



**HIGH COURT OF NAMIBIA, MAIN DIVISION
JUDGMENT**

CR No: 34/2017

In the matter between:

THE STATE

and

MUNIKA STEFANUS MUKENA

HIGH COURT MD REVIEW CASE NO 584/2017

Neutral citation: *S v Mukena* (CR 34/2017) [2017] NAHCMD 138 (12 May 2017)

CORAM: LIEBENBERG J et SHIVUTE J

DELIVERED: 12 May 2017

Flynote: Criminal procedure – Sentence – Charge – Attempted rape under the Combating of Rape Act 8 of 2000, read with provisions of s 18 of Riotous Assemblies Act 17 of 1956 – Conviction as charged – Punishment to which person convicted of actually committing offence would be liable – Coercive circumstances that of assault – Prescribed minimum of ten years’ imprisonment applicable – Sentence of 18 months’ imprisonment set aside.

ORDER

1. The conviction is confirmed.
2. The sentence is set aside and the matter is remitted to the trial court with the direction to explain the provisions of s 3(2) of Act 8 of 2000 to the accused and thereafter to sentence afresh.
3. The court at sentencing must have regard to the period already served by the accused.

JUDGMENT

LIEBENBERG J: (Concurring SHIVUTE J)

[1] The accused was arraigned in the magistrate's court for the district of Rundu on a charge of attempted rape in contravention of s 2 of the Combating of Rape Act 8 of 2000, read with the provisions of s 18(1) of the Riotous Assemblies Act 17 of 1956. He was convicted as charged and sentenced to 18 months' imprisonment.

[2] In the light of opposing judgments delivered in this jurisdiction as to whether a charge of attempted rape in contravention of s 2 (1) of the Combating of Rape Act 8 of 2000 (the Act) is competent, it seems necessary to revisit this vexed question.

[3] In *S v Karenga*¹ the accused was charged and convicted of attempted rape in contravention of s 2(1)(a) of Act 8 of 2000. When the matter came on review the court acknowledged that the Act does not create the offence of attempted rape and found that it was 'bad in law' to have charged the accused for attempted rape under the said Act, as the accused ought to have been charged with the common-law offence of attempted rape. The court thereupon amended the charge sheet and conviction to a charge of attempted rape under common-law.

[4] In the subsequent case of *S v Hengar*² where the accused was also charged and convicted of attempting to contravene s 2 of the Act, the court on review found the decision reached in *Karenga* to have been clearly wrong in that s 18(1) of the Riotous Assemblies Act 17 of 1956 provides that any person –

'who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such attempt, be liable on conviction to the punishment to which a person convicted of actually committing the offence would be liable'.

(Emphasis provided)

[5] The court relied on the unreported judgement in *S v Awaseb and Two Others*³ where it was held that by virtue of s 18 of the Riotous Assemblies Act an offence of attempted rape under the Combating of Rape Act is a *competent verdict on a charge of rape* under that Act. I respectfully agree with both decisions from which it is clear that where the evidence does not prove the offence of *rape* charged under the Combating of Rape Act, but merely an attempt, then a conviction of *attempted rape* by virtue of s 18(1) of the Riotous Assemblies Act would be competent.

¹ 2007(1) NR 135 (HC).

² 2010(2) NR 412 (HC).

³ Unreported Case No CA 46/2003 delivered on 11.11.2004.

[6] However, in both cases the accused/appellant was charged with the offence of *attempted rape* under the Act and the convictions could therefore not have been a competent verdict of the offence of rape. The court notwithstanding confirmed the convictions and, in the absence of any reasons given when coming to this conclusion, the court seems to have acted on the wording of s 18(1) of the Riotous Assemblies Act in that it specifically *creates* the offence of *attempted rape* by stating that any person who attempts to commit any offence against a statute (in this instance Act 8 of 2000), *shall be guilty of an offence*. It accordingly creates a stand-alone or independent offence over and above providing for a competent verdict on a charge of rape under the Act.

[7] In the present instance the accused is charged with attempted rape in contravention of s 2(1) of the Combating of Rape Act 8 of 2000, read with the provisions of s 18(1) of the Riotous Assemblies Act 17 of 1956. The accused was therefore duly informed of the charge he had to meet.

[8] For the aforesaid reasons I am satisfied that the charge preferred against the accused is proper and the conviction will be confirmed on review.

[9] Section 18(1) makes plain that punishment following a conviction under the said section would be to which the accused would have been liable, had the actual offence been committed. The court was therefore compelled to give effect to the penalties provided for in s 3(1)(a), read with subsection (2), of the Act.

[10] In the present case the coercive circumstances under which the attempted rape took place were that the accused used force against the complainant, grabbing her on the arms and by kicking her, causing her to fall onto her back. In terms of s 3(1)(a)(ii) of the Act the mandatory minimum sentence for rape committed under these circumstances is ten years' imprisonment. Section 3(2) however makes provision for the

imposition of a lesser sentence if the court is satisfied that substantial and compelling circumstances exist.

[11] The trial court in this instance sentenced the accused to a term of 18 months' imprisonment without any regard being had to the penalty provision in the Combating of Rape Act, compelling the court to impose a minimum of ten years' imprisonment if no substantial and compelling circumstances are found to exist. Failing to do so constituted a misdirection and the sentence of 18 months' imprisonment imposed falls to be set aside.

[12] In the result, it is ordered:

1. The conviction is confirmed.
 2. The sentence is set aside and the matter is remitted to the trial court with the direction to explain the provisions of s 3(2) of Act 8 of 2000 to the accused and thereafter to sentence afresh.
 3. The court at sentencing must have regard to the period already served by the accused.
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J C LIEBENBERG

JUDGE

N N SHIVUTE

JUDGE