

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 5/2016

THE STATE

v

PIET KONDJEJE NAKANENE

Neutral citation: *S v Nakanene* (CC 5/2016) [2018] NAHCMD 385 (29 November 2018)

Coram: USIKU, J

Heard: 30 October 2018

Delivered: 29 November 2018

Flynote: Sentence – Factors to be taken into account – Minimum sentences in terms of section 3 (1) of Act 8 of 2000 – Whether substantial and compelling circumstances exist – Court found that there are substantial and compelling circumstances – Consequently court entitled to depart from the minimum sentences.

Summary: Criminal procedure – Sentence – Minimum sentences in terms of section 3 (1) of Act 8 of 2000 not applied – Court found that there were substantial and compelling circumstances as defined under section 3 (2) of Act 8 of 2000 – This court was entitled to depart from the minimum sentences – Accused convicted of attempted rape and rape of the three complainants – The victim of rape has since died – The victims of the attempted rape were all strangled but they all survived their respective attacks by the accused – The attempted rape offences were committed

over a period of time – Accused having spent a considerable period of time awaiting the finalization of his case, as well as his age at the time of the commission of the offences and being a first offender – Court concluded that under the circumstances in which the crimes were committed, the accused deserved some mercy.

ORDER

Count One: Attempted Rape – Five years' imprisonment.

Count Two: Attempted Rape – Five years' imprisonment.

Count Three: Attempted Murder – 15 Years imprisonment.

Count two is ordered to run concurrently with the sentence on count three.

Count Four: Attempted Rape – Five years' imprisonment.

Count Five: Attempted Murder – 15 Years imprisonment.

Count four is ordered to run concurrently with the sentence on count five.

Count Six: Murder read with the provisions of the Combating of Domestic Violence – 35 years' imprisonment.

Count Seven: Rape read with the Provisions of the Combating of Domestic Violence – 10 years' imprisonment.

Count Eight: Defeating or obstructing the course of justice – Four years' imprisonment.

Count eight is ordered to run concurrently with the sentence on count seven.

An order for disposal is made in respect of the following exhibits:

- (a) One dustbin.
- (b) A peach night thrill.
- (c) A wooden plank.
- (d) One multi coloured blanket.

The above items must be destroyed under the supervision of the Namibian Police.

SENTENCE

USIKU J:

[1] The accused was convicted on 6 September 2016 on the following charges:

Count one: Housebreaking with intent to contravene section 18 (1) of the Riotous Assemblies Act 17 of 1956 – Attempted rape.

Count two: Housebreaking with intent to contravene section 18 (1) of the Riotous Assemblies Act 17 of 1956 – Attempted rape.

Count three: Attempted murder.

Count four: Contravening section 18 (1) of the Riotous Assemblies Act 17 of 1956 – Attempted rape.

Count five: Attempted murder.

Count six: Murder read with the provisions of the Combating of Domestic Violence Act 3 of 2003.

Count seven: Contravening section 2 (1) (a) read with sections 1, 2 (2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000.

Count eight: Defeating or obstructing the course of justice.

[2] The Courts primary duty is now to sentence the accused person, Ms Nyoni represents the State whilst Mr Dube represents the accused.

[3] It is important to summarise the evidence presented in aggravation as well as in mitigation.

Accused's personal circumstances

[4] Accused testified that at the time of the commission of the offence in respect of count one he was aged about 21 years. He is a father of one minor child who is currently being taken of care by her maternal grandmother. The accused has been an absentee father. He has no idea whether his child is currently attending school or not.

[5] His further testimony is that at the time of the commission of the offence in respect of the second count he was aged 28 years. The incident regarding the fourth and fifth counts were committed at the same time. He was kept in custody for about four month's whereafter he was released on bail before he was arrested in respect of the offences on the six, seventh and eighth counts.

[6] Since his arrest in respect of the sixth, seventh and eighth counts he has been incarcerated for about five years to date.

[7] Accused attended school up until grade 10 and was employed at different companies in Walvisbay. Prior to his arrest he was the bread winner and used to make contributions towards the upbringing of his minor child.

[8] Accused expressed his sadness about what had happened between him and the complainant in respect of the first count who is his cousin. He denied the allegations of having attempted to rape the complainant. According to him he had

been under the influence of alcohol at the time and could not have reacted in a manner he did, had he been in his sober senses.

[9] The complainants in respect of counts one, two, three, four and five all lied about him having attempted to rape each one of them and also having tried to kill each one of them in respect of count three and five respectively. He told the court the truth about what had transpired.

[10] Mr Ingo, the accused's biological father confirmed to have known the two complainants in respect of counts one, two, and three. He did not know the complainant in counts four and five. He also did not know the deceased in counts six and seven.

[11] He asked for forgiveness and apologised for what the accused had done against the complainants in counts one, two and three. According to his testimony a meeting was held by the family in which the complainant in count one had offered to have the charges withdrawn against the accused and the latter was informed about such a decision whilst in custody. Accused's actions had brought a division within their family.

[12] Mr Ingo had been tasked by the accused to go and ask for an apology from the family of the complainant in count one and has done it two years ago. He had not been asked to extend an apology to the complainant in count two and three. The complainant in counts two and three had since left their house because of the bail conditions imposed by the magistrate.

[13] The complainant in counts four and five had been involved in a fight with the accused. Mr Ingo had visited her house but could not find the complainant at the time. He was also not tasked to ask for forgiveness from the complainant.

[14] In respect of counts six and seven, Mr Ingo visited the deceased's family on his own accord only because they were neighbours in order to console them. He does not know whether the accused was responsible for the rape and the death of the deceased. Neither did he apologise to the deceased's family.

[15] In my view the accused's personal circumstances does not carry much weight. Accused's minor child has never lived with him. She is being taken care of by her maternal grandmother.

[16] Accused also does not seem to have shown any remorse whatsoever throughout the trial for the heinous crimes he committed against the three complainants and the deceased herein. All the complainants at the time of the crimes were vulnerable as they were each under the influence of alcohol and accused had taken advantage of their condition. It must however also be considered by this court that none of the three complainants has sustained injuries as a result of the attempted rape. However, the fact that no injuries were sustained does not make a crime of attempted rape less serious. In terms of the Riotous Assemblies Act 17 of 1956, section 18 (1) provides:

'Any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.'

[17] Although the Combating of Rape Act does not specifically provide a penalty for attempted rape, the provisions of the Riotous Assemblies Act finds application herein, in that a person convicted of an attempt or conspiracy will be liable on conviction to the same punishment as the one who had actually committed the offence.

[18] As with regards the attempted rape, counts one, two and four, and the rape on count seven, the applicable penal provisions are provided for in section 3 of the Combating of Rape Act 8 of 2000. They prescribe minimum sentences which may only be departed from where the court finds that there are substantial and compelling circumstances within the meaning of section 3 (2) of the Act.

[19] Mr Dube submitted that the period spent in custody awaiting trial be considered as a substantial and compelling circumstance when sentences are imposed. Also that at the age of 33 years the accused did not have a record of previous convictions. He implored the court to consider that the accused person is

still a productive member of the community who can be rehabilitated, asking the court to show mercy towards him. The fact that accused has persisted in his innocence should not be held against him.

[20] Reference was also made to the case of *Zedikias Gaingob*¹ in which the Supreme Court held that the absence of a realist hope of release for those sentenced to inordinately long term of imprisonment would offend against the right to human dignity and protection from cruel, inhumane and degrading punishment.

[21] What this court must keep in mind is that punishment must firstly be reasonable, (i.e. it should reflect the degree of moral blameworthiness attaching to the offender, as well as the degree of reprehensibleness or seriousness of the offence.) Punishment therefore should ideally be in keeping with the particular offence and the specific offender. Thus punishment should fit the criminal as well as the crime.

[22] This court is mindful of the fact that due weight must be given to the personal circumstances of the accused throughout the process of sentencing. However, at the same time when passing sentence the court should not lose sight of the feeling of the community, otherwise it cannot effectively protect the interest of the community. In the same vain a court should further not allow the feelings of the community to over influence it when passing sentences.

[23] When considering the issue of substantial and compelling circumstances, there is no requirement that the circumstances must be special or exceptional. An accused's personal circumstances such as his age, educational background, his family circumstances as well as the time spent in custody awaiting his trial cannot therefore be ignored. Those are all relevant and must be taken into consideration to be weighed cumulatively with all other factors in order to decide whether there are substantial and compelling circumstances or not.

[24] Taking all the circumstances of this case into account, I am satisfied that there are indeed substantial and compelling circumstances to allow this court to depart from the minimum sentences in respect of count one and four only.

¹ Zedikias Gaingob Case No. SA 7/2008.

Counts three and five

[25] Both complainants testified how they were unconscious after the accused had throttled them each. It was by sheer luck that they each survived and it was only after the intervention of the people who came to their rescue. Attempted murder is a very serious crime which calls for very severe punishment.

Counts six, seven and eight

[26] The deceased was in a domestic relationship with the accused at the time of her death. The manner in which the deceased was killed was through strangulation. Similarly the deceased was strangled in the same manner like in the case of the complainants in counts three and five. She was first raped. In this particular count I do not find that special and compelling circumstances exist that would justify a departure from the prescribed minimum sentences. The manner under which the crimes were committed call for a very severe sentence. Murder committed in a domestic setting have become too much prevalent within our society.

[27] It is undoubtedly so that the sentences this court is about to mete out for the crimes of attempted rape and rape will fall under the penalty clause in terms of the Combating of Rape Act 8 of 2000 and will look heavy because of their cumulative effect, however, those are usually the consequences a convicted person cannot escape.

[28] Furthermore, each crime must be punished on its own. In the case of *S v Engelbrecht Oxurub*² Parker J had the following to say:

'It is just and proper for each crime of rape to be treated in its own right because the Namibian constitution protects each person's basic human rights, including the right to privacy and dignity, on an individual basis and not on collective basis. Each of those women should receive justice as an individual and within her own rights.' I too share the same view.

² S v Engelbrecht and Oxurub CC 30/10 2015 NAHCMD 171 delivered on 28 July 2015.

Count eight

[29] The accused after having killed the deceased by strangulation in respect of count six, went on to remove her body and dumped it in the dunes. Had it not been for the couple that discovered it on the morning of 12 March 2014 to 13 March 2014, it could have been a mammoth task to find it. Accused to date persists in his denial of not having been responsible for the deceased's death. He had shown no remorse whatsoever.

[30] In the result, the Accused is sentenced as follows:

Count One: Attempted Rape – Five years' imprisonment.

Count Two: Attempted Rape – Five years' imprisonment.

Count Three: Attempted Murder – 15 Years imprisonment.

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D N USIKU
Judge

APPEARANCES

STATE : Mrs Nyoni
Office of the Prosecutor-General, Windhoek

ACCUSED: Mr Dube
Instructed by Directorate of Legal Aid, Windhoek