

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

Case No: CC 12/2016

In the matter between:

THE STATE

and

JOHNY RYNO DIERGAARDT

ACCUSED

Neutral citation: *S v Diergaardt* (CC 03/2015) [2019] NAHCMD 454 (5 November 2019)

CORAM: NDAUENDAPO J

Heard: 9 October 2019

Delivered: 5 November 2019

Fly note: Sentencing – Accused convicted of murder with direct intent read with provisions of combating of Domestic Violence Act – Accused has shown genuine remorse – Interest of society for outweighs the personal circumstances – Deceased

stabbed 27 times – Sentenced to 35 (thirty five years’) imprisonment of which five years are suspended on the usual condition.

Summary: The accused was convicted of murder with direct intent, read with the Provisions of the Combating of the Domestic Violence Act, Act 8 of 2003. The accused, who has a minor child with the deceased, stabbed her 27times. She was 22 years old. The accused has shown genuine remorse. Gender based violence has reached a crisis point. Men are murdering their girlfriends and wives as if they have the right to do so. The courts must send a strong message that Gender Based Violence is totally unacceptable and those found guilty will be severely punished. Interest of society far outweigh the personal circumstances of the accused. Accused sentenced to 35 (thirty five years’) imprisonment of which 5 (five years) are suspended on the usual conditions.

ORDER

- (a) The accused is sentenced to 35 (thirty five years’) imprisonment of which 5 (five years) are suspended for a period of 5 (five years) on condition that the accused is not convicted of murder, committed during the period of suspension.

JUDGMENT

NDAUENDAPO, J

[1] On 9 August 2019 this Court convicted the accused of murder with *dolus directus*, read with the provisions of the Combating of the Domestic Violence Act, Act 4 of 2003.

[2] It is now my duty to sentence the accused for the crime he committed. In terms of our law there are three factors to be taken into account, namely: (a) the personal circumstances of the accused; (b) the nature of the crime and (c) the interest of society.¹

[3] At the same time the sentence to be imposed must satisfy the objectives of punishment which are: (i) the prevention of crime; (ii) deterrence or discouragement of the offender from re-offending and would-be offenders from committing crimes; (iii) rehabilitation of the offender and (iv) retribution. Thus, if the crime is viewed by society with abhorrence, the sentence should also reflect this abhorrence.

[4] The prevention of crime, otherwise known as 'direct prevention' is premised on the notion that by making it impossible for the offender to commit at least a certain type of crime again, crime would be reduced, however, other jurists advocate for 'indirect prevention' which school of thought postulates that the offender is persuaded to cease his activities 'voluntarily' by means of three different methods; namely through *retribution*, *deterrence* and *rehabilitation*.²

[5] In *S v Rabie*³ 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 circumstances'.

Personal circumstances

[6] The accused is 36 years old, single and a father of a girl, 8 years old. He was born in Rehoboth and grew up mainly with his grandmother and grandfather. Accused does not know his father. He could not stay with his mother because his stepfather did not like him and his sister. He is very close to his sister. The deceased also has a son, with a different father, whom he brought up like his own. He does not feel well about what he did. The deceased was somebody he loved and who died at his hands. He is heartbroken, hurt the family of the deceased very much and is asking for mercy. He tendered his apology to the family and friends of the deceased

¹ *S v Zinn* 1969 (2) SA 537 (A) at 540G.

² DP Van Der Merve. *Sentencing Service* 5. 1996 at 3-11.

³ *S v Rabie* 1975 (4) SA 855 at 862 G-H.

and he knows that 'words' cannot take away the pain and he hopes that they will forgive him. He loved the deceased very much and he wanted them to be together as a family. He wrote a letter to the family of the deceased in which he expressed his remorse for causing the death of the deceased and asked for forgiveness. He was diagnosed with HIV and is on ARV treatment. Whilst in prison he started biblical studies and obtained 2 diplomas in 2017 and 2018. He loved his daughter very much including the son of the deceased. His mother passed away. He has a previous conviction of theft of money. Ms Pienaar, the sister of the accused's mother testified that the accused is a soft hearted person and could not believe that the accused could do something like that.

[7] In aggravation of sentence, the mother of the deceased, Ms Lewin, testified that the deceased was 22 years old at the time of her death. Her son was 4 years old and the daughter 2 years old. The deceased loved her children very much and her death had a great effect on her grandmother. After the death of the deceased her son developed behavioral problems. She took him to a psychologist and received counselling for a year. To this day he is still having problems, every now and then she is summoned to school because he had done something wrong. The deceased's daughter was not affected by the death of her mother as she was young at the time the mother was murdered. She is doing well at school, passing with flying colours. She testified that the accused caused her much pain by killing her daughter. She can never come back and her children must grow up without a mother.

[8] Mr. Isaacks submitted that society does not expect to destroy the offender. Punishment must be blended with a measure of mercy. He submitted that the accused committed the crime with diminished criminal responsibility. He referred to the reports of Dr. Dr. Sieberhagen and clinical psychologist Mensah-Husselman who examined the accused. Dr Sieberhagen found that the accused acted with diminished criminal capacity. He concluded that: "the accused may have reduced conative ability to resist the impulse to kill as a result of external factors."

[9] Clinical psychologist Ms Mensah-Husselman concluded that the slaying of the deceased by the accused was an automatic response to his unconscious rage and

drove him over the cliff. His actions were out of character. He submitted that the accused spent 5 years and 7 months in custody awaiting finalization of his trial and that should lead to the reduction of sentence. Accused is HIV positive and on ARV treatment. The accused is very protective of his daughter and that he sought help from social worker to get custody of his daughter, but the system failed him. The accused is remorseful for his actions, he was seen crying over the body of the deceased and he addressed a letter to the family in which he said that he was very, very sorry for what he did.

[10] Ms Jacobs argued that at the time the deceased went to the flat of the accused, the relationship between them had ended. The accused took her belongings and lured her to his flat, for what? He stabbed her 27 times. Society must see that the courts are serious. In cases such as this the interest of society must outweigh the interest of the criminal. In *S v Thomas* only the report of psychiatrist can be taken into account and not the psychologist. The deceased was only 22 years old and did not deserve to die in that cruel manner. She left behind two minor children who must grow up without the love and care of a mother.

Nature of the crime

[11] There is no doubt that murder is a serious crime which calls for severe punishment. The deceased was a defenceless and innocent human being who died at the hands of her boyfriend. She was butchered in the cruelest manner imaginable. She was stabbed 27 times. Her son of four years tried to defend her by asking the accused not to stab his mother and even stabbed the accused in the leg, in defence of her mother but to no avail. The accused just continued stabbing the deceased as if she was an animal, one of the knives was found stuck in her head. The pain that she must have endured must have been very profound. The accused's actions towards another human being was simply beyond belief. The sentence to be imposed must fit the true nature and seriousness of the crime. Every person's right to life is entrenched in our Constitution and the accused violently took that away from her. The deceased was just 22 years old, barely started her adult life and she left two minor children who must now grow up without the love and care of a mother and a

father because of the actions of the accused. The courts must send out a strong message that gender based violence is totally unacceptable and that those who make themselves guilty of that will be sentenced to very lengthy sentences.

Interest of society

[12] Violence against women, the most vulnerable members of our society, continues unabated. The courts are trying their level best to impose severe sentences to send a clear message that murderers will be dealt with severely. High levels of crime invariably result in the public demanding that ever more severe sentences be imposed on perpetrators of these crimes. In *S v Motolo en andre* 1998 (1) SACR 206 OPD the court held that:

"In cases like the present the interest of society is a factor which plays a material role and which requires serious consideration. Our country at present suffers an unprecedented, uncontrolled and unacceptable wave of violence, murder, homicide, robbery and rape. A blatant and flagrant want of respect for the life and property of fellow human beings has become prevalent. The vocabulary of our courts to describe the barbaric and repulsive conduct of such unscrupulous criminals is being exhausted. The community craves the assistance of the courts, its members threaten, inter alia, to take the law into their own hands. The courts impose severe sentences, but the momentum of violence continues unabated. A Court must be thoroughly aware of its responsibility to the community and by acting steadfastly, impartially and fearlessly announce to the world in unambiguous terms its utter repugnance and contempt of such conduct."

[13] Although a South African judgment, what is expressed in there is equally apposite in this country and I fully associate myself with the sentiments expressed therein.

[14] I closely observed the accused when he testified and I could clearly see that he was genuinely remorseful for what he did. He took the court into his confidence. He also wrote a letter to the family of the deceased in which he expressed his remorse. He spent 5 years 7 months in custody awaiting finalization of the trial. Dr. Sieberhagen found that the accused acted with diminished criminal responsibility. In

S v Shapiro (1994 SACR 112 (A) 123d-f, the court held that: 'A person who has diminished criminal responsibility is by definition a person with diminished capacity to appreciate the wrongfulness of his act, or to act in accordance with an appreciation of its wrongfulness.' The murder was also not premeditated and he acted out of character. Those are all factors that the court must take into account in favour of the accused.

[15] Having taken into account all the factors, an appropriate sentence will be as follows:

(a) The accused is sentenced to 35 (thirty five years') imprisonment of which 5 (five years) are suspended for a period of five years on condition that the accused is not convicted of murder, committed during the period of suspension.

G N NDAUENDAPO

Judge

APPEARANCES

FOR THE STATE

Mr. S Jacobs
Of the Office of the Prosecutor General

FOR ACCUSED

Mr. B. Isaacks
Of Isaacks & Associates