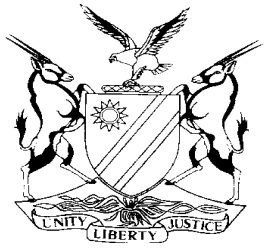

"Not Reportable"

CASE NO.: CC 15/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

JOHANNES KANDJENGO **Accused**

***CORAM*: PARKER J**

Heard on: 2011 April 11 – 13; 2011 May 12; 2011 June 29
Delivered on: 2011 July 14

JUDGMENT (SENTENCING)

PARKER J: [1] In this matter, Ms Ndlovu represents the State, and Mr Coetzee represents the accused. In my judgment, delivered on 16 June 2011, I convicted the accused on one count of murder, committed with *dolus directus*. The facts and reasons respecting the conviction are contained in that judgment. The instant proceedings concern the matter of sentencing. The accused gave evidence on his behalf respecting mitigating factors. The State adduced the

evidence of Victoria Jonas, a sister of the deceased, for whose death the accused was convicted, as aforesaid. As I see it, Victoria's testimony is in the nature of victim-impact evidence.

[2] The accused's evidence dwelt primarily on his personal circumstances. The accused was 35 years of age when he committed the crime of murder; he is now 38 years old. He is not married, but he has two daughters – aged seven and five. The first daughter lives with her maternal parents; and the second, with her mother. The accused only sees them whenever he visited one of the northern Regions of the country where they live. What this means is that the accused is not directly involved in the upbringing of his daughters, as Ms Ndlovu submitted. In my opinion the fact that the accused has two daughters of his own should, instead of counting in his favour, stand against him in this way: The accused is not directly involved in the upbringing of his daughters; and more important, he should appreciate the incalculable sorrow and traumatic loss the untimely death of the deceased has wreaked on the deceased's family, particularly her children who will go through the trials and tribulations of life without motherly love and care. The deceased was about to get married and live a family life. But that was not to be.

[3] It should, in my view, count in the accused's favour that, as a welder working for a construction company he contributed to the economy of the country. But so was the deceased: she kept the shebeen of a shebeen owner so as to eke a living. The accused 'went through' Grade 12 education: it was not established if he gained a Grade 12 'School Certificate'. Be that as it may, I think, he was sufficiently literate to be able to read the newspapers and listen to the Radio to gain an appreciable knowledge of the loud cries coming from all manner of leaders and some members of the public against the intolerable societal cancer of

horrendous and murderous violence against women that appears to go on unabated. The accused himself has been found guilty of such senseless and murderous violence against the deceased – a woman whose only 'fault' (and I use the word 'fault' with tongue in cheek) is that she gave herself to the accused in a romantic relationship. The sheer gruesome manner in which the accused committed the murder, as I described it in the judgment on conviction, and with direct intention to kill, should on any pan of scale – as Ms Ndlovu submitted – far outweigh any personal circumstances of the accused. And in the face of such cold-blooded murder committed with *dolus directus*, it is appropriate for this Court to emphasize the retributive purpose of punishment over the other purposes of punishment, i.e. deterrent, preventive and reformative. (See *State v Both* Case No. CC 39/2008 (Unreported) at para [2].)

[4] That the crime committed by the accused is very serious; is indeed, proverbial. That much; Mr Coetzee admits – quite frankly and honourably. Furthermore, it goes without saying that it is in the interest of society that such heinous and hard-hearted crimes as the present one should be met with severe punishment. As Ms Ndlovu reminded the Court, society is so sick of the rampancy of such abominable and terrible crimes against women that the Parliament passed the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003), as the legislative effort to stem the seemingly unending occurrences of such crimes. In this regard, it must be remembered that the indictment charging the accused takes into account the relevant provisions of that Act. And so one may say that the Legislature has played its role in the fight against domestic violence. The Court must not be seen to be lagging behind in that noble fight. The best way in which the Court may act, in my opinion, is to pass sentences that do not render the legislative effort (under Act No. 4 of 2003) to combat such

crimes nugatory. In fact, in the instant matter, as in suchlike cases, there are victims specific besides the general society, namely, the family of the deceased. It is on behalf of the family that Victoria gave her testimony, as aforesaid. And this Court, in my view must – not should – give her evidence great weight in considering the interests of society as one of the factors to be taken into account in imposing an appropriate sentence; otherwise the family may feel the Court has let the victims specific down.

[5] Of course, in all this, I am mindful of the principle that judicial punishment should not aim at breaking the wrongdoer, as Mr Coetzee reminded the Court (see *State v Daniel Joao Paulo and Josue Manuel Antonio* Case No. CC 10/2009 (Unreported) at par [10]). Indeed, the Court's is not vengeance but justice; and justice, in my view, requires a measure of mercy for the wrongdoer. But in the instance case, I take the reasonable view that not much mercy should be shown to the accused. The accused, despite overwhelming evidence to the contrary by persons who bore him no ill-will or hatred (i.e. Fransina and Foibe) and incontrovertible medical evidence, has failed to take responsibility for the death of the deceased. He blames it on a stone that happened to lie on the ground at precisely the point where, according to the accused, the deceased fell and hit her head.

[6] Both counsel referred to this Court cases which, according to them, bear some similarities to the instant case and the sentences that were there imposed by the Court. I have consulted those cases; some of them were decided by me. I am grateful to counsel for their industry. But as I said in *State v Daniel Joao Paulo and Josue Manuel Antonio* supra at para [11] –

> Granted, while imposing an appropriate sentence in a matter a court ought to take into account sentences imposed in similar matters; but to follow this judicial precept mechanically and with religious ferver without due regard to the particular circumstances and facts of a particular case will throw the whole aspect of sentencing into laughable straightjackets of precedents, robbing the Court of one of its most important and efficacious tools found in judicial decision-making, namely, the exercise of judicial discretion.

[7] It makes sense to repeat what I said in *State v Gert Hermanus Hansie Losper* Case No. CC 11/2007 (Unreported) at para [8] and *State v Both* Case No. 39/2008 (Unreported) at para [7], that is to say '… no amount of punishment will bring the deceased back to her family. All the same the accused must be punished for this terrible crime, and punished severely, considering the circumstances of the commission of the crime …' Indeed, Mr Coetzee concedes that the crime is a serious one and a custodial punishment of 30 years would be appropriate. Ms Ndlovu on the other hand urged on the Court to impose a custodial punishment of 35 years owing to the circumstances of the crime and the fact that the indictment takes into account the relevant provisions of the Act No. 4 of 2003, as aforesaid.

[8] I have taken into account all the considerations enquired into previously, including the factors that must be taken into account in imposing an appropriate sentence and also the purposes of punishment, as well as the submissions by counsel on the degree of punishment that in their respective view would be appropriate. Having done that, it is my view that a sentence of 35 years' imprisonment would be appropriate. But I think the accused deserves some measure of mercy. I use the word 'some' advisedly in view of what I said previously about the attitude of the accused concerning his insistence that the death of the deceased cannot be placed at his door. In this regard, it is my view

that I should take into account the fact that the accused has been held in custody, awaiting trial, for about three years.

[9] For all the above conclusions and reasons, I conclude that the sentence set out hereunder meets the justice of this case.

[10] In the result,

I sentence you –

Mr Johannes Kandjengo to 32 years' imprisonment.

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PARKER J

COUNSEL ON BEHALF OF THE STATE:	Adv. E N Ndlovu
Instructed by:	Office of the Prosecutor-General
COUNSEL ON BEHALF OF THE ACCUSED:	Mr E E Coetzee
Instructed by:	Tjitemisa & Associates