

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT (SENTENCE)

Case no: CC 2/2018

In the matter between:

THE STATE

and

MARTHINUS PRETORIUS

ACCUSED

Neutral citation: *S v Pretorius* (CC 2/2018) [2022] NAHCMD 114 (15 March 2022)

Coram: ANGULA DJP

Heard: 16 February 2022

Delivered: 15 March 2022

Flynote: Criminal Procedure – Sentence – Rape – Combating of Rape Act 8 of 2000 – Human Trafficking – Prevention of Organized Crime Act 29 of 2004 – Factors taken into account in sentencing – Triad of *Zinn* – Nature of the crime – Personal circumstances of the accused – Interests of society – Objectives of punishment – (i) the prevention of crime; (ii) deterrence of the offender from re-offending and would be offenders from committing crimes; (iii) rehabilitation of the offender and (iv) retribution – A measure of mercy taken into account.

Summary: The accused an adult male person was on his guilty plea, convicted of five counts of rape in terms of the Combating of Rape Act, 8 of 2000 and five counts of Trafficking in persons (minor girls) in terms of Prevention of Organized Crimes Act 29 of 2004.

Held; that the fact that the accused's own daughter was the same age as the victims at the time the offence was committed is an aggravating factor;

Held; that the fact there was more than one victim and multiple incidents of sexual exploitation over a period is also an aggravating factor.

Held; that the advanced age of the accused is both a mitigating and aggravating factor and will depend on each case.

Held; that the offences for which the accused have been convicted are closely related in time and execution but they all attract a lengthy period of imprisonment.

Held; that in order to avoid that the total sentence imposed is not disproportionate to the accused's blameworthiness, I will order that part of the sentences imposed run concurrently.

Accordingly, the accused was sentenced to an effective prison term of 35 years.

ORDER

1. On the charges of rape the accused is sentenced:

Counts 2, 4, 6, 8 and 9 and 11 each: 15 years' imprisonment.

2. On the charges of trafficking of minor children:

Counts 1, 3, 5, 7 and 10 each: 5 years' imprisonment.

3. In the terms of section 280(2) of the Criminal Procedure Act, Act No. 51 of 1977 it is ordered that counts 6, 8, 9 and 11 are to be served concurrently with counts 2 and 4 furthermore, counts 3, 5, 7 and 10 to be served concurrently with count 1.

JUDGMENT

ANGULA DJP

Introduction

[1] Mr Pretorius you have been convicted of six counts of committing sexual acts with children below the age of 16 which amounted to rape in contravention of the provisions of the Combating of Rape Act, 8 of 2000 ('CORA'). In addition you have been convicted of five counts of trafficking of minor children on diverse occasions in contravention of the provisions of the Prevention of Organised Crime Act 29 of 2004 ('POCA').

[2] It then becomes the duty of this court to impose the sentence that it considers is appropriate having regard to the offences you have been convicted of. In considering an appropriate sentence the court has to consider the 'triad of Zinn' named after the matter of the *State v Zinn*¹. In terms of triad of Zinn, this court has to consider the seriousness of the offences for which you have been convicted; your personal circumstances; and the interests of society. In addition to the said factors, the sentence must also be blended with an element of mercy.² The process undertaken in arriving at an appropriate sentence, involves a delicate balancing act of the mentioned factors. I proceed with that balancing act.

The seriousness of the offence

¹ *S v Zinn* 1969 (2) SA 537.

² *S v V* 1972 (3) SA 611 (A).

[3] I first consider the seriousness of the offences. There is no doubt that you have been convicted of serious offences committed over a period on diverse occasions. As mentioned earlier, the offences consist of sexual acts with minor girls aged 13 and 14 respectively and trafficking of those children for the purpose of sexual exploitation. You were 40 years old at the time of the commission of those offences. The minor girls in question are victims by virtue of their ages and as such are deemed to be exceptionally vulnerable within the meaning of the provisions of the Combating of Rape Act³ which prescribes a period of not less than 15 years imprisonment, unless the court finds that substantial and compelling circumstances exist that may justify a departure from imposing the prescribed minimum sentence.

[4] In this matter, the State led evidence in aggravation of sentence. Dr Veronica Theron testified that she is a Social Worker specializing in Child Protection. She holds a Masters degree in Play Therapy which she obtained from the University of South Africa better known as Unisa, during 2008. She testified that since 1993 she has been working with children who suffered from psychological trauma. At the time of testifying, she was employed as a Sexual, Gender and Child Protection Specialist.

[5] Dr Theron testified that she read the record of the proceedings in the present matter upon which she based her expert opinion. According to her, what is overwhelming in this matter is the difference between the ages of the victims and your age. She pointed out in this regard that there was difference in cognitive development between you, Mr Pretorius, as an adult person as you were more cognitively developed as opposed to a 13 – 14 year old minor girls who are cognitively not able to appreciate the consequences of their actions. Dr Theron rightly pointed out that your acts were premeditated. This fact is borne out by the evidence before court.

[6] According to Dr Theron, you are a preferential sex predator who preferred virgin minor girls and young black girls from poor households who are in need of money. In order to satisfy your preference you used a third person, Ms Lukas to procure the type of young girls you preferred. It is common cause that Ms Lukas has

³ Combating of Rape Act, 8 of 2000.

already been convicted for her role and in that regard has been sentenced to 16 years imprisonment.

[7] Dr Theron further testified that it was evident to her from the reading of the record, that the victims experienced trauma judging from their testimonies. In this connection, she pointed to the evidence of M when she testified that when you told her to undress she became numb. According to Dr Theron, that was a sign of a traumatic experience. Regarding the evidence of D, Dr Theron referred to her testimony where she stated that: 'I was too young to comprehend, I was small, I was only 13 years old.' In Dr Theron's expert opinion, that statement demonstrates a traumatic experience.

[8] The evidence by Dr Theron was not challenged by the defence in any way. Quite apart from the challenge or lack thereof, I am satisfied that the expert opinion expressed by Dr Theron is sound and reliable. I therefore accept her evidence and opinion in its totality and will take it in consideration in assessing an appropriate sentence.

[9] On the basis of the foregoing evidence Ms Shikerete for the State, who ably conducted the State case, submitted, correctly so in my view, that you abused your power you had over the victims based on your age, maturity and social standing. I should add the fact that you had disposable cash to spend, so as to satisfy your paedophilic lust.

[10] It is common ground that you have three children, two girls and a boy. It is further common ground that during 2012, when you committed the offences for which you have been convicted your younger daughter was 14 years old, meaning the same age as your victims. In this regard, in *S v Koch*⁴ the fact that the accused's own daughter was the same age as that of the victims was considered by the court as 'a weighty aggravating factor'. I adopt the court's approach in *Koch* in the present matter and hold that the fact that your own daughter was of the same age as the victims in this matter as an aggravating factor.

⁴ *S v Koch* (CC 20/2017) [2018] NAHCMD 318 (11 October 2018) para [3].

[11] There is a further aggravating factor highlighted by Dr Theron and that is the fact that there was more than one victim and multiple incidents of sexual exploitations which took place over a period. In my considered view, this is an aggravating factor. Your actions were deliberate, premediated and perpetrated over a period on diverse occasions. I therefore reject your explanation that your actions were 'a stupid mistake' as you would like this court to believe.

[12] You testified that you are a former police officer in the South African Police Services in which you served some 12 years. It is elementary to say that police officers are there to maintain law and order and to protect vulnerable members of the society such as children. It is odious that you as a former police officer became a minor children's sexual exploiter instead of protecting them. I also consider that to be an aggravating factor.

The accused's personal circumstances

[13] I take into account that you testified in mitigation of the sentence to be imposed. You testified that you are now 51 years old, but that at the time of the commission of the offences you were 40 years old. You were gainfully employed as manager of a construction company. You were thus a useful member of the society and as such contributed to the economic growth of the country. I take into account that you are a first offender. I further take into account, as you testified, that during 1997 while on duty, you as a member of the murder and robbery squad, you were shot in the abdomen and that you are still suffering from abdominal pain. In this connection you instructed your counsel, Mr Andreas, to convey to the court that you are due to undergo a further operation next month, April 2022.

[14] You testified that you were previously married but divorced sometime back. Furthermore that you are a father of three children. When you testified your two daughters were aged 24 and 27 respectively. Your 17 years old son is now in matric. I take into account that your mother passed away while you were in custody and that your father predeceased your mother during 2005.

[15] I take into account that you pleaded guilty to all the charges of having unlawful sexual intercourse with minor girls. In this regard you did not waste the court's time. You however pleaded not guilty to the charges of trafficking minor girls. Evidence had to be led after which you were duly convicted of the offence of trafficking of minor girls. I take into account that you have been in custody for six years as a prisoner-awaiting inmate. I should however mention in this regard that when you were arraigned before this court, the court was (most of the times) available to deal with the matter. On a number of occasions the matter was postponed for considerable periods so as to allow you sufficient time to undergo medical operations (and thereafter to recuperate). Unfortunately such medical operation never took place. At times the trial could not proceed due to Covid-19 pandemic. Sadly, your previous lawyer Mr Grobler also passed away during that period which necessitated you to apply to the Director of Legal Aid to appoint a new legal practitioner to represent you. Once he was appointed, Mr Andreas needed time to ready the record so as to be in position to effectively represent you. Part of the six year period has thus to be viewed against that background.

[16] As mentioned earlier in this judgment you described your actions as 'stupid mistakes'. You mentioned during your testimony that you regret what happened. I am not satisfied that by saying that you showed real remorse. I gain the impression that you failed to appreciate the psychological damage and lasting trauma you have inflicted on your victims. I therefore reject your explanation in this regard as it does not demonstrate a genuine contrition and remorse.

[17] That concludes your personal circumstances. The court shall take into account all those aforementioned factors in your favour in assessing an appropriate sentence. I proceed to consider how the interest of society should be factored into the sentence to be imposed.

The interests of society

[18] As regards the interests of society, the courts are inundated with mounting number of cases involving rape of minors by adult men. Society is pleading with the courts to impose stiffer sentences in order to deter would be offenders. Rape cases

not only leave the victims permanently traumatized but also the family members of the victims as well as the family members of the perpetrators. I am sure that your children are deeply disappointed with what you have done. You will be separated from them for a considerably long time. They will grow without a father figure around them.

[19] In response to the society's cry, the courts have been doing their best to address the scourge of rape. In this connection with respect to the offence of rape, the Supreme Court said the following in *S v Libongani*⁵ at para 26:

[26] I associate myself with the sentiments above, rape and the murder of women, wherever the crimes rear their ugly faces, should be visited with severe punishments. Our society is undoubtedly embarrassed by the killing and raping of women and children on a daily basis. The promulgation of the Combating of Rape Act is a serious effort the legislature undertook in an attempt to arrest the scourge. The courts should join that fight, in some cases where possible, should show no mercy.'

[20] I should mention in this regard which, I consider as a notorious fact for this court to take notice of without extraneous evidence, the fact that Parliament, as the representative of society, is currently debating an amendment to the Combating of Rape Act with the intention to increase the prescribed minimum sentence of 15 years to a higher limit. That is being done in response to the constant demand by society for the increase of sentences in rape cases. In this connection courts are thus expected to 'join that fight' in order to address the tide of the rape cases in our community.

[21] In respect of the interests of society with regard to trafficking in persons, the Supreme Court has as recently as 14 February 2022 in *Koch*⁶ matter (the appeal judgment) increased the sentence from 8 years to 18 years and in doing so had the following to say at para 73 of its judgment:

[73] Section 15 of POCA provides that a person convicted of trafficking in persons is liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding 50 years. This penalty undoubtedly reflects the serious light in which the Legislature views

⁵ *S v Libongani* 2014 (1) NR 187 (SC).

⁶ *S v Koch* (SA 3/2019) [2022] NASC (14 February 2022).

the offence of trafficking in persons for sexual exploitation. The offence is regarded as a heinous crime that attracts a severe sentence.'

[22] I fully associate myself with the view expressed by the Supreme Court in the two mentioned judgments and will adopt the approach dictated by the Supreme Court when considering an appropriate sentence with regard to the offence of trafficking in persons for which you have been convicted, in order to reflect the interests of society in the sentence. Mr Pretorius, quite apart from the fact that the minimum sentence of 15 years applies in your case for the reasons I will state later, I am of the view that, it would be in the interest of society that you be removed from society for a long period so as to prevent you from committing sexual exploitation and from trafficking with minor girls. I hope that by the time you will be released, you will have lost the appetite for committing those 'heinous crimes'.

Are there substantial and compelling reasons present in the instant matter?

[23] The Combating of Rape Act⁷ stipulates that a minimum sentence of 15 years be imposed on conviction of rape unless the court is satisfied that substantial and compelling reasons are present justifying the court to impose a lesser sentence. It has been held that for the court to find that substantial and compelling circumstances are present, they must be such as to cumulatively justify a departure from the standardized response chosen by the Legislature.⁸

[24] In an attempt to convince the court that substantial and compelling circumstances are present in this matter, your legal representative, Mr Andreas submitted that such substantial and compelling reasons are present in the present matter which obliges this court to deviate from the mandatory minimum sentence of 15 years prescribed by the Combating of Rape Act⁹. To buttress his submission, counsel enumerated a number of factors. Most if not all factors have already been mentioned when I dealt with your personal circumstances. The most significant are: the fact that you have spent six years in custody while awaiting your trial; that you are at an advanced age of 51 years; that you are in poor health and as a result you

⁷ Combating of Rape Act 8 of 2000.

⁸ *S v Malgas* 2021 (2) SA 1222 (SCA) adopted by this court in *S v Lopez* 2003 NR 162 (HC).

⁹ Combating of Rape Act 8 of 2000.

require regular medical checkups and treatment; and finally that no violence was perpetrated upon the victims and no physical injuries were sustained by the victims.

[25] In countering Mr Andreas' arguments, Ms Shikerete representing the society pointed out that the victims suffered trauma at your hands even though no physical injuries were inflicted. I agree with this submission. As regards the fact that you plead guilty, Ms Shikerete correctly in view, argued that you had no option but to plead guilty because your two victims were ready to testify against you as well as your accomplice, Ms Lukas.

[26] Concerning your poor health, I agree with Ms Shikerete that the Correctional Facilities are equipped to render medical services to you. In this regard, it is common cause that during the trial of this matter you had been treated by the State's medical doctors. As mentioned earlier in this judgment you would be undergoing an operation of your abdomen during April 2022 while in custody at the States expense.

[27] As regards your advanced age, Ms Shikerete referred the court to *Vujicin v State*¹⁰ where an accused aged 67 years old was sentenced to an effective term of 35 years imprisonment. He was convicted rape and trafficking of minor victims. Counsel therefore urged this court not to be moved by your advanced age. I earlier mentioned that I took into account your advanced age as a mitigating factor. It would appear to me that your advanced age cuts both sides in that it also serves as an aggravating factor. As an aggravating factor at your age even when you were 41 years old at the time you committed the offences, you betrayed the trust of the community when you sexually exploited the minor girls contrary to what would ordinarily be expected from an adult person when minor children are in his or her presence. In this matter, instead of you protecting the minor girls as an adult person, you sexually violated and exploited them to satisfy your 'rapacious appetite for pedophilia' to borrow from the court in *Koch*. In my considered view, your advanced age as mitigating factor is far outweighed by your betrayal of trust the society had vested in you.

¹⁰ *Vujicin v S* (HC-MD-CRI-APP-CAL-2020/00062) [2020] NAHCMD 551 (1 December 2020).

[28] Taking all the factors into consideration, I am of the considered view that no substantial and compelling reasons exist in this matter justifying this court to impose a sentence below the prescribed minimum sentence of 15 years.

What is the appropriate sentence in this matter?

[29] Your legal representative, Mr Andreas urged this court to impose a sentence of 16 years imprisonment as that was imposed on Ms Lukas, who solicited or procured the victims for you. I should say that is a tall order. In my view, to do so would be a miscarriage of justice. It is an inapt comparison to compare the sentence imposed on Ms Lukas with the sentence to be imposed on you. Your offences and that committed by Ms Lukas are different and thus require different periods of imprisonment. Moreover, the degree of blameworthiness of Mr Pretorius and Ms Lukas are different.

[30] Mr Andreas proposed a total sentence of 16 years whereas Ms Shikerete for her part proposed an effective sentence of 37 years. I am of the view that between the two extremes lies the appropriate sentence.

[31] I have had regard to the sentences imposed by the courts in more or less similar instances like the present matter. Earlier in this judgment, reference was made to *Vujicin* matter where a sentence of 35 years was imposed. In the *Koch* matter, even though the accused in that matter was not convicted of rape but of indecent exposure to children in contravention of the Combating of Immoral Practices Act 21 of 1980 as amended, he was convicted of trafficking in person, as mentioned earlier and on appeal his sentence was increased from 8 years to 18 years. In the unreported judgment of *S v Jonas*¹¹ delivered on 3 December 2019 the accused, a woman, was convicted of both rape and trafficking in persons. She was sentenced to a cumulative sentence of 23 years for rape and trafficking in persons.

[32] What is to be deduced from the foregoing comparison of sentences imposed in those cases, it appears to me that the sentences imposed in those matters like in the present matter are in the range of 23 years to 35 years.

¹¹ *S v Jonas* (CC 14/2017 [2017] NAHCMD 525 (3 December 2019)).

[33] I take into account that the offences for which you have been convicted are closely related in time and execution but they all attract lengthy period of imprisonment. In order to avoid that the total sentence imposed is not disproportionate to your blameworthiness I will order that part of the sentences imposed to run concurrently.

[34] In the result, the following sentences are imposed:

1. On the charges of rape the accused is sentenced to:

Counts 2, 4, 6, 8, 9 and 11 each: 15 years' imprisonment

2. On the charges of trafficking of minor children to:

Counts 1, 3, 5, 7 and 10 each: 5 years' imprisonment

3. In the terms of section 280(2) of the CPA Act 51 of 1977 it is ordered that counts 6, 8, 9 and 11 are to be served concurrently with count 2 and 4 furthermore, counts 3, 5, 7 and 10 to be served concurrently with count 1.

[35] You have to serve an effective period of 35 years imprisonment.

H Angula
Deputy-Judge President

APPEARANCES:

FOR THE STATE:

F SHIKERETE

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FOR THE ACCUSED:

J N ANDREAS

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