CASE NO.: CC 08/2007

REPORTABLE

THE STATE v MWESHITIWA MWETUYEKA

MULLER, J

06 JUNE 2007

- Accused pleaded guilty to and was convicted on charges of assault with the intent to cause serious bodily harm and rape in contravention of s 2 (1) of the Combating of Rape Act, No 8 of 2000.
- Evidence by the complainant that she was beaten by the accused during the rape indicated that the convictions in fact constituted a duplication of convictions. *S v Gaseb* 2000 NR 139 (HC) discussed. There is no prejudice to accused if the two convictions taken together for purpose of sentencing.
- The well-known triad of the circumstances of the accused, the nature of the offence and interests of society, as set out in *S v Zinn* 1969 (2) SA 537 (A) and *S v Rabie* 1975 (4) SA 855 (A), as followed by courts in South Africa and Namibia, as the three important principles to be considered in respect of sentence, discussed. Since the time of those cases, South Africa and Namibia accepted Constitutions that acknowledge basic freedoms. Certain articles of the Namibian Constitution discussed. The Combating of Rape Act also deals with the rights of the victim. Suggested that the time has perhaps come to consider the aspect of the victim's circumstances as a separate factor and to extend the accepted triad to add thereto the victim's circumstances as a fourth factor.
- The elements in respect of sentencing viewed against the expectations of society in respect of "brutality against the vulnerable in our society, especially women and children" as considered in *S v Kanyuuka* 2005 NR 201 (HC), referred to with approval.

- No "substantial and compelling circumstances" to impose a lesser sentence than the prescribed minimum sentence, were put before the Court by the defence. Accused legally represented and no duty rested on the Court to explain this right to the accused as is required in respect of an unrepresented accused. The Court was in any event satisfied that there were no such "substantial and compelling circumstances" present.
- The most important question was whether s 3 (1) (b) (ii), prescribing a minimum sentence of 20 years, or s 3 (1) (b) (iii), prescribing a minimum sentence of 45 years (a difference of 25 years) was applicable to this case where the accused is a second offender. The difference between the two subsections in this case depended on whether the circumstances in s 3 (1) (a) (iii) (aa) have been proved, or not. That subsection provides for the suffering of "grievous bodily or mental harm as a result of rape." No grievous bodily harm" was proved. Only question to be considered, was whether "grievous mental harm as a result of rape" was proved. Complainant testified that she is afraid of the accused, now lives in fear and feels insecure in her own home. *Jacobus Domingo v State*, Case No CA 185/2004 followed with approval. Held that such "grievous bodily or mental harm *as a result of rape"*;

  a) not to be confused with coercive circumstances applied during or as part of the rape, but whether it manifested after the rape as a result thereof,

  b) expert evidence is necessary to prove whether the complainant suffered grievous bodily or mental harm *as a result of rape*; and

  c) the "normal or mental harm associated with rape" not enough, but harm must be "more serious, damaging or lasting in its effect or consequence" as stated in *Jacobus Domingos v S (supra).*
- No such expert evidence was presented. Held that s 3 (1) (b) (ii) applies.
- Defence's submission that the sentence to be imposed in respect of this offence should be ordered to run concurrently with the accused's

previous conviction and sentence for rape, rejected. No evidence or information in respect of the circumstances and time of commission of the previous sentence put before the Court to be considered. To follow the defence's suggestion, would be tantamount to no sentence for this serious offence that the accused was convicted of.

- Both convictions taken together for sentence and accused sentenced to 20 years to run *consecutively* to the other previous conviction.

CASE NO.: CC 08/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

MWESHITIWA MWETUYEKA

CORAM: **MULLER, J**

Heard on: 17; 27 April 2007 and 10 May 2007

Delivered on: 05 June 2007

SENTENCE

MULLER, J.: [1] On 16 April 2007 at the Circuit Court of the High Court at Oshakati the accused pleaded guilty to two charges, namely a) that he assaulted Leena Immanuel with his fists with the intent to cause her bodily harm; and b) that he contravened s 2 (1) of the Combating of Rape Act, No 8 of 2000 in that he raped Leena Immanuel on 25 June 2005.

[2] Ms Kishi appeared for the accused, instructed by the Directorate of Legal Aid, and read out and handed in a plea explanation in terms of s112 (2) of the Criminal Procedure Act, No 51 of 1977. The plea explanation was not accepted by Ms Nyoni on behalf of the State, nor was the Court satisfied with it, because no coercive circumstances were admitted. At the request of Ms Kishi the matter was then postponed to the next day to consider to amend the plea explanation. In the amended plea explanation, which was confirmed by the accused, he admitted in respect of count 1 that he assaulted the complainant wrongfully, unlawfully and intentionally by beating her with a fist on her eye with the knowledge that she would sustain serious injuries. In respect of the rape charge, he admitted that he wrongfully, unlawfully and intentionally had sexual intercourse with the complainant without her consent and that there were coercive circumstances present, to wit that he applied physical force to empower her and by hitting her on her eye with his fist. He further admitted that he inserted his penis in her vagina and had sexual intercourse with her.

[3] The State accepted the plea on the basis of the amended plea explanation. By agreement the following documents were handed in by the State:

a. The medical examination report of the complainant; and

b. The section 119 proceedings before the magistrate.

[4] The Court was satisfied that the accused intended to plead guilty to these charges and the accused was convicted on both charges. It must be added that at that stage of the proceedings it was not apparent that the conviction of the accused on both charges might constitute a duplication of charges, neither was this aspect raised by the defence.

[5] The State proved one previous conviction of the accused, which was confirmed by him. This previous conviction will be dealt with in more detail hereinafter, but it reveals that the accused was convicted of rape in terms of s2(1) of the Combating of Rape Act, No 8 of 2000 on 31 May 2006 and he was sentenced to 15 years imprisonment. He is presently serving that sentence.

[6] On 17 April 2007 Ms Kishi, with the approval of the State, a applied for a postponement of this case in order to obtain a pre-sentencing report from a social worker. The Court postponed the matter to 27 April 2007 and because on that day the pre-sentencing report was not available, it was further postponed to 10 May 2007.

[7] When the case was called 10 May 2007, Ms Kishi handed in the pre-sentencing report in respect of the accused, but did not call the author of

that report to testify. The said pre-sentencing report was compiled by a social worker, W. N. Ithana and was handed in by agreement with the State. That report did not take the matter any further and obviously did not provide any additional mitigation evidence regarding the accused. In respect of the offence the report clearly referred to allegations made to the social worker by the accused, which did not even comply in all respects with his plea explanation. As an example, the accused mentioned to the social worker that he consumed alcohol and that he was intoxicated when he committed the offence. There is no evidence in that regard at all, neither was it mentioned in his plea explanation. It is not necessary to deal with the pre-sentencing report as it provides no substantiated evidence in mitigation. Ms Kishi also conceded that the pre-sentencing report does not take the matter any further and that is obviously the reason why she did not call the social worker to testify.

[8] Ms Kishi did not call the accused to testify under oath and only made certain submissions in respect of his personal circumstances from the bar. These circumstances include the following: the accused's age of 25 years at present, that he has no children and only completed grade 2 at school. Furthermore, it was submitted that he looked after cattle and lived with his aunt who is a pensioner. According to Ms Kishi, he is of low intelligence and was not even able to provide his date of birth to her. She further conceded that he is not a first offender, but submitted that

he was sentenced on 31 May 2006 to 15 years imprisonment in respect of a rape that he committed not long before this incident for which has been convicted in this Court. She finally submitted that he did show remorse through his plea of guilty and thereby did not waste the Court's time. In respect of the sentence that should be imposed, she conceded that it is a serious offence and that he should be severely punished because he is not a first offender, but requested the Court to order that the sentence to be imposed in this case should run concurrently with the one that he is presently serving. She did not provide the Court with any substantial and compelling circumstances which would allow the Court to impose a lesser sentence than the prescribed minimum sentences provided for in the Combating of Rape Act.

[9] Ms Nyoni called the victim of the offences, namely Leena Immanuel to testify. She testified that she is presently 45 years old and has 5 children. From her evidence it became clear she was very upset of being raped by a such young person, who could have been her child. She knew the accused prior to the offence by sight and saw him in the village where she also resides. In respect of the incident itself, she testified that around 22h00 that evening she was asleep inside her hut. She was sleeping in her normal sleeping attire. The accused pulled her out of her hut into the mahangu field where he undressed her. She screamed and while the accused was busy having intercourse with her, two neighbouring girls

came running to them. She was also hit on the eye by the accused. One of the girls asked him "*Mwetuyeka, what are you doing?"* Thereupon the accused ran away. The complainant was naked and was taken by the two girls of 14 and 17 years of age to other people. She was very embarrassed of being found in that position and to be seen naked by these young girls. She also testified in respect of her feelings after the incident. She said that even by looking at the accused in the dock, she is afraid. She feels bad that this young man of the age her children, raped her. She also feels bad because the young girls saw the accused having intercourse with her and saw her naked. She is afraid to be alone, which she never was, she does not feel safe at home and locks her door, which she never did before the incident. She denied that the accused was under influence of alcohol and said she did not smell any liquor on his breath. She was not cross-examined.

[9] Ms Nyoni submitted that the accused committed two serious offences for which he should be punished, but when asked by the Court whether it was not effectively a duplication of convictions, she conceded that it was. Although the accused had been convicted on both offences, it became apparent during the evidence of the complainant that the assault in fact formed part of the coercive circumstances. When the well-known tests in respect of the duplication of convictions are applied, namely the "single intent test" and the "same evidence test" it is clear that the

assault that took place forms part of the coercive circumstances of the rape charge. (*S v Gaseb* 2000 NR 139 (SC). Ms Nyoni agreed that in sentencing the accused he should only be sentenced for the serious charge of rape and that there can no prejudice to the accused in that regard.

[10] In respect of the personal circumstances of the accused, Ms Nyoni submitted that in comparison with the seriousness of the offence and the interest of society, this factor is in fact negligible.

[11] With regard of the seriousness of the offence, she submitted that the accused committed an offence which is regarded as one of the most heinous crimes. She referred to several cases in this regard. She also submitted that, as set out in the decision of *S v Michael Katamba*, Case No.: SA 2/1999, our society requires severe punishment for this serious type of offence. She also urged the Court to consider its duty as set out in *S v Matolo* 1998 (1) SACR 206. She argued that the complainant suffered a brutal assault and rape and referred to the evidence of the complainant in this regard. She still suffers from it, because she now lives in fear after the incident. Ms Nyoni submitted that the accused is a menace to society and the sentence should not only punish himself, but should protect society and send a clear message to other members of society that this type of offence would not be tolerated. Ms Nyoni

submitted that being a second offender, the accused should be sentenced in terms of s 3 (1) (b) (iii) of the Combating of Rape Act, which provides for imprisonment not less than 45 years. She submitted the complainant "has suffered grievously bodily or mental harm as result of the rape" as set out in s 3 (1) (a) (iii) (aa), for which a minimum sentence of 45 years is prescribed in the said Act.

[12] The Court discussed this suggested punishment and the applicability of s 3 (1)(b) (iii) with Ms Nyoni and asked her whether the accused should not be sentenced in terms of s 3 (1) (b) (ii) prescribing a minimum sentence of imprisonment of not less than 20 years. It was pointed out that difference between these two minimum sentences are 25 years, which is very long period. Ms Nyoni, however, remained adamant that the evidence of the complainant to the effect that she still lives in fear as a result of the rape, indicates that she in fact suffered mental harm which renders the accused, as a second offender, liable to a minimum sentence of 45 years imprisonment in terms of 3 (1)(b) (iii). In reply Ms Kishi submitted that the accused should be sentenced in terms of s 3 (1) (b) (ii) to a minimum period of 20 years, because there is no evidence that the complainant did suffer bodily and mental harm as a result of the rape.

[13] When the Court considers what is an appropriate sentence for the accused, it takes into consideration the personal circumstances of the accused, the nature of the crime and the interests of society and attempt to balance these factors. The Court may consider to add a measure of mercy to these factors. These considerations have been followed in other cases since the decisions of *S v Zinn* 1969 (2) SA 537 (A) and *S v Rabie* 1975 (4) SA 855 (A). It has often been suggested that the circumstances of the victim should also be considered. In fact, our courts have considered the circumstances of the victim and brought it to home, either under the nature of the crime, or the interest of society. The question may be asked whether the circumstances of the victim should not be considered as fourth category on its own in addition to the well-known triad when the court considers sentence. It is clear that the decisions referred to above, which have often been followed, were decided at a stage when neither Namibia, nor South Africa, had a Constitution. In the Namibian Constitution the sanctity of life is a cornerstone. Not even a court has the right to take, or to order, that a person's life should be taken since the death penalty had been abolished by the Constitution. Article 6 of the Namibian Constitution provides:

> *"The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia."*

Human dignity should also be respected and that includes the dignity of the complainant. Article 8 states:

> *"1) The dignity of all persons shall be inviolable.*
> *2)a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.*
> *b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."*

Furthermore, legislation like the present Act, namely the Combating of Rape Act, takes the victim's interest into consideration and provide for severe minimum sentences. Perhaps the time has come to extend the triad to add the circumstances of the victim as a separate factor to be considered in the sentencing process.

[14] When the Court considers what is an appropriate punishment for an accused before it should be, elements such as retribution, deterrence and prevention, as well as reform or rehabilitation should be considered.

In respect of retribution Young, J said in *S v Ndlovu* 1967 (2) SA 230 (R) at 231B:

> *"The object of punishment is to hurt the offender and to hurt him sufficiently and to prevent him from committing a similar offence."*

An accused is punished for the offence he has committed. This also shows to those who suffered by his conduct, the complainant in particular, as well her family and the community that the accused is punished for what he has done and that justice had been done. The further purpose of imprisonment is prevention and deterrence. The convicted accused is deterred from committing such an offence in future and other members of society are deterred from committing similar offences. The Court, as instrument of society, protects society by preventing, not only this particular offender to commit further similar offences, but also by deterring others to commit such offences. Finally, the rehabilitation or reformation function should not be forgotten. Hopefully a long term of imprisonment will serve this purpose.

[15] In *S v Kaanyuka* 2005 NR 201 (HC) the Judge-President expressed himself in respect of these elements in a case where an appellant's appeal against a sentence of 40 years for rape was dismissed, in the following words on page 206 F-I:

> *"Brutality against the vulnerable in our society, especially women and children, has reached a crisis point. Small children have become the target of men who are unable to control their base sexual desires. What once may have been unthinkable had now become a quotidian occurrence – a fact which the learned magistrate, as he did, was entitled to take judicial notice of. These crimes against the vulnerable in our society evoke a sense of helplessness in the national character. The courts are doing their*

utmost, through stiff sentences, to deter men from raping women and small children, but, apparently, without much effect. Rehabilitation and general deterrence should therefore have very little relevance when it comes to considering sentences for these kinds of sexual offenders. I am sure that laws do not make people moral, but the courts as custodian of our laws must exact vengeance for people's actions, when those threaten the fabric of our society, lest the general populace lose faith in the legal system and resort to means not concordant with our Constitution. Those who commit despicable and heinous crimes against women and children, crimes that we have, shamefully, now become accustomed to as a community, should expect harsh sentences from the courts of this land."

[16] I have no doubt that the accused, who is a second offender for this serious and brutal type of offence should be incarcerated for a very long period. He is already serving a sentence of 15 years imprisonment for a similar offence. Unfortunately circumstances of that offence and when it was committed are not available. This offence had been committed on 25 June 2005 and is only now before Court, nearly 2 years later. The accused had already been sentenced on 31 May 2006 for the previous conviction. If the defence intended to rely thereon that these two offences were committed close to each other, evidence in one or other form should have been placed before the Court. That was not done and it cannot be considered in imposing sentence for this offence.

[17] The accused's sentence has to comply with the interests referred to above. I agree with Ms Nyoni that in comparison, the accused's personal

circumstances are outweighed by the seriousness of the offence and the interest of society. This was a serious offence and the coercive circumstances, which the accused admitted, namely that he hit her on her eye to subdue her, as well as the complainant's evidence that he continued with his act despite her screams after he forcefully took her from her own home, aggravates this offence. The embarrassment she has felt by being raped by a person who is of the same age as some of her children and that she was seen in that situation by young girls and also the embarrassment of her nakedness, further aggravates this offence of the accused. I have taken cognizance of all the circumstances and factors submitted to me, as well as the enunciations by our courts regarding the seriousness of this type offence and the expectations of society. The accused's age makes him liable to a prescribed minimum sentence in terms of the Act. The only question is whether the prescribed minimum sentence of 20 years or 45 years is applicable in these circumstances.

[18] In *Jacobus Domingo v S*, Case No.: CA 85/2004, Damaseb, J and Van Niekerk, J had to deal with the meaning of what constitutes "grievous bodily or mental harm" in s 3 (1) (a) (iii) (aa) of the Combating of Rape Act. After discussing several interpretations of what "grievous bodily harm" could mean, Van Niekerk, J said the following on page 7 of that judgment:

"Applying these authorities by analogy to the expression "grievous mental harm" is not as easy as it may seem. At first glance it seems to me that "grievous mental harm" must mean serious harm of a mental or psychological nature, or serious harm to the mental health of the person. It further seems to me that the legislature had in mind, not the "normal" or usual mental trauma associated with the offence of rape, but harm more serious, damaging or lasting in its effect or consequence. I am partly led to this conclusion by the fact that the Act provides for minimum sentences of five and ten years as well. I would consider it very unusual for complainants in such cases of rape not to experience some, if not all, of a range of feelings such as fear, shock, humiliation, shame, distrust, degradation, depression, feeling "dirty", aggression, constant alertness, etc. By this I am not to be taken as implying that the normal mental trauma suffered by rape survivors is not considerable, but is does not necessarily mean that such trauma causes serious mental harm, which, it seems to me, would be evidenced by some form of psychological damage or even resulting physical damage to the health or wellbeing of the complainant, which is substantial and not of a passing nature. In reaching this conclusion I found it useful to have regard to various authorities on the issue of delictual liability for emotional shock (see "Emotional Shock", by JM Potgieter (updated by L Steynberg) in LAWSA vol 9; Bester v Commercial Union Versekeringmaatskappy van SA Bpk 1973 (1) SA 769 (A) 779 (H); Muzik v Canzone Del Mare 1980 (3) SA 470 (C) .) (See also N v T 1994 (1) SA 862 (C); Jackson v Jackson 2002 (2) SA 303 (SCA) at 310-312). Proof of such damage as a result of the rape would normally require medical, psychiatric or psychological evidence. (See eg. N v T (supra); S v R 1996 (2) SACR 341 (T) 343h; 345a) but see M v N 1981 (1) SA 136 (Tk).)"

In that case (*Jacobus Domingo v S*) the accused was only a first offender. The court regarded the evidence of a certain person, who testified about the psychological effect after the rape on the accused, but found that it

was hearsay and that that person was not an expert. Furthermore, in respect of the complainant's own evidence of whether she suffered grievous bodily harm and mental harm, van Niekerk, J said the following on page 12:

> *"Ms Herunga submitted that the complainant suffered grievous bodily harm. She referred to the complainant's description of the attack on her, especially the fact that the appellant grabbed her on her throat rendering her unconscious. There was also the fact that there was laceration on the perineum, which is indicative of forceful entry while the complainant (w) as in a lying position. I have no doubt that the attack must have been a terrifying experience. I have no doubt that the violence was brutal. However, I am not convinced that the injuries suffered as a result were grievous. The doctor did not give any details about the gravity of the injuries, how long they would take to heal, what treatment was given of any, or how long or deep the laceration was. There is simply is not sufficient evidence on which to conclude beyond a reasonable doubt that the complainant suffered grievous bodily harm."*

The conclusion of the court was that grievous bodily or mental harm was not proved to render the accused liable for a sentence of 15 years in that case.

[19] Despite by being bound by it, I am in agreement with the decision by the two appeal judges on appeal in the case of *Jacobus Domingo v S, supra.* In my opinion expert evidence is necessary for a court to evaluate whether there was grievous bodily or mental harm "as a result of the rape" in terms of s 3 (1) (a) (iii) (aa). Such grievous bodily or mental harm

should not be confused with injuries caused in the process of raping the complainant and which constitute coercive circumstances as s 2 (2) of the Act provides for. The question is whether the complainant suffered grievous bodily or mental harm after the rape. In this instance there is no medical evidence of any physical injury that could lead to such suffering by the complainant after the rape as a result thereof. Evidence of the fear and feeling of uncertainty of the complainant, although the seriousness thereof cannot be denied, do not amount to mental harm as a result of the rape. For that expert evidence would be required.

[20] Ms Kishi did not place any "substantial and compelling circumstances" before the Court on which the Court could have been satisfied that a lesser sentence than the prescribed minimum sentence applicable could be imposed. The accused was legally represented and, therefore, no duty rested on the Court to explain this provision to the accused. I am satisfied in the circumstances of the case that there in any event are no such "substantial and compelling circumstances" to allow the Court to impose a lesser sentence.

[21] In the result, I find that the accused, being a second offender, falls within the provision of s 3 (1) (b) (ii) and the minimum sentence is then one of 20 years. Ms Nyoni submitted that if I should find that the accused falls under that statutory provision, on the basis of her

submissions in respect of the seriousness of the offence and the expectations of society, the acused should be sentenced to at least 30 years for this offence.

[22] After the taking all the personal circumstances of the accused, the seriousness of the offence and expectations of society into consideration and weighing them up according to their respective importance, the period of 20 years imprisonment, which is the minimum provided for in the Act, would in my opinion be an appropriate punishment for the accused. As already mentioned, the accused had also been convicted on the charge of doing grievous bodily harm to the complainant, but that this offence forms part of the main offence of rape. I shall consequently take these two convictions together for the purpose of sentencing. I am furthermore not convinced by Ms Kishi's submission that the sentence I intend to impose in respect of this offence should run concurrently with the sentence of 15 years that the accused is presently serving. These are two different offences and the effect of that submission would be that he would not be punished for this offence at all.

[23] The following sentence is imposed:

1. Both convictions are taken together for the purpose of sentencing;

2. The accused is sentenced to 20 years imprisonment, which sentence shall not run concurrently with the sentence that he is presently serving, but consecutively thereto.

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MULLER, 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**