



CASE NO.: CC 17/2010

IN THE HIGH COURT OF NAMIBIA

HELD AT OSHAKATI

In the matter between:

THE STATE

and

LAZARUS GABRIEL

CORAM: TOMMASI, J

Heard on: 16 & 23 February 2011

Delivered on: 23 February 2011

SENTENCE:

TOMMASI J: [1] The accused before Court stands to be sentenced; having been convicted on a charge of murder read with the provisions of the Combating of the Domestic Violence, 2003 (Act No 4 of 2003); in that he on 27 March 2009 unlawfully and intentionally (in the form of *dolus directus*) killed Tulonga Naudjebo Shitaleni.

[2] In sentencing the accused the Court must consider the well established objectives; i.e prevention, deterrence; reformation and retribution; and principles of sentence i.e, the crime; the offender; and the interests of society.

This Court's task is to balance these, sometimes divergent interests and to

"blend the punishment "with a measure of mercy according the circumstances.¹

This is no easy task as the offender and the facts of each case differ. The Court has to evaluate in each case the weight that must be given to the different factors. In *S v Van Wyk*,² Ackerman A J A indicated on page 448 D-F that:

"...the difficulty arises, not so much from the general principles applicable, but from the complicated task of trying to harmonise and balance these principles and to apply it to the facts. The duty to harmonise and balance does not imply that equal weight or value must be given to the different factors".

[3] The accused testified under oath and placed his personal circumstances before this Court. The accused is 32 years old and a first offender. He completed grade twelve (12); was employed on a contract basis teaching adult education; and earned N\$1000.00 per month. The deceased was the accused's girlfriend from 2005 to January 2009. He has one son who was born of a relationship with the deceased and who is now five years old. The accused's main concern is for the future of his son as he believes that his son should be raised by his biological parent. The minor child has been in the custody of his maternal grandmother since February 2009; and although the accused felt it would be in the best interest of his son for his biological parent to raise him, no allegation was made that his son was not properly being taken care off.

[4] The accused has been in custody since the date of his arrest on 28 March 2009; which period is just short of two years. This Court accepts that the period the accused spent in custody is a factor that should be taken into account when sentencing the accused.³

1 *S v Tjiho* 1991 NR 361 (HC); *S v Rabie* 1975 (4) SA 855 (A.D.)

2 1993 NR 426 (SC)

3 (See *S v KAUZUU* 2006 (1) NR 225 (HC))

[5] The Accused further testified that he suffers from epilepsy although he has not had a seizure whilst he was in custody. I am therefore satisfied that the accused generally enjoys good health and that, if needed, the accused would have access to medical care at any correctional facility in Namibia.

[6] The accused indicated that he was unable to extend an apology to the parents of the deceased as it was difficult for him to talk to them. He expressed remorse and indicated that he feels bad for the family of the deceased. This expression of contrition comes far too late for it to ring true. Remorse is expressed both in deeds and in words. The Court however takes note of the fact that the accused at least feels ashamed of his deed.

[7] The accused offended for the first time at the age of thirty (30) and there were no previous incidents of domestic violence. The accused fulfilled an active role in society teaching adults and has completed grade twelve. The accused thus can be rehabilitated but what remains disconcerting to this Court is the brutal and callous nature of the crime he committed.

[7] The mother of the accused testified in his support. She confirmed that the accused was taking care of his son and the deceased at the time they were living with her. She testified that her family paid; the funeral costs of the deceased; and six (6) cattle as compensation, to the deceased's family. She pleaded with the court to be lenient when sentencing her son. Although this Court has compassion for the desperate plea of a mother it cannot ignore the feelings of grief and loss suffered by the deceased's mother

[8] The State called the biological mother of the deceased in terms of s25 of the Combatting of Domestic Violence Act 4 of 2003, to testify under oath. She informed the court that the deceased died one day after she buried her son who was older than the deceased. She remains with 6 children that are still of school going age as well as the five year old son of the deceased and the accused. She cultivates the land for subsistence and relied on the little income that was given to her by the deceased. She acknowledged the fact that the accused's family paid the funeral expenses and compensation in the form of 6 cattle. She clearly indicated to the Court that the compensation cannot even begin to address her loss and that it gives her no consolation. She felt aggrieved by the accused's inability to apologise on the three occasions she visited him whilst he was in custody.

[9] The accused killed the deceased by stabbing her twenty six (26) times with a pocket knife. The event was preceded by an argument between the deceased and the accused. The argument related to N\$500.00 which the accused left in the room he was sharing with the deceased; and he suspected the deceased of having taken it. The accused confronted the deceased after he had consumed alcohol. The deceased verbally abused the accused and tried to stab him with a pocket knife that was attached to the room key. The accused disarmed the deceased of the knife and sustained 3 cut wounds on his hand.

[10] Counsel for the accused submitted that the accused had consumed alcohol before he committed the crime and this together with the provocation impacted on the accused's ability to restrain himself and to control the rage he was feeling at the time. There is some merit in this submission, however if one juxtapose this against

the heinous nature of the crime committed; and the triviality of the issue causing the rage, it can only to a slight degree mitigate in the accused's favour. It is too often that alcohol abuse is used as an excuse for the most brutal of murders in our society and this cannot be encouraged. It was furthermore stated in *S v Kanghondi*⁴ by Shivute JP, as he then was: on page 4 that:

"This case is yet another example of a most disturbing and relatively recent trend of cases involving mainly men employing extraordinary violent methods to settle petty quarrels"

Needless to say the trend continued well after this judgment was delivered and in fact gained some momentum in recent days.

[11] This was a vicious and brutal attack on a defenceless woman weighing no more than 45 kg. The accused stabbed her in rapid succession without heeding to her screams for 26 times. He walked away leaving her to die and tried to evade being brought to justice. He misled the court during his trial by indicating that he had no recollection of the event. The conduct of the accused was callous and coldblooded.

[12] Domestic violence has a devastating domino effect on families, their communities and society at large. The loss of life of a 25 year old young woman leaves behind a young son of 5 years old who now has to grow up without the love and nurturing of his own biological mother. Custodial sentence, which is inevitable in this case, would leave the son of the accused effectively orphaned for the duration of the custodial sentence. It places an additional financial burden on an already impoverished household. The deceased was a young woman with a reasonable expectation that she would still experience a full life which was cut short in a moment of rage. Her mother's grief is still evident two years after the death of

4 CC 09/2002, delivered 25 September 2003 an unreported case.

her daughter. It is only natural that she would seek retribution.

[13] This Court has already expressed itself on a number of occasions that robust sentences should be imposed to stem the tide of deaths as a result of domestic violence⁵. In *S v Amunyele*,⁶ Muller J indicated that:

"Society would expect of this Court to seriously pay attention to the nature of the offence and what our Courts have said in this regard in the past"

and stated further on page 6 para [11] of the same judgment:

"The only appropriate punishment for the accused is one of a long term of imprisonment and the Court will neglect its responsibility if such a sentence is not imposed."

The Court in that matter imposed a sentence of 30 years where the accused was convicted of murder after having stabbing the deceased twenty four (24) times.

[14] The nature and the manner in which the crime was committed and the interest of society compels this Court to impose a sentences which would deter other would be offenders from resolving emotional disputes with violence and which would satisfy the retributive objective. The Court has taken the personal circumstances of the accused into consideration and in particular the fact that the accused spent almost two years in custody to date.

[15] Having said this it is a appropriate for this Court to be reminded of the

5 *S v BOHITILE* 2007 (1) NR 137 (HC).

6 Case No CC 22/2006 delivered on February, 25, 2008

following excerpt from R v Karg 1961 (1) SA 231 (A) at 236B - C

"It is not wrong that the natural indignation of interested persons of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if the sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment."

[16] After considering all the circumstances in mitigation, evidence led in terms of s25 of the Combating of Domestic Violence Act 4 of 2003; and arguments by both counsel, the Court sentences the accused to 27 years imprisonment.

TOMMASI, J