

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 15/2018

THE STATE

v

HENDRIK ATAB SWARTZ**Neutral citation:** *S v Swartz* (CC 15/2018) [2019] NAHCMD 128 (30 April 2019)**Coram:** USIKU, J**Heard:** 8 April 2019**Delivered:** 30 April 2019

Flynote: Criminal Procedure – Sentencing – Accused convicted of several crimes – Amongst them murder, attempted murder, rape, assault with intent to do grievous bodily harm and crimen injuria – Offences committed one after the other in almost similar pattern – Accused having shown no remorse – Court justified to impose minimum sentences as no compelling and substantial circumstances found to exist allowing diversion from minimum sentences in terms of the Combating of Rape Act, Act 8 of 2000.

Summary: The accused was charged with several crimes including murder, rape, attempted murder, assault with intent to do grievous bodily harm and crimen injuria. The offences involved different victims who were vulnerable due to the fact that they were either minors or under the influence of alcohol at the time of the commission of the crimes.

ORDER

Count One : Murder with direct intent – 26 Years imprisonment.

Count Two : Not guilty and acquitted.

Count Three : Attempted murder – 10 Years imprisonment.

Count Four : Rape – 15 Years imprisonment.

Count Five : Attempted murder – 10 Years imprisonment.

Count Six : Not guilty and acquitted.

Alternative charge to Count Six, Crimen Injuria – Cautioned and discharged.

Count Seven: Assault with intent to do grievous bodily harm –
Cautioned and discharged.

In terms of section 208 (2) of Act 51 of 1977 it is ordered that the sentence imposed on Count five be served concurrently with Count three.

SENTENCE

USIKU J:

[1] On the 8 April 2019 the accused was convicted by this Court on counts of murder, two counts attempted murder, a count of rape, a count of assault with intent to do grievous bodily harm and a count of crimen injuria. The accused was acquitted

on a count of rape in respect of the deceased person on the second count as well as in respect of count six, which relate to rape charges in respect of one Juanitta Sussana Sonn.

The State did not prove any previous convictions against the accused.

[2] In their respective addresses both counsel for the state and the defence reminded me, about the triad factors which are the nature of the crime committed, the interest of society as well as the accused's personal circumstances. That the Court in sentencing must also keep in mind the purposes of punishment and must try to balance in respect of the interests of the accused and that of the society in relation to those purposes. (*State v Brand*).¹

[3] The accused testified under oath and the following were his personal circumstances:

He is aged 32 years old and single. He fathered a daughter who is currently eight years old and attending school. The daughter has been residing with her mother in Gobabis. He is no longer in a relationship with the mother of his daughter and they have no communication to date. The last time he heard about his daughter was when she was in grade two before his arrest in October 2016. He has no idea in which grade she is currently. Both of his parents are deceased. He was not raised by his parents but by different people some of whom were not related to him. He lost his siblings except one who is still alive. As a child he never received any family support. Neither did his deceased father play any role in his upbringing.

[4] Accused pleaded guilty to the charge of murder and asked for forgiveness from the deceased's mother who had promised to forgive him. He however have not shown any remorse with regard to the other offences he has been found guilty of, persisting in his innocence. He asked the Court to extend mercy towards him and impose lenient sentences. He still wish to be reunited with his daughter. Though accused was residing in Mariental at the time of the commission of the offences, he maintained that he use to assist his child who is residing in Epako at Gobabis.

¹ *State v Brand* 1991 NR 356 at page 365 B – C.

Accused admitted that it was not because of the absence of his parents that he got involved in criminal activities.

[5] Accused denied that he had a pattern whereby he attacked the vulnerable member of the society. Apart from the girl child, he persisted that he had been meeting the other victims and had agreement with each one of them. He would not be happy to hear someone violating his own child. Accused further admitted that he has been convicted of serious crimes that carries terms of imprisonment.

[6] In their submissions the defence conceded that accused was found guilty of very serious crimes and pleaded with the Court to consider the period of incarceration awaiting trial as well as the accused's other personal circumstances to be compelling and substantial circumstances, warranting a diversion from the minimum sentences in terms of the Combating of Rape Act 8 of 2000.

[7] It was further submitted on accused's behalf that the Court must guard against the cumulative effect of the sentences to be imposed and order some of the sentences to run concurrently with others.

[8] On the other hand, the state retaliated about the seriousness of the offences, as well as the manner in which the offences were planned and executed.

[9] In that in the first count, the victim had been a minor and was heavily intoxicated as confirmed by the report on toxicology. She was strangled manually by the accused which must be taken as an aggravating factor. Furthermore that accused had a direct intention to kill the deceased, who was a defenceless minor girl. Her death must have been a traumatic event.

[10] With regard to the fourth count, the victim was only aged 12 years old. She had no power to defend herself, thus she was vulnerable. A message must therefore be sent out that we live in an orderly society which is governed by moral values and obligations with respect of one another. Further that every member of society must be allowed to enjoy freedom of movement without being attacked. It is therefore not in the interest of society when persons like the accused trample on the values and rights of others. The sanctity of life is a fundamental human right

enshrined in law by the Namibian Constitution and must be respected and protected by all.

[11] Therefore a Court have an important role to play in that it must uphold and promote respect for the law through its judgments and the imposition of appropriate sentences on those making themselves guilty of serious crimes such as the present ones. We are all aware that if Courts fail to protect society that may lead to anarchy where those aggrieved can go on and take the law into their own hands in revenge.

[12] In cases of serious crimes where it is evident that the crime deserve a substantial period of imprisonment, the personal circumstances of the offender will necessarily recede into the background, thus the offender's personal circumstances such as his employment or the number of his dependants largely become immaterial. That does not necessarily mean that the Court will ignore it, because it will still remain relevant in another respect such as to determine whether the accused is likely to repeat the same offence or not.

[13] Having carefully considered all the factors relevant to sentencing. I am of the view that the aggravating circumstances in this case are such that lengthy custodial sentences seems inevitable which brings about that rehabilitation, as an objective of punishment, become a lesser consideration, and therefore has to take place in a prison environment.

[14] It is indeed so that during accused's testimony in mitigation he regretted his actions in respect of the deceased. He has to live with a constant sense of guilt for having cut short the deceased's life. However, that is an inevitable consequence of crime which the Court must have regard because violence against women and children have become rampant and as such courts have the duty to curb those crimes which have become a threat to society as a whole.

[15] It was further submitted that the Court must consider accused's modus operandi as all his victims were subjected to some form of violence, which included stabbing or stuffing of object into the victim's mouth, alternatively throttling the victim with an object.

[16] Indeed to show and demonstrate remorse is a genuine mitigating factor. Accused has however not at all shown any remorse for the crimes he have been convicted of in respect of the other victims. The offences of attempted murder are all serious. The victims could have lost their lives had it not been for other person's interventions. The accused was determined, and acted with a complete disregard for life and the rights of his victims.

[17] On the offence of assault with intent to do grievous bodily harm, that is equally a serious offence which may attract a direct custodial sentence depending on the circumstances. Although the victim did not sustain an injury, which is not a requirement for the offence, the absence thereof is indeed a mitigating factor. Furthermore, the period the accused had spend in custody awaiting the finalisation of his case, which was said to be 29 months, is another factor to be considered and the court will, therefore, take that period into account in order to arrive at appropriate sentences under the circumstances of this case.

[18] Turning to the objectives of punishment, in this case the emphasis should be placed on deterrence, especially of the accused and, in general to serve as a warning to others who may be tempted to engage in similar criminal activities.

[19] A message must therefore be clear that our Courts will not hesitate to punish those who commit serious crimes and will protect and defend the victim's rights especially the most vulnerable who are women and children in our society.

[20] Though the accused is a first offender, I am at pains to treat him as such in real sense, because the crimes he was convicted of were committed one after the other. He had a chance to reflect, but failed to do so. Custodial sentences are usually the norm for similar cases, decided in this jurisdiction.

[21] For the aforesaid reasons, I am of the view that the following sentences will be appropriate under the circumstances of the accused.

Count One : Murder with direct intent – 26 Years imprisonment.

Count Three : Attempted murder – 10 Years imprisonment.

Count Four : Rape – 15 Years imprisonment.

Count Five : Attempted murder – 10 Years imprisonment.

Alternative charge to Count Six, Crimen Injuria – Cautioned and discharged.

Count Seven: Assault with intent to do grievous bodily harm –
Cautioned and discharged.

In terms of section 208 (2) of Act 51 of 1977 it is ordered that the sentence imposed on Count five be served concurrently with Count three.

D N USIKU

Judge

APPEARANCES:

STATE : Mr Olivier
Office of the Prosecutor-General, Windhoek

ACCUSED : Mr Appolus
Instructed by Directorate of Legal Aid, Windhoek