CASE NO.: CC 03/2011

IN THE HIGH COURT OF NAMIBIA

HELD AT OSHAKATI

In the matter between:

THE STATE

and

SIMON NGHILIFILWA SHAADUKA **ACCUSED**

CORAM: **TOMMASI, J**

Heard on: 25/03/2011

Delivered on: 14/04/2011

SENTENCE:

TOMMASI J: [1] The accused pleaded guilty to and was convicted of having contravening section 2(1)(a) read with sections, 1, 2(2), 3,5,6 and 7 of the Combating of Rape Act, 2000 (Act 8 of 2000) and murder.

[2] The accused was represented by Mr Bondai instructed by the Directorate Legal Aid and the State by Mr Shileka.

[3] When the accused testified in mitigation he described fully to the court how the crimes were committed. He testified that he was drinking beer and "*castello"* during the day. During the early evening he came from the cuca shop and found the deceased, a nine (9) year old girl, at the house with other children. He invited her to a meal whereafter she left. He followed her and when he asked her to have sexual intercourse with him, she refused. He, regardless of her lack of consent, forced her to lie on the ground and had sexual intercourse with her. He testified that the deceased begged him to let her go several times. The accused however covered her mouth and nose to prevent her from screaming and to tell others what he had done. He only let go of her when she died. Thereafter he took her body and dumped it under a tree away from the footpath. The accused, by his own admission murdered the deceased with *dolus directus.*

[4] The body was detected the next day. The members of the community confronted the accused and he admitted to having raped the deceased and killing her. According to the accused he wanted to apologize but the

members of the community did not want to give him the opportunity. This is not surprising as one can well imagine their outrage at what the accused had done. The accused admitted his crimes during the proceedings in terms of section 119 of the Criminal Procedure Act, 1977 (Act 51 of 1977) and pleaded guilty in this Court.

[5] By the time the post-mortem examination was conducted, the body had reached such a state of decomposition as to make it impossible for the pathologist to determine the cause of death. The pathologist however determined that the deceased's hyoid bone (*a U-shaped bone positioned at the base of the tongue and above the thyroid cartilage that supports the tongue and its muscles)* was fractured; and observed epicardium petechiaes (*tiny purplish red spots on the membrane of the heart).* According to the pathologist the latter injury is consistent with the lack of oxygen to the heart. It is clear that the accused did more than just cover the nose and mouth of the deceased but also broke her hyoid bone. The photographs indicate a discoloration of the neck area. The inescapable inference is that the accused also strangled her by applying a strong enough force to her neck to fracture her hyoid bone. The doctor was unable to determine any injuries to the pelvic walls and genital organs due to the state of decomposition.

[6] The accused was thirty nine (39) at the time he committed the offence and is a first offender. He has two children that have been and still are in the custody of his mother. He is not married and has no formal education. When the accused was asked why he did it; he informed the Court that he did it because he was drunk. Counsel for the accused argued that the following factors should be considered in mitigation: that the accused admitted his wrongdoings and expressed his remorse; that the accused had reached the age of 39 years before he offended for the first time; and that the accused has been detained in pre-trial custody since 27 December 2009 i.e a period of just over one (1) year and three months.

[7] The fact that the accused, at the age of 39, offended for the first time and spent a period prior to his trial in custody are recognized factors the Court has to consider in mitigation.(see *S V KAUZUU 2006 (1) NR 225 (HC) & S v FATYI 2001 (1) SACR 485 (SCA)*). Although the accused is the father of two children he has never taken responsibility for the children as they were living with his mother. The Court also takes into consideration the fact that the accused has never received any formal education. The accused consistently admitted his culpability throughout the proceedings. This factor has to be considered as mitigating the blameworthiness of the accused and deserving of mercy. The Court is reminded of the fact that when sentencing an accused it is useful to:

"Remember, mercy in a criminal court means that justice must be done, but it must be done with compassion and humanity, not by rule of thumb, and that a sentence must be assessed not callously or arbitrarily or vindictively, but with due regard to the weakness of human beings and their propensity for succumbing to temptation"

(S v CHIPAPE 2010 (1) SACR 245 (GNP))

[8] It is however an aggravating factor that the accused caused the death of the young victim of his rape and furthermore that he wanted to conceal the commission of the offence by silencing the deceased and placing her body away from the footpath. Her young life was disposable in order for him to save his own skin. So is the brutal manner in which she died. The accused testified that the deceased was kicking for a long time until eventually she died. One can just but imagine the absolute terror this 9 year old innocent girl must have endured moments before she died.

[9] The accused blamed his conduct on the fact that he was under the influence of alcohol. Counsel for defense argued this has made the conduct of the accused less blameworthy. This argument, under the circumstances of this case, is without merit. The accused waited for an opportune time to follow the deceased already having made up his mind to seek sexual gratification. He then acted with cold blooded intent to silence the deceased by killing her and tried to conceal the crime by dumping her body away from the footpath. He appreciated the consequences of a 39 year old man

ravaging a 9 year old innocent girl. This was calculated conduct; before during and after the crimes he committed. This suggests a clear mind driven by specific intent and cannot be said to have been clouded by alcohol.

[10] The prescribed minimum sentence in terms of section 3 (a)(iii) of the combating of Rape Act (*supra),* is 15 years. A lesser sentence may be imposed if the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed.

[11] Although this Court has carefully considered the personal circumstances and the mitigating factors of the accused there are none found that compel the Court to deviate from the prescribed period. In fact the aggravating factors present in this case calls for a sentence in excess of the prescribed minimum.

[12] The deceased had at the time of her death, successfully completed grade two and was promoted to grade three. Her family had every expectation that she would return from an errand she was sent on but instead had to find that she was never to return. She was unarmed vulnerable and walking home in a village with no reason to believe that it was unsafe. There exists no reason why the Court should shy away from its duty to protect young children by imposing lengthy custodial sentences on

perpetrators such as the accused. The interest of society dictates that the Court should play its role. If the outrage by the community of this village is anything to go by, the Court is mandated to exact retribution on its behalf. By doing so consistently it would demonstrate its resolute response, against crimes committed against vulnerable members of the Namibian society, in no uncertain terms to those who may contemplate the commission of such offences.

[13] This Court has on a number of occasions expressed the need for it to state in clear and unequivocal language that this kind of senseless violence perpetrated on vulnerable children will be met with the imposition of lengthy custodial sentences.

[14] In *S v Kaanjuka 2005 NR 201 (HC)* at p206 F-I, Damaseb JP expressed himself as follow:

> *"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.". (my emphasis)

[15] Even before the Combating of Rape Act (*supra)* was enacted, Strydom CJ expressed himself as follow in *S v SHAPUMBA 1999 NR 342 (SC*) at p 343 J – 344 A-D:

"The crime of rape, being an unlawful and forceful invasion of the body and privacy of a woman, mostly with the purpose to satisfy the sexual urge of the offender, can, except in the most exceptional circumstances, not contain mitigating factors which could explain the commission of the crime and diminish the moral blameworthiness of the offender. Whereas there is very little that can mitigate the commission of the crime of rape there are certain specific factors which would further aggravate and contribute towards the seriousness of the crime and the consequent punishment thereof. Examples of these are the rape of young children, the amount of force used before, during or after the commission of the crime, the use of weapons to overcome any resistance by means also of threats of violence, rape committed by more than one person on the victim, the fact whether the rapist is a repeat offender, etc. These factors, or a combination thereof, resulted in heavy punishments imposed by the Courts. See in this regard S v P 1991 (1) SA 517 (A); S v G 1989 (3) SA 695 (A); S v R 1996 (2) SACR 341 (T); S v W 1993 (1) SACR 319 (SE); S v V and Another 1991 (2) SACR 484 (A); S v D 1991 (2) SACR 543 (A) and S v F D 1990 (1) SACR 238 (A)."(my emphasis)

[16] While the Court has considered the personal circumstances of the accused and the objective of reform, it cannot but, given the brutality of the crimes committed and the loss of such a young life child, emphasize one objective at the expense of the other.

[17] I was encouraged by Counsel for the State not to order the sentences to run concurrently. However this Court is cautioned to consider the undesirability of the cumulative effect that the sentences may have, in order to ensure that the total period of imprisonment is reasonable and fair and that it would not be unreasonably onerous or oppressing upon the accused. (See *S v SHAPUMBA (supra)* at page 345 G-I),

[18] Having considered: the nature of the crime committed, the offender; the interest of society; having concluded that the nature of the crime committed in this case calls for the court to emphasize retribution at the expense of general deterrence and reform; and the cumulative effect of the sentence; the Court imposes the following sentence:

Count 1 (Rape):	20 years imprisonment
Count 2 (Murder)	30 years imprisonment

It is further ordered that a period of 5 years imposed in respect of count 1 should run concurrently with the 30 years imprisonment imposed in respect of Count 2.

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Tommasi J