

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

SENTENCE

Case no: CC 14/2013

In the matter between:

THE STATE

and

VILHO KADHILA

ACCUSED

Neutral citation: *S v Kadhila* (CC 14/2013) [2014] NAHCNLD 17 (12 March 2014)

Coram: LIEBENBERG J

Heard: 20; 28 February; 04 – 05 March 2014

Delivered: 12 March 2014

Flynote: Sentence – Murder – Domestic violence – Accused convicted on plea of guilty – Mitigating and aggravating factors discussed.

Plea of guilty – Considerable weight should be given to plea of guilty – Provided accused has no other option – Guilty plea unlikely where accused

stands nothing to gain from plea of guilty – Plea of guilty might serve as incentive with prospects of a lesser sentence – Weight accorded not considered in isolation – Assessed in the light of circumstances of case and all other factors, mitigating and aggravating.

Remorse – Mitigating factor – Accused not testifying – Court cannot accept accused is without remorse – Other reasons might exist – Regard had to circumstances of the case.

Domestic violence – Accused killed his lifelong companion – Intoxication affecting judgement not ruled out – Court not to speculate on degree of intoxication – Accused relying on intoxication as mitigating factor must adduce evidence – Without evidence court unable to determine degree of intoxication and weight to be accorded.

Domestic violence – Deceased's conduct considered provocative – Direct consequence of physical assault – Notwithstanding accused over reacted in circumstances.

Summary: The accused on a charge of murder was convicted on his plea of guilty in circumstances where he brutally assaulted his lifelong companion with a knobkerrie resulting in her death. Though no evidence was led in mitigation the court is satisfied that the plea of guilty, considered together with expression of contrition by counsel on the accused's behalf, constitutes mitigation in the circumstances of the case. Considerable weight ought to be accorded to a plea of guilty to serve as incentive to others: Provided the case against the accused is not such that he was left with no other option. Circumstances under which offence was committed are aggravating ie within a domestic relationship and the attack on a defenceless victim being brutal and merciless.

ORDER

The accused is sentenced to 25 years' imprisonment.

SENTENCE

LIEBENBERG J:

[1] The accused was convicted on his plea of guilty of the offence of murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003.

[2] Consequential to his plea of guilty a statement in terms of s 112 (2) of the Criminal Procedure Act, 51 of 1977 was handed up in which the accused admits all the elements of the offence charged and described the circumstances under which the offence was committed, namely: The deceased was the lifelong companion of the accused and three children were born from this relationship which spanned over seven years. On the 18th of April 2013 the accused and deceased during the day visited local cuca shops where they imbibed traditional beer until both got drunk. When the deceased became quarrelsome they returned home. The accused before entering the house went to relieve himself in the bush and on his return discovered that the deceased was not in the house. He took their baby from outside where the deceased had laid it down and retired to bed. When the deceased returned home later that night the accused confronted her about her absence and an

altercation started which became physical when the accused wrestled a knobkerrie from the deceased which she had been wielding. During the scuffle the deceased fell over whereafter the accused used the knobkerrie to strike her all over the body, inflicting injuries resulting in death. He immediately thereafter, and whilst the deceased was still alive, made a report to the neighbours and the police were summoned but found the deceased to have died. The accused further explained that although he had consumed alcohol and got drunk, he appreciated the wrongfulness and consequences of his conduct. Also that he did not mean to bring about the deceased's death, though he foresaw death as a possibility but, notwithstanding, continued with the assault.

[3] The forcefulness of the assault is evident from the medical evidence and photo plan handed in. Dr Ricardo, a pathologist, testified about findings he had made when performing an autopsy on the body of the deceased, reputedly 35 years of age. He concluded that the cause of death was blunt force trauma as a result of the infliction of multiple injuries all over the body. These were described as follows: Multiple abrasions, lacerations and fresh contusions covering the whole body; multiple fractures of the sternum and four ribs; a lineal printed mark on the frontal bone of the skull with corresponding laceration; bilateral contusions of the lungs; contusions of the diaphragm and pericardium; multiple lacerations of the liver; and dislocated elbow. In view of the nature of the injuries the doctor was asked about the degree of force required and opined that it had to be strong or severe force and likely to have been inflicted using a blunt object.

[4] The prosecution called the deceased's biological mother, Elizabeth Kahule, and the investigating officer, Detective Warrant Officer (D/W/O) Paulus Endjala in aggravation of sentence.

[5] Ms Kahule's evidence mainly sets the background regarding the four minor children of the deceased, the last three born from the relationship with the accused and the youngest a few months old at the time of the mother's passing. The older children aged 12, 8 and 3 years, respectively, had been living with her prior to the incident for reasons that the deceased and the accused did not take proper care of their children because of their abuse of alcohol. This is fortified by the events of that fateful night when they took their baby along to the cuca shops where they became drunk and the deceased upon their return home left the baby on its own outside while she disappeared into the night. When put to the witness in cross-examination that the accused extended his apologies to the deceased's family, Ms Kahule refused to accept it and said she was finding it difficult to raise the children on her own as the youngest, now aged 1 year, is not healthy. She however receives some support from her family.

[6] D/W/O Endjala's evidence *inter alia* relates to one previous case where the deceased laid charges of assault with intent to do grievous bodily harm against the accused and on which he was convicted of common assault. A record of previous convictions was produced and reflects that the accused has three previous convictions relevant to the present proceedings. On 24 April 2008 he was convicted of assault with intent to do grievous bodily harm and sentenced to 12 months' imprisonment suspended on condition of him performing 250 hours' community service. On 25 August 2008 he was convicted of assault and merely cautioned. In this matter the deceased was the complainant. On 08 July 2010 he was again convicted of assault with intent to do grievous bodily harm and was sentenced to a fine of N\$1 000 or 6 months' imprisonment. The accused did not challenge this evidence and confirmed the previous convictions as correct.

Personal circumstances of accused

[7] The accused elected not to give evidence in mitigation and his personal circumstances were placed before the court from the Bar. He is 41 years of age and besides the three minor children born from the relationship with the deceased he has a son aged 15 years who resides with his family. The accused, an unsophisticated person, together with the deceased, was employed as a domestic worker and earned N\$300 per month. The deceased was equally employed receiving the same income. When submitting that part of their earnings was handed over to the deceased's mother for the maintenance of their children, I pointed out to counsel that this was never put to Ms Kahule during her testimony. It was explained that the instruction in that respect only came after Ms Kahule had testified. I find the accused's contention in this regard unconvincing as it is clear from Ms Kahule's evidence that she only received help from other family members and not the accused or the deceased who, according to her, had squandered all their means on liquor.

The crime and surrounding circumstances

[8] Counsel appearing for the accused argued that although the consumption of liquor could not in itself be considered a mitigating factor it could, however, in the present circumstances, have contributed to the severity of the assault perpetrated against the deceased. State counsel concedes that it is a factor to be considered, though it is not an excuse for having committed such heinous crime.

[9] The State accepted the accused's statement made in terms of s 112 (2) in which it is stated that both the accused and the deceased 'imbibed in a traditional liquor called tombo until we both got drunk' and whereafter they returned home. That the accused had been drunk earlier in the day is common cause, but is qualified in that he admits having appreciated the wrongfulness and consequences of his conduct at the time of committing the

offence that night (para 4.5). In *S v M* 1994 (2) SACR 24 (A) at 29i-j the Court of appeal was required to consider the affect alcohol had on the accused in its determination of an appropriate sentence and said:

'Liquor can arouse senses and inhibit sensibilities. It is for the State to discount it as a mitigating factor, to show that it did not materially affect the appellant's behaviour.' (Emphasise provided)

[10] The State did not attempt to discount the accused's assertion that he had been drunk earlier that day but accepted it as a fact; neither is there any evidence before the court showing otherwise. Whereas the accused did not give evidence it would be difficult to say whether or not the liquor he had consumed during the day impaired his faculties or affected him in any way at the time of committing the offence. I do not rule out this possibility because the accused said that when the deceased became quarrelsome he decided they should go home. He retired to bed and it is not known for how long he had been asleep before the deceased returned home and the quarrel started.

[11] Mr *Bondai* argued that this is not an instance where the accused consumed liquor to pluck up courage to do something but that he had been drinking the whole day until he became drunk. It could therefore not be excluded, so the argument went, that the consumption of alcohol could have played a role during the commission of the offence. In the absence of evidence proving otherwise, I am in agreement with the submissions made that the possibility cannot completely be ruled out that the accused's mental faculties had been impaired as a result of the liquor he earlier consumed.

[12] It must however be said that where the accused relies on intoxication as a mitigating factor, then he should have adduced evidence to that effect which was not done in the present case. It is not for the court to speculate about something which is within the accused's knowledge and him being the only person who could give evidence in that regard. Though it remains a factor to be taken into account when sentencing – intoxication can operate as a mitigating factor where the accused's moral blameworthiness is diminished

(*S v Cele* 1990 (1) SACR 251 (A)) – I am of the view that it should not be afforded too much weight in the present case.

[13] The court was invited to find in favour of the accused that the deceased's unexplained disappearance from the common home that night, only to return some time later, triggered the incident, as it must have been annoying to the accused; more so, because the deceased had left the baby unattended outside the house when she left. I have no doubt that the deceased's conduct in the circumstances described would have annoyed the accused and likely to have sparked the quarrel and subsequent fight. The situation was clearly aggravated when the deceased wielded a knobkerrie. Such conduct is considered provocative and uncalled for in the circumstances; conduct which, in all probability, was roused by the liquor the deceased had consumed earlier in the day (or after her disappearance from home). I shall therefore find in favour of the accused that there was some degree of provocation present but, as was argued by Mr *Shileka*, a misstep by the deceased by no means justified the accused's reaction. The fact that the accused immediately after the incident sought assistance from the neighbours is indicative that he acted on the spur of the moment and not with premeditation to bring about death.

[14] Mr *Bondai* conceded that the offence committed was brutal and prevalent throughout the country. It is further aggravating because it involves domestic violence which has escalated during the past year or so to the point where the Executive has called out a day of national prayers against gender based violence in an attempt to bring an end to the horrendous and senseless killing of women in this country. What these cases have in common is the ease with which spouses or partners resort to dangerous weapons to attack and kill, for no reason, the person he (or she) is supposed to love and protect. This is often done in the most gruesome and inhuman manner conceivable. The present case is one such instance where the accused completely overreacted when he, after disarming the deceased, used the knobkerrie to mercilessly hit the deceased all over her body. At that stage she was lying on the ground, a defenceless woman posing no threat to him.

[15] The medical evidence and the photo plan undoubtedly reflect the force behind these blows resulting in death. Besides multiple abrasions and lacerations on the head and the entire upper body down to the left leg, there are also four fractures of the ribs and a fractured sternum. The force applied was such that it contused the internal organs ie the lungs, diaphragm and pericardium, and caused multiple lacerations of the liver. The injuries were fatal and the deceased died on the spot.

[16] Despite the severity of the attack I will bear in mind that the accused had not acted with direct intent. This notwithstanding, the ruthless and cruel manner in which the accused went about during the assault cannot be overlooked and is an aggravating factor taken into account in sentencing; a factor which increases his moral blameworthiness where the offence was committed in a domestic environment. Defence counsel therefore conceded that in the circumstances society had reason to exact severe punishment for the accused.

Interest of society

[17] We live in an orderly society which is governed by moral values and obligations with respect for one another. It is expected of all members of society to uphold and respect these values. It is therefore not in the interest of society when persons like the accused trample on the values and rights of their spouses, life companions and loved ones only to make *their* authority felt. The sanctity of life is a fundamental human right enshrined in law by the Namibian Constitution and must be respected and protected by all. The courts have an important role to play in that it must uphold and promote respect for the law through its judgments and by the imposition of appropriate sentences on those making themselves guilty of disturbing the peace and harmony enjoyed in an ordained society; failing which might lead to anarchy where the aggrieved take the law into their own hands to take revenge.

[18] On the other hand, the present accused must not be made the scape goat of all those guilty of committing heinous crimes within a domestic relationship in the past. An appropriate sentence must reflect a balance struck between often competing factors ie the interests of society and that of the accused and regard being had to the crime committed, as well as the accused's moral blameworthiness.

[19] The view taken by this court in the past in cases involving violence committed in the context of a domestic relationship is that the courts are enjoined to follow a stern approach when it comes to sentencing. This is clear from *S v Bohitile* 2007 (1) NR 137 (HC) where Smuts AJ (as he then was) said at 141C-F:

[21] The prevalence of domestic violence and the compelling interest of society to combat it, evidenced by the recent legislation to that effect, require that domestic violence should be regarded as an aggravating factor when it comes to imposing punishment. Sentences imposed in this context, whilst taking into account the personal circumstances of the accused and the crime, should also take into account the important need of society to root out the evil of domestic violence and violence against women. In doing so, these sentences should reflect the determination of courts in Namibia to give effect to and protect the constitutional values of the inviolability of human dignity and equality between men and women. The clear and unequivocal message which should resonate from the courts in Namibia is that crimes involving domestic violence will not be tolerated and that sentences will be appropriately severe.'

[20] I respectfully endorse the sentiments expressed by my Brother and it is well known that our society abhors any form of domestic violence, more so where the most vulnerable members within society have lost such precious thing as life in the most harrowing and gruesome circumstances. The circumstances under which the present killing took place are indeed aggravating and deserving of severe punishment.

Remorse as mitigating factor

[21] It was submitted on the accused's behalf that his plea of guilty, and him having expressed his remorse for the pain he had caused to the deceased's family, are mitigating factors to be taken into consideration for sentence. This court in the past has stated that, in order for remorse to be a valid consideration in deciding whether the offender is likely to re-offend or not, the accused must take the court into his or her confidence and without giving evidence it would be difficult for the court to decide whether the accused's contrition is genuine. However, it does not mean to say that an accused who decides not to testify in mitigation has no remorse, as there may be other reasons why the accused elects not to testify in mitigation. Which ever is the case will depend on the circumstances and the form of contrition claimed to exist.

[22] In this case the deceased's mother refused to accept the accused's apologies saying that, as a result of her daughter's death, he had left her with their children of whom the youngest was ill, causing her additional hardship. The rejection of the accused's repentance by Ms Kahulu, in my view, does not *per se* negate contrition on his part as a mitigating factor. It was further argued that the accused's plea of guilty must be seen as a sign of remorse. Opposing views were expressed by the State saying the proverbial writing was on the wall for the accused, therefore he did not have an option to do otherwise. I am not entirely convinced that the accused was left without option when he decided to plead guilty, as there was no eye-witness and, as submitted by defence counsel, it would not have been too difficult for the accused to come to court with a fictitious defence like private defence as it so often happens where no one else had witnessed the incident. There seems to be no reason to doubt the accused's sincerity in this regard and I am inclined to find the plea of guilty as a mitigating factor.

Plea of guilty as mitigating factor

[23] How much weight should be accorded to the accused's plea of guilty as a mitigating factor? It is my considered opinion that considerable weight should be given to any accused who pleads guilty in circumstances where it cannot be said that there was no other option. If the accused stands nothing to gain from offering a plea of guilty, why would he or she even consider doing so? It might even serve as an incentive to others if the accused knows in advance that a plea of guilty will count in his or her favour at the stage of sentencing. Obviously, it cannot be considered in isolation and must be assessed in the light of the circumstances of each case and all other factors, mitigating as well as aggravating, taken into account.

Previous convictions

[24] The accused is not a first offender and has three previous convictions with elements of violence against persons, one being the deceased. The latter conviction followed four months after the accused had been convicted of assault with intent to do grievous bodily harm and was given a suspended custodial sentence on condition he performs community service. It must be assumed that the assault perpetrated against the deceased then was not of serious nature as he was merely cautioned and discharged. Just more than two years later the accused was again convicted of assault with intent to do grievous bodily harm and this time he was sentenced to a fine.

[25] It would appear to me that it does not seem unreasonable to deduce from the record of previous convictions, and given the short period of time in which these crimes were committed, that the accused readily resorts to violence. This likely prompted the State to argue that the accused is considered a threat to society and that the present case is an instance where deterrence and retribution, as sentencing objectives, should come to the fore. The argument is not without merit as it would appear from his criminal record that the accused has some propensity to turn violent towards other persons, though the circumstances under which the previous incidents took place are

unknown. Be that as it may, he has three previous convictions involving assault against him. It also seems that the sentences imposed in the past did not have the necessary deterrent effect and that he simply disregarded any warning extended to him by the court. In view thereof it does not appear to me that a suspended sentence would have the required result of bringing the accused to his senses and therefore, in my view, is not an option.

Conclusion

[26] One cannot help feeling for the children born from the relationship, not only having lost a mother, but are likely to be deprived of the security and care of their father from whom they would be separated for some time. Unfortunately punishment of the offender is an inevitable consequence of crime.

[27] The accused has been in custody since his arrest which was almost one year ago. Although lengthy periods of pre-trial incarceration usually lead to a reduction in sentence, I do not consider the period the accused had spent in custody compelling, justifying a reduction in his sentence.

[28] Having duly considered all the above, I have come to the conclusion that the interests of the accused do not measure up to the seriousness of the offence and the interests of society and that a lengthy custodial sentence will be justified.

[29] In the result, the accused is sentenced to 25 years' imprisonment.

It is further ordered that Exhibit 1 is forfeited to the State.

JC LIEBENBERG
JUDGE

APPEARANCES

STATE

R Shileka

Of the Office of the Prosecutor-General, Oshakati.

ACCUSED

G F Bondai

Instructed by Dr Weder, Kauta & Hoveka,
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