REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 58/2013

In the matter between:

DUSANTOS GOMASEB **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Gomaseb v The State* (CA 58/2013) [2013] NAHCMD 366 (29 November 2013)

Coram: **SMUTS, J** *et* **MILLER AJ**
Heard: 25 November 2013
Delivered: 29 November 2013

Flynote: Appeal against sentence of 6 years, of which 3 years were suspended for 5 years on appropriate conditions for a contravention of s2 (1) (a) of Act 8 of 2000 imposed by a regional magistrate. The appellant was at the time of the commission of the offence 15 years and 1 month old. He had also spent some 18 months incarcerated prior to sentencing. But a severely aggravating feature of the crime (comprising the insertion of his finger in the vagina of a girl of 5 years) was the tender age of the victim. The regional magistrate had considered the personal circumstances of the appellant following a social report being handed in before sentencing. The appellant did not establish a misdirection or irregularity on the part

of the regional magistrate. Despite the age of the appellant, the sentence does not induce a sense of shock, given the seriousness of the crime and the interest of society in ensuring that severe sentences are handed down for the statutory rape of young children at tender ages.

ORDER

That the appeal is dismissed.

JUDGMENT

SMUTS J

[1] The appellant was charged with and pleaded guilty to the offence of contravening s2(1)(a) read with ss1,2 (2), 2 (3), 3, 4, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000 (the Act) by a regional magistrate in Mariental on 21 June 2011. On 15 September 2011, the appellant was sentenced to 6 years imprisonment of which 3 years were suspended for 5 years on condition that the accused is not convicted of rape or attempted rape within the period of suspension. The appellant's appeal lies only against his sentence.

[2] The primary thrust of the argument of Mr McNally, who appeared for the appellant in this appeal, was that the regional magistrate failed sufficiently to take into account the age of the appellant at the time of the commission of the offence. The appellant was 15 years and 1 month when the offence was committed. Following his conviction, a report by a social worker was obtained concerning the personal circumstances of the appellant. It was established that he was the first of five children and grew up in Gochas. He and his siblings had been abandoned by their father at an early but unspecified age and he had dropped out of school already in grade 5. The report stated that the appellant did not appear to have fully developed his identity which led to him making wrong choices. The report further

pointed out that the absence of a father figure in the appellant's life had made a significant impact. It was further stated in the report that the appellant dreaded the prospect of imprisonment and had no sense of emotional security after being abandoned by his father.

[3] Mr McNally correctly acknowledged that the appellant had been convicted of a most serious offence. The complainant in the matter was a 5 year old girl. The appellant had been convicted of statutory rape by inserting his finger in her vagina. There was medical evidence from the doctor who had examined the complainant that she had bled from the hymen and that her vagina was tender and that minor abrasions on the right knee and shin were also found.

[4] Mr McNally submitted that despite the very serious nature of the offence, imprisonment of such a youthful offender should be a course of last resort. He referred to the Convention on the Rights of the Child which, in Art 37(b), states:

> 'The arrest, detention or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time.'

This Convention forms part of the law of Namibia, having been duly ratified. I accept that this should be point of departure when dealing with children. The appellant, being only 15 years and 1 month at the time of the commission of the offence, certainly falls within that category.

[5] Mr McNally also referred to the fact that the appellant had spent some 18 months in custody prior to being sentenced. He accordingly submitted that an effective period of imprisonment to which the appellant was sentenced was of the order of 54 months. He submitted that the regional magistrate did not properly apply his mind to the period of pre-trial incarceration and by failing to do so amounted an irregularity. He submitted that the presiding magistrate also committed an irregularity by failing to apply his mind to other sentencing options.

[6] Mr McNally also referred to several authorities concerning the sentencing of youthful offenders and the need to avoid incarceration where possible. The thrust of many of these cases spanning several decades is to the effect that a court should guard against overemphasizing the gravity of offence and the interest of society at the expense of the personal circumstances of a youthful offender. He also referred to

Centre for Child Law v Minister of Justice and Constitutional Development and Others[1] where Cameron J stated:

'But while the Bill of Rights envisaged that detention of child offenders may be appropriate, it mitigates the circumstances. Detention must be a last, not a first, or even intermediate, resort, and when the child is detained, detention must be "only for the shortest appropriated period of time." The principles of "last resort" and "shortest appropriate period" bear not only on whether prison is a proper sentencing option, but also on the nature of the incarceration imposed. If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempered, so as to ensure detention for the shortest possible period of time. In short, s 28(1)(g) requires an individuated judicial response to sentencing, one that focuses on the particular child who is being sentenced, rather than an approach encumbered by the rigid starting point that minimum sentencing entails. The injunction that the child may be detained only for the shortest "appropriate" period of time relates to the child and to the offence he or she has committed. It requires an individually appropriate sentence.'

[7] I respectfully agree with that approach. It also accords fully with the Convention on the Rights of the Child. This approach has also as to large extent been articulated by the courts of Namibia. Mr McNally referred us to several cases including unreported cases of this court stressing that extra care was needed in determining a suitable sentence for young offenders and where imprisonment should be guarded against where possible.[2] Mr McNally also submitted that a wholly suspended sentence would achieve the purposes of sentence in this matter and submitted that the sentence should be set aside and replaced by such a sentence.

[8] Ms Esterhuizen for the State referred to the test to be followed by courts of appeal in respect of appeals against sentence, namely that the imposition of sentence is a matter within the discretion of a trial court and that a court of appeal would only interfere with the exercise of that discretion if the trial court misdirected itself or perpetrated an irregularity or if the sentence was so inappropriate so as to induce a sense of shock. Ms Esterhuizen submitted that the appellant had failed to establish a misdirection or irregularity on the part of the regional magistrate. Nor did the sentence induce a sense of shock, so she submitted.

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[1] 2009 (2) SACR 477 (CC) at 491 (par 32 and 33).

[2] See *S v Erickson* 2007 (1) NR 164 at 166; *Shikesho v The State* CA 111/2008 delivered on 13/10/2008; *S v Amunyela*, unreported, delivered on 3/03/2010; *S v Swartz* case number CC 8/2010, delivered on 18/11/2011.

[9] Ms Esterhuizen submitted that the aggravating feature of the serious statutory crime of rape was that the complainant was a child of 5 years old when the offence was committed. This is indeed a gravely aggravating factor. There is unfortunately very little material before us concerning the circumstances of the commission of the crime because of the plea of guilty.

[10] Ms Esterhuizen pointed out that the regional magistrate had in fact taken the 18 months period of pre-sentence incarceration into account in his judgment. Ms Esterhuizen also pointed out that the regional magistrate took the appellant's youthfulness into account when sentencing him and submitted that the regional magistrate accorded sufficient weight to the appellant's personal circumstances.

[11] The regional magistrate has in this case provided detailed reasons for the sentence, taking into account the personal circumstances of the appellant set out in the social welfare report, his youthfulness, being a first offender, his plea of guilty and his expression of remorse expressed to the social worker. The court a quo also referred to the serious nature of the offence aggravated by its perpetration upon a child of such a tender age, correctly stating that sexual abuse upon very young children evokes a sense of outrage in the minds of right thinking persons. He concluded that a custodial sentence was justified but should be ameliorated by suspending a portion of it.

[12] Upon analysis of the approach of the regional magistrate, it would not seem to me that he misdirected himself or perpetrated any irregularity in the sentencing of the appellant. Although the sentence may be considered somewhat harsh for a first offender who committed the crime at the age of 15 years and 1 month, it certainly does not induce a sense of shock because of the seriousness of the offence compounded by the aggravating feature of being perpetrated upon a child of 5 years old – such a tender and vulnerable age. The crime of rape and especially the sexual abuse of young children have rightly received special attention from the legislature in enacting severe sentences for their perpetration in the Act. Despite the youthfulness of the appellant and his other mitigating circumstances, the seriousness of this crime justified the imposition of a custodial sentence and falls within the category of last resort contemplated by the convention. An effective three year term – albeit on top of

18 months pre-sentence incarceration – does not induce a sense of shock, given the aggravating feature of this case.

[13] The appellant has not, despite Mr McNally's best endeavors, established any misdirection or irregularity in sentencing. Nor does the sentence induce a sense of shock.

[14] It follows that the appeal is dismissed.

DF Smuts

Judge

I agree

P J Miller

Acting Judge

APPEARANCES

APPELLANT:	P McNally
	Instructed by Lentin, Botma & Van den Heeven
RESPONDENT:	K Esterhuizen
	Instructed by Office of the Prosecutor-General