CASE NO.: CC 10/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

TUHAFENI JOSEPH

CORAM: **MULLER, J**

Heard on: 20 April 2007

Delivered on: 23 April 2007

SENTENCE

MULLER, J.: [1] The accused was convicted of an attempt to commit a sexual act with a girl under the age of 16, in terms of 21 of 1980 as amended by Act 7 of 2000. The penalty for such conviction is a fine not exceeding N$40 000 or imprisonment for a period not exceeding 10 years, or both such fine and imprisonment.

[2] The accused's legal practitioner, Ms Kishi, called the accused to testify in mitigation after he was cross-examined by Ms Nyoni for the State.

[3] In considering what an appropriate sentence for the accused should be, the Court considers the elements of retribution, prevention, deterrence and reformation or rehabilitation and attempts to incorporate a combination thereof in the sentence to be imposed. Furthermore, a balance of the circumstances relating to the accused, the crime and society, coupled with a blend of mercy, is the aim that the Court attempts to achieve by imposing an appropriate sentence. (*S v Zinn* 1969 (2) SA 573 (A) and *S v Rabie* 1975 (4) SA 855 (A)).

[4] The accused's personal circumstances are the following:

- He was 16 when he committed the offence and is now 21 years of age;
- He left school when he was in Grade 5;
- Thereafter he worked as a cattle herder for a certain George Heita;
- He was not paid a salary but received cows from the owner with which he ploughed his field;
- He grew up with his grandmother;
- His mother died and his father left them;
- There are in total 7 children who stays with his grandmother and who are dependent on her meagre pension of N$370 per month;
- A relative in Windhoek also contributes to the support;
- The accused works in the mahangu field and assists his grandmother to look after the other children;
- If sent to prison, that assistance will be lost;
- He expressed remorse and told the Court that the will not repeat this offence again;

- He was in custody after being arrested for approximately a week, whereafter he was warned and returned to his grandmother.

[5] Ms Nyoni directed her cross-examination mainly at the ages of the minor children and possible contribution to their own support, if the accused should not be there. The oldest child after the accused is a girl of 16 years, who is at boarding school and consequently not available for this purpose. The next child is 14 and attends school from the home of the grandmother. Ms Nyoni also elicited from the accused that he committed this crime with the complainant, who apparently stayed in the same house, during a time when there were no adults and so took advantage of their absence.

[6] Ms Kishi concentrated in argument on the age of the accused at the time, the fact that he is uneducated and comes from a poor background, as well as that assists the grandmother, who looks after several young children. She indicated that he showed remorse and pleaded guilty. Although conceding that society condemns this kind of offence, she submitted that a term of direct imprisonment for the accused will not only spell disaster for himself, but also for the grandmother and the other minor children. She consequently asked that the Court should suspend the sentence to be imposed *in toto.*

[7] Ms Nyoni urged the Court to consider the young age of the complainant at the time, namely 8 years, whose innocence was lost through the conduct of the accused. She also argued that the accused does not have any remorse and his plea of guilty is not an indication thereof, because he was caught in the act and could not plead otherwise. A further aggravating factor, she submitted, was that the accused was entrusted with care of the children, including the complainant. The adults were away and he abused this trust. She further submitted that although only 16 at the time the accused was still 8 years older than the complainant, an age difference much greater than that which the legislator regarded as serious and should be visited by the penalty provided in the Act. Ms Nyoni finally submitted that the community demands that such offences be treated with seriousness and that the Court's sentence for the accused should also reflect the interest of society.

[8] I have considered all the factors, including the personal circumstances of

the accused, the seriousness of the offence and the interests of the community and will attempt to impose a sentence that would reflect all these interests in a balanced sentence.

[9] There are certain elements of the evidence of the offence in itself and the evidence submitted in mitigation, that I believe should also be considered. I take it into consideration that the accused did testify in mitigation and subjected himself to cross-examination. My impression of his demeanour is that he honestly answered all questions, also those put to him during cross-examination. As an example he admitted his responsibility to look after the younger children when the adults were away and that he abused this trust to take advantage of the complainant being alone with him. Ms Nyoni submitted he pleaded guilty to the alternative charge because he was caught in the act. This was not put to him during cross-examination and he could not respond thereto. His evidence that he has remorse for what he did was left unchallenged. From the time when he pleaded the accused indicated that he wanted to have sexual intercourse with the complainant, but this was fortunately interrupted before it could happen by Mr Paavo's arrival. The evidence of the complainant was also that his "thing" was on her "thing", but not inside it. The doctor's evidence of his physical examination of the complainant after the incident and of her genitalia is that it was found to be normal and that there was no evidence of rape. I have already dealt with those findings of the doctor and concludes that on the evidence before me, the accused attempted to commit the alternative offence, namely of a sexual act with a child under 16. Although the accused was double the age of the complainant at the time, it must be remembered that he only attempted to commit the said contravention of the Act. I can, therefore, also not agree with Ms Nyoni that the complainant's innocence was taken away by the accused. I take cognizance of the accused's evidence under oath that he will never repeat this act again and from what I have seen of him, I believe it. Although the precautions that I have referred to in my judgment on the merits taken by the Court in respect of the complainant, her demeanour in Court does not indicate any serious permanent harm. No evidence was presented in mitigation of any psychological harm that the complainant suffered after the incident.

[10] Finally, I take into consideration that the accused was only in custody for a week and this incident occurred on 09 September 2002, namely nearly after 5 years ago. Since then it appears that the accused continued with his life at the village where the complainant also lives. I have not been told what the position is regarding the two of them during this period. The accused apparently continued with his cattle herding, working in the mahangu field and assisting his grandmother to look after the 7 other young children, of which the complainant may be one. If society, or the community wherein they live, would expect the Court to impose a sentence on the accused of a custodial sentence, I find it difficult to evaluate that without any evidence to that effect. The delay to bring the matter to court was not explained. The community has apparently accepted the accused back and although it would expect that he be punished for what he has done, the Court is left to draw its own conclusions as mentioned. I am also not sure why this

case has taken nearly 5 years before it was heard and the fairness thereof to both the accused and the complainant is doubtful in my opinion.

[11] Although I have taken all these factors and aspects into consideration, I am of the opinion that the only proper and balanced sentenced for the accused is a period of imprisonment which is totally suspended. I am aware that such a totally suspended sentence may be difficult to be understood by society, but as mentioned before, I believe it would be a correct sentence.

[12] The accused is sentenced as follows:

> Four years imprisonment which are fully suspended for a period of 5 years on condition that the accused is not convicted of a contravention of s 2 (1) of the Combating of Rape Act, No 8 of 2000, or of a contravention of s 14 (a) of the Combating of Immoral Practices Act, No 21 of 1980, as amended by Act 7 of 2000.

MULLLER, J

On behalf of the State: **Ms I. Nyoni**

Instructed by: **Office of the Prosecutor-General**

On behalf of the Defence: **Ms F. Kishi**

Instructed by: **Directorate of Legal Aid**