

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

Case No: CC 10/2022

In the matter between:

THE STATE

and

PETRUS ABUSEMA**ACCUSED**

Neutral citation: *S v Abusema* (CC 10/2022) [2023] NAHCMD 801 (7 December 2023)

Coram: D USIKU J

Heard: 10 November 2023

Delivered: 7 December 2023

Flynote: Criminal procedure – Sentence – Murder – *Dolus Eventualis* – Offence committed in a domestic setting – The prevalence of such offences – Deterrence as an objective of punishment emphasised – Accused's personal circumstances equally to be considered when imposing sentence – Custodial sentence for such crime unavoidable.

Summary: The accused stood charged with the crime of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

Accused pleaded not guilty to the charge and opted to remain silent. His defence counsel stated that the accused's defence will become apparent during the course of the trial.

ORDER

The accused is sentenced to Twenty-two (22) years' imprisonment of which two (2) years' imprisonment are suspended for a period of five (5) years', on condition that accused is not convicted of murder, attempted murder, assault with intent to cause grievous bodily harm or assault common, committed during the period of suspension.

JUDGMENT

D USIKU J:

Background

[1] On 21 June 2023, the accused was convicted on a charge of murder in the form of *dolus eventualis* before this court.

[2] During the course of the proceedings Mr Shiikwa appeared on his behalf, whilst Mr Nyau appeared on behalf of the State. Ms Ndlovu took over from Mr Nyau after the accused was found guilty on a charge of murder.

[3] At this stage the court is tasked with the duty to consider what an appropriate sentence would be in the circumstances of this case.

[4] It is common cause that the accused and the deceased were involved in a domestic relationship at the time when the offence was committed. That relationship was said to have been short-lived, as the two only dated for about a month.

[5] The accused testified in mitigation of sentence that he was born on 1 January 1993 at Gobabis. He is single and a father of a four year old daughter. He has a girlfriend, the mother of the four year old daughter. At the time of his arrest, he was residing with his mother and his child. The child's mother is unemployed and he was the one responsible for their daily needs.

[6] Accused attended formal education at Epako High School, in Gobabis and completed grade 10. He was employed at a local butchery which is situated outside Gobabis town. He worked at the butchery for about two (2) years and six (6) months earning a salary of N\$1800 per month.

[7] He used the money to pay his accounts as well as for the payment of his living expenses. Accused also used his money to support his sister who is still schooling. The sister is currently nineteen (19) years old. His father is deceased whilst his mother is still alive and in her late fifties. Accused also supported his mother by buying her electricity and paying for her water. He owns furniture as well as livestock. He has a house which is situated in Kaanan A location in Gobabis. His livestock consists of six (6) goats, seven (7) herd of cattle and two (2) donkeys. These livestock are being taken care of by his uncle who reside in the area of Rundu.

[8] Accused further testified that he has been suffering from high blood pressure for the past 6 years and is on medication. He is receiving medication in the form of tablets as well as an injection monthly.

[9] Since his arrest he has been incarcerated for three (3) years and three (3) months. He has since learnt a lesson not to handle issues with anger, and to refrain from any trouble. Accused testified that he will not commit a similar crime in future.

[10] Accused informed the court that he wishes to apologise to the deceased's family, especially the deceased's mother for the loss of her daughter. He further claimed that it was not his intention to cause the deceased's death.

[11] He pleaded with the court not to impose a long custodial sentence as there will be no one to take care of his girlfriend and his child. Furthermore, accused testified that he planned to ask for forgiveness earlier on by asking his mother to contact the deceased's father in order for them to see him whilst in custody, however the plan did not materialise.

[12] In cross-examination, accused conceded that his relationship with the deceased was for a very short time. It was only the deceased's sister who was aware of their relationship. He also conceded to the fact that his girlfriend has continued to take care of their child during the period of his incarceration.

[13] According to the accused, it has been difficult to contact his family after he was transferred to Windhoek from the Gobabis police station. Thus he has not been able to communicate with his immediate family. He would not be blamed for not asking for forgiveness earlier as that failure could not be attributed to him, because he could not get any assistance from the authority where he has been incarcerated. Accused also confirmed that he did not offer any assistance for the deceased's funeral expenses.

[14] Furthermore, accused confirmed that he is able to see a doctor every month for his medication whilst in custody. He however could not provide any proof of such medication before court.

[15] Accused acknowledged that what he did was wrong and asked the court to exercise leniency when imposing sentence.

[16] On the other hand, the State called the deceased's mother to testify in aggravation of sentence, in terms of s 25 of the Combating of Domestic Violence Act 4 of 2003. Mrs Betta Kau testified that the deceased was her biological daughter and her first born. She had six children in total.

[17] The deceased was born on 4 August 1988 and was the mother of two children aged 9 and 10 years respectively. The children are both girls. Prior to her death, the deceased was employed at a butchery and used to provide for her children.

[18] Mrs Kau has since been taking care of the two children as well as the deceased's sister. The deceased's children's father died during 2015.

[19] According to her testimony, since August 2023 she has been receiving the children's grant from the Ministry of Gender Equality and Child Welfare, in the amount of N\$700 per month. The amount of money received is however not sufficient for the up-keep of the children. The two children are currently at a hostel at Tjaka, where they are required to pay hostel fees in the amount of N\$300 per year each. Mrs Betta Kau is the one responsible for such payments. So far she does not qualify for pension pay out, as she was born on 4 March 1970. Neither can she get employment because she is sickly, suffering from a heart condition. The little help she gets is from her daughter who has been employed as a domestic worker. She is a widower since May 2021.

[20] The deceased's funeral expenses were paid by her family members. They did not receive any assistance from the accused's family. She had not been aware about the accused and the deceased's relationship. She met the accused for the first time when he appeared at court. She denied that her late husband had attempted to get in touch with the accused's family at any given time. None of the accused's family members have contacted her to date.

[21] Mrs Betta Kau further testified that she is heartbroken about the deceased demise at accused's hands. The deceased was her right hand and first born daughter who was responsible for assisting them and was the one assisting her two already orphaned children whose father died in December 2015. Her plea before court is that accused be sentenced heavily because he broke her down.

[22] With regard to the impact of the deceased's death on the children of the deceased's, she testified that they usually cry a lot when they come home from

school, telling her how they miss their mother. Her husband died as a result of shock due to their daughter's death after which he suffered a heart attack.

[23] Her four male children are currently employed at Mariental. Mrs Kau refused to accept the accused's request for forgiveness at this stage as accused had failed to approach her earlier on. Her concern is that she has to struggle daily with her grandchildren who have been left orphaned.

[24] In his submissions, counsel for defence implored the court to take into account the accused's medical condition when imposing sentence. Counsel submitted that accused has learnt his lesson as a result of the offence. Further, counsel also asked the court to consider the interests of society. He conceded that the offence the accused has been convicted of is of a serious nature and further that the court should consider the circumstances under which it was committed. It was counsel's further submission that the crime was committed in the spur of the moment and not pre-planned. It was because the deceased slapped the accused which led to the accused's conduct.

[25] Counsel also submitted that accused had shown remorse, and it is the accused who stands to be punished. The court was requested not to punish the accused to the extent of being broken. The accused is not likely to repeat his conduct. The court was referred to the celebrated case of *S v Rabie*¹.

[26] His further submission is that, in general, punishment must fit the crime and the criminal and be blended with a measure of mercy according to the circumstances. Counsel further submitted that when sentencing, the court should consider the period the accused has spent in custody awaiting the finalization of his case. Accused is a first offender. Reference was made to recent cases on that point emphasising the form of intent in which the offence was committed.

[27] On the other hand, counsel for state submitted that the authority referred to by counsel for defence is distinguishable in that the offence was committed in a domestic setting.

¹ *S v Rabie* 1975 (4) SA 855 (A).

[28] This court was referred to several case law on point, and that regard be had to the objectives of punishment. In particular counsel referred to the case of *S v Bohitile*² where the court stressed as follows:

'It is indeed a notorious fact and one which I can take judicial notice of, that domestic violence and in particular violence against women, is widespread throughout Namibia. This important factor, in my view, gives cause for appropriate deterrent sentencing. The prevalence of and the social problems connected with domestic violence have given rise to specific legislation passed by Parliament in 2003 in the form of the Combating of Domestic Violence Act 4 of 2003.'

[29] It is against the above sentiments as expressed in the cited judgment that this court, in order to arrive at an appropriate sentence, will have to balance the interests of the society with factors such as the circumstances under which the crime was committed, as well as the accused's personal circumstances.

[30] It has been reinstated in our Courts that where the different and compelling factors jostle for equal treatment, it is necessary to strike a balance which will do justice to the accused and the interests of society. Courts are however entitled to give greater weight to one factor at the expense of others³.

[31] It must also be pointed out that because the accused was convicted on a charge of murder with constructive intent (*dolus eventualis*) this, should not per se constitute a mitigating factor for the purposes of sentencing. In this case, the absence of direct intent would need to be considered in the context of the other factors that are aggravating. Such as, that the offence was committed in a domestic setting to which accused has admitted, their relationship merely lasted for about a month, accused applied severe force thereby interrupting the flow of oxygen to the deceased's brain which led to her death. Accused foresaw the death of the deceased as a clear possibility and reconciled himself to that. He disappeared into thin air never to return, to assess what could have happened to the deceased until he was arrested.

² *S v Bohitile* 2007 1 NR 137 H.

³ *S v van Wyk* 1993 NR SC at 448 D-E.

[32] All these appalling features of the crime are compounded by further aggravating factors that the deceased at the time of her death was only 33 years old and in her prime age.

[33] As much as the accused testified about his remorsefulness, and that he was admitting his wrongfulness, it has been held that when it comes to punishment, the Courts are shaped by the spirit of the time and should be responsive to the outlook of the community which they intend to serve. Thus, Courts are required to send out the clear and unequivocal message that violent conduct will not be tolerated.

[34] This court is mindful of the fact that the accused is a first time offender. He has been incarcerated for a considerable period of time prior to his sentence today. However, courts should also not close their eyes to the widespread violent crimes being committed almost daily within our communities.

[35] The deceased's minor children will grow up without the love of their mother, who was killed by the accused for no apparent reasons.

[36] A term of imprisonment under the circumstances of this case is therefore inevitable. Violent crimes have become endemic in our society which should indeed be discouraged through the imposition of appropriate sentences by our courts. In that regard this court wish to borrow from Parker J (as he then was) in *S v Naftali Kondja*⁴ to which I agree.

'Consequently, in my opinion, the courts must not behave as if it is perched on an ivory tower, far removed from the general populace and its genuine fears and concerns about horrendous and deprived crimes and from the people's desire to live in peace. Thus the community expects that the court will punish perpetrators of serious crimes severely, but at the same time, the community also expects that mitigating circumstances, including the accused's personal circumstances will be given due considerations. That to my mind, is fairness in sentencing'.

⁴ *S v Naftali Kondja* Case no CC 04/2006.

[37] Taking into account that society is up in arms against the escalation of domestic violence, this court is of the view that deterrence, as an objective of punishment, should be necessary under the circumstances of this particular case, and it will also serve as a warning to would be offenders.

[38] Having carefully considered all factors relevant to sentencing, accused's mitigating factors as well as the aggravating factors of the case, accused is sentenced as follows:

Twenty-two (22) years' imprisonment of which two (2) years' imprisonment are suspended for a period of five (5) years, on condition that accused is not convicted of murder, attempted murder, assault with intent to cause grievous bodily harm or assault common, committed during the period of suspension.

D N USIKU
Judge

APPEARANCES:

STATE:

E Ndlovu
Of Office of the Prosecutor-General,
Windhoek

ACCUSED:

E Shiikwa
Of The Directorate of Legal Aid,
Gobabis