



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
SENTENCE**

Case no: CC 09/2016

In the matter between:

**THE STATE**

and

**DANNE RODNEY SHANINGUA**

**ACCUSED**

**Neutral citation:** *S v Shaningua* (CC 09/2016) [2017] NAHCMD 247 (31 August 2017)

**Coram:** LIEBENBERG J

**Heard:** 15 – 16 August 2017

**Delivered:** 31 August 2017

**Flynote:** Criminal Procedure – Sentence – Acts with *dolus eventualis* and not direct intent - In appropriate circumstances could be mitigating – Reduces the moral blameworthiness of the offender – On present facts – Accused's continued firing at close range into the cabin of the deceased's vehicle until the magazine was empty – Death virtually being certain – Fact that the accused acted with *dolus eventualis* not considered a mitigating factor – Accused's extremely reckless conduct increases his moral blameworthiness.

Sentencing – Accused's offer for reparation – Care must be taken not to create the impression that the wrongdoer can be ordered to pay fines to the aggrieved party – Neither should society be brought under the impression that 'a rich man can use his relative wealth to obtain for himself a lesser sentence of imprisonment than that which a poorer man would receive in the same circumstances'.

Sentencing – Road rage – Not premeditated – Accused angered by collision with his vehicle – Cold blooded and unnecessary killing – Society outraged when a crime of this nature is committed – Each and every person who drives a vehicle can expect to be involved in a collision at some or other time – It is wholly unacceptable that such a person, even if he is the cause of such collision, can be executed on the scene by the other driver – Even where accused's personal circumstances extremely favourable – Must yield to society's legitimate demand that its members be entitled to drive the roads without risk of being murdered by other irate drivers.

**Summary:** It is not in dispute that the negligence of the deceased caused the collision when the front part of his vehicle collided with the rear end of the accused's vehicle which was parked on the side of the road. Accused immediately alighted from his vehicle, pulled out his pistol and fired nine shots into the body and cabin of the deceased's car which was slowly driving past him. Two bullets hit the deceased of which one causing death. The court earlier rejected the accused's defence of having acted in self-defence. The accused thereafter hid the vehicle he had been driving and removed the registration plates and licence disc. He only handed himself over to the police after three days and assisted the police by handing over the firearm and pointed out where the vehicle was. In mitigation the accused expressed remorse and apologised to the family of the deceased. He offered to remunerate the deceased's family and offered financial assistance. Chronic ailments the accused suffers from and possible back injury as a result of the accident not life threatening or that it would be worsened by his incarceration.

Held, the fact that the accused person acted with *dolus eventualis* is not considered a mitigating factor. His extreme continued reckless shooting in the body of the deceased's vehicle increased his moral blameworthiness. Nothing justified accused to resort to his firearm in order to stop the deceased from departing the scene.

Held further, as favourable as accused's personal circumstances are likely in the present case, they cannot outweigh society's interest when it comes to road rage where the public is entitled to drive free of fear that they will be murdered by other drivers when involved in a motor vehicle collision.

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### ORDER

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Count 1: Murder – 24 years' imprisonment.

Count 2: Attempting to defeat or obstruct the course of justice – 4 years' imprisonment.

In terms of s 280 (2) of Act 51 of 1977 it is ordered that the sentence imposed in count 2, *in toto*, be served concurrently with the sentence imposed in count 1.

It is further ordered:

1. In terms of s 10 (8) of the Arms and Ammunition Act 7 of 1996, the accused is declared unfit to possess an arm for a period of five years, commencing from the date of his release.
  2. In terms of s 34 (1)(c) of the Criminal Procedure Act 51 of 1977, one 9mm Glock pistol with serial number BBA 098 and magazine, is declared forfeited to the State.
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## SENTENCE

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LIEBENBERG J:

[1] The accused at the end of the trial has been convicted of murder and attempting to defeat or obstruct the course of justice. The deceased was murdered after a minor traffic collision between the two vehicles driven by the two parties. It is not in dispute that the negligence of the deceased caused the collision when the front part of his vehicle collided with the rear end of the accused's vehicle that was parked on Bell Street in the Southern Industrial area of Windhoek. Both convictions arose from the same incident when the accused immediately after the collision drew his pistol and fired several shots into the body and cabin of the deceased's vehicle. He thereafter departed the scene and hid the vehicle he had been driving, whilst evading arrest before turning himself in after three days.

[2] Evidence proved that seven out of nine shots fired by the accused with his pistol hit the deceased's vehicle on the front, right and rear sides, and that two bullets which struck the deceased, were fired at an angle from the right and rear side whilst the vehicle was slowly driving past the accused. The accused was accordingly convicted of murder, having acted with intent in the form of *dolus eventualis*.

[3] The accused testified in mitigation and his personal circumstances are the following: He is 45 years of age and a man of substance in that he, since 2001, owns a construction business with 84 employees and which had been doing well until his arrest in August 2015. Since then he has remained in custody during which period his wife, with his assistance, managed to run the business which, in turn, allowed them to support their children. The wife is employed at a security company and it is not clear whether the accused's

business would continue to operate through his wife's intervention if the accused were to be incarcerated. The family is currently financially strapped as a result of the accused's detention, while the future and continued support of their children looks dreary. The accused has three children with his wife and a further three children born outside wedlock, their ages ranging between 25 and 9 years. The accused has a large number of dependants and besides his children also has an elderly mother whom he has been supporting financially. The younger children are still at school of whom some attend school in South Africa whilst the older ones are currently furthering their tertiary education, either part-time here in Namibia, or full-time in South Africa, for all of which the accused has covered the expenses to date.

[4] The accused informed the court that he is not a healthy person as he has been diagnosed with high blood pressure, cholesterol and diabetes and is on chronic medication. Shortly after the collision he started suffering from severe headaches and although he periodically has to take injections and medication to relieve the pain, there is a likelihood that he injured his back during the mentioned accident and that he might have to undergo a back operation in the near future. He is currently still on his wife's medical aid and expressed his concern as to the assistance available when solely dependent on the State during imprisonment. In the absence of medical evidence or records supporting the accused's assertions, the seriousness of his ailments and extent of the suspected back injury cannot be determined. It would however appear not to be life threatening; neither was it contended that it was likely to be aggravated by his incarceration, or bring about undue hardship.

[5] The accused is in agreement that the offences are serious, moreover where a firearm has been used and a life lost as a result thereof. He also accepts responsibility for what has happened but says it was never his intention to kill as everything happened so quickly that it spun out of control. During his testimony he acknowledged the presence of the deceased's wife

who had been attending proceedings throughout the trial and tearfully told the court that he appreciates that the deceased's wife and children have suffered a great loss as a result of his actions. He finally broke down when begging for their forgiveness and apologised in open court. He went on to say that the three minor children of the deceased aged 16, 15 and 5 years, respectively, would find it difficult to go through life without a father, but so would his own children suffer if he were to be sent to prison. He further committed himself to financially support the deceased's children as regards their education and well-being, but realises that he would not be able to fulfil his undertaking when sent to prison; however, he will do so after his release.

[6] Besides copies handed in of the deceased's marriage and the children's birth certificates, the personal circumstances of the deceased and that of his family, the effect his death had on his dependants and whether they cope without the deceased, remains unknown. Also whether the family is managing financially, and how the accused's offer of financial assistance in future would be received is uncertain.

[7] How honest and honourable the accused's intentions may be, his situation in the measurable future has no prospect of improving to the extent where he would be able to give financial support to the deceased's family. It was submitted that even while in custody, the accused is willing to liquidate the remainder of his livestock on the family farm in order to assist the deceased's family. His own family however are barely surviving at present whilst they remain his main priority. There is the old adage that says: Charity begins at home. In any event, there would be no effective way for this court of enforcing any of the accused's promises made or undertakings given in mitigation. Furthermore, in *S v Tshondeni; S v Vilakazi*<sup>1</sup> it was said that care must be taken not to create the impression that the wrongdoer can be ordered to pay fines to the aggrieved party. Neither should society be brought under

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<sup>1</sup> 1971 (4) SA 79 (T).

the impression that 'a rich man can use his relative wealth to obtain for himself a lesser sentence of imprisonment than that which a poorer man would receive in the same circumstances'.<sup>2</sup> This notwithstanding, I will accept that the accused's offer of reparation is an indication of remorse.

[8] Ms *Esterhuysen*, for the State, countered the accused's alleged contrition by saying that, whereas remorse only came after his conviction and that he throughout persisted in his proclaimed innocence, it was not sincere and therefore nothing more than a prayer for a lesser sentence. Hence, it should not be accorded much weight.

[9] The court in *S v Seegers*<sup>3</sup> as per Rumpff JA on remorse as mitigating factor said (at 511G-H):

'Remorse, as an indication that the offence will not be committed again, is obviously an important consideration, in suitable cases, when the deterrent effect of a sentence on the accused is adjudged. But, in order to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined.'

It has also been said that punishment is generally meted out to deter others from committing the same offence (general deterrence), but also to deter the accused from reoffending.

[10] The accused in this matter pleaded not guilty and required of the State to prove the allegations set out in the indictment. This the State did, and secured convictions on both counts. I do not believe that in all instances where an accused expresses remorse only after conviction, can it be said that it is not sincere. Much will depend on the circumstances of the case and I

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<sup>2</sup> *S v Sehlako* 1999 (1) SACR 67 (WLD) at 71d-e.

<sup>3</sup> 1970 (2) SA 506 (A).

have no doubt that there could be circumstances in which the court would be able to find that remorse, albeit demonstrated only after conviction, is genuine and sincere.

[11] In this case the accused testified on oath and accepted legal and moral responsibility for his wrongdoing. He broke down emotionally when apologising to the deceased's wife and begged for forgiveness. This is not an instance where the accused, by pleading not guilty, tried to mislead the court. Though his defence of having acted in self-defence did not stand up in court, the circumstances surrounding the shooting incident are such that the accused might subjectively have believed that he was not guilty of murder. He explained that things happened so quick that he was not in control of the situation.

[12] I am for the stated reasons convinced that the amount of repentance demonstrated by the accused during his testimony is an indication of sincere remorse. To this end I am satisfied that there is no real likelihood that the accused will reoffend. However, the weight accorded to this factor must be considered against the gravity of the crimes committed and, in my view, falls short of realising sufficient retribution for the accused's wrongdoings.

[13] I now turn to the offence of murder and the circumstances under which it was committed. Judging from the accused's immediate reaction after the collision when he alighted from his vehicle and instantly drew his pistol, there can be no doubt that the collision with his vehicle angered him. The court, having rejected his evidence on this part, unfortunately does not have the benefit of knowing what went through his mind at that stage and, therefore, cannot speculate in his favour as to what caused him to become so angry that it led to him shooting on the deceased's vehicle. His reaction was sudden, unpredicted and irrational in the circumstances. He maintains that, had the deceased not started driving away, then none of this would have happened. Though the deceased indeed drove away after the accused started shooting at his vehicle, the possibility – as stated in the court's earlier judgment – cannot be ruled out that it was because of shots having been fired at his



vehicle. What else was he supposed to do? – he was a sitting duck. Even if deceased departed the scene because of the collision he had caused with another vehicle and quietly wanted to drive away, it still did not justify the accused's reaction to resort to his firearm in order to stop the person from departing the scene. Bearing in mind that the accused immediately exited his vehicle, the latter scenario seems highly unlikely.

[14] In the *Sehlako* case (*supra*) an accused was convicted of murder after he shot and killed the driver of a vehicle that collided with his and in sentencing the accused, Borchers J, said the following at 71i-j:

'As far as the offence is concerned, the murder can on the facts before me only be attributed to what has come to be called 'road rage'. It was obviously not premeditated. It arose directly from the fact that the accused believed that the deceased was responsible for the collision which occurred between their respective vehicles. It was, however, a cold-blooded and wholly unnecessary killing. This country is suffering from an epidemic of violence which cannot be tolerated.'

And at 72b-c the following appears:

'Society however is outraged when a crime of this nature is committed. Each and every person who drives a vehicle can expect to be involved in a collision at some or other time. It is wholly unacceptable that such a person, even if he is the cause of such collision, can be executed on the scene by the other driver. In my view even where an accused's personal circumstances are extremely favourable, as they are in this case, they must yield to society's legitimate demand that its members be entitled to drive the roads without risk of being murdered by other irate drivers.'

I associate myself with these sentiments.

[15] Though the accused in *Sehlako* walked over to the deceased and shot him at point blanc range, thus acting with direct intent, the accused in the present matter fired nine shots at the deceased's moving vehicle with intent *dolus eventualis*.

[16] There appears to be a general perception that where the offence of murder is committed with intent in the form of *dolus eventualis*, then this fact *per se* is a mitigating factor. However, the phrase *dolus eventualis* as such has nothing to do with mitigation and is merely a legal expression to indicate that an accused had a certain form of intent. Mitigation lies in the fact that the accused did not have direct intent to kill.<sup>4</sup> Therefore, it is not necessarily a consequence that in all cases where the accused had no *direct* intent to kill, but intent in the form of *dolus eventualis*, that it would constitute a mitigating factor; this will largely depend on the facts of a particular case.

[17] Thus, where an accused person acts with *dolus eventualis* and not direct intent, this is a fact which, in appropriate circumstances, could be mitigating in that it reduces the moral blameworthiness of the offender.<sup>5</sup> When applying these principles to the present facts and regard is had to the accused's continued firing at close range into the cabin of the deceased's vehicle until the magazine was empty and where death was virtually certain, the fact that the accused acted with *dolus eventualis*, in my view, is not considered a mitigating factor. On the contrary, his extremely reckless conduct actually increases his moral blameworthiness.

[18] In the circumstances of this case, I am of the view that it is necessary to send a deterrent message to society in general that conduct, as demonstrated by the accused will not, and should not, for the sake of law and order, be tolerated and that the imposition of a sentence of long-term imprisonment is inevitable.

[19] I have been referred by counsel for the defence to judgments of this court and more particularly to the sentences imposed therein. It must however be pointed out that the facts in those cases differ markedly from the present facts and the sentences imposed could hardly be seen as guidance to this

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<sup>4</sup> *S v de Bruin en 'n Ander* 1968 (4) SA 498 (A) at 505; *S v Joseph Gariseb and Another* (unreported) delivered on 24.10.2006.

<sup>5</sup> *S v Rapitsi* 1987 (4) SA 351 (A) at 358F.

court in sentencing. I am therefore unable to rely on those cases in order to decide what would be a suitable sentence, based on the present facts.

[20] In respect of the accused's conviction of attempting to defeat or obstruct the course of justice, the offence is equally considered serious. It has become the norm in cases of this nature that sentences of direct imprisonment be imposed. There are no compelling reasons why this court should deviate from the norm. However, there are factors favourable to the accused which ought to impact on the gravity of punishment meted out.

[21] Although the accused hid his vehicle and had the registration plates and licence disk removed, he did not destroy any of it and in the end led the police to where the vehicle was parked. The accused after three days handed himself and the weapon used in the shooting over to the police, by which he demonstrated that he accepts responsibility and thereby assisted in the investigation.

[22] Both counsel proposed that the sentence imposed on this count should be served concurrently with that imposed on the murder count. It is trite that regard must be had to the cumulative effect of sentences of long-term imprisonment and for the court to ensure that the total sentence imposed is not disproportionate to the accused's blameworthiness in relation to the offences committed.

[23] Lastly, the accused has been in custody pending finalisation of the trial for a period of just over two years. Though I do not consider the period unreasonably long, it remains a factor favourable to the accused and one the court should take into consideration in that it usually leads to a reduction in sentence.<sup>6</sup>

[24] By virtue of s 10 (8) of the Arms and Ammunition Act 7 of 1996 the court may declare a person who has been convicted of an offence in the

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<sup>6</sup> *S v Kauzuu* 2006 (1) NR 225 (HC) at 232F-H.

commission of which a firearm was used (s 10 (6)), unfit to possess an arm for such period as may be fixed by the court, but for not less than two years.

[25] The State's application to have the accused declared unfit to possess a firearm was not opposed by the defence. In view thereof the appropriate order should be made declaring the accused unfit to possess a firearm for some period after his release.

[26] Application was also made to have the pistol used in the commission of the murder forfeited to the State. Equally, the application was not opposed and the accused's weapon will accordingly be forfeited to the State.

[27] In the result, I consider appropriate the following sentence:

Count 1: Murder – 24 years' imprisonment.

Count 2: Attempting to defeat or obstruct the course of justice – 4 years' imprisonment.

In terms of s 280 (2) of Act 51 of 1977 it is ordered that the sentence imposed in count 2, *in toto*, be served concurrently with the sentence imposed in count 1.

It is further ordered:

1. In terms of s 10 (8) of the Arms and Ammunition Act 7 of 1996, the accused is declared unfit to possess an arm for a period of five years commencing from the date of his release.
2. In terms of s 34 (1)(c) of the Criminal Procedure Act 51 of 1977, one 9mm Glock pistol with serial number BBA 098 and magazine, is declared forfeited to the State.

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JC LIEBENBERG  
JUDGE

APPEARANCES

STATE

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ACCUSED

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