Reportable

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

CASE No: CC 10/2010

THE STATE **APPLICANT**

V

JACOB VAN DER BYL **RESPONDENT**

Neutra Citation: The State V van der Byl (CC13/2010) [2013] NAHCMD 19 (29 January 2013)

CORAM: NDAUENDAPO, J

HEARD ON: 18 October 2012
DELIVERED ON: 29 January 2013

Flynote: Criminal procedure— Accused convicted of assault and raping his own daughter—Appeal—Leave to appeal to the Supreme Court against sentence by the state—Spent 11 months in custody before conviction—Court finds that to constitute compelling and substantial circumstances to deviate from mandatory sentence of 15 years—State appeals against sentence—Prospect of success—Application granted.

Summary: Respondent was convicted of one count of assault and one count of rape of his own daughter. Sentenced to one year on assault and 14 years on rape. Court ordered the one year sentence on assault to run concurrently with the sentence on rape. Effective 14 years imprisonment. Court deviated from mandatory sentence because it found that 11 months spent in custody before conviction constituted compelling and substantial circumstances. State unhappy with that:

Held, personal circumstances of the accused outweighed by the seriousness of the offence and interest of society.
Held, that there are prospect of success. Application allowed.

ORDER

In the result, the application for leave to appeal is allowed.

APPEAL JUDGMENT

NDAUENDAPO J [1] Before me is an application by the state for leave to appeal in terms of section 316 A of the Criminal Procedure Act 51 of 1977.

[2] On 29 Feb 2012, I convicted the accused of one count of assault and one count of rape—Contravening section 20 read with sections 1, 2, [2], 3, 5 ,6 and 7 of Combating of Rape Act, Act 8 of 2000 Rape and further read with sections 2 [2] [a] [i] and [ii] 2[1] [b], 3 [1], 2S [1] abd [3] and the first schedule of the Combating of Domestic violence Act, 4 of 2003.

I sentenced the accused as follows:

Count 1 1 year imprisonment

Count 2 14 years imprisonment

I ordered that the sentence of one year was to run concurrently with the sentence of 14 years on the rape count.

[3] Disenchanted, with the sentence the state filed the application for leave to appeal in terms of section 316 A of the criminal Procedure Act 51 of 1977.

The grounds for the application for leave to appeal are stated as follows:

'1 Finding that the fact that the Respondent spent 11 months in custody pending his trial singularly constitutes substantial and compelling circumstances that justified a departure from the mandatory minimum sentences prescribed by the Combating of Rape Act, Act 8 of 2000.

2) Determining the existence of substantial and compelling circumstances based on the circumstances of the Respondent at the exclusion of all other factors normally taken into account in sentencing.

3) Finding that there were substantial and compelling circumstances that warranted a departure from the prescribed mandatory minimum sentences when from the Court's own finding the circumstances of the Respondent were far outweighed by the circumstances of the offence and the interests of society.

4) Departing from the Mandatory minimum sentences prescribed by the Combating of Rape Act, 8 of 2000 for flimsy reasons that do not stand scrutiny.

5) Ordering the sentence of one year imprisonment imposed in respect of the Assault charge to run concurrently with the sentence on the charge of rape.

6) Imposing a sentence that is shockingly lenient when the circumstances of the Respondent are weighed against the circumstances of the offence as well as the interest of society'.

Ms Nyoni appeared for the applicant and Mr Isaacs for the respondent.

[4] When considering an application for leave to appeal the court must consider whether there are reasonable prospect of success on appeal. In Sv Nowaseb (2) NR 640 of 640 F -641 Parker J, had this to say concerning application for leave to appeal:

'It has been stated in a long line of cases that in an application of this kind, the applicant must satisfy the Court that he or she has a reasonable prospect of success on appeal (See, e.g., Rex v Nxumalo 1939 AD 580; Rex v Ngubane and Others 1945 AD 185; Rex v Ramanka 1948 (4) SA 928 (0); Rex v Baloi 1949 (1) SA; 523 (A), Rex v Chinn Moodley 1949 (1) SA 703 (D); Rex v Vally Mahomend 1949 (1) SA 683 (D & CLD); Rex v Kuzwayo 1949 (3) SA 761 (A), R v Muller 1957 (1) SA 642 (A); The state v Naidoo 1962 (2) SA 625 (A); S v Cooper and Others 1977 (3) SA 475 (T); S v Sikosana 1980 (4) SA 559 (A). The first ten sample of cases adumbrated above were decided before the coming into operation of the new Criminal Procedure Act, 1977 (Act 51 of 1977) (CPA), but the test remains unchanged. (Sikosana, supra, at 562D).

Thus, an application for leave to appeal should not be granted if it appears to the Judge that there is no reasonable prospect of success. And it has been said that in the exercise of his or her power, the trial Judge (or, as in the present case, the appellate Judge) must disabuse his or her mind of the fact the he or she has no reasonable doubt. The Judge must ask himself or herself whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal, in other words, whether there is a reasonable prospect that the court of appeal may taken a different view (Cooper and Others, supra, at 481E; Sikosana, supra, at 562H; Muller supra, at 645E-F). But, it must be remembered that "the mere possibility that another Court

might come to a different conclusion is not sufficient to justify the grant of leave to appeal.' (S v Ceaser 1977 (2) SA 348 (A) at 350E).

'Application for leave to appeal have been dealt with extensively by this honorable court. Time and again this honorable court has emphasized that an application for leave to appeal under section 316 (1) of the Criminal Procedure Act 51 of 1977 should be allowed if the court is satisfied that the accused has a reasonable prospect on appeal. These applications are not granted on compassionate ground, to console the accused or simply afford them a further opportunity to ventilate their arguments and, to obtain another judgment in a court of appeal. S v Nangombe 1991 (1) SA CR 315 (NM) AT 352 B-C.'

And in Sikosana, supra, at 562H-563A, Diemont, JA stated: (head note)

'Where an accused has been convicted and the judge decides to grant an application for leave to appeal his reasons for so doing are less likely to be found in his judgment. It is important in such a case that he should state concisely his reasons for allowing the application unless they otherwise appear clearly from the record.'

The principles enunciated above are equally applicable where the state is the applicant in terms of section 316 A of the Criminal Act, 51 of 1977.

Applicant's submissions:

[5] Counsel submitted that rape is a very serious offence and referred this Court to various cases, amongst others S v Chapman 1997 (2) SA CR 3 (A) at 55, where the late chief Justice Mohamed described rape as follows:

'Rape is a serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the constitution and to any defensible civilization.'

Counsel also referred this court to various authorities dealing with the mandatory minimum sentences. She referred to the case of S v Hoaseb 2006 (1) NR 317 (HC) at 317 where Maritz J (as he then was) held that:

"I agree with the view of Stegmann J that for substantial and compelling circumstances to be found the facts of the particular case must present some circumstance that is exceptional in its nature, and that so obviously exposes the injustice of the statutorily prescribed sentence in the particular case, that it can rightly be described as compelling the conclusion that the imposition of a lesser sentence from that prescribed by parliament is justified."

[6] Counsel submitted further that there are circumstances that further aggravate the offence committed by the respondent such as;

(i) The complainant managed to run away from the house of the respondent and the respondent pursued her.
(ii) The complainant sought shelter at the house of Elsie Prins and the respondent followed her inside that house.
(iii) Elsie Prins pleaded with the respondent to let the complainant go but that did not deter the respondent.
(iv) Elsie Prins testified that the complainant urinated on her stairs as the respondent continued beating her.
(iv) The respondent for his part confirmed that he followed the complainant to Elsie Prins' house and grabbed her
(vi) The respondent testified that as he removed the complainant from the house of Elsie Prins', he pulled and pushed her.

Counsel contended that having found 'that the personal circumstances of the applicant were outweighed by the seriousness of the offence and the interest of society should have not found that there were substantial and compelling circumstances warranting a departure from the prescribed sentences.

Respondent's submissions

Counsel submitted that if is trite that our courts consider the accused time spend in custody and that such consideration normally leads to a reduction of sentence, especially if it was a lengthy incarceration. He further submitted that the 11 months spent in custody, the fact that the complainant did and not suffer any injuries because of the rape, the age of the accused, the fact that the wife and the children lost a bread winner and the level of education taken cumulatively constitute compelling and substantial circumstances that justify a departure from the mandatory sentence.

I have considered the submissions by counsel in this matter. I fully agree with the submission by counsel for the applicant that rape is a very serious offence and that it is very prevalent. The accused is the biological father of the complainant, he was trusted by the complainant and I found that his personal circumstances were far outweighed by the seriousness of the crime and the interest of society.

I am of the view that Supreme Court may come to a different view as to the sentence imposed by this court.

In the result, the application for leave to appeal is allowed.

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G N NDAUENDAPO

Judge

APPEARANCE

	I.M. Nyoni
For Applicant	**Office for the Prosecutor-General**
	B Isaack
For Respondent	**Of Isaacks and Benz Incorporated**