

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK



NAMIBIA MAIN DIVISION,

SENTENCE

Case No: CC 21/2020

THE STATE

Versus

ROBERT FUNNY USEB

Neutral citation: *S v Useb* (CC 21/2020) [2022] NAHCMD 199 (19 April 2022)

Coram: SHIVUTE, J

Heard: 30 March 2022

Delivered: 19 April 2022

Flynote: Criminal Procedure – Sentence – Factors to be taken into account – Personal circumstances of the accused – Nature of crime – Interest of society – Personal circumstances of the accused outweighed by interest of society when balance is struck.

Summary: The accused was convicted of murder read with the Combating of Domestic Violence Act. Factors to be considered are personal circumstances of the accused. He is a first offender. At the time he committed the offence he was a youthful

offender of 21 years old. He is now 24 years old. He spent 3 years in custody awaiting trial. The offence was committed in a domestic setting. The deceased was 19 years old at the time of her demise. She left a baby of 8 months old. The offence is serious and prevalent. Society views domestic violence crimes especially murder in a serious light. Interest of society not served by a sentence which is too severe or too lenient. Personal circumstances of accused outweighed by interest of society when a balance between the two interests is struck.

SENTENCE

28 years' imprisonment.

JUDGMENT

SHIVUTE J:

[1] The accused was convicted of murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The accused in this case had a romantic relationship with the deceased. The murder arose from the assault of the deceased in a domestic context. The accused stabbed the deceased with a knife five times and the cause of death was hypovolemic shock due to multiple stabbing.

[2] In aggravation of sentence, the State called the deceased's mother Ms Khamuxas. She testified that the deceased left a minor child. At the time of the deceased's death she was only 8 months old and now she is 3 years old. Although the accused said he is the father of the deceased's child he is in fact not the father. She is the one who looks after the deceased's child with the assistance she receives from her elder sister. She further testified that the accused and his family did not contribute anything towards the deceased's funeral. The accused did also not apologise to the

deceased's family. It was the testimony of the deceased's mother that the accused should be sentenced to life imprisonment.

[3] On the other hand, the accused did not testify in mitigation and he did not call any witness. His personal circumstances were placed on record by his counsel from the Bar. The accused is 24 years old. At the time he committed the offence he was 21 years old. He is the father of two minor children. The first born is 6 years old whilst the last born is 3 years old. The deceased is the mother of the accused's last born. Prior to the accused's incarceration he was staying with the two children and the deceased at the residence of the deceased's mother. The deceased was not employed and the accused was the bread winner for them. He did general work and he earned a salary of N\$2000 per month.

[4] The accused's level of education is Grade 7. The accused had a very harsh and difficult upbringing. Although he was capable of completing his studies, due to lack of social and economic support he left school. The accused is a first offender. He has been in custody for 3 years.

[5] Counsel argued that the offence was committed at the bar where alcohol was consumed. The accused being a youthful offender he is a good candidate for rehabilitation and deserves to be given a second chance to be a productive member of society. The court should consider imposing a sentence blended with a measure of mercy. The court should also take into account that after the accused committed the offence, he was assaulted and he sustained an eye injury. Therefore, the court should not impose a sentence that can break the accused; it should consider youthfulness as a mitigating factor.

[6] Counsel further argued that although cases of domestic violence are serious and prevalent, the courts have been sentencing offenders severely but this did not deter them from committing further offences. Because these offences are committed in the spur of the moment or as a revenge, its prevalence may be controlled if the courts

impose partially suspended sentences and order the accused persons to undergo mandatory counselling. With regard to life imprisonment, requested by the deceased's mother, counsel argued that no sentence to be imposed by this court can bring back the deceased. The deceased's mother was under high emotions as she has an interest in this matter. Furthermore, accused is not the type of offender who should be given life imprisonment. She urged the court to sentence the accused to 20 years' imprisonment.

[7] On the other hand, counsel for the State argued that the offence committed is serious and prevalent. Namibian women are being murdered by men with whom they are in domestic settings. The accused was supposed to protect the deceased but instead he turned himself into a criminal and murdered the deceased. It cannot be an excuse that these types, of offences are committed out of revenge or in the heat of the moment because human beings are blessed with the will to reason as human beings. The accused stabbed the deceased multiple times. The accused has no respect for the right to life and human dignity.

[8] The deceased left a baby who was a few months old. This child is now orphaned. Although the accused instructed his counsel that he is the father of the deceased's baby, there is evidence from the grandmother that the accused is not the father of the deceased's baby. The accused did not show any remorse as he did not testify. Furthermore, the court should not take into account that the accused was under the influence of alcohol, because it has never been evidence placed before this court. Counsel submitted that the accused should be sentenced to 35 years' imprisonment.

[9] Both counsel referred me to authorities regarding sentencing which I have considered.

[10] In the process of determining an appropriate sentence, the court is guided by the well-established principles as stated in *S v Zinn* 1969 (2) SA 537 (A):

The court must consider the triad consisting of the crime, the offender and the interest of society. The court will also have regard to the theories pertaining to sentencing namely, preventative, reformatory, deterrent and retributive.

[11] As per Ackerman AJA in *S v Van Wyk* 1993 NR 426 at 448 (D – E): (SC)

‘As in many cases of sentencing, the difficulty arises, not so much from the general principles applicable but from the complicated task of trying to harmonise and balance these principles and to apply them to the facts. 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.’

[12] Cases of domestic violence against defenceless women are on the increase. The accused committed a cruel, violent and disgusting crime. He was following the deceased who was running away from him like a predator following its prey. At the same time, he was stabbing her several times until she departed. The accused did not exercise mercy on his victim.

[13] This Court views domestic violence cases in a serious light especially where loss of life is involved. The deceased died at a tender age of 19 and she left a baby of 8 months old. The poor baby has been deprived of her motherly love and care. Now she has to grow up without a mother. These are aggravating factors.

[14] Although the accused is a youthful offender who has no previous convictions, he committed a despicable act. The Court is alive to the fact that the accused spent 3 years in custody, awaiting the finalisation of his trial. However, such period is not arithmetically discounted and subtracted from the overall sum of imprisonment imposed. This is a factor which is considered together with other factors such as the culpability of the accused and his or her moral blameworthiness, to arrive at an appropriate sentence, in all the circumstances of a particular case. *S v Karirao* Case No. SA 70/2011 delivered 15 July 2013 at para 23.

[15] Having considered all the personal circumstances of the accused, to arrive at an appropriate sentence, the Court must balance these personal circumstances with the interest of society and the circumstances of the crime. Society views domestic violence in a serious light and it demands that the sentence should fit the crime. Too severe a sentence and too lenient a sentence does not serve the interest of society. The seriousness and prevalence of violence against women in domestic context as well as the interest of society outweigh the personal circumstances of the accused.

[16] Given all the circumstances concerning this case, this Court is of the opinion that the following will be a just and appropriate sentence.

28 years' imprisonment.

NN Shivute
Judge

APPEARANCES:

THE STATE:

Mr Ian M. Malumani
Office of the Prosecutor-General

ACCUSED:

Ms Meriam Kandoni
Instructed by: The Directorate of Legal Aid