



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

Case no: CC 9/2015

**THE STATE**

versus

**JOSHUA HITUAMATA**

**ACCUSED**

**Neutral citation:** *State v Hituamata* (CC 9/2015) [2017] NAHCMD 106 (4 April 2017)

**Coram:** SHIVUTE J

**Heard:** 7 March 2017

**Delivered:** 4 April 2017

**Flynote:** Murder – Sentence – Factors to be taken into account – First offender – Time spent in custody pending the finalisation of trial – Accused contributed towards funeral expenses of deceased – Accused paid compensation to the family – Factors in his favour – Aggravating factors – Murder – Serious offence – Accused shot deceased six times whilst deceased laying helplessly – Sentence to fit the crime.

**Summary:** Murder sentence – The accused is convicted of murder with direct intent – Factors to be taken into account – First offender – Time spent in custody

pending the finalisation of the trial – The accused has contributed towards the funeral expenses of the deceased and he paid compensation to the deceased's family. These are factors in his favour.

Aggravating factors: The accused shot at the deceased six times whilst the deceased was laying helplessly. The sentence to be imposed should fit the crime.

### **SENTENCE**

- (a) Murder with direct intent: The accused is sentenced to 28 years' imprisonment.

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### **ORDER**

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- (b) The firearm with serial no. 3540 used in the commission of the offence is forfeited to the state.

- (c) In terms of s 10 (7) (8) of the Firearms and Ammunition Act, 7 of 1996 the accused is deemed not to be fit to possess a firearm for 20 years with effect from the time the accused finishes to serve his sentence.

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### **SENTENCE**

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SHIVUTE, J

[1] The accused was convicted of one count of murder with direct intent by shooting the deceased six times with a lethal weapon after he had already incapacitated him. The deceased died at the spot.

[2] The accused testified in mitigation and called no witness. His personal circumstances are as follows:

He is a Namibian national aged 49. He is single with one child and five other dependents. His daughter is 24 years old and she is still a student. He financially assists his daughter. The mother of his daughter is deceased. He has been incarcerated for about 4 years pending the finalisation of his trial. He had apologised to the court as well as to the deceased's family for causing the death of the deceased, although he insisted that the death came about by accident. He had contributed towards the funeral expenses of the deceased. Furthermore, he had also paid compensation to the traditional authority and to the family of the deceased in terms of his customary law. He prayed to the court to exercise mercy on him when imposing sentence.

[3] Counsel for the State called the deceased's brother in aggravation of sentence. He testified that the deceased was self-employed and he was responsible for assisting the family financially. The family includes the deceased's parents and siblings. He also assisted the family in any manner he could whenever it was necessary. The witness continued to testify that the deceased's death had an effect on the family because it had left a gap that could not be filled.

[4] Counsel for the accused argued that the accused has shown remorse by apologising and contributing towards the deceased's funeral and urged the court to exercise leniency on the accused. Counsel further suggested that a sentence of 20 years' imprisonment will be just in the circumstances, considering the time the accused has been in custody.

[5] On the other hand, counsel for the State argued that the accused committed a senseless murder. The deceased was killed for a petty quarrel that involved the amount of N\$164. The offence committed is serious and attracts a heavier sentence. Counsel suggested a sentence of 30 years' imprisonment. Counsel for the State further made an application in terms of s 35 (1) (A) of the Criminal Procedure Act 51 of 1977, for the firearm used in the commission of the crime with serial No. 3540 to be forfeited to the State and for the court to invoke the provisions of s 10 (7) of the

Arms and Ammunition, Act 7 of 1996, for the accused to be deemed not fit to possess a firearm for the rest of his life.

[6] Counsel for the accused did not oppose the application sought by counsel for the State and left it in the hands of the court.

[7] In deciding on the appropriate sentence, I will be guided by the general principles of sentencing known as Zinn triad as discussed in *S v Zinn* 1969 (2) SA 537 (A). This court will not be said to have exercised its discretion judiciously if it does not take into account the seriousness of the crime and the mitigating factors as well as the aggravating factors surrounding the person of the offender. At the same time, an appropriate sentence should also reflect the interests of society that includes among others, the protection of society needs or the removal of the offender from the society for a long period not only to protect the society against the offender but also to be a deterrence to would be offenders as well.

[8] Although the offence of murder is serious in nature, the court must have regard to the degree of harmfulness of the offence and the degree of culpability of the offender. The accused in the present matter shot the fatal shots directed to the deceased's head and chest whilst the deceased was already laying helplessly, making the degree of culpability of the offender very high. I am therefore, of the opinion that an appropriate sentence should reflect the seriousness of the crime and it should fit the crime.

[9] As far as the accused is concerned, he is a first offender. He contributed towards the funeral expenses of the deceased and he also paid compensation. The accused has been in custody for about four years. These are factors in his favour.

[10] With regard to interests of society in passing an appropriate sentence, it must have an element of serving the interest of society namely the sentence should have a deterrent effect, to deter the offender and would be offenders and a prevention effect to remove the offender from society in order to protect the society. The sentence should also have a retribution effect.

[11] Having considered the Zinn triad guidelines on sentencing, I am of the view that the sentence below will be an appropriate one in the circumstances:

(a) Murder with direct intent: The accused is sentenced to 28 years' imprisonment.

### **ORDER**

(b) The firearm with serial no. 3540 used in the commission of the offence is forfeited to the state.

(c) In terms of s 10 (7) (8) of the Firearms and Ammunition Act, 7 of 1996 the accused is deemed not to be fit to possess a firearm for 20 years with effect from the time the accused finishes to serve his sentence.

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NN SHIVUTE  
Judge

## APPEARANCES:

THE STATE:

Mr E N Ndlovu

Of Office of the Prosecutor-General, Windhoek

ACCUSED:

Mr M Siyomunji

Siyomunji Law Chambers