

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

Case No: CC 24/2019

THE STATE

Versus

FRANS ABRAHAM

Neutral citation: *S v Abraham* (CC 24/2019) [2022] NAHCMD 58 (17 February 2022)

Coram: USIKU, J

Heard: 24 October 2019, 6 May 2020, 15 June 2020, 16 June 2020, 18 June 2020, 19 June 2020, 17 July 2020, 22 July 2020, 6 August 2020, 7 September 2020, 29 September 2020, 18 November 2020, 16 February 2021, 3 May 2021, 16 June 2021, 26 July 2021, 1 September 2021, 22 November 2021, 3 December 2021, 19 January 2022

Delivered: 17 February 2022

Flynote: Criminal Procedure – Sentence – Domestic Violence – Aggravating factor – Court cannot turn a blind eye on it – Period spend in custody awaiting trial – Weighs in the accused's favour – Custodial sentence inescapable – Personal circumstances of accused also important – However, courts required to send out a clear message to society – Protection of human dignity and life under the Constitution is equally important.

Summary: The accused was convicted on a charge of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. He pleaded not guilty but was subsequently found guilty as charged.

ORDER

Accused is sentenced to 26 years imprisonment of which 6 years imprisonment are suspended for 5 years on condition that the accused is not convicted with the crime of murder, committed during the period of suspension.

SENTENCE

USIKU J:

[1] The accused person was convicted in this court on 3 December 2021 on one count of murder, *dolus eventualis* read with the provisions of the Combating of Domestic Violence Act 4 of 2003. He had pleaded not guilty to the charges.

[2] Accused testified in mitigation of sentence and the following are his personal circumstances. He is currently 35 years old and a father of four minor children. The children are aged between eleven and three years of age respectively. He is a first offender and has been incarcerated since the second of January 2019. His highest educational qualification is grade seven, where after he became a general worker. According to his testimony, his two children are currently being looked after by the

deceased's mother. It has since been confirmed that the deceased's mother has also passed away last year due to Covid-19. This fact was confirmed by the deceased's sister whom the state called to testify in aggravation.

[3] Accused further testified that whilst in custody he had approached the deceased's mother in order to convey his apology for what he had done. It was on that basis that the deceased's mother visited him whilst at the holding cells at Maltahöhe. He confessed his wrongfulness and regretted the fact that the deceased lost her life due to his conduct. Accused claimed the deceased's mother to have accepted his apology.

[4] With regard to how he feels about his conviction, accused informed the court that he regrets his conduct which caused the deceased's death. His children lost their mother, and also lost him as a result of his incarceration. He pledged to continue being his children's father even though in custody as they are still his blood.

[5] His further testimony relates to the time he had spent in custody since the second of January 2019 to date, which translates to three years in custody. Accused further extended his apology to the deceased's family as well as to the entire community of Maltahöhe and asked them for forgiveness. Accused asked the court to be lenient when considering the sentence to be imposed.

[6] On the other hand the state also called one witness to testify in aggravation of sentence. Ms. Dorotea Swartbooi, the deceased's sister testified that she had known the accused and described him as having been her deceased sister's boyfriend. She and the deceased share the same parents. Her mother who had been the deceased's children's guardian has since passed away during 2021. The deceased shared the same name with her mother.

[7] According to her further testimony, the deceased had four children who are still minors. She is currently the one taking care of the eldest daughter and the youngest son, whilst the other two boys are being taken care by the accused's mother. She and her husband maintain the children and take care of their

educational needs. The eldest child is receiving a grant from the government, an amount of N\$250 per month.

[8] She further testified that prior to the death of the deceased, the children always resided with her late mother and only visited their parents during the school holidays. The younger children who were not in school resided with the accused and the deceased on the farm Spes Bona, because their parents worked on different farms in the surroundings.

[9] As a guardian staying with the eldest and youngest child of the deceased, she claimed that the children are well behaved and are receiving good care. The oldest child is currently in grade six after passing her grade five during 2021 whilst the youngest is still not attending school.

[10] With regard to the death of her sister it has left them hurt but they have decided to leave it in God's hands.

[11] The witness confirmed that they had received assistance from the accused's mother during the funeral in the form of food items. She could not however confirm whether her mother had accepted or refused the accused's apology explaining that her mother was very hurt and due to her high blood pressure condition it worsened.

[12] On the issue of punishment, the witness would not say much apart from requesting that the accused be made to pay for his deeds.

[13] It was submitted on behalf of the accused that he is a first offender and that he has been convicted of a very serious crime which was committed in a domestic setting. At the same time counsel for the defence pleaded with the court to consider a well-balanced sentence which would fit the accused, the offence and the interests of society.

[14] On the other hand the state submitted that the accused has been convicted of a serious crime and argued that the court should impose a sentence that will show that violent crimes are not to be condoned by the courts. It was further submitted that

the accused had not shown any remorse as he persisted that the deceased died due to the knife he held in his hands that struck the deceased. The state requested the court to impose a long custodial sentence due to the aforementioned reasons.

[15] It was further the state's submission that the accused could only be reformed through a custodial sentence and referred to case law on point.

[16] The court has taken into consideration the personal circumstances of the accused person which have been placed before it when accused testified in mitigation. Further the court has also considered the submissions by both counsels and the authorities referred to with regard to sentencing.

[17] It is the court's duty to take into account the factors relevant to sentencing, which are the crime committed, the personal circumstances of the accused who is to be sentenced, the seriousness of the crime as well as the objectives of punishment. It is trite that being a first offender weighs in the accused's favour. However that is not the only factor the court has to consider.

[18] The offence was committed in the domestic setting, which is indeed an aggravating factor. Our courts are expected to deal severely with crimes committed in a domestic setting such as the present one. Thus this court cannot turn a blind eye to that even when the accused to a certain extent could be said to have shown remorse for his conduct.

[19] In the post mortem examination report which was handed in as exhibit "F" the cause of death was described as a single stabbing to the abdomen. There were other wounds on the deceased's right cheek numbering two as well as a 20mm stab wound on the left upper arm as evidenced on the annexure to the post mortem examination report compiled by Doctor Kabanje. The extent of injuries in this case shows that the accused had used a lot of force.

[20] The deceased left 4 minor children and as such they were robbed of a mother whose demise have created a vacuum in their respective lives. One cannot describe how the death of their mother will have serious repercussions on them as they grow. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impact on all family members, especially children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person.

[21] In the present task the Court should impose punishment on the accused taking into account amongst others the time tested triad factors, which entail the crime committed, the offender as well as the interest of society *S v Zinn*¹. There is also another factor that this court is required to consider when imposing the sentences which is a measure of mercy. It must however be stated that the factor of mercy should not be a misplaced pity but it should be a measure of mercy according to the circumstances of each particular case. At the same time the Court must further consider the main purposes of punishment, which are namely deterrent, prevention, reformative and retributive. *S v Tcoeb*².

[22] Though the accused had been convicted with the crime of murder in the form of *dolus eventualis*, that does not make it less serious. This crime calls for a deterrent sentence. It is also prevalent and a serious crime.

[23] The accused has asked the court to exercise mercy on him, I do consider that accused has shown some sort of remorse, in that, it has been confirmed that accused had called in the deceased's mother shortly after he was detained and apologised for his conduct. It is a fact that the first thing in showing genuine remorse is to acknowledge the wrongfulness of one's conduct and then to demonstrate remorsefulness.

¹ *S v Zinn* 1969 2 SA 537 (A).

² *S v Tcoeb* 1991 NR 262 (HC).

[24] Furthermore, as held in *S v Rabie*³ ‘punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to circumstances’.

[25] From the evidence adduced before court it is clear that the accused did in fact confess remorse at the first stage shortly after the incident.

[26] Having said that it remain the court’s duty to consider the fact that a precious life was lost. In the matter of *S v Strauss*⁴ it was rightly pointed out that:

‘The requirement of mercy in imposing an appropriate sentence does not mean that the courts must be too weak or must hesitate to impose a heavy sentence where it is justified by circumstances.’

[27] I am of the view that justice should not only be done to the offenders but the victims of crime should also receive justice.

[28] I agree with Siboleka J (as he then was) in *S v Jagger*⁵ that:

‘the brutality perpetrated by male persons on their female partners is increasing. This is despite the community’s continuous pleas that it should be halted. The imposition of heavy custodial sentences on [convicts] of these crimes does not seem to calm down this tendency. Some male persons continuously appear to be under the impression that they are entitled to end the lives of their female partners whenever they saw it fit, which is totally not acceptable’.

[29] The accused should pay for his deeds and must be punished appropriately for his crime. I have taken into account the period spent in custody whilst awaiting the finalization of his trial.

[30] In the result, I am of the view that the following sentence would meet the justice of this particular case.

³ *S v Rabie* 1975 4 SA 855 at 862 G – H.

⁴ *S v Strauss* 1990 NR 71

⁵ *S v Jagger* (CC 08/2017) [2017] NAHCMD 245 (29 August 2017)

[31] Accused is sentenced to 26 years imprisonment of which 6 years imprisonment are suspended for 5 years on condition that the accused is not convicted with the crime of murder, committed during the period of suspension.

D N USIKU

Judge

APPEARANCES

STATE: Mr. Malumani
Office of the Prosecutor-General

ACCUSED: Mr. Engelbrecht
(Instructed by Directorate of Legal Aid)