



**REPORTABLE**

CASE NO: SA 6/2021

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**STATE**

**Appellant**

and

**SEM SHAFOSHUNA HAUFIKU**

**Respondent**

**Coram:** DAMASEB DCJ, HOFF JA and MAKARAU AJA

**Heard:** 3 July 2023

**Delivered:** 21 July 2023

**Summary:** This is a State's appeal, with the leave of the High Court, against that court's finding (and resultant sentence) that there are 'substantial and compelling circumstances', as contemplated by s 3(2) of the Combating of Rape Act 8 of 2000 (CORA), to justify a departure from the mandatory minimum sentence of 15 years upon a conviction of rape under coercive circumstances. The accused was convicted of two counts of rape, one count of housebreaking with intent to steal and theft and one count of housebreaking with intent to rob and robbery. Having found substantial

and compelling circumstances the sentencing court imposed sentences less than the mandatory minimum sentences on the rape counts.

The question on appeal is whether the court *a quo* got the balance right between the factors meriting deviation from the mandatory minimum sentence and those pointing in the opposite direction.

*Held that*, the factors considered by the court *a quo* of youthfulness, the fact that the State lead no evidence that the victim suffered ‘lasting physical or psychological trauma’; that the offences were committed on the same evening and the fact that the perpetrator spent a considerable amount of time in custody awaiting trial do not qualify to be substantial or compelling circumstances to justify a departure from the mandatory minimum sentences on the two counts of rape.

The appeal succeeds and the mandatory minimum sentences imposed on the rape counts but a portion of the sentence on one rape count made to run concurrently with the 15 year sentence on the other, together with the sentences on the theft and robbery counts.

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## APPEAL JUDGMENT

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DAMASEB DCJ (HOFF JA and MAKARAU AJA concurring):

### Introduction

[1] This is the State’s appeal, with the leave of the High Court, against that court’s finding (and resultant sentence) that there are ‘substantial and compelling circumstances’, as contemplated by s 3(2) of the Combating of Rape Act 8 of 2000 (CORA), to justify a departure from the mandatory minimum sentence of 15 years upon a conviction of rape under coercive circumstances. The State’s appeal had lapsed and it applied for (a) condonation for non-compliances with the rules of court and (b) reinstatement of the appeal. The application is not opposed. For the reasons

that I set out later in this judgment, the condonation application is granted and the appeal reinstated. The appeal is opposed.

#### The offences

[2] At the age of 18, the respondent (Mr Haufiku), under cover of darkness broke into a house and by force, whilst brandishing a knife, raped a 13-weeks pregnant woman (the victim), forced the victim to open a cuca shop over which she was a caretaker, stole items from the cuca shop while threatening the victim with a knife, again raped the pregnant victim this time using a condom and made off under cover of the night. At some point during one of the acts of rape, Mr Haufiku cut the victim with the knife on the upper lip as a result of which she bled. At his trial, Mr Haufiku elected to remain silent and was convicted on two counts of rape, one count of housebreaking with intent to steal and theft, and one count of housebreaking with intent to rob and robbery. After he was convicted, Mr Haufiku once again elected not to testify in mitigation of his sentence.

#### Mitigating factors

[3] The convicted rapist's counsel elicited the following mitigating factors from the Bar: He was a first time offender and was 18 years old at the time he committed the crimes. He had been in pre-conviction incarceration for eight years. There was some suggestion that he was an orphan when the crimes were committed but it appears not much turned on that. Mr Haufiku who had turned 25 years old at sentencing, had been in custody for eight years, only punctuated by a brief period of six months on account of an escape from custody.

### The sentence

[4] Mr Haufiku was sentenced as follows:

‘Count 1 – Housebreaking with intent to steal and theft – 2 years imprisonment;

Count 2 – Contravening section 2(1)(a) of the Combating of Rape Act . . . (8 of 2000) rape – 10 years imprisonment;

Count 3 – Housebreaking with intent to rob and robbery – 5 years imprisonment;

Count 4 – Contravening section 2(1)(a) of the Combating of Rape Act . . . (8 of 2000) rape – 10 years imprisonment;

It is ordered that the sentence imposed on count 4 runs concurrently with the sentence imposed in count 2.’

[5] The court *a quo* therefore imposed an effective sentence of 17 years imprisonment.

### The court found substantial and compelling circumstances

[6] The CORA provides as follows in s 3:

‘(1) Any person who is convicted of rape under this Act shall, subject to the provisions of subsections (2), (3) and (4), be liable –

(a) in the case of a first conviction –

(i) where the rape is committed under circumstances other than the circumstances contemplated in subparagraphs (ii) and (iii), to imprisonment for a period of not less than five years;

(ii) where the rape is committed under any of the coercive circumstances referred to in paragraph (a), (b) or (e) of

subsection (2) of section 2, to imprisonment for a period of not less than ten years;

(iii) where –

(aa) the complainant has suffered grievous bodily or mental harm as a result of the rape;

(bb) the complainant –

(a) is under the age of thirteen years; or

(b) is by reason of age exceptionally vulnerable;

(cc) the complainant is under the age of eighteen years and the perpetrator is the complainant's parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant;

(dd) the convicted person is infected with any serious sexually-transmitted disease and at the time of the commission of the rape knows that he or she is so infected;

(ee) the convicted person is one of a group of two or more persons participating in the commission of the rape; or

(ff) the convicted person uses a firearm or any other weapon for the purpose of or in connection with the commission of the rape, to imprisonment for a period of not less than fifteen years;

(b) in the case of a second or subsequent conviction (whether previously convicted of rape under the common law or under this Act) -

- (i) where the rape is committed under circumstances other than the circumstances contemplated in subparagraphs (ii) and (iii), to imprisonment for a period of not less than ten years;
  - (ii) where the rape in question or any other rape of which such person has previously been convicted was committed under any of the coercive circumstances referred to in paragraph (a), (b) or (e) of subsection (2) of section 2, to imprisonment for a period of not less than twenty years;
  - (iii) where the rape in question or any other rape of which such person has previously been convicted was committed under any of the circumstances referred to in subparagraph (iii) of paragraph (a), to imprisonment for a period of not less than forty-five years.
- (2) If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the applicable sentence prescribed in subsection (1), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.
- (3) The minimum sentences prescribed in subsection (1) shall not be applicable in respect of a convicted person who was under the age of eighteen years at the time of the commission of the rape and the court may in such circumstances impose any appropriate sentence.
- (4) If a minimum sentence prescribed in subsection (1) is applicable in respect of a convicted person, the convicted person shall, notwithstanding anything to the contrary in any other law contained, not be dealt with under section 297(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977): Provided that, if the sentence imposed upon the convicted person exceeds such minimum sentence, the convicted person may be so dealt with in regard to that part of the sentence that is in excess of such minimum sentence.' (My underlining).

[7] Thus, in terms of sub-sec (1)(a)(iii)(ff), the use of a weapon during the commission of the rapes undoubtedly made Mr Haufiku liable for the mandatory minimum sentence of 15 years on each count of rape. Whether a portion of the 15

years on one count of rape should be made to run concurrently remained within the trial court's discretion. But the legislature ordained that he had to serve a minimum of 15 years on the rape count.

[8] The only way in which Mr Haufiku could escape the mandatory minimum sentence regime is if the court found, as it did, that there existed substantial and compelling circumstances to justify a departure from the mandatory minimum sentence. In that case, the court had the discretion to impose any other sentence which it considered appropriate.

[9] The learned trial judge *a quo* held that Mr Haufiku's personal circumstances set out at para [2] above constituted substantial and compelling circumstances to justify departure from the mandatory minimum sentences prescribed under the CORA.

[10] The trial judge wrote:

'[7] The prescribed minimum sentence in terms of s 3(1)(a)(iii)(ff) of the Combatting of Rape Act, is 15 years imprisonment if the convicted person used a firearm or any other weapon for the purpose of or in connection with the commission of the rape. The accused herein used a knife to subdue the complainant. The complainant was pregnant at the time. She testified that the sexual assault on her was painful. The complainant was sleeping when the accused entered the room and raped her. He thereafter again raped her for a second time. This must have been a horrific ordeal for her particularly knowing that she was pregnant. The State however led no evidence adduced (sic) to the effect that there was lasting physical or psychological trauma suffered by the complainant.

[8] The protection of women and children ranks as an important consideration by the courts. A clear and consistent message of this court has been that offenders who commit gender based violence will be dealt with severely. There should be no room

for misunderstanding. The legislature for this reason imposed the mandatory minimum sentences and the courts should not lightly deviate from those sentences.

[9] There is no rational explanation which mitigates the accused's actions. I am however mindful of his youthfulness. The legislature also considered this an important factor and section 3(3) provides that the minimum sentences prescribed in subsection (1) shall not be applicable in respect of a convicted person who was under the age of eighteen years at the time of the commission of the rape and the court may in such circumstances impose any appropriate sentence. This provision is not applicable to the accused. The accused was 18 years and 4 months old when he committed the offence. The offences were furthermore committed the same evening and the court must guard against imposing a sentence which would be disproportionate to the blameworthiness of the accused. This together with the fact that he spent a considerable time in custody awaiting trial leads this court to conclude that there exists (sic) substantial and compelling circumstances which justifies (sic) a lesser sentence.

[10] Mr Shileka, counsel for the State submitted that the accused showed no remorse for his conduct. I agree. Nothing in the conduct of the accused afterwards leads this court to conclude that he has remorse. There was no acknowledgment of wrongdoing and no sincere and heartfelt apology for his conduct. The impersonal averment of remorse tendered to this court by his legal practitioner can hardly be considered as sincere.'

### The State's appeal

[11] Was the court *a quo* correct? The State says the learned judge got it wrong.

The grounds of appeal state that the High Court misdirected itself or erred in law and or fact:

'2.1 By finding that the facts that the respondent spent a considerable time in custody awaiting trial, and/or youthfulness of the respondent, and/or that the offences were committed during the same evening constitutes substantial and compelling circumstances justifying a departure from the mandatory minimum sentence prescribed by the Combating of Rape Act, 8 of 2000;



2.2 By determining the existence of substantial and compelling circumstances based on the personal circumstances of the respondent to the exclusion of all other factors normally taken into account in sentencing;

2.3 By finding that there were substantial and compelling circumstances that warranted a departure from the prescribed mandatory minimum sentences when, from the court's own finding, there is no rational explanation which mitigates the respondent's action;

2.4 By finding that there were substantial and compelling circumstances that warranted a departure from the prescribed mandatory sentences when, from the court's own finding, the youthfulness of the respondent at the time he committed the offence mitigates his offences but this court has made it clear that young offenders who commit heinous crime like adults cannot escape punishment merely because they are youthful and/or that the provisions of section 3(3) (of Act 8 of 2000) are not applicable to the respondent;

2.5 By finding that there were substantial and compelling circumstances that warranted a departure from the prescribed mandatory sentence when, from the court's own finding, the respondent showed no remorse for this conduct and/or in the circumstances of this case the respondent's personal circumstances and mitigating factor must of necessity give way to other considerations such as the interest of society and the need for deterrent sentences;

2.6 By departing from the mandatory minimum sentences prescribed by the Combating of Rape Act, 8 of 2000 for flimsy reasons;

2.7 By overemphasizing the personal circumstances of the respondent and underemphasizing the seriousness of the offences in ordering the sentence of 10 years imprisonment imposed in count 4 in respect of the rape in contravention of section 2(1)(a) of the Combating of Rape Act, 8 of 2000 to run concurrently with the sentence of 10 years imprisonment imposed in count 2 a charge of rape in contravention of section 2(1)(a) of Act 8 of 2000;

2.8 By underemphasizing the seriousness of the offence of housebreaking with intent to rob and robbery with aggravating circumstances in imposing a shockingly lenient sentence of 5 years imprisonment given the circumstances under which the offence was committed;

2.9 By imposing lenient sentences to the extent of inducing a sense of shock if regard is taken of the circumstances and the nature of the offences committed thus that it can be described as startlingly inappropriate.’

The law: what are substantial and compelling circumstances?

[12] Namibia’s courts<sup>1</sup> have adopted the test for substantial and compelling circumstances as enunciated in the leading South African case of *S v Malgas*.<sup>2</sup> *Malgas* has been consistently applied in South Africa and approved by the Constitutional Court in, for example, *S v Dodo*.<sup>3</sup>

[13] Substantial and compelling circumstances constitute facts and circumstances concerning the crime, its impact on society, in particular on the victim, and the personal circumstances of the perpetrator which, viewed cumulatively and in their totality, make the imposition of the mandatory minimum sentence disproportionate and unjust. In assessing whether that test has been met, a sentencing court should place in the scale all the factors traditionally taken into account in mitigation or aggravation of sentence but bearing in mind that the legislature’s chosen standardised response to the crime of rape should not be departed from for flimsy reasons such as sympathy for the perpetrator. It must be borne in mind that, apart from it being an obnoxious offence deserving severe punishment in its own right, the legislature has identified certain types of conduct under which rape is committed (coercive circumstances) as deserving of standardised severity. These include where ‘the complainant has suffered grievous bodily or mental harm as a result of the rape’ or where ‘the convicted person uses a firearm or any other weapon for the purpose of or in connection with the commission of the rape’.

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<sup>1</sup> *S v Lopez* 2003 NR 162 (HC); *S v Limbare* 2006 (2) NR 505 (HC); *S v Gurirab* 2005 NR 510 (HC) and *S v JB* 2016 (1) NR 114 (SC).

<sup>2</sup> *S v Malgas* 2001 (2) SA 1222 (SCA).

<sup>3</sup> *S v Dodo* 2001 (3) SA 382 (CC).

### Misdirection

[14] The High Court found substantial and compelling circumstances because of the youthfulness of the perpetrator; the fact that the State led no evidence that the victim suffered 'lasting physical or psychological trauma'; that the offences were committed on the same evening and the need to guard against imposing a sentence which would be disproportionate to the blameworthiness of the perpetrator; and the fact that the perpetrator spent a considerable amount of time in custody awaiting trial.

[15] The question is whether the court *a quo* got the balance right between the factors meriting deviation from the mandatory minimum sentence and those pointing in the opposite direction.

[16] As the High Court correctly pointed out, a remarkable feature about the present case is Mr Haufiku's total lack of remorse for what he did to the victim. That is certainly a factor counting against him. The State not having led evidence on the 'lasting physical and psychological impact' of the acts of rape on the victim ought not to have enjoyed the priority it did. I am not prepared to accept that because evidence is not led to that effect, the experience of rape does not produce lasting psychological impact on a woman. How could it not? Empirical research findings by the Legal Assistance Center (LAC) which has done pioneering work in this area demonstrates that social stigma attaches to rape.

[17] According to the LAC<sup>4</sup>:

‘In every focus group discussion participants raised the topic associated with rape. This stigma brands the victim as tainted and suggests that the experience of rape, though beyond her control, is one that is deeply shameful.

...

While the shame that rape brings on a family in large part derives from the community’s response to that rape, sometimes this shame comes from feelings of guilt within the family as well.’

[18] Therefore, even in the absence of specific evidence, the baseline assumption must be that non-consensual sexual intercourse with a woman is the most humiliating experience she can ever be subjected to. I doubt that a woman can ever forget the day that she had been subjected to the indignity of rape!

[19] The High Court’s conclusion that (at the very least) the State had not proved lasting psychological impact on the victim cannot be correct.

[20] Besides, ‘grievous bodily or mental harm’ to the victim is (*vide* sub-sec (1)(a) (iii)(aa)) a separate ground for the imposition of the mandatory minimum sentence. That is not what the State relied upon. The court *a quo* overlooked the fact that the mandatory minimum sentence of 15 years is also engaged where, as here (and as the High Court found), the rapist uses a weapon such as a knife for the purpose of or in connection with the commission of the rape. The High Court found that the State had proved that Mr Haufiku used a knife not only to subjugate the victim in committing the rape but cut her with it on the upper lip. A necessary jurisdictional fact

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<sup>4</sup> E M Coyle (2009) *Withdrawn: Why complainants withdraw rape cases in Namibia*. Gender Research and Advocacy Project Legal Assistance Centre, p 8.

for the imposition of the minimum mandatory sentence had therefore been proved by the State beyond reasonable doubt.

[21] The High Court's further justification – to avoid imposing a disproportionate sentence because the crimes were committed on the same evening – is met by two responses. First, the two acts of rape were separated in time by the intervening sojourn to the cuca shop during which Mr Haufiku committed the robbery. He had time to reflect on his actions after he had perpetrated the first rape and to leave the victim alone –having already violated her. Second, it is the kind of consideration which was more properly open to the sentencing court to have regard to in considering what portion of the sentence on the one rape count should run concurrently with the other.

[22] Although Mr Haufiku was not aware at the time of committing the acts of rape that the victim was pregnant, the objective reality is that she was. That she was raped whilst carrying the baby of another man – in our conservative society – adds to the undoubted shame experienced by the victim because of the rape.

[23] Although deserving of consideration, Mr Haufiku's youthfulness at the time he committed the offences and the fact that he was incarcerated for about eight years awaiting finalisation of his trial cannot outweigh the gravity of his conduct which called for the legislature's standardised response especially given the sad reality that rape shows no sign of abating in our society.

[24] In my view, there are no substantial and compelling circumstances to justify a departure from the mandatory minimum sentences on the two counts of rape of

which Mr Haufiku was convicted. In coming to a contrary conclusion, the High Court erred.

#### Appropriate sentence

[25] This court is now at large to impose an appropriate sentence in respect of the offences for which Mr Haufiku was convicted. As Strydom CJ observed in *S v Shapumba*.<sup>5</sup>

'The crime of rape, being an unlawful and forceful invasion of the body and privacy of a woman, mostly with the purpose to satisfy sexual urge of the offender, can, except in the most exceptional circumstances, not contain mitigating factors which could explain the commission of the crime and diminish the moral blameworthiness of the offender. Whereas there is very little that can mitigate the commission of the crime of rape there are certain specific factors which would further aggravate and contribute towards the seriousness of the crime and the consequent punishment thereof. Examples of these are the rape of young children, the amount of force used before, during or after the commission of the crime, the use of weapons to overcome any resistance by means also of threats of violence, rape committed by more than one person on the victim, the fact whether the rapist is a repeat offender, etc. These factors, or a combination thereof, resulted in heavy punishments imposed by the Courts.'

[26] In considering an appropriate sentence, I take into account Mr Haufiku's personal circumstances. He was a first time offender when he committed the crimes and had been in pre-conviction incarceration for quite a long time. I also take into account his youthfulness and the fact that the two rapes were committed not long in between on the same day.

[27] Mr Shileka on behalf of the State quite properly conceded that unless a significant portion of the 15 years in respect of one count of rape and the sentences

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<sup>5</sup> *S v Shapumba* 1999 NR 342 (SC) at 343J-344C.

on counts one and three are made to run concurrently with the mandatory minimum 15-year sentence on the one count of rape, the overall sentence will be unduly severe.

[28] Accordingly, taking into account the perpetrator's personal circumstances and the rather long period of pre-conviction incarceration, and to blend the sentence with mercy, the eight years of pre-conviction incarceration and the entirety of the sentences on housebreaking with intent to steal and theft and housebreaking with intent to rob and robbery will be made to run concurrently with the 15-year sentence on count two.

#### Condonation application

[29] The State seeks condonation for the late filing of the appeal record. In terms of rule 17, the record should have been lodged within three months of the order appealed against. The High Court granted the State leave to appeal on 5 November 2020. In the State's affidavit in support of the condonation and reinstatement application it is alleged that upon receipt of the court order on 11 November 2020, the State began its preparation to get the record transcribed.

[30] Mr Shileka who deposed to the founding affidavit in support of the condonation application explains in his explanatory affidavit that, after the request was sent to have the record transcribed in November 2020, his office did not get a response from the transcribers or the registrar at the High Court's Northern Local Division (NLD). A follow up was made on 26 January 2021, and on 2 February 2021 a service requisition sheet was issued to the transcription service provider, Hibachi. It became apparent that Hibachi were experiencing technical difficulties in retrieving

the recording of the case from the computer's hard drive. He was informed that the hard drive would be sent to Windhoek for the Information Technology experts to handle. The problem persisted until April 2021.

[31] Mr Shileka indicated that he only received the bound record on 23 August 2021, and upon perusal of the bound record he received, he realized that it was not a complete record as the judgments on the verdict and sentence were not part of the record that was bound. He returned the record for correction. On 22 February 2022 he was informed that the record that required amendments was misplaced as a result of the change of transcribers and the corrected record was only received by the prosecutor general's NLD office on 23 March 2022 – by which time the three months' time period had lapsed.

[32] Mr Shileka states under oath that he at all times kept both this Court's registrar and Ms Mugaviri for the accused abreast of the reasons for the delay.

[33] I am satisfied that the reasons for the delay are satisfactory and that every period of delay has been satisfactorily explained and that the State has very good prospects of success on appeal. The application for condonation and reinstatement of the appeal should therefore be granted.

#### Order

[34] Accordingly, I propose the following order:

1. The application for condonation of the State's non-compliance with the rules of court is granted and the appeal reinstated.



2. The appeal succeeds and the High Court's judgment on sentence is set aside and replaced with the following:

- '(i) There are no substantial and compelling circumstances as contemplated by s 3(2) of the Combating of Rape Act 8 of 2000;
- (ii) The following sentence is imposed on the accused:
  - (a) Count one – Housebreaking with intent to steal and theft – 2 (two) years imprisonment.
  - (b) Count two – Contravening s 2(1)(a) of the Combating of Rape Act 8 of 2000, rape – 15 (fifteen) years imprisonment.
  - (c) Count three – Housebreaking with intent to rob and robbery – 5 (five) years imprisonment.
  - (d) Count four – Contravening s 2(1)(a) of the Combating of Rape Act 8 of 2000, rape – 15 (fifteen) years imprisonment.
  - (f) It is ordered that 8 (eight) years of the sentence imposed on count two and the entirety of the sentences imposed on counts one and three (two years and five years respectively) are ordered to run concurrently with the sentence of 15(fifteen) years imposed on count four.'

3. The sentence is ante-dated to 12 April 2019, the date on which Mr Haufiku was sentenced by the High Court.
  
4. Mr Haufiku is therefore sentenced to an effective term of 22 (twenty-two) years imprisonment.

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**DAMASEB DCJ**

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**HOFF JA**

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**MAKARAU AJA**

## APPEARANCES

APPELLANT:

R Shileka

Office of the Prosecutor-General

RESPONDENT:

GN Mugaviri

Instructed by Legal Aid