



REPUBLIC OF NAMIBIA

CASE NO.: CC

08/2010

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

10

and

RICHARD SWARTZ

CORAM: MILLER AJ:

Heard on: 2011.11.18

Delivered on: 2011.11.18

SENTENCE:

MILLER AJ: [1] Mr Swartz you were convicted by me on your plea of guilty of the crime of rape read with the provisions of the Combating of Rape Act which I shall refer to in the remainder of this judgment as the Act.

[2] At the time of the commission of the offence you were approximately 16 years old. The act for which you were convicted was committed upon a girl of approximately four years of age of the time of the commission of the offence.

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[3] The circumstances under which the offence was committed are limited by the manner in which the admissions you made in terms of Section 112 (a) (b) of Act 51/1977 were made and accepted by the State. I know very little other than you committed the offence by inserting your finger into the vagina of the Complainant. What the circumstances were which led up to that act being committed was not placed before me.

[4] What is apparent in addition is the fact that the insertion of
20 your finger into the vagina of the Complainant did not cause her any physical injury according to the report of the medical

examination upon the Complainant which was handed in as Exhibit P.

[5] The hymen of the Complainant was found to be not intact at the time of the examination but there is no indication that it was caused by the fact that you inserted your finger into her vagina.

[6] Remaining with the facts of the matter you stated that you
10 found the Complainant in her room where she was sleeping. You then removed her underwear halfway whereupon you put your finger into her vagina. You told me that she then woke up and started to cry whereupon you stopped.

[7] The principles and factors that the Court must consider and take into account are well settled and easy to understand. At the risk of stating again what has been stated in numerous cases I have had the opportunity to consider the Judgment of Muller J in **State -v- (M) 2007 (2) NR 434** and I quote from the
20 passage appearing on page 438. The passage reads as follows:-

“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 attempts to balance these factors. The Court may consider to add a measure of mercy into these factors.”

[8] These considerations have been followed in other cases since the decisions of **S -v- Zinn 1969 (2) SA 537A and S -v- Rabie 1975 (4) SA 855A.** It is the application of these principles and factors to individual facts of a case which is at
10 times problematical. It becomes more problematical in cases where juvenile offenders are convicted of having committed serious offences.

[9] In balancing and affording weight to often competing considerations especially as I have indicated in cases involving juvenile offenders requires in my view a more careful and more cautious approach especially in cases where the nature of the offence in general attracts custodial sentences.

20 [10] I have outlined the circumstances of the offence and the circumstances under which it was committed. The circumstances are such that the commission of the offence was

a serious matter. The facts admit of no doubt that you committed indeed a serious crime.

[11] As far as your personal circumstances are concerned I called for and received a report from a social worker attached to the Ministry of Gender, Equality and Child Welfare.

[12] This report reveals that you grew up or the better part of your life with your maternal grandmother following the death of both your biological parents. You attended school but while you were doing your grade 4 you left school because you felt that you did not want to go to school anymore.

[13] Having left school you got employed as a goat herder. You are also a first offender. In the decision in **S -v- M** to which I have already referred the Learned Judge having referred to the general principles held the following:

"It has often been suggested that the circumstances of the victim should also be considered. The question may be asked whether the circumstances of the victim should not be considered as a fourth category on its own in addition

to the well known triad when the Court considers sentence”

[14] In my view whether one considers the interests of the victim as a separate matter or whether the interests of the victim finds its place when the interests of society and the circumstances of the crime concerned are in my view neither here nor there.

[15] I am of the view that it is perfectly permissible in
10 considering what an appropriate sentence should be to also take into account not only the physical or economical damage caused by the crime to the victim but also the psychological effect especially in cases of rape, that the commission of the crime had on the victim.

[16] In your case I likewise had the benefit of a report by a social worker attached to the Ministry of Gender, Equality and Child Welfare concerning the Complainant in this matter. From the report it is abundantly clear that at the time of the
20 consultations that the social worker had with the Complainant some five years after the commission of the offence the

Complainant is still suffering from the commission of the crime upon her.

[17] These manifest themselves physically in a tendency on the part of the Complainant to wet her bed. The report speaks of her fears as she is being stigmatised because she had been raped and the fact that since the commission of the offence her attitude towards her father and men in general has deteriorated to the extent that she tends to avoid the company of men.

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[18] The interests of society in matters of rape were articulated by the Judge President Mr Justice Damaseb in the decision of **State -v- Kanyuka 2005 NR 201** and I quote from the passage appearing on page 206. It reads as follows:

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“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 basic sexual desires. What once may have been unthinkable had now become a common 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 the utmost with very stiff sentences to deter men from raping women and small children but apparently without much effect."

[19] Whereas it would be inappropriate to classify you as a man at the time of the commission of the offence, the fact remains that your crime was nonetheless one committed against a vulnerable child.

10 [20] Some argument was placed to me that I should differentiate between cases where the perpetrator of the crime inserted his penis into the vagina of the Complainant and cases where some other object like a finger was used.

[21] Since the enactment of the Act the question of the part of the accused's anatomy, be it a penis or a finger, or some other object is irrelevant. What is relevant as far as sentence is concerned will be the consequences of the insertion of whatever part of the anatomy or object into the vagina of the Complainant
20 were.

[22] In your case as I have indicated, although there is no evidence of physical injury, the complainant continues to suffer from emotional scars caused by your crime. I was referred to various decisions by different Judges past, and present of this Court.

[23] I thank Counsel both for the State and the Accused for their industry in this regard. These decisions are helpful only in a general sense. First and foremost the sentence imposed must
10 be individualised.

[24] By that I mean that the personal facts, the facts and the personal circumstances of the Complainant and the Accused and the circumstances under which the offence was committed should receive the weight they deserve in each individual case.

[25] The manner in which crimes are committed, the personalities and characteristics of the Accused and the victim almost always differ.

[26] The ultimate question which I wrestled with was whether or not I should impose upon you a custodial or a non custodial sentence.

[27] Courts are normally reluctant to send juvenile offender to prison. Sadly Namibia does not have alternative detention centres for juvenile offenders.

[28] I have upon consideration of what were competing
10 considerations come to the conclusion that the interests of the victim and society in general and the circumstances of your crime carry more weight than your personal circumstances.

It follows that in the circumstances having come to those conclusions I consider myself bound to impose upon you a custodial sentence.

[29] In the circumstances the sentence I impose is the following. You are sentenced to EIGHT YEARS (8) imprisonment of which FOUR YEARS (4) imprisonment is suspended for a
20 period of FIVE YEARS (5) on condition that you are not again convicted of Rape read with the Provisions of the Combating of

Rape Act and which offence was committed during the period of suspension.

MILLER AJ

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ON BEHALF OF THE STATE

MS

HUSSELMAN

Instructed by:

Office of the Prosecutor-

20 **General**

ON BEHALF OF ACCUSED

MR

WESSELS

Instructed by:

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Aid