

**“SPECIAL INTEREST”**

CASE NO. CC 17/2006

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

and

**MADHIMBILO TJATENDELA**

**CORAM:** DAMASEB, J.P.

Heard on: 2006.05.11

Delivered on: 2006.05.11

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**SENTENCE**

**DAMASEB, J.P.:** [1] Madhimbilo Tjatendela, I found you guilty of murder with direct intent to kill a woman with a three year old baby. I think you are a scoundral of the worst kind imaginable. You intentionally killed a woman carrying a three year old baby on her back. She probably felt safe in your company, and you left a helpless and innocent child for dead in

the bush late at night. You represent a very serious threat to society, Mr Tjatendela.

[2] You were also prepared to take the risk of playing an elaborate hoax on this Court. First admitting to strangling the deceased, although you gave an explanation for it, but completely disowning that when you came to testify on your own behalf. Even the warning that whatever you said was captured on tape and can be played back to confirm what you said in this Court, did not even deter you. That you can tell a lie to get yourself out of trouble is therefore a moot point. Your conduct shows utter contempt for this Court and its dignity, and you have not shown any remorse for your actions. Instead, you decided to mislead the Court in a vain attempt to save your skin.

[3] I do have regard for your personal circumstances. You are a first offender, and a man of very low social status. You have had no formal education. You are thirty years old, married with three kids, the youngest of whom is three years old. These kids don't go to school. Your wife is unemployed. You have been in custody since arrest. Your conduct in this case, however, is such that I must impose a retributive sentence on you to keep you away from society for a very long time.

I accordingly sentence you to 38 years imprisonment.

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**DAMASEB, J.P.**

**ON BEHALF OF THE STATE**

**Ms**

**Miller**

**Instructed by:**

**Office of the Prosecutor-**

**General**

**ON BEHALF OF THE ACCUSED**

**Ms Kishi**

**Instructed by:**

**Directorat of Legal**

**Aid**

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**JUDGMENT**

**DAMASEB, J.P.:** [1] The accused stands charged with three counts. Count one: murder. Count two: rape and, count three: attempted murder.

[2] Count one: that on or about the 9<sup>th</sup> of October 2005 and at or near Oshanaputa village in the district of Outapi, the accused did wrongfully, unlawfully and intentionally kill Eunike Tjitana, a female

person. Count two: on or about 9 October 2005 and at or near Oshanaputa village in the district of Outapi, the accused hereinafter called the perpetrator, did wrongfully, unlawfully and intentionally commit or continue to commit a sexual act with Eunike Tjitana, hereinafter called the complainant, by inserting his penis into the vagina of the complainant while applying physical force, and or threatening to kill the complainant. Count three: that on or about the 9<sup>th</sup> of October 2005 and at or near Oshanaputa village in the district of Outapi, the accused did wrongfully, unlawfully and intentionally assault Erastus Shikongo and strangled him with intent to murder him.

[3] The accused hails from Oshanaputa village in the district of Outapi in the northern part of Namibia. His native tongue is Otjizemba. Before commencing proceedings, I satisfied myself that he also understands the Otjiherero language, which has the same roots as his native tongue. When thus satisfied, the proceedings commenced and throughout the proceedings were interpreted for him in the Otjiherero language and I was satisfied that he followed the proceedings fully.

[4] When called upon to plead, speaking through the interpreter, the accused pleaded as follows: Guilty on count one, which is murder, and not guilty on counts two and three. And in the plea explanation in terms of s 112, in regard to the guilty plea, he said that

he strangled the deceased person because she forced him to have sexual intercourse with her, and that he did not wish to do so because he was working for the husband of the deceased. In the event, I entered pleas of not guilty in respect of counts one to three.

[5] The first witness to testify was Dr Aneline Hatutale. The high watermark of this witness's testimony is that the minor child, who is the subject of the indictment, in respect of count three, had several scratch marks on both sides of the neck. Scratches which, in her opinion, could have been caused by a rough object such as a robe or a cord. She did not exclude the possibility that those scratches could have been caused by human nails.

[6] The next witness was the investigating officer, Sergeant Erastus Uunona of the Outapi police. He was the one who reported at the crime scene with a colleague. The date was given to be about the 10<sup>th</sup> of October; and he arrived at the scene at about 09:30 in the morning. At the reported scene of crime, he came upon a female body lying in the bush. He observed marks on the ground suggestive of a struggle. The deceased's skirt was not properly on and it was lifted up. He observed abrasions on her neck and blood was coming out of her nose. From the appearance of the scene and the clothing of the deceased, this witness formed the opinion that the deceased was

raped. He referred the Court to the photographic evidence to support that assertion.

[7] He had photos taken of the scene of crime, including of the deceased. While at the scene, he received reports of a possible suspect and where he could possibly be. After searching for the suspect, following tracks, they eventually isolated a search area in a watery place full of reeds. He and others eventually arrested the accused at that watery place, while he was hiding in the water. Uunona testified that he arrested the accused; told him why he was arresting him, and took the accused to the police station.

[8] At the police station, witness Uunona said he found a three-year old boy known as Erastus Shikongo. It is common cause that this boy is the son of the deceased. The boy had abrasions on the neck and was swollen in that area. Uunona then went to the accused, informed him of his rights and took a warning statement from the accused with the help of an interpreter. This statement was taken on the 11<sup>th</sup> October 2005 at the Outapi police station, at 07:00 in the morning.



The accused was, amongst others, reported as having said as follows:

“On Sunday 9 October 2005 at about 18:00, I was together with the deceased person at the cuca shop unknown to me. I was selling my goat that was given to me by the deceased’s husband. When I sold my goat I bought beers, and we started drinking. The deceased then told me that her husband does not sleep at night, because he suspects that the two of us used to sleep together. We then decided to go home because we stay in the same house. While we were on the way, the deceased asked me to have sex with her in the bush. I refused by saying that her husband will find out and he will be angry with me. She said that she will tell her husband that I raped her. I got angry and I beat her and strangled her neck with my hand. We walked some few steps and I had sexual intercourse with her. I took her from behind because that is what we are doing in our tradition. She was still alive and I again strangled her neck and she died. I did not think that she was dead, so I waited a while to see if she can wake up, but she didn’t. So I realised that I killed her. So I went. I left the deceased there and her son. I did not touch the boy at all. I just went home, took my belongings so that I go to our house. I went to hide in the grass in (indistinct), it is where the police found me.”

That is the warning statement that was taken from the accused person.

[9] In cross-examination, Uunona testified that he properly informed the accused of his right to legal representation, including

that one could be provided at State's expense, and that this was before the taking of the warning statement. That much is however not recorded in the body of the warning statement. Uunona said that he did not do so because the *pro forma* form they use makes no allowances for that.

[10] I am not satisfied by this explanation for the failure to record such an important detail. But I have to, in the overall context of the case, see if the accused was prejudiced in any way by the failure to properly have explained to him his right to legal representation at Government expense, if necessary. Although, as I conclude, such failure indeed took place.

[11] In cross-examination, it was put to Uunona that the accused denied having sex with the deceased or that he strangled her twice, implying that he strangled her only once. Uunona confirmed that throughout the accused denied harming the minor boy and said to him that the boy was on his mother's back when they were struggling and the boy may have been injured in that process.

[12] The next witness was Detective Sergeant Shipiki, the scene of crime officer. He prepared the photo plan which was led into evidence. His evidence was that he never spoke to the accused, but

confirmed that Inspector Maritshane spoke to the accused through an interpreter at the scene of the crime.

[13] The next witness was Constable Sebastian Kazondjou. His mother tongue is Otjiherero but he understands Otjizemba, the native tongue of the accused. Kazondjou assisted in the translation, when the accused's warning statement was taken, and also when the pointings-out were done. He confirmed that he signed the certificate confirming that he translated to the accused properly, and maintained that the accused understood everything that took place when the statement was taken and read back to him in Otjiherero, and thereafter placed his right thumb thereon.

[14] The next witness was Inspector Marcellus Maritshane of Outapi police, a commissioned officer. He testified that he was not connected with the investigation of the case and presided over the pointing-outs by the accused, with the assistance of an interpreter as aforesaid. The thrust of his evidence was that the accused took them to the scene of crime and pointed out various spots where the assault on the deceased took place. He too confirmed that the deceased also admitted to having sex with the deceased. In cross-examination, of this witness it was not denied that the accused admitted to strangling the deceased. Sexual intercourse was denied in terms by counsel.

[15] The next State witness was Her Worship, Magistrate Iyambo, stationed at Outapi. She took the alleged confession from the accused and, prior to that, his plea in terms of s 119. What emerged in cross-examination of her, is that she took the plea of the accused, after it became apparent that he wished to engage a legal practitioner at State's expense. The magistrate was aware of that election when she also took his purported confession. I consider that that was irregular. In her position, she ought to have known better. The plea in terms of the s 119 proceedings and the purported confession following it, therefore, stand to be excluded because of the prejudice to the accused on account of the fact that his right to legal representation was denied to him, when his election to have a lawyer represent him was communicated to the magistrate.

[16] The next State witness to testify was the thirteen year old Eelu Selma. She and others found the minor boy in the morning, on the 10<sup>th</sup> of October 2005, whilst on their way to school, and took him along with them to their school from where he was taken to hospital. This girl testified that the boy told her and others that the mother was lying or sleeping in the bush, but when tried to wake her, she did not respond. This witness saw the scratch marks on the neck of the boy. In cross-examination, she testified that the boy told her that somebody scratched him, but he did not know who it was.

[17] The minor child, Erastus Shikongo (three years old) was next called, but turned out not to be a competent witness, after an enquiry to determine his competence. His evidence was therefore not received.

[18] The next State witness to testify was the teacher at Eelu Selma's School. Her name is lileka Hilma. The minor child was brought to her by the children, who includes Eelu Selma. She took the child to hospital. In cross-examination she said the child told her the scratch marks on the neck were caused by Madhimbilo, the accused in this case. She says that she never knew the accused at the time, and never reported what the boy told her to police. She conceded that that allegation is not in the statement she gave to the police because she forgot to do so.

[19] The next State witness to testify was Silas Kontindi. He is the owner of the cuca shop. He knows both the accused and the deceased. According to him, on the 10<sup>th</sup> of October 2005, the husband of the deceased came to him to ascertain if the deceased, the minor child and the accused had not been there. He confirmed to the husband that the three people were there the previous evening, and left together. He also told him that they had a goat with them and some cooked meat which they were selling. The husband of the deceased then told him that they came across the deceased's body in

the bush. They then went together. It was about 09:00 in the morning when they came to the deceased's body. Kontindi said he then went to report the matter to the police.

[20] The next State witness was Dr Yuri Vasin. He conducted the post mortem on the deceased. He established the cause of death to be asphyxiation. He did not find abrasions or lacerations on the genitals of the deceased suggestive of forced sexual intercourse. He took vaginal and other swabs from the deceased and handed some to the police.

[21] At the end of the State's case, accused testified on his own behalf and, in a rather bizarre twist, took the attitude that he did not kill the deceased, contrary to the plea explanation that he gave in this Court. He testified that he only saw the deceased at the cuca shop on the fateful day, but never went with her. That is clearly in conflict with the evidence of State witness Silas Kontindi, the owner of the cuca shop, who saw them leave together.

[22] I find that no prejudice had been occasioned to the accused in the way in which his warning statement was taken and the pointings-out were conducted. Where there was prejudice, I already said so; and that relates to the s 119 proceedings and the purported

confession. The accused, in his warning statement and during the pointings-out, placed himself at the scene of the crime of murder. That is also corroborated in material particular by his plea explanation in this Court. He however strenuously denied that he ever stated before me that he had killed the deceased. This is quite incredible.

[23] The State has established beyond reasonable doubt that the accused, by strangulation and intending to do so, caused the death of the deceased and I convict him of murder with *dolus directus*.

[24] The allegation of rape is sought to be relied upon on the strength of the admissions made by accused. The State took vaginal swabs. What had happened to those was not explained. The doctor did not find abrasions or lacerations suggestive of forced sexual intercourse on the genitals of the deceased. The accused's admissions in the warning statement and in the pointings-out notwithstanding, I am not satisfied beyond reasonable doubt that the State established that the accused raped the deceased person. I accordingly acquit him on that count.

[25] There is no direct evidence of the strangulation of the minor child by the accused. Throughout, he denied that he caused harm to

the young child. The only direct evidence linking him to the strangling of the boy was that of the teacher Hilma. That is hearsay evidence of

course, but elicited in cross-examination and therefore receivable. For two reasons I reject it: First, the explanation that the teacher forgot to tell the police about so important a detail is so incredulous as to be untrue. Second, the source of it is an incompetent witness whose evidence would not have been admissible in any event. I therefore acquit the accused on the count of attempted murder of the minor, Erastus Shikongo.

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**DAMASEB, J.P.**



**ON BEHALF OF THE STATE**

**Ms Miller**

**Instructed by:**

**Office of the Prosecutor-General**

**ON BEHALF OF THE ACCUSED**

**Ms Kishi**

**Instructed by:**

**Directorate of Legal Aid**