



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

Case no: CC 14/2017

THE STATE

And

TUUFILWA NDAWINA JONAS

ACCUSED

Neutral citation: *S v Jonas* (CC 14/2017) [2019] NAHCMD 525 (3 December 2019)

Coram: SHIVUTE J

Heard: 2 October 2019, 5-6 November 2019

Delivered: 3 December 2019

Flynote: Criminal Procedure – Sentence – Substantial and compelling circumstances – Factors taken into account – Personal circumstances of accused – minimum prescribed sentence not departed from lightly – personal circumstances of accused not qualifying as cumulatively to justify departure from mandatory sentence – Regard given to degree of culpability or blame worthiness exhibited by accused in executing crime –

No substantial and compelling circumstances found to justify deviation from the mandatory sentence provided for by the Rape Act.

Summary: The accused was convicted of three counts of rape and three counts of trafficking in persons. She is a 34 year old single mother of five minor children who have absent fathers. She has been in custody since 24 November 2015. Regard should be had to the degree of culpability or blame worthiness exhibited by the accused in executing the crime. The period which accused spent in custody pending finalisation of the trial and the genuine remorse she showed for her actions are mitigating factors. However, she committed premeditated offences. Sentences must reflect the seriousness of the offence and fit the offender. The minimum prescribed sentence is not to be departed from lightly and for circumstances to be substantial and compelling, they must be such as cumulatively to justify a departure from the standardised response chosen by the legislature. The personal circumstances of the accused do not qualify cumulatively to justify a departure from the mandatory sentence.

ORDER

1st Count: Trafficking in persons, contravening section 15 read with section 1 of the Prevention of organised Crime Act 29 of 2004:
Five (5) years' imprisonment.

2nd Count: Rape, contravening section 2 (1) (b) read with sections 1, 2 (2) and 3 of the Combating of Rape Act 8 of 2000:
Six (6) years' imprisonment.

3rd Count: Rape, contravening section 2(1) (b) read with sections 1, 2 (2), and 3 of the Combating of Rape Act of 2000 further read with section 94 of the Criminal Procedure Act 51 of 1977:

Six (6) years' imprisonment.

4th Count: Trafficking in persons – contravening sections 15 read with section 1 of the Prevention of Organised Crime Act 29 of 2004:

Five (5) years' imprisonment.

6th Count: Trafficking in persons, contravening section 15 read with section 1 of the Prevention of Organised Crime Act 29 of 2004:

Five (5) years' imprisonment.

8th Count: Rape, contravening section 2 (1) (b) read with sections 1,2 (2) and 3 of the Combating of Rape Act 8 of 2000 further read with section 94 of the Criminal Procedure Act 51 of 1977:

Six (6) years' imprisonment.

The sentence in count 6 is to run concurrently with the sentence in count 4.

SENTENCE

SHIVUTE, J

[1] The accused was convicted on three counts of rape, two contravening section 2 (1) (b) read with the provisions of sections 1, 2 (2), 3, 5, 6 and 18 of Act 8 of 2000 of the Combating of Rape Act. One count contravening section 2 (1) (b) read with sections 1, 2 (2), 2(3), 3,5,6,7 and 18 of Act of 2000 and further read with section 94 of the Criminal Procedure Act 51 of 1977. She is further convicted on three counts of trafficking in persons contravening section 15 read with section 1 of the Prevention of Organised Crime Act 29 of 2004.

[2] The accused gave evidence under oath in mitigation of sentence. At the time of the commission of this offence she was 28 years old and currently she is 34 years old. Both parents are deceased. Her level of education is Grade 8. She is single. However, she is a mother to five minor children. The eldest child is 12 years and the youngest are twins aged three. They were born whilst the accused was in custody. She has been in custody since 24 November 2015. The five children have different fathers. Their fathers do not support them. The children are staying with a relative.

[3] Before the accused was incarcerated, she was employed on a farm as a general worker where she earned a salary of N\$3000 per month. She was supporting her family with that money. After the accused was convicted, she was admitted in hospital where she was diagnosed with Tuberculosis and she is now on treatment.

[4] The accused apologised to the victim, the court and to the public at large for having committed the offences she had been convicted of. She urged the court to exercise mercy on her and to impose a lenient sentence. This court had noted that the accused was very emotional when she was testifying and she was in tears.

[5] On the other hand, counsel for the state called Dr Veronica Theron in aggravation of sentence. Doctor Theron is a social worker by profession who has an experience of more than 25 years in social work. She has been involved in cases of trafficking in persons since early 2000's to date.

[6] She never interviewed the victim in respect of this case. However, according to her experience, trafficking in persons is a unique offence and the trauma attached to the offence is different from other offences, because this offence involves elements of recruitment, deception, transport or transfer of victims from their familiar surroundings where they have supporting systems to unfamiliar surroundings where they have no such systems. A further element is that there is an imbalance of power whereby the trafficker is always the person in power or authority and sometimes in a position of trust. The victim is normally depended on the offender for survival. The victim hates the

offender for the exploitation and the abuse and this makes the victim to lose a sense of self and the victim starts to see the world through the lens of the trafficker. This makes it tricky and complex.

[7] The witness has read the court proceedings as well as the judgment. What struck her was that, the victim was taken out of school. There were promises made to her concerning work. The victim was exposed to health risks of contracting HIV/ AIDS and other sexually transmitted diseases. This is an aggravating factor. With regard to the accused, she used threats towards the victim and this is an aggravating factor too.

[8] It was submitted on behalf of the accused that the court should exercise a blend of mercy on the accused as she is a first offender. The accused has been in custody for about 4 years. The accused has shown remorse as she took the court into its confidence and testified in mitigation whereby she apologised and she accepted the outcome of the case. She also said she was very sorry that the victim had to drop out of school. It was submitted further that the accused had expressed genuine remorse.

[9] Counsel further argued that substantial and compelling circumstances exist because if the court imposes the mandatory minimum sentence, the accused will be faced with a penalty of 50 years' imprisonment. The court should consider circumstances of the accused person such as her educational background, family circumstances and her employment. The court should also consider that the accused has five minor children. According to counsel, the substantial and compelling circumstances in this case are that the victim did not suffer injuries. The victim was 18 years at the time of the offence. The accused was 28 years when she committed the offences. The period of incarceration as well as the wellbeing of her children are also said to constitute substantial and compelling circumstances. The accused needs to be given a chance to return back to society after she served her sentence and to come and look after her children whose fathers are absent.

[10] Concerning Dr. Theron's testimony, counsel argued that she did not give conclusive authority concerning her findings apart from referring the court to the court proceedings and the judgment. She only made sweeping statements with possibilities. What she testified is what she thought could happen.

[11] Concerning the sentence, counsel suggested some sentences to be imposed by this court and that they should run concurrently because, the accused having being convicted of multiple offences, these are likely to attract severe punishment. The court should impose a sentence that is proportionate to the convict's blameworthiness in relation to the offences as these offences are related to each other.

[12] On the other hand, counsel for the State argued that in terms of s 3 (1) (a) of the Act, the mandatory minimum sentence for rape is 15 years. The victim was trafficked from her village to an unknown place where she was given to several men. One of the men could sleep with her two to three times a night for a period of two months. Whilst the other man instructed her that as soon as she gets into bed she should be naked. When she forgot, he would assault her with fists. This pushed the victim to have suicidal tendencies. The victim testified that her life was destroyed because of what the accused made her to go through.

[13] The victim had to scream when she was identifying the accused and she was emotional as a result, the court had to adjourn for the witness to compose herself. It is evident that the victim was traumatised. Furthermore, the offence was not committed at the spur of the moment; it was pre-planned. The accused travelled to the North of the country and identified her possible victims and managed to deceive and traffic the victim. Although the accused spent four years in custody awaiting trial, there are aggravating factors that outweigh her personal circumstances. Taking into consideration the period of incarceration of the accused, counsel urged the court to impose a minimum mandatory sentence instead of a higher sentence in respect of the rape counts.

[14] With regard to the counts of trafficking in persons, counsel argued that this is modern day slavery. It is a heinous offence. The accused exposed her victim to sexual abuse for months. Counsel also suggested sentences to be imposed by this court. Both counsel referred me to authorities in connection with sentencing which I have had the privilege of considering.

[15] This court will now have to consider the sentence to be imposed on the accused. Although the accused is a first offender, she committed heinous offences which are unimaginable to be committed by a mother. It is aggravated by the factors that the accused is an extended family member of the victim. She lured the victim from her place to a place unknown to her under a false pretense that she would get employment for her. Yet, she knew very well that she would give her to men for sexual exploitation. The victim trusted the accused. It is clear from the record that the victim suffered trauma because of the accused's merciless actions. The victim had to scream when she saw the accused in court. She testified that the accused had destroyed her life and she is no longer in a position to think properly.

Interest of society

[16] With regard to the interest of society, it is necessary to protect members of the society from individuals like the accused. By imposing appropriate sentences, courts promote respect for the rule of law and help to keep harmony as well as co-existence amongst the members of society. However, sentences must reflect the seriousness of the offence and at the same time must fit the offender. Furthermore, for the court to arrive at a just sentence it needs to strike a proper balance between the interests of the accused as well as those of society.

Substantial and compelling circumstances

[17] The accused having been convicted of three counts of rape, this court should determine whether the factors placed before it support a finding for the court to impose

a mandatory sentence or a finding for the court to deviate from imposing a mandatory sentence.

[18] The approach taken by the South African Court of Appeal in *S v Malgas* 2001 (2) SA 1222 (SCA) and adopted by this court in *S v Lopez* 2003 NR 162 (HC) at 173 has been accepted as guiding principles to determine what are substantial and compelling circumstances in rape cases in order to deviate from the mandatory minimum sentences as prescribed by the Combating of Rape Act. The following are some of the factors to be considered:

- (a) A court ought to take into account the facts traditionally taken into account in sentencing;
- (b) The minimum prescribed sentence is not to be departed from lightly and for flimsy reasons;
- (c) For circumstances to be substantial and compelling, they must be such as cumulatively to justify a departure from the standardised response chosen by the legislature;
- (d) If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
- (e) There are no prescribed circumstances defined as substantial and compelling circumstances each case should be considered on its own facts.

[19] The Combating of Rape Act provides for penalties in respect of the first conviction as follows:

'3. (1) Any person who is convicted of rape under this Act shall, subject to the provisions of subsections (2), (3) and (4) be liable –

(a) In the case of a first conviction –

(i) where the rape is committed under circumstances other than (ii) and (iii), to imprisonment for a period of not less than 5 years;

(ii) where the rape is committed under any of the coercive circumstances referred to in paragraph (a), (b) or (e) of subsection (2) of section 2, to imprisonment for a period of not less than ten years;

(iii) where –

(aa) the complainant suffered grievous bodily harm or mental harm as a result of rape;

(bb) the complainant –

(A) ...

(B) ...

(cc) the complainant is under the age of eighteen years and the perpetrator is the complainant's parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant;

to imprisonment for a period of not less than fifteen years.'

The accused has committed the offence under coercive circumstances that fall under s 2 (2) (c). A conviction under those circumstances is punishable in terms of s 3 (1) (a) (i).

[20] I have considered the mitigating as well as aggravating factors placed before me. At the pain of being repetitive, in determining what a proper sentence would be, I have considered a triad of factors namely the offender, the crime and the interest of society and I have endeavor to strike a balance between the personal circumstances of the offender and the interest of society. Being a first offender who has been in custody for a

considerable period of time awaiting the finalisation of her trial are factors in the accused's favour as well as the fact that she had shown remorse.

[21] In determining an appropriate sentence, I must have regard to the degree of culpability or blame worthiness exhibited by the accused in executing these crimes. The accused was aggressive during her testimony when she was placed on her defence. However, she broke down when she was testifying in mitigation and she apologised for her deeds. She was truly remorseful. Although the accused showed a genuine remorse, she committed premeditated offences. She had left her work on the farm and travelled to Ohangwena Region to her victim and deceived her that he would get a job for her. She arranged for her transportation from her place of residence to Okahandja district where these offences were committed.

[22] The fact that the accused is a mother herself and yet she is actively involved in trafficking in persons and rape weighs heavily against her. It is even made worse by the fact that the victim in this case is a well-known person to the accused as she is a member of her extended family. Although the accused has minor children, it is questionable whether she is a fit and proper person to be entrusted with their custody. These offences are premeditated, another aggravating factor. The complainant testified that the accused had destroyed her life. The complainant was taken from school just to be given away by the accused to be sexually abused by several men. This is yet another aggravating factor. The accused took advantage of the vulnerability of her victim because she is an orphan who comes from a less privileged background.

[23] The offences of rape and trafficking in persons are very serious and have a serious impact on victims. The scar of being raped would always remain on the victim. As Dr Theron testified, by being given to men for sexual exploitation, the victim was exposed to all sorts of health risks. I have also considered the uniqueness of the offence of trafficking in persons and its effect on the victims as testified to by Dr Theron. However, the weakness of Dr. Theron's evidence is that she did not interview the victim. Therefore, she could not tell this court the extent of the clear trauma on the victim.

[24] Apart from considering the triad of factors in sentencing, this court should also consider the element of mercy.

In *S v V* 1972 (3) SA 611 (A) AT 614 D Holmes JA said:

'The element of mercy, a hallmark of civilized and enlightened administration, should not be overlooked, lest the court be in danger of reducing itself to the plane of the criminal'

This is an important principle that must not be overlooked in the onerous task of considering an appropriate sentence.

[25] In considering all the circumstances of the case, the personal circumstances of the accused, I do not find the circumstances to be such as cumulatively to justify a departure from the mandatory sentence.

[26] However, the court has considered that the offences committed are closely related. They all attract a lengthy period of imprisonment. To avoid the cumulative effect of the lengthy period of imprisonment to be imposed and to ensure that the total sentence is not disproportionate to the accused's blameworthiness, I will consider part of the sentences to run concurrently.

[27] In the result, the accused is sentenced as follows:

1st Count: Trafficking in persons contravening section 15 read with section 1 of the Prevention of organised Crime Act 29 of 2004:
Five (5) years' imprisonment.

2nd Count: Rape contravening section 2 (1) (b) read with sections 1, 2 (2) and 3 of the Combating of Rape Act 8 of 2000:
Six (6) years' imprisonment.

3rd Count: Rape contravening section 2(1) (b) read with sections 1, 2 (2), and 3 of the Combating of Rape Act of 2000 further read with section 94 of the Criminal Procedure Act 51 of 1977:

Six (6) years' imprisonment.

4th Count: Trafficking in persons – contravening sections 15 read with section 1 of the Prevention of Organised Crime Act 29 of 2004:

Five (5) years' imprisonment.

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Six (6) years' imprisonment.

The sentence in count 6 is to run concurrently with the sentence in count 4.

NN SHIVUTE
Judge

APPEARANCES:

THE STATE:

Ms Shikerete
Office of the Prosecutor-General.

ACCUSED:

Mr Engelbrecht
Instructed by the Directorate of Legal Aid.