

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 8/2017

THE STATE

v

LAZARUS OSCAR AWASEB

Neutral citation: *S v Awaseb* (CC 8/2017) [2019] NAHCMD 31 (21 February 2019)

Coram: USIKU, J

Heard: 16 January 2019

Delivered: 21 February 2019

Flynote: Criminal Procedure – Sentence – Offences committed closely connected in time – Accused, a police officer, used his service firearm in the commission of the crime – Court cannot turn a blind eye on that fact – Court’s duty to punish the accused appropriately for each crime – Deterrence as objective of punishment emphasised – Direct imprisonment not avoidable – Accused not having shown genuine remorse at all.

Summary: The accused aged 50 years was a Detective Inspector in the Namibian police and the Unit Commander of the Criminal Investigation Unit at Epako Police station in Gobabis. During the year 2015 a romantic relationship developed between him and the complainant Mildred Hoases. At that stage Mildred Hoases was already

in a romantic relationship with the deceased which accused had disapproved. The complainant, however, did not end her relationship with the deceased.

There is evidence that a few days prior to the deceased's death the complainant had ended her romantic relationship with the accused and continued her romantic relationship with the deceased. Accused decided to damage the complainant's properties which were kept at her shack in the Kanaan location in Epako at Gobabis.

On the 22 March 2016 whilst the complainant and the deceased were together in the complainant's shack, accused arrived uninvited and armed with a loaded pistol and fired about five shots at the complainant and the deceased. The complainant was shot three times in her thigh and leg but managed to flee from her shack. The deceased was shot twice in his back and died instantly. Accused shot himself in the chest.

At the time of the incident the accused had not been on duty neither did he have any permission or authority to possess the pistol and ammunition which is the property of the Namibian Police Force. In sentencing the Court considered the triad of factors and principles applicable thereto.

ORDER

Count One - Murder with direct intent - 28 years imprisonment.

Count Two - Attempted murder - 8 years imprisonment.

Count Three - Possession of a firearm without a licence -
2 years imprisonment.

Count Four - Unlawful possession of ammunition -
2 years imprisonment.

Count Five - Malicious damage to property –
6 months imprisonment.

Counts three, four and five are ordered to run concurrently with the sentence on the second count.

Furthermore, the following orders are made:

- (a) In terms of section 34 (1) (b) of Act 51 of 1977, the firearm, a pistol with serial number CZ75BA 826547 together with its magazine and the live rounds are to be returned to the lawful owner. The Namibian Police Force.
- (b) The Flat Screen TV and the Hi-Fi system are to be returned to the lawful owner Ms Mildred Hoases.
- (c) In terms of section 10 (7) and 8 of Act 7 of 1996, the accused Mr Lazarus Oscar Awaseb, is declared to be unfit to possess a firearm for a period of five years from the time he has completed his sentences as he did not oppose such an application.

SENTENCE

USIKU J:

[1] On 27 September 2018 the accused before court was convicted on five counts. Count one, murder with direct intent; count two, attempted murder; count three, possession of a firearm without a licence; count four, unlawful possession of ammunition in contravention of section 2 of the Arms and Ammunition Act 7 of 1996. On the fifth count, accused was convicted of malicious damage to property.

[2] In aggravation of sentence the State called one witness, the biological mother of the deceased.

[3] The accused also testified in mitigation of sentence. He did not call any witness

[4] Ms Motonane the deceased's mother testified that at the time of his death, the deceased was 18 years old. He had one brother aged 16 years and a sister aged 9 years old. The deceased was a grade 12 student. He was a good performer at school and had never failed any grade. The deceased had dreams to move to South Africa and stay with his uncle and then pursue his studies further on.

[5] During his school holidays the deceased used to assist the family by looking after their animals on the farm. He would also do some holiday jobs and being the eldest he would take care of his siblings and other children whose parents had passed away. He was a handyman.

[6] As a result of the death of the deceased, Ms Motonane and her last born daughter have been severely affected, whereby the child failed her grade one at school. The deceased had high hopes to finish his education, get employment and had promised to assist the younger siblings to finish their grade 12.

[7] Ms Motonane further testified that she only knew accused by sight as they both resided in the same area of Gobabis. She had seen him a year prior to the murder. The accused has never approached her to apologise for the killing of the deceased. She requested the court to impose a sentence which would relieve her from the pain the accused has caused to her because the deceased was her right-hand man. She has never had a job and is still unemployed.

[8] Ms Motonane confirmed to have received N\$5000 which was brought by the accused's family who also asked for forgiveness. It was not made clear to her that the money was given by the accused, neither did the family indicate to her that they were sent by the accused. The family that came to her specifically told her that they were sorry for what the accused had done and promised that they will ask the accused to come to her and personally apologise for his conduct.

[9] Accused testified in mitigation of sentence. The following are his personal circumstances:

He is a first time offender. Born on 4 April 1968 at Gohas. Both his parents are deceased. He attended school at Gibeon and completed grade 10 in 1988

whereafter, he applied at the Police College and was admitted. After his six months training, he successfully completed his police training and was posted at Gibeon police station where he worked for eight years until 1998. He was promoted to the rank of a sergeant in 1998 and was then transferred to Gobabis police station. He worked as the commander of the Criminal Investigation Unit at the Epako police station until the time of this incident.

[10] He married Anna Hendrina Bock on 29 February 1992. She passed away in 2014 and he remained a widower. They had no children. He took in a boy who is currently aged 17 years and is still in school at Rehoboth. He has been responsible for his upbringing since his early age. The boy is related to the accused's late wife.

[11] Accused suffers from several ailments amongst them high blood pressure and is currently on medication on a daily basis. He also suffers from asthma and gout. He is on medication for these ailments. Apart from the three ailments, accused is also suffering from a chest infection and is diabetic although it is under control. Medication is offered to him in custody.

[12] According to the accused, he developed asthma whilst incarcerated. He had been suffering from gout for about 10 years, which has now become worse because of the conditions in custody.

[13] Accused testified further that he was touched by the deceased's death as well as the victim's injuries. Accused also testified that immediately after the incident, he had a discussion with his family members and had tasked them to go and apologise on his behalf. He also offered them money to take to the funeral. The money was taken. According to him, he could not personally go to the deceased's family to apologise because after the incident he was hospitalised.

[14] He also did not apologise to Mildred personally but her mother approached him and he then apologised to her at the court during the proceedings. He has opted to apologise before court and asked to be forgiven by the deceased's mother, the community of Gobabis and the country as a whole. He wishes to apologise for the pain he caused on the date of the incident.

[15] Furthermore, accused testified that he met with Mildred after they had a telephonic conversation. He has since transferred money into her bank account an amount of N\$45 000 as confirmed by the transfer slip from NamPost. This money is meant to cover the damages he has caused to the complainant's properties as well as to pay for specialised treatment for the injuries the complainant had suffered as a result of the accused's conduct.

[16] It was submitted on behalf of the accused that he is willing to pay for the deceased's child's/children's education if any or alternatively to make payment towards the costs of the tombstone on the deceased's grave. It was further submitted that since the offences committed are closely connected, in terms of the time, the Court should consider to impose concurrent sentences.

[17] Accused maintained that he had not thought of asking for an apology earlier but decided to do so because he has since repented whilst in custody. He admitted to having only made the money transfer after his conviction. He persisted that he was the one that sent his family to go and apologise to the deceased's family on his behalf.

[18] Counsel for the State on the other hand submitted that it was an aggravating factor that the accused was a police officer who attacked the complainant and the deceased in the former's shack, where she thought could have been safe. Further that it was the accused who had interfered in the deceased and the complainant's relationship. There was no reason for the accused to kill the deceased. Neither did the deceased wronged the accused at all. Furthermore, that offences of domestic violence have become prevalent as evidenced in the news-media.

[19] It was further submitted that the murder was committed with actual intent and it is further aggravating that the offences were committed in a domestic setting whereby the accused had shot at his former girlfriend and then killed the deceased, who at the time was been involved in a romantic relationship with the complainant (Mildred Hoases).

[20] The Court has the duty to take into account the personal circumstances of the accused person, which had been placed before it in mitigation. It also has to

consider the arguments by both counsel and the authorities referred to in connection with sentencing. The duty of the Court is further to consider all the factors relevant to sentencing, namely the crimes committed, the accused's personal circumstances as well as the interest of society. The seriousness of the offences committed and the objectives of punishment cannot also be ignored, when considering what appropriate sentences would be under the circumstances.

[21] The fact that accused is indeed a first offender weighs in his favour. Accused's period of incarceration after his arrest before the finalisation of his case is also one of the factors the sentencing Court will have to take into account when imposing sentences. The period spent in custody awaiting trial will usually lead to a reduction in sentence.

[22] As regard the accused's illnesses, it has not been submitted that treatment cannot be continued or is not available in a Correctional Facility. I am satisfied that sentences of imprisonment will not be more burdensome to the accused by reason of his state of health. In the same vein it is not unusual to impose heavy sentences where an accused has been convicted of such offences which are serious in nature.

[23] Furthermore, the absence of real remorse on the part of the accused and the prevalence of the offences of murder and attempted murder is another aggravating factor and it is important to consider imposing sentences that will have a deterrent effect. Whereas the accused had offered to make a token towards either the deceased's children's education or towards the deceased's tombstone, this only came at an eleventh hour, and one would wonder whether he is indeed being genuine in that case. It could have been taken more serious had he made his offer known to the deceased's family soon after the death. In fact to date, accused does not seem to have whole heartedly accepted his unlawful conduct. In this premise, I am not satisfied that he has shown remorse for what he has done.

[24] Indeed our country as a whole has experienced a wave of violent crimes and there is therefore a need to effectively combat such crimes, thus the emphasis has now changed from individualisation to deterrence, in particular where those who are charged with the duty to combat crimes are themselves committing crimes¹. The

¹ S v Gerhard Shipena CC 179 of 2004 unreported judgment HC delivered on 12 October 2014.

community craves for the assistance of the Courts. They are members threatened to take the law in their own hands should the Court fail in protecting them and their properties.

[25] It is my strong belief that unfortunately hardship brought upon the family and the dependants of criminals is an inevitable consequence of crime and does not in my view constitute a mitigating factor at all.

[26] In this case the person about to be sentenced was a police officer holding a senior rank and as held in the case of *Maleagi Toy Gaseb v S*² at page 6, 'A policeman who commits a crime not only breaches the trust that the community has placed on him, he attacks and undermines the foundation of organised society and thus deserves a sentence that serves as an example'. I share the same view and endorse those sentiments.

[27] It is trite that Courts are entitled to attach more weight to a certain factor(s) at the expense of others.³ In deciding what punishment in the present circumstances would fit the criminal as well as the crimes committed and the society's interest, it would undoubtedly be a custodial sentence. That being the norm.

[28] It is common knowledge that all crimes have harsh effects on society. What distinguishes domestic violence is its hidden, repetitive character and its unreasonable ripple effects on our society and in particular on family life. This Court was told that the deceased was the right-hand man of his mother and a first born child. A pillar for his two younger siblings whose life was cut short for no apparent reason. He was shot twice on the right mid aspect of the back of the torso. He had no chance of survival at all. His departure has indeed created a vacuum.

[29] The accused used his service pistol without authorisation. He engaged in a criminal activity thereby acting outside his powers as an officer who is tasked to prevent crime. He can clearly be regarded as a danger to society and the only way is to remove him from public circulation for a substantial period of time. His sentence

² *Maleagi Toy Gaseb v S* an unreported judgment HC CA 33 of 1995 delivered on 6 May 1996.

³ *S v Van Wyk* 1993 NR 426 SC at 448 D – E.

must serve as a wakeup call to other uniformed men and women who are going to find themselves in a similar situation.

[30] The sentences the Court is about to pronounce will however not take away all hope the accused might have of being released from the Correctional Facility at some stage should he conduct himself in a manner that is acceptable to warrant his release.

[31] In the result, I consider the following sentences to be appropriate:

Count One - Murder with direct intent - 28 years imprisonment.

Count Two - Attempted murder - 8 years imprisonment.

Count Three - Possession of a firearm without a licence -
2 years imprisonment.

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D N USIKU

Judge

APPEARANCES:

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

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