

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
CIRCUIT COURT HELD AT



MAIN DIVISION
RUNDU

SENTENCE

Case No: CC 12 /2022

THE STATE

v

NCUNDA MOSES NEROMBA

ACCUSED

Neutral citation: *S v Neromba* (CC 12/2022) [2023] NAHCMDCR 483 (8 August 2023)

Coram: DAMASEB JP
Heard: 4 August 2023
Delivered: 8 August 2023
Sentence corrected: 9 August 2023

Flynote: Criminal Procedure – Conviction – Murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003 –Guilty plea – Conviction in terms of s 112(2) – Sentence – Mitigating factors – No previous convictions – Pensioner – Did not waste the courts time – Barbaric assault against his wife – Sentenced to 20 years' imprisonment of which five years are suspended on conditions.

Summary: The accused was convicted on 4 August 2023 with murder after he pleaded guilty and tendered a guilty plea in terms of s 112 (2) of the Criminal Procedure Act 51 of 1977 in, he did unlawfully and intentionally kill Atyi Nangura Ncame by beating her with a stick, fists and stabbing her with a knife, whilst in a domestic relationship.

In mitigation the convict pleaded for mercy. He pleaded that he has been in custody awaiting trial for four years. He is a pensioner and has nine children. He pleaded guilty and had tendered his apologies to the deceased's family. He is a first time offender and indicated that killing his wife was a mistake.

The courts' witness in terms of s 25 of the Combating of Domestic Violence Act, the deceased's aunt testified that the accused must remain in custody and he must not come out for killing her daughter in the manner that he did.

The state submitted that there are no mitigating factors present in the matter before court and that the convict must get a custodial sentence to act as a deterrence for others planning to commit similar offences.

The convict before court is 65 plus years of age and the sentence to be imposed must be in line with the principle as laid down in *Gaingob v The State*.

Held that, murder is now common place in our society, especially by men against women, that the sentences the courts impose must be severe. Lenient sentences are out of place in the current climate of societal violence. The extent of severity will of course depend on the particular circumstances of each case.

Held that, the convict's personal circumstances are very compelling and had it not been for his age this court would have meted out a life sentence for the heinous manner in which he killed the deceased. Taking the totality of the evidence into consideration: Mr Neromba is sentenced to 20 years imprisonment of which five years are suspended for

a period of five years, on condition that he is not convicted of murder, manslaughter or grievous bodily harm during the period of suspension.

VERDICT

Mr Neromba is sentenced to 20 years imprisonment of which five years are suspended for a period of five years, on condition that he is not convicted of murder, manslaughter or assault with intent to cause grievous bodily harm during the period of suspension.

SENTENCE

DAMASEB JP:

Introduction

[1] Mr Neromba, a member of the San community¹, was charged with murder as follows:

'Murder, read with s 1 and s 3 of the Combating of Domestic Violence Act 4 of 2003 in that on or upon 29 May 2019 and at or near Etendera Village in the district of Rundu, he did unlawfully and intentionally kill Atyi Nangura Ncame by beating her with a stick, fists and stabbing her with a knife, whilst in a domestic relationship.'

[2] The summary of substantial facts in terms of s 144(3)(a) of the Criminal Procedure Act 51 of 1977 (the CPA) states:

'The deceased was residing at Etenderera Village in the Kavango West Region near Mururani. The accused and the deceased were married. On 22 May 2019 the accused and the deceased were together on their way from a shebeen to their resident. The deceased went to sit on the footpath and refused to go home. The accused started to assault the deceased with a stick, kicked her and stabbed her with a knife. The

¹ I reference his ethnicity only because it is being relied upon in mitigation of sentence.

deceased died on the spot on account of this assault. After the assault the accused went to people at the village and reported that he murdered his wife.'

[3] On the admirable and commendable advice of his legal practitioner, Ms Hango, the then accused (Mr Neromba) tendered a guilty plea and made a plea explanation in terms of s 112(2) of the CPA. The State accepted the plea explanation as containing all the elements of the crime. The plea reads as follows:

'COUNT OF MURDER READ WITH DOMESTIC VIOLENCE ACT 4 OF 2003

4. In pleading guilty to Murder, I admit that on or about the 22nd day of May 2019 at or near Etendera village I unlawfully and intentionally kill Alyi Nangura Ncame (the deceased) by beating her with sticks and fists. My plea of guilty is based on the following facts:

4.1 On the 22nd day of May 2019, I and the deceased left the cuca shops to go home after we had spent the day there drinking traditional beer.

4.2 Along the way, the deceased went to sit in the footpath and refused to go home. I then started assaulting the deceased with a stick several times all over her body and kicked her. The deceased died on the spot on account of the assault. I intended to cause her death.

4.4 After the assault, I ran home to the village and reported that I murdered my wife.

4.5 Although I was intoxicated at the time, my state of intoxication was not such as to render me criminally incapable in the sense that I still knew the difference between right and wrong and I still had the capacity to act in accordance with such insight. I accordingly admit also the element of knowledge of unlawfulness.

4.6 I admit that the deceased sustained no further injuries until such time as a medico-legal post-mortem examination was performed on the body of the deceased.

4.7 I accordingly admit that the deceased died as a result of the injuries sustained during the course of my assault on her.

4.8 I admit further that the deceased was in life an adult female who is my wife.

4.9 I further admit that all of the aforementioned occurred in the district of Rundu.

4.10 I further admit that my aforesaid action was both wrongful and unlawful and that I have no legal justification for assaulting the complainant.

4.11 I am at a loss to explain precisely what went through my mind when I assaulted the complainant. I have anguished over this incessantly ever since the incident. My actions have shocked me, I have never experienced something like this.'

[4] Based on his own plea explanation, duly accepted by the State, I found Mr Neromba guilty of the murder of his wife.

[5] Several documents were admitted into evidence with the consent of the convict. These include:

1. Indictment – 'A'
2. Plea explanation in terms of s 112 (2) and dated 4 August 2023 – 'B'
3. The report on a medico-legal post Mortem Examination and the certificate of the post-mortem examination by Dr.Alfonso dated 28/05/2019.-A11 – 'C'
4. The photo plan with neg.52/2019 by W.O.Marungu dated 10 July 2019.-A10. – 'D'

5. Court proceedings in terms of s 119 from the magistrates court – ‘E’

Cause of death

[6] The post-mortem report concluded that the cause of death was severe internal haemorrhage and the following observations were made:

‘Secondary post-mortem changes: Rigor Mortis

External appearance of body and condition of limbs:

Multiple injuries in head, genitals and thorax

Head and neck

Skull: Laceration in right forehead

Chest

Thoracic cage and diaphragm: Fracture of right 3,4, 5 ribs

Mediastinum and oesophagus: Thoracic Haemorrhage.

Abdomen

Liver, gall bladder and biliary passage: Liver rupture

Kidney and ureters right: Rupture

Genital organs: Vaginal injury’.

Photo-plan

[7] It is common cause from the photo-plan that the deceased was dragged in the sand for some distance either during the assault or after. The photo-plan tells a horror story. It gives visual expression to the pathologist’s dry written narrative. It shows pictures of the wounds on the deceased’s body. Simply put, they are horrific. There are lacerations all over the body. There are deep cuts on the forehead and the torso. There are lacerations and cuts on her genitalia. It is no exaggeration that no part of the deceased’s body was spared. So comprehensive was the assault on the deceased.

[8] The nature and extent of the injuries reveal the state of mind of Mr Neromba when he assaulted his late wife. He intended to kill the deceased by the most brutal

means. He intended it to be painful and prolonged. His victim must have endured unimaginable pain and suffering.

[9] After I entered the guilty plea, Mr Pienaar for the State advised the court that a victim impact witness, Ms Gunda Kandambo, as contemplated by s 25 of the Domestic Violence Act 4 of 2003 was available. She was called to the stand and provided information under oath. According to this witness, the deceased was her niece whom she raised as her own child. The deceased had many children with the convict. After the death of the deceased the children are being cared for by other people. Ms Kandambo was unable to tell me who those people are. She stated that her efforts to get the children to come to live with her had proven fruitless. She painted a picture of children whose whereabouts are uncertain and one wonders if they are not in some peril wherever they are. As will become apparent in due course, even the convict himself testified under oath that he does not know where the children are. On his own version the youngest was only learning to talk when the mother died.

[10] I will fail in my duty if I do not draw the attention of the authorities to trace these children and to ensure their wellbeing. A copy of this judgment will therefore be forwarded to the Governor of the Kavango East Region to bring the matter to the attention of the relevant agencies. This court is upper guardian of minor children and where there is reason to believe that children's welfare may be in danger, it has to act.

Evidence in mitigation

[11] The accused testified in mitigation. He informed the court that he does not know his age although before the incident he was in the process of applying for an identity document to enable him to start receiving pension. Both counsel agreed with the Court that for sentencing purposes, the Court must assume that he had reached the age of 60 at the time he had committed the murder. Since he must be considered to be older than the deceased who was 60 years at the time of her death. For purposes of sentencing the accused is probably between 60 and 65 years of age.

[12] The convict has nine children with the deceased although he does not know where they are. He was born and raised in a rural setting of a village, never attended school and had never been in formal employment. He testified that the members of the local dominant ethnic group with whom he grew up sent their children to school but prevented him from attending school so that he can tend to their livestock.

[13] The convict testified that he had apologised for his actions to the deceased's mother. He said he was sorry for his actions as reflected by his guilty plea.

[14] It emerged during cross-examination that when he killed the wife they were accompanied by their youngest child.

Submissions

[15] Ms Hango submitted that the convict is an uneducated man of advanced age (probably not having a long life expectancy) and should not be sent to prison for a very long period of time. She added that he has shown remorse; served four years of pre-trial detention; and is a first offender without a track-record of violence.

[16] Mr Pienaar, for the State emphasised the prevalence of violence against women in our society and the community's expectation that murderers should be punished severely.

[17] This court now has the difficult task to apply the principles laid down by the apex Court's ratio in *S v Gaingob and others*².

Discussion

[18] *Gaingob* establishes the following important principles. Life imprisonment is the harshest penalty in Namibia. That penalty passes constitutional muster because it

² *S v Gaingob and others* 2018 (1) NR 211 (SC).

leaves open the prospect of the prison authorities releasing a person after he or she has served a minimum of 25 years imprisonment. A fixed sentence of long term imprisonment (such as those which were being considered in *Gaingob*) which – because of its length and the age of the convict – removes all hope of a prisoner ever being released from prison is a sentence harsher than life imprisonment and is unconstitutional for being cruel, inhuman and degrading.

[19] A sentence of imprisonment in excess of average life expectancy of 37 and a half years is unconstitutional. As the Supreme Court said at para [74] ‘. . . an effective sentence of more than 37 and a half years would mean that such offender is worse off than those sentenced to life imprisonment.’ In other words, a Namibian court may not impose more than 37 and a half years direct imprisonment on a convicted person however heinous his or her crime(s).

[20] If the sentencing court’s objective is to permanently remove a convict from society life imprisonment would achieve that result. (But it seems to me that such a sentence will also not pass muster if the convict is, for example, 80 years old because he or she would have lost all hope of release removed). Dealing with what it referred to as ‘*de facto* life imprisonment’ (ie a sentence which has the effect that the prisoner dies in prison because the release date is beyond their life expectancy), the court said at para [64]:

‘This form of informal life sentence — where a sentence is so unusually long so as to deny offenders all possible hope of ever being released during their lifetime — was found by the SCA in *S v Siluale en 'n Ander* ‘to be alien to a civilized legal system’. I entirely agree with that characterisation. The SCA held that where the circumstances of a case required a sentence which for all practical purposes required the removal from society of an offender, life imprisonment is the only appropriate sentence . . . ’

[21] There are unanswered questions which our apex court must still address in due course, but that is the present state of the law. An obvious example is the statutory

regime which requires courts to impose mandatory minimum sentences in excess of 37 and a half years for repeat offenders such the Combating of Rape Act 8 of 2000. Those sentences were not the subject of decision in *Gaingob* yet they remain on the statute book.

[22] Under the current state of the law as I am bound to apply it, there is now a real prospect of unequal treatment of offenders contrary to art 10 of the Namibian Constitution. Take for example two offenders who commit similar offences or who even commit an offence together. If there is a vast discrepancy in their ages, their sentences may have to be differentiated – the older one getting a lighter sentence to comply with the *Gaingob* ratio. Alternatively, which is even more worrisome, the younger one will have to be given the same sentence as the older one to ensure equality.

[23] Back to the present case, as things stand, I am bound by the *Gaingob* ratio and have to follow it in my consideration of a condign sentence for this elderly man whose age I am even uncertain of. I will err on the side of caution and (in favor of liberty) assume that he was 60 years old when he committed the crime and 65 years old now.

The crime

[24] As I have already demonstrated, Mr Neromba committed a heinous crime. He subjected his late wife to the most humiliating ordeal. It beggars belief that a husband could display such gratuitous violence against the woman who bore him nine children – for the flimsy reason that she refused to go home and insisted to remain at the cuca shop. As I pointed out during *Haingura's*³ sentencing, murder has regrettably become the currency for the settlement of the most trivial interpersonal disputes.

[25] The convict subjected the deceased to such severe assault that he did not spare any part of her body. When one considers the severity of the wounds, it is mind boggling that they were all inflicted with a stick. He denies that a knife found by the

³ *S v Haingura* (CC 23/2022) [2023] NAHCMDCR 482 (8 August 2023).

police at the scene of the crime was his or that he used it in the assault. Improbable as it may sound, his own version makes the assault barbaric. For a stick to cause the injuries depicted on the crime scene photos, the amount of force used must have been enormous beyond measure and comprehension.

[26] Murder is now common place in our society, especially by men against women and the sentences the courts impose must be severe. Lenient sentences are out of place in the current climate of societal violence. The extent of severity will of course depend on the particular circumstances of each case.

[27] The convict's personal circumstances are very compelling. He was 60 years old or more when he committed the crime and has been in pre-trial detention for four years. He is an unsophisticated man from a vulnerable community for whom, as this case demonstrates, formal education is a distant dream. The poor circumstances in which he grew up are heart-wrenching. He had from the start demonstrated his remorse by agreeing to plead guilty and to be open with the court. He made clear that there is no excuse for what he did.

[28] Had it not been for his age, I was considering a sentence of life imprisonment for Mr. Neromba which is considered by our apex court as the severest penalty that a court may impose. To sentence a man of 65 or perhaps more to a term in excess of 20 years effectively removes all hope. He would be over 80 years if such a sentence were imposed. Mr. Pienaar for the State was magnanimous in his approach to an appropriate sentence when the Court drew his attention to the import of *Gaingob*. He proposed a sentence of 20 years of which three should be suspended whereas Ms Hango proposed a sentence of 18 years direct imprisonment.

[29] I am indebted to both counsel for their very helpful submissions. Both counsel consider that about 18 years is an appropriate sentence, if regard is had to Mr. Pienaar's suggestion of a 20 year sentence of which three years should be suspended. Counsel's submissions have greatly lightened the burden on my shoulders as to what is an appropriate sentence, although I am not bound by their proposals. From what I have

previously stated, an effective sentence of 20 years or more would not be appropriate in the circumstances of Mr. Neromba.

Sentence

[30] Having regard to all the circumstances of the case, I impose a sentence of 20 years imprisonment of which five years are suspended for a period of five years, on condition that Mr. Neromba is not convicted of murder, manslaughter or assault with intent to cause grievous bodily harm during the period of suspension.

[31] He will be approximately 80 years old when he completes his sentence. That is a long time but this crime is such that a tariff shorter than 15 years effective imprisonment would be shockingly inappropriate and send out a wrong message.

[32] I direct the local representative of the Prosecutor General, Mr Pienaar, to ensure that a copy of this judgment is delivered to the Governor of the Kavango East Region.

Postscript

[1] After handing down sentence, I realized that I made a mistake in describing one of the offences which are the subject of suspension. In its current form the sentence reads:

‘20 years of which five years are suspended for a period of five years, on condition that he is not convicted of murder, manslaughter or grievous bodily harm during the period of suspension.’

[2] There is no offence ‘grievous bodily harm’. That is clearly a technical mistake. I intended to say ‘assault with intent to cause grievous bodily harm’. Section 298 of the Criminal Procedure Act 51 of 1977 empowers the court as follows:

'When by mistake a wrong sentence is passed, the court may, before or immediately after it is recorded, amend the sentence.'

[3] I accordingly amend the sentence as follows:

'I impose a sentence of 20 years imprisonment of which five years are suspended for a period of five years, on condition that the convict is not convicted of murder, manslaughter or assault with intent to cause grievous bodily harm during the period of suspension.'

[4] I caused both legal practitioners to be advised that I am going to correct the sentence accordingly.

P.T. DAMASEB
Judge-President

APPEARANCES:

THE STATE: JW Pienaar
Of Office of the Prosecutor-General

ACCUSED: P. Hango
Instructed by the Directorate of Legal Aid

