



CASE NO: CC 13/2010

**IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION
HELD AT WINDHOEK**

In the matter between:

THE STATE

and

LAIZER KUHLEWIND

ACCUSED

CORAM: DAMASEB, JP

HEARD ON: 27 OCTOBER 2011 & 26 JULY 2012

SENTENCED ON: 14 AUGUST 2012

JUDGMENT ON SENTENCE

DAMASEB JP: [1] I have convicted the prisoner at the bar of raping a 7-year-old minor girl by inserting a finger into her vagina, contrary to s 2(1) (a) read with secs. 1 and 2(2) of the

Combating of Rape Act of 2000 ('Act no. 8 of 2000'). The legal position in Namibia today is that rape is no longer only committed by penile penetration. Penetration of a female's vagina, or the mouth or anus of any person with any part of human anatomy or another object constitutes rape under Namibian law. In *S v Swartz*¹ a 16 -year -old male had raped a 4 year old female by inserting his finger into her vagina. Miller AJ said:

“Since the enactment of the Act the question of the part of the accused's anatomy, be it a penis or a finger, or some other object is irrelevant. What is relevant as far as sentence is concerned will be the consequences of the insertion of whatever part of the anatomy or object into the vagina of the Complainant were.”

[2] That something other than a penis was used in the crime of rape is therefore no less obnoxious. The prisoner was more than 3 years older than the complainant when he raped her. In fact, he was 20 years old while the complainant was 7 years old. That is a statutorily aggravating circumstance which attracts a minimum sentence of 15 years unless the Court finds that there are 'substantial and compelling' circumstances that lead the Court to depart from the statutory minimum. If there are no substantial and compelling circumstances, the Court is under a statutory obligation to impose the minimum sentence of 15 years. The accused bears the evidential burden on the existence of substantial and compelling circumstances.

[3] The prisoner testified on his own behalf both on conviction and in mitigation of sentence. There are also before me two pre-sentence reports that provide some material bearing on the personal circumstances of the prisoner, the victim and the circumstances and consequences of the offence of which the prisoner stands convicted. Neither party wished to have the authors of the two pre-sentence reports brought to Court for cross-examination. At the sentencing procedure, the mother of the minor complainant also testified as did the mother of the prisoner.

¹ Case No. CC 08/2010, (unreported), delivered on 18 November 2011, para [21].

[4] The test for substantial and compelling circumstances as developed in the seminal South African case *S v Malgas*² has been approved in this jurisdiction.³ It states:

“The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as to cumulatively justify a departure from the standardised response that the Legislature has ordained.”

And:

“The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favorable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.⁴”

[5] In Namibia this Court held that the factors customarily considered in mitigation of sentence could, depending on their cumulative effect, qualify as substantial and compelling so as to warrant departure from the minimum prescribed sentence.⁵

Circumstances of the offence and impact on the victim

[6] The prisoner and the minor victim were no strangers to each other when the offence was committed. They lived in the same yard and socialized often. The prisoner rented a room from the mother of the complainant. This caused the victim's mother to testify at the sentencing procedure that she treated the prisoner as if he were her own child. On the day in question when the offence was committed, there was no adult present. The prisoner had gone out on a casual job and partook of cannabis and crack cocaine. He returned to the house and forcibly grabbed the minor victim (then only 7 years old), placed her on his lap and then inserted his

² 2001 (2) SA 1222 (SCA) at 1236 para 25

³ *S v Lopez* 2003 NR 162 (HC), at 172D-174A; *S v Gurirab* 2005 NR 510 (HC); *S v Limbare* 2006 (2) NR 505 (HC) at 509, para [9].

⁴ At page 1230, para [9].

⁵ See *S v Paul Uiseb*, case no CC 38/2001; *S v Lopez* 2004(4) NCLR 96(HC); *Frans Limbare v State*, case no CA 128/2005 delivered by Van Niekerk, J on 16 June 2006.

finger into her vagina. According to her testimony, she experienced pain and bled from her private part.

[7] The mother of the victim who testified at the sentencing hearing stated that the victim is her only child. She testified that in the aftermath of the rape, the minor complainant would experience nightmares. The mother sought to demonstrate that the minor victim's grades at school deteriorated as a result of the rape she had been subjected to by the prisoner. She testified that the daughter is constantly subjected to mocking and taunts by others as a result of the rape experience that she went through. She testified that this is done not only by other children but also by adults.

[8] The pre-sentence report on the victim in so far as it is relevant to the impact the offence has had on her, states that the minor victim's performance at school has been negatively affected by the rape experience and that she has been psychologically traumatised by the experience. The report concludes that the victim still vividly remembers the details of the offence and evinces a strong fear and hatred for the prisoner and wants to have him locked away.

The prisoner

[9] In addition to asking the Court to blend the sentence with mercy, Mr. Isaacks for the prisoner has urged me to have regard to the following factors as potentially constituting 'substantial and compelling' circumstances:

- (a) The prisoner is a first offender;
- (b) Although not a juvenile, at 20 years of age he was a youthful offender at the time of the commission of the offence;
- (c) He was under the influence of intoxicating drugs (cannabis and crack cocaine) and acted with diminished capacity to exhibit good judgment;

- (d) The offence was not premeditated or planned;
- (e) Because of his age, the prospect of rehabilitation is a real possibility in the case of the prisoner;
- (f) The sexual act consisted of the prisoner inserting his finger into the vagina of the complainant as opposed to penile penetration;
- (g) No violence, threats of violence or weapons was used during the commission of the offence;
- (h) He let the Complainant go immediately after she screamed and the unlawful act was not vicious and brutal;
- (i) In terms of the J88 report by the doctor, the Complainant did not suffer any serious injuries but only an inflamed (redness) vestibule and her 'innocence remained intact';
- (j) The prisoner has shown strong remorse;
- (k) Imprisonment of the prisoner would result in his mother losing a breadwinner;
- (l) The prisoner spent a total of 18 months while awaiting trial before bail was granted and after conviction.

[10] It is clear from the evidence on record that the prisoner had an unhappy upbringing and had to fend for himself for much of his adolescence. His mother testified at the sentencing procedure that his biological father deserted him and the mother when she was expectant with the prisoner. The mother who was very poor and sickly (she suffers from osteoporosis) was unable to look after him and left him in the care of her friends (the Khulewind's) who took him in their care when he was only 1 (one) month old and brought him up. They cared for him until he was 15 years old, when, it seems from the evidence, he again for the first time made contact with his biological mother when he moved to Windhoek to attend grade 10. There is no indication that he had anything other than a normal upbringing in the care of these proverbial Good Samaritans. The mother's evidence demonstrates though that he was aware at all times that the Kuhlewinds were not his biological parents and that his father had abandoned them. She also testified that the prisoner had no behavioural problems as a child. He had to abandon school after he failed grade 10 and because of her lack of money, the prisoner could no longer

continue with school. After dropping out of school he took on occasional odd jobs from which he fended for himself and the mother as his means allowed. The drift of this evidence of the mother is in material respects corroborated by the pre-sentence report on the prisoner. The report also points out that the prisoner is remorseful for what he did to the minor victim.

[11] Mr. Moyo for the State has submitted that there is nothing in the circumstances of the prisoner that justify the finding that there are substantial and compelling circumstances that would induce departure from the statutorily prescribed minimum sentence of 15 years. He even pointed out that the prisoner had nothing but a normal upbringing with his foster parents. He mocked the suggestion by the prisoner that he was the victim of the colonial era and deserved lenient treatment. Mr. Moyo argued that the prisoner had never experienced the colonial experience and could therefore not seek lenient treatment on that basis.

Substantial and compelling circumstances established

[12] Although it caused some bleeding to the minor complainant's vagina, the sexual assault was not sustained. The J 88 records that the doctor found that as a result of the rape the victim's vestibule was inflamed. The testimony given at the trial was that she bled from the vagina as a result of the sexual assault. The victim testified that she experienced pain as a result of the forceful insertion of the prisoner's finger into her vagina.

[13] To suggest, as Mr. Moyo for the State does, that in the case of the prisoner there was no abuse from the care givers and that, for that reason, the prisoner's upbringing was normal is being pedantic and down-plays the psychological need of all humans to be cared for and loved by their biological parents. It is an important factor in this case that the prisoner had an unhappy upbringing. He was obviously aware all his intelligent life about the poverty that afflicted his biological mother and her inability to care for him and to love him and to provide to her and to him a normal and decent life that all humans desire and deserve.

[14] Age is an important mitigating factor: The younger the offender the greater the need to give him another chance in life. Young people, it is accepted, are less able to control their impulses and offer resistance to temptation compared to adults. Youthfulness coupled with intoxication has always been regarded as a strong mitigating factor.⁶ All the more so where, as in the present case, the consumption of the intoxicating substance was not done as an inducement for the offence.⁷ I also agree with the observation by the author Van der Merwe that “a young person is liable to be affected much more detrimentally by...a term of imprisonment, than a more mature person”.⁸

[15] The prisoner who, it remains undisputed, had never before experienced drugs had partook of a very dangerous drug under peer pressure and was under its influence when he committed the crime. The State has not disproved his version that he labored under the influence of those drugs when the offence was committed. His brother, one Ronaldo Again Davids, who also testified at the trial on conviction testified to the effect that the prisoner did not look normal and behaved contrary to character at the time he committed the offence. That evidence stands un-contradicted by the State. In addition, he seems truly remorseful for what he had done. He spent altogether 18 months in prison, both before trial and after his conviction when the Court withdrew his bail. It remains undisputed that although he has not had any permanent job he had from earnings made by doing casual jobs, supported his sickly mother as best he could. He wants to be given another chance to get his life in order and to seek employment so that he can continue to assist his mother.

[16] Mr. Moyo for the State also conceded in argument that there is no admissible evidence on record that the acknowledged poor performance of the minor victim at school is the direct result of the sexual assault at the prisoner’s hands.

⁶ S v R 1996 (2) SACR 341 (T).

⁷ The so-called Dutch courage situation.

⁸ Van der Merwe, D P .1998. *Sentencing*, Juta, Service 6, page 5-21.

[17] I am satisfied that all the factors listed in paragraphs [12] to [16] , and in particular the youth of the prisoner at the time of the commission of the offence, compounded by his over-indulgence in drugs, the remorse he has shown for his unlawful conduct, and the particularly unfortunate circumstances of his dislocation from his biological parents for much of his life, cumulatively constitute substantial and compelling circumstances that justify departure from the statutorily prescribed minimum sentence of 15 years in this case.

What is the appropriate sentence?

[18] It is important, however, that a wrong message is not sent out by not imposing a custodial sentence. The attack on the young girl had the result that she bled from her vagina. That she was traumatized by the sexual assault is also not in doubt. A custodial sentence is therefore unavoidable. The weighty personal circumstances of the prisoner however cry out for mercy. In my view that will, on the facts of this case, be achieved by suspending a substantial part of the prison term.

[19] I have regard to the triad of sentence, being the seriousness of the offence, the interests of society and the personal circumstances of the prisoner. I cannot agree with Mr Isaacks' submission that there was no use of violence. Violence must be seen in a proper context here: the grabbing and forceful insertion of a finger was perpetrated on a 7 year old who experienced pain and bleeding. Its effect on a child of that age is bound to be different than if perpetrated on an adult. That said, the State did not lead any expert evidence that the act caused lasting psychological trauma, although I accept that the minor complainant suffered mental trauma in the immediate aftermath of the sexual assault. I am also alive to the evidence given by especially the mother of the victim that the latter experiences nightmares as a result of the rape experience.

[20] In determining an appropriate sentence I take into account the fact that the prisoner had already spent 18 months in prison. I intend to suspend part of the sentence as a sword of Damocles against possible sexual offences in the future. Although it is inherently problematic to determine a sentence in a rape case on the ill-advised and ill-informed attitudes of people in the community towards rape victims, it remains a reality - as shown by the attitudes to the complainant in the case before me - that rape attaches a stigma and brings opprobrium to victims. That reinforces the seriousness of the offence of rape and the need to protect the interests of society by imposing stiff penalties on the perpetrators of rape. No doubt, the public needs education to change such attitudes.

[21] In *S v Swartz*, supra, Miller J imposed a sentence of 8 years of which 4 years were suspended, against a 16 year old male who inserted his finger into the vagina of a 4 year old girl.

[22] Mr. Kuhlewind, I sentence you to 7 (seven years) imprisonment of which 4 (four) years imprisonment is suspended for a period of 5 (five) years on condition that during the period of suspension you are not convicted of the offence of rape read with the provisions of the Combating of Rape Act 8, of 2000.

DAMASEB, JP

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