

**REPUBLIC OF NAMIBIA**

NOT REPORTABLE



**IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: CC 9/2021

In the matter between:

**THE STATE**

and

**MANFRED LINKS**

**ACCUSED**

**Neutral citation:** *S v Links* (CC 9/2021) [2023] NAHCMD 291 (01 June 2023)

**Coram:** LIEBENBERG, J

**Heard:** 29 March 2023

**Delivered:** 01 June 2023

**Flynote:** Criminal Procedure – Sentence – Charges – Murder and attempted murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

Criminal Procedure – Sentencing – Triad factors, objectives of punishment considered and restated – Principle of individualisation considered.

Criminal Procedure – Sentencing – Taking offences together for sentence only to be applied in exceptional circumstances – Gravity and circumstances of each offence considered separately – Cumulative effect of sentences considered.

**Summary:** The accused was convicted of the following offences: Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003; and Count 2: Attempted murder, also read with the provisions of Act 4 of 2003.

*Held:* It is trite that equal weight or value need not be given to the different factors and depending on the facts and circumstances of the case, a situation may arise where one principle needs to be emphasised at the expense of others.

*Held that:* Although the offences in this case are not dissimilar *per se*, the gravity of each should be distinguished in sentencing. On count 1 the deceased succumbed to her burn wounds, whereas on count 2 the baby suffered minor burn wounds to her arm and leg. It is therefore not an instance where the counts should be taken together for the purpose of sentence.

*Held further that:* The offences are to be considered separately by imposing individual sentences full regard being had to the cumulative effect thereof so as to ensure that the total sentence is not disproportionate to the accused's blameworthiness in relation to the individual offences committed.

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## ORDER

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Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 28 years' imprisonment.

Count 3: Attempted murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 6 years' imprisonment.

In terms of s 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that the sentence imposed on count 3 be served concurrently with the sentence imposed on count 1.

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## SENTENCE

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LIEBENBERG J:

[1] On 13 March 2023 and after evidence was heard, the accused was convicted of murder and attempted murder, both counts read with the provisions of the Combating of Domestic Violence Act 4 of 2003. At the end of the trial the court, on the charge of murder, found that the accused had acted with direct intent to kill when he doused the deceased with petrol and set her alight. Similarly, as regards the attempted murder, it was found that the accused equally foresaw the possibility of setting his baby alight whilst being carried by her mother at the time of the incident, thus acting with *dolus eventualis*. Both counts were committed in a domestic setting in that the deceased and the accused were, as defined in Act 4 of 2003, romantically involved and had a child together (the victim in the attempted murder charge).

[2] Consequent to the conviction of the accused, the court is now faced with the unenviable task of having to impose a sentence that, in the particular circumstances of this case, would be just and fair. In arriving at an appropriate sentence, the court must consider the triad of factors comprising the crime, the offender and the interests of society. In addition, the court must decide which of the objectives of punishment is best suited in the circumstances, ie deterrence, prevention, reformation and retribution. It is trite that equal weight or value need not be given to the different factors as a situation may arise, depending on the circumstances, where one factor needs to be emphasised

at the expense of others.<sup>1</sup> Put differently, in sentencing, the court should strive at imposing a sentence that is balanced. The purpose of the aforementioned principles is to find a sentence which is just and fair, serving not only the interests of the offender but also that of society. As stated in *S v Rabie*<sup>2</sup>, '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.'

[3] In aggravation of sentence the state led the evidence of a sister to the deceased, Magrieta Kaffer who narrated on the current situation of the deceased's five children left behind after their mother's passing. She testified that the eldest two children, aged 13 and 14 years, live in South Africa with their father; the third child, now aged 11, who lived with the deceased, was placed in the custody of the grandmother when the deceased was hospitalised; the fourth child, 7 years old, had been living with the biological father in Windhoek prior to the death of the deceased; whereas, Eva, the fifth one aged 4, lives with her and is under her care.

[4] According to this witness the death of the deceased touched the family deeply. She testified how she was with the deceased for 11 days before she succumbed to her burn wounds and, as a result of the shock, she herself suffered a stroke. She confirmed that after the accused's arrest, he applied for a grant in favour of his child with the deceased and whilst already in custody and before his salary was stopped, he would every now and then provide some necessities and money. She however remained unforgiving towards the accused. Furthermore, to her mind, the accused did not contribute towards the funeral arrangements, nor did he apologise to the deceased's family.

[5] Accused testified in mitigation of sentence and stated he is 31 years of age and a father of three children aged between 4 and 5 years. It suffices to mention that of the three children, the youngest is his child with the deceased and also the victim in count 3. It was the testimony of the accused that prior to his arrest, he was employed as a Health Assistant in the Ministry of Health and Social Services at Ariamsvlei. It was

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<sup>1</sup> *S v Van Wyk* 1993 NR 426 (SC).

<sup>2</sup> *S v Rabie* 1975 (4) SA (AD) at 862G-H.

through this employment that he sustained his children and elderly mother. Owing to him losing his job following his incarceration, he testified that, as far as maintenance for his and the deceased's child was concerned, he had filled out an application form for a social grant in favour of the child in order to ensure her well-being whilst he is incarcerated.

[6] In his testimony, accused made mention of the relationship between himself and the deceased. The accused describes his relationship with the deceased being generally good, except for the times when the deceased was intoxicated. Arguments would then erupt to the extent that he, on two occasions, reported the deceased's behaviour to the police, with one occasion when she was detained in order to sober up. Aside from this, they generally got along well.

[7] During his testimony, the accused apologised to the court, the family of the deceased as well as the community at large and gave a rendition of his contrition for the crimes he was convicted of. The fact that the accused is a first time offender is a mitigating factor which carries significant weight in sentencing.

[8] As evinced by evidence adduced during the trial, the attack on the deceased was preceded by a physical altercation between the deceased and the accused earlier that same day, during which the deceased stabbed the accused with a pair of scissors on his arm, for which he required medical attention. Consequential thereto, the accused, before leaving home, informed the deceased to pack her belongings and not to return. During the day the accused bought two litres of petrol which he intended using to burn out the deceased's clothes and personal belongings. When he returned home later in the day, he found that the deceased had not left and after confronting her, poured petrol over her and set her alight. At that stage she was carrying their baby whom she threw down when her body caught fire. Though the baby sustained minor burn wounds to one hand and foot, the deceased's body was covered with more than 81 percent burn wounds from which she died in hospital 12 days later. According to medical evidence, the cause of death was kidney failure, consequential to the burn wounds.

[9] There can be no doubt that both crimes are serious by their very nature, particularly when regard is had to the brutal and merciless nature of the attack on the vulnerable and defenceless deceased in the safety of their home. The accused's actions were unexpected and callous and perpetrated with direct intent to kill. It must be emphasised that both crimes were committed in a domestic setting where the accused killed his partner and stood reckless as to the possible killing of his baby daughter when dousing the deceased with petrol and setting her alight. In these circumstances I endorse the sentiments expressed in *S v Bohitile*<sup>3</sup> where sentencing guidelines were laid down in cases where crimes are committed in the context of a domestic relationship, as defined in the Combating of Domestic Violence Act, 2003. This court in subsequent judgments on sentence made it clear that it considers crimes committed in a domestic setting in a serious light and would increasingly impose heavier sentences in order to bring an end to the spate of murders currently experienced. The court's approach in this instance would therefore be no different, moreover, where this unrelenting crime wave continues unabated.

[10] The present instance is just another example of the extent of abuse and crimes committed on a daily basis in our society, where the weak and vulnerable often pay with their lives for no reason at all. Differences between persons in virtually any relationship, moreover when of a romantic nature, are likely to arise. Persons, each being unique human beings, are often confronted with difficult situations which require emotional decision making – it is simply part of life. That obviously includes breakups in relationships and, irrespective of how difficult and painful the process may be to the affected parties, they are bound to abide by the fundamental rights enshrined in our Constitution, including the moral values endorsed and upheld by society. It is therefore in the interest of justice that these rights and mutual respect for one another be protected and upheld at all cost. To this end the court plays an important role in upholding the rule of law through its decisions and sentences.

[11] In the present instance, the accused had the right to terminate his relationship with the deceased and walk away, for whatever reason, without her becoming a victim.

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<sup>3</sup> *S v Bohitile* 2007 (1) NR 137 (HC).

What is evident from the accused's own evidence is that the real issue was not because the deceased refused to leave the house, but rather because she had stabbed him with a pair of scissors in the arm earlier in the day. His act of pouring petrol on her was more likely in retaliation rather than forcing her to leave; this much was conceded during submissions.

[12] A further aggravating factor is that the accused did not act on the spur of the moment, but required some degree of planning when buying petrol in advance. This undoubtedly makes the accused's criminal behaviour even more reprehensible.<sup>4</sup> It seems inconceivable the amount of pain the deceased must have suffered during those 12 days before her death. Not only was it horrid, cruel and heartless, it was completely unnecessary. Five young children were left without the love and care of their mother and, for the youngest one, she would likely find this challenge even more difficult as she has the extra burden of having to deal with the knowledge that her own father sacrificed her life just to get back at her mother. There can be no doubt that the death of the deceased and the absence of the accused as a father to these children, would adversely impact on the lives of the children and bring about additional hardship to the family. This much is evident from the testimony of Ms Kaffer.

[13] One of the sentencing principles is that, for a sentence to be appropriate, it should accord with the accused person's moral blameworthiness.<sup>5</sup> In the present instance the accused's blameworthiness is exacerbated by the fact that the murder was premeditated and directed at a defenceless victim who was attacked unexpectedly by her partner. On the other hand, this happened at a time when their relationship appeared to have broken down and escalated to physical assaults from both sides.

[14] There is a cry from society for the imposition of stiffer sentences against perpetrators such as the accused, who mercilessly turned on his girlfriend to air his frustration with her, killing her in the process. This heinous behaviour will not be tolerated by the courts and punishment must be meted out by imposing the appropriate

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<sup>4</sup> *S v Mafu* 1992 (2) SACR 494 (A) at 495d-e.

<sup>5</sup> *S v Qamata* 1997 (1) SACR 479 (E) at 483a.

sentence. In the present circumstances, this would usually be in the form of a lengthy custodial sentence.

[15] In *S v Flanagan*<sup>6</sup> the court held that the interests of society are not served by a sentence which is too lenient. After all, it is the members of society who one day have to accept the accused back in their midst. This process might be troubled when there is a perception that the sentence given to the accused was too lenient and he does not deserve to be allowed back into society. Though the courts in sentencing should not give in to the expectations of society (at the expense of the accused or the interests of justice), it should neither ignore society's reaction of indignation and public outcries against those who make themselves guilty of committing serious crimes. It is in these circumstances that the sentencing court would consider it justified that retribution and deterrence, as objectives of punishment, must come to the fore. Furthermore, given the gravity of the murder count, a lengthy custodial sentence seems inevitable.

[16] The accused undoubtedly after the incident expressed his concern for the well-being of the deceased and immediately sought help and medical assistance. This much was demonstrated when travelling with her in the ambulance to Karasburg hospital where he was of further assistance until his arrest. To this end the Supreme Court in *S v Schiefer*<sup>7</sup> adopted, with approval, what was held in *S v Matyityi*<sup>8</sup>, 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.'

[17] In the present instance it would appear to me that there was not much more that the accused could have done to show contrition. The fact that his plea for forgiveness was declined was not in his hands and takes the matter no further; he at least asked. Looking at the accused's behaviour immediately after the incident and, considered with his testimony, I am satisfied that the accused expressed genuine remorse.

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<sup>6</sup> *S v Flanagan* 1995 (1) SACR 13 (A) at 17e-f.

<sup>7</sup> *S v Schiefer* 2017 (4) NR 1073 (SC).

<sup>8</sup> *S v Matyityi* 2011 (1) SACR 40 (SCA) ([2010] 2 All SA 424; [2010] ZASCA 127) para 13.



[18] It is common cause that the offences accused is convicted of, were committed with a single intent. In light thereof, it was submitted by his counsel that the two counts must be taken together for purposes of sentence whilst at the same time, taking into account the cumulative effect of the sentences imposed. It has however been held that the taking together of counts for sentencing is discouraged and should be reserved for exceptional circumstances. As stated by Corbett JA in *S v Immelman*<sup>9</sup> at 728H-729A:

'In my view, difficulty can also be caused on appeal by the imposition of a globular sentence in respect of dissimilar offences of disparate gravity. The problem that may then confront the Court of appeal is to determine how the trial Court assessed the seriousness of each offence and what moved it to impose the sentence which it did. The globular sentence tends to obscure this.'

[19] This court earlier found that when the deceased carried the baby in her arms at the time petrol was poured over them, they essentially formed a 'unit'. This notwithstanding, I am of the view that although the offences in this case are not dissimilar *per se*, the gravity of each should be distinguished in sentencing in that the deceased succumbed to her burn wounds, whereas the baby suffered minor burn wounds to her arm and leg. It is my considered view that this is not an instance where the offences should be taken together for sentence.

[20] The offences are to be considered separately by imposing individual sentences and regard being had to the cumulative effect thereof so as to ensure that the total sentence is not disproportionate to the accused's blameworthiness in relation to the offences committed.<sup>10</sup> Section 280 (2) of the Criminal Procedure Act 51 of 1977, allows the court to order the concurrent running of sentences, or part thereof, which would sufficiently ameliorate the severity of the cumulative effect of the individual sentences imposed.

[21] Accused has been in custody since his arrest on 2 January 2020, a period of just over three years. It is a settled principle of our law that where an accused is in custody

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<sup>9</sup> *S v Immelman* 1978 (3) SA 726 (AD).

<sup>10</sup> *S v Sevenster* 2002 (2) SACR 400 (CPD) at 405a-b.

pending trial, this period would usually lead to a reduction in sentence, particularly if it has been for a substantial period.<sup>11</sup>

[22] Given the personal circumstances of the accused, the gravity of the offences the accused stands convicted of and the legitimate interest of society, the objectives of punishment in this instance should be deterrence and retribution, rehabilitation being of lesser consideration.

[23] I therefore consider the following sentences appropriate:

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 28 years' imprisonment.

Count 3: Attempted murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 6 years' imprisonment

In terms of s 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that the sentence imposed on count 3 be served concurrently with the sentence imposed on count 1.

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JC LIEBENBERG  
JUDGE

APPEARANCES:

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<sup>11</sup> S v *Kauzuu* 2006 (1) NR 225 (HC).

STATE: I Malumani  
Of the Office of the Prosecutor-General, Windhoek.

ACCUSED: M Engelbrecht  
Instructed by the Directorate of Legal Aid, Windhoek.