

NOT REPORTABLE



CASE NO.: CC 11/2010

IN THE HIGH COURT OF NAMIBIA

NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

In the matter between:

THE STATE

versus

ABISAI NDAUMBWA

ACCUSED

CORAM: TOMMASI J

Heard on: 29 FEBRUARY 2012

Delivered on: 7 MARCH 2012

SENTENCE

TOMMASI J: [1] The accused has been convicted of murder and robbery with aggravating circumstances and the Court now need to determine an appropriate sentence.

[2] In considering an appropriate sentence the Court must consider the crime(s) committed, the offender and the interests of society. In doing so I must bear in mind the purposes of punishment and must try to balance the interests of the accused, and the interests of society in relation to the crimes itself and in relation to those purposes.¹

[3] The accused on 9 June 2009 went to the farm Jakalomuramba armed with a *panga* with the specific intention to break into the farmhouse and to rob the deceased. He came prepared to ensure that he be able to overcome any resistance which he may encounter hence he armed himself with a panga. He waited on a nearby mountain waiting for the sun to set and to, under the cover of darkness, break into the house. He entered the house through the sitting room window which was not properly closed and found the deceased sitting in the kitchen. When she saw him she started screaming and he silenced her by hitting her several times with the *panga*. She tried to ward off the blows with her arms but the accused chopped her on her hands and arms, using such force as to fracture her bones in order to reach her head where he dealt her the fatal blows and stabbed her in her chest. The deceased was an old women of 75 years old, helpless against the vicious attack by the accused. One can but imagine the terror and

¹ See S v TJIHO 1991 NR 361 (HC)

horrendous pain she felt during the last hours of her life. What is abundantly clear was that the accused intended to kill the deceased. He left her lying on the kitchen floor to die, whilst he ransacked the house for valuable items. He took her laptop, keyboard, computer screen, cellular phone and other valuable items and placed it in a bag. He found the keys to the vehicle and the gate which he opened and drove away with the stolen items and the deceased's vehicle. The accused abandoned the vehicle in Otjiwarongo and returned to his work the next morning where he continued working as if nothing had happened. The actions of the accused were cold and calculated and driven by nothing other than his self interest. The murder of the late Ms Volkman was intentional, pre-meditated, brutal and senseless. It falls in a category which may be described as extreme. The robbery was carefully planned. The accused took leave from his work under the pretext that he was not well and needed to go to the clinic. He bided his time to enter the house of the deceased. He chose a dangerous weapon to overcome the resistance encountered. The Court however bears in mind that the items stolen were recovered. It appears from the facts of the case that accused did not intend to derive any profit from the robbery of the vehicle but mainly to use it to get away from the scene of the crime.

[4] Both the offences were committed within the same time frame and are closely linked. Both are serious and both have violence as an element. The

Court is mindful to avoid sentencing the accused twice for something he had done once². For purposes of sentencing the accused for the robbery the Court will not take the death of the deceased into consideration as an aggravating factor and to further address the risk of double jeopardy by ordering that a portion of the term of imprisonment imposed for robbery to run concurrently with the term of imprisonment imposed for murder.

[5] The accused did not testify under oath and his personal circumstances were placed before the Court by his Legal Representative. The accused was 20 years old at the time when he committed these offences. He grew up mostly with his father as his mother found employment in Otjiwarongo when he was very young. It was submitted that he grew up somewhat isolated from the extended family and his mother. He has six siblings all younger than him but his relationship with them is distant. He completed grade 7 and left school as his parents could no longer afford to keep him in school. The accused found employment at a garage after he left school and was employed on a farm at the time he committed the offence. He was found trustworthy enough to be placed in charge of the rations of the other farm workers. The accused was living below the breadline being a farm worker and had to provide for his daughter, but he at least had a means of income. His ex-girlfriend is currently taking care of his 4 year old daughter. There was

² See S v ALEXANDER 2006 (1) NR 1 (SCA) where it was held that inasmuch as the conviction on both crimes was based on the same series of facts and the violence perpetrated on the victim constituted an element of both these crimes, the accused found himself in jeopardy of being punished twice for something he had done but once.

no evidence of any remorse shown by the accused. The fact that he was young when he committed the crime and the fact that he is a first offender must be weighed against the cold and calculating personality of the accused and the violent nature of the crimes he committed.

[6] The Court further has to take into consideration the fact that the accused had been convicted of escape from lawful custody whilst awaiting his trial and has two pending cases of escape from lawful custody. This is not a previous conviction but apart from his disregard for law enforcement, it impacts on the time that he spent awaiting trial. The accused was detained after his arrest on 12 June 2009 to date hereof. Fifteen months hereof he was serving a term of imprisonment for having escaped. The State submitted that the nature of the offences committed by the accused and his personality makes him a danger to society and that a lengthy custodial sentence is called for. Having said all this, the Court cannot simply ignore his youthfulness, the fact that he is a first offender and the time he spent in custody awaiting trial.

[7] The children of the deceased addressed a letter to the Court wherein they call for a sentence which would give them some solace for having lost their mother who was an active and caring member of the Otavi Community. They *inter alia*, reminded the Court that farmers form the backbone of the

Namibian productive and social development and that a high number of similar crimes are being committed countrywide. It is indeed so that farmers contribute substantially to economy of this country, provide labour and stimulate the rural economies. Farmers, who are living in remote areas, increasingly fall victim to violent robberies and as is the case herein, lose their lives. The Courts are called upon to impose deterrent sentences. In *S v Alexander, supra*³ Maritz AJA, as he then was, cited with approval the remarks made in *S v Matolo en 'n Ander* 1998 (1) SACR 206 (O) at 211d-f:

'In cases like the present the interests of society is a factor which plays a material role and which requires serious consideration. Our country at present suffers an unprecedented, uncontrolled and unacceptable wave of violence, murder, homicide, robbery and rape. A blatant and flagrant want of respect for the life and property of fellow human beings has become prevalent. The vocabulary of our courts to describe the barbaric and repulsive conduct of such unscrupulous criminals is being exhausted. The community craves the assistance of the courts: its members threaten, inter alia, to take the law into their own hands. The courts impose severe sentences, but the momentum of violence continues unabated. A court must be thoroughly aware of its responsibility to the community, and by acting steadfastly, impartially and fearlessly, announce to the world in unambiguous terms its utter repugnance and contempt of such conduct.'

Although this was cited from a South African case, the same can equally be said of Namibia.

[7] It is clear that the aggravating factors herein, the need for retribution, general deterrence and prevention outweighs the personal circumstances of the accused and the need for his reform. I have compared your case with

³ Page 7 G-J & 8A

certain of the cases provided to this Court by the State to ensure that a consistent approach is adopted.

[8] In the premises this Court is of the view that the following would be an appropriate sentence:

Count 1 - Murder - 32 years imprisonment

Count 2 - Housebreaking with intend to rob and robbery, with aggravating circumstances - 15 years

In terms of s280 of Act 41 of 1977 it is ordered that 7 years of the sentence imposed in count 2 be served concurrently with the sentence imposed on count 1.

It is further ordered that the exhibits 1-20 be returned to the children of the deceased and that exhibit 21-22 (two *pangas*) be declared forfeited to the State.

Tommasi J

ON BEHALF OF THE STATE

Mr.

Shileka

Instructed by:

Office of the Prosecutor-

General

ON BEHALF OF THE ACCUSED

Ms.

Mugaviri

Instructed by:

Directorate of Legal

Aid