



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 05/2017

In the matter between:

**THE STATE**

and

**PLESIE GOWASEB**

**ACCUSED**

**Neutral citation:** *S v Gowaseb* (CC 05/2017) [2017] NAHCMD 193 (19 July 2017)

**Coram:** LIEBENBERG J

**Heard:** 28 June; 13 – 14 July 2017

**Delivered:** 19 July 2017

**Flynote:** Criminal Procedure – Sentence – Accused convicted of murder with direct intent committed in a domestic setting and arson – Aggravating and personal circumstances discussed – Accused a second offender – Plea of guilty – Accused remorseful.

Sentence – Court to accord with accused's moral blameworthiness – Accused's conduct was irrational and unjustified – No justification exists that renders accused's behaviour to be regarded as mitigating – Offences were

serious, premeditated and prevalent – Objective of punishment – Retribution and deterrence.

**Summary:** Accused pleaded guilty to a count of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003 and arson. Prior to committing the crimes, the accused earlier during the day had approached the deceased with an attempt to rekindle their broken relationship. When the deceased refused to do so, the accused returned during the night with the intent to kill her, locked the door of the deceased's house from the outside with the padlock he had brought with. While the deceased was sleeping he entered through an open window, doused the room with paraffin and set it alight. He escaped through the window causing the deceased to suffer from burn wounds which she died from one week later. Court found that, his guilty plea coupled with the fact that he had apologized to the deceased's parents in open court is indicative of genuine remorse. However, accused's blameworthiness is exacerbated by the fact that his action was premeditated and perpetrated against the mother of children for no apparent reason, such offences are serious and prevalent. For purposes of sentencing, the court took into consideration, the seriousness of the offences, the manner in which it was committed as well as the interest of society. The court found that the interests of society outweigh the interests of the accused significantly.

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### ORDER

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Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 34 years' imprisonment.

Count 2: Arson – 8 years' imprisonment.

In terms of s 280 (2) of Act 51 of 1977 it is ordered that 4 years on count 2 be served concurrently with the sentence imposed on count 1.

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## SENTENCE

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LIEBENBERG J:

[1] Consequential to pleading guilty the accused stands convicted of one count of murder, read with the provisions of the Combating of Domestic Violence Act, 2003<sup>1</sup> (the Act) and one further count of arson. The offences were committed during the night of 13 – 14 October 2012 when the accused set alight the house in which the deceased was, causing injuries to her person from which she died in hospital one week later.

[2] In amplification of his plea the accused admitted that he and the deceased were in a domestic relationship as defined in the Act and that his unlawful actions towards the deceased had caused her death. He explained that during the day of 13 October 2012 he approached the deceased in order to rekindle their relationship but that she reacted by insulting him and told him to leave. It is common cause that at the relevant time they were living separate. This angered the accused and during the night when everyone was asleep, he returned and locked the door from the outside with a padlock where after he gained access to the house through an open window. Once inside he doused the deceased's room with paraffin he had found inside the room before setting it alight. He afterwards escaped through the open window, followed by the deceased whose body by then was on fire. It is common cause that the deceased sustained serious burn injuries and one week later died in hospital as a result thereof.

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<sup>1</sup> Act 4 of 2003.

[3] The accused stated that he was consumed by anger after he had been insulted and unable to control himself. He was regretful of committing these heinous crimes and appreciates that he employed such violent and cruel manner to rob the deceased of her life, and their children of a mother.

[4] A photo plan of the scene of crime<sup>2</sup> and the post-mortem report compiled and issued by Dr Vasin,<sup>3</sup> a forensic pathologist attached to the Windhoek Central hospital, were received into evidence by agreement. According to the report the deceased had sustained an estimated 70 percent 2<sup>nd</sup> and 3<sup>rd</sup> degree skin burns all over the body, being the cause of death.

[5] The State in aggravation of sentence led the evidence of Ellie Goagoses, the biological mother to the deceased. The thrust of her testimony is that the accused and the deceased were in a relationship from which three children were born. One child is deceased and the remaining two are aged 16 and 13 years, respectively. Since birth she had been caring for them and at present they are still living with her. The reason, she explained, was due to the tempestuous and unsettled relationship of their parents, circumstances not conducive to raise a child in. It was mainly driven by mutual jealousy which often ended in physical fights and the opening and withdrawing of cases with the police. From her evidence it is clear that the relationship was marred by distrust and violent behaviour which, in the end, claimed the deceased's life.

[6] The accused testified in mitigation of sentence and confirmed having had a poor relationship with the deceased. It seemed to have reached an all-time low approximately one month prior to the incident when he learned that he was HIV+ and the deceased having been informed accordingly. By then they were already living apart as the deceased had taken up employment. Accused said he on that fateful day went to the deceased in order to try and rekindle their relationship, but was turned down. He admits having become angry and returned to the deceased's room after midnight when he locked the

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<sup>2</sup> Exhibit 'B'.

<sup>3</sup> Exhibit 'C'.

door from the outside with a padlock he brought with, thereby ensuring that she would not be able to leave the room through the door.

[7] I pause to observe that the accused during his testimony proffered a different version from what is stated in his plea explanation where he said that after the first altercation he *pretended* to leave and returned after a short while. Opposed thereto stands his testimony that he came on foot from his house, situated in Dordabis, some two km away. He further testified that after he had entered the deceased's room there was a physical fight between him and the deceased. He said he (by chance) found paraffin on a table in the deceased's room and on the spur of the moment decided to put the room on fire. However, nothing had been said in his plea explanation about a preceding fight between him and the deceased at that stage. On the contrary, the impression was gained that the deceased was asleep when he set the room alight. When asked where he found the padlock used to lock the door with, he explained that he had earlier picked it up in Dordabis. He said he had brought it along in order to use it, though unable to explain why he wanted to lock the door.

[8] There can be no doubt that the accused hatched his plan to kill the deceased prior to his return late that night; this is evident from the padlock he brought with in order to lock the door from the outside. It also suggests that his *modus operandi* would be to set the deceased's room alight. The only reasonable inference to draw from his explanation is that it would prevent the deceased from escaping through the door. I find the accused's testimony about a preceding fight implausible; also that he by chance came upon the bottle of paraffin and in the heat of the moment decided to set the room on fire. If that were to be the truth, why then did he lock the door in the first place and how did he intend to vent his anger – the sole reason for returning at night? On his own admission he entered the deceased's room whilst she was asleep, doused the room in paraffin and set it alight. On the latter version it would explain why he had earlier locked the door from the outside namely, to prevent her from escaping the flames. I accordingly reject the accused's

testimony on this point as false beyond reasonable doubt as it clearly has the making of an afterthought.

[9] What is most aggravating is that the crimes were not committed on the spur of the moment, but required some degree of planning; making the accused's criminal behaviour even more reprehensible.<sup>4</sup> He waited until the deceased was asleep before he set his evil plan in motion. According to the accused the deceased rejected him because of his HIV status which angered him to the point where he was unable to control himself. It seems to me that in these circumstances the deceased's reaction could at least have been expected, and the accused's response clearly being irrational and unjustified. The deceased made her intentions of no longer being interested in the relationship known to him and, seemingly, for good reason.

[10] These crimes were committed in the context of a domestic relationship as defined in the Combating of Domestic Violence Act, 2003. This Court in past judgments made it clear that it considers crimes committed in a domestic setting in a serious light and would increasingly impose heavier sentences in order to bring an end to the spate of murders currently experienced. The present instance is just another example of the extent of abuse and crimes committed on a daily basis in our society, where the weak and vulnerable often pay with their lives for no reason at all. Differences between persons in virtually any relationship, moreover when of romantic nature, are likely to arise and as independent human beings we are often confronted with difficult situations which require emotional decision making – it is simply part of life. That obviously includes breakups in relationships and irrespective of how difficult and painful the process may be to the affected parties, they are bound by the fundamental rights enshrined in our Constitution, including the moral values endorsed and upheld by society. It is therefore in the interest of justice that these rights and mutual respect for one another be protected and upheld at all cost. To this end the court plays an important role in upholding the rule of law through its decisions and the sentences it imposes.

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<sup>4</sup> *S v Mafu* 1992 (2) SACR 494 (A) at 495d-e.

[11] In the present instance the deceased had all the right to terminate her relationship with the accused for whatever reason, without her becoming a victim for having done so. The accused was enraged by the deceased's decision and driven by nothing else but hatred or jealousy when deciding to end the deceased's life. Though there is some undertone in the accused's plea explanation that he was provoked by the deceased's accusations resulting in her terminating the relationship, this factor, clearly aimed at explaining and mitigating the accused's unlawful actions, significantly loses weight in the light of the accused's admitted HIV status. In any event, there could be no justification for the accused's behaviour that could possibly be regarded as mitigation.

[12] There can be no doubt that both crimes committed are serious, particularly when regard is had to the brutal and merciless nature of the attack on a vulnerable person in the safety of her own home – the mother of his children. I can hardly imagine something more horrid happening to a person who is set alight – more so, when the innocent victim is a defenceless and helpless person. His actions were unexpected and callous, perpetrated with direct intent to kill. This is yet another senseless killing which could have been avoided, had the accused not served his own interests at the expense of others.

[13] One of the sentencing principles is that for a sentence to be appropriate, it should accord with the accused person's moral blameworthiness.<sup>5</sup> In the present instance the accused's blameworthiness is exacerbated by the fact that the murder was premeditated, directed at a defenceless victim who was attacked whilst in the safety of her home, and that the offence being committed in a domestic setting. As admitted by the accused, he killed the mother of their children which undoubtedly will bring about disruption and unnecessary hardship to the family for years to come. The cumulative effect of these factors is that it considerably outweighs any mitigating factors placed on record and should therefore reflect in the punishment meted out.

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<sup>5</sup> *S v Qamata* 1997 (1) SACR 479 (E) at 483a.

[14] Turning to the plea of guilty offered by the accused on both counts as being a sign of remorse, coupled with apologising to the parents of the deceased in open court, it was argued by State counsel that he was not sincere and therefore, should not be considered as mitigation. Only if it can be deduced from his actions that he is deeply and sincerely remorseful for his wrongdoing, the court may consider that a mitigating factor.<sup>6</sup>

[15] The accused in his plea explanation acknowledged the extent of his 'horrible, cruel and chilling act' and expressed his remorse and shame for what he put his family through, as a result thereof. By testifying and confirming these sentiments in support of his plea of guilty, he in my view took the court into his confidence as regards his intentions, despite during his testimony painting a somewhat different picture as to the circumstances under which the crimes were committed. Besides having earlier apologised to the deceased's father when he was still in police custody, he again sought forgiveness from the family in open court. What more was he required to do to show that his remorse was genuine? This is not an instance where the accused at the end of the trial and only after being convicted suddenly claims to be remorseful. In this court he from the outset pleaded guilty and when coupled with his expression of remorse under oath, there is no reason to doubt that he is sincere and deeply remorseful. I accordingly find this a factor to be taken into account in sentencing.

[16] In deciding what would in the circumstances of the case constitute suitable punishment, regard must be had to the personal circumstances of the offender, the crime, with specific reference to the seriousness thereof and the circumstances in which it was committed, as well as the interest of society. A well-balanced sentence would reflect that proper consideration was given, not only to the personal interests of the accused person, but also to the legitimate interest and expectations of society. Though society expects that those making them guilty of committing serious crimes must receive sufficient punishment, it is equally in its interest that the personal circumstances of the

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<sup>6</sup> *S v Volkwyn* 1995 (1) SACR 286 (A) at 289h.



offender before court must not be overlooked and be given proper consideration.

[17] The accused is currently 41 years of age, not married and the father of five children with ages ranging between 21 and 13 years. At the time of committing the offence he was employed and had been supporting his children, including the two children he has with the deceased. Though the deceased's mother testified that it was only the deceased who maintained the children, the accused said that money had been paid into the savings account of the deceased's sister which was for the benefit and maintenance of the children. In the absence of evidence to the contrary, there is no reason to doubt his version on this score.

[18] The accused was arrested on 14 October 2012 and only released on bail three years later. Where the accused is in custody pending trial this period would usually lead to a reduction in sentence, particularly if it has been a substantial period.<sup>7</sup>

[19] From the accused's report of previous convictions he has one relevant previous conviction for which he on 18 May 2011 was sentenced to a fine. He was then convicted of assault with intent to do grievous bodily harm where the victim was a 39 year old female who was struck on the head with a stone. Though a previous conviction would in appropriate cases lead to the imposition of a heavier sentence, it is trite that the sentence to be imposed must still be reasonable in relation to the seriousness of the offence under consideration. A sentencing court must guard against according too much weight to a previous conviction and must remember that the accused has already been punished for the previous conviction.<sup>8</sup> For purposes of sentencing in the present matter, I am satisfied that the accused is not a first offender and that his previous conviction is indeed a relevant factor.

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<sup>7</sup> *S v Kauzuu* 2006 (1) NR 225 (HC).

<sup>8</sup> *S v Beardman* 1997 (1) SACR 304 (E).

[20] Turning to the objectives of punishment and regard being had to the seriousness of the crimes the accused stands convicted of, I am of the view that deterrence and retribution should come to the fore. In this instance the interest of society outweighs the interests of the accused significantly and should reflect in the sentence imposed. Given the circumstances of the case set out hereinbefore, a lengthy custodial sentence seems inevitable. I am however equally of the view that the accused's plea of guilty on both counts must be accorded significant weight and impact favourably on the magnitude of the sentence to be imposed.

[21] Opposing submissions were made for and against the imposition of a partly suspended sentence. Though the court in terms of s 297 of the Criminal Procedure Act 1977,<sup>9</sup> has a discretion to suspend part of a sentence, it still requires of the court to exercise its discretion judiciously. In the matter of *Muamuhona Karirao*<sup>10</sup> the court, as per Strydom AJA, found that 'where a long term of imprisonment is imposed it is not appropriate to impose a further suspended sentence' and in such instances 'that consideration must yield to the sentencing objective of rehabilitation and the principle that there should also be finality and certainty in regard to the punishment meted out'.

[22] Though a partly suspended sentence for the aforesaid reasons may not seem appropriate in the present instance where the imposition of lengthy custodial sentences are inevitable, it is my considered opinion, particularly where the accused has pleaded guilty to the offences charged and has shown sincere remorse, that the circumstances justify a significant reduction in sentence.

[23] No evidence had been led as to the extent of damages caused to the property and loss suffered by the owners of the room. Be that as it may, the offence in itself, as already stated, is serious and usually attracts punishment in the form of a lengthy term of imprisonment. Bearing in mind that the accused set alight the room occupied by the deceased which was home to

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<sup>9</sup> Act 51 of 1977.

<sup>10</sup> Unreported Case No 70/2013 delivered on 15.07.2013.

her and a place of safety, I find no reason to break away from the norm of sentences usually imposed in cases of this nature.

[24] Where an accused is sentenced in respect of two or more related offences, the accepted practice is that regard should be had to the cumulative effect of the sentences imposed in order to ensure that the total sentence is not disproportionate to the accused's blameworthiness in relation to the offences committed.<sup>11</sup> Section 280 (2) of the CPA allows the court to order the concurrent running of sentences, or part thereof, which would sufficiently ameliorate the severity of the cumulative effect of the individual sentences imposed.

[25] Given the personal circumstances of the accused, the gravity of the offences the accused was found guilty of, the legitimate interest of society, and the emphasis on specific and general deterrence, I find the following sentences appropriate:

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 34 years' imprisonment.

Count 2: Arson – 8 years' imprisonment.

In terms of s 280 (2) of Act 51 of 1977 it is ordered that 4 years on count 2 be served concurrently with the sentence imposed on count 1.

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JC LIEBENBERG

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<sup>11</sup> *S v Sevenster* 2002 (2) SACR 400 (CPD) at 405a-b.

JUDGE

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