

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

CC11/2020

In the matter between:

THE STATE

And

THEUNS GANEB

ACCUSED

Neutral citation: *S V Ganeb* (CC11/2020) [2021] NAHCMD160 (15 April 2021)

Coram: UNENGU AJ

Heard: 18 August 2020; 22-23, 14-16 September 2020; 05-07 October 2020;
16, 18 20 November 2020 & 01 December 2020; 23 March 2021; 09
April 2021

Delivered: 15 April 2021

Flynote: Criminal Law – Murder and Sentencing – Accused charged and convicted with murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – Sentencing is a consideration of trite factors of crime, the offender and the interests of society – Court duty bound to balance the interests of the society against that of the offender - Court in appropriate situations may give more weight to certain factors as

opposed to others – Crime of murder in domestic set up very serious – Severe punishment warranted – Accused sentenced to 30 years imprisonment.

Summary: Accused was charged and convicted of murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003. Deceased was killed in a domestic set up by the accused. The deceased and accused were leaving together as a boyfriend and girlfriend in one house. However, in the morning of between 9 and 10 March 2018 the deceased was assaulted and killed by the accused in their house. During the trial the accused pleaded not guilty to the charge of murder and raised the defence of private defence. In his plea explanation the accused alleged that he acted in self-defence because the deceased and an unknown man attacked him. Furthermore, he alleged that he did not realise that he was beating his girlfriend because it was dark. However, the court rejected his version and defence and convicted him of murder with direct intent to kill. As a result the accused is now due for sentencing.

Held that consideration for sentencing requires this court to consider the crime and the offence as opposed to the interests of society and balance same to arrive at just and fair sentence.

Held that according to the post mortem examination report it is a testimony to the fact that the deceased died a cruel and brutal death.

Held that the court in appropriate situations may give more weight to certain factors as opposed to others and the crime of murder is very is serious and compounded by domestic set up, therefore warrants severe punishment.

ORDER

Accused is sentenced to thirty (30) years imprisonment.

JUDGMENT

UNENGU AJ

[1] The accused in the matter was found guilty and convicted of murder with direct intent to kill his girlfriend with whom he lived in a romantic relationship. These happened in the location of Kanaan at Gobabis in the early morning of between 9 and 10 March 2018. At the trial and during these proceedings, the accused is represented by Mr Kauari instructed by Legal Aid in the Ministry of Justice. Mr litula from the Prosecutor Generals' Office is handling the State's case.

[2] On 23 March 2021 after I have convicted the accused, I postponed the matter until 9 April 2021 for counsel to prepare written heads of argument in respect of mitigation and aggravation of sentence. These, both counsel have done. They filed not thick and extensive written heads but well researched heads discussing the facts of the matter and principles of law supported by case law they expanded on with oral submissions.

[3] On behalf of the accused Mr Kauari put on record the mitigation and personal factors for consideration by the court with regard to sentencing of the accused. Mr Kauari submitted that the accused is a first offender at the age of 80 years and urged the court to attach more weight to the two factors. He said that the accused was on ARV and TB medication, therefore, not a healthy person. However, no proof was furnished in court to this effect. He proposed a five years sentence considering his age and health condition as an appropriate punishment for the accused. With regard to the age of the accused, Mr. Kauari referred the court to the Supreme Court judgment in the matter of *Gaingob and others v The State* where excessive long sentences were declared unconstitutional and placed a cap on an imprisonment sentence not to exceed thirty seven and half years.

[4] It is common cause that the accused at the age of 80 years is an old man. His age will count in his favour as a mitigating factor. It is also common knowledge that the

accused has been convicted of murder with direct intent which is very serious thus calling for severe punishment. The accused and the deceased were in a romantic relationship for some time such that the deceased could have regarded the accused her chateau and shield for protection and safety. I do not imagine for a moment that the deceased could have thought that the accused would do to her what he had done.

[5] The accused admitted inflicting the injuries to the body of the deceased which caused her demise. The post mortem examination report is a testimony to the fact that the deceased died a cruel and brutal death. She suffered bleedings in all three layers of the skull and fractured seven of her ribs due to the assault on her by the accused. Her body was literally crushed and as such died the death of a pauper.

[6] It is the accused testimony that the loss of his lover pains him and as a result, wished to show his sincere remorse to the family of the deceased and the community at large. On the question as to whom from the deceased family did he approach to ask for forgiveness, he was at pains to answer this question. The impression gained by the court is that it is an afterthought which gained momentum upon overwhelming evidence adduced in court and the quest for a lesser sentence.

[7] In this regard I will borrow from the Supreme Court judgment in *S v Schiefer*¹ adopted, with approval, what was held in *S v Matyityi*, at 1081C-D:

'Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error'.

[8] In *S v Nowaseb*² My Brother Liebenberg J, said the following:

"The accused's proclaimed penitence is not sincere and that he did not fully take the court into his confidence. On the contrary, he tried to mislead the court by presenting his own

¹ *S v Schiefer* (SA29/2015) 2017 NASC (12 September 2017)

² *S v Matyityi* (CC 14/2020) [2021] NAHCMD 86 (01 March 2021)

set of facts far removed from what actually transpired on that fateful evening. Here I am referring to the alleged physical altercation he had on that fateful morning when he was attacked outside his house. Such conduct does not connote 'repentance, an inner sorrow inspired by another's plight or by a feeling of guilt ...' I am therefore unable to find that the accused demonstrated any remorse for the crimes he committed. I remained unimpressed by the accused proffered remorse".

In the matter at hand, the accused presented to court the same story blaming the deceased for the cause of her death.

[9] The accused claimed to have 8 children of his own, whom he supports, and who are all majors, without tendering any documentary proof. He mentioned that he supports them with his pension he gets from the government. The accused could not amplify the support assertion and to that I say nothing further.

[10] The state evidence in aggravation was led through an emotional 25 years old daughter of the deceased who befittingly came to hear the fate of her mother's killer. No prior engagement was granted with the state's counsel and a brief consultation resulting in adjournment of the court session was granted for such purpose. On resumption she testified that she is a biological daughter of the deceased and has a sister and a brother aged 10 and 9 respectively. She is unemployed and struggles to support the two as their only breadwinner was the deceased. Her remembrance of forgiveness by the accused was while in Gobabis when accused was in the holding cells. She repeated the words for forgiveness verbatim as follows: *"forgive me I did not expect something like this to happen, but it happened"*.

Her attitude is one of unforgiveness and remarked that it was difficult for her to forgive the accused as they lost their mother forever and that the proposed five years jail term is grossly inappropriate.

[11] Mr. litula, Counsel for the State correctly referred the court to the sentiments expressed by Liebenberg J in *S v Van der Westhuizen*³ that the task of a sentencing

³ *S v Van der Westhuizen* [2015] NAHCMD 260

judge is indeed a daunting one that punishment should be such that it reflects the indignation of both the court and society, particularly those directly affected by the accused's wrongdoing, but also that of society in general, who has a legitimate expectation that justice will be done.

[12] Mr. Kauari for accused made reference to the case of *S v Rabie*⁴. Therein it was pointed out the overriding principles that guide the courts in sentencing accused persons, namely: the infliction of punishment is pre-emminently a matter of the discretion of the trial court and individualization of punishment.

Furthermore, that the 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. I agree.

[13] Also relevant to sentencing is what was said in the matter of *S v Nowaseb* above, that the court is required to consider the triad of factors comprising the crime, the offender and the interests of society. In *S v Van Wyk*⁵ it was said that some difficulty often arises when trying to harmonize and balance these principles, and to apply them to the facts of the particular case. It is trite that equal weight or value need not be given to the different factors and, obviously depending on the facts, the situation may arise where one or more factors require emphasis at the expense of others. This is called the principle of individualisation where punishment is meted out with regards to the circumstances of the particular accused; the facts and circumstances under which the crime was committed; and what sentence would best serve the interests of society. The purpose is thus to find a just and fair sentence that would not only serve the interests of the offender, but also that of society.

[14] The reaction of society, in my view, is a valid consideration in the court's determination of an appropriate sentence. In *S v Flanagan*⁶ the court held that the interests of society are not served by a sentence which is too lenient. After all, it is the

⁴ *S v Rabie* 1975(4) SA 855(A)

⁵ *S v Van Wyk* (SA 6/91) [1991] NASC 6; 1992 (1) SACR 147 (NmS) (29 October 1991) at 45

⁶ *S v Flanagan* 1995 (1) SACR 13 (A)

members of society who one day have to accept the accused back in their midst; which process might be troubled when there is a perception that the sentence given to the accused was too lenient and he or she does not deserve to be admitted back into society. The courts should not give in to the expectations of society (at the expense of the accused or the interests of justice) when it comes to sentencing; but, neither should the courts ignore society's reaction of indignation and public outcries against those who make themselves guilty of committing heinous crimes, for that, in my view, would be out of touch with reality and the legitimate expectations of society. It is in these circumstances that the sentencing court would consider it justified that retribution, as an objective of punishment, should come to the fore in cases of this nature. Furthermore, given the gravity of the murder count, a lengthy custodial sentence seems inevitable. Not only should it serve as specific deterrence to the accused, but also as a general warning to like-minded criminals.

[15] Despite the accused being a first offender, his personal circumstances and interests simply do not measure up to the gravity of the crime committed and the aggravating factors present, coupled with the interests of society. In the circumstances of this case, reformation, as an objective of punishment, becomes a lesser consideration.

[16] In *Gariseb v S*⁷ the court referred to *Van Wyk above*, where Ackermann AJA at 448D-E recognised the complicated task to harmonize and balance the general principles of sentencing and went on to say, the following:

'the duty to harmonise and balance does not imply that equal weight or value must be given to the different factors. Situations can arise where it is necessary (indeed it is often unavoidable) to emphasise one at the expense of the other'. See also *S v Alexander 2006 (1) NR 1 (SC) at 8B-C*.

[17] Reference was made to the judgment in *Gaingob v S* above by the accused counsel. At issue in the appeal was whether inordinately long fixed terms of

⁷ *Gariseb v S* (SA6-2014)[2016] NASC (12 May 2016)

imprisonment which could deprive an offender of the hope of release during his or her lifetime would constitute cruel, inhumane or degrading treatment or punishment in conflict with Art 8 of the Constitution which entrenches the right to human dignity. The court reiterated the variation of parole release mechanism as equipped with value judgment components to enable the relevant authorities to determine eligibility of offenders for parole. Such release is a prerequisite by meritorious conduct and industry unless offenders are declared habitual criminal sentenced to life imprisonment and those offenders sentenced to imprisonment for scheduled offences. It is said that the more serious the offence and severe the sentence, the more onerous are the requirements set for parole.

[18] The judgment in *Gaingob* in my opinion did not bar life sentence or inordinately long sentences but instead brought to the fore that any imprisonment sentence must be embedded with a release mechanism. See *Gaingob* at paragraph 49 where the Supreme Court endorsed Mohamed CJ when he said the following in *Tcoeib*:

“It seems to me that the sentence of life imprisonment in Namibia can therefore not be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner’s natural life as if he was a ‘thing’ instead of a person without any continuing duty to respect his dignity (which would include his right not to live in despair and helplessness and without any hope of release, regardless of the circumstances).”

[19] Furthermore, Mohamed CJ said the following: *“The crucial issue is whether this is indeed the effect of a sentence of life imprisonment in Namibia. I am not satisfied that it is”*.

Mohamed CJ proceeded to refer to the mechanisms in the then applicable legislation concerning the duty to make recommendations for the training and treatment of those sentenced to life imprisonment and the machinery for the functioning of a

release board to make recommendations to the President for the release of offenders sentenced to life imprisonment. And concluded:

“It therefore cannot properly be said that a person sentenced to life imprisonment is effectively abandoned as a 'thing' without any residual dignity and without affording such prisoner any hope of ever escaping from a condition of helpless and perpetual incarceration for the rest of his or her natural life. The hope of release is inherent in the statutory mechanisms. The realisation of that hope depends not only on the efforts of the prison authorities but also on the sentenced offender himself. He can, by his own responses to the rehabilitative efforts of the authorities, by the development and expansion of his own potential and his dignity and by the reconstruction and realisation of his own potential and personality, retain and enhance his dignity and enrich his prospects of liberation from what is undoubtedly a humiliating and punishing condition but not a condition inherently or inevitably irreversible”.

[20] In arriving at an appropriate sentence the court must consider the triad factors comprising the crime, the offender and the interests of society. 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. The offence of murder committed by the accused in this case is very serious and compounded by domestic relationship between the accused and the deceased. Furthermore, the manner in which the accused acted in killing the deceased was vicious and inhumane. In reaching its decision the court is mindful of the accused's age and the fact that he is a first offender but is not oblivious to the seriousness of the offence and the interest of the society. In my view, the personal circumstances of the accused are of less weight in comparison with entrenched opposing interest of society. The crime warrants appropriate sentence meted out in these circumstances.

[21] Considering what is stated hereinbefore, it follows therefore that five (5) years imprisonment proposed by Mr. Kauari, is far too disproportionate to the crime of murder with direct intent to kill read with the provisions of the Combating of Domestic Violence

Act 4 of 2003 for which the accused was found guilty and convicted of. The sentence proposed by counsel if accepted in this matter would evoke anger and outrage from members of the society. The community would laugh and scoff at such sentence. They may lose faith in the criminal justice system and resort to taking the law in their own hands.

[22] That being the case, I find no reason why I should not follow the sentencing precedent followed by this court in murder cases where an accused person has been convicted of murder with direct intent to kill, like in the instant matter. I said already that the deceased in the matter died a cruel and brutal death at the hands of the accused whom she regarded as a person who would take care of her and protect her from danger.

[23] In the result, the accused is sentenced to thirty (30) years imprisonment.

E P UNENGU
Acting Judge

APPEARANCE

STATE: T T Itula
Office of the Prosecutor-General, Windhoek

ACCUSED: N Kauari

Instructed by Directorate of Legal Aid, Windhoek