



CASE NO.: CC 30/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

EWALD EWELIESA GAWESEB

ACCUSED

CORAM: SIBOLEKA, J

Heard on: 2010 October 4, 6, 13, 14, 15, 18, 19, 20; 26

Delivered on: 2010 October 29

SENTENCE:

SIBOLEKA, J

[1] Ewald Eweliesa Gaweseb, having been convicted as follows: Murder as read with sections 1, 3 and 21 of the Combating of Domestic Violence Act, Act 4 of 2003, Defeating or obstructing the course of justice, it is now incumbent

upon me to consider what appropriate sentence should be passed on you.

[2] You would need to know that the ultimate purpose of the whole of the criminal process is to induce the observance of law and order for the common good of society as a whole. One principal way of achieving this goal is the imposition of punishment upon persons who are convicted of crimes such as yourself. Punishment is the Courts official sanction calculated to interfere with life, liberty or property of the offender which often entails the infliction of suffering for an offence. Therefore the ultimate aim of punishment is to protect society against crime.

[3] In sentencing you it is necessary to bear in mind the crime, the interest of society and your personal circumstances, all of which are commonly referred to as the triad. See *S v Zinn* 1969(2) SA 537 (AD). The element of mercy must also be considered and the measure of the scope will depend upon the circumstances of each case.

[4] In *S v Rabie* 1975(4) SA 855 (AD) at 861 C to D, Holmes, JA, said the following about sentence:

"While recognizing that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society."

[5] I am alive to the sentencing principles being prevention, deterrence

rehabilitation and retribution. In sentencing you, I have the task of harmonizing and balancing these principles and to apply them to the facts.

[6] The crime of murder by its very nature is serious and the particular features thereof in this matter are severe.

[7] Accused pleaded guilty to both counts of the indictment. Details of the incident and what exactly happened surfaced during the evidence in extenuation of sentence by the accused and in aggravation by Magdalena Xoagus (the mother of the deceased.)

[8] The deceased boy (13 months old), his 5 year elder brother, their mother Magdalena Xoagus and the accused resided at house no. 36 at Henties Bay. The accused and the deceased's mother had a boy and girl friend relationship, at the start of which the deceased's mother had six children excluding the deceased. The water tap was far away from their residence and as such they kept clean water in a bucket for use. The accused did not tell the deceased' mother that he had a pending case. When he was latter sent to prison for raping another woman, she visited him twice at Walvis Bay Prison, but thereafter stopped and decided on her own not to continue with the relationship. According to the deceased's mother, she wanted to start her own life, because she saw that the accused would stay long in prison.

[9] During the accused's incarceration, the deceased's mother was pregnated by another man and a baby boy was born, who is the deceased in this matter.

According to the deceased's mother, she stopped the relationship with the deceased's father, because he used alcohol too much.

[10] After the accused's release from prison he came to the deceased mother's house, where the latter told him she has got a child with another man and for that reason she did not want to be with him anymore. Both say one begged the other to continue with the relationship. Be it as it may, they stayed together and agreed to marry each other.

[11] According to the accused the deceased's mother was cheating on him and problems related thereto had not yet been resolved but he nonetheless forgave her and allowed her to go to Otjimbingwe to attend to one of her children reported missing. This was denied by the deceased's mother who stated that she did not have problems with the accused at the time she left for Otjimbingwe. When the accused was questioned about how he had forgiven the deceased's mother (the alleged transgressor according to him) the following was stated:

"Ms. Moyo:

Mr. Ewald, the deceased was the innocent party in this, can you confirm that? - I confirm that my Lord.

He was only a baby, an infant? - Correct my Lord.

Who needed protection from you? - Yes my Lord.

You forgave the alleged transgressor - Yes my Lord.

You even refused an invitation to punch her (the transgressor) a little bit so that you can satisfy your pulse - Yes my Lord."

It is very clear from the above, that the accused had indeed forgiven the so

called culprit. I am therefore not persuaded to accept that he killed the deceased because he was heartbroken when he thought about the disappointments the deceased's mother caused him. According to the deceased' mom she wanted to take the two boys along with her to Otjimbingwe, but the accused desuaded her from doing so, citing money constraints, because he had given her N\$100,00 from the sale of fish he usually caught at the beach of Henties Bay. The deceased's mother agreed, because the accused treated the two boys as his own biological children. According to her, the accused would come at her workplace and fetch the deceased, take him home, stay and look after him until she knocked off in the evening. She stated that the relationship between her and the accused and between the accused and the deceased was very good, that is why she found it safe to leave her two boys with the accused at home.

I agree with this altogether, because when the accused was asked how he came to know about the birth dates of the two boys (the deceased and his elder brother) this was his reply:

"...My Lord, the reason why I know their ages, respective ages is, these two boys were together with me as my children, and I had sight on their birth certificates," my own underlining.

[12] On Saturday at 07h00 in the morning when the deceased's mother left for Otjimbingwe, the accused escorted her to the hiking point. The two boys were still asleep and they just pulled the door of their house to close. On their way to the hiking point she checked in at Paulina Xoagus's house and asked her to look after the two boys. Paulina confirmed this in her testimony in

Court and said the accused used to leave the two boys at her home on his way to the beach for fishing. She would look after them during the day when the accused was busy fishing, and she would take them back home in the evening when the accused had come back from fishing. On the day of the incident, Paulina testified that she carried the deceased who was dressed in his nappies and the elder brother was walking and she handed the two boys as usual to their step father, the accused. According to her, the deceased was okay. The accused confirmed that he allowed the deceased's mother to go to Otjimbingwe and that he remained at home with the two boys during her absence. They disagree as to on whose request the two kids remained behind, but this is not an issue. I take it that the accused indeed agreed to remain behind with the two boys and that if he did not want to do so, their mother would have taken them along with her to Otjimbingwe or would have left them with her aunt, Paulina Xoagus.

[13] In the evening of the day of the incident, Paulina Xoagus left the two boys in the care of their (step father), the accused. According to the accused's evidence in mitigation of sentence, the elder boy was outside the house playing. Accused sat in the sitting room, and the deceased was also there sitting on a blanket. The accused picked up a magazine 'huisgenoot', and was reading it. This reading, according to him has not influenced him to kill the deceased in anyway and neither was he able to tell the Court what this reading was all about. The accused started thinking about the disappointments the deceased's mother caused to him and he became very heartbroken.

[14] The deceased was still sitting on a blanket when the accused stood up, and grabbed him with one hand on his throat (by the neck) and with the other hand around his body. He lifted the deceased, took him to the bedroom and put him head low, (head first) in a 20 litre bucket full of water. The accused saw that the deceased had started struggling, kicking his feet obviously due to suffocation, but he nonetheless went and sat in the sitting room. While so sitting the accused continued to hear the noise of the water in the bucket caused by the deceased as he was kicking with his legs, obviously seeking for help which did not come. The accused waited until he could no longer hear the noise of the water in the bucket, and he knew then that he was dead. He then stood up went into the bedroom and removed the body of the deceased who was then indeed already dead and put the body into the bag pack and put it in the spare room. All these are aggravating factors to be taken into consideration in determining what a suitable sentence will be.

[15] When the elder boy came, he gave him food and prepared his bed. When he latter went to bed he took the bag containing the body of the deceased, and threw it in the sea so that no one else should know about it. Later he felt bad and drank battery acid but vomited, and lived to come and tell the story of what happened. He thereafter made a false complaint with the police, stating in his statement that the deceased was kidnapped by four unknown male persons who also attempted to kill him. The accused thereby caused a police docket Henties Bay Crime Register 45/02/2006 to be opened against the unknown persons and investigations launched accordingly. According to Detective Constable Amamub the investigations for kidnapping were progressing when it was found that during the absence of the deceased's mother the accused was the only person who was staying with him at the

house, as a stepfather. A battery with some lids open was also found at the house leading to the suspicion that the accused may have drunk the acid at his home and not in the veld as he was alleging that four unknown men had forced him to do so. Latter the accused decided to co-operate and told the police the truth and he made a confession regarding how he killed the deceased. According to the accused the main cause of this incident was that the deceased's mother did not keep the promise that they should marry each other. The deceased's mother denied this, because according to her they had agreed to marry somewhere in April, but they latter decided to sell their rings to those who married earlier, and this was followed by the demise of the deceased. Worse still, so testified the accused, the deceased's mother did not inform him that she had been pregnated by another man and she had given birth to a baby boy (the deceased) in the matter. It was only after his successful appeal and a subsequent release from prison that he had to come and see the baby boy (the deceased) with his own eyes.

[16] The above, so said the accused, coupled with the fact that according to him, the deceased's mother continued to cheat and appeared not wanting to stop her relationship with the deceased's father prompted the accused to kill the deceased.

[17] It is my considered view that the deceased, only 13 months old and still being dressed in nappies and sometimes still being carried along on the back of an elderly person had absolutely nothing to do with that relationship, and neither is he to blame for the none fulfillment of the promise to marry. The accused committed the highest wrong that can ever be perpetrated on a human being when he released his anger on a small child. To say the death of the deceased was prompted by the fact that his mother was not honest in a

love relationship is in fact an aggravating circumstance of a very high order. The deceased's protection and well being entirely depended on the accused. At that age there was nothing the deceased could do to escape an attack such as this. He was at the mercy of the accused in whose care his mother had left him. The accused had the responsibility to look after the deceased. In the end it is that noble responsibility (parental care) that the accused has brutally transgressed. There is no ground of justification that can soften the condemnation of such a vicious attack on a small child.

[18] The personal circumstances of the accused placed before Court by his counsel, Mr Ujaha are as follows:

The accused is now 31 years of age, he was 27 years at the time of the commission of the offence. He is single, has two girlfriends, Magdalena and Rosalia who is currently three months pregnant. His father passed away in 2000, and the mother is a pensioner. He has one brother and four sisters, two of whom are employed at Karibib and Otjimbingwe. He is maintaining a four year old child of his girlfriend, and is unemployed. He does casual construction work. At the time of the offence he was unemployed, but he used to do fishing on his own at the beach in Henties Bay. He went up to Grade 4 in school, pleaded guilty to both counts (which are serious in nature), was honest with police officers. He has taken the Court into his confidence, and did not waste the Courts time. He spent two years in custody before he was released on bail. He has shown remorse or contrition and is asking for forgiveness. He also regrets what transpired on that horrible day. According to the defence counsel, these factors, coupled with the time the accused spent in custody are important mitigations giving cause for a reduction in sentence.

[19] The Court appreciates the guilty plea tendered by the accused in this regard. However, according to the accused's evidence in mitigation of sentence, he dumped the body of the deceased in the sea so that no one should know about the matter. This conduct leaves a lot to be desired when viewed in the perspective of what would have happened if the deceased's body was not washed ashore where it was detected by passerbys who alerted the police. It would have been very difficult for the police to find out what had happened to the body of the small boy.

Therefore it could safely be said that the discovery of the deceased's body, the fact that the accused was the only person who was staying with him in the absence of his mother, the presence of a battery with some of its lids open are some of the factors that may have influenced the accused to change his mind and plead guilty without any delay.

[20] On the interests of society, Courts generally fulfill an important function in applying the law in order to maintain peace and harmony in the communities. The decisions of this Court, and sentences imposed promote respect for the rule of law. It would appear in my considered view, that when the deceased was sitting on a blanket he could have been waiting for the accused to give him food and to prepare a bed for him like he latter on did for the other boy (the deceased's elder brother), but instead the accused lashed out a vicious attack on the small boy, an unfortunate conduct indeed, and the one that cannot be allowed to stand.

[21] Members of society, and in particular the vulnerable groups such as

women and children look up to our Courts for protection and should therefore not be subjected to irrational behavior of this kind.

[22] I accept the reasoning of the Court in *State v Vilikazi and Others* 2000(1) SACR 140 where Goldstein, J, at 147 E-F stated:

"Very many of our citizens live in fear of crime and especially violent crime. Our news media all too regularly report terrible crimes. There appear to be a widespread view that life itself is unimportant and not worthy of respect. That view must be stamped out and our Courts must use whatever power they have to help in the fight to do so." And further on at G-H and I it is stated:

"This Court must, however, be sensible to the prevalence of violent crime and the widespread terror and misery it causes, and must send out a clear message that punishment for such will become progressively heavier until the battle is won and the tide is turned."

[23] It is therefore my considered view that although heavy sentences seem not to have the desired effect anymore, Courts should not shy away from its duty to impose exemplary sentences where the circumstances and facts of the matter allow it. The one way in which society can be protected is by removing convicted persons from their midst.

[24] The age of the deceased, a little boy (13 months old), the vicious, cruel, and violent manner in which he was killed outweigh by far the fact that the accused was 27 years at the time and that he pleaded guilty, a sign generally viewed as remorseful. Therefore in my view the interests of society undoubtedly require that the accused be kept away from the community for some time.

