

REPUBLIC OF NAMIBIA



**IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
SENTENCE**

Case No: CC 10/2017

In the matter between:

THE STATE

v

SHIYAVE NCAMUSHE

ACCUSED

Neutral citation: *S v Ncamushe* (CC 10/2017) [2021] NAHCNLD 45 (18 May 2021)

Coram: SMALL AJ

Heard: 19-20 April 2021

Delivered: 18 May 2021

Flynote: Criminal Procedure-Sentence-A judicial officer should not approach punishment in a spirit of anger as it then will make it difficult for to achieve the delicate balance between the crime, the criminal, and the interests of society which the objects of punishment demand. Nor should such officer strive after severity; nor, on the other hand, surrender to misplaced pity.

Criminal Procedure-Sentence- Through its decisions and the imposition of appropriate sentences, the Court promotes respect for the law. In doing so, it must reflect the

seriousness of the offence and provide just punishment for the offender while also considering the offender's circumstances.

Criminal Procedure-Sentence - The accused has been diagnosed as suffering from an Antisocial Personality Disorder. Even if the prospects of reformation and correction, and him becoming a useful member of society seems unlikely and perhaps even remote accused's human frailties as effected by the circumstances surrounding the commission of the offence in question needs to be balanced against the evil of the offender's deed.

Criminal Procedure-Sentence- Any substantial time spent in custody awaiting trial although not a mitigating factor per se lessening the severity of the criminal act or the accused's culpability cannot be ignored when imposing an appropriate sentence.

Criminal Procedure-Sentence- The senseless killing of a young mother, although seemingly motiveless also aggravates the crime.

Criminal Procedure-Sentence-Gender-based violence and murders have reached unacceptable levels in Namibia. The Courts cannot allow this perception that women belong to men to do with as the former pleases to continue. Society rightly expects that perpetrators of such crimes, and anyone who contemplates it, should expect substantial sentences if convicted.

Criminal Procedure-Sentence-In view of the antisocial personality disorder of the accused it serves no purpose to suspend a part of the sentence to credit the accused with the time he spent in custody pending his conviction and sentence. In the circumstances of this case, more appropriate to subtract the time in pre-trial custody from the sentence considered appropriate.

Summary: The accused was charged with, and on 31 March 2021 convicted of, murdering Kauma Nankali Clementine with direct intent. The accused and the deceased were in a marital relationship, as is defined in section 1 of the Combating of Domestic Violence Act 4 of 2003. On the morning of 8 June 2015, near Lukwatetera village, some distance away from Hamweyi village in the district of Rundu the accused obtained a

loaded shotgun and one shotgun shell. From there the accused rushed to the house where the deceased was employed and stayed after she left their common residence more or less a week earlier. He shot the deceased with the shotgun and she died on the same date due to a severe head injury caused by the gunshot. The accused fled the scene but was arrested on 13 June 2015 at Gongwa village and has been in custody since then. Accused was diagnosed as suffering from antisocial personality disorder and spent almost six years in custody up to the date of sentence.

Accused was sentenced to twenty-four years imprisonment.

ORDER

1. The accused is sentenced to twenty-four years imprisonment.
2. Exhibit 1 the Baikal 12GA (Single shotgun) Serial Number 12007712 is to be returned to the licenced owner Mr. T.L Mukonda ID 47071600163.

SENTENCE

SMALL AJ

[1] On 31 March 2021 the accused was convicted of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The court found that the accused had direct intent to kill when he shot and killed his wife with a shotgun.

[2] Mr Gaweseb represented the State. The accused was unrepresented during most of his trial and the proceedings prior to sentence.

The facts

[3] On the morning of 8 June 2015, near Likwatetera village, some distance away from Hamweyi village in the district of Rundu the accused obtained a loaded shotgun and one shotgun shell. From there the accused rushed to the house where the deceased was employed and stayed after she left their common residence more or less than a week earlier. He shot the deceased with the shotgun and she died on the same date due to a severe head injury caused by the gunshot. The accused fled the scene but was arrested on 13 June 2015 at Gongwa village and has been in custody since then.

Evidence in mitigation and aggravation

[4] After his conviction, I postponed the matter as the accused indicated that he wishes to call four witnesses in mitigation and Mr Gaweseb intended leading evidence in aggravation. The defence witnesses were Mukuve Serlima, Michael Jakara Tame, Tame Sondaha Willem and Magdalena Mukulilo of Likwaterera village. The Court instructed the Registrar to issue subpoenas for these witnesses and requested the Namibian Police to trace and transport these witnesses to and from Oshakati to Rundu.

[5] Only Michael Jakara Tame and Magdalena Mukulilo of Likwaterera village were present on the date set for their evidence. Of the other two witnesses requested by the accused, one passed away, and the other left the village and could not be traced by the Namibian Police.

[6] The witness, Michael Jakara Tame, told the Court that the accused and he grew up together. The accused was younger than the witness. He stated that the accused did not attend school and built traditional huts used to store mahangu for other people on a part-time basis. The accused previously resided at Likwaterera village, but at the time of the incident, he was staying at Hamweyi village. The accused was not officially married to the deceased, but they traditionally lived as husband and wife. The accused, according to the witness, had no children. As far as the witness knew, the accused had no formal training in firearms and was never employed by the defence force or police. On a question elicited by the accused, the witness stated that the accused on occasions

fought with the deceased, and if people attempted to stop him, he would fight with the person that intervenes.

[7] When the witness Magdalena Mukulilo was called to the witness stand, the accused indicated that he no longer wishes to lead her evidence. He said that he would not give evidence himself but was prepared to answer questions by the court. He confirmed what the witness Michael Jakara Tame said on questions by the court regarding his circumstances and employment. However, he clearly had no idea how old he was as he said that he was 23 years old and that he and the deceased have been a couple for 25 years. This concluded the evidence in mitigation.

[8] The State then lead the evidence of a Psychiatrist Dr Kissah Eliah Mbwabene who was part of a panel who previously for purposes of this case evaluated the accused in terms of section 77(1) and 78(2) of the Criminal Procedure Act 51 of 1977. After observing the accused from 25 May 2017 till 22 June 2017 the panel found that the accused did not suffer from any mental illness, was fit to stand trial and at the time of the commission of the crime could appreciate the wrongfulness of his actions. He however was found to have an Antisocial Personality Disorder (Axis II diagnosis). Their report was handed in as Exhibit J. The doctor stated that he has a history suggestive of conduct disorder suffered during childhood due to psychosocial tendencies as his parents were abusing alcohol and they had constant fights at home. The accused started to abuse alcohol at a young age and had behaved aggressively, was disobedient and involved in fights with others. She said that this explains his current personality and behaviour which include failure to conform to social norms and respect and to comply with lawful behaviour.

[9] Persons with Antisocial Personality Disorder are aggressive, have no remorse and obeys no social rules. They manipulate and lie, are very arrogant and do not care about others. Everything turns around themselves. Rehabilitation is difficult. She, however, stated that this was not a case of diminished responsibility as provided for in section 78(7) of the Criminal Procedure Act, 51 of 1977. In cross-examination, the accused confirmed what the doctor said about his parents and stated that he did the same. The doctor also stated that persons with Antisocial Personality Disorder regularly

end up in correctional facilities because they cannot conform to society's rules. They also display [arrogance](#), think lowly and negatively of others, and lack [remorse](#) for their harmful actions and have a callous attitude to those they have harmed.¹ What was mentioned by the doctor was borne out by my observation of the accused during the trial and by the proven facts of the case.

[10] From the evidence of the Doctor, it became apparent that the accused was born on 16 March 1988. He thus was 27 years old on the date of the incident being 8 June 2015. And 33 years old on the date of sentence. This is in line with the Court's own observation as to the accused's age. He was arrested five days after the incident on 13 June 2015 and has been in custody since then. On the date of his sentence, he will thus have spent almost six years in custody awaiting trial.

[11] The State also presented the evidence of Makenna Mahilla a relative of the deceased. A relative on the deceased's mother's side took over caring for the deceased's young child. The witness stated that the accused in her opinion should just be kept in custody. This concluded the evidence on behalf of the State.

Submissions by the parties

[12] In submissions prior to sentence the accused submitted that he is 'guilty as testified'. He said that that was the reality, and he knows that it is a serious offence and does not want to waste time. He further pointed out that this was his first conviction.

[13] Mr Gaweseb fairly in his submissions referred the court to *S v Gool*² Although this related to a minor shoplifting case the approach advocated in it warns that over-

¹ The following decisions were considered in respect of Antisocial Personality Disorder *S v Stander* 2012 (1) SACR 537 (SCA) paragraph 10; *S v Mshumpa and Another* 2008 (1) SACR 126 (E) Paragraphs 77 and 78; *S v Sekiti* 2010 (1) SACR 622 (ECG); *S v Nandjembo* (CC 8/2018) [2020] NAHCNLD 107 (17 August 2020) paragraph 17 and 24 and *State v Savage* (CC 12/2014) [2016] NAHCMD 66 (10 March 2016) paragraph 4

² *S v Gool* 1972 (1) SA 455 (N) at 456H-I; See also *S v Martinez* 1991 (4) SA 741 (Nm) at 757H following *S v Rabie* 1975 (4) SA at 962G.

emphasizing any of the relevant factors often leads to under-estimation, or even total disregard, of one or more of the other factors. If a court's mind is preoccupied with deterring others from committing an offence, it is apt to give insufficient attention to other factors that may be more important for assessing a just and proper sentence for the accused. It is necessary to be alert to that danger. I will attempt to remain mindful of this very valid risk when considering an appropriate sentence.

[14] He also referred to *S v Alexander*³ a full bench decision written by Mtambanengwe J and agreed to by Hannah AJP and Angula AJ in which the Court concluded that Murder per se is a serious crime. Courts however must look at various factors and surrounding circumstances to determine whether it can say that the type of murder it is dealing with is an extreme case. A Court should consider whether there was prior planning or whether it was committed on the spur of the moment. How ruthlessly the accused executed the murder is a further factor to be considered. Courts should also consider whether the victim could defend herself or whether she was defenceless; the degree of moral blameworthiness of the accused, including whether the accused murdered with *dolus directus* or *dolus eventualis*; as well as the cumulative effect of all these factors. In other words, the Court must adequately consider the mitigating and aggravating factors against each other.

[15] In *S v Rabie*⁴ Corbett CJ stated:

'A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case.'⁵

³ *S v Alexander* 1998 NR 84 (HC) at 87C-E

⁴ *S v Rabie* 1975 (4) SA 855 (A) 866B-C,

⁵ Referred to in *S v Banda and Others (supra)* at 354A-C; See also *S v Zinn* 1969 (2) SA 537 (A) at 541D-E and In *S v Harrington* 1989 (2) SA 348 ZSC at 362E-H where the Court stated that a sentencing court

[16] In *S v Banda and Others*⁶, another case referred to by Mr Gaweseb, Friedman J, while dealing with the interest of the community, pointed out that Courts fulfil a vital function in applying the law in the community. It must maintain law and order. The Court operates in society, and its decisions impact individuals in the ordinary circumstances of daily life. It covers all possible ground. Through its decisions and the imposition of appropriate sentences, the Court promotes respect for the law. In doing so, it must reflect the seriousness of the offence and provide just punishment for the offender while also considering the offender's circumstances.

[17] Mr Gaweseb in conclusion requested the Court to impose a sentence of thirty-five years imprisonment and to suspend a period of five years for a further five years on the normal conditions.

Approach by the Court in sentencing

[18] In the court's determination of what punishment is appropriate in the circumstances of this case, I will regard the triad of factors, namely the personal circumstances of the accused; the offence, considering the circumstances in which it was committed; and the interests of society. Punishment must fit the criminal as well as the crime. It should further be fair to the community and be blended with a measure of mercy according to the circumstances.⁷

[19] As far as possible, I will endeavour to strike a balance between the interests of the accused and society's interests. Though all the general principles applicable must be considered, balanced and harmonised when applied to the facts, they need not be

should never assume a vengeful attitude and correctly in my view quoted from Francis Bacon's essay 'On Revenge' which stated: 'Revenge is a kind of wild justice which, the more man's nature runs to, the more ought law to weed it out.'

⁶ 1991 (2) SA 352 (BG) at 356E-F

⁷ *S v Zinn* 1969 (2) SA 537 (A) and *S v Tjiho* 1991 NR 361 (HC) (1992 (1) SACR 639); *S v Rabie* 1975 (4) SA 855 (A) at 862G – H; *S v Seas* 2018 (4) NR 1050 (HC) paragraph 23

given equal weight or value. It might become necessary to emphasise one or more at the expense of others, depending on the circumstances of each case.⁸

[20] A court searches for an appropriate sentence in the circumstances of any given case. It however does not mean that there is only one such appropriate sentence. No court of law is a court of perfection. The court is the community's arm dedicated to the making of assessments for appropriate sentences. The court's sentence judgement is essentially its evaluation of what is fair in the circumstances of a given case. It is not a scientific calculation. A sentence cannot be objectively measured and then snipped off in the correct lengths.⁹ It has been said that:

'Sentencing, at the best of times, is an imprecise and imperfect procedure and there will always be a substantial range of appropriate sentences.'¹⁰

[21] There is a persistent demand for more severe sentences imposed on all offenders for all crimes. The apparent foundation for this demand is a steadfast belief that no punishment can be too harsh and that the more severe it is, the better it will protect society.

[22] In determining an appropriate sentence, a court should strive to accomplish and arrive at a reasonable counterbalance between these elements to ensure that one factor is not unduly accentuated at the expense of and to the exclusion of the others. The process is not merely a formula, nor is it satisfied by simply stating or mentioning the requirements. What is necessary is that the Court shall consider, try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern. This conception, as expounded by the Courts, is sound and is incompatible with anything less.¹¹

⁸ *S v Van Wyk* 1993 NR 426 (SC) (1992 (1) SACR 147); *S v Seas* 2018 (4) NR 1050 (HC) paragraph 23

⁹ *S v Martin* 1996 (2) SACR 378 (W) at 381E-G

¹⁰ *Smith v The Queen* 1987 (34) CCC (3d) 97 at 109-110 by McIntyre J in the minority judgment as quoted in *S v Vries* 1996 (2) SACR 638 (Nm) at 643f-g; *S v Vries* 1998 NR 244 (HC) at 249G-H

¹¹ *S v Banda and Others* 1991 (2) SA 352 (BG) at 355A-C

Evaluation of the respective factors

[23] The accused at present is 33 years old. He never went to school, received no formal training, and essentially lived an extremely basic life in rural Namibia where he built storage facilities for people of his community. Shortly before the incident he lived in a domestic relationship with the deceased. They were not married, and he has no children. He is a first offender. The accused never told the Court why he shot the deceased, but she was shot shortly after she moved out of their common residence.

[24] The accused has been diagnosed as suffering from an Antisocial Personality Disorder. Unfortunately the prospects of reformation and correction, and him becoming a useful member of society therefore seems unlikely and perhaps even remote. I must still consider accused's human frailties as effected by the circumstances surrounding the commission of the offence in question and a balancing of those frailties against the evil of the offender's deed. This is not an easy task as the accused has never taken the Court into his confidence.¹²

[25] The accused has not shown any remorse for what he has done. Definitely not to the extent of remorse alluded to by the Supreme Court in *S v Schiefer*¹³ where it quoted what Flemming DJP stated in this respect in *S v Martin*¹⁴:

'For the purpose of sentence, there is a chasm between regret and remorse. The former has no necessary implication of anything more than simply being sorry that you have committed the deed, perhaps with no deeper roots than the current adverse consequences to yourself. Remorse connotes repentance, an inner sorrow inspired by another's plight or by a feeling of

¹² *S v Seegers* 1970 (2) SA 506 (A) at 511G: 'Remorse, as an indication that the offence will not be committed again, is obviously an important consideration, in suitable cases, when the deterrent effect of a sentence on the accused is adjudged. But, in order to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined'. See also *S v Kapia and Others* 2018 (3) NR 885 (HC) paragraph 16

¹³ *S v Schiefer* 2017 (4) NR 1073 (SC) paragraph 26

¹⁴ *S v Martin* 1996 (2) SACR 378 (W) at 383G – H

guilt, eg because of breaking the commands of the higher authority. There is often no factual basis for a finding that there is true remorse if the accused does not step out to say what is going on in his inner self.'

[26] The remorse required was explained as follows in *S v Matyityi*¹⁵:

'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.'

[27] This court must consider any substantial time spent in custody awaiting trial. It is not a mitigating factor per se that lessens the severity of the criminal act or the accused's culpability. However, a court tasked with imposing an appropriate sentence cannot ignore the time the accused spent in custody pending his conviction and sentence if such period is substantial. A court must accord sufficient weight to such time spent in custody and should consider it together with other relevant factors to arrive at an appropriate sentence. It has been said that taking it into account does not mean simply deducting the time spent in custody from the intended sentence.¹⁶ In this matter I however believe such calculation will be fair and appropriate.

[28] The killing of another person is always serious. But the facts of this matter point to one of the more severe types of murder. The accused in this matter planned and executed the murder in a callous and cold-blooded manner. First, he obtained the firearm, and then he travelled a substantial distance to where the deceased was and shot her with the shotgun. The deceased was a defenceless victim and had no chance of escaping what was to be her fate at the hands of the accused. After that, the accused fled the scene to escape the consequences of his act. The motive for the murder

¹⁵ *S v Matyityi* 2011 (1) SACR 40 (SCA) ([2010] 2 All SA 424; [2010] ZASCA 127) para 13; See also *S v Schiefer* (supra) paragraph 27. See also *S v Nanyemba* (CC 12/2018) [2021] NAHCNLD 42 (27 April 2021) paragraphs 16 and 17.

¹⁶ *S v Kauzuu* 2006 (1) NR 225 (HC) at 232E-G quoting numerous South African cases that set this principle. See also *S v Seas* 2018 (4) NR 1050 (HC) paragraph 27 and *S v Mbemukenga* (CC 10/2018) [2020] NAHCMD 262 (30 June 2020) paragraph 11.

remains unknown, and the court cannot speculate to find such a reason. This is thus doomed to remain another senseless killing of a young mother. This, if anything, however, aggravates the crime.

[29] Gender-based violence and murders have reached unacceptable levels in Namibia. I get the impression that for some inexplicable reason, some males, I deliberately do not call them men, believe that women are their property to do with as they please. The Courts cannot allow this perception to continue, and society rightly expects that perpetrators of such crimes, and anyone who contemplates it, should expect substantial sentences if convicted.

[30] The only appropriate sentence in the circumstances of this case must be a substantial period of imprisonment. In view of the antisocial personality disorder of the accused that it would serve no purpose to suspend a part of the sentence to credit the accused with the time he spent in custody pending his conviction and sentence. In the circumstances of this case, I consider it more appropriate to subtract the six years from the sentence I considered appropriate.

[31] It is ordered that:

1. The accused is sentenced to twenty-four years imprisonment.
2. Exhibit 1 the Baikal 12GA (Single shotgun) Serial Number 12007712 is to be returned to the licenced owner Mr. T.L Mukonda ID 47071600163.

D F SMALL
Acting Judge

APPEARANCES:

STATE:

Mr T Gaweseb

Office of the Prosecutor-General, Oshakati

ACCUSED:

Mr. Shiyave Ncamushe (In person)

Oshakati Police Station – Holding Cells, Oshakati