

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI  
JUDGMENT

Case no: CA 39/2016

In the matter between:

**KONDJASHILI TOMAS**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Tomas v The State* (CA39/2016) [2017] NAHCNLD 21  
(28 March 2017)

**Coram:** TOMMASI J and JANUARY J

**Heard:** 24 March 2017

**Delivered:** 28 March 2017

**Flynote:** Appeal – Sentence – Court imposed prescribed minimum sentence in terms of the provisions of the Combating of Rape Act, 2000 Act 8 of 2000 – No misdirection by learned magistrate – Sentence proper – Appeal dismissed.

---

**ORDER**

---

1. The appeal is dismissed.
- 

**JUDGMENT**

---

TOMMASI J (JANUARY J concurring):

[1] This is an appeal against sentence. The appellant was convicted of having contravened s 2(1)(a) of the Combating of Rape Act, 8 of 2000 and was sentenced to 15 years' imprisonment.

[2] The appellant had raped a 10 year old girl who was living in the same house with him. He was the nephew of the owner of the house. He was 21 years old at the time. He entered the room of the complainant, told her he wanted to have sex with her, when she refused he removed her clothing, he held her mouth to prevent her from screaming and proceeded to rape her.

[3] It is trite that the court of appeal will not readily interfere unless the court *a quo*; misdirected itself; and/or if an irregularity occurred; and/or the court *a quo* imposed a sentence that is shockingly inappropriate.

[4] The prescribed minimum sentence is 15 years imprisonment given the fact that the victim is under the age of 13 and the accused is more than 11 years older than the complainant. The court may impose a lesser sentence if there exists substantial and compelling circumstances. In terms of s 3(4) of the Combating of Rape Act, the court may not, in the case where the prescribed minimum is applicable, suspend a portion thereof. A sentencing court is

however permitted to suspend that portion which exceeds the prescribed minimum.

[5] The appellant appealed on the ground that the sentence is 'shockingly inappropriate and it is out of proportion with the totality of the accepted facts in the mitigation' (sic); that the court failed to consider a suspended sentence; that the learned magistrate under emphasised the personal circumstances of the appellant; and overemphasised the seriousness of the offence.

[6] The minimum sentence of 15 years is prescribed and the learned magistrate had to determine whether there exists substantial and compelling circumstances. The learned magistrate indeed took into consideration the personal circumstances of the appellant; the gravity of the offence; the youthfulness of the complainant and the manner in which the appellant committed the offence. The learned magistrate found no substantial and compelling circumstances to exist and imposed the prescribed minimum sentence. As can be seen from paragraph 4 above, the court *a quo* was not permitted to suspend any portion of the prescribed minimum sentence.

[7] This court finds no misdirection by the learned magistrate in the exercise of his discretion. The sentence imposed by the learned magistrate is proper and there is no reason for this court to interfere.

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

1. The appeal is dismissed.

---

M A TOMMASI  
JUDGE

---

HC JANUARY  
JUDGE

APPEARANCES

For the appellant:

Mr Greyling  
Of Greyling & Associates

For the Respondent :

Mr Gaweseb  
Prosecutor General Office-Oshakati