

REPUBLIC OF NAMIBIA



NOT REPORTABLE

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

CASE NO: CC 04/2017

In the matter between:

THE STATE

v

ELWEN GAWAXAB

ACCUSED

Neutral citation: *S v Gawaxab* (CC 04/2017) [2018] NAHCMD 325 (17 October 2018)

CORAM: SIBOLEKA J

Heard on: 03 October 2018

Delivered: 17 October 2018

Flynote: Criminal law: Brutal murder of a defenseless woman – seriously viewed – a custodial sentence is inevitable.

Summary: A defenseless lady continuously assaulted, kicked with shoed feet, stabbed with a broken bottleneck, and a stone dropped on her. She later died the same morning due to multiple incised and stab injuries.

Held: Violence against defenseless women is a serious concern that has to be dealt with decisively.

VERDICT

In the result the accused is convicted as follows:

Count 1: Murder – dolus directus – Thirty seven and half years (37½) years' imprisonment;

Count 2: Assault with intent to do grievous bodily harm – Five (5) years' imprisonment

SENTENCE

SIBOLEKA J

[1] On 20 September 2018 I convicted the accused on murder and assault with intent to do grievous bodily harm. It is now my duty to consider an appropriate sentence for him. In doing this I have to take the following into account; the accused's personal circumstances; the crime itself and the interests of society. Closely connected to the above are the objectives of punishment such as deterrence; retribution; reformation and prevention.

[2] I will start with the accused's personal circumstances.

[3] Siyomunji, Counsel for the accused placed the following personal circumstances from the bar. He said the accused is now thirty nine years old, he

was thirty six years at the time of the incident. The accused was working for the Ministry of Environment and Tourism, stationed at Waterberg. He has recently resigned and it is the wife who is now the breadwinner. He has two children and are still in school. Siyomunji referred the court to the cases of Tjiho and Zinn respectively where it is provided that a sentence the court imposes on a convict has to be blended with mercy. The accused is a first offender. This counsel conceded that the offences on which the accused has been convicted on are very serious. He requested the court to consider the sentences of twenty five years on murder and two years on assault with intent to do grievous bodily harm.

[4] In aggravation of sentence, Lutibezi, counsel for the prosecution called the deceased's biological mother Rachel Haipare who told the court that she was seventy one years of age. The deceased was forty years old at the time of her tragic death. She was married and is survived by two children aged fifteen and nineteen years respectively. Although the deceased was not permanently employed, she kept herself busy by doing some catering work at ceremonies and it was from this and the money she got from her husband that she supported her with.

[5] Haipare testified that the death of her daughter emotionally affected her resulting in her getting epileptic fits from the severe grief. It took place at the time her children were writing examination. According to Haipare the accused has shown no remorse, and to date he never found it appropriate to say sorry to the deceased's family members in the open court and through his own family. She persuaded the court to send the accused to goal for a very long time.

[6] On the crime a nearby resident who observed the assault on the deceased during the night testified how the accused started pulling her by the hair/braids for a distance such that pieces thereof came out and were seen laying on the road. At the scene proper he beat her till she fell to the ground landing on her back. As if that was not enough, the accused left her laying there helplessly.

He walked to the nearby bushes and picked up a bottle, broke it and came back to her. He used the bottle neck and stabbed her several times on her body. He walked back to the same place and picked up a relatively big stone and came back to her. He held it in his two hands, raised them high up and dropped it on her. The accused sat on top of the deceased and held both sides of her face and was moving her head. He thereafter stood up and disappeared under the cover of darkness.

[7] At the time of the deceased's admission to the Medical Centre she had multiple stab wounds in the face, head, breast, and abdomen. She did not react to light, both pupils of her eyes were fixed and dilated. No lid, no cornea reflex, no gag reflex. She had massive brain oedema, small subdural hemorrhage on her left side. She had multiple dislocated skull fractures especially in her face. She was not reacting to any stimulus and had no brainstem reflex. Her condition did not allow any surgery to be done on her. The doctor tried to stabilize her, but breathing and the heartbeat stopped, and she was declared dead that same morning.

[8] Dr. Vusin examined the body of the deceased. He stated that the chief post mortem findings were, the deceased had a lacerated wound on the left side of her head; fourteen stab and incised wounds on her head, chest, and abdomen. A single penetrating stab injury on the left pleural cavity; a base skull hinge fracture. She had a left side subdural hematoma. Diffuse subarachnoid hemorrhages on the frontal and right temporal aspect of the brain; a marked cerebral oedema; a moderate systemic visceral pallor and pulmonary oedema. He concluded that death was caused by a blunt force head trauma coupled with multiple incised and stab injuries. According to him the deceased's wounds were caused by a sharp pointed object, markedly varied in their shape, width, and depth; 'the wounds may be considered to have been inflicted by a broken bottle'.

[9] On the interests of society, the message is very clear. The assault, and murder of defenceless women and children has uncontrollably gone out of hand. Although convictees of these heinous crimes have been severely punished, it seems the situation remains unabated. This conduct will however not deter the Courts from tackling crimes of this nature with an iron fist. Women have to be protected to enable them to feel safe thereby creating an enabling environment for them to contribute fully and meaningfully to the transformation of our Society.

[10] Submitting on the aggravation of sentence, Lutibezi, counsel for the prosecution stated that in serious cases such as murder the role of rehabilitation is very limited. He referred to the case of *Ningise*¹ where it was held that our country too 'at present suffers unprecedented, uncontrolled and unacceptable wave of violence, murder, robbery, and rape. A blatant and fragrant want of respect for life ... of fellow human beings has become prevalent ...' According to this counsel the serious nature of the crimes committed, the extent of brutality in which they were committed dictates that a convictee's personal circumstances must play a limited role. It is even more so when these heinous crimes are committed against vulnerable defenseless members of our society, such as women.

[11] Lutibezi also referred to the matter *S v Karg*² where it was held that: 'It is necessary to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take justice into their hands'. This Court is agreeable with the reasoning of the Court in the above cases. This counsel asked the court to consider imposing a Life sentence on the accused.

[12] On sentence I have taken the following into consideration: The accused's personal circumstances as well as the fact that he is a first offender; the brutal manner in which the accused continuously assaulted the deceased even when

¹ S v Hyacinth James Ningise Case No. CC 04/2002 delivered on 22 February 2006.

² S v Karg 1961 SA(A) at 236A-B.

she was already laying helpless, he still continued to inflict injuries on her for no apparent valid reason.

[13] In the result the accused is convicted as follows:

Count 1: Murder – dolus directus – Thirty seven and half (37½) years' imprisonment;

Count 2: Assault with intent to do grievous bodily harm – Five (5) years' imprisonment.

A M SIBOLEKA

Judge

APPEARANCES:

FOR STATE: Mr. C. K. Lutibezi
Office of the Prosecutor-General, Windhoek

FOR ACCUSED: Mr. M. Siyomunji
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