

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

SENTENCE

CC NO: 03/2015

In the matter between:

THE STATE

and

JASON MICHAEL

ACCUSED

Neutral citation: *The State v Michael* (03/2015) [2016] NAHCNLD 48 (09 June 2017)

Coram: **JANUARY J**

Heard; **28 March 2017**

Delivered: **09 June 2017**

Flynote: Sentence – Murder – *dolus eventualis* – principles and factors to be considered – Exceeded bounds of self-defence – In the circumstances tantamount to an independent unlawful attack – Deceased disabled on one hand - Aggravating deceased stabbed 24 times with 6 wounds fatal – First offender – 25 years – Trial awaiting portion suspended.

Criminal law: Murder — Mens rea — Intention — Type of intention — Determination of — Court to consider nature of weapon used, position on body where injuries inflicted and number of times injuries inflicted.

Summary: The accused stabbed the deceased 24 times with a knife. He claimed self-defence. He was convicted for murder with *dolus eventualis*. The accused had injuries and the court found in his favour that there was a fight with the deceased. He reported the incident and handed himself over to the police. It was found that he excessively exceeded the bounds of self-defence. The court considered the triad of sentencing and the objectives thereof. The personal circumstances of the accused was also considered and the court strived towards a balanced individualized sentence.

ORDER

The accused is sentenced to 25 years' imprisonment of which three (3) years and six (6) months are suspended for 5 years on condition that the accused is not found guilty of murder, assault or culpable homicide involving a dangerous weapon being used committed during the period of suspension.

SENTENCE

JANUARY J

[1] Mr Michael you are convicted of murder which is a serious if not the most serious of crimes. The killing of another person is since the early biblical times prohibited. The Roman Dutch Law, which is our common law, prohibits the unlawful and intentional killing of another person. Our current supreme law, the Namibian Constitution, in

Chapter 3, The Fundamental Human Rights and Freedoms, protects life. Article 6 stipulates:

'Article 6

Protection of Life

The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia' (my emphasis).

[2] You are convicted for murder not that you directly intended to kill the deceased but that you foresaw the possibility of death of the deceased and recklessly continued stabbing him indiscriminately in reckless disregard of the result of your unlawful conduct. In legal terms it is referred to as *dolus eventualis*. You did not take this court in your confidence and decided not to testify in your defence nor in mitigation. Your counsel, Mr Aingura only addressed the court in mitigation. Your silence is not held against you as it is your right to remain silent.

[3] Mr Aingura placed your personal circumstances on record. You were 26 years old when the crime was committed and now 30 years old. You attended school until grade 4 and did not complete it as you dropped out when your mother passed away. The death of your mother impacted negatively on you. You were raised by your grandmother. At the time of arrest you looked after the livestock of your uncle. You have no children and are single. Your father left to Angola. At some point in time you went to look for your father and the last time you saw him was in 2011. You made a living by doing odd jobs at times. You are a first offender and was in custody trial awaiting for about three (3) years and seven (7) months.

[4] Mr Aingura submitted that you are having remorse. It is difficult for this court to assess if indeed you have remorse. You pleaded not guilty, which is your right to do so, but in addition you remained silent and this court has nothing before it except the mere say so of your counsel. I can in the circumstances not attach too much weight to the

submission. Likewise the court can also not attach much weight to the submission that you are apologetic towards the family. Mr Aingura informed the court that you have not apologized in person yet as you did not have the opportunity. It is up to you when you get the opportunity. Mr Aingura conveyed your apology to the mother of the deceased. She accepted it unconditionally.

[5] This court already found in your favour that there was a fight between you and the deceased and that initially you might have acted in self-defence. Considering the post mortem report it is however evident that you exceeded the bounds of self-defence excessively. Exhibit "L", the post mortem report reflects the most important findings relating to the deceased; a history of being stabbed to death, 20 stab wounds and 4 incised injuries to the chest, abdomen, pelvic and upper limbs. The wounds are numbered from 1 to 20 and the incised wounds from 1 to 4 respectively. The Dr reported and testified to the effect that 6 of the 20 wounds were into the chest cavity with fatal consequences. According to the numbering of the wounds on the post mortem report, the fatal wounds were; numbers 1, 2, 3, 5, 6 and 11. The chest is a vulnerable part of the body and even the most uneducated lay person knows that as a fact.

[6] These wounds penetrated underlying muscles and vital organs respectively as follows: the upper lobe of the left lung, the lower lobe of the right lung, the dome of the hemi diaphragm laterally, another wound penetrating the lower lobe of the right lung, another wound penetrating the lower right hemi diaphragm and right suprarenal gland, the anterior hemi diaphragm with a penetrating injury to the right lobe of the liver, the lower lobe of the left lung, mediastinum, posterior pericardium and left ventricle of the heart. The doctor concluded that the cause of death was multiple stab wounds to the chest.

[7] The knife is a stainless steel pocket knife with the blade measuring about 90 mm from the tip to where it is fixed to the handle. The handle has a longer part measuring about 115 mm on the longer part and measuring 105 mm on a shorter part with a stainless steel ring about 30 mm from where the blade is fixed. On both sides of the blade are two brownish wooden panels affixed to the stainless steel handle by small screws. It can be described as a flick-knife. There is a small button on the handle that allows the blade to flick open when pressed. The blade and part of the handle are stained with a substance that appears to be

dried blood. The blade measures about 23 mm at the widest side affixed to the handle and tapers down to a very sharp point where the cutting edge and the rest of the blade connects. The knife is not only a dangerous but lethal weapon as is proved by the result in this case. A person is deceased.

[8] No matter what sentence this court may impose, it will never bring back the life of the deceased or wipe out the impact of the death to the relatives. The sentence should however reflect that this court abhors and condemns the unlawful taking of a life. In accordance with its constitutional mandate, this court must attempt to protect the lives of others by deterring likeminded persons as you.

[9] Mr Gawaseb called the mother of the deceased in aggravation. The deceased was her first born child. She is still sad about the loss of her son. She never expected him to die in advance of her death. The deceased was the breadwinner for her and the other seven siblings. He was gainfully employed as a security guard. He assisted four of them. No one else assisted. The mother now makes ends meet by making and selling traditional baskets. She had to leave the place where they stayed before the incident because she was haunted by bad thoughts reminding her of her lost son. Your family never apologized to the mother and she saw them for the last time when the deceased was buried. The mother forgives you and that is amplified by the fact that she did not suggest a particular sentence. She merely requested the court in her testimony to impose a sentence that shows that you have committed a crime and that it is wrong to do so. She indicated that according to tradition she was compensated by the traditional authority with 12 head of cattle. Your family has to date handed nine head of cattle and three cattle are still outstanding. It is not in this court's jurisdiction to address that issue but I mention it to you to consider.

[10] In my task to sentence you various guidelines have developed over the years in courts. I have to consider you and your personal circumstances, the crime and the interest of society. This is referred to as the triad, the three primary principles in sentencing. Mercy is also an element to be considered.¹ Furthermore the objectives of punishment are that the court

¹S v *Nakale & others* (No 2) 2007 (2) NR 427 (HC).

considers the elements of retribution, prevention, deterrence, reformation or rehabilitation and attempts to incorporate the combination thereof in the sentence to be imposed.²

[11] Your personal circumstances, the crime and expectations from society are referred to above. The mother of the deceased is part of society. Her views on the sentence are generally a reflection of what society expects courts to do when crimes are committed. Accused persons should be punished. Having exceeded the bounds of self-defence in your case is tantamount to an initiated unlawful attack on a person not attacking you. The deceased was disabled in his right hand at the time. He injured the hand when a fire arm accidentally discharged and the bullet was lodged in the right hand. The hand was still in a state of recovery. From the evidence of the mother it is evident that the deceased did not use his right hand at the time.

[12] You were convicted that you foresaw the possibility of death of the deceased and recklessly continued stabbing him indiscriminately in reckless disregard of the result of your unlawful conduct (*dolus eventualis*). It depends on the circumstances of each case whether *dolus eventualis* could be a mitigating factor either alone or together with other factors.³ I find in your favour that the evidence revealed that after you stabbed the deceased you reported the incident to Flamingo Bar's owner. In a sense you sought for help. Thereafter you indicated that you will hand yourself over to the police and not run away. You indeed handed yourself over with the knife and admitted to the stabbing. The evidence revealed that you and the deceased were staying in the same neighbourhood. It is not clear if you were friends but the evidence indicates that at least you were acquaintances. On the date of the incident you took your cell phone for charging to the deceased.

[13] I find it aggravating that you stabbed the deceased 24 times with 6 of the stab wounds fatal. The doctor who conducted the post mortem report testified that despite the sharpness of the knife you used force to inflict the injuries. The deceased was unarmed and as stated with his right hand disabled at the time.

[14] Your counsel conceded that it is indeed a serious offence and that it is inescapable that you must serve a custodial sentence.

² *S v Nakale* (supra)

³ *S v Gariseb* 2016 (3) NR 613 (SC) at 615 para 8.

[15] I have considered your personal circumstances, the crime and the interest of society, the objectives of punishment, the element of mercy and conclude that imprisonment is inescapable. I am also striving to individualize the sentence and balance your personal circumstances against the interest and expectations of society and the seriousness of the crime.

[15] In the result you are sentenced:

To 25 years' imprisonment of which three (3) years and six (6) months are suspended for 5 years on condition that the accused is not found guilty of murder, assault or culpable homicide involving a dangerous weapon being used committed during the period of suspension.

H C JANUARY

JUDGE

APPEARANCES:

FOR THE STATE

Mr Gawaseb

Office of the Prosecutor-General – Oshakati

FOR THE ACCUSED

Mr Aingura

Of Aingura Attorneys