

CASE NO. CC **41/97**

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

BERNARD GUIBEB
PHILLIPUS GUXAB
BENNY KAMENDU
RONNY HARAEB
RODNEY GUIRAB
PENIAS KURZ GIVEN
DOeSEB

CORAM: HANNAH, J.

Heard on: 1997/12/2,3,4,5,8; 1998/04/27

Delivered on: 1998/08/19

SENTENCE

HANNAH, J.: The five accused have been convicted of various offences involving sexual assault. The first accused was convicted of two offences of rape. The second accused was convicted of two offences of indecent assault. The third accused was convicted of two offences of rape. The fourth accused was convicted of one offence of indecent assault and the seventh accused was convicted of one offence of indecent assault. I should mention that the fifth and sixth accused were acquitted. Although the convictions in the case of the second, fourth and seventh accused were for indecent assault that was because of the common law

rule that a boy under the age of 14 years is irrefutably presumed incapable of sexual intercourse and therefore of rape. In my judgment convicting the accused I described that rule as patently absurd. The second, fourth and seventh accused did have sexual intercourse with the complainant or complainants in question and when it comes to sentence I see no reason to distinguish between the accused on the basis of the label attached to the offence of which they were convicted. The offences were committed on 11 July, 1995 which is now over three years ago and at the time the first accused was 15 years, the second accused was 12 years, the third accused was 15 years, the fourth accused was 13 years and the seventh accused was 12 years. The fact that they were children or, in the case of the first and third accused, little more than children at the time is obviously a fact which must weigh quite heavily with me in determining sentence. And in the case of the two older accused the fact that they pleaded guilty is also a factor which goes to their credit.

Welfare reports have been obtained in respect of all the accused and it is clear that with the exception of the seventh accused they are all, despite adverse circumstances at home, doing well at school and are apparently respected by their teachers. The seventh accused's progress at school is not satisfactory but he does not give problems to his teachers which I understand to mean that his behaviour is good. The fact that all but one of the accused are making good progress at school is another factor to be taken into account. If it can possibly be avoided then their good progress should not be disturbed. Another factor which weighs with me is the lengthy time which has elapsed since the incident occurred. Three years is a substantial period of time in the life of a 12, 13 or 15 year old and memories fade. At this stage the accused probably have only a faint recollection of the enormity of what they did on the evening of 11 July, 1995. And I think there is something to be said for Mr van Vuuren's submission that at their respective ages and acting in a group they may not fully have appreciated the gravity of their action.

I must of course bear in mind the effect of what they did on the complainants. Forcing sexual intercourse on a woman or, in the present case, a young girl of 14 years especially as a group is not only to submit her to a horrifying physical experience but it can, and often does, leave permanent emotional scars. And it is for that reason that rape normally attracts an immediate custodial sentence. But because of the present lack of proper custodial facilities for juvenile offenders I am most reluctant to take that course in the present case. Indeed it might well be counter productive to do so in the sense that the accused who are now living responsible, well behaved lives might as a result turn into criminals. The Welfare Officer who compiled the reports recommends either a postponed or suspended sentence and counsel for the accused urged me to follow that recommendation. Ms Jacobs, for the State does not dissent from that course. She adopts a neutral position.

In all the circumstances I consider a suspended sentence would be appropriate but this should not be taken by other teenage boys as meaning that sexual assaults will always attract such a sentence. There are, as I have endeavoured to indicate, special circumstances in the present case.

The sentence on the first, second and third accused is as follows. Taking both counts together for the purpose of sentence:

Five years imprisonment suspended for a period of five years on condition that the accused is not convicted of rape, attempted rape or indecent assault committed during the period of suspension.

The sentence of the fourth and seventh accused is as follows:

Five years imprisonment suspended for a period of five years on the same conditions as referred to in the case of the other accused.

