



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

SENTENCE

Case no: CC 07/2011

In the matter between:

THE STATE

and

KUNOWEE KAUMA

ACCUSED

Neutral citation: *The State v Kauima* (CC 07/2011) [2013] NAHCNLD 35 (20 June 2013)

Coram: TOMMASI J

Heard: 19 , 26 March 2013, 2 April 2013, 23 May 2013

Delivered: 20 June 2013

Flynote: Criminal procedure - Sentence-Factors to be taken into account - Fact that accused has spent time in custody awaiting finalization of trial important mitigating fact - Sentencing court must take such period of custody into account when imposing sentence – Youthfulness – Not all youthful offenders act impulsively – Each case has to be determined on own merits – Substantial and compelling circumstances – although same exist the weight of the other factors considered and the court deemed it appropriated to deviate marginally from the prescribed minimum.

Summary: The accused had raped the complainant who was 4 years and 11 months old at the time by having inserted his penis into her anus. Although the court

could not conclude from the evidence that the complainant suffered permanent injuries the court took into consideration that the complainant had suffered injuries at the time and experienced excruciating pain when the accused raped her. The accused showed no sign of remorse. The accused was 18 years old at the time and was a first offender. He spent 2 years and 7 months in custody awaiting the finalisation of the trial. The court held that his youthfulness, the fact that he is a first offender and the period detained are substantial and compelling. The court however, in view of the gravity of the offence and the legitimate expectations of society deemed it appropriate to deviate marginally from the prescribed minimum sentence. The accused sentenced to 13 years' imprisonment.

ORDER

The accused is sentenced to 13 years' imprisonment.

JUDGMENT

TOMMASI J:

[1] The Accused had been convicted of rape read with provisions of the Combating of Rape Act, 8 of 2000. He was found to have committed a sexual act by inserting his penis into the anus of the complainant under coercive circumstances i.e that the complainant was under the age of fourteen years and he was more than three years older than her. The complainant was 3 years and 11 months old and the accused 18 years and 7 months old years at the time he committed the offence.

[2] The State led the evidence of the complainant's grandmother in aggravation. Her testimony may be summarised as follow: The complainant was in her care from a very young age. Before this incident she sent the complainant to live with her aunt because they were experiencing food shortages as a result of the drought. The complainant returned to her care after she was raped. It was very painful for her that her granddaughter had been raped and to see the effect it had on her. The complainant has difficulty controlling her stools, complains of stomach and headaches; and has fainted on a few occasions. She had taken her to clinics and although tests were performed they were unable to tell her what was wrong with the complainant. She had taken her to the traditional priest and had to fork out N\$500 as a fee and she paid N\$440 for transport. She is unable to afford private medical care. The accused never apologised and his family did not pay any compensation. Her main concern was that the complainant was in need of proper medical treatment. She was decidedly unhappy about the fact that she had received no assistance whatsoever from the accused or his family to pay for the medical treatment of the complainant.

[3] I am unable to conclude from the above evidence that the rape was the cause of the current complaints. However medical evidence was adduced that the complainant suffered lacerations to her anus and a superficial tear into the rectum. Evidence was adduced that the complainant's screams could be heard from a distance and this is a clear indication that the complainant must have suffered excruciating pain during penetration. It is not unlikely that such trauma would leave lasting physical discomfort.

[4] The accused testified under oath in mitigation. He, at the time of the incident, resided in Ongama and took care of his father's cattle. He is one of seven children. Six of his siblings are living elsewhere whilst he and his younger brother still lives with their father. He is not married and does not have any children. He attended school up to grade 5.

[5] He testified that he was diagnosed with having a smaller than normal brain (brain atrophy). This sometimes affects his speech. He was however unable to produce the medical record in which this diagnosis was recorded. The court ordered the accused to be examined by a medical doctor. A medical report was handed into evidence with no objections either to its admissibility or the contents thereof. The following findings were recorded: "No surface collection, no intracranial lesion observed, no abnormal meningeal enhancement, no abnormal calcification. Normal bones and soft tissue. No brain atrophy. Ventricle and *sulci* are patent. In conclusion No abnormalities detected, Normal examination." I am satisfied that the accused does not suffer from brain atrophy. He also complained of painful legs but testified that he was taken to hospital and was receiving medication.

[6] The accused is a first offender. The accused was held in custody awaiting the finalisation of the trial for a period of 2 years and 7 months.

[7] The minimum sentence prescribed by s3(1) of the Combating of Rape Act, 8 of 2000 is 15 years. The court may impose a lesser sentence if there are substantial and compelling circumstances. Section 3(3) of the Act provides that the minimum sentences prescribed in subsection (1) shall not be applicable in respect of a convicted person who was under the age of eighteen years at the time of the commission of the rape and the court may in such circumstances impose any appropriate sentence.

[8] Ms Mainga, counsel for the accused, urged the court to consider the youthfulness of the accused and the period he was detained in custody awaiting the finalisation of his trial as substantial and compelling circumstances. Mr Wamambo conceded that the accused was "a borderline case" i.e he had turned 18 seven months prior to the incident. The legislator recognized that "..., irresponsibility is more often a characteristic of the youth than it is of adults. This is so because a youthful person often lacks maturity, insight, discernment and experience and, therefore, acts in a foolish manner more readily than a mature person."¹ It is for this reason differential treatment is prescribed for perpetrators below the age of 18 years. Not all youthful offenders

¹S v ERICKSON 2007 (1) NR 164 (HC) at page 166 para 5

however are the same and the court has to consider the offender before it and the manner in which the crime was committed.

[9] The accused was living in harmony with his family and was a trusted member of the complainant's family. He took the opportunity when the children were left without supervision. He cowardly chose the complainant whose resistance he would easily overcome and subjected her to anal penetration which caused her excruciating pain. There was nothing impulsive and immature about his behaviour. It was calculated and brutal. He had no regard for the excruciating pain he was causing the complainant or her vulnerability. He further showed no sign of remorse. He considered it "bad luck" that he was pointed out as the perpetrator. He held the view that he should have escaped being held accountable because there was no direct or medical evidence which implicated him. Notwithstanding this, the court cannot rule out the possibility that he may reform considering his youthfulness and the fact that he is a first offender. Custodial sentence would adequately provide the accused with the opportunity to reform.

[10] It is trite that the period which the accused had been detained awaiting the finalisation of his trial should be taken into consideration and in most instances this would lead to a reduction in the sentence.² The period of incarceration of the accused whilst awaiting the finalization of his trial has been considerable and I am satisfied that this should result in a reduction of his sentence.

[11] The accused was convicted of a serious and very prevalent offence. It is an aggravating factor that he was a family member who had abused his family's and the complainant's trust. Children should feel safe within their home environment and the accused violated the complainant's sense of security. She was very young and defenceless and this weighs heavily as an aggravating factor. The accused effectively robbed this young girl of a childhood.

[12] It has become commonplace in our society to hear of this form of brutality against children. Children in our society are subjected by offenders such as the

²S v KAUZUU 2006 (1) NR 225 (HC)

accused to cruel, inhuman and degrading treatment and they have no respect for their dignity. Despite severe sentences being prescribed by legislation and imposed by the courts, rape of young children continues unabated. Society calls for even stiffer sentences to be imposed by the courts hoping that this would deter would be offenders and offer protection from those who have offended. Members of society publicly voice their anger and seek retribution against perpetrators of crimes against vulnerable members of society.

[13] The court has to carefully weigh the mitigating factors and the aggravating factors when determining whether there are substantial and compelling circumstances. The court further has to have regard to offence committed, the personal circumstances of the accused and the interest of society bearing in mind the objectives of sentencing. Having had due regard to the above I am of the view that the following constitute substantial and compelling circumstances: the fact that the accused is a first offender, his youthfulness and his lengthy incarceration whilst awaiting the finalisation of his trial. Having concluded that there are substantial and compelling circumstances, the court may impose a lesser sentence. I deem it appropriate however to only marginally deviate from the prescribed minimum sentence in view of the gravity of the offence and the legitimate expectations of society.

[14] In the result the following sentence is deemed to be appropriate:

1. The accused is sentenced to 13 years' imprisonment. .

MA Tommasi
Judge

APPEARANCES

THE STATE :

Mr Wamambo

Office of the Prosecutor-General, Oshakati.

ACCUSED:

Ms Mainga, Oshakati

Instructed by the Directorate of Legal Aid