CASE NO.: CA 120/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LAWRENCE EISEB **APPELLANT**

versus

THE STATE **RESPONDENT**

CORAM: **HOFF, J *et* SIBOLEKA, AJ**

Heard on: **2010 February 12**

Delivered on: **2010 April 06**

APPEAL JUDGMENT

SIBOLEKA AJ:

[1] The appellant, a nineteen (19) year old first offender has on the 28th of June 2005 been arraigned in the Regional Court, Windhoek on a charge of Rape in contravention of

section 2(1), 2(2), 2(3), 3, 4, 5, 6 and 7 of The Combating of Rape Act, Act no. 8 of 2000, and sentenced to seventeen (17) years imprisonment. He now appeals against that sentence.

[2] Appellant pleaded not guilty and after evidence was lead he was convicted of having raped the complainant, M H K.

[3] The appeal was noted well in time: Appellant was represented by Mr. B. B. Isaacks during the trial in the Court *a quo*. He however appeared in person during the appeal proceedings.

[4] The notice of appeal reads as follows:

> "Be pleased to take notice, that the appellant hereby notes an appeal on the following grounds:
> Ad sentence:
> 1. The sentence is grossly excessive and severe in that it induces a feeling of shock or outrage in the mind of the Court.
> 2. That the Court has misdirected itself on facts or the law in that the learned magistrate failed to take into account that substantial and compelling circumstances that were present when considering sentence."

[5] The reasons for sentence by the learned magistrate in part reads as follows:

> "Yes. The provisions of the Act must be taken into account and the provision is that if there is a firearm or other weapon used during the commission of the crime, the minimum prescribed sentence is that of fifteen years imprisonment. If there are however then compelling or substantial circumstances then the Court

> may impose a lesser sentence. I see no compelling or substantial circumstances in the fact that the accused is a first offender, … is relatively young, … is employed as a lorry driver, … has people to support, … no injuries were suffered by the complainant, the reason obvious is that she submitted to this attack on her out of fear for the spear. For some time now … it appears to me that these stiff sentences still do not have the desired effect. Having this in mind and also having regard to the age of the complainant (16 years old at the time of the incident) and to the general behavior that evening of the accused that came what may, he will have sex with someone that evening. He is sentenced to seventeen years imprisonment, of which nothing will be suspended."

[6] The penalty provision in The Combating of Rape Act, Act 8 of 2000 reads:

> "3. (1) Any person who is convicted of rape under this Act shall, subject to the provisions of section (2), (3) and (4), be liable- …
> (iii) where –
> (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;"

[7] In his heads of argument Mr. D. M. Lisulo, counsel for respondent submitted that he agrees with the learned magistrate that there are no compelling and substantial circumstances in this matter. He further argued that the personal circumstances of the appellant are outweighed by the seriousness of the offence. He further stated that the magistrate correctly balanced the personal circumstances of the appellant and the seriousness of the offence.

[8] I am not in agreement with the contention that there are no substantial and compelling circumstances in this matter warranting a departure from the prescribed minimum sentence of fifteen years.

[9] The facts of this matter are briefly as follows:

On the evening of the 5th of March 2005, the complainant and Jenette were at Jolly Joker shebeen. Also present were the appellant and Nemushi, who sat in the corner drinking alcohol. Later Tokkies and Shilongo also arrived.

An argument erupted when appellant alleged that Nemushi drank his beer and must pay him N$20,00. Nemushi, who resided nearby ran to

their home and the appellant chased her. There at home Nemushi's aunt came out and paid N$20,00 to the accused and the dispute was resolved.

The remaining group left for Jero Inn, on arrival there Shilongo suggested they go to Cool Off shebeen. Tokkies agreed because the complainant and Jenette resided in that vicinity. The appellant joined them and were then five in number ie, Tokkies, complainant, Jenette, Shilongo, and the appellant. They walked to Cool Off shebeen and while so underway the appellant grabbed Jenette on the arm, but she broke loose and ran away. Shilongo, who also resided nearby ran away as well. The appellant, Tokkies and the complainant continued walking. Appellant was then walking together with the complainant in front, while Tokkies walked behind them. Appellant had a spear in his hand, and Tokkies saw that they were walking past the complainant's residence. The two stood apart and Tokkies heard appellant telling the complainant to "take off". Tokkies saw the complainant loosening her belt, then pulling down her jeans, and laid on the ground. The appellant went on his knees, and according to the complainant he had sexual intercourse with her.

Later Jenette came back with three men, and, referring to the appellant, she told them the latter wanted to rape her but they did nothing. The appellant first emerged followed by the complainant crying. Complainant's mother came out and inquired what was going on. Later, inside the house complainant reported to her mother that the appellant raped her and an arrest followed later.

[10] I now revert back to the main sticking point in this appeal, and that is whether there are substantial and compelling circumstances or not.

In *Franciska De Conceicao Lopez versus The State* unreported Case No. CA 30/2003 delivered on 16 September 2003 by Hannah J with Maritz J concurring (as they then were), the following was said about 'substantial and compelling circumstances at page 22:

> "In short, the legislature aimed at ensuring a severe, standardized, and consistent response from the courts to the commission of such crimes unless there were, and should be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may … But for the rest I can see no warrant for deducing that the Legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets 'substantial' and 'compelling' cannot be interpreted as excluding even from consideration any of those factors

> … What they are apt to convey is that the ultimate cumulative impact of those circumstances must be such as to justify a departure."

11. It is therefore my considered view that the appellant's personal circumstances enumerated by the learned magistrate indeed constitute substantial and compelling circumstances which warranted a departure from the proscribed minimum sentence.

12. It is clear from the record of proceedings that at the time of sentencing the appellant the following personal factors were present, and the learned magistrate ought to have taken them into account: These are:

- That he was a first offender;
- That he was nineteen (19) years of age, (a relatively young age) a weighty factor (see unreported case: *State versus Toini Erickson* case no. CR 18/07 delivered on 09 February 2007);
- That he was employed as a lorry driver, and had people to support;
- That no injuries were suffered by the complainant.

Aggravating of course is that the complainant submitted to the attack on her out of fear for the spear.

[13] The appellant appeared in person. In his handwritten heads of argument he quoted several authorities which I did not find necessary to deal with in this judgment.

[14] Appellant argued further that he was convicted on two counts and sentenced as follows:

Count no. 1: seventeen years imprisonment, and

Count no. 2: two years imprisonment

However, this is not the case. The case record clearly shows that he was charged and convicted on one count of Rape only.

[15] This Court is of the view that the sentence imposed by the court *a quo* failed to exercise a proper judicial discretion resulting in an inappropriate sentence warranting interference by this Court.

[16] In the result, the sentence is set aside and the following sentence substituted:

> Fifteen (15) years imprisonment, six (6) years of which are suspended for five (5) years, on condition that the accused is not again convicted of an offence of contravening the Rape Act, committed during the period of suspension

[17] The sentence is back dated to 28 June 2007.

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SIBOLEKA AJ

I agree.

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HOFF J

ON BEHALF OF THE APPELLANT: **IN PERSON**

ON BEHALF OF THE RESPONDENT: **ADV. D. M. LISULO**

INSTRUCTED BY: **THE OFFICE OF THE PROSECUTOR-GENERAL**