CASE No. SA14/2003

IN THE SUPREME COURT OF NAMIBIA

In the matter between

GERSON TJIVELA APPELLANT

And

THE STATE RESPONDENT

CORAM: Mtambanengwe, A.C.J. O'Linn, A.J.A. *et* Chomba, A.J.A.

HEARD ON: 20/10/2004

DELIVERED ON: 16/12/2004

APPEAL JUDGMENT

CHOMBA, A.J.A.: The appellant, Gerson Tjivela, was on March 20, 2002, then aged 32 years convicted on three counts, namely indecent assault, rape and murder. In the result prison sentences of 1 year, 20 years and 30 years were respectively imposed on him. The learned trial judge in the court below then made the following order, to wit, that the sentences on the first two counts run concurrently while those on the second and third counts should run consecutively. The effective sentence imposed was therefore one of 50 years imprisonment.

The appellant unsuccessfully applied to the court a quo for leave to appeal against both conviction and sentence on all counts. Undaunted, he thereafter submitted a petition of a similar nature to the Supreme Court. On May 12, 2003, Mtambanengwe, A.C.J., Teek, J.A., and O'Linn, A.J.A., sitting in Chambers, granted leave to appeal against sentences only.

In the heads of argument submitted by both the appellant's and respondent's counsel, due recognition was given to the well settled principle that, by and large, the power of sentencing criminal offenders lies within the discretion of trial courts; that where that discretion has been judicially exercised, an appellate court should be slow in its approach to the question of interfering with sentence. To this end, both counsel cited the case of *S v Rabbie* (4) SA 855A in which Holmes, J.A. stated at page 857 –

> " In every appeal against sentence whether imposed by a magistrate or by a judge, the court hearing the appeal -

(a) should be guided by the principle that the punishment is pre-eminently a matter for the discretion of a trial court, and

(b) should be careful not to erode such discretion; hence the further principle that the sentence should only be altered if the discretion has not been judicially exercised."

Similarly the case of *R v Lindsay* 1956(2) SA 235 (N) was cited and in it Holmes J., as he then was, said –

> *"Judging by the appeals against sentence which come before us, it would not appear to be sufficiently appreciated that the Supreme Court does not have an overriding benevolent discretion to ameliorate magistrates' sentences. The matter is governed by principle, not by ad hoc discretion. And the principle is this : If a magistrate has passed a sentence within his jurisdiction, and has not misdirected himself on law, and has duly considered the relevant facts, the Supreme Court will not interfere unless the sentence is so severe as to be unjust."*

It is inherent in the principle stated in the two sample cases, Rabbie and Lindsay, supra, that the door to interference with sentence by an appellate court has never been irretrievably shut. Some of the bases upon which the opening of that door is justified are disclosed in the following cases :

S v Mothile 1977(3) SA 823:

> "The sentence imposed is totally out of proportion to the seriousness of the crime, that is to say the sentence was disturbingly inappropriate and sufficiently disparate for the court to interfere."

S v Hlapenzula and NO 1965 (4) SA 439:

> "The sentence is grossly excessive and severe in that it induces the feeling of shock and outrage in the mind of the court."

S v Van Wyk 1992(1) SA CR 147 (Nm):

> " ------- a court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say, unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable court could have imposed it."

S v Ivanisevic and Another 1957 (4) SA 572 (A):

> " Where however the dictates of justice are such as clearly to make it appear to this court that the trial court ought to have had regard to certain factors and that it failed to do so, or that it ought to have assessed the value of these factors differently from what it did, then such action by the trial court will be regarded as a misdirection on its part entitling this court to consider the sentence afresh."

Authorities on the principles which buttress justification for interference with sentence are so legion that one can go on and on reproducing them. However I think that this is unnecessary and therefore I shall pause here and then proceed to consider what appeared to me in the course of hearing this appeal to be the main pillar upon which the appellant's counsel, Ms. Daringo, relied in praying that this court should interfere with the sentences imposed on the appellant. She submitted that in their individual capacities the

sentences of 20 years and 30 years imposed in respect of the rape and murder respectively were condign. However, she expressed concern at the ordering by the court a quo that those sentences should run consecutively to produce an aggregate and effective sentence of 50 years. In her view that aggregation sentence induced a sense of shock when account is taken of the appellant's age at the time of committing the offences, namely 32 years. She shuddered at the thought that the appellant will have attained the age of 82 years at the time of release from prison if the whole of the cumulative sentence imposed were to be served.

Ms. Daringo further accused the trial judge of paying insufficient or no regard to the important principle that criminal punishment is intended to be rehabilitative. She wondered how the appellant could be rehabilitated when he will be a senile man of 82 years at the completion of the sentences. She referred us to that part of the homily given by the judge prior to imposing sentence when he stated the purposes of punishment as being retribution, deterrence and rehabilitation. She criticized that despite that sound direction to himself the trial judge however over-emphasized the deterrence objective at the expense of rehabilitation. In underscoring that criticism she stated this court's dictum in *S v. Ndikwetepo* 1993 NR 319(SC) in which at page 324 I stated the following :

> "In our view a misdirection would be said to occur if for example, the court a quo were to fail to apply any or all the principles of punishment, or if in applying them the court was guilty of over-emphasizing any one of them at the expense of others."

On the face of it Ms. Daringo would appear to be justified to cite that *dictum* in aid of her argument in the present case, but in reality she is not. The pith in the *dictum* cited from *Ndikwetepo* is the phrase "at the expense of others." The *Oxford Advanced Learners' Dictionary* gives the meaning of that phrase as "with loss or damage to something." The dictionary gives as an illustration of that meaning the sentence "he built up a successful business but at the expense of his health," which means that although that person succeeded in establishing the business the consequence of his efforts to succeed was that he injured his health. Did the trial judge, by parity of reasoning, over-emphasize deterrence while occasioning loss or damage to rehabilitation?

In explaining the objective of rehabilitation the judge stated the following as reflected at lines 10 to 15 of page 2 of his judgment (Page 805 of appeal record):

> "In rehabilitation the court must consider a sentence which will afford the offender an opportunity to reform. This is the ultimate objective that the courts generally strive to achieve as retribution has now yielded ground to rehabilitation."

As can be seen from this excerpt, the judge recognized rehabilitation as the ultimate, i.e. the best or fundamental objective of punishment. Having given such pre-eminence to rehabilitation how can he at the same time be said to have over-emphasized something else at the expense of rehabilitation? It is evident that he was alive to it, and therefore did not over-emphasize the importance of deterrence, at the expense of rehabilitation.

In my judgment the learned judge was entitled after giving lauded regard to rehabilitation to nevertheless examine, as he in fact did the facts and circumstances in which the current offences were committed. He summed up these circumstances by observing "that the crimes the accused has been convicted of are so vile and apprehensible." While I endorse that observation, I feel that what he said was an understatement.

The victim of these crimes was barely a teenager, a school-going girl and innocent. At the time the appellant assailed her, ravished and brutally broke her neck, she was sleeping in her own home, a place she undoubtedly thought as her safest sanctuary.

Further, the appellant showed no remorse for the dastardly offences he committed. He persisted in protesting his innocence up to the time when his quest to appeal against conviction was rejected by the judges of this court sitting in these Chambers. His attitude in this regard begs the question whether a shorter imprisonment period would have had any reformative influence on him.

Although the trial judge never alluded to considering prevalence of crimes of violence as a factor in aid of assessing punishment, I am of the view that this ought to have been done. There are far too many crimes of violence being perpetrated by Namibians on Namibians in this country. Records of cases heard and determined by this court bear testimony to this intolerable situation. Not infrequently, as in the current case, lives are lost in

consequence of such crimes. Quite clearly courts have, when an opportunity presents itself, to play their role in protecting potential victims of this scourge by imposing deterrent sentences on persons found wanting in the field of respect for human life.

In the final analysis, I am of the view that in imposing the cumulative prison sentence of 50 years the trial judge exercised his discretion not only judicially but also judiciously. Having regard to the revolting circumstances in which the crimes under consideration were committed this court cannot accept that the sentence imposed was irregular or wrong in principle. This court cannot accept the submission made by Ms. Daringo – although we commend her for the industry she must have put into preparing her submissions – that there is any justification for this court to interfere with the sentences. Consequently I find the appeal to be without merit.

In the result:

The appeal is dismissed.

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CHOMBA, A.J.A.

I agree

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MTAMBANENGWE, A.C.J.

I agree.

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O'LINN, A.J.A.

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INSTRUCTED BY:	
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