

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
SENTENCE**

Case No: CC 15/2022

In the matter between:

THE STATE

v

DAVID DANIEL

ACCUSED

Neutral citation: *S v Daniel* (CC 15/2022) [2024] NAHCNLD 26 (13 March 2024)

Coram: KESSLAU J

Heard: 5 December 2023; 23 January 2024; 5 March 2024

Delivered: 13 March 2024

Flynote: Criminal procedure – Sentence – Murder – *Dolus Eventualis* – Offence committed in a domestic context – Prevalence of such offences – Private defence – Accused exceeded the bounds of self-defence by using excessive force and a deadly weapon to inflict a multitude of fatal injuries - Custodial sentence appropriate.

Summary: The accused was convicted by this Court on a charge of Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003. The accused raised self-defence in that he was unlawfully attacked by the complainant.

The version of the accused on the attack accepted however it was determined that the accused exceeded the boundaries of private defence intentionally when he stabbed the deceased eleven times with a deadly weapon causing a multitude of fatal injuries. Sentencing principles and factors restated.

Held that even though the absence of direct intent does not *per se* qualify as a mitigating factor, the circumstances in this matter amounted to such.

ORDER

1. Murder (*dolus eventualis*), read with the provisions of the Combating of Domestic Violence Act 4 of 2003 - the accused is sentenced to 20 years' imprisonment of which 8 years are suspended for a period of five years on the condition that the accused is not convicted of murder or attempted murder committed during the period of suspension.
2. Exhibits 1, 2 and 3 are forfeited to the State.

JUDGMENT

KESSLAU J

[1] The accused was convicted on a charge of Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003, in that he exceeded the bounds of self-defence whilst having the *mens rea* of *dolus eventualis*.

[2] This court is now tasked with determining an appropriate and suitable sentence. To that end, I 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. An element of mercy will form part of the sentencing which should not be misdirected pity.¹

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.

[3] This court will endeavour to balance and harmonize the above factors whilst being mindful of the fact that in some circumstances, it might be necessary to emphasise one factor at the expense of another.²

[4] In an attempt to satisfy the principle of uniformity in sentencing, I have considered sentences imposed for similar offences whilst being mindful that the circumstances in each matter are unique.³

[5] In considering the interest of Society 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.⁴ Furthermore, it is important to impose a sentence that will deter the constant wave of crimes committed within the domestic context.

[6] Regarding the impact the murder of the deceased had on the family, an aunt testified in terms of s 25 of the Combating of Domestic Violence Act 4 of 2003. She told this court that the deceased was left an orphan at the age of six and was thereafter raised by her aunt and grandmother. In adulthood the deceased was a productive member of the community making a living through informal trading and cultivation. The deceased financially supported her family and her death left them without such income. Furthermore that the deceased died childless at the age of 32. She said that the accused's family paid compensation for their loss and financially assisted with the funeral. Furthermore, that some members of the accused's family attended the deceased's funeral and shared in their grief. She confirmed that the accused's family apologized for his actions.

[7] Turning to the personal circumstances of the accused, he accused testified that he is 45 years, unmarried with six children. The ages of his children varies from 7 years to 23 years. The two younger children, aged 7 and 12 respectively, are living with their biological mother whilst the other four are being cared for by his niece at his home. The accused said that prior to his arrest, he was a self-employed vendor and furthermore earned rent on his premises at approximately N\$ 9000 per month. He has been in custody for close to 2 years and 6 months. He said that he gave

² *S v Van Wyk* 1993 NR 426.

³ *S v Silunga* (SA 1 of 2000) [2000] NASC 5 (8 December 2000).

⁴ *S v Seas* (CC 17/2017) [2018] NAHCMD 245 (17 August 2018).

instructions to his family to apologize to the family of the deceased as he was in custody and unable to do so. Furthermore, he personally contributed to financial compensation to the deceased's family. The accused agreed with the State that he committed a serious and violent offence in a domestic context by using a dangerous weapon.

[8] The right to life shall be respected and protected according to the Constitution. The crime of murder remains one of the most serious in our law. Unfortunately, the crime of murder, committed in a domestic context, is alarmingly prevalent and is thus an aggravating factor. The deceased, being a woman, was part of the vulnerable members of society which deserves the protection from this court. She was stabbed multiple times with an enormous knife which caused her instant death. Considering the nature of the offense the accused cannot escape a custodial sentence.

[9] When considering the moral blameworthiness of the accused, this court cannot lose sight of the circumstances in which the crime was committed. The deceased was previously removed with the assistance of the police from the premises of the accused. She chose to return that night and attacked him with an unknown object on his head. This caused a scar on his forehead. She furthermore in a barbaric manner bit him in his face which left a scar which is visible up to this day. The actions of the deceased thus amounted to the provocation of the accused.⁵ The circumstances of this matter, which resulted in a conviction on murder committed with the *mens rea* of *dolus eventualis*, constitute a mitigating factor.⁶

[10] After careful consideration of the above principles, factors and circumstances the accused is sentenced as follows:

1. Murder (*dolus eventualis*), read with the provisions of the Combating of Domestic Violence Act 4 of 2003, the accused is sentenced to 20 years' imprisonment of which 8 years are suspended for a period of five years on the condition that the accused is not convicted of murder or attempted murder committed during the period of suspension.

⁵ *S v Gowaseb* (CC 2/2019) [2020] NAHCMD 423 (21 September 2020).

⁶ *S v Werner and others* (SA 8-2021) [2023] NASC (28 July 2023); *S v Gariseb* 2016 (3) NR 613 (SC); *S v Heita* (CC 14/2016) [2024] NAHCNLD 18 (16 February 2024).

2. Exhibits 1, 2 and 3 are forfeited to the State.

E.E. KESSLAU
JUDGE

APPEARANCES

FOR THE STATE: L. S. Matota
Office of the Prosecutor - General, Oshakati

FOR THE ACCUSED: V. Hango
Instructed by the Directorate of Legal Aid