

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

OSHAKATI

SENTENCE

CASE NO: CC 1/2019

In the matter between:

THE STATE

and

ADOLF WILHELM AUMBAASA

ACCUSED

Neutral citation: *S v Aumbaasa* (CC 1/2019) [2020] NAHCNLD 26 (13 February 2020)

CORAM: SALIONGA J

Heard on: 16, 17, and 23 January 2020

Delivered on: 13 February 2020

Flynote: Criminal Procedure: - Sentence—Factors to be considered at sentencing--Accused convicted of murder—Offence committed in the domestic setting--Accused murdered his biological uncle—Deceased being the initial aggressor—Weight not to be considered in isolation--Assessed in light of

circumstances of case and other factors— Deceased at all material times unarmed --
No imminent danger at the time the deceased was hit—Conduct of the accused
unacceptable –Personal circumstances considered--Accorded less weight--Custodial
sentence inevitable.

Summary: Accused convicted of murder read with the provisions of the Domestic
Violence Act of 2003. The accused and the deceased resided together in the
accused's mother's house. Accused admitted to having stoned the deceased on the
chest twice after the deceased dropped a panga he had. He further admitted that
when he hit the deceased with the stone, the deceased was no longer armed. He
stated that he was agitated and angry when he started hitting the deceased in the
chest with a stone because he could not understand why his uncle, the deceased
wanted to assault him. The deceased succumbed to the hitting. Though accused
opted not to say anything in mitigation, the court was satisfied that a plea of guilty
and his counsel's submission constitute adequate mitigation. Considerable weight
ought to be accorded to a plea of guilty as incentive to others. However such weight
should be assessed in the light of circumstances of the case and other factors. This
court held that the seriousness of the offence outweighs the accused personal
circumstances and such conduct calls for a lengthy custodial sentence.

ORDER

In the result the accused is sentenced to 20 years' imprisonment.

SENTENCE

SALIONGA, J

[1] On 16 January 2020 this court convicted the accused person on a charge of
murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of
2003. It is now my duty to impose an appropriate sentence. In sentencing the

accused this court must have regard to three factors, generally known as the Zinn triad, namely; the crime, the accused's personal circumstances and the interests of society. It is generally accepted that an appropriate sentence is one based on a well-balanced consideration of the aforesaid three factors.

[2] At this juncture I must state that the determination of a suitable sentence does not entail a mechanical process in which predetermined sentence are imposed for specific offences in each case. The sentencing court has to assess all relevant factors, afford appropriate weight thereto and struck a balance between the various interests.

[3] Balancing these factors is a challenging task as Miller J in *S v Gool 1972 (1) SA 455 (NPD)* stated:

'The result of over-emphasis of any of the relevant factors is often under-estimation or even a total disregard of one or more of the other factors. A mind tending to pre-occupation with the desirability of deterring others from committing an offence is apt to give insufficient attention to other factors which in the particular circumstances of the case may be more important for the purposes of assessing a just and proper sentence for the accused than standing in the dock. It is necessary to always avert to that danger'.

[4] The above being true, in my view, as Parker J in *S v Mathias Indongo* an unreported judgement of the High Court of Namibia delivered on 31 October 2007 remarked that;

'In imposing an appropriate sentence, I must strike a fair balance between competing factors in order to do justice to both the accused and the society and I may give more weight to certain factors than to others'. The above insert show that it is sometimes unavoidable for courts to place more weight to one factors than to others'.

[5] In this case your personal circumstances as an accused and the person convicted of the offence, the nature of the crime including the gravity and extent as well as the interest of the community will be looked at carefully. The court must also think through the appropriate sentence with a measure of mercy while at the same

time striving to meet the objectives of punishment being retribution, prevention, deterrence and rehabilitation. In doing that the court must be alive to the principles of individualization and uniformity which are well established in our law.

[6] On the crime itself, no doubt that the offence for which the accused is convicted of is serious with no signs of fading. The victim of this offence was none other than his own uncle. The accused had been living with him in his biological mother's house. Accused used a dangerous weapon a stone in murdering the deceased. Indications are that the accused firstly threw the deceased with a stone and proceeded to assault an unarmed uncle twice with a stone. The court has to reflect on all the surrounding circumstances in determining whether it is dealing with an extreme case of murder.¹ In casu the accused despite a quarrel he had picked up with the deceased the previous night he nonetheless went back to the deceased's room the early hours in the morning and hit the deceased to death. That is an aggravating factor to consider.

[7] Accused did not testify in mitigation of sentence but through his lawyer the court was told he was 43 years at the time of the incident and is now 44 years old. At the age of 44 he has been an exemplary citizen until his conviction in this matter. His father died while he was a young boy and his mother is still alive. Accused is the first born child of his mother and his only sibling passed on. Accused is not married but he is a father of a 20 year old boy. His son stays with the mother and is in grade nine. He was unemployed at the time of his arrest and was making a living by selling fruits, MTC recharge vouchers and vegetables earning between N\$300 -600 per month. The accused pleaded guilty to the charge.

[8] With regards to the interests of society, the court must weigh the interests of the accused and the seriousness of the offence. The interest of society should be protected as Silungwe J in *S v Sibitwani* unreported judgement delivered on 14 March 2008 stated on page 4 that;

¹ See *State v Alexander* 1998 NR 84 (HC).

'The interest of society is indeed a factor that plays a material role which requires not only serious consideration, but it must be jealously guarded. Our society is at mercy of unrepresented and unacceptable wave of cries of violence such as murder, homicide, robbery and rape, but it (society) is sick and tired of such crimes. A blatant lack of respect for the life of fellow human being has become rampant and is thus a matter of concern to society.'

[9] Mr Grusshaber submitted that the accused though elected not to testify or address the court in mitigation showed genuine remorse. He further submitted that the accused's remorse can be deduced from his willingness to plea guilty at the time he was arrested, and during his section 119 plea proceedings and eventually his plea of guilty which resulted in his conviction.

[10] Counsel further submitted that from the accused plea explanation, Exhibit A it divulges that the deceased armed himself with a panga and walked towards the accused. In turn the accused threw the deceased with a stone in the chest and the deceased fell, when the deceased fell the panga he had also fell. At that stage the deceased was no longer armed but the accused proceeded to assault the unarmed man who succumbed to his injury. Counsel therefore requests the court to consider 18 years imprisonment as an appropriate sentence.

[11] Mr Gaweseb, counsel for the prosecution submitted that unless exceptional and compelling circumstances exist or existed at the time of the commission of the offence to justify a departure from the uniform manner of sentencing in this type of cases, the personal circumstances of the accused can hardly outweigh the seriousness of the crime and the interest of society so as to justify imposing a non-custodial sentence.

[12] Further, counsel submitted that a research of sentences imposed by superior courts both in our jurisdiction and the South African jurisdiction in similar offences shows that courts are prepared to impose very lenient sentences for murder in circumstances where the accused's moral blameworthiness would be lessened by factors which existed at the time of the commission of the offence. According to counsel, the accused was a first time offender who pleaded guilty to the charge and

has no previous convictions. He is asking the court to consider imposing twenty years' imprisonment as an appropriate sentence.

[13] The court has considered both counsel's submissions in mitigation before sentence: It further considered the circumstances under which the offence was committed in that; the deceased was the initial aggressor ensuing an unarmed nephew. That the accused did not plan to kill the deceased and the hitting of the deceased happened in a spur of a moment.

[14] I concur with what Holmes JA had stated in *S v Kumalo 1973 (3) SA 697 (A)* that 'Punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances. The last of these four elements are sometimes overlooked.

[15] Notwithstanding the aforesaid in casu the aggravating circumstances of the murder of his uncle are significant and startling. I set them out as follows: the accused used a stone to hit the deceased twice on the chest. That the offence was committed in a domestic relationship as accused killed his own uncle. The deceased was an elderly person over the age of 70 at the time of his death. That murder is a serious offence which indisputably warrants a long custodial sentence.

[16] Even if a substantial lengthy custodial sentence is inevitable in the instant case same will be lessened by factors which existed at the time of the commission of the offence.

[17] In the result the accused is sentenced to 20 years' imprisonment.

J T SALIONGA

Judge

APPEARANCES:

THE STATE: Mr. Gawaseb
 Of the Office of the Prosecutor-General, Oshakati

THE ACCUSED: Mr. Grusshaber
 Of the Directorate of Legal Aid, Ondangwa