



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 04 /2015

In the matter between:

THE STATE

And

PAULUS SHILONGO

ACCUSED

Neutral citation: State v Shilongo (CC 04/2015) [2016] NAHCMD 127 (25 April 2016)

Coram: USIKU J

Heard: 7 April 2016

Delivered: 25 April 2016

Flynotes: Sentence – Domestic violence – should be aggravating factor in sentencing – such violence prevalent in Namibia society – In sentencing courts must reflect intolerance of violence against women – Personal circumstances of accused also important – However courts wanting to send clear message to society – Regard to be had on the protection of human dignity and equality between men and women as enshrined in the Constitution.

Summary: The accused convicted of murder of his live in girlfriend. Though claiming to have consumed alcohol on the date of the incident he was able to appreciate his actions. He assaulted the deceased with stones as a result of which the deceased sustained several fractures of her head and neck bones. The deceased was also assaulted with a sjambok all over her body and sustained bruises. She was dragged on the ground from where the fight had started to the shack where they lived together, a distance of about 18.2 km. There accused then locked the shack and left. The deceased was discovered dead the next day. The accused was arrested a day after.

Held; that the seriousness of the crime and the interest of society out-weight the accused's interests by far.

Held; further, that the accused though a first offender had to be removed from society as the objectives of punishment, prevention and retribution should be emphasized.

ORDER

30 years imprisonment of which 2 years imprisonment are suspended for 5 years on condition that the accused is not convicted with the crime of murder or any offence involving violence against another person, committed during the period of suspension.

JUDGMENT

USIKU J,

[1] On the 30 March 2016 after hearing evidence, the accused was convicted on a charge of murder in the form of dolus eventualis. Evidence was presented in

mitigation of sentence by the accused under oath. Both counsel also addressed the court. The state did not prove any previous convictions against the accused.

[2] In passing sentence regard must be had to those factors that were placed before court in mitigation and aggravation of sentence as rightly pointed out by both counsels in their submissions.

[3] It is trite that in order to determine what punishment in the circumstances of this case would be suitable, the court has to consider the triad, that being the accused's personal circumstances, the seriousness of the offence as well as the interest of the society. These three factors need not be afforded equal weight and where justified, one may be emphasised at the expense of others. It is also the duty of the court to consider the element of mercy, depending mainly on the circumstances of the case.

[4] The following were the accused person's personal circumstances. Accused's age is unknown and he had never attended school. Accused is a father of three children of which two are being taken care by his mother. The youngest child is being looked after by the mother elsewhere. He is a first offender and has no case pending against him. Since his arrest he has been in custody.

[5] During the trial it was testified that at the time of the commission of the offence the accused was under the influence of alcohol. Though the intake of alcohol does not necessarily constitute a mitigating factor, regard must be had to the facts of each case in deciding whether or not it is mitigating. It is *trite* that intoxication can indeed operate as a mitigating factor in that the accused's moral blameworthiness is reduced and is considered to be a mitigating factor¹. In the present case, the accused admitted to have taken alcohol on the date the crime was committed and that he is a person who even when under the influence of alcohol would recall what he had done, he was able therefore to recollect in detail the events that led to the death of the deceased. It is therefore not in dispute that even though the accused was under the influence of alcohol prior to the assault on the deceased, he was not

¹ S v Moses 1997 2 SACR 322

heavily intoxicated and as such was able to appreciate what he was doing at the time. The intake of alcohol did not have much effect on him.

[6] The assault on the deceased was as a result of the deceased having spoken to other male persons in a language the accused did not understand and that the deceased had laughed at the accused. The victim was a women and extremely vulnerable. She was defenceless and stood no chance whatsoever to ward off the accused's attack on her. It leaves one with a sense of shock and as such. I find the following passage by Damased JP from the case of ² fitting, at 206 F-I "brutality against the vulnerable in our society especially women and children, has reached a crisis point. These crimes against the vulnerable in our society evoke a sense of helplessness in the national character. Those who commit despicable and serious crimes that we have shamefully now become accustomed to as a community, should expect harsh sentences from the Courts of this land".

[7] The accused had been convicted with murder without direct intent. That however does not make this crime less serious. Life was lost as a result of the accused's unlawful conduct. It is a fact that murder is one of the most serious crimes that can be committed. The sanctity of life as enshrined in the Constitution must be respected by all. The killing of the deceased was uncalled for and there was no provocation on the part of the deceased towards the accused.

[8] The nature of the crime, the callousness and the brutality of the accused's conduct show that he attaches no value to other people's lives, or physical integrity, or to their dignity. Evidence before court is that the deceased was stripped off her clothes and left naked for all to see. Thanks to the Good Samaritan who provided a blanket to the deceased in order for her to cover her nakedness at the time. All these are aggravating factors weighing heavily against the accused when it comes to sentencing.

[9] I am mindful of the fact that the accused have been incarcerated since the date of his arrest on the 10 November 2012 to date. The period the accused has been in custody awaiting the finalisation of his trial which is +- 3 years have to be

² S v Kaanyuka 2005 NR 201 (HC)

taken into account and will lead to a reduction in sentence as the period so spent is indeed a substantial one.

[10] Consideration of mercy as referred to in³ “Indeed the element of mercy is a hallmark of a civilised and enlightened administration but it should not be overlooked lest the court be in danger of reducing itself to the plain of the criminal”. I respectfully endorse these sentiments. At the same time the objects of punishment is to hurt the offender and to hurt him sufficiently to prevent him from committing a similar offence and also to warn others of the consequences of committing such offences.

[11] Having balanced the mitigating and aggravating factors. I have come to conclude that the crime which the accused have been convicted of and the interests of society by far out weight the accused’s personal interests. The sentence I am about to impose must therefore reflect the court’s findings in that respect.

[12] In the result, and after considering all factors relevant to sentencing, the following sentence on a charge of murder in the form of *dolus eventualis* is considered to be appropriate:

The accused is sentenced to:

30 years imprisonment of which 2 years imprisonment are suspended for 5 years on condition that the accused is not convicted with the crime of murder or any offence involving violence against another person, committed during the period of suspension.

DN USIKU
Judge

³ S v Vee 1972 3 SA page 6 11 AD at 614

APPEARANCES:

THE STATE:

Mr Henry Muhongo
Of Office of the Prosecutor-General, Windhoek

ACCUSED:

Mr Trevor Brockerhoff
Instructed by Legal Aid, Windhoek