

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

SENTENCE

Case no CC: 22/2012

In the matter between:

**THE STATE**

v

**PITJO AKIMANA JACOB**

**ACCUSED**

**Neutral citation:** *S v Jacob* (CC 22/2012) [2018] NAHCNLD 114 (31 October 2018)

**Coram:** TOMMASI J

**Heard:** 8 May 2018, 1-2 October 2018

**Delivered:** 31 October 2018

**Flynote:** Criminal Procedure- Sentencing- accused convicted of assault with intent to do grievous bodily harm and murder – accused sentenced to 5 years imprisonment of which two are suspended for 5 years on condition that accused does not commit a similar offence- accused sentenced to 25 years' imprisonment for murder.

**Summary:** On 10 May 2011 the accused assaulted his brother-in-law with a panga on his left shoulder and the court found that he had the intent to do him grievous

bodily harm. On 15 May 2011, the accused met with the deceased on a path leading to her homestead and he killed her with the screwdriver, he admitted to having stabbed the 56 year old deceased 4 times with a screwdriver. He further explained that the deceased had bewitched him and that he was advised by the witchdoctor to kill the deceased if he wanted to be healed. He was subsequently arrested, stood trial for the above offences and convicted of assault with intent to do grievous bodily harm and murder.

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### ORDER

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Count 1      Assault with intention to do grievous bodily harm

5 years' imprisonment of which 2 years' are suspended for five years on condition that the accused is not convicted of assault with the intent to do grievous bodily harm or any other offence involving violence against the person of another committed during the period of suspension.

Count 2      Murder

25 years' of imprisonment.

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### SENTENCE

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TOMMASI J:

[1]      The accused was convicted of assault with the intent to do grievous bodily harm and murder. The court is now required to sentence the accused.

[2]      The brief summary of the factual background of the two offences is as follows: On 10 May 2011, the accused who lived in Angola near the Namibian border, entered Namibia to visit his girlfriend and his two children. His aim was to persuade her to return to him. He was not welcomed at his girlfriend's brother's place where his girlfriend and children were. He then assaulted his brother-in-law with a panga on

his left shoulder and the court found that he had the intent to do him grievous bodily harm.

[3] On 15 May 2011 the accused found his way into Namibia and stabbed the mother of his girlfriend with a screwdriver on her way home. In his plea explanation he admitted to having stabbed the 56 year old deceased 4 times with a screwdriver on her upper body. He further explained that the deceased came to fetch his girlfriend at his request. He became sick and when he visited the witchdoctor, he was informed that his girlfriend's mother was the one who bewitched him. He was advised by the witchdoctor to kill the deceased if he wanted to be healed. He met with the deceased in a path leading to her homestead and he killed her with the screwdriver. He left her there and returned to Angola. He was subsequently arrested and stood trial in this court for the above offences.

[4] The brother of the accused's girlfriend, the complainant in count 1, sustained a big open cut wound exposing the bone.

[5] The Post-Mortem Medical Report and the photographs taken at the mortuary reflect multiple stab wounds, lacerations and abrasions. The mortal stab wound was in the neck and it perforated the right jugular vein and trachea. There were two other stab wounds also in the neck and upper chest area and rectangular shape wounds to the skull.

#### Personal circumstances of the accused

[6] The accused was 32 years old at the time he committed the offence and 43 years old at the time he testified in mitigation. He is a deaf-mute person and the court deemed it in the interest of justice to obtain a pre-sentence report. His personal details are gleaned from this document and his testimony in mitigation.

[7] He was born in Angola. His date of birth, tribe of origin and biological family is not known. According to the welfare report, he was found as a child walking aimlessly after the Kaluheke bombing. He was informally adopted by the people who found him. He did not go to school but he was taught how to read and write. He was working periodically and when he found his girlfriend he built his own homestead where they lived. Two children were born of this relationship. He maintained them.

They are now in the care of the girlfriend's brother and are living in Opuwo. They do not attend school. His adopted family describes him a non-aggressive person.

[8] The accused was held in custody awaiting trial for 7 years and 5 months and the state proved no previous convictions against he accused.

[9] The deceased was 56 years old at the time of her death. According to a relative, the deceased was looking after her children whilst she was looking for work. She indicated that she is suffering now as she does not have someone to take care of her children.

[10] Mr Nsundano, counsel for the accused, reminded the court that, in its determination of an appropriate sentence, it must have regard to the well-established triad of factors and the purpose of punishment. He argued that the object of punishment is indeed to punish a man for his evil deed but not to break a man. He submitted that any punishment or term of imprisonment which takes away all of hope of release from an offender should be contrary to the values and aspirations of the Namibian constitution and more specifically the inherent right to dignity afforded to such an incarcerated offender.

[11] It was further his submission that the accused alone should not pay the price of all the domestic violence offences committed in Namibia and that long sentences does not necessarily achieve the objective to deter others. He submitted that the court should be alive to the interest of society and its duty to protect law-abiding citizens, but that it should not succumb to every demand that harsher penalties be applied.

[12] He referred this court to the recent case of *S v Gaingob & others* 2018 (1) NR 211 (SC). He further cited the well-known case of *S v Rabie* 1975 (4) SA 855 (A) referring to that court's view that sentence ought to be blended with mercy.

[13] He also referred this court to *S v Kastoos* 2006 (2) NR 450 (HC) where the court held that that a judicial officer must approach sentencing in a balanced way, free of anger towards an accused person.

[14] He addressed the court on the issue of cumulative and concurrent sentences and urged the court to impose a sentence of 4 years in respect of count 1 and 25

years in respect of count 2 and that the sentence in count 1 run concurrently with the sentence in count 2.

[15] Ms Nghiyoonnyane for the State submitted that the court should have regard for the aggravating circumstances in this case such as the fact that the accused in a premeditated fashion and with direct intent set out to murder the deceased. The weapon of choice was a screwdriver and the injuries sustained reflects the viciousness of the attack. She submitted that the deceased was ambushed on her way home and was unarmed and vulnerable.

[16] She referred this court to *S v Alexander* 2006 (1) NR 1 (SC) and submitted that the circumstances of this case warrants a sentence of life imprisonment.

[17] She encouraged the court to strike a good balance between the accused who is deaf-mute and the interest of society. She indicated that the evidence suggests that, despite the hardships he had to endure i.e. the death of his parents and his disability, he was loved and treated well by his adoptive family.

[18] She submitted that it has not been properly established that the accused believed in witchcraft and the furthermore that the accused has shown no remorse.

[19] She proposed a sentence of 7 years for count 1 and 35 years imprisonment in respect of count 2.

#### The offence count 1.

[20] The attack on the complainant in count 1 was perpetrated with the intention to do grievous bodily harm. The weapon used is a dangerous weapon and the blow was struck on the shoulder. I however bear in mind that the accused was provoked to anger by the family's refusal to allow him to see his girlfriend and children. I am further mindful of the fact that the accused suffered from a debilitating impairment which impacts on his ability to properly communicate with others. The complainant in count 1 and his family members, including the girlfriend of the accused, non-verbally communicated to the accused that he was not welcome. They no doubt also understood his mission and his dissatisfaction with their stance. It is difficult for most persons to deal effectively with anger and I cannot ignore the fact that the accused's

impairment diminished his ability to express himself properly. None of these factors would excuse the conduct of the accused but it lessens his moral blameworthiness.

[21] When it comes to the murder, the court has regard to the fact that he accused was not provoked in any way. He committed this offence five days after the first. By his own admission the murder was pre-meditated and intentional. The wounds suffered and the weapon used are indeed a testimony of the viciousness of the attack perpetrated on an unsuspecting and unarmed vulnerable victim. The manner in which the offence was committed indeed calls for a lengthy custodial sentence. The question whether it justifies the strongest condemnation would require a consideration of all the facts and circumstances.

#### Interest of Society

[22] It is not disputed that the accused was in a domestic relationship with the complainant in count 1 and the deceased. This court similarly need not repeat all of what has been stated in numerous cases regarding domestic violence offences. I am however mindful that each case is determined on its own facts and circumstances and that the court ought to have a balanced approach. I agree with the following sentiments expressed by Liebenberg J in *S v Kanguro* 2011 (2) NR 616 (HC) 619 paragraph 9:

‘The interests of society is a factor that deserves due consideration in sentencing and as was stated in *R v Karg*,<sup>1</sup> it would not be wrong for the sentencing court to recognise the natural indignation of interested persons and of the community at large when deciding what an appropriate sentence would be, as the element of retribution remains part of the modern approach. It is of relevance for the courts to bear in mind that, if sentences for serious crimes are too lenient, the administration of justice will fall into disrepute and aggrieved and injured persons may be inclined to take the law into their own hands. Courts, through the sentences they impose, promote respect for the law and uphold the rule of law within society.’

#### Witch craft

[23] The accused contended that he was motivated to commit the murder on the advice of a witchdoctor. The court must examine if this has been established as a fact. The accused, during cross-examination on this issue, gave contradictory

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<sup>1</sup> 1961 (1) SA 231 (A).

accounts as to when it took place. What was clear was that it did not take place between the first assault in count 1 and the murder of the deceased. It was also clear that he received medication for his ailment and there was no indication that he suffered from his ailment during the five days prior to the murder. I am not persuaded that this was his motivation. A more plausible explanation would be his anger and resentment stemming from the rejection of his girlfriend.

#### Pre-trial incarceration

[24] In *S v JB* 2016 (1) NR 114 (SC) held that the period an offender has spent in custody awaiting the finalisation of his or her trial, especially if lengthy, is a factor normally taken into account in sentencing. The period the accused has been in custody awaiting the finalization of the trail is indeed a factor this court takes into consideration given the duration thereof.

[25] It is my considered view that the accused's disability is a factor which the court ought to take into account. The pre-sentencing report has this to say on this aspect: 'Mr Pitjo is a deaf person, who lived in a community where he interacted with people who do not communicate the way he does, leading to misunderstandings. Furthermore: as a child Mr Pitjo survived multiple traumas (witness and victim of war violence, loss of entire family, forced displacement, traumatic grief/separation which has the potential of manifesting into separation anxiety. It is recommended that everyone receives interventions to deal with and overcome whatever traumas they experience to avoid the traumas re-emerging and effecting the individual. These unresolved traumas had shaped the world that Mr Pitjo grew up in. the complex situation that led to the crimes was stressful, and it threatened the family of Mr Pitjo and it had the potential of causing re-traumatization (unconscious reminder of past traumas that result in re-experiencing the initial trauma).' Perhaps the accused may benefit from trauma counseling in the correctional facility.

[26] The report acknowledges that the accused was fortunate to have landed into a loving and supportive family. The accused has no previous convictions and little if any weight can be attach to hearsay evidence adduced by the cousin of the accused's girlfriend. What is clear is that the accused understands very well what is right and what is wrong and his patent lack of remorse does not auger well for him. It is to his credit that he has earned himself a reputation of supporting his family

despite his disability and that he was a trusted employee as per the pre-sentencing report.

[27] In the final analysis, this court is reminded of what was stated in *S v Harrison* 1970 (3) SA 684 (AD) at p. 686A:

‘Justice must be done, but mercy, not a sledgehammer is its concomitant.’

[28] In cases such as these where the accused has committed a serious offence the objectives of retribution and deterrence must enjoy more prominence and of necessity at the expense of the personal circumstances of the accused.

[29] Having considered all the factors and circumstances of this case I am of the view that the following sentence would be appropriate:

Count 1. Assault with intention to do grievous bodily harm

5 years’ imprisonment of which 2 years are suspended for five years condition that the accused is not convicted of assault with the intent to do grievous bodily harm or any other offence involving violence against the person of another committed during the period of suspension.

Count 2 Murder

25 years’ of imprisonment.

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M A TOMMASI  
JUDGE



## APPEARANCES:

For the State: Ms Nghiyoonanye  
Office of the Prosecutor-General, Oshakati

For the Accused: Mr Nsundano  
Directorate of Legal Aid, Oshakati