

REPUBLIC OF NAMIBIA



NOT REPORTABLE

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
SENTENCE**

CASE NO: CC 19/2011

In the matter between:

THE STATE

V

CHARLES NAMISEB

ACCUSED

Neutral citation: *S v Namiseb* (CC 19/2011) [2019] NAHCMD 154 (20 May 2019)

CORAM: SIBOLEKA AJ

Heard on: 29 February 2016; 15-16, 31 March 2016; 7 April 2016;
9 – 10 April 2019

Delivered on: 20 May 2019

Flynote: Criminal law: Sentence – very serious offences committed at the

same time – concurrent running of some of the sentence – appropriately avoids the cumulative effect thereof.

Summary: An elderly couple gruesomely attacked with a spade – their hands tied up – the female victim raped in full view of her husband – property including firearms and a Toyota sedan vehicle robbed; total N\$78.900. The goods were loaded on the stolen vehicle in which the robbers fled the scene. The accused was the driver – he ignored an order to stop at mobile police road block resulting in his former co-accused being shot in the buttocks. He survived and has already started serving his sentence.

Held: Offences very serious, the firearms are among the property that was not recovered.

VERDICT

In the result the accused is sentenced as follows:

Count 1: Rape: Fifteen (15) years' imprisonment;

Count 2: Rape: Fifteen (15) years' imprisonment;

Count 6: Rape: Fifteen (15) years' imprisonment;

Count 7: Robbery with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act 51 of 1977: Twelve (12) years' imprisonment;

Count 8 and 9: Assault with intent to do grievous bodily harm. These two counts are taken together for purposes of sentence: Six (6) years' imprisonment.

It is ordered that the sentence imposed on the accused in counts 8 and 9 should run concurrently with the sentence imposed in count 7.

SENTENCE

SIBOLEKA AJ

[1] On 29 February 2016 I convicted the accused on three counts of Rape in contravention of Section 2(1)(a) read with sections 1, 2,(2), 3, 5 and 6 of the Combating of Rape Act 8 of 2000 – Rape; one count of robbery with aggravating circumstances, and two counts of assault with intent to do grievous bodily harm.

[2] It is now my duty to consider an appropriate sentence. In doing that I have to take into the account the accused's personal circumstances, the crime itself and the interests of society. Also relevant to the sentencing process are the objectives of punishment such as retribution, prevention, deterrence, and rehabilitation.

[3] In sentencing it is required to maintain a balance so that one factor should not be over emphasized than the other. This is however not very easy as each case depends on its own merits.

[4] I will start with the accused's personal circumstances.

[5] The accused elected not to mitigate under oath, his counsel placed his personal circumstances as well as mitigation from the bar. He was aged 29 at the time of the commission of this offence, he has three siblings, one brother and two sisters. His father passed on, the mother, a pensioner is still alive. He went up to Grade 12 at school, enrolled at the Vocational Training Centre in Okakarara, where he got trained as a plumber. He started a plumbing business at Swakopmund (CC Plumbing Services) and was a sole member. He performed well and had other few people working for him. From the time of his arrest on this matter up to the date of conviction he has spent six (6) years in custody.

[6] On the day he was convicted he escaped from lawful custody and fled to Pretoria in South Africa. He stayed there up to the time he was arrested and extradited back to Namibia. His coming back to Namibia took long because he vehemently resisted extradition. In the meantime his co-accused was sentenced

to a total of fifty three years (53) in custody and has already started serving his sentence. The accused is not married, but has five children. The eldest 19 year old is in Grade 12; the second 17 years old is in Grade 10; the third 13 years old is in Grade 7; the fourth 11 years old is in Grade 5; the last born and the youngest of them all is not yet in school. Three of these children are from the same mother while the last two children are from separate mothers. Before his arrest he was financially assisting and maintaining them all. The accused lost everything related to his plumbing business, house, and his vehicle. He has no previous record. He is still facing a charge of escaping from lawful custody in the Magistrate's Court. The accused's counsel conceded the seriousness of the offences the accused has been convicted on. He however still reminded the court about its duty to blend the sentence with the required mercy.

[7] The accused did not testify under oath in his own defence during the trial. He maintained his innocence during his cross-examination of all the prosecution witnesses and he is still holding that view to date. On the crime, the accused and his co-accused who has already been sentenced viciously attacked an elderly couple at Uis. This happened in the victims' own residence at the time they were relaxed, preparing for a trip to Henties Bay. The two elderlies were viciously assaulted with a spade, their hands tied up. The female victim was sexually assaulted in full view of her husband (the second victim) while her hands were tied at her back. The accused robbed the victims of the following: a Toyota Corolla, cash, revolver, pistol, watch, engagement ring; two wedding rings; 122 live ammunition, eternity ring, all totaling to N\$78,900. It is only the electric shaver that was recovered. The accused fled the scene in the victims' Toyota Corolla sedan. The accused before court whom the elderly female victim described as the commander of the operation sexually assault her twice. He drove away in the vehicle whereon the stolen items were loaded. He defied the order to stop at the police road block. His co-accused sitting in the front passenger seat got injured when the police fired at the vehicle. They found the stolen car abandoned a short distance from the road block with blood stains on

the passenger's seat. The tracking team of officers found the bleeding second accused in the neighborhood, injured in the buttocks. He was taken to hospital for medical attention. The accused before court was not found during that search, he was only arrested much later on. On 29 February 2016 the accused were convicted and on that same day the accused before court escaped from the police custody. This necessitated in the separation of the matter resulting in his co-accused being sentenced alone and has already started serving his sentence.

[8] It was untoward when the two accused stormed into the victims residence pretending to be thirsty and after water was provided to them, they launched a vicious attack. Society expects that violations of this magnitude be dealt with and punished decisively.

[9] On her part, counsel for the prosecution submitted during aggravation of sentence that the accused has been convicted on very serious offences. She said the accused had shown no remorse for what he had done to the elderly couple in Outjo on the day of the incident. According to this counsel the accused had a thriving plumbing business, ruling out any need for the commission of the offences. The accused, in the view of this counsel displayed a vicious, heartless, greedy and an unfeeling mindset. The seriousness of this crime and the interests of society must be prioritized over all other factors. The fact that he spent six (6) years in prison should not be singularly considered as an extenuating circumstance. He spent two years in South Africa and he opposed his extradition back to Namibia. He can therefore not expect this court to reward him for escaping from lawful custody. This conduct should in fact be viewed as aggravating. The accused must pay his debt back to society for what he has done to the elderly complainants.

[10] The counsel made reference to the matter of *S v Tjiho*,¹ wherein it was held that the society must feel that punishment is adequate, if not so, they may

¹ S v Tjiho 1991 NR 361.

easily take the law into their own hands. According to this counsel the brutal attack the accused has launched on these two elderly victims outweighs his personal circumstances. The sexually assaulted victim referred to the accused as the "commander" on whose directives the assault on them had taken place. Counsel further stated that the accused had sexually assaulted the complainant twice before he helped his co-accused who similarly assaulted once only. This, according to this counsel is what makes the accused's case serious than that of his co-accused. The prosecution counsel submitted that the accused deserves a more severe sentence than his co-accused.

[11] Looking at the number of counts the accused has been convicted of coupled with the fact that among the items that have not been recovered are two firearms, it is very likely that these will be used in the commission of other crimes. It is my considered view that even though these crimes were committed in one transaction they remain very serious, and the society must be protected by punishing offenders appropriately.

[12] From the evidence placed before court I am satisfied that it was the accused who masterminded the removal of the victims' property and eventually driving away their vehicle whereon all the items were loaded. It was also the accused whom the police had signaled to stop at the road block, but he ignored them, accelerated and later left the vehicle on the road side and fled on foot. It is for this reason that the accused before court deserves to get a much more severe sentence than his co-accused.

[13] In the result the accused is sentenced as follows:

Count 1: Rape: Fifteen (15) years' imprisonment;

Count 2: Rape: Fifteen (15) years' imprisonment;

Count 6: Rape: Fifteen (15) years' imprisonment;

Count 7: Robbery with aggravating circumstances as defined in Section 1 of Act 51 of 1977: Twelve (12) years' imprisonment;

Count 8 and 9: Assault with intent to do grievous bodily harm: These two counts are taken together for purposes of sentence: Six (6) years imprisonment.

It is ordered that the sentence imposed on the accused in counts 8 and 9 should run concurrently with the sentence imposed in count 7.

A. M. SIBOLEKA
Acting Judge

APPEARANCES:

STATE: I. M. Nyoni
Office of the Prosecutor-General, Windhoek

ACCUSED: J. Wessels
Directorate of Legal Aid, Windhoek