REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 19/2019

THE STATE

versus

PAULUS KAULUMA

Neutral citation: *S v Kauluma* (CC 19/2019) [2021] NAHCMD 189 (27 April 2021)

Coram: USIKU, J
Heard: **30 November 2020; 15 February 2021; 30 March 2021**
Delivered: **27 April 2021**

Flynote: Criminal Procedure – Sentencing – Domestic Violence – Child and parent relationship should be an aggravating factor when sentencing – Public outcry to stern the tide of domestic violence in Namibia – The prevalence thereof – The victim's right to safety in a home – Interest of society outweigh accused's personal circumstances – Courts justified to mete out severe sentences to protect victim's right to dignity and respect of human rights of individuals and also to deter the accused as well as would be offenders.

Summary: Criminal Procedure – Sentence − The accused was convicted of rape of his 10 years old biological child on diverse occasions whereby the victim fell pregnant and had to undergo abortion procedure. These series of rapes were committed over a period of time against the minor victim. Having regard to the circumstances of the case the court found that there were no substantial and compelling circumstances which would allow the court to divert from the minimum prescribed sentences in terms of the Combating of Rape Act 8 of 2000. S 3 (2) of the Combating of Rape Act not applicable under the circumstances of the case. Court concluded that the circumstances of the case require the court to impose deterrent sentences in respect of each count. Accused found to have committed heinous crimes and hence deserved little mercy. Accused is sentenced to 15 years imprisonment in respect of each count.

ORDER

(a) Count one (1) : 15 Years Imprisonment

Count two (2) : 15 Years Imprisonment

Count three (3) : 15 Years Imprisonment

Count four (4) : 15 Years Imprisonment

Count five (5) : 15 Years Imprisonment

(b) Sentences on counts 1, 2, 3 are ordered to run concurrently with the sentence on count four.

(c) Count 5 is ordered to run consecutively with the sentence on count 4.

SENTENCE

USIKU J

[1] On 30 November 2020, the accused was convicted of rape in contravention of s 1, 2 (2), 3, 5, 6 and 7 of the Combating of Rape Act 8 of 2000 on Counts 1, 2, 3, 4 and 5 read with s 1, 3 and 21 of the Combating of Domestic Violence Act 4 of 2003 further read with s 94 of the Criminal Procedure Act 51 of 1977.

[2] It now remains to sentence the accused person. Mr. Kumalo represents the state whilst Mr. Muchali appeared on behalf of the accused person.

[3] In the present task the Court should impose a sentence on the accused taking into account amongst others the time tested triad factors, which entail the crime committed, the offender as well as the interest of society *S v Zinn*[1]. There is also another factor that this court is required to consider when imposing the sentences which is a measure of mercy. It must however be stated that the factor of mercy should not be a misplaced pity but it should be a measure of mercy according to the circumstances of each particular case. At the same time the Court must further consider the main purposes of punishment, which are namely deterrence, prevention, reform and retributive. *S v Tcoeb*[2] .

[4] Whilst considering the triad factors and the main purposes of punishment in order to come up with an appropriate sentence, a balance must also be struck between the competing factors so as to ensure that justice is done towards the accused as well as to the society. It is however not an easy task as I may give more

[1] *S v Zinn* 1969 2 SA 537 (A).
[2] *S v Tcoeb* 1991 NR 262 (HC).

weight to certain factors then to others, see *Van Wyk*[3], but of course, I should not do so at the expense of the other factors.

[5] In sentencing it is required that a court should strike a balance between two important principles which are equality and consistency of treatment on the one hand and the issue of individualisation on the other. Individualisation relates to an accused's personal circumstances as an individual, whilst equality and consistency of treatment would mean that punishment meted out to different offenders convicted of similar offence must not appear to be too different as to be seen as unfair.

[6] In this particular case, the court must be guided by the sentence as sanctioned by statute, if applicable, or by sentences imposed by the court in similar cases though one should not lose sight of the fact that no two cases can be the same.

[7] I intend now to proceed to apply the foregoing factors, consideration and approaches to sentencing to the particular factors of this case, firstly, the facts concerning the circumstances of the commission of these crimes of which the accused was convicted by this court on 30 November 2020 on the five counts of rape in terms of the Combating of Rape Act 8 of 2000.

[8] The accused person testified under oath and was led by his counsel Mr. Muchali. His personal circumstances are as follows. He is 49 years old currently but was 45 years old at the time of his arrest on 10 April 2018. Since his arrest he has never been granted bail to date. Accused is still married to his wife whom he married on 17 December 2010 in a civil marriage. They were blessed with 3 children, the eldest of the children is the victim in this case and is now aged 14 years old. The second child is 7 years old and last born aged 4 years old.

[9] Accused has 4 other children outside the marriage with different women, some of whom are major. All his children from his marriage are still school going and he has been responsible for their educational needs before his arrest. Currently, his wife is the one who is taking care of their school needs with assistance from his

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[3] *Van Wyk* 1993 NR 426 SC.

family. From the children that were born outside the marriage only one of them is attending tertiary education at University of Namibia. Others are trying to make ends meet on their own. According to the accused, the child who is at the University of Namibia has no study loan and he has been helping him to pay his tuition fees. He is studying towards a four year Bachelor Degree in Education.

[10] The accused's wife is employed by Tunacor at Walvisbay and earns a salary of plus minus N$2 200-00 per month which would increase to N$2 800-00 per month when she works overtime. His other children's mothers are all unemployed. Before his arrest, accused worked as a builder with a construction company. He also had people employed by him and was responsible for their monthly salaries. He had worked for the construction company since 2008 until the time of his arrest in 2018. His salary depended on the work load and could earn up to N$16 000-00 per month. His highest earning was N$50 000-00 when he completed a project at Langstrand, Walvisbay.

[11] Apart from his monthly salary, he had other benefits such as his pension which was deducted from his monthly salary. He had no medical aid benefits. To date he has not received his pension money as he has to wait for the finalisation of this case. He intends to claim his pension after the case is finalised, though he is not aware how much he would get from the pension funds.

[12] The accused further testified that during his incarceration he developed high blood pressure and is currently on medication which he takes once a day. He owns small livestock. He also had funeral policies which were payable at each month end with Metropolitan and had a fixed deposit account with Namlife. Those policies have since been stopped. He is a first offender.

[13] With regard to the five convictions of raping the victim who is his biological daughter, the accused testified that he feels bad because of what he has done, though persisting that he did not do it purposely but due to drunkenness. He at the same time testified that he only accepted the one count and denied the rest of the charges.

[14] The accused pleaded with the Court not to give him severe sentences and asked for forgiveness because he has minor children and a family to take care of. He is the only male sibling and has two sisters. He denied that he is a danger to his own children and that he will be his children's enemy, claiming that he still loves his children. Accused promised not to repeat the offence indicating that he regrets what he has done. He further testified that he is uneducated only having gone to school up to grade 2 to be taught how to read and write. He left school early to go and look after his father's cattle.

[15] In cross-examination, the accused persistently maintained that he only accepted the one count of rape and has no remorse about the four counts he has been convicted of. His claim is that he could not show remorse for something he did not do. Neither can he accept the convictions on the four other counts. Throughout his testimony, the accused made no reference about asking for forgiveness from the victim of the crime but only asked the court to be lenient towards him when sentencing.

[16] To date accused had not asked the victim for forgiveness because he has had no chance to do so, neither did he have a chance to call the victim after the court convicted him. He has had no contact with the victim because her mother did not allow him contact. He claimed that the victim has since found peace.

[17] On the other hand the state led evidence in aggravation of sentence through a social worker Ms. Sophia Negonga. She is a qualified social worker having obtained a Bachelors Degree in Social Work in 2016 from the University of Namibia. During her employment at the Ministry of Gender Equality and Child Welfare, she met the victim. She had earlier on obtained a statement from the victim. Her task was to prepare the victim for the abortion procedure. This was meant to make the victim understand what was going to happen to her, because she was a minor.

[18] She had to counsel the victim before she was taken to Windhoek for the intended procedure. She also had sessions with the victim after the abortion procedure was carried out. The victim expressed herself by informing her that she

was being re-traumatised and was tired whereby she offered to give her a chance to go back to school and return after a period of time.

[19] Upon return she continued with the counselling sessions with the victim where after she was requested to compile a report. The said report was received by the court duly signed by the social worker and marked Exhibit “P”. In the victim impact report issues pertaining to the family of the victim were discussed, the offence, the developmental stage of the victim as well as the impact of the offence on the victim. In her conclusion the social worker found that the victim could narrate the incidences that have happened in a chronological order however that seemed to have not been the case.

[20] I could be construed that such behaviour might have been brought upon by the fear, instilled in the victim by the accused not to reveal what had transpired. The incidences have been happening over a period of time and the child had disclosed to her biological mother after her menstrual period was late in the particular month where after she had to inform the relevant authorities.

[21] It was found that the impact of the incidences on the victim were of a traumatic nature as were explained by herself and her mother which was the observation made by the social worker. The victim appeared to have an agitated behaviour and insomnia. This could be explained as a result of the incidences that had occurred as is the case with children going through trauma.

[22] Having attended to numerous sessions of counselling it was evident that the victim has suffered sexual offences against her person. She appeared to be traumatised as the person in whom she had built trust in as a father, broke the natural bond as should have been in a family between his wife and their children. The victim experienced isolation and alienation when she underwent an abortion process from her peers at school. She shows definite signs of trauma as evident by the fact that she still feels insecure, shame and guilt about what has happened to her.

[23] In his submissions Mr. Muchali put forth the accused's personal circumstances most importantly that the accused has admitted to the one count only that led to the pregnancy. He asked the court to consider the fact that the consumption of alcohol by the accused had affected his decision making and therefore should be taken into consideration when sentencing. He also addressed the issue of substantial and compelling circumstances citing relevant case law on point.

[24] In that regard it was submitted that the accused is at an advance age of 49 years, he is suffering from high blood pressure and is on medication. Further that the accused has been incarcerated for 2 years and 9 months, also the fact that the accused has become born again, has repented and apologised to the victim. Accused's wife has minor children with challenges, and the Constitutional Rights of children to have parents involved in their upbringing should further be considered. It was also the contention of the defence that the incidences involved no violence as the victim did not suffer any injuries.

[25] It was further submitted that when sentencing the accused the court must consider the principle of individualization as well as consistency and reformation. Reference was made to the case of *Geingob v The State*[4] , in which the court held that sentence exceeding the period of 37 and half years were found to be inhuman and degrading which make an accused to lose hope of being released and suggested a sentence not exceeding 17 years in respect of all the five counts. That in my view would amount to a travesty of justice to say the least.

[26] Having regard to the testimony of Ms. Negonga and the doctor who conducted the abortion procedure on the victim, it was explained to the court that the doctor had to do a medical procedure referred to as a manual vacuum extraction to remove cells and membranes left in the victim's uterus after the abortion, that procedure must have been very painful to the victim who was only 11 years old at the time. One cannot therefore conclude that there was no physical and emotional trauma suffered by the victim.

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[4] *Geingob v The State* (CA 87-2014) [2014] NAHCMD 19 (06 February 2015).

[27] An act of rape immediately causes injury to a victim. The offences were committed in a family home by the victim's biological father, a place a child considered home which should at all times equate to safety for minors. An act of rape and incest at that tender age of 10 years makes it much more aggravating. It is a despicable act perpetrated by a biological father. It is an act that the victim will have to live with for her entire life. These are all factors that place extreme weight when the court metes out sentences in this case.

[28] It is trite that Courts must take into account the interest of the society. Such that the most vulnerable members of our society being women and children deserve to be protected at all times. The Courts are the upper guardian of all minors, thus Courts should mete out appropriate sentences against those who commit these heinous crimes against minors.

[29] In terms of s 3 (1)(a) of the Combating of Rape Act 8 of 2000, the prescribed minimum sentence is 15 years.

'The question ultimately is whether the sentence imposed, which is in excess of the prescribed minimum sentence, is disturbingly inappropriate. It is quite permissible, and more often than not inevitable, that in considering and affording appropriate weight to the conflicting considerations relevant to sentence, more weight will be attached to one or more considerations, and lesser weight to others . . . . It is a realistic fact that the imposition of substantial custodial sentences is not the ultimate panacea for this scourge. That does not detract from the fact that the courts should play their role as part of the collective effort to eradicate this violence from society. More often than not, our courts when considering an appropriate sentence in cases of this kind, ought to afford more weight to the punitive, retributive and deterrent aspects of sentence. The personal circumstances of the accused, although relevant and worthy of consideration, must yield to the other competing considerations. . . . For these reasons, (I) conclude that the sentence imposed was not disturbingly inappropriate'.

[30] I associate myself fully with the above sentiments expressed. In *S v Malgas*[5] *(117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001)* where the test for compelling substantial circumstances was developed and illustrated as follows.

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[5] *S v Malgas* (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001).

'The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as to cumulatively justify a departure from the standardized response that the Legislature has ordained." And: "The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favorable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.'

[31] It is my considered view that there are no compelling and substantial circumstances in this case that would justify this Court to divert from the prescribed minimum sentences, hence fore, considering the facts of this case, and in the absence of compelling and substantial circumstances, the court must sentence the perpetrator to terms of imprisonment, but this does not bar the Court from going beyond the minimum sentences provided in terms of the Act[6].

[32] With regard to the accused's personal circumstance, those are normal circumstances that are usually placed before Courts and must be considered too. Indeed this Court has also considered the period of incarceration the accused has spent in custody. *S v Kauzuu*[7] before this case is finalised.

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

(a) Count one (1) : 15 Years Imprisonment

Count two (2) : 15 Years Imprisonment

Count three (3) : 15 Years Imprisonment

Count four (4) : 15 Years Imprisonment

Count five (5) : 15 Years Imprisonment

[6] The Combating of Rape Act 8 of 2000
[7] *S v Kauzuu* 2006 1 NR 225 (HC).

(b) Sentences on counts 1, 2, 3 are ordered to run concurrently with the sentence on count four.

(c) Count 5 is ordered to run consecutively with the sentence on count 4.

D N USIKU

Judge

APPEARANCES

STATE	:	Mr Kumalo Office of the Prosecutor-General
ACCUSED	:	Mr Muchali (Instructed by Directorate of Legal Aid)