

SUMMARY JUDGMENT

LEVY, ACTING

CA 83/98

THE STATE vs E M SHIKONGO

SUMMARY

APPEAL BY THE STATE

When Court will interfere in sentence.

In respect of a sentence for the Sodomy of two children the sentence was increased from one year to three years but two years suspended as the Accused was already out of prison.

CASE NO. CA 83/98

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

APPELLANT

versus

E M SHIKONGO

RESPONDENT

CORAM: GIBSON, J. et LEVY, A.J.

Heard on: **2000.03.20**

Delivered on: **2000.03.20**

JUDGMENT

LEVY, A.J.: In this matter the appellant is represented by Mr Advocate January and the respondents is represented by Mr Advocate Walters.

This is an appeal brought by the State in terms of Section 310(1) as read with Section 310(2) of Act 51 of 1977. Leave to appeal having been granted to the State by His Lordship Mr Justice O'Linn. The appeal is against sentence only. The respondent who was the accused in the Lower Court was found guilty on two counts of sodomy.

In one instance the victim, a boy was 7 years old, and in the other instance also a boy the victim was 12 years old.

The sentence which the Magistrate imposed was 12 months imprisonment.

The offences took place on two different occasions but the magistrate treated them as one for sentence.

Punishment is pre-eminently, a matter for the discretion of the trial Court and the right of a Court of appeal to interfere therewith is limited. The Court of appeal will however interfere where a trial Court has not exercised its discretion judicially. This occurs where the trial Court misdirected itself in respect of sentence or where the sentence is so startling or disturbing and inappropriate that an inference can be drawn that the *court a quo* did not apply its judicial mind.

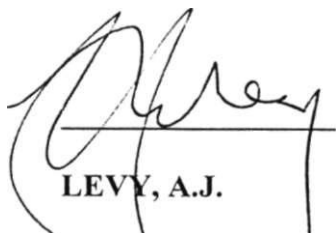
In this matter the Learned Magistrate has submitted his reasons for sentence. It appears therefrom that he failed to take into account the ages of the victims and that in respect of the elder boy the victim resisted and that he was forced to submit. Furthermore, he threatened to kill the boy if he should complain about the offence. Obviously the child of 7 could not consent. The Learned Magistrate also appears to have overlooked the fact that both offences, although on different occasions, took place in the veld while the victims were herding cattle or goats, making them far more vulnerable than under other circumstances where the offence may have been taking place in a village or town. For these reasons this Court is entitled to interfere in the sentence. It must however, be borne in mind that to re-arrest the accused, who has already served his sentence, would be grossly unfair and unjust. -Furthermore, when

these offences were committed, the accused was 16 years of age. In terms of the legislation concerning statutory rape of girls, where an accused is under 16 years, this fact is a complete defence. Therefore, if he is 16 it would be a mitigating factor. The *court a quo* overlooked the fact that the accused had committed the same type of crime on two different occasions in very similar circumstances, namely in the veld where the victims were herding animals, and the sentence therefore, in addition to its other purposes, must also be directed at deterring him from repeating the same offences.

Suspending part of the sentence frequently acts as a deterrent. The sentence is in my view far too lenient and must be altered to 3 years imprisonment, 2 years whereof should be suspended for 5 years on condition that during such time the accused is not found guilty of committing the crime of sodomy. The sentence should be ante-dated to the 13th of August 1998.

GIBSON: Just a short point or correction of fact. Judge O'Linn refused to certify the proceedings and I granted leave to appeal. Subject thereto I agree. Accordingly the order of this Court is

"The Appeal is upheld. The sentence is altered to three years imprisonment, two years to be suspended for 5 years on condition that during such period the accused is not found guilty of committing the crime of sodomy. The sentence is ante-dated to 13 August 1998."



LEVY, A.J.

I agree on this judgment

GIBSON, J.

ON BEHALF OF THE APPELLANT

ADV H JANUARY

Instructed by:

Office of the Prosecutor-General

ON BEHALF OF THE RESPONDENT

ADV J WALTERS

Instructed by:

Directorate of Legal Aid