

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

APPEAL JUDGEMENT

<b>Case Title:</b> The State v Itana Sakaria	<b>Case no.:</b> HC-NLD-CRI-APP-SNA-2023/00001
	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Mr Justice Munsu J et Honourable Mr Justice Kessler J	<b>Heard on :</b> 30 June 2023 <b>Delivered on:</b> 3 November 2023
<b>Neutral citation:</b> <i>S v Sakaria</i> (HC-NLD-CRI-APP-SNA-2023/00001) [2023] NAHCNLD 118 (3 November 2023)	
<b>The order:</b>  <ol style="list-style-type: none"><li>1. The point <i>in limine</i> is dismissed.</li><li>2. The appeal succeeds.</li><li>3. The sentence is set aside and in terms of s 322 of the CPA substituted with a sentence of 10 (ten) years' imprisonment.</li><li>4. The Respondent is to report at the Evaristus Shikongo Correctional Facility, Tsumeb on 20 November 2023 before 17h00.</li></ol>	

**Reasons for the order:**

KESSLAU J (MUNSU J concurring)

Introduction

[1] The Respondent was convicted in the Regional Court sitting at Tsumeb on a charge of Rape in contravention of s 2 (1) of the Combating of Rape Act 8 of 2000 (the Act), read with s 94 of the Criminal Procedure Act 51 of 1977 as amended (CPA). The accused at the time was the class teacher of the complainant who was 13 years old and in Grade 7. The offences were committed on several occasions.

[2] During sentencing the Magistrate found that there were compelling and substantial circumstances present and imposed a sentence of ten years imprisonment wholly suspended for a period of five years with the usual conditions attached thereto.

[3] The State applied for leave to appeal against the sentence imposed which application was granted.<sup>1</sup>

[4] The grounds on which leave to appeal was granted reads:

'1. That the learned magistrate erred in law by imposing a sentence of 10 years' imprisonment wholly suspended in the circumstances where the prescribed minimum sentence in terms of section 3 (1)(a) (iii)(bb) and (cc) of the Combating of Rape Act 8 of 2000 is not less than 15 years imprisonment.

2. The learned magistrate erred in law or facts when he elevated the personal circumstances and or mitigating factors of the Respondent: ill health, being a sole breadwinner, having partially orphaned children, remorse and being a first offender to compelling and substantial circumstances without viewing them against the background of the following aggravating factors:

- 2.1 That he committed the offense over a period of diverse occasions;
- 2.2 He was in a position of thrust and authority over the victim;
- 2.3 He impregnated the complainant at a very young age;
- 2.4 The complainant was vulnerable by virtue of her age;

<sup>1</sup> *S v Sakaria* (HC-NLD-CRI-APP-SLA-2022/00016 [2022] NAHCNLD 131 (21 December 2022))

2.5 Seriousness and prevalence of the offence.

3. The learned Magistrate misdirected himself when considering the lack of physical force and injuries as a compelling and substantial factor.

4. The learned Magistrate misdirected himself when he imposed an incompetent sentence by applying s 3(4) of the Act which induces a sense of shock.'

Point in limine

[5] Mr Aingura for the respondent raised a point *in limine* that the present appeal is not properly before court because the appellant neglected to file the notice of appeal with the clerk of court after being granted leave to appeal. The argument is anchored on s 310(6) of the CPA which provides that an appeal of this nature is subject to the provisions of s 309. Counsel argued that under s 309, an appeal of this kind must be prosecuted in the manner prescribed by the rules of court, and that under rule 67, the appellant must lodge the notice of appeal with the clerk of court within 14 days after the decision appealed against.

[6] Mr Aingura emphasised that an application for leave to appeal is different from the appeal itself. Counsel submitted that the notice of appeal need only be submitted to the clerk of court once leave to appeal is granted. Additionally, counsel argued that an appeal is only noted once the notice of appeal is received by the clerk of court. It seems common cause in this matter that, upon being granted leave to appeal, the appellant served the notice of appeal on the respondent's legal practitioner of record instead of filing it with the clerk of court. For this reason, Mr Aingura submitted that the appellant did not comply with the law, thereby necessitating the striking of the appeal.

[7] Ms Nghiyoonanye for the appellant explained the steps which were followed in this matter. She stated that after the sentencing of the respondent by the court *a quo*, the appellant, on 23 December 2021 filed a notice of an application for leave to appeal with the Registrar of this court. Upon the Registrar issuing the notice of leave to appeal, the appellant forwarded same, along with a letter instructing the clerk of court to prepare the record of proceedings for purposes of the application for leave to appeal. The trial magistrate was prompted by the notice for leave to appeal to provide reasons. Counsel further submitted

that after leave to appeal was granted, the notice of appeal was served on the respondent's legal practitioner. It was counsel's submission that there is no basis in law for the appellant to 'go back to the clerk of court and file the notice of appeal'.

[8] A reading of s 310(6) of the CPA confirms that, once leave to appeal is granted, the rules relating to appeals from the lower court by a person convicted (s 309) find application to an appeal by the State.

[9] It was not the respondent's argument that he was prejudiced by the manner in which the appellant prosecuted the appeal. In fact, counsel for the respondent submitted that he was not raising any issue relating to fairness or otherwise of the proceedings but rather that the appellant did not comply with the law, on which basis he moved for the striking of the appeal.

[10] In my opinion, the appellant substantially complied with the provisions of the law. The respondent's legal practitioner received the notice of appeal served on him. The trial magistrate provided a statement, although prematurely, but he did not have to provide one once leave was granted. Accordingly, I find that the respondent was not prejudiced in the process. For these reasons, the point *in limine* is academic and stands to be dismissed.

#### The law applicable

[11] It is trite law that a court of appeal is only entitled to interfere with a sentence if: the trial court misdirected itself on the facts or on the law; an irregularity which was material occurred during the sentencing proceedings; the trial court failed to take into account material facts or that it over emphasized the importance of other facts or; the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal.<sup>2</sup>

[12] The term 'substantial and compelling circumstances' has been discussed at length in

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<sup>2</sup> *S v Tjiho* 1991 NR 361 (HC) at 366 A-B.

various cases. It was established that the factors usually considered in mitigation of sentence may, depending on their cumulative effect, qualify as substantial and compelling circumstances as to allow for the court to deviate from the minimum prescribed sentence.<sup>3</sup>

[13] In that regard the following was stated in *S v Gemeng and other*<sup>4</sup> :

'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.'

[14] Both counsel are *ad idem* that, considering the facts of the matter and before substantial and compelling circumstances were found by the magistrate, the applicable sentence according to the penalty clause provided for in terms of s 3 (1)(a)(iii)(bb) and (cc) of the Combating of Rape Act 8 of 2000 was a minimum term of imprisonment of 15 years.

[15] Section 3 of the Act deals with the penalties provided for and the parts relevant to this appeal states:

'3. (1) Any person who is convicted of rape under this Act shall, subject to the provisions of subsections (2), (3) and (4), be liable -

<sup>3</sup> *S v Kangulu* (CA 09-2007) [2012] NAHC 33 (17 February 2012); *S v Kuhlewind* (CC 13/2010) [2011] NAHCMD (11 October 2011); *S v Libongani* (SA 68-2013) [2015] NASC (18 March 2015) at par 20.

<sup>4</sup> *S v Gemeng & 1 Other* (CC 20/2016) [2022] NAHCMD 214 (26 April 2022).

(a) in the case of a first conviction -

(i) . . . ;

(iii) where -

(aa) . . . ;

(bb) the complainant -

(A) . . . ;

(B) is by reason of age exceptionally vulnerable;

(cc) the complainant is under the age of eighteen years and the perpetrator

is the complainant's parent, guardian or caretaker or is otherwise in a

position of trust or authority over the complainant;

. . . to imprisonment for a period of not less than fifteen years;'

[16] Section 3 (2) furthermore states 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 subsection (1), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.'

[17] Section 3 (4) deals with the imposition of suspended sentences and states that:

'If a minimum sentence prescribed in subsection (1) is applicable in respect of a convicted person, the convicted person shall, notwithstanding anything to the contrary in any other law contained, not be dealt with under section 297(4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) . . . '

(Emphasis added).

### Discussion

[18] The first three grounds of appeal raised all have the same subject matter, being the alleged misdirection by the magistrate to find substantial and compelling circumstances and for purposes of this judgment, will be considered simultaneously.

[19] The court *a quo* noted the following factors that were found to be cumulatively sufficient to deviate from the penalty clause as being the respondent's ill health; him being the sole breadwinner with nine dependants; some of these dependants being orphaned; no physical violence used during the rape, no threats or weapons used in the commission of the

offense; the victim was a willing partner; no physical injuries sustained; remorse shown by the respondent; his apology to the family and the victim and; being a first offender.

[20] The Magistrate considered the cumulative effect of all the personal circumstances together with the request by the victim in the matter for a lenient sentence and found compelling circumstances exist. The magistrate was best positioned to make this decision having the benefit of being in the environment of which the evidence was presented and being able to observe the demeanour of witnesses. Furthermore considering that substantial and compelling circumstances might be different in each case, this court will not interfere with that finding and on that basis the first three grounds of appeal are dismissed.

[21] I will now consider the last ground of appeal in that the magistrate erroneously applied s 3(4) of the Act and suspended the entire sentence which resulted in a shockingly inappropriate sentence. Section 3(4) is clear that it is only applicable if a minimum prescribed sentence in subsection (1) is applicable in respect of a convicted person. Having found substantial and compelling circumstances being present, the minimum prescribed sentence was no longer applicable and the Magistrate was allowed to suspend the sentence in terms of s 297 of the CPA. The result however led to a shockingly inappropriate and lenient sentence.

[22] The respondent was in a position of trust being the teacher of the victim who was, due to her age, exceptionally vulnerable. The result of the wholly suspended sentence was that the respondent returned to his employment as teacher with access to the same group of vulnerable learners. The sentence gravely deviated from sentences imposed in similar cases and the principle of consistency in sentencing is absent.<sup>5</sup>

[23] The Magistrate overemphasised the element of mercy at the expense of the administration of justice and the personal circumstances of the respondent overshadowed the serious nature of the offense. This resulted in a sentence that amounted to a failure of

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<sup>5</sup> *S v Libonga* (Supra); *Nghuulondo v The State* (CA 04/2013) [2016] NAHCNLD 6 (12 February 2016); *S v Gemeng and others* (supra); *Tomas v The State* (CA 39/2016) [2017] NAHCNLD 21 (28 March 2017); *S v Kauima* (CC 7/2011) [2013] NAHCNLD 35 (20 June 2013); *Muhongo v S* (CA 12/2014) [2012] NAHCNLD 17 (7 March 2016).

justice. The appeal is upheld on this ground and it follows that this court will interfere with the sentence imposed and is entitled to do so in terms of s 322 of the CPA.

[24] In the result it is ordered:

1. The point *in limine* is dismissed.
2. The appeal succeeds.
3. The sentence is set aside and in terms of s 322 of the CPA substituted with a sentence of 10 (ten) years' imprisonment.
4. The Respondent is to report at the Evaristus Shikongo Correctional Facility, Tsumeb on 20 November 2023 before 17h00.

<b>Judge(s) signature</b>	<b>Comments:</b>
Kessler J:	None
Munsu J:	None
<b>Counsel:</b>	
<b>Appellant</b>	<b>Respondent</b>
M Nghiyoonanye Of Office of the Prosecutor General, Oshakati	S Aingura Of Aingura Attorneys, Oshakati