



CASE NO 18/2010

IN THE HIGH COURT OF NAMIBIA

HELD AT OSHAKATI

In the matter between:

THE STATE

and

MAUHPE LIKUWA

CORAM: TOMMASI J

Heard on: 19 - 21 January 2011

Delivered on: 2 February 2011

SENTENCE:

TOMMASI J: [1] The accused, a 49 (forty nine) year old male, pleaded guilty to and was convicted of culpable homicide in that he on 24 November 2007 negligently caused the death of Innocentia Vehemba Mbambi by beating her with fists and slapping her in her face. The deceased died on 25 November 2007. It is now the duty of this Court to determine an appropriate sentence.

[2] In doing so this Court must take into consideration the crime, the offender and the interest of society (often referred to as the triad) whilst bearing in mind the aims of punishment being deterrence, prevention, reform and retribution.

[3] From the testimony given in mitigation and aggravation the following facts were placed before the Court: The accused was traditionally married to the deceased during 1986 and on the date of death was married to her for 11 years. The accused was first betrothed to the deceased when they were both very young. They had 5 children together. Two of the children are still at school whilst two left school. One child was very young when the deceased died and is still not of school going age. Two of the children are residing with the maternal aunt who has four of her own children, two of whom are still attending school. Three of the children live with the maternal grandfather.

[4] The accused and the deceased cultivated the land, growing crops for subsistence. Both worked together. The produce was sold to the public and some used for personal consumption. The deceased also weaved baskets. The household of the accused and the deceased accommodated not only their own children but other dependants and relative's children. There were the four other children of the accused from another relationship, the accused's elderly mother and some children of the accused's predeceased siblings. After the deceased's death, accused's mother could no longer support the children due to her advanced age and lack of financial resources. They were sent to live with other relatives. She now lives alone in the house of the accused.

[5] The accused comes from a poor rural community but one that extends the concept of family to render support to the elderly and orphaned children. The Court took note of the fact that the children are not completely left to their own devices but have been taken care of by the relatives mentioned, although it places an additional financial burden on the custodian relatives.

[6] The accused assaulted his wife (the deceased) after she in public divulged his health status and the fact

he was responsible for infecting her with the Human Immunodeficiency Virus (HIV). The accused felt humiliated and retaliated by launching a vicious attack on the deceased by beating her with fists and slapping her in the face with open hands. The nature of the injuries is indicative of the force with which the accused assaulted the deceased. The deceased died of brain oedema. She had a swelling on the left side of her face and frontal region; bleeding in her nasal cavity and; an abrasion on the left shoulder and right hand. Although there was some provocation it does not detract from the fact that his conduct was unlawful. The accused negligently caused the death of the deceased which was not brought about by the lack of proper care (eg in a motor vehicle collision) but by a deliberate attack on the deceased. It is important for sentencing purposes to determine the degree of the accused's culpability. It is true that the accused only used his fists and open hands but it is also evident from his own admission that the attack was prolonged and persistent to the extent that the neighbours had to physically restrain him from continuing with the assault on the deceased. The accused had no business to assault the woman he professes to love. The accused's deviation from the standard of the reasonable man deserves a greater punishment than the punishment ordinarily given to those convicted of culpable homicide resulting from a motor vehicle collision where negligence could be as slight as a momentary lapse of concentration. (see *S v BOHITILE 2007 (1) NR 137 (HC)*)

[7] Although the cause of the children's suffering can directly be attributed to the actions of the accused, this Court bears in mind the fact that their plight may be alleviated if the accused is given the opportunity to personally take care of them. The personal circumstances of the accused however have to be weighed against the other factors such as the interest of society and the crime he committed.

[8] The accused, although illiterate, came across as a person of average intellect and was able to eloquently inform the court of his regret at having caused the death of his wife; particularly because his children are now left without a future. He also informed the Court that he would, if he could, undo what he did and that he loved his wife. An expression of remorse, particularly when accompanied by actions, operates as a mitigating factor. This Court however is not convinced that the accused has shown genuine

remorse. The accused made no attempt whatsoever to tender an apology for being the cause of the deceased's death to her family. Whereas he indicated that he was advised by the investigating officer not to have any contact with the deceased family, nothing prohibited him from communicating his apology through his relatives or members of that community. The accused admitted that he left in the morning after noticing that the deceased's face was swollen. No steps were taken by the accused to ensure that the deceased received medical attention. This demonstrates that the accused showed no remorse for having assaulted the deceased. The accused however indicated to this Court that he would never assault another person again and to that extent, I believe him. I believe that the accused failed to have the forethought that his assault may result in the death of the deceased. The accused is a first offender at the age of 49 (forty nine) and is capable of rehabilitation.

[9] The state's witness who testified in aggravation, indicated to this court that there was a history of domestic abuse. She herself did not witness this but formed part of the family members who mediated and counselled the parties. According to her the deceased miscarried on two occasions as a result of the assaults by the accused. The accused denied that he assaulted the deceased prior to this occasion and that such family meetings took place. I found this witness to be a credible witness but was not satisfied that she had firsthand knowledge of the assaults and that she was qualified to conclude that the miscarriages, took place as a result of an assault by the accused. These incidences were never reported to the Police and although the deceased received medical attention for the miscarriages no report or referral was made by the medical practitioners to the Police. This evidence is insufficient for this Court to conclude that there has been a history of previous domestic violence and I therefore attach no weight to this evidence.

[10] The father of the accused was, according to the accused, "dragged" before the traditional leaders. He was ordered to bear the funeral expenses of the deceased and to pay compensation of 15 head of cattle to the family of the deceased. The funeral expenses were paid and 5 cattle slaughtered for the funeral. Three

cattle have been paid toward the compensation leaving 12 cattle still to be paid by the accused and his family. The main contributors to the funeral expenses and the compensation were the accused's father and his half brother (also the husband of the deceased's niece who is currently taking care of two of the accused's children). The accused was in custody at the time the traditional tribunal was sitting and did not contribute anything. The accused indicated that he owned one cow, chickens, a table and a bed. He has no idea what happened to it since he has been in custody. It was common cause that the accused would be expected to honour this compensation order but the evidence was not clear as to how this would be enforced in view of the accused's obvious incapacity to pay the remaining 12 (twelve) cattle.

[11] If the accused paid the compensation it would to some extent restore the relationship with the deceased's family. In this case however his family paid the compensation and little weight can be attached to compensation already paid. I however have to consider the fact that the community would still expect the accused to make good on the order to pay the outstanding compensation.

[12] The accused was arrested during November 2007 and remained in custody until January 2010 due to the fact that he and/or his family could not afford to pay the bail that was granted by the Magistrate. The bail was paid in January 2010 but cancelled, due to the fact that the accused failed to attend the pre-trial proceedings in this Court. The accused lacked the necessary funds to travel to Windhoek and he was therefore remanded in custody during May 2010 where he remained until the date of his trial. This means that the accused was held in custody for a period of two years, nine months. For the period after he was released on bail the accused, on the advice of the police, did not return to the village where he stayed and only occasionally had contact with his children.

[13] This Court accepts that the period that the accused spent in custody is a factor that should be taken into account when sentencing the accused. (See *S v KAUZUU2006 (1) NR 225 (HC)*)

[14] It was not disputed that the accused tested positive for the human immunodeficiency virus (HIV) prior to the incident but has been receiving medication and goes for regular checkups. It was not indicated whether he received this medication and treatment with the assistance of the authorities detaining him but logic dictates that this must be the case. The Court is thus satisfied that the accused enjoys good health and is currently receiving medication.

[15] All too often disputes within a domestic relationship are resolved by resorting to violence. This situation has become untenable and there is a growing concern in society that violent crimes against women and children are on the increase. In *S v BALOYI2000 (1) SACR*

81 (CC) Sachs J stated the following at p86 -87A-C

All crime has harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished. The Law Commission, supporting the need for appropriate legislation to reduce and prevent family violence, invoked the following quotation from a document drafted by the US National Council of Juvenile and Family Court Judges:

'Domestic and family violence is a pervasive and frequently lethal problem that challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person. It violates our communities' safety, health, welfare, and economies by draining billions annually in social costs such as medical expenses, psychological problems, lost productivity and intergenerational violence.'

In this jurisdiction the situation is no different. The devastating impact on the family of the accused is clear. A consistent message should be that it is safe for victims of domestic violence to speak up and that they would be heard.

[16] It is the function of this Court to ensure that the interest of society is protected by reacting appropriately when confronted with the punishment of crime that threatens its safety. A clear message must be sent to all persons who perpetrate violence against their partners that their conduct will not be tolerated. In recent times the war against domestic violence gained little momentum as more and more women and children lose their lives in the sanctity of their own homes.

[17] Whilst taking into account the personal circumstances of the accused and the crime, this Court also has to take into account the need of society to root out the evil of domestic violence and violence against women. Having said this, the Court is mindful of that it is not the wishes of communities that are served, but its interest. (See *S VMAKWANYANE AND ANOTHER* 1995 (3) SA 391 (CC))

[18] Counsel for the defence invited the Court to consider alternatives to direct imprisonment. Some of the options mentioned were: a fine suspension, compensation and community service. I however have to agree with counsel for the State that a compensation order under these circumstances would not be appropriate or even advisable as this would place an additional drain on the resources of the family of the accused rather than on the accused who clearly would not be in a position to compensate the family of the deceased. Fines are generally imposed for lesser offences. Culpable homicide especially given the facts of this case cannot be considered as such. Furthermore, the accused is simply not in a position to pay such a fine. The accused own very little property and derive his income from growing crops. His family, having already paid compensation, is currently taking care of his children and their remaining financial recourses are better spent for this purpose. In *S v VEKUEMININA AND OTHERS* 1992 NR 255 (HC) the Court held that the offender must, as a general rule, either be capable of paying the fine or of getting the fine paid on his behalf and where the nature of the offence arouses moral indignation and the purpose of the penalty is clearly retributive, the interests of the accused are then secondary. Counsel for Defence correctly conceded that this offence arouses strong moral indignation.. Having said this it is my considered view that the facts of this case justify a custodial sentence and suspending a portion thereof.

[19] In the result I make the following order

1. The accused is sentenced to seven years' imprisonment, two years of which are suspended for five years on condition that the accused is not convicted of culpable homicide, assault with intent to do grievous bodily harm or assault committed during the period of suspension.

TOMMASI, J