CASE NO.: CC 02/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

EASTER MICHAEL ROOY **ACCUSED**

***CORAM*: SWANEPOEL, J**

Heard on: 06 - 08 September 2011

Delivered on: 14 September 2011

SENTENCE

SWANEPOEL, J: [1] Mr Rooy you have pleaded guilty to charges of murder, a contravention of section 2(1)(a) read with sections 1, 2(2), and 3 of the Combating of Rape Act, 8 of 2000 ("the Act") - Rape and abduction, alternatively kidnapping.

[2] Your amended plea explanation in terms of section 112 of the Criminal Procedure Act, Act 51 of 1977 (exhibit B) was accepted by Ms Verhoef, appearing for the State which reads as follows (unedited):

"COUNT1: GUILTY
COUNT 2: GUILTY
COUNT 3: GUILTY

COUNT 1

I admit that on 27 October 2010 and at Keetmanshoop in the Republic of Namibia I unlawfully and intentionally killed the deceased, Queen Beverly Dausab, a four year old female human being by hitting her numerous times with two stones in her face and when she failed to die, I pushed a T-shirt deep down her throat and secured it with two stones that I placed also in her mouth, so that she would suffocate to death. At all material times mentioned hereinbefore, I intended to kill her, reason being that she should not report me to the authorities for raping her.

I knew that I was committing a crime of murder for which I would be punished by a Court of Law.

COUNT 2

I admit that on 27 October 2010 and at Keetmanshoop in the Republic of Namibia, I unlawfully and intentionally raped Queen Beverly Dausab, a four year old female human being, by inserting my penis into her vagina and having sexual intercourse with her, without her consent.
In the process of the foregoing, coercive circumstances were present in that I did apply physical force to the deceased when I used my physical strength to forcefully took her to the place where I raped her, pulling her on the ground the last ten meters

or so, where after I pushed her down on the ground near a tree in order to have sex with her.

1 also admit that I was more than three years her elder when I raped her and I unlawfully detained her when I carried her on my back to the place where I raped her.

I knew that I was committing a crime of rape for which I would be punished by a Court of Law.

COUNT 3

I finally admit that on 27 October 2010 and at or near House 1855, Tseiblaagte, Keetmanshoop in the Republic of Namibia, I unlawfully and intentionally abducted Queen Beverly Dausab, a four year old female human being, by removing her from the custody and against the will of her lawful guardian, Annemarie Dausab, being her biological mother, for the sole purpose of having sexual intercourse with her.

I also knew that I was committing the crime of abduction for which I would be punished by a Court of Law.

PLEA TO THE MERITS

On 27 October 2010, I met with two friends, named Theo Fredericks and one Damarop, whose true name and surname is unknown to me. It was about 09:15 and Theo said we should get a few drinks. Theo bought a few bottles of wine, I think it was two bottles and we drank it at House 1854, a neighbouring house to that where the deceased resided, while smoking a cannabis joint, also produced by Theo. He later again bought some wine, two or three bottles, I'm not sure and we also drank

that. Theo also had a pipe containing a mandrax/cannabis mix and we took turns at smoking from that as well.

At around 12:00 to 13:00, I'm not sure of the correct time, I left the two friends and went home. I was a bit drunk from all the liquor and drugs I took. On my way home I passed the house of Annemarie Dausab, house 1855, Tseiblaagte, Keetmanhoop and I saw the deceased, Queen Beverly Dausab, standing at the entrance gate to the said house. The deceased knew me quite well.

I got this craving to have sexual intercourse with her and I picked her up on my back and carried her into the direction of where I was staying in Tseiblaagte.

When I got close to my place, I decided to rather have sexual intercourse with her in the field, because I was afraid someone might catch me while having sexual intercourse with her, or she might scream and attract attention to us. I therefore carried her into the field and close to a tree, I put her on the ground and because she refused to go further with me, I dragged her on the ground to the said bush. The physical force I used caused her injuries on her body.

I undressed her where after I raped her once. She never gave me permission to have sex with her. After having raped, I got scared that she might report me to the authorities and I decided to kill her.

I took a stone and started to beat her in the face with it. I got hold of a bigger stone, because the first was too small and continued

to beat her in the face numerous times, I cannot recall how many times, but it might be more than ten times.

The beating however did not kill her, so I pushed a T-shirt deep down her throat and secured it with two stones that I placed also in her mouth, so that she would suffocate to death. I left her there and went home where I changed my clothes, which were blood stained.

Later, her mother, Annemarie Dausab, came at my place and asked where the deceased was, but I said I took her back to her house. I went to Donkerhoek location where I continued to consume liquor. Around sunset, I started to panic and went home again, packed my stuff and left to the tar road leading to Karasburg, to hitch a hike to any farm where I could obtain work.

It was getting dark and I therefore slept under a bridge. I left my stuff there under the bridge, while trying to get employment and was finally arrested by the Police on 29 October 2010.

I am very sorry for what I did and still today cannot believe what I have done. I know that I cannot undo my evil deeds and I know that I probably do not deserve any mercy, but I still beg for mercy from your Lordship when sentencing me for the crimes that I have committed.

DATED and SIGNED at WINDHOEK on this 7th day of SEPTEMBER 2011

Signed: EASTER MICHAEL ROOY"

[3] The Court was satisfied that you had admitted all the elements of the respective crimes and has convicted you on counts 1 - 3 as charged. Despite your plea of guilty to the alternative to count 3 to wit kidnapping, you were found not guilty.

[4] Subsequent to your conviction and by agreement between your counsel, Mr Scholtz and counsel for the State, certain documentary evidence consisting inter alia of handwritten notes pertaining to your pointing out, a photo plan consisting of 20 photographs, a sketch plan depicting the route you took with the deceased (±1,2 km) as pointed out by you; a sketch plan and key to the photo plan taken at the scene of the crimes with 43 photographs; a report of the post-mortem examination conducted on the body of the deceased; a medical report pertaining to the examination of the genital organs of the deceased and a report by the National Forensic Science Institute pertaining to the results of DNA tests as well as five (5) stones (exhibits 1-5) were handed in, all of which this Court has considered in arriving at an appropriate sentence, together with other admitted common cause facts which will appear later in this judgment.

[5] This Court has to strike a balance between the crimes you have committed, your personal interests including your personal circumstances and the interest of society. Deterrence, prevention, reformation and retribution are the main aims of punishment. It has been said by the highest court in this land that the difficulty in sentencing arises not so much from

the general principles applicable, but from the complicated task of trying to harmonise and balance these principles and to apply them to the facts of any particular case. It does not however imply that equal weight or value must be given to the different factors. Situations can arise when it is necessary (indeed it is also unavoidable) to emphasise one at the expense of the other.

Compare: *S v Van Wyk* 1992(1) SACR 146 at 165 per Akerman AJA.

[6] Your case today is no exception to the above and it is indeed a very difficult task for this Court to pass sentence on you.

[7] You have elected not to give evidence under oath or to call any other witnesses in mitigation of sentence. Your personal circumstances were placed before Court by your counsel from the bar. You were 29 years old when these (in the words of your counsel) horrific crimes were committed. You are unmarried with a pair of twins (six years) a daughter (2 years) and a son (1 year) born from three different mothers, all of whom are brought up by their respective mothers.

[8] You have no fixed employment and perform loose jobs from which you contribute to the maintenance of your children; your zinc house is your only possession. You were brought up by your grandfather on a farm. You felt that your parents did not love you and you left school after attending only one year because you did not want to go to school. This probably resulted in

the fact that you could not obtain any gainful employment due to a lack of any meaningful education. Your father passed away during the course of last year. All of the afore going contributed to you feeling rejected by life and being filled with anger. Your lifestyle brought you in contact with liquor and drugs in which you have also partaken on the fateful day of the 27 October 2010.

[9] Your counsel submitted, that apart from your personal circumstances, that this court should also consider the following additional mitigating circumstances in arriving at an appropriate sentence:

1. You have pleaded guilty from the outset during the section 119-proceedings in the magistrate's court as well as in this court. In this regard it must be pointed out that you have not disclosed your full role in the commission of the crimes in your initial plea explanations. It was only when you were confronted with the decision by the State not to have accepted your limited plea of guilty which would have resulted that the trial proceed on the basis that pleas of not guilty were to be entered, that you had a change of heart resulting in your latest plea explanation (exhibit B *supra*).
2. Your guilty pleas saved a lot of time in court as well as costs to the State to have brought all the witnesses to Court from Keetmanshoop and also experts from Canada pertaining to the results of the DNA tests.

[10] The court will also take into consideration that you have been in custody since your arrest on 29 October 2010 – a period of almost 11 months.

[11] All of the above deserves leniency according to your counsel. However, Mr Scholtz conceded that the murder was gruesome which really shocked him. He suggested life imprisonment on the murder charge. With regard to the rape he stressed that the rape was committed only once with no serious injuries to the private parts of the deceased. He conceded however that the deceased was dragged for approximately 10m which caused injuries to the posterior parts of her body when she resisted accused's pulling her down before the rape.

[12] In view of the fact that the rape had been committed under coercive circumstances to wit: the application of force; the fact that the deceased was only 4 years old and you being more than 3 years older than her as well as the fact that you had unlawfully detained the deceased when you took her away from the safety of her home and from her mother, your counsel submitted that a sentence of at least 15 years imprisonment be imposed. Lastly, and with regard to the abduction charge he left the sentencing in the hands of the Court although submitting that it was a lesser offence than the first two charges. He contended that the sentence should run concurrently with the sentence on the murder or the rape charge.

[13] The State called as first witness Dr Yuri Vasin, the Chief Forensic Officer at the Windhoek Mortuary in aggravation of sentence. Dr Vasin conducted a post-mortem examination on the body of the deceased. He compiled reports, examined exhibits and gave his opinion on various aspects of the case. Save for a brief cross-examination on the injuries found on the private parts of the deceased, the rest of his evidence and opinion was not contested at all. These include the following:

(i) The deceased's hymen was still intact with no injuries visible to the naked eye;

(ii) Small abrasions on the posterior wall of the vagina constituting a minor injury for which no remarkable force was needed;

(iii) The deceased died of asphyxia caused by a piece of cloth (T-shirt) gagged deep into the mouth and throat of the deceased resulting in an airway obstruction. The cloth was firmly secured by 2 stones put into the mouth of the deceased;

(iv) A laceration on the nasal breach resulting in massive nasal bleeding was a possible contributory cause of death. The bleeding obstructed normal breathing;

(v) The aforesaid gagging could have caused unconsciousness in less than a minute and death within a few minutes;

(vi) Further important in a long list of injuries found on the body are numerous injuries to the head and face of the deceased some of which resulted in cerebral injuries caused by (a) blunt objects(s) such as the

stones handed in as exhibits 1-5. Massive force was needed to have inflicted these injuries to the head of the deceased.

(vii) 2 dislodged teeth in the lower jaw which was found in the oesophagus of the deceased and probably swallowed by her during the ordeal;

(viii) Had the gagging not taken place, the severe cranial fractures, cerebral injuries and haemorrhage of the brain would also have caused death. In this case death was most likely accelerated.

[14] Annemarie Dausab, the biological mother of the deceased was the only other witness called by the State. It was clear to the Court that she was overawed and virtually stunned when giving her evidence. On an invitation by Ms Verhoef to inform the Court about her feelings in respect of what had happened to her daughter and the way in which her child died, she could only say that the Dausab family "suffered the loss of this girl killed". The court also invited her views or comment on the last paragraph of exhibit "B" wherein the accused expressed how sorry he was for what he had done and wherein he begged for mercy from the court. She replied that she had nothing to say. She did however testify that the accused had for a period of months prior to 27 October 2010 known the deceased, bought her sweets and had given her money on a weekly basis. According to her the deceased did trust the accused which evidence is corroborated by your response to the State's Pre-Trial memorandum (exhibit "E"). On page 3 of your reply, you have not disputed that prior to the deceased's death, you on occasions

collected her from her residence and returned her unharmed and that at the time of her death, you held a position of trust or authority over her.

[15] On the murder charge Ms Verhoef has urged this court to remove you from society for a long time.

[16] I furthermore agree with the State's submission that your personal circumstances and the mitigating factors referred to above should yield to and be afforded lesser weight, given the crimes and the way in which same were committed.

[17] With regard to the rape charge she referred to the minimum sentence of 15 years prescribed by the legislature in section 3 of the Act if no substantial and compelling circumstances be found. She submitted that a sentence in excess of 15 years be imposed. It was furthermore properly contended by Ms Verhoef that the cumulative effect of the three sentences be considered so that you do not have to serve unreasonably long terms of imprisonment. This factor however, must be weighed against the public interest (including the outcry of society) albeit that the crimes were closely connected in time, place and with the same victim. In her submission the court should not order that the whole of the sentence on the abduction charge run concurrently with the sentence on the murder or rape charge.

[18] Counsel for the State has referred the court to various decisions of this court, our Supreme Court and a few decisions of South Africa. I will only refer to two of them and one other case which in my view are most apposite and *in pari materia* with the facts and circumstances of this case and with which I respectfully associate myself: In *S v Alexander* 2006(1) NR 1 SC the Court echoed the following dictum of Lombard J in *S v Matolo* en 'n Ander 1998(1) SACR 206 (0) at 211 a-f:

> *"In cases like the present the interests of society is a factor which plays a material role and which requires serious consideration. Our country at present suffers an unprecedented, uncontrolled and unacceptable wave of violence, murder, homicide, robbery and rape. A blatant and flagrant want of respect for the life and property of fellow human beings has become prevalent. The vocabulary of our courts to describe the barbaric and repulsive conduct of such unscrupulous criminals is being exhausted. The community craves the assistance of the courts: its members threaten, inter alia, to take the law into their own hands. The courts impose severe sentences, but the momentum of violence continues unabated. A court must be thoroughly aware of its responsibility to the community, and by acting steadfastly, impartially and fearlessly, announce to the world in unambiguous terms its utter repugnance and contempt of such conduct. ''*

[19] The second case is *S v Louw*, CC 09/2005, delivered on 24 November 2006. The facts show remarkable similarities with your case. The accused in that case also abducted a 6 year old girl, abused her trust and viciously raped and murdered her by holding her legs and smashing her head four to

five times on the concrete pillar of a dam in fear of being identified. Two features in that case are however different to the present one. The deceased suffered serious injuries to her private parts as a result of the rape and the accused had also been convicted of indecent assault which he committed the day after the abduction, rape and murder. He was sentenced to 45 years imprisonment on the murder charge, 25 years on the rape charge of which 5 years were ordered to run concurrently with the sentence on the murder charge and 10 years on the abduction charge which was ordered to run concurrently with the sentence on the rape charge.

[20] In S v Chapman 1997(3) SA 341 SCA at p345 the Court said:

> *"The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights."*

The rights referred to are the rights to dignity to privacy and the person of the victim.

[21] The court has furthermore regard to the guidelines on sentencing referred to in *S v Van Rooyen and Another* 1992 NR 165 HC which I do not intend to elaborate upon.

[22] No submissions were made by your counsel on the fact that you were a bit drunk from all the liquor and drugs you took prior and after the

commission of the crimes nor did you claim any diminished responsibility in your plea explanation. I agree with Ms Verhoef that if regard is had to the documentary evidence handed in, the pointing out by you, that your actions were logical, rational and goal directed. In this regard the court refers to the route of 1,2km which you have pointed out when you carried the deceased to end up in the veld. Furthermore, when the deceased showed resistance – you dragged her further to the place where you raped her. Upon deciding to kill the deceased, it was once more goal directed – you found a callous solution to kill her with numerous and massive blows with stones in her face and when same did not have the desired effect, you gagged her. After the crimes you have inter alia removed your bloodstained clothes, taking same along with you and hiding them under a culvert as indicated on the sketch and photo plan. You took the evidence which might have linked you to the crimes along with you. Your conduct shows a complete presence of mind. The court finds in the circumstances that the wine and drugs did not diminish your moral blameworthiness in the circumstances.

[23] Accused, in summary, you have abducted the deceased, a vulnerable and defenceless little girl of the 4 years of age who had done you no harm from the safety of her home and out of the parental control of her mother. You have breached her trust in you when you unlawfully took her into the veld, away from her neighbourhood where you could not be detected nor where any outcry could be heard. When she resisted your initial acts you dragged her on her back for approximately 10 metres. Thereafter you used

force to press her down and then you raped her. Afraid of being reported to the authorities, you then decided to kill her. Numerous and massive blows, first with a smaller and thereafter with a bigger stone followed and in your own words "when she failed to die" (exhibit "B") you gagged her with a T-shirt and secured her suffocation by placing 2 stones in her mouth. The emotional and psychological stress and trauma the deceased must have gone through together with the physical pain caused by the blows, leaves one with a loss of words and too ghastly to imagine. Your conduct that day goes against the grain and was inhumane in the extreme. Her head and face had been mutilated as can be seen from inter alia photographs 22, 24, 25 and 33 handed in as part of exhibit "L".

[24] In conclusion the court reiterates that the aspects of deterrence and retribution as well as the interest of society far outweigh your personal circumstances which were duly taken into account. The following sentences are passed:

Count 1: You are sentenced to 35 years imprisonment.

Count 2: You are sentenced to 19 years imprisonment.

Count 3: You are sentenced to 6 years imprisonment of which 5 years are to run concurrently with your sentence on count 2.

SWANEPOEL, J.

ON BEHALF OF THE STATE	Adv. A Verhoef
Instructed by:	Office of the Prosecutor-General
ON BEHALF OF THE	Mr M Scholtz
Instructed by:	The Directorate of Legal Aid