

**REPUBLIC OF NAMIBIA**



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

**SENTENCE**

Case No: CC 16 /2022

**THE STATE**

**and**

**DAVID MWAHONDAMANGE JOHANNES**

**ACCUSED**

**Neutral citation:** *S v Johannes* (CC 16/2022) [2022] NAHCMD 240 (17 May 2024)

**Coram:** CHRISTIAAN J

**Heard:** 05 March 2023, 03 April 2023, 17 August 2023, 3-4 October 2023, 26 October 2023, 2 November 2023, 18 January 2024, 15 March 2024 & 23 April 2024

**Delivered:** 17 May 2024

**Flynote:** Criminal Procedure – Murder – Read with the Combating of Domestic Violence Act 4 of 2003 – Accused pleaded not guilty to one count of Murder – Accused convicted as charged.

**Summary:** The accused was convicted on one count of Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003, for unlawfully and intentionally killing his now deceased girlfriend by assaulting her with a pick handle. The court considered the accused's personal circumstances, the cowardly manner in which the offence was committed, the interest of society, and the court's need to impose deterrent sentences. Sentencing principles and objectives re-stated.

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### **ORDER**

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1. Count 1 - Murder - The accused is sentenced to 30 years' imprisonment.
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### **SENTENCE**

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#### **CHRISTIAAN J:**

##### Introduction

[1] This sentence involves one case of gender based violence, perpetrated by the accused against his intimate partner. In this case, the progression of physical violence ended in the death of the accused's intimate partner, Ms Hilya Namutenya Shiku. The accused was convicted of the murder of his girlfriend, by assaulting her with a pick handle (with direct intent) and is now before this court for sentencing. The State did not prove any previous convictions against the accused.

[2] It is so easy to glibly use the terminology of gender based violence, in part because of the relentless frequency of its occurrence in our society, communities and homes, that it hardly causes anyone to raise an eyebrow. In this matter, the court will take into account the nature and prevalence of the crime and balance these considerations with the effect of the accused's actions, and the court will ultimately consider the question as to what sentence would be appropriate and proportionate to

him, in light of the prescripts of *S v Zinn*<sup>1</sup> and this disease of gender based violence which permeates the psyche of our country.

[3] The accused in this matter is David Mwahondamange Johannes who has been convicted of/on one count of murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The deceased in this matter was in a romantic relationship with the accused, and they have one child together.

[4] In passing sentence, it is well established that a court has to take into account various considerations in mitigation and aggravation of sentence. The considerations in particular enunciated in *S v Zinn* supra finds application in that this court has to take into account the personal circumstances of the accused, the gravity of the crime and the interests of the community. Whilst it is so, that a court must always endeavour to exercise a measure of mercy, sight must not be lost on the purpose and objectives of punishment. In *S v Rabie*<sup>2</sup>, the court held that:

‘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’.

[5] This means that a court should consider the objectives of punishment which is that of prevention, deterrence, reformation and retribution and a court must decide what punishment would best serve the interests of justice. A court should also be cautious in weighing one element of such consideration, above that of another. Rather, a balance must be struck between the interests of the accused and that of society.

[6] It is trite that in sentencing proceedings, a more inquisitorial approach is taken during the sentencing phase, with formulation taking a back seat. This court will also endeavour to balance and harmonize the above factors whilst being mindful of the fact that in some circumstances during sentencing, it might be necessary to emphasise one factor at the expense of another.<sup>3</sup>

#### Personal circumstances of the accused

<sup>1</sup> *S v Zinn* 1969 (2) 537 (A) at 540G.

<sup>2</sup> *S v Rabie* 1975 (4) SA 855 (AD) at 862G-H.

<sup>3</sup> *S v Van Wyk* 1993 NR 426.

[7] The personal circumstances of the accused was placed before court by Mr Siyomunji as the accused chose not to testify under oath. His evidence was that he was 34 years old at the time and, with the 3 years that has since passed, is now 37 years old. He is single with one child. The accused has no previous convictions. At the time of his arrest, the accused was employed at a car wash and earned N\$1800 per month. Both his parents are alive and live in the north.

[8] The accused has been in custody since the date of his arrest, ie 30 October 2020. He has thus been in custody for 3 years and 7 months.<sup>4</sup>

[9] The State contended that the accused displayed no remorse and claimed that he acted in self-defence. The State argued that the post-murder behaviour of the accused should also be a factor to be taken into account when one assesses whether or not remorse existed. The accused uttered the words: 'I killed Namutenya', after the assault on the deceased. The Supreme Court in *S v Schiefer*<sup>5</sup> adopted, with approval, what was held in *S v Matyityi*<sup>6</sup>, at 1081C-D:

'There is, moreover, a chasm between regret and remorse. 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 the appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look.'

[10] 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 accused did not even attempted to ask for forgiveness. Looking at the accused's behaviour immediately after the incident and, considered with his testimony, I am satisfied that the accused expressed no remorse.

### The gravity of the offence

<sup>4</sup> See *S v Kauzuu* 2006 (1) NR 225 (HC) at 232.) For the effect of lengthy pre-trial incarceration on sentence.

<sup>5</sup> *S v Schiefer* 2017 (4) NR 1073 (SC).

<sup>6</sup> *S v Matyityi* 2011 (1) SACR 40 (SCA) ([2010] 2 All SA 424; [2010] ZASCA 127) para 13.

[11] The crimes that the accused stood convicted of are extremely serious and even more so because it was committed in a domestic context. Jealousy and distrust, as in so many domestic relationships, were the causes of these crimes. The deceased was hit with the pick handle numerous times and her wounds are indicative of how serious the attack was on her head. She was left to die without any attempt from the accused to assist or get some help. The deceased was murdered by the person who was supposed to protect her from harm.

[12] The State argued that the murder was committed with direct intent and that the moral blameworthiness of the accused is high. The accused brutally attacked the deceased with a pick handle, and she sustained multiple injuries and succumbed to blunt impact head injuries. It was further argued that the children of the deceased would grow up without any parents, as the mother of the children was murdered, and the accused would spend time in custody.

[13] As evinced by evidence adduced during the trial, at all relevant times, the accused and the deceased were involved in a domestic relationship as they lived together in a relationship which had the nature of a marriage and they have a child together. During the evening of Friday 30 October 2020, whilst waiting for the deceased to arrive at their residence, the accused harbored suspicions that the deceased was unfaithful to him by having sexual intercourse with another man/men. Upon the deceased's arrival, an argument erupted between the accused and the deceased and the accused assaulted the deceased as set out in count 2 in the indictment. When the complainant in count 3 rushed to the assistance of the deceased, the accused pushed her out of the way and dragged the deceased by her hair into their residence and the accused locked the two of them inside the residence. Whilst inside the locked residence, the accused killed the deceased by hitting her multiple times with an axe handle on the head and/or body. The deceased died on the scene. According to medical evidence, the cause of death was due to blunt impact head injuries caused by the assault on her.

[14] There can be no doubt that the crime is serious by its 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.

[15] It must be emphasised that the crime was committed in a domestic setting, where the accused killed his partner. In these circumstances, I endorse the sentiments expressed in *S v Bohitile*<sup>7</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.

[16] 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.

[17] One of the sentencing principles is that, for a sentence to be appropriate, it should accord with the accused person's moral blameworthiness.<sup>8</sup> In the present instance, the accused's blameworthiness is exacerbated by the fact that the murder was directed at a defenceless victim who was attacked unexpectedly by her partner.

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<sup>7</sup> *S v Bohitile* 2007 (1) NR 137 (HC).

<sup>8</sup> *S v Qamata* 1997 (1) SACR 479 (E) at 483a.

### The interest of society

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

[19] The crimes that the accused stood convicted of, are extremely serious and even more so because it was committed in a domestic context. Jealousy and distrust, as in so many domestic relationships, were the causes of these crimes. The deceased was hit with the pick handle numerous times and her wounds are indicative of how serious the attack was on her head. She was left to die without any attempt from the accused to assist or get some help. The deceased was murdered by the person who was supposed to protect her from harm.

[20] In *S v Flanagan*<sup>9</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.

[21] Accused has been in custody since his arrest on 30 October 2020, a period of just over three years. It is a settled principle of our law that where an accused is in

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<sup>9</sup> *S v Flanagan* 1995 (1) SACR 13 (A) at 17e-f.

custody pending trial, this period would usually lead to a reduction in sentence, particularly if it has been for a substantial period.<sup>10</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 sentence appropriate:

1. Count 1 - Murder - The accused is sentenced to 30 years' imprisonment.

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**P CHRISTIAAN**

Judge

## **APPEARANCES**

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<sup>10</sup> *S v Kauzuu* 2006 (1) NR 225 (HC).



The State:

B Lilungwe  
Office of the Prosecutor-General

ACCUSED:

Mr Siyomunji  
Instructed by Legal Aid  
Siyomunji Attorneys