

REPUBLIC OF NAMIBIA

NOT REPORTABLE



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
APPEAL JUDGMENT**

Case no: CA 27/2015

In the matter between:

THE STATE

APPELLANT

and

MELKISEDEK WAANDJA MATHEUS

RESPONDENT

Neutral citation: *S v Matheus* (CA 27 - 2015) [2017] NAHCNLD 19 (14 March 2017)

Coram: TOMMASI J and JANUARY J

Heard: 27 January 2017

Delivered: 10 March 2017

Flynote: Appeal – Sentence – Culpable homicide – State appealed against sentence imposed – State failed to place factors in aggravation and took 11 years to bring matter to trial – Court not persuaded that sentence is shockingly inappropriate or that the learned magistrate erred when imposing a wholly suspended sentence.

Summary: The State appealed against the sentence imposed by the regional court magistrate. The respondent was sentenced to 4 years imprisonment wholly suspended. The respondent exceeded the bounds of self-defence by stabbing his cousin. They were both 17 years old at the time. Almost 11 years after the event the respondent pleaded guilty to culpable homicide. The appellant placed no aggravating factors before the court *a quo* and gave no explanation for the inordinate delay. Court held that, given the circumstance of this case, the sentence was not shockingly inappropriate; and that the learned magistrate did not misdirect himself when he imposed a wholly suspended sentence.

ORDER

1. The appeal is dismissed
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JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] This is an appeal by the State. The respondent was convicted of culpable homicide and sentenced to 4 years imprisonment which was wholly suspended on condition that he does not commit the offence of culpable homicide or murder during the period of suspension. It is against this sentence the State is now appealing.

[2] The respondent was initially charged with murder in that he on 26 January 2002 stabbed his cousin to death. The charge was changed on 16 April 2013 to culpable homicide and the respondent pleaded guilty. The respondent and the deceased, his cousin, were both 17 years old at the material time.

[3] The respondent gave the following details in his plea explanation: He was living in the same house as the deceased. On the fateful day they were eating together. He got up from the bench which he shared with the deceased and the deceased fell down. The deceased became angry and started cursing him. He tried to apologise but the deceased started beating him in the face with fists. He then stabbed the deceased.

[4] The medical report was received into evidence by agreement and it confirmed that the deceased died of a single stab wound to his upper left chest which penetrated the heart.

[5] The respondent was represented and his counsel made submissions from the bar in mitigation. He provided the court with the national identification document which was handed in by agreement. This document confirmed the age of the respondent. He further pointed that it took the State 11 years to bring this matter to trial. The respondent was 28 years old at the time. The respondent has, in the meantime, completed his grade 12 and obtained a diploma in tourism and travel. It was not clear whether he was employed at the time he appeared before the court. He submitted that the respondent was a youthful first offender who had pleaded guilty and had shown remorse. He submitted that the court ought to caution alternatively give a wholly suspended sentence.

[6] The State Prosecutor submitted that life was sacred and that the respondent cannot hide behind his youthfulness. The appellant submitted that it would not be appropriate to caution the respondent but the court was encouraged to consider a sentence which would deter and rehabilitate the respondent. The State Prosecutor proposed that the court *a quo* ought to impose a sentence which would make the respondent feel the pain of the crime he had committed by imposing a custodial sentence with the alternative of a fine and suggested that it ought to be coupled with a period of suspension.

[7] The learned magistrate took note of these submissions and highlighted the fact that it took the appellant 11 years to bring the matter to trial and furthermore that the appellant failed to inform the court of the reasons for this inordinate delay. The learned magistrate bemoaned the fact that the family of the deceased had to wait this long for closure. He furthermore took into consideration that the young respondent had been burdened with the pending trial and had to carry it into his manhood. He took note of the fact that the respondent, under trying circumstances, advanced his career and maintained a positive lifestyle.

[8] The learned magistrate considered the fact that the offence was serious and that a life was lost. He considered the expectations of society. He doubted whether any member of the public would clamour for the imprisonment of the appellant given the inordinate and unexplained delay by the appellant to bring the matter to trial. The magistrate also referred to the youthfulness of the respondent who was standing before him at the age of 28 years.

[9] The learned magistrate was not invited to give additional reasons but both parties were *ad idem* that the reasons for sentence were quite comprehensive and that a further delay would not be in the interest of justice.

[10] The grounds of appeal were as follow:

- The sentence was so lenient that it induces a sense of shock when considered against the sentences imposed for similar offences in this honourable court.
- The learned magistrate overemphasised the personal circumstance of the respondent
- The learned magistrate totally ignored or attached little weight to the seriousness of the offence and or the interest of society.
- The learned magistrate failed to consider the fact that punishment must fit the crime committed.

[11] It is trite that this court may only interfere if the learned magistrate “demonstrably committed a misdirection and imposed a sentence ...which is wholly inappropriate and therefore entitles this court to interfere with the sentence”¹

[12] Mr Greyling, acting *amicus curiae*, referred this court to two reported cases where this court imposed wholly suspended sentences². It is evident from the case law that the sentences imposed for culpable homicide vary quite considerably. This is so because the court in each case has to determine the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act for which he was convicted.³ In *S v Lang* 2014 (4) NR 1211 (HC) this court, on appeal, reduced the sentence the regional court imposed. The appellant in that case was sentenced to five years' imprisonment of which two years were conditionally suspended. This court substituted this sentence with a fine of N\$15000 or two years imprisonment plus three years' imprisonment conditionally suspended for five years.

[13] The court *a quo* was given the bare minimum of facts surrounding the incident. I do not find it surprising that he overemphasised the personal circumstances of the respondent. The only information regarding the incident presented by the appellant in the court *a quo* is that a life was lost. This fact the court *a quo* took into consideration. The mitigating circumstances described by the respondent was that the deceased was the initial aggressor. The aggravating circumstances surrounding the stabbing were not placed before the court *a quo* and the learned magistrate could not be expected to speculate on the behaviour of the respondent at the time. I therefor find that there is no merit in the ground that the learned magistrate overemphasised the personal circumstances of the respondent and underemphasised the seriousness of the offence and the interest of society.

[14] In *S v Lang, supra*, at page 1217, para 23 -24, Miller AJ, stated the following:

¹ *S v Shipanga & another* 2015 (1) NR 141 (SC) page 170 paragraph 67

² *S v Johannes* 2009 (2) NR 579 (HC) – wholly suspended sentence for murder (*dolus eventualis*); *S v Britz* 1994 NR 25 (HC)

³ *S v Simon* 2007 (2) NR 500 (HC).

"In finding that because a life was lost through the negligence of the appellant and that consequently a heavier sentence than would otherwise have been should be imposed, the learned regional magistrate seeks to rely on a passage from the judgment of Parker J and Manyarara AJ in *S v Simon* 2007 (2) NR 500 (HC). I think the passage the learned regional magistrate had in mind is the one appearing at 517C – D which reads as follows:

"It has been held that if the consequence of the accused person's negligence has resulted in serious injury to others or a loss of life, such consequences will almost inevitably constitute an aggravating factor, warranting a more severe sentence than might otherwise have been imposed. (*S v Nxumalo* 1982 (3) SA 856 (A) at 861H.)"

This passage must not be read in isolation as the learned magistrate seems to have done. At 518D – F the court states the following:

"It appears to us that in the present case in determining an appropriate sentence the court must have regard to the degree of culpability or blameworthiness exhibited by the appellant in committing the negligent act for which he was convicted. And, in doing so, the court ought to take into account the appellant's unreasonable conduct in the circumstances, foreseeability of the consequences of his negligence and the consequences of his negligent act. (*S v Nxumalo* (supra at 861G – H).) Indeed the community expects that a serious offence will be punished, but also expects at the same time that mitigating circumstances must be taken into account and the accused person's particular position deserves thorough consideration: that is, sentencing according to the demands of our time." [my emphasis]

[15] It is indeed so that the fact that a life is lost is an aggravating factor but it is not the only factor the court ought to consider. If one has regard to the age of the appellant at the time he committed the offence, the fact that he was provoked to some degree, the fact that he waited 11 years for the matter to come to trial, the fact that he was a first offender and has lived an exemplary life whilst he was awaiting trial and the fact that he had shown remorse for his actions are all factors which the magistrate considered to arrive at a sentence which, under the circumstances of this case, is appropriate. I am not persuaded that the sentence which the court *a quo* imposed was shockingly

inappropriate or that it did not fit the crime. What is shocking indeed is the inordinate delay in bringing the matter to trial and the failure of the appellant to place sufficient facts in aggravation before the court *a quo*.

[15] In the result the appeal by the appellant against sentence must fail and the following order is made:

1. The appeal is dismissed.

M A TOMMASI
JUDGE

JUDGE
HC JANUARY

APPEARANCES

For The Appellant:

Mr Gaweseb
Of the Prosecutor General
Office oshakati

For The Respondent:

Mr Grelying
Of Greyling & Associates
(Amicus Curiae)