

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
SENTENCE**

Case no: CC 19/2020

In the matter between:

THE STATE

and

AXAROB THYS

ACCUSED

Neutral citation: *S v Thys* (CC 19/2020) [2021] NAHCMD 190 (27 April 2021)

Coram: CLAASEN J

Heard: 12 April 2021

Delivered: 27 April 2021

Flynote: Criminal Procedure – Sentence – Convicted of murder with direct intent, read with the provisions of the Combating of Domestic Violence Act – Domestic relationship an aggravating factor – Violent masculinity has no place in an egalitarian society and the courts will treat such violence perpetrated against women with the disdain that it deserves – Personal circumstances of the accused recede against the magnitude of the other components in the sentencing triad – Lengthy term of imprisonment inescapable.

Summary: The accused and deceased were in a romantic relationship for 8 months at the time of incident. The accused heard from a person that the accused intended to cheat on him with her ex-boyfriend. That information fuelled the accused with anger and jealousy causing him to go and 'discipline' his girlfriend. The mode of discipline was a stab in her chest with a solid steel wire, which penetrated her aorta causing her to die on the spot. The accused accepted responsibility for the wrongful deed and tendered a guilty plea in terms of section 112(2) of the Criminal Procedure Act as amended.

The accused and his sister testified in mitigation of sentence. The court heard that he was a first offender at the age of 26 years, he asked forgiveness and expressed remorse about his wrongful deed. His sister confirmed that he and the deceased had a peaceful relationship and that their family went to apologize to the family of the deceased.

One of the sisters of the deceased testified in aggravation of sentence. She testified about the consequences of the death of her sister. Not only did it abruptly left the three children without a primary caregiver, but also imposed a financial burden on other family members who are also financially constraint.

Held, that the accused's remorse expressed under oath is valid. In addition he has, without further ado, tendered a guilty plea and accepted responsibility for his wrongful deed, which this court regards an factor in mitigation of sentence.

Held, that the mere saying that the accused consumed liquor that apparently contained 16% volume of alcohol, without any further details, is insufficient to sustain a finding that intoxication should be construed as a factor in mitigation.

Held, further that, the grave consequences of murder is a factor in aggravation of sentence. Not only did it deprive the life of an innocent person, but it also left three children without a primary caregiver. The relatives who took in the children are financially constrained and it is difficult to fulfil the special role of a mother. The death of the mother in this household changed the trajectory of the life of each of these children.

Held, further that, the notion of violent masculinity has no place in an egalitarian society. Inevitably the courts will treat such violence perpetrated against women with the disdain that it deserves, in the form of more severe sentences.

Held, further that, the personal circumstances of the accused recede against the magnitude of the other components in the sentencing triad and a lengthy term of imprisonment inescapable.

ORDER

Murder (direct intent) read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003 – 29 years' imprisonment.

SENTENCE

CLAASEN J:

[1] On 12 April 2021 this court convicted the accused on his own plea of guilty of murder with direct intent, of his girlfriend, Elfriede Afrikaner, read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003.

[2] Mr Shikwa represents the accused while Mr Olivier appears for the State.

[3] It is now the duty of the court to consider an appropriate sentence. In doing that, I take into account the triad of sentencing principles as laid down in *S v Zinn*¹, which entails a consideration of the nature of the offence, the interests of society and the personal circumstances of an accused. It is a trite that at times, these factors are not accorded equal weight, which depends on the individual circumstances of each case. I am also mindful of the objectives of punishments which are, deterrence,

¹ *S v Zinn* 1969 (2) SA 537 (A).

prevention, retribution and restoration and the need to blend the sentence with a measure of mercy.

[4] The following exhibits were admitted by consent:

- (a) Exhibit 'A' – The accused's statement in terms of s 112(2) of the Criminal Procedure Act 51 1977, as amended;
- (b) Exhibit 'B' – The State's pre-trial memorandum;
- (c) Exhibit 'C' – The accused's reply the State's pre-trial memorandum;
- (d) Exhibit 'D' – The post mortem report;
- (e) Exhibit 'E' – The photo plan of the post mortem;
- (f) Exhibit 'F' – The photo plan of the scene;
- (g) Exhibit 'G' – The lower court proceedings of case number GOB-CRM 2952/2019.

[5] The accused testified in mitigation of sentence. He was born in Gobabis and is a first time offender at the age of 26 years. He is not married and has no children. His educational career ended in grade 6 at Gobabis Primary School, due to financial hardship in the household.

[6] Before his arrest he fixed fences on a contractual basis and earned between N\$ 3 000 and N\$ 4 000 monthly. He used that to provide financial assistance to his 77 year old grandmother, as well as his siblings. His mother passed away during the year 2018 and his father is staying at a farm. He does not suffer from any health impediments.

[7] He was in a relationship with the deceased for 8 months. According to the plea explanation, what triggered the incident is that the accused received information from a certain Ms Desire Kalantoihe that the deceased intended to cheat on him with her ex-boyfriend, who was Mr Ben Perd. Infuriated with jealousy and whilst having consumed an alcohol called 'Clubman' he decided to go and discipline his girlfriend.

[8] He testified that he regrets his actions and apologized in court, saying that his heart is still in pain about what he has done. He explained that he could not personally apologize to the family of the deceased, as he was in custody. His family

went to apologise to the deceased's family and contributed financially towards the burial of the deceased.

[9] During cross-examination it was postulated that violence was not the only way to deal with a situation like the one he faced. Another option suggested by Counsel for the State was that he could have parted from the relationship, as he saw that when he spoke to the deceased about the allegations she ignored him. He essentially conceded that he could have handed the situation in a different manner.

[10] Ms Annie Thys, the sister of the accused also testified in mitigation. She testified that he is not an aggressive person and had a peaceful relationship with the deceased. She confirmed that her family apologized to the deceased's family, and contributed financially towards the burial of the deceased. She also validated that the accused maintained her and her siblings financially. She reiterated that their family is also saddened by the events, which amongst others left the grandmother without that financial support.

[11] Ms Petrina Afrikaner, one of the deceased's sisters testified in aggravation of sentence. She characterised the deceased as a friendly, quiet and loving person. The deceased worked as a domestic servant, on a part-time basis. That income was utilized to sustain herself and her three children who are now aged 20 years, 17 years and 3 years respectively. The death of the deceased left an emotional void for these children as they shared a close bond with their mother. The death also saddled the family, with the care of the children from that point onward. Though family members took in the children, the family also struggles financially. She explained that the 20 year old daughter, who resides with her, is currently enrolled at NAMCOL. She testified that the 17 old boy attends school but recently disciplinary issues emerged at school. The baby resides with her maternal grandmother on the farm. Ms Afrikaner testified that the baby, who was merely one year and six months at the time of the incident, is still in search of a mother-figure as she calls every women 'mommy'.

[12] Counsel for the accused implored the court to have mercy and that the sentence should not break the spirit of the accused. He petitioned the court to consider that the accused has taken responsibility for the death, which is evident in

the guilty plea and the remorse as attested under oath. He also emphasized the circumstances that preceded the event, which prompted the accused to want to effect corrective measures and that the accused consumed liquor that day. This he argued led to emotional distress on the accused when he heard about his girlfriend's planned infidelity.

[13] On the other hand, Counsel for the State, apart from emphasising the ferocious manner wherein the accused used a steel wire to stab the deceased, also drew the court's attention to *S v Bohitile*² which sets the tone for courts to take a tough stance in sentencing matters of domestic violence to ensure that such sentences are appropriately severe. He also relied on *S v Van der Westhuizen*³ which referred to the constant outcry by members of the society against the ruthless killing of women in romantic relationships and that such heinous deeds must be accorded the necessary recognition in the imposition of sentence. Council for the State stressed that notwithstanding the severe sentences, the offence remains prevalent in our society.

[14] I turn to the contention by Counsel for the accused that the intoxicated state of the accused counts as a factor in mitigation. It has to be remembered that when the accused was on the stand all he said on this topic was that he consumed 'Clubman' which contains 16% volume of alcohol. The court was not informed of further details such as the quantity consumed, the duration of the drinking and any other relevant factors. As stated in *Hangue v The State*⁴ different people in different circumstances will react differently to alcohol. If his alleged drunkenness is a factor this court has to take into consideration, I agree with Council for the State that the onus is on the accused to put evidence to that effect before the court. The mere saying that the accused consumed liquor that apparently contains 16% volume of alcohol, without any further details, is insufficient to sustain a finding that intoxication should be construed as a factor in mitigation. In any event, the accused in his plea explanation stated words to the effect that he was not so intoxicated that he did not know what he was doing when he stabbed the deceased.

² *S v Bohitile* 2007 (1) NR 137 (HC).

³ *S v Van der Westhuizen* (CC 06-2015) [2015] NAHCMD 260 (5 November 2015).

⁴ *Hangue v The State* (SA 29-2003) [2015] NASC (15 December 2015).

[15] It was also argued by Counsel for the accused that the accused demonstrated remorse under oath and that he fully took the court into confidence by virtue of his guilty plea. Furthermore during the passing of the deceased, the family of the accused had gone to express remorse to the deceased's family and gave a financial contribution to defray funeral expenses. The latter aspect was reiterated by the sister of the accused, Ms Thys who testified in mitigation of the sentence. On the issue of remorse and a guilty plea for murder committed in a domestic violence context it was stated in *S v Seas*,⁵ at para 25 that:

'In circumstances where the court is satisfied that the accused's contrition is sincere and had manifested itself in a plea of guilty, this in itself should have a significant impact on the sentence to be imposed. Firstly, it must be emphasised that there is no duty on an accused person to plead guilty on any charge. But, by pleading guilty and confess to the offence committed, the court takes the view that the accused should gain some benefit from a guilty plea without wasting time and, in suitable circumstances, is likely to be given a lesser sentence. A reduction in sentence should therefore serve as an incentive to the accused when knowing that he or she is guilty of the offence and a conviction inevitable.'

[16] In light of the above the court accepts the accused's remorse as valid and sincere. In addition he has, without further ado, tendered a guilty plea and accepted responsibility for his wrongful deed, which this court regards as a factor in mitigation of sentence.

[17] Next I turn to the nature and gravity of the offence. The deceased met her death on 29 November 2019 when the accused stabbed her in the chest with a wire. Photo 7 in exhibit 'F' portrays the particular wire as a solid and relatively thick steel wire. According to the post mortem report it caused a 5mm round wound which penetrated the aorta of the deceased and caused her death. Council for the State argued that even though this was only one injury as opposed to multiple stabbings the offence was committed in a brutal manner where the victim died on the spot.

[18] Without a doubt, the offence of murder is one of the most serious offences in our midst. The gravity of the consequences of murder has been accentuated in numerous Namibian judgements. Not only does it deprive a person of his/her life,

⁵ *S v Seas* (CC 17/2017) [2018] NAHCMD 245 (17 August 2018).

which in itself is an aggravating factor, but it has dire consequences for those who are left behind. In this case the parents were left without a daughter, the siblings were left without a sister and three children abruptly found themselves without their primary caregiver. Though the two sisters of the deceased and the grandmother stepped in to care for the children, it is difficult to fulfil the pivotal and special role of a mother to her children. Two of the children are still minors. The death of the mother in this household changed the trajectory of the life of each of these children. That much was clear from the evidence of the sister of the deceased.

[19] Council for the accused furthermore argued that the offence was not pre-meditated and it was somewhat provoked by the advance warning that was volunteered by Ms Kalantohie that the deceased is planning to cheat on him. This, Council for the State did not agree with due to the lapse of time between receiving the information and the fatal stabbing. Whilst it is true that it was not a planned murder, I have to agree with Counsel for the State that the accused had time to process this information.

[20] According to the plea explanation the accused was at his house when Ms Kalantohie told him this story. Thereafter the deceased and Ms Kalantohie walked to the house of Mr Witbeen which is situated opposite the house of the accused. The accused followed them there. At Mr Witbeen's house another individual, one Mr Malan added a sequel to the story. Mr Malan volunteered that he asked the deceased why she was with another man, referring to Mr Perd and also that Mr Perd slapped the deceased on her buttocks saying that the deceased was his woman. After hearing this, the accused confronted the deceased, to find out if it was true, but she ignored him. The accused returned home. Thereafter he went back to Mr Witbeen's house with the wire to 'discipline the deceased'⁶ based on the information he heard.

[21] This situation shows an effluxion of time, which time the accused could have used to control his anger and jealousy. Instead he used that time to collect the murder weapon and went to commit a heinous crime in the name of teaching discipline to his girlfriend.

⁶ Plea Explanation, Exhibit 'A' at para 5.9

[22] As for the plague of women being killed by their intimate partners, it continues unabated. Namibia has ratified the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) as well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (the Maputo Protocol). The country has gone further and enacted specialised legislation to curb the proliferation of domestic violence.⁷ The courts have played its part by the imposition of severe sentences. Despite that, the country continues to be stained by the blood of Namibian women who die at the hands of their violent partners.

[23] Relationships amongst partners may be described as complex at best. Whilst the reasons or motives for the perpetration of violent acts are numerous and diverse the one common threat therein appears to be remnants of a patriarchal system that accords more power to men than women. In cases such as the current one, it manifest itself in the practice of men that use that power as a tool of violence to exert control over the female partner. The accused in this case was no exception. The plea explanation reveals the notion that upon hearing a story that his girlfriend intends to cheat on him, in the logic of the accused she needed to be disciplined by him. The mode of discipline that he opted for was not reasonable, to say the least. Instead the 'discipline' that he meted out was a lethal stab into the aorta of the deceased, which caused her immediate death. This authoritarian role left the deceased with no choice to voice what she wanted at that time, whether it was a temporary pause from conversing about the specific situation, or whether she wanted a separation from the relationship, that we will not know. What is clear though, is that the notion of violent masculinity has no place in an egalitarian society. It cannot dwell in our midst. Inevitably the courts will treat such violence perpetrated against women with the disdain that it deserves, in the form of more severe sentences.

[24] The irony is that the fear of being abandoned by his girlfriend and the need to retain possession of her fuelled the accused to commit this angry and jealous act. This act ultimately caused not just a loss of her life but also resulted in a loss to him of the person he did not want to loose in the first place. This irrational lack of control over emotions over an aspect which at that juncture was mere speculation, cannot be rewarded in sentencing.

⁷ Combating of Domestic Violence Act 4 of 2003

[25] In conclusion I have considered the personal circumstance of the accused which include that he is a first offender, the 17 months that he spent in custody, his guilty plea and his remorse which are the main factors in mitigation of sentence. That is weighed against the severity of the offence committed within a domestic violence context, the brutality of stabbing his partner with a steel wire, and the societal interest in curbing offenses of this nature. Against this background I find that the personal circumstances of the accused recede against the magnitude of the other components in the sentencing triad and a lengthy period of imprisonment is inescapable.

[26] In the result the following sentence is appropriate:

Count 1: Murder (direct intent) read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003 – 29 years' imprisonment.

C Claasen

Judge

APPEARANCES:

FOR THE STATE:

M. Olivier
Office of the Prosecutor-General,
Windhoek

FOR THE ACCUSED:

E.T. Shikwa
Instructed by Directorate: Legal Aid
Windhoek