

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

Case no: CC 10/2015

THE STATE

v

ANDRE FRIEDEL CASTRI DAUSAB

ACCUSED

**Neutral citation:** *S v Dausab* (CC 10/2015) [2018] NAHCMD 77 (05 April 2018)

**Coram:** SHIVUTE J

**Heard:** 30 August 2017, 1 March 2018

**Delivered:** 5 April 2018

**Flynote:** Criminal Procedure – Sentence Murder with direct intent – Factors to be taken into account – Personal circumstances of offender – Accused first offender – Time spent in custody – Factors in his favour – Accused professing in a letter that he was remorseful – Accused insisting that he was not guilty – Accused not accepting consequences of his actions – Accused not remorseful.

Nature of offence – Serious offence – Prevalent – Offence committed in a domestic setting – Offence pre-meditated – Accused stabbing deceased 27 times with three knives – Accused locking deceased in a room after stabbing her and leaving her to die – These aggravating factors – Deterrent sentence called for.

Interest of society – Court not to emphasise one interest at the expense of the other – Instead interests of the accused as well those of the society to be considered and a balance between the two to be struck. Having considered both interests – Court finding that interest of society outweighs personal interest of accused – Accused a danger to society – Greater need to remove him from society.

Constitutional Law: Death penalty – Accused urging court to impose death penalty on him if not given a sentence less than 15 years - suspended sentence or a fine - Article 6 of the Namibian Constitution proscribing imposition of sentence of death.

Constitutional Law – Fundamental Freedoms – Accused demanding to have access to computer, to practice his profession and freely communicate with the outside world – Although accused having the right to practice any profession or carry on an occupation, trade or business in terms of Article 21 (1) of the Namibia Constitution, these freedoms are not absolute – Fundamental freedoms in terms of Article 21 (1) to be exercised subject to the law of Namibia in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub – Article which are necessary in a democratic society...

---

### **ORDER**

---

Murder with direct intent: Accused is sentenced to life imprisonment

---

### **SENTENCE**

---

SHIVUTE, J

[1] The accused was convicted of murder with direct intent read with the provisions of the Domestic Violence Act 4 of 2004.

[2] The particulars of the offence are that on 22 February 2014, at Pioneers Park Windhoek, the accused killed Gofaone Mothlamme with whom he had a romantic relationship by stabbing her 27 times with knives whereby she died as a result of multiple stab wounds.

[3] Counsel for the State called Ms Kgakgamatso Monnaesi, the deceased's sister, in aggravation of sentence. She testified that the deceased had left behind two minor children aged 12 and 10 years. At the time the deceased met her death, she was in Namibia studying theology. Before she became a theology student she worked as a temporary teacher and was looking after her children. After her death, the children were staying with her parents and the witness looks after them financially as she pays for their school expenses and buys clothes for them. The deceased was also providing for the children at the time she was a student because she was getting an allowance from her sponsor.

[4] She further testified that the deceased's death had a big impact on the family. They were severely affected. The deceased's young child kept on asking whether she was going to see her mother again. She fights with other children because of the anger concerning her mother's death. Regarding the deceased's parents, their health had deteriorated. Both are suffering from hypertension. Concerning the deceased's siblings, the young brothers have turned to drugs since the incident and had also quit tertiary education. When they were taken for counselling, they mentioned the deceased's death as the reason for their actions. The deceased's death had caused a lot of pain and left broken hearts in the family. The witness is considering adopting the children so that they could not feel that void left by the mother. The witness had mixed feelings towards the accused. She first felt anger, disappointment and then fear to the extent that she does not feel comfortable around him. The accused had written a letter to the witness but the witness refused to accept it.

[5] The accused testified under oath in mitigation of sentence and called no witness. First of all he read a letter he had addressed to his family and to the deceased's family. In the letter he stated, among other things, that he was going through a difficult time as he was experiencing sleepless nights, hallucinations and

stress. He found it hard to accept the loss of the deceased and he wished he had the power to return life. He further stated that deceased was his best friend and everything to him. He urged the two families to understand that they all had broken hearts and that he was also a victim who needed love and support. He further stated that he was not an enemy neither was he a threat to the two families. Therefore, they should not fear him. Furthermore, he has asked for forgiveness from the families.

[6] The accused testified that he did not agree with the judgment on conviction as he was not guilty of murder. The accused urged the court to give him a fine or a suspended sentence. He argued that to be given a custodial sentence of forty or ten years amounts to 'indirect death penalty'. If he goes to prison for a period of more than ten years, he would not be able to make a contribution to the society. He would thus never pursue a decent career. The reason for the accused to request to be given a fine or a suspended sentence is because he would like to go out and support his family as well as the deceased's family. Furthermore, if the court is not inclined to impose a fine or a suspended sentence the accused would like to be given a solitary confinement and be given access to his computer in order to work. He would want the court to give him a guarantee that he must have access to his computer in order to be able to use his skills. He continued to state that denying him access to his computer would amount to inhuman and degrading treatment. On the other hand if he is given a fine or a suspended sentence, he would be able to reconcile with the deceased's family. The accused further testified that a sentence on him for a term of imprisonment for more than 15 years would amount to torture, cruel and inhuman treatment.

[7] The accused further testified that if he could not have access to electronic equipment or his computer while in a correction facility, he would rather be sentenced to death although he is aware that the death sentence is unconstitutional. The accused is 37 years old. He was born in Usakos. He has five siblings being three sisters and two brothers. His father is deceased and his mother is still alive. He was brought up by his parents. He attended school at Karibib, Okahandja, and at Khomasdal and Augustineum in Windhoek. He also attended College of the Arts and did an external program at the Ulster University in Northern Ireland. Before his

incarceration, he was employed at NAMCOL as a Desktop Publisher but he ended up doing IT Graphics.

[8] The accused is not married but has five minor children from three different mothers. Although he could not remember their exact dates of birth, he is of the opinion that the eldest was born during 2005 and the youngest is 9 years old. Two of the children are staying with their mothers whilst three of them are staying with the accused's sister. The accused was looking after his children before he was incarcerated. Concerning the sentence, the accused said 'the court can do what it pleases'.

[9] The accused argued that he was sorry for the loss of life of the woman he loved most and he never stopped loving her. Even if the court has found him guilty of murder with direct intent he did not agree with the court's decision. He is not guilty of any murder being it with direct intent or just murder. He is of the view that he did not receive a fair trial as he was unjustly and unfairly convicted. He was only found guilty because a woman has died and he, the man, has survived. The fact that he survived and 'experienced a disgraceful and depressing ordeal' did not make him guilty. He further argued that the death of the deceased was never pre-meditated. He was unjustly convicted and he was prejudiced by the conviction. The accused argued that it would be inhuman and tormenting if he is sentenced to a term of imprisonment of more than 15 years as the only sentence he considered to be correctional is the sentence between 5 and 15 years. It would be tormenting and inhuman if the accused is isolated for years. The isolation would be inappropriate to the interests of society, his family and in particular his children. If he has to be imprisoned he should be granted the liberty to freely communicate with the outside world and to be able to practice his profession and provide for his family. It is his desire to be allowed to use his computer and utilise his skills, abilities and knowledge whilst he is in a correctional facility.

[10] Counsel for the State argued that the accused has been convicted of a serious offence of murder. It becomes more aggravating because the accused had a direct intent and the offence was committed in a domestic setting. The offence is rampant in Namibia and the accused had used three knives to stab the deceased 27

times. When he killed the deceased, the accused was aware that the deceased had two minor children but despite this knowledge he killed their mother thereby making them orphans. Counsel further argued that justice should not only be seen to be done to the offenders but it must also be seen to be done in respect of victims of crime. Furthermore, in considering the interest of society the court must also take into account the interest or the anguish of the deceased's family by losing their family member at the hands of the accused. The court should also not lose sight of the consideration that the offence was pre-meditated, which makes the accused's blame worthiness very high.

[11] The accused was informed that the deceased was no longer interested in their romantic relationship yet he killed her because he suspected her of seeing other men. Although the accused might have been provoked by the alleged love messages between the deceased with other men, the deceased had informed him that she was no longer in love with him. Although provocation and loss of temper could be a mitigating factor, in the present circumstances they could not be a mitigating factor because the accused was informed that the deceased was no longer interested in their romantic relationship. The accused had behaved in an irrational manner and it has been held by courts that persons who behave irrationally are dangerous to society. This makes the accused a danger to society. Furthermore, counsel for the State argued that the accused did not show any remorse although in his letter he purported to apologise to his family and the deceased's family. But then he never accepted the consequences of his actions.

[12] The accused went to the deceased's home and stabbed her. After he stabbed her, he locked her in the house and left her to die. Counsel further argued that although the accused spent four years in custody pending the finalisation of his trial, the accused's blameworthiness and personal circumstances are such that the time he spent in custody should not be considered to play a big role in the outcome of the sentence to be imposed on him. It is again counsel for the State's submissions that a sentence of life imprisonment would be appropriate in the circumstances. Concerning the sentence of more than 15 years which the accused said would be inhuman and degrading, counsel argued that the proposition by the accused is not correct because the judgment which had ruled long terms of imprisonment to be

unconstitutional to which the accused is referring to did not say 15 years of imprisonment is degrading or inhuman. The judgment has referred to terms of imprisonment of more than 25 years. Counsel referred me to several authorities which I have considered.

[13] In, imposing the appropriate sentence, I take into account the main objectives of sentencing, namely retribution, the prevention of crime, the deterrence of criminals and the reformation of offenders. I am also mindful of the fact that a court has to consider the triad of sentencing as discussed in *S v Zinn* 1969 (2) SA 537 (A) and several other cases, namely the nature of the offence, the interests of society and the personal circumstances of the accused. The accused is a first offender who spent 4 years in custody awaiting trial. These are factors in his favour. Although the accused wrote a letter in which he purports to apologise to the deceased's family and his own family, he could not be said to have shown true remorse because he testified that he was unfairly convicted and did not accept the court's verdict. Moreover, in the letter containing the so-called apology, the accused simply indicated that he was sorry for the deceased's loss of life and does not appear to acknowledge that he was responsible for such loss. The accused played victim instead of accepting the consequences of his actions. The accused also did not accept that the offence he committed is serious and appears to trivialize a serious situation by suggesting that the court should imposed a term of imprisonment not exceeding 15 years. He is of the view that a sentence in excess of 15 years imprisonment would violate his rights as he considers such sentence to be inhuman and degrading. The accused has no regard for the deceased's right to life. Instead, he is more concerned about his own wellbeing.

[14] The accused committed a heinous offence. He viciously and brutally attacked the deceased and stabbed her with knives 27 times. Although the accused professed to have loved the deceased, his actions were obviously not consistent with a loving and caring partner. One cannot intentionally harm a person you love. After he brutally assaulted the deceased, the accused locked her inside the room although she was still alive. He did not want other people to reach her and render assistance. Locking her in a room is a clear indication that he intended her to succumb to the multiple injuries he caused her. The accused's actions towards the deceased were

inhuman, cruel and degrading. He subjected the deceased to torture and one can imagine the pain she had to endure. It is high time that men in relationships with women should understand that once a woman tells them that they are no longer interested in continuing with the relationship, she means just that and her views and feelings should be understood and respected.

[15] The accused submitted to this court that he wished to be given a fine or a suspended sentence or a sentence of less than 15 years and that he should have access to his computer to utilise his skills and provide for his family. Despite that the accused was found guilty of a serious offence he still wishes to lead a normal life as if he is not a convicted offender. It goes without saying that once in a correctional facility one's rights have to be restricted to a certain extent.

[16] Furthermore, the accused argued that if he could not be granted access to his gadgets or to be given a lesser term of imprisonment the court should impose a death sentence. The accused knows very well that the court cannot impose a death sentence as a death sentence has been prohibited by our constitution. Article 6 of the Namibian Constitution provides in part that 'no court or tribunal shall have the power to impose a sentence of death upon any person'.

[17] Again, although the accused has fundamental freedoms which include the right to practice any profession or carry on any occupation, trade or business, in terms of Article 21(1) (j) these freedoms are not absolute. There are limitations to them which are subject to the law of Namibia.

Article 21(2) reads as follows:

'The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedom conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court defamation or incitement to an offence'.



[18] The accused has deprived the deceased of her precious life and has made her children to be orphans. The deceased's death has had a serious impact on her family. Both parents developed hypertension. The two brothers have turned to substance abuse, and have dropped out of school. The deceased's children were seriously affected, especially the youngest child who continued to ask whether she would be able to reunite with her mother. The accused did not kill the deceased in the heat of the moment; the offence was pre-meditated. The accused first sent a text message to the deceased that he would do all those things including murder. All these are aggravating factors.

[19] With regard to the interest of society, members of the society need to be protected from dangerous individuals like the accused who behave irrationally. However, the courts should not overemphasise the interest of society at the expense of the interest of the offenders. The court has to consider both interests and strike a balance between the two.

[20] Having considered the personal circumstances of the accused, the seriousness of the offence and the interest of society and all the factors presented before me with regard to sentence, I am of the view that although the accused is a first offender who spent 4 years in custody awaiting the finalisation of his trial his personal interest has been outweighed by the interest of society. I am convinced that the accused is a danger to society who needs to be removed from society for a period of time. Although the accused was responsible for looking after his family especially his minor children, unfortunately he has to be sent to prison as this is a consequence of committing crimes especially serious ones. However, the sentence I will impose will not take away all reasonable hopes for the accused to be released as he may be eligible for parole after serving 25 years of his sentence. This is not automatic but subject to certain considerations. See *Gaingob and 3 others v State*. Case nos. SA 7/2008 and SA 8/2008, unreported, delivered on 6 February 2018.

[21] In the result the following order is made:

Murder with direct intent: Accused is sentenced to life imprisonment.

Furthermore, the accused is informed of his rights of appeal that should he not be satisfied with the conviction or sentence or both conviction and sentence, he has the right to apply for leave to appeal to the Supreme Court within 14 days. If he fails to apply for leave within 14 days he has to apply for condonation for the late filing of an application for leave to appeal accompanied by an affidavit in which the accused should give a reasonable and satisfactory explanation for his delay. He must also state that he has reasonable prospects of success to prosecute his appeal should he be granted leave to appeal and the reasons on which he is basing his contentions.

-----  
NN SHIVUTE  
Judge

## APPEARANCES:

THE STATE:

Ms E. N. Ndlovu

Of Office of the Prosecutor-General, Windhoek

ACCUSED:

In-Person