

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT

Case No: CC 14/2022

In the matter between:

THE STATE

v

MAWAYA BERNARD LIONGA

ACCUSED

Neutral citation: *S v Lionga* (CC 14/2022) [2024] NAHCNLD 17 (16 February 2024)

Coram: KESSLAU J

Heard: 30 January 2024, 9 February 2024

Delivered: 16 February 2024

Flynote: Criminal Law - Criminal Procedure – Sentence – Murder (*dolus eventualis*) - Combating of Domestic Violence Act 4 of 2003 – Offences under the Arms and Ammunition Act 7 of 1996.

Summary: The accused was convicted on three counts to *wit* count 1-Murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2003), count 2- Contravening section 2 of the Arms and Ammunition Act 7 of 1996 and

count 3- Contravening section 33 of the Arms and Ammunition Act 7 of 1996. Sentencing principles and objectives restated.

ORDER

1. Count 1: Murder (*dolus eventualis*) (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) – 24 years' imprisonment.
2. Count 2: Contravening section 2 of the Arms and Ammunition Act 7 of 1996: Possession of a firearm without a license – 2 years' imprisonment.
3. Count 3: Contravening section 33 of the Arms and Ammunition Act 7 of 1996: Unlawful possession of ammunition – 1 year imprisonment.
4. In terms of section 280 (2) of Act 51 of 1977 it is ordered that the sentence on count 3 to be served concurrently with the sentence on count 2.
5. In terms of section 10 (6) (a) of the Arms and Ammunition Act 7 of 1996, the accused is declared unfit to possess a firearm for a period of four (4) years, commencing only after the accused has served his sentence in full.
6. The shotgun with serial number no. SB-5134 (Exhibit 1) to be returned to its rightful owner.

SENTENCE

KESSLAU J

[1] The accused was convicted by this Court on three counts *to wit* Murder (read with the provisions of the Combating of Domestic Violence Act 4 of 2003), Contravening section 2 of the Arms and Ammunition Act 7 of 1996 (the Act): Unlawful possession of a firearm without a license and Contravening section 33 of the Act: Unlawful possession of ammunition.

[2] This court is now tasked with the finding of an appropriate and suitable sentence and will take into account the triad of factors being the interest of society, the personal circumstances of the accused and the crime committed. The aims of punishment *to wit* retribution, rehabilitation, deterrence and prevention will form part of the factors to be considered during sentencing. Additionally, an element of mercy will form part of the sentencing without it being misplaced pity.¹ This court will also endeavour to balance and harmonise the above factors during sentencing whilst being mindful of the fact that in some circumstances it might be necessary to emphasise one factor at the expense of another.²

[3] Another aspect to consider during sentencing is the fact that the accused was convicted of multiple offences and if sentenced individually the cumulative effect of the combined sentences might result in an excessively lengthy term of imprisonment.³

[4] This court also considered sentences imposed for similar offences in an attempt to satisfy the principle of uniformity whilst bearing in mind that the circumstances in each matter are unique.⁴

[5] In considering the interest of Society during sentencing it is the duty of this court to uphold the law whilst at the same time reflecting society's resentment and aversion towards those making themselves guilty of heinous crimes.⁵ It is furthermore important to impose a sentence that will deter the current onslaught of crimes committed against vulnerable members of our society in the context of domestic relationships.

[6] In terms of section 25 of the Combating of Domestic Violence Act 4 of 2003, a cousin to the deceased testified and narrated the impact of the loss suffered by the family. He relayed to the court that the family is heartbroken after the death of the

¹ *S v Zinn* 1969 (2) SA 537 (A); *S v Tjiho* 1991 NR 361 (HC); *S v Rabie* 1975 (4) SA 855 (A); *S v Ganes* 2005 NR 472.

² *S v Van Wyk* 1993 NR 426.

³ *S v Tcoeib* 1999 NR 24 (SC); *S v Gaingob and others* 2018(1) NR 211.

⁴ *S v Domingo* (CC 9/2020) [2021] NAHCNLD 115 (16 December 2021); *S v Gowaseb* (CC 2-2019) [2020] NAHCMD 423 (21 September 2020); *S v Katale* (CC 5/2021) [2022] NAHCNLD 80 (2 September 2022).

⁵ *S v Seas* (CC 17/2017) [2018] NAHCMD 245 (17 August 2018).

deceased and that they will never be able to forgive the accused. Furthermore that the accused did not ask for their forgiveness or offered any compensation to the family for their loss. He also told the court that the deceased left behind two minor children who are now aged 6 and 3 years. They are in the care of family members.

[7] In cross-examination it was pointed out to the witness that the accused could not apologise to the family or contribute in any manner due to the fact that he was in custody since her death.

[8] The personal circumstances of the accused was placed before court by the accused testifying under oath. He testified that he was 31 years old at the time of the incident. He had spent approximately four years in custody and is now 35 years old. He confirmed that he fathered two boys with the deceased who are currently in his relatives' care. He testified that prior to his arrest he was the sole breadwinner supporting the deceased and their two minor children.

[9] When asked by his counsel in mitigation to remark on his conviction of murder, the accused replied that he cannot remember what occurred and asked the court to be merciful as he had no intention to kill the deceased. On the charges of the unlawful possession of a firearm and ammunition the accused insisted that he is not guilty. Furthermore, when asked if he has any words to the family of the deceased, the accused replied that her death was caused by her father, whom by means of witchcraft used the accused to sacrifice their daughter. He added that they should know what they have done. Finally he submitted that he has no objection to being declared unfit to possess a firearm as prescribed by law.

[10] From the aforesaid it is clear that the accused has no remorse for what he has done. To make matters worse, he is resorting to outrageous allegations of witchcraft to lay the blame at the door of the family of the deceased. The absence of regret and remorse from the accused is an indication that he is a danger to society. As a result, the only appropriate sentence will be a considerable period of imprisonment to ensure the protection of society and to attempt to rehabilitate the accused.

[11] The crime of murder that the accused stood convicted of is extremely serious and even more so because it was committed in a domestic context. It is also clear that the offences were premeditated in that the accused arrived at their house with a loaded firearm. Whilst on his way there, he had sufficient time to rethink his actions however failed to do so. The deceased was shot at close range in the upper leg and bled to death in the presence of their baby. Without concern for the deceased or his own one month old baby the accused left the scene. The actions by the accused not only caused the loss of an innocent person but furthermore will result that the two young children will have to grow up whilst in the care of others.

[12] Regarding the convictions on the unlawful possession of a firearm and ammunition it is aggravating that the accused was trusted with these dangerous items and chose to abuse such trust by removing it from his place of employment and killing his partner. The penalty clauses⁶ in both instances allowed for the option of a fine however in the circumstances imposing a fine as an option will send an undesirable message to prospective offenders. These counts were however interlinked and committed simultaneously and for that reason their sentences will be ordered to run concurrently.

[13] Finally, it was submitted by the State that the accused be declared unfit to possess a firearm in terms of s 10 (6) of the Act which was unopposed by the accused and his counsel.

[14] After careful consideration of the above, the accused is sentenced as follows:

1. Count 1: Murder (*dolus eventualis*) (read with the provisions of the Combating of Domestic Violence Act 4 of 2003) – 24 years' imprisonment.
2. Count 2: Contravening section 2 of the Arms and Ammunition Act 7 of 1996: Possession of a firearm without a license – 2 years' imprisonment.
3. Count 3: Contravening section 33 of the Arms and Ammunition Act 7 of

⁶ See s 38(2)(b)(i) and s 38 (2)(c)(i) of Act 7 of 1996.

1996: Unlawful possession of ammunition – 1 year imprisonment.

4. In terms of section 280 (2) of the Criminal Procedure Act 51 of 1977 it is ordered that the sentence on count 3 to be served concurrently with the sentence on count 2.
5. In terms of section 10 (6) (a) of the Arms and Ammunition Act 7 of 1996, the accused is declared unfit to possess a firearm for a period of four (4) years, commencing only after the accused has served his sentence in full.
6. The shotgun with serial number no. SB-5134 (Exhibit 1) to be returned to its rightful owner.

E.E. KESSLAU
JUDGE

APPEARANCES

FOR THE STATE: V. T. Shigwedha
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