

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT (SENTENCE)

Case No: CC 32/2009

In the matter between:

THE STATE

and

KINGSLEY DAUSAB

ACCUSED 1

MICHAEL TSOWASEB

ACCUSED 2

Neutral citation: *S v Dausab & Another* (CC 32/2009) [2019] NAHCMD 188 (14 June 2019)

CORAM: NDAUENDAPO J

Heard: 28 May 2019

Delivered: 14 June 2019

Flynote: Criminal Procedure – Sentencing – two accused Convicted of murder – Violating a dead body – Theft – Both accused having previous convictions – Prevalent offence in the community

Summary: Accused 1 and 2 were convicted of murder with direct intent; and violating a dead body, with accused 2 being convicted on a count of theft. The accused murdered the deceased and violated her body after her murder. Both the accused did not testify in person and their personal circumstances were placed before court by their respective counsel.

Held that, on the count of murder the accused are sentenced to life imprisonment.

Held further that, on the count of theft, accused 2 is sentenced to 1 year imprisonment.

Held further that, on the count of violating a dead body the accused are sentenced to 1 year imprisonment.

Held further that, the sentences in Counts 1 and 2 shall run consecutively with the sentence for Count 1.

ORDER

Accused 1 Count 1 – Murder with direct intent – life imprisonment.

Accused 2 Count 1 – Murder with direct intent – life imprisonment.

Accused 2 Count 2 – Theft – 1 year imprisonment.

Accused 1 Count 3 – Violating a dead body – 1 year imprisonment.

Accused 2 Count 3 – Violating a dead body – 1 year imprisonment.

The sentences in Counts 2 and 3 are ordered to run concurrently with the sentence for Count 1.

JUDGMENT

Introduction

[1] On 5 April 2019 This Court convicted accused 1 and 2 of (a) murder with direct intent; and (b) Violating a dead body. Further, accused 2 was convicted on a count of theft.

[2] It is now the duty of this court to impose a sentence on the accused for the crimes they have committed. It is trite in our law that sentencing is expected to consider three factors when coming to a sentence. These are (a) the personal circumstances of the accused; (b) the nature of the crime and (c) the interest of society.¹

[3] While such factors are to be considered at all times, the court further has the duty to ensure that sentencing is as a measure of curbing and preventing crime. Sentencing shall further have a deterrent element to it to discourage the two offenders and other would be offenders from committing similar offences again. Regard must be had for the society as a whole and how the crimes committed by the accused are viewed by society.

[4] Offences of this nature have become prevalent in our communities in especially as they relate to violence against women. Sentencing in this regard should send a strong message that this kind of crimes will never be tolerated in our civilized society.

[5] In S v Rabie² the court held that:

‘Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstance’.

Accused 1 - Personal circumstances

[6] The accused did not testify in person and his personal circumstances were placed before court by his counsel. The accused is 46 years old, married with eight children of whom four are minors. He went to school up to grade 9, both his parents

¹ S v Zinn 1969 (2) SA (A) at 540G.

² S v Rabie 1975(4) SA 855 at 862 G-H

are deceased. At the time of the incident, he was employed as a panel beater. The accused spent eight years in custody awaiting finalization of this trial. The accused has eight previous convictions. Counsel submitted that he was instructed by the accused to express his great remorse to the court and the family of the deceased.

Mitigation in respect of accused 2

[7] Personal circumstances. Accused did not testify and his personal circumstances were placed before court by his counsel. The accused is 44 years of age. He is single and a father of two minor children. He attended school up to grade 8. He suffers from a painful knee. He has been in custody for 10 years awaiting finalization of his trial. He is remorseful for what he did. The accused has 8 previous convictions, mostly theft and none violent in nature. (Pertaining to theft, no violent convict)

[8] In aggravation of sentence, counsel for the state called Ms. Frederika Uises to testify. She is 65 years of age and the mother of the deceased. She testified that the deceased was her second child. The deceased was single and has two minor boys who now reside with them. She and her husband are looking after the boys. She works at a school hostel and earns N\$700. Her husband is a builder. Looking after the two boys is an added financial burden to them. The boys have been negatively affected by the death of their mother. They miss their mother very much. They are all hurt by the death of their daughter and mother. She testified that the accused have never expressed remorse to her for what they did to her daughter.

Submissions

[9] Mr. Moyo submitted that murder is a very serious crime, a life has been lost. The killing was callous, cold and brutal. The accused had zero feeling for another human being. The deceased caused them no harm at all. The accused were not remorseful as they did not take the court in their confidence to express their remorse. Their personal circumstances are nothing compared to the gravity of the death. Both accused have many previous convictions and that shows that they have no respect for the law. Counsel argued that the deceased was violated by a gang of two men because she was a woman. The children of the deceased were left motherless. 14 years after the incident the emotions are still raw. Counsel argued that mercy should

not be extended to the accused as they have shown no mercy to the deceased. Counsel argued that the appropriate sentence in the circumstances is life imprisonment.

[10] Mr. Cupido argued that the crime was committed at a spur of the moment and not planned. Accused had been drinking wine and that to a certain extent affected his judgment. Counsel further argued that some of the previous convictions are of a minimal nature.

[11] Mr. Tjituri argued that the accused has a deep sense of remorse and a deep sense of guilt. He further argued that the court must have regard and distinguish the conduct of each of the accused and that accused 2 played a minor role in causing the death of the deceased. He further argued that the previous convictions of the accused are non-violent in nature.

[12] in the matter of *S v Bothile*³ said the following:

“The prevalence of domestic violence and the compelling interest of society to combat it, evidenced by the recent legislation to the effect, required that domestic violence should be regarded as an aggravating factor when it came to imposing punishment. Sentences imposed in this context, whilst taking into account the personal circumstances of the accused and the crime, should also take into account the important need of society to root out the evil of domestic violence and violence against women. In doing so, these sentences should reflect the determination of courts in Namibia to give effect to and protect the constitutional values of the inviolability of human dignity and equality between men and women. The clear and unequivocal message which should resonate from the courts in Namibia was that crimes involving domestic violence would not be tolerated and that sentences would be appropriately severe.”

[13] The murder of Menesia was gruesome, it was made more disturbing by the mutilation of her genitalia after the accused had murdered her. Murder is a serious offence and warrants a severe sentence. This was a senseless killing that warrants a

³ *S v Bothile* 2007 NR 1 137

severe sentence to be imposed on the accused persons. Women in society are crying for the courts to impose a sentence befitting the crime especially because of its brutal and senseless nature which deprived two children of a mother at such young ages. The accused acted with common purpose when they murdered the deceased and they are, in the eyes of the law, equally guilty in causing the death of the deceased. Both accused persons have previous convictions ranging from assault GBH, rape in respect of accused 1 and mainly theft in respect of accused 2, and that shows that they have no respect for the law.

[14] The personal circumstances of the accused have been taken into consideration, but there is nothing special about their circumstances to outweigh the gravity of the offence. I have considered the seriousness of the offence and the interest of society. In the circumstances, the appropriate sentence is as follows:

Accused 1 Count 1 – Murder with direct intent – life imprisonment.

Accused 2 Count 1 – Murder with direct intent – life imprisonment.

Accused 2 Count 2 – Theft – 1 year imprisonment.

Accused 1 Count 3 – Violating a dead body – 1 year imprisonment.

Accused 2 Count 3 – Violating a dead body – 1 year imprisonment.

The sentences in Counts 2 and 3 are ordered to run concurrently with the sentence for Count 1.

G N NDAUENDAPO
Judge

APPEARANCES:

FOR THE STATE:

Mr. C Lutibezi
Of the Office of the Prosecutor General

FOR ACCUSED:

Mr. C Engelbrecht
Of Engelbrecht Attorneys