CASE NO.: SA 15/2002

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE APPELLANT

And

JOHNY HOAëB RESPONDENT

CORAM: STRYDOM, ACJ, O'LINN, AJA *et* MTAMBANENGWE, AJA

Heard on: 08/04/2004.

Delivered on: 08/09/2004

APPEAL JUDGMENT

STRYDOM, ACJ: The respondent, a 38 year old Namibian Citizen, was charged in the High Court with murder (Count 1), attempted murder (Count 2), assault with the intent to do grievous bodily harm (Count 3) and rape (Count 4). All the charges relate to actions by the respondent on the night of 9 September 2000 at Orwetoveni township, Otjiwarongo. During the night the respondent returned to the shack where he, the complainant on the second Count, CG, and the 9 months old son of the respondent and CG lived. On the way to his house the respondent met the complainant on the 3rd and 4th Counts, MG, a younger sister of CG, and forced her to accompany him to his house. At his house he immediately started to assault CG and when the baby cried he picked him up and threw him out of the house. Thereafter he continued his assault on CG

during which he used various weapons such as a spear, a piece of wood and a pick handle. During the assault CG was twice stabbed by the respondent with the spear. Both wounds had to be stitched. Although there was evidence that the infant boy was thrown to the ground on more than one occasion the Court *a quo* found that this happened at least once. The Court made this finding because the evidence of CG and MG differed on this aspect.

The Court also found in respect of MG that she was assaulted by the respondent and that he had sexual intercourse with her against her will. This took place in the presence of CG.

The findings of the Court was made on the versions of the State witnesses. The Court was alive to certain discrepancies and conflicts in the evidence of CG and MG and, after a proper analyses of the evidence, came to the conclusion that most of the differences were not material. The respondent, who was legally represented, elected not to give evidence, or call witnesses.

In the end the respondent was convicted as follows:

On Count 1 the respondent was convicted of murder. In this regard the Court *a quo* found that the respondent acted with *dolus eventualis.* On Count 2 the respondent was convicted of assault with the intent to do grievous bodily harm. In regard to Count 3 the respondent was convicted of assault and on Count 4 he was convicted of rape.

The Court *a quo* sentenced the respondent to twelve years imprisonment on the conviction for murder. The sentence on Count 2 was three years imprisonment. In regard to MG the respondent was sentenced to six months imprisonment on Count 3 and to ten years imprisonment on Count 4, i.e. the conviction for rape.

However, the Court then ordered that the sentences imposed in regard to Counts 2, 3 and 4 should run concurrently with the sentence imposed on Count one. The result of this was that the effective term of imprisonment imposed was twelve years. The appellant, the State, was not satisfied with the sentences, more particularly the order by the Court *a quo* that the sentences imposed in respect of Counts 2, 3 and 4 should run concurrently with that imposed on Count 1. The appellant consequently applied for leave to appeal against the sentences which leave was granted by the learned Judge *a quo.*

Mr. Potgieter represented the appellant and Ms. Hamutenya appeared for the respondent at the request of the Court. The Court hereby expresses its appreciation for the assistance given in this matter by Ms. Hamutenya.

Both Counsel agreed that it was settled law that the Court *a quo* has an unfettered discretion when it comes to the imposing of a sentence at first instance. They were furthermore agreed that a Court of Appeal will only interfere with the sentence should it find that the sentence imposed is not a reasonable one, or where the discretion has not been judiciously exercised in the sense that the sentence imposed is startlingly inappropriate or induces a sense of shock or is such that a striking disparity exists between the sentence

imposed by the trial Court and that which the Court of Appeal would have imposed had it sat in first instance. (See *S v Shikunga and Another,* 1997 NR 156 (SC) 173 B-F; *S v Shapumba,* 1999 NR 342 (SC) 344J-345A and *S v Gaseb and Others,* 2000 NR 139 (SC) 167 G-I). A further ground on which a Court of Appeal will be competent to interfere with a sentence imposed in first instance is where such Court misdirected itself on the law or facts to such an extent that it can be said that the Court exercised its discretion unreasonably or improperly. (See *S v Pillay,*1977 (4) SA 531 (A)).

Mr. Potgieter submitted that the learned Judge *a quo*, in an attempt to ameliorate the cumulative effect of sentencing the respondent in respect of the serious charges on which he was convicted, erred in regarding the crimes as part of a single criminal transaction closely associated in time, place and circumstances and that this finding had the effect that the Court ordered that the sentences on Counts 2, 3 and 4 run concurrently with the sentence imposed on Count 1. Counsel submitted that the rape was not so closely associated and that the order of the Court meant that the respondent went unpunished in regard to this conviction. In the alternative Counsel submitted that, bearing in mind the seriousness of the crimes of which the respondent was convicted, an effective sentence of 12 years imprisonment was inappropriate and so lenient as to induce a sense of shock.

Ms. Hamutenya stressed the fact that this Court's power to interfere with the sentence of the Court *a quo* is limited. She submitted that there was no irregularity nor any misdirection committed. She furthermore pointed to the fact that the trial Court was aware of the seriousness of the crimes committed

by the respondent and to that extent highlighted the findings by the Court which clearly supported her submission. She therefore urged the Court not to interfere with the sentence.

Where an appeal Court is asked to increase a sentence imposed by the trial Court, the Court of Appeal is subject to the same limitations as if it were asked to interfere in a sentence which was too harsh. In the present instance the trial Judge took into consideration all the personal circumstances of the respondent in determining a sentence. He also took into consideration that the respondent was to a certain extent under the influence of liquor. All in all it seems to me that it cannot be said that the learned Judge misdirected himself in regard to the facts of the matter.

However, in my opinion, the effective sentence of 12 years imprisonment imposed in this instance is startlingly inappropriate. The respondent was convicted of the commission of three serious crimes of which one was murder and the other rape. In regard to the crime of murder the victim was his own 9 months old baby son. Although the Court found intention in the form of *dolus eventualis* the facts show that this is a borderline case which came close to *dolus directus.* From the medical evidence it is clear that the deceased died of head injuries which caused extensive internal bleeding. To throw a baby infant for a distance through the air, to fall without any support on the ground, carries with it such a high incidence of serious and fatal injury that a finding of *dolus directus* may have resulted if the evidence of how the infant was thrown was clearer. In all the circumstances the commission of the murder on a helpless infant who, as was found by the learned trial Judge, was under the

care and protection of the respondent, constitutes a high degree of moral blameworthiness on the part of the respondent.

After the serious assaults on CG and the infant boy the respondent, who had brought MG to his house by force, then assaulted her and had sexual intercourse with her against her will. This happened in the presence of the woman with whom the respondent had a relationship and who is the mother of his child. The Court *a quo*, in my opinion, correctly found that this must have been particularly humiliating for both women.

The way in which the crimes were committed and the circumstances which led to the commission of the crimes caused the learned trial Judge to remark on the seriousness of the crimes "demanding severe sentences". The Court further stated that the actions of the respondent "are grossly morally reprehensible and are abhorred by society." The sentences imposed individually reflect the sentiments expressed by the learned Judge and correctly so. However, by ordering that the sentences on Counts 2, 3 and 4, all to run concurrently with the sentence imposed on Count 1, the Court imposed in my opinion a sentence which was glaringly inappropriate in all the circumstances. The Court took into account, so it seems, the cumulative effect of the individual sentences imposed. (See *S v Shapumba,* 1999 NR 342.) In doing so the Court was not obliged to order that all sentences should run concurrently but should have considered to order that, e.g. the sentence on the conviction for rape, to run partially concurrent with the other sentences. (See *S v M,* 1993 (1) SACR 126(A) at f – h).

If I had sat in first instance in this matter I would have ordered that the respondent serve at least 6 years of the sentence imposed on the rape charge. In the result the effective sentence of imprisonment would be 18 years instead of 12 years that the respondent would have had to serve. An increase of the sentence by 6 years is in my opinion sufficiently striking to allow this Court to interfere with the sentence imposed by the Court *a quo.*

The appeal therefore succeeds to the extent that in respect of Count 4 only four years of the sentence of ten years is ordered to run concurrently with the sentence imposed on Count 1.

In the result the order of this Court is as follows:

1. On Count 1 the respondent is sentenced to 12 years imprisonment;
2. On Count 2 the respondent is sentenced to 3 years imprisonment;
3. On Count 3 the respondent is sentenced to 6 months imprisonment; and
4. On Count 4 the respondent is sentenced to 10 years imprisonment.
5. It is further ordered that the sentences on Counts 2, 3 and four years of the sentence of ten years on Count 4 to run concurrently with the sentence imposed on Count 1.
6. The above sentences are backdated to the 15th February 2002, being the date when the respondent was sentenced by the Court *a quo.*

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STRYDOM ACJ

I concur.

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O’LINN, AJA

I concur.

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MTAMBANENGWE, AJA

COUNSEL ON BEHALF OF THE APPELLANT:	MR. A.H. POTGIETER
INSTRUCTED BY:	THE PROSECUTOR-GENERAL
COUNSEL ON BEHALF OF THE RESPONDENT:	MS. L. HAMUTENYA
INSTRUCTED BY:	*AMICUS CURIAE*