



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 13/2010

In the matter between:

THE STATE

APPLICANT

And

LIAZER KUHLEWIND

RESPONDENT

Neutral citation: *S v Kuhlewind* (CC 13/2010) [2014] NAHCMD 23 (28 January 2014)

Coram: DAMASEB, JP

Heard: 28 January 2014

Delivered: 28 January 2014 (*ex tempore*)

ORDER

I make the following order:

The application for leave to appeal has no merit and is refused.

JUDGMENT

Damaseb, JP:

[1] On 14 August 2012 I sentenced Mr Khulewind to 7 years imprisonment and suspended 4 years on condition. I tried and convicted Mr Kuhlewind on a single count of raping a seven (7) year old girl with whom he was well-acquainted. He had inserted his finger into the young girl's private part. She was traumatized by what Mr Kuhlewind did to her. The evidence showed that the rape perpetrated on her brought her opprobrium. It appears to have scarred her emotionally. I was alive to this pain caused to the minor victim when I sentenced Mr Kuhlewind.

[2] The State alleged, and during trial urged, that I find coercive circumstances given the difference of more than three years in age between the complainant and the complainant. It was also proved that Mr Khulewind used force in the rape of the minor victim. During the sentencing phase I was faced with the difficult task of deciding whether Mr Kuhlewind established substantial and compelling circumstances for the court to deviate from imposing a minimum mandatory sentence of least 15 years. Given the circumstances of Mr. Kuhlewind's upbringing which, on anybody's showing, was not ideal, the fact he was a young man when the offence occurred and that he had partook of drugs at the time of the offence, I found substantial and compelling circumstances. That placed the court in the position that it could deviate from having to impose the minimum mandatory sentence. That finding is not being challenged. Those very factors were the very foundation for the sentence I imposed at the end of the day. I was convinced, and remain so having listened to the evidence and seen both the victim and villain in court, that this was a case that called for mercy and to give another chance in life to a young man who had at birth been abandoned by his biological father, leaving the brunt of his upbringing to his mother, a poor and sickly woman, who then entrusted his upbringing to some Good Samaritans.

[3] This is partly what Mr Kuhlewind testified in mitigation of sentence:

He is 22 years old and grew up on a farm near Mariental. He grew up with a friend of the mother's parents. He was born in the colonial era and his mother was unable to get employment as a result of which he was placed in the care of others. He had never seen his father. He has one brother and two sisters but never grew up with them. The person who acted as his father is his mother's friend's parents. That father figure was a building contractor and hardly stayed at home. He attended school up to grade 12 and attended a computer course. He lived with his mother at the time of the incident. His mother is unemployed and gravely ill and cannot work. He could not say with certainty the age of his mother. She is married but the man she married left her and there is no-one but him looking after her. His brother resides in Windhoek but does not care for the mother. His one sister is attending school and is in a hostel and the other one is here in Windhoek. He used to do casual jobs and never had a permanent job. He helps the mother with her medical bills. He also said that he felt very sorry for what happened and that of his deed did harm to the relatives of the victim and the victim. At the time he did not ask for forgiveness when he got out on bail as the court ordered him not to have any contact with the family members or the victim. He asked for forgiveness from the victim and the family and requested the court to be lenient – to forgive him for what happened. He said he was sorry from the bottom of his heart. He asked the court for forgiveness and to think of his mother and the siblings who depend on him. He assured the court that he does not use drugs at the moment.

[4] The State appears before me today claiming that the young man whose circumstances I have just described deserved a heavier sentence than the one I imposed. In effect it says I was wrong in giving Mr Kuhlewind another chance in life. Mr Moyo who appears for the State advances the rather pedantic argument that Mr Kuhlewind was unaware of his upbringing and of the fact of abandonment by his

father and that it was a misdirection on my part to rely on such a circumstance for the sentence I imposed. I will assume, but not accept, that there is substance in that proposition. Even assuming that it is a misdirection not every misdirection vitiates a sentencing procedure; only a material one does. Mr Moyo has not pointed to a single such misdirection, except expressing some desire that the prisoner deserved a heavier sentence. That is not the test for faulting a sentence in our law.

[5] What it boils down to then, on the state's version, is that had I found that Mr Kuhlewind was unaware of his abandonment by his father I would have imposed a heavier sentence than the one I did. This reasoning only needs to be put to be rejected. I find it unnecessary to regurgitate the reasons I advanced in justification of the sentence I imposed. The record speaks for itself.

[6] I repeat the basic premise that Mr Kuhlewind deserved another chance in life. A heavier sentence than the one I imposed would not have achieved that sentencing objective which it was in my discretion as trier of fact to select. The interest of society does not always lie in not showing mercy. There are cases where that interest requires that a person be given another chance. This is such a case.

[7] I am unpersuaded that another court, even if inclined to impose a heavier sentence than the one I imposed, would fault me for giving Mr. Kuhlewind another chance in life.

[8] The application for leave to appeal has no merit and is refused.

P T Damaseb
Judge-President

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APPEARANCES

APPLICANT:

B Isaacks

Isaacks & Benz Inc

RESPONDENT:

E Moyo

Of Office of Prosecutor-General