

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

GISELINDE PAULUS SHATIWA

Accused

CORAM: DAMASEB, JP

Heard on: 19 April 2006

Delivered on: 19 April 2006

SENTENCE

DAMASEB, JP: Giseline Shatiwa: You caused the death of your husband negligently. I must now pass sentence on you. Violence in the home has become a serious problem in our society. When it results in death it is even more objectionable. Society expects of the Courts, therefore, through the sentences they impose, to discourage this evil. The violence you

perpetrated was unnecessary and I do not want you, or others, to gain the impression that it is acceptable.

You are a first offender and quite advanced in age. You are the sole provider of a 17 year old school-going child. You have shown genuine remorse for your irresponsible behaviour in causing the death of the man towards whom you entertained deep affection from what I was able to establish from your evidence and demeanor in Court. You already spent about 3 months awaiting trial before you were let out on bail. I have also carefully considered your other mitigating circumstances although I do not propose to enumerate each one of them. They have all influenced me in arriving at a sentence in this case. A retributive sentence is therefore not what I have in mind in your case. I cannot think of any productive purpose to be achieved by society in sending you to prison. I accept that you have endured great emotional pain as a consequence of what you did. For the remainder of your natural life you will have to live with the thought that you caused the death of your husband.

Your case calls out for mercy. I have considered the submissions of both counsel that I consider imposing community service. I do not know how that will affect your affairs at home and, especially, the care you must provide to the youngest child whilst also attending to domestic chores. I do not propose

therefore to impose community service. I have concluded that a suspended sentence will serve as a sufficient deterrence to you.

I sentence you to 5 years imprisonment wholly suspended for 3 years on condition that you are not convicted of the offence of murder, culpable homicide or assault with intent to cause grievous bodily harm during the period of suspension.

DAMASEB, JP

ON BEHALF OF THE STATE:

Ms S Miller

Instructed By:
General

Office of the Prosecutor-

ON BEHALF OF THE ACCUSED:

Ms H Hitula

Instructed By:
Aid

Directorate of Legal

CASE NO.: CC 06/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

and

GISELINDE PAULUS SHATIWA**Accused****CORAM:** Damaseb, JP**Heard on:** 18 April 2006**Delivered on:** 19 April 2006

JUDGMENT

DAMASEB. JP: [1] The accused, an unsophisticated adult female, faces a single count of murder. She is accused of intentionally causing the death of her husband who was 72 years old at the time she is alleged to have killed him. She was 63 years old at the time of the incident and the duo had been married for 35 years. The charge reads as follows:

"[O]n or about 6 June 2005 and at or near Oshikulufitu in the district of Ombalantu the accused did wrongfully, unlawfully and intentionally kill Tobias Nashapi, an adult male human being".

[2] In her plea in terms of s112(2) of the CPA¹, the accused, *inter alia*, states the following:

"I plea not guilty to the charge of murder as aforesaid however I tender a plea of guilty to the offence of assault with intent to do grievous bodily harm and I admit the following:

I admit that on or about the 6th of June 2005, and at or near Oshikulufitu in the district of Ombalantu I wrongfully and unlawfully and intentionally assaulted Tobias Nashapi an adult male human being, by hitting with a saw on the ankle of the right leg.

I admit that I intended to cause the said Tobias Nashapi grievous bodily harm alternatively that I was negligent and I foresaw that my action could cause grievous bodily harm to Tobias Nashapi.

My aforesaid actions were brought about by a quarrel between the late Tobias Nashapi's who is my husband and I where I indicated to him that I was concerned about his coming home late on a constant basis and we thereafter started quarreling.

I admit that as a result of the aforesaid assault a serious wound was inflicted on the right ankle of the said Tobias Nashapi.

¹ Recorded as formal admissions, at her instance, in terms of s220 of the CPA

I admit that the said Tobias Nashapi died as a result of the wound so inflicted and I further admit that the body of Tobias Nashapi did not suffer further injuries whilst being transported to the mortuary.

I admit that in assaulting the said Tobias Nashapi I caused him grievous bodily harm however I admit that I did not intend to kill nor to cause the death of the said Tobias Nashapi.

I submit that the aforesaid admissions may be recorded as formal admissions in terms of Section 220 of the Criminal Procedure Act 51 of 1977." (sic)

[3] The medical evidence, led through Dr Yuri Vasin, is that the deceased died of a 50mm wound inflicted with a sharp object to the ankle of the right foot. The wound resulted in excessive blood loss. According to the pathologist, without immediate medical attention death would result from such a wound within a ½ hour to an hour. The pathologist did not rule out the possibility that the deceased's life may well have been saved if he received immediate medical attention.

[4] The only issue in this case is whether the accused intended to cause the death of her husband. Mrs Miller for the State submits that the State does not rely on *dolus directus* but on *dolus eventualis*. There is no eye-witness to the admitted assault on the deceased.

[5] On 7th June 2005, the accused gave a warning statement at the Outapi Police Station. This was, by agreement, read into the record and received as evidence. In it the accused stated that the deceased had left home on 5th June 2005 to see a female person by the name of Johanna Kaluwapo. He did not return that day. When he had not returned by the morning of the next day, she went in search for him and met him on the way coming home. She later joined up with him in his room and demanded to know where he slept the previous night. He told her he slept at Johanna's house. She added in the statement:

"I ... entered in his room and found him sitting on a bed with a panga on his right hand ... I took out the panga from his hand and threw it outside the room as well as the axe which was in the room, I threw it outside.

...

I took a saw and beat him on his right foot three times, I only came to see him bleeding on the foot. I did this to him ... to let him stay in the house and to learn him a lesson not to sleep at other houses. I decided to go to the kitchen but he followed me, I told him to stay ... I went to boil the water in a kettle put a bit of salt and came to him, I took a cloth, put it in a boiled water and I used it to stop the bleeding. But the bleeding doesn't want to stop." (sic)

[6] The State called two witnesses in addition to the pathologist. The first was the investigating officer: constable Marcellus Mwanyangapo of Outapi

Nampol. He went to the scene on the day of the incident, met the accused who confirmed the stabbing and retrieved the saw, 25cm in length and 10cm in width, with a sharp iron blade, used in the commission of the offence. The saw was received in evidence. He also identified the deceased's body. He testified that the accused told him that she 'killed' the husband by cutting him with a saw. He was not cross-examined.

[7] The next witness was Anna-Liese Bendeka. She is a neighbour of the accused. On the fateful day, she testified, the accused came to her and asked her if she could call the police as she had 'killed' her husband. The witness could not assist as she had no 'credit' to make the call, presumably from her cellphone. Nothing worthy of specific mention emerged during cross-examination of her.

[8] I refused an application for discharge in terms of s174 of the CPA as I thought that the State had established that a) the assault had taken place with a potentially dangerous weapon, raising the inference that the accused intended the consequences of her action and that b) her explanation of her state of mind at the time would be crucial in determining whether or not she had the requisite intent to commit murder.

[9] The accused testified under oath on her own behalf. She pretty much repeated under oath what she said in her warning statement. In her *viva*

voce evidence under oath, she went a little bit further: she said that when the deceased returned on the 6th June 2006, she went to his room to quarrel about the fact that he squandered the pension moneys belonging to both of them on women and drink. She also added that as she hit the deceased with the saw, she said: "These feet will bring you trouble" or words to that effect. She confirmed that upon realizing that the husband had died she raised the alarm and stated to those to whom she had run, it appears for help, that she killed her husband. It emerged during cross-examination that not all was rosy in the marriage of the duo: the deceased had extra-marital affairs (and this did not please the accused) and he had previously assaulted her; in one instance, it appears, with the help of a lover. In the way the State's case was presented, nothing turns on this though.

[10] The accused persisted that when she hit the deceased with the saw, her intention was not to kill. As she put it: "That is why I hit him on the foot. It is only when God looked the other way that this caused his death." (Or words to that effect). She stated under further cross-examination that she thought that the saw was less dangerous than the panga or the axe. She conceded that in the latter years of his life the deceased needed to support himself with a walking stick and had some malaise in the left leg and walked with an uneasy gait. It seems, from the evidence, that this was attributable to him being hit by a train. I got the impression of a frail 72 year old man at the time this incident happened.

[11] Under further cross-examination, the accused testified that the saw she used against her husband was normally used by him on “trees”. As it was translated “to cut off (presumably saw off) branches of trees”; and that, for that reason, the saw would be more dangerous and harmful if used on humans. She was quick to add, however, that she did not realize (or know) the saw would kill and that she was surprised that her husband died from its use on him. She also conceded that the saw was not the kind of object she would have left her children to play with when they were growing up.

[12] I must point out at once, *apropos* the comparison drawn in cross-examination between the effect of the use of the saw on a tree and the effect of its use on humans, that the evidence does not come anywhere close to suggesting that the saw was used on the deceased in a fashion comparable to its use on trees.

[13] To convict the accused of murder on the basis of *dolus eventualis*, I must be satisfied, beyond reasonable doubt, that when she inflicted the wound to the deceased’s foot with the saw she:

- a) foresaw the possibility of the husband dying from that assault;
and
- b) reconciled herself to that possibility.

[14] The test as to her relevant mental state, is subjective, although the subjective mental state may be inferred from the objective facts proved by the State.

(Generally, See C R Snyman "Criminal Law" (4th edn) p. 423)

Is this a case where I can infer *dolus eventualis* from the proven objective facts?

[15] The weapon used in the assault is no doubt a dangerous one. It was produced in Court and I have already described its features. The accused was quite aware that it could cause serious harm. In her admissions she actually says so. She testified that she only wanted to inflict harm to his foot so that he does not walk around and sleep at other people's homes.

[16] What troubles me in this case is the way the weapon was used - which points to me more to the conclusion that the accused's *dominant motive*, throughout, was to teach the deceased a lesson only that he will remember in future. Why did she aim at the foot and not at his head or neck, for example? Could the axe or the panga not have been used to more deadlier effect? Why did she in fact first throw away those 2 weapons which so readily were available for use? She says that she did not use the axe, or the

panga, because either of those could cause death. The test of her mental state is a subjective one, and is not to be measured by the standards of a reasonable person. I am not satisfied, beyond reasonable doubt, that the accused intended to cause harm to the deceased foreseeing that death may result yet reconciled herself to that risk. Her conduct subsequent to the assault strengthens this conclusion. She went to boil water, added salt to it and, using a cloth, attempted to stop the bleeding. She raised the alarm and was quite candid about what happened. She testified to being shocked by the result that ensued. The charge of murder cannot therefore be sustained by the proven objective facts.

[17] The accused offered a plea of guilty in respect of assault with intention to cause grievous bodily harm. The State rejects it and submits that at the very least, the evidence establishes a crime of *culpable homicide*, which is a competent verdict on a charge of murder.

[18] In answer to a question from the Court, the accused said that she used a saw, instead of the knob-kierie, because she thought it was more dangerous than the saw. I find this difficult to accept and reject it as reasonably possibly true. In order to convict the accused of *culpable homicide*, the unlawful killing must be accompanied by negligence, which is established if:

- a) the reasonable person in the same circumstances would have foreseen the possibility of her conduct causing death;
- b) that a reasonable person would have taken steps to guard against the possibility of death; and
- c) her conduct differed from the conduct expected of the reasonable person.

The test is an objective one. (See: Snyman op cit p.209)

[19] In my view any reasonable person would have foreseen that an injury which inflicts pain of the nature which forces the victim not to walk around can be life-threatening. A reasonable person who only wants to teach another a lesson would, in the circumstances of this case, have used the knob-kierie or some other less dangerous weapon to inflict pain, and in this way guard against the possibility of death: in that respect the conduct of the accused deviated from that of a reasonable person such as one would find in Oshikulufitu village.

[20] Accordingly;

The accused is acquitted on the charge of murder; but is convicted on the competent verdict of culpable homicide in respect of her husband Tobias Nashapi, an adult human being.

DAMASEB, JP

ON BEHALF OF THE STATE:

Instructed By:
General

Ms S Miller
Office of the Prosecutor-

ON BEHALF OF THE ACCUSED:

Instructed By:
Aid

Ms H Hitula
Directorate of Legal