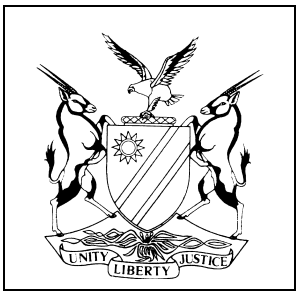

CASE NO.: CC 16/2008

IN THE HIGH COURT OF NAMIBIA
HELD IN OSHAKATI

In the matter between:

THE STATE

and

SHIKOYENI KESHIKULE

***CORAM*: LIEBENBERG, A.J**

Heard on: 04 March 2009 – 26 May 2009
Delivered on: 27 May 2009

SENTENCE: [1] The accused, now 18 years of age, pleaded guilty to a single charge of Rape in contravention of section 2(1) (a) of the Combating of Rape Act, 2000 (Act 8 of 2000) in that he, on the 23rd day of September 2006 at Ohakatiya Village in the district of Eenhana, committed a sexual act with a girl aged 9 years, while the accused at the time, was 15 years of age.

[2] In a statement prepared in terms of section 112(2) of the Criminal Procedure Act, 1977 (Act 51 of 1977) by Mr. Bondai, who appeared for the accused on instructions of the Directorate: Legal Aid, amplified the accused's plea of guilty in the following terms: During September 2006 the accused was employed at the home of the complainant as a cattle herder and shared a bedroom with the complainant and other children. On the night of 22nd or the morning of the 23rd September 2006 the accused stood up from his bed and went to where the complainant was lying and after pulling her panties aside, he inserted his penis into her vagina where after he engaged in a sexual act with her. He furthermore admitted the age difference between him and the complainant being more than 3 years and stated that he knew, when committing the crime, that his actions were unlawful and punishable by law.

[3] In view of the young age of the accused, the Court requested a pre-sentence report compiled by a social worker. This report was compiled by a social worker, Ms Ilunga Muyinda employed by the Ministry of Gender Equality and Child Welfare: Directorate of Child Welfare Services.

The gist of this report is that the accused is one of a family of 9 members and he grew up with his biological parents. During these years they did not experience any behavioural problems with him. Accused has no formal education as he apparently was too old when sent to a public school the first time and only attended a Literacy Programme for a few months before dropping out for no apparent reason. He thereafter started herding the cattle of his family which he was still doing at the time of committing the crime in question.

In her assessment of the facts Ms Muyinda came to the conclusion that the accused, when committing the crime, could have been vulnerable owing to the fact that he was far from home and the family members with whom he was living, did not support him emotionally and furthermore, that the accused at the time possibly lacked parental guidance and supervision. She did however emphasise that the accused at no stage displayed any behavioural problems. He is a first offender and besides acknowledging the wrongfulness of his act, has also expressed remorse for his wrongdoing. Because the accused being a minor when he committed the crime and without him fully appreciating the

consequences of his actions, Ms Muyinda recommended that the accused be sent to a rehabilitation centre where he could receive reconstruction services. In her evidence however, she conceded that she was unaware of a rehabilitation centre that could provide the necessary reconstructive services.

[4] In sentencing the Court has to take cognizance of those factors relevant to sentencing namely, the personal circumstances of the accused; the crime and the interests of society, while at the same time the Court will endeavour to satisfy the objectives of punishment being prevention, deterrence, rehabilitation and retribution. (*S v Zinn* 1969(2) SA 537 (A))
The courts, when sentencing, have adopted an approach of mercy or compassion, which should not be interpreted to mean that the Court has sympathy for the accused. It has been said that "*mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society."*
(S v Narker and Another, 1975(1) SA 583 (AD))

[5] With regard to the accused's personal circumstances, the young age of the accused weighs very heavy with the Court especially when taking into account that he was only 15 years of age when he committed the crime. Until then he had not displayed any behavioural problems or misconduct, despite his upbringing and background being far from ideal. It is not clear since what age the accused started herding cattle or moved away from his parents' home, but it seems to me that the accused already at a very young age, was left to fend for himself and had to go without the guidance and emotional support of his parents and siblings. Therefore, Ms Muyinda's evaluation of the accused having been quite vulnerable at the time of committing the offence of rape is not without merit.

[6] Another aspect of the accused's personal circumstances which carries considerable weight is that at no stage did the accused make himself guilty of misconduct or do someone mischief other than the complainant in this case. I am therefore inclined to disagree with the view taken that the accused has to

be *rehabilitated,* as he has no history of misconduct, criminal behaviour or the propensity to commit crime. The crime he committed, albeit serious, was his first and given the circumstances of this case, it would in my view, be wrong to equate the accused with the majority of criminals daily appearing in our courts on similar charges.
Accused has now reached the age of 18 years and there can be no doubt that he at this age has a better understanding of the law as well as the moral and social values expected from all in society.

[7] Rape is always a serious crime for which lengthy custodial sentences are generally imposed other than in wholly exceptional circumstances. The circumstances in which the rape was committed will determine the degree of seriousness of the case and in the present matter the age of the victim being 9 years, is regarded to be an aggravating factor. On the other hand, the accused himself was only 15 years of age and a youth himself. This, in my view, distinguishes this case from other cases where women and young children fall prey to adult offenders who either assault or force their victims into submission only to satisfy their sexual desires. Although it can be said that the accused in this case did the same, sight must not be lost of him being very young and, bearing in mind that he was sharing a room with other children, it is clear that those adults living in the house with him and the complainant, approved of the situation, probably because they regarded the accused to be still a child. A matter of concern to this Court is that the accused did not attend school as was expected of a boy of his age, but instead, was a herd boy looking after cattle. It cannot be said that therefore, the accused should no longer be treated as a juvenile and has to be punished like an adult.

[8] It will only be in exceptional cases where the courts will follow such course, for instance in the matter of *Director of Public Prosecutions, Kwazulu-Natal v P* 2006(1) SACR 243 (SCA) where the accused was 12 years old at the time of murdering her grandmother and 14 years old upon conviction. The passing of sentence was postponed on certain conditions of correctional supervision, against which the State appealed. The Court of Appeal held that

on the facts, the accused acted like an 'ordinary' criminal, despite her age and background, and should have been treated as such. The Court further held that neither the Constitution nor the international conventions forbade incarceration of children, and it was not inconceivable that there might be cases in which incarceration of a child was required. Even in the case of child offenders, it was said, the sentence had to be in proportion to the gravity of the offence. The Court proceeded and imposed a sentence of imprisonment, suspended on certain conditions.

[9] In sentencing juvenile offenders, the courts have, through the years, placed emphasis on 'care and rehabilitation' rather than retribution and deterrence as objectives of punishment. This is evident from the words of Wessels J in *S v Smith* 1922 TPD 199 who said: "…*the State should not punish a child of tender years as a criminal and stamp him as such throughout his after life, but it should endeavour by taking him out of his surroundings, to educate and uplift him and to make him gradually understand the difference between good conduct and bad conduct."*

In the Court's endeavour to find a suitable sentence, it must have regard to the circumstances in which the crime was committed as well as the seriousness thereof; while at the same time, decide what punishment would be best for the young offender that will also serve the interest of society. In *S v Jansen* 1975(1) SA (A) at 427H – 428A Botha JA stated: *"In the case of a juvenile offender it is above all necessary for the court to determine what appropriate form a punishment in the peculiar circumstances of the case would best serve the interest of society as well as the interest of the juvenile. The interest of society cannot be served by disregarding the interests of the juvenile, for mistaken form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society."*

[10] As a matter of principle, the Court must as far as possible avoid imposing a sentence of imprisonment on the juvenile offender and should bear in mind especially

> *"(a) that the younger the accused, the less appropriate imprisonment will be, (b) that imprisonment is inappropriate in the case of a first offender, and (c) that short-term imprisonment is rarely appropriate. The court should thus*

> *always consider the appropriateness of other sentencing options. However, if, in all the relevant circumstances and upon a consideration of the objects of sentencing, imprisonment appears to be the appropriate sentence, the court must impose it."*
> (*S v Z* 1999(1) SACR 427 (E))

[11] When applying the aforementioned principles to the present facts the Court has to ask itself whether, bearing in mind the accused's personal circumstances as well as the circumstances of the case, a custodial sentence is called for? The complainant did not sustain serious injury and from the medical report handed in, it would appear that the only injury was to the hymen which was no longer intact. Unfortunately, this loss to the complaint will always stick to her mind, especially when she becomes older. After having given due consideration to all the factors relevant to sentencing as well as the principles set out herein, I have come to the conclusion that it will neither be in the best interest of the accused nor society, to impose a custodial sentence where the accused has to go to prison. The nature of the crime committed however, dictates the imposition of a deterrence sentence; one that would personally serve as a warning to the accused and other likeminded persons.

[12] In the result, the accused is sentenced as follows:

> 10 Years imprisonment wholly suspended for 5 years on condition that the accused is not convicted of Rape or Attempted Rape, committed during the period of suspension.

_____(Signed)

LIEBENBERG, A.J.

ON BEHALF OF THE STATE	Adv. O. Sibeya
Instructed by:	Office of the Prosecutor-General
ON BEHALF OF DEFENCE	Mr Bondai
Instructed by:	Directorate: Legal Aid