

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

APPEAL JUDGEMENT

Case no: HC-NLD-CRI-APP-CAL-2019/00066

In the matter between:

**LAAMEKA HAUFIKU MOSES**

**APPELLANT**

**V**

**STATE**

**RESPONDENT**

**Neutral citation:** *Moses v S* (HC-NLD-CRI-APP-CAL-2019/00066) [2019] NAHCNLD 111 (20 August 2020)

**Coram:** JANUARY J *et* SALIONGA J

**Heard:** 16 July 2020

**Delivered:** 20 August 2020

**Flynote:** Criminal Procedure – Appeal against sentence – Rape Act 8 of 2000 – Complainant 15 years old – Minimum mandatory sentences- Failure to explain the concept of substantial and compelling circumstances irregular – Guidelines including

explaining coercive circumstances not followed – Appeal against sentence upheld--  
Remitted back for sentence.

**Summary:** The appellant was convicted of Rape in terms of the Combating of Rape Act, 8 of 2000 and sentenced to 15 years imprisonment. He appeals against the sentence imposed. The court found that the minimum prescribed sentences, notion of substantial and compelling circumstances were not explained to an unrepresented accused. This court had on numerous recent cases emphasized that where accused is charged in terms of a specific statute that he/she be made aware of the sentencing provision of that statute. Misdirection occurred where the sentencing guidelines were not complied with.

*Held that;* accused is entitled to be informed of the applicable mandatory minimum sentences.

*Held further that;* the notion of substantial and compelling circumstances should have been explained before sentencing. The matter is remitted to the Magistrate to comply.

---

### ORDER

---

In the result the following order is made;

1. The appeal against sentence is upheld and the sentence is set aside.
2. The matter is remitted back to the Magistrate in order to explain the minimum sentences, substantial and compelling circumstances and coercive circumstances and comply with the guidelines set out above.
3. The period already served should also be considered when sentencing the appellant afresh.

---

## JUDGMENT

---

SALIONGA J (JANUARY J concurring):

### Introduction

[1] The appellant was convicted in the Regional Court at Eenhana on a charge of Rape in contravention of section 2(1) (a) of the Combating of Rape Act, (Act 8 of 2000). He was subsequently sentenced to 15 years imprisonment on 3 October 2018.

[2] Dissatisfied with the sentence imposed appellant filed a notice of appeal on 21 November 2018. The notice of appeal was filed out time and Appellant simultaneously filed an application for condonation as required by the Rules which the Respondent did not oppose. The appellant conducted his own defense during the appeal and the state was represented by Ms. Petrus.

### Grounds of appeal

[3] The grounds of appeal have been drafted in layman's language and can be summarized as follows:

1. 'The magistrate erred by not considering the appellant personal circumstances through his mitigation.
2. The appellant have two kids, a daughter who is two months old and a son who is 3 years old. They all need general father assistance as each and every one Namibian citizen child needs support from a biological father.
3. The mother of two kids is unemployed and the appellant is the only bread winner by doing hard work.
4. We were both underage, so we don't know what we were doing.'

### Application of the law

[4] As mentioned earlier the Respondent did not oppose the Appellant's application for condonation and therefore the court proceeded to hear the merits of the appeal. From the variety aforesaid grounds of appeal raised, the Respondent submitted that the only ground related to sentence is that the court erred by not considering his personal circumstances and that a minimum and affordable fine or reduction in sentence should have been considered.

[5] This court is mindful of the fact that a notice of appeal constitute the essence and a core of an appeal. It informs the court and interested parties of what exactly is being appealed against. This court has on many occasions emphasised the requirements for clear and specific grounds of appeal and the importance of a proper and complete notice of appeal.

[6] Ms Petrus submitted that although in this appeal no proper grounds were raised and the personal circumstances of the appellant were explained in a court a quo, this appeal ought to succeed because the notion of substantial and compelling circumstances was not explained to the Appellant upon being convicted and before passing of sentence for him to address the court in that regard. She further submitted that the court a quo also failed to explain to the Appellant the type of crime appellant was facing in terms of the Minimum sentence to be imposed as prescribed by the Combating of Rape Act, Act 8 of 2000.

[7] An accused person has a right in terms of the constitution where he is charged in terms of a specific statute to be informed in sufficient detail of the charge he is to answer and to be made aware of the sentencing provision of that statute. The benefit here is to ensure that the accused is not misled into believing that the state is relying on a different sentencing regime. This should be the norm especially for unrepresented accused. In this instance I am persuaded by the finding in *S v Ndlovu* 2003 (1) SACR

331 (SCA) at para 12 'where the State intends relying upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the onset of the trial, if not in the charge sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences'.

[8] In most instances mandatory sentences would seem to emphasize punishment and deterrence without having due regard to the principle of individualization of sentences. It is for this very reason that the notion of substantial and compelling circumstances always accompanies mandatory minimum sentences in order to ensure that there is a balance in achieving the objects of sentencing in a constitutional state.

[9] Therefore with the introduction of the Combating of Rape Act, Act 8 of 2000, section 3(2) was enacted to regulate the manner in which such mandatory minimum sentence are to be imposed by the courts. This section provides that 'if a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the applicable sentence prescribed in section (1), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.'

[10] In giving effect to the provisions of the Act, this court in *S v Gurirab* 2005 NR 510 (HC) at pages 517G-J to 518A-F, found it fit to set guidelines to be followed in sentencing in rape matters as follows.

'I am of the view that to assist magistrates, the following guidelines should be implemented in respect of the Combating of Rape Act, 2000:

1. at least after the accused has been convicted, the accused should be informed which provisions of the Act are applicable for purposes of a specific minimum prescribed sentence and on which specific facts the State relies for that purpose;
2. at least, the following should then be stated to the accused:

- 2.1 it must be pointed out to the accused that as a result of the fact that he had been found guilty of the offence of Rape under coercive circumstances (the coercive circumstances must be mentioned and explained) and that unless the court finds that substantial and compelling circumstances exist which would justify a lesser sentence, the court will have to impose at least a period of imprisonment of (the term of this minimum imprisonment must be specified);
- 2.2 it must be explained to the accused that if the court is satisfied that his particular circumstances render the minimum prescribed sentence unjust, in that it would be disproportionate to the crime, the accused's personal circumstances and the needs of society (so that an injustice would be done by imposing the minimum prescribed period), the court will be entitled to impose a lesser sentence;
- 2.3 it must be explained to the accused that this type of crime has been singled out by the Legislator for severe punishment and that the minimum prescribed sentence is not to be departed from lightly or for flimsy reasons, but that the court will take it into consideration all facts and factors the accused will advance in order for the court to come to a just conclusion. As usual, it must be pointed out that the accused may make statements from the dock, or that he may testify under oath. If he testifies under oath the State will be again entitled to cross-examine him, but more weight may be attached to what he says under oath. It should also be emphasized that he may call witnesses to testify on his behalf;

[11] In addition to the aforesaid guidelines, this court had in numerous recent cases emphasized the importance of complying with section 3(2) in the following judgements; *Awarab v S* (HCNLD-CRI-APP-CAL-2018/00024) [2019] NAHCNLD 43 (23 April 2019), *Zeronimo v S* (HC-NLD-CRI-APP-CAL- 2019/00011) [2020] NAHCNLD 57 (26 May 2020) and *Shanghala v S* (HC-NLD-CRI-APP-CAL-2019/00055) [2020] NAHCNLD 39 (12 March 2020) with reference to *S v Limbare 2006 (2) NR 505 (HC)* and *S v Gurirab 2005 NR 510 (HC)*. Rightfully so, the court should only impose minimum sentences after a proper enquiry was made.

[12] I agree with Ms. Petrus that the court a quo was under a duty to explain the concept of substantial and compelling circumstances to the appellant during the

proceedings and in the absence of anything indicating that same were explained it cannot be said that the appellant received a fair trial. It is imperative that the accused be assisted during this process. The judicial officer should have played an active role and properly advise the unrepresented appellant. The accused must be made aware of minimum sentences to enable him to properly mitigate before sentence.

[13] Construing from the number of appeal cases handled by this court in the Northern Local Division; it is apparent that the Regional courts have not yet appreciated the impetus that comes from the cited cases. The nature of mandatory minimum sentences is that they are peremptory and must be complied with. They can only be deviated from if so authorized by the specific statutes that created them. If the magistrate is aware of any reason why minimum prescribed sentences should not be imposed he/she should inform the parties about it, and give them an opportunity to address him on such issues.

[14] In our view, failure to follow the guidelines including failure to comply with section 3 (2) of the Act is material misdirection that calls for the appeal court to interfere with a sentence. For ease reference I have included in this judgement a pro-forma annexure which should be used in making sure that the above guidelines are adequately explained to the accused. This annexure should however not limit the Magistrates explanation in getting accused to understand the proceedings.

[15] In the result the following order is made:

1. The appeal against sentence is upheld and the sentence is set aside.
2. The matter is remitted back to the Magistrate in order to explain the minimum sentences, substantial and compelling circumstances and coercive circumstances and comply with the guidelines set out above.

3. The period already served should also be considered when sentencing the appellant afresh.

---

J SALIONGA

JUDGE

I agree

---

H JANUARY

JUDGE



## APPEARANCES:

For the Appellant:

Mr L H Moses (In person)  
Oluno Correctional Facility,  
Ondangwa

For the Respondent

Ms S Petrus  
Prosecutor General Office-  
Oshakati

## ANNEXURE

CASE NO: RC \_\_\_\_\_

The State versus \_\_\_\_\_

Explanation in terms of section 2 and 3 of the Combating of Rape Act, 8 of 2000  
(Regional Courts)

1. Take note of the following explanation in terms of the above sections;
  - 1.1 As a result of the fact that you have been found guilty of the offence of Rape under coercive circumstances **(the Magistrate should mention, explain and record the applicable coercive circumstances present)**;
  - 1.2 And that unless the court finds that substantial and compelling circumstances exist, the court will have to impose the minimum prescribed period of imprisonment **(the Magistrate should specify the applicable term of minimum imprisonment)**;
2. Also that if the court is satisfied that your particular circumstances are substantial and compelling **(the Magistrate should explain what these circumstances are)** the court will be entitled to impose a lesser sentence;
3. Take further notice that this type of crime has been singled out by the Legislator for severe punishment and that the minimum prescribed sentence is not to be departed from lightly or for flimsy reasons, **(If the magistrate is aware of any**

**reason why minimum prescribed sentences should not be imposed he/she should inform the parties about it, and give them an opportunity to address him on such issues)** but that the court will take into consideration all facts and factors that you will advance in order for the court to come to a just conclusion;

4. You are therefore entitled to address the court on the aforesaid explanation in mitigation, you may do this by making statements from the dock or that you may testify under oath. If you testify under oath the State will be entitled to cross-examine you, consider that more weight may be attached to what you say under oath. You should also know that you still have a right at this stage to call witnesses to testify on your behalf who will also be cross-examined by the State.

Q. Do you understand the above explanation?

A. \_\_\_\_\_

Q. What is your choice?

A. \_\_\_\_\_

Q. Do you have any witnesses?

A. \_\_\_\_\_

\_\_\_\_\_  
**SIGNATURE OF ACCUSED**

\_\_\_\_\_  
**DATE**

