

REPUBLIC OF NAMIBIA

**HIGH COURT OF
WINDHOEK**



NAMIBIA MAIN DIVISION,

SENTENCE

Case No: CC 20/2016

THE STATE

versus

**JAN GEMENG
TJAAVA EBSON**

**FIRST ACCUSED
SECOND ACCUSED**

Neutral citation: *S v Gemeng & 1 Other* (CC 20/2016) [2022] NAHCMD 214 (26 April 2022)

Coram: SHIVUTE, J

Heard: 8 April 2022

Delivered: 26 April 2022

Fly Note: Criminal Procedure – Sentence – Accused 2’s counsel arguing that accused 2 shown genuine remorse – Accused not testifying under oath – No genuine remorse shown – Substantial and compelling circumstances – Accused 2’s counsel submitting that personal circumstances of accused 2 viewed cumulatively amount to substantial and compelling circumstances – Personal circumstances cumulatively taken

together with all factors need to be considered – Court not satisfied that substantial and compelling circumstances exist that justify court to depart from imposing sentence less than mandatory minimum sentence.

Summary: Criminal Procedure – Sentence – The accused persons were convicted of rape committed under coercive circumstances contravening section 2 (1) (a) read with sections 1, 2 (2), 3, 4, 6, 7 and 18 of the Combating of Rape Act 8 of 2000. Counsel for accused 2 argued that accused 2 had shown genuine remorse. The court finds that accused persons showed no remorse. None of the accused persons testified under oath in mitigation to show that they were truly remorseful. Furthermore, counsel for accused 2 argued that personal circumstances of the accused cumulatively viewed, constitute substantial and compelling circumstances. The court having considered the accused's personal circumstances cumulatively, together with all the factors that need to be considered when sentencing, is not satisfied that substantial and compelling circumstances exist that justify the court to depart from imposing a sentence less than the mandatory minimum sentence.

SENTENCE

Accused 1, in respect of count 1: Rape contravening s 2 (1) (a) of the Combating of Rape Act 8 of 2000:

18 years' imprisonment.

Accused 2, in respect of count 4: Rape contravening s 2(1) (a) of the Combating of Rape Act 8 of 2000.

18 years' imprisonment.

SHIVUTE J:

[1] Accused 1 was found guilty of count 1 of rape whilst accused 2 was found guilty of count 4 of rape. Both rape counts are committed in contravention of s 2(1) (a) read with sections 1, 2 (2), 3,4,6,7 and 18 of the Combating of Rape Act 8 of 2000.

[2] Both accused persons preferred not to testify in mitigation, but rather elected to provide the Court with some mitigating factors through their counsel from the Bar.

[3] Counsel for accused 1 placed accused 1's personal circumstances as follows: He is 36 years old and a Namibian citizen who was born at Otjorukune village. He had no special skills as he never attended school. However, he worked as a farm labourer in and around Otjorukune where he earned a salary of N\$1000 per month. The accused is single with three children aged 13, 12 and 9. He is no longer in the relationship with the mother of these three minor children. He is staying with the 13 year old boy whilst the other two children are staying with their mother. The accused and the mother of the children were assisting each other to pay towards the school fund for the children. The mother of the children who is a domestic worker will be carrying this burden alone.

[4] The accused is a first offender. The offence was not pre-meditated. The accused and the complainant knew each other and on the day of the incident they socialised with each other. The accused was drunk and this is an aspect of diminished responsibility so, counsel argued. Counsel further argued that the rape committed by the accused person falls within the category of minimum sentence of 10 years in terms of section 3(1) (a)(ii) of the Act, unless the court finds that there are substantial and compelling circumstances. Counsel submitted that accused 1 be sentenced to 10 years' imprisonment of which 4 years are to be suspended.

[5] Personal circumstances of accused 2 were placed before court by his counsel as follows:

He is 32 years old. At the time of the commission of the offence he was 27 years old. He did not attend school and he is unsophisticated. He was employed as a cattle herder and earned a monthly salary of N\$800. He has been married for 3 years and he has three children who are 5 years, 2 years and 7 months respectively. The accused maintains all his three children as well as his wife. He is the breadwinner. The accused is a first offender and according to his counsel, he had shown genuine remorse. The court should further consider that when the offence was committed, the accused was under the influence of alcohol. Counsel for accused 2, like counsel for accused 1, argued that accused 2 should be sentenced in terms of section 3 (1)(a)(ii) of the Act.

[6] It was again counsel for accused 2's argument that, the personal circumstances of accused 2 viewed cumulatively constitute substantial and compelling circumstances as defined by the Act. Counsel urged the court to show mercy on the accused and give him a second chance in life by not sentencing him to a lengthy term of imprisonment but rather impose an appropriate sentence that would enable him to be rehabilitated.

[7] Counsel for the state argued that the personal circumstances of the accused persons cannot weigh up to the seriousness of the offence and the interest of society. The accused persons were in a group of two participating in the commission of the offences. Therefore, when it comes to sentencing the provisions of section 3 (1) (a) (iii) (ee) find application. The appropriate penalty provision, prescribes a period of not less than 15 years imprisonment, unless substantial and compelling circumstances are established that may justify a departure from imposing the prescribed minimum sentence.

[8] Counsel for the state argued that the court should consider the aggravating factors against the accused persons to wit:

- (i) The victim who is now deceased, was more than ten years senior to the accused persons. She was a woman and physically weak. The victim was drunk

at the time of the incident. The victim was a sister-in-law to accused 1. Accused 1 was supposed to protect her.

(ii) The victim was assaulted as per witnesses' evidence and struggle marks were found at the scene. She was further left in the open field where she was found the following day.

(iii) Law makers view this offence in a serious light and put stringent measures in place by coming up with mandatory sentences.

(iv) It was further counsel's argument that where a victim is raped by more than one offender, the offender's blameworthiness is greater than where a victim is raped by one person. This affects the sentence to be imposed as the sentence must fit the crime. Where two accused persons are involved and no substantial or compelling circumstances exist, the sentence ought to be higher than the prescribed minimum sentence of 15 years. Counsel argued that in the present matter there are no substantial and compelling circumstances placed before this court. Therefore, each accused should be sentenced to 20 years' imprisonment.

[9] Defence counsel as well as counsel for the state referred me to authorities which I have considered.

[10] Although the accused persons are first offenders, it is indisputable that they committed extremely serious offence of rape. In addition, to the seriousness of the offence of rape it has become significantly more prevalent in this jurisdiction. Although counsel for accused 2 said accused 2 had shown genuine remorse, this argument is unsubstantiated as none of the accused persons showed any remorse. They did not testify in mitigation to show that they were truly remorseful. It is an understatement to say that the accused persons violated the victim's right to privacy and dignity.

[11] It was also argued on behalf of accused 2 that his personal circumstances viewed cumulatively, constitute substantial and compelling circumstances. Therefore, it is necessary to consider the legal principles regarding this subject.

[12] 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 the guiding principles in determining what are substantial and compelling circumstances in rape matters, that may call for the deviation from the mandatory minimum sentences prescribed under section 3 of the Combating of Rape Act.

These include *inter alia*:

(a) The minimum prescribed sentence is not to be departed from lightly or for flimsy reasons;

(b) For circumstances to be substantial and compelling, they must be such as cumulatively to justify a departure from the standardized response chosen by the legislature;

(c) 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;

(d) A court ought to consider the facts traditionally measured in sentencing;

(e) There are no prescribed circumstances defined as substantial and compelling circumstances, each case should be considered on its own facts.'

[13] This court in determining whether there are substantial and compelling circumstances present, will take into consideration the above mentioned principles together with all other factors relevant to sentencing.

[14] Having discussed the personal circumstances of the accused persons as well as what may constitute substantial and compelling circumstances, it is time now to reflect on the nature of the crime for which the accused persons stand convicted of as well as the interest of society. It is undoubtedly so, that the accused persons committed serious offences of rape that were committed under coercive circumstances as described by counsel for the state. The complainant was raped by more than one person. She was also under the influence of intoxicating liquor. Therefore, the sentence applicable in this case is not less than 15 years' imprisonment as prescribed by section 3(1) (a) (iii) (ee) if no substantial and compelling circumstances exist.

[15] With regard to the interest of society, the society looks upon the Court to impose appropriate sentences. If the Court fails to exercise its discretion judiciously society may take the law into its own hands. Society requires the Court to protect its members, especially vulnerable people that include women and children. If sentences for serious crimes are too lenient, the administration of justice may fall into disrepute.

[16] Taking into account all the relevant factors that need to be considered when sentencing, I did not find any substantial and compelling circumstances that justify this court to depart from imposing a sentence less than the mandatory minimum sentence.

[17] In sentencing the accused persons, this court is alive to their personal circumstances. They did not exercise mercy on their victim and they have no respect for women of this land.

[18] Consequently, the accused persons are sentenced as follows:

Accused 1, in respect of count 1: Rape contravening s 2 (1) (a) of the Combating of Rape Act 8 of 2000:

18 years' imprisonment.

Accused 2, in respect of count 4: Rape contravening s 2(1) (a) of the Combating of Rape Act 8 of 2000.

18 years' imprisonment.

NN Shivute
Judge

APPEARANCES:

THE STATE:

Ms Shikerete
Office of the Prosecutor-General

FIRST ACCUSED:

Mr Tjituri
(Of Tjituri Law Chambers)
Instructed by the Directorate of Legal Aid

SECOND ACCUSED:

Mr Andreas
(Of Andreas Hamunyela Legal Practitioners)
Instructed by the Directorate of Legal Aid