

CASE NO CC08/2010

**IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

THE STATE

and

ALBERT SOROSEB

CORAM: TOMMASI J

Heard on: 19 – 21 May 2010; 1 June 2010; 4 June 2010

Delivered on: 18 June 2010

SENTENCE:

TOMMASI J: [1] The accused was convicted of culpable homicide.

[2] The state did not prove any previous convictions.

[3] I was reminded by counsel for defence of my duty to bear in mind the nature of the crime, the interest of society and the interest of the accused. In sentencing the accused I have to keep in mind the purpose of punishment and must try to affect a balance in respect of the interest of the accused and the interest of society in relation to those purposes. (See State v Brand 1991 NR 356 at p 365 B – C).

[4] The accused testified under oath. The personal circumstances can be summarised as follow:

[5] The accused is 32 years old residing in Grootfontein. He is the father of two minor children aged 13 and 10 years old respectively. The 13 year old girl is living with her mother who resides in Grootfontein. The 10 year old boy lives with his uncle in Walvisbay. The boy is maintained by his uncle. The accused contributes to the maintenance of his daughter whenever he finds employment. The accused had no children born of the relationship with the deceased.

[6] His father died in 1981 and he grew up with his mother and grandfather. His grandfather mainly supported them and his mother collected berries to supplement the income. When he was old enough he cleaned yards and worked in the garden. He failed grade 10 and he had to leave school since there was no money for him to re-write grade ten (10). The accused found it tough to grow up without a father.

[7] The Accused found employment as a security guard and was employed as such until 1998 for a meagre income of N\$790.00 per month. He has been unable to find fix employment after this date. He thereafter sustained himself by doing construction work for N\$3.50 per hour if and when the opportunity availed itself.

[8] The accused is a first offender. There was also no evidence of previous violence perpetrated against the deceased in the four years that the parties were living in a domestic relationship. The evidence supports the impression that the accused was not normally given to reacting violently and has been able to restrain himself in previous situations when provoked and I can deduce that this render the accused capable of being rehabilitated.

[9] The accused visited the mother of the deceased soon after he was released on bail and informed her that he did not intend what happened. The accused tendered a plea of guilty on culpable homicide. When asked how he felt about the fact that he caused the death of the deceased he indicated that he felt bad about it.

[10] Mr Tjituri pointed out that the accused was genuinely remorseful and that this was evident from his demeanour when testifying. The court observed that the accused was emotional at times when testifying.

[11] The provocation by the deceased during the evening of this incident was persistent and public. The accused suffered public humiliation and this I need to consider. It was also the evidence that this happened on several occasions before this incident, the accused had to endure verbal abuse from the deceased. This can also be characterised as domestic violence as per the definition of section 2(g) of the Domestic Violence Act, 2003 (Act 4 of 2003).

[12] In *S v BRITZ* 1994 NR 25 (HC) the accused had pleaded guilty to culpable homicide. He had killed his stepson in a drunken state after an argument between the accused and his wife and after the deceased had provoked him with a pocket knife. The Court held that the intoxication and provocation of the accused had played a significant role in the commission of the crime. The Court sentenced the accused to a period of five years' imprisonment wholly suspended for five years, together with community service. The Court held that this was an appropriate case for community service, given the circumstances under which the crime had been committed and that

the accused had been a first offender. The mitigating facts in that case however differ substantially from this case.

[13] The state did not lead any evidence in aggravation. This court requested the state to ensure that the next of kin attend the proceedings and be called as a witness to testify even though culpable homicide does not form part of the defences specified in the schedule of offences listed in the Domestic Violence Act, 2003 (Act 4 of 2003). This I did to inform the court as to the proper sentence to be passed.

[14] The daughter of the deceased, Ms Hoeses, testified that the accused approached her to ask for forgiveness and she sensed a genuine feeling of remorse. This witness testified that she now is left with taking care of her siblings after her mother, who was the breadwinner, died. She indicated that she would leave the sentence in the hands of the court. She indicated that she knows the accused person to be a quiet person. She further informed the court that neither the accused nor his family contributed to the funeral expenses but conceded that the accused is unemployed and was in custody at the time the funeral took place.

[15] When it comes to consider the interest of society, I can only re-iterate what was stated in *S v BOHITILE* 2007 (1) NR 137 (HC). In that case the court held that the prevalence of domestic violence and the compelling interest of society to combat it, evidenced by the legislation to that effect, required that domestic violence should be regarded as an aggravating factor when it came to imposing punishment. Sentences imposed in this context the court held, whilst taking into account the personal circumstances of the accused and the crime, should also take into account the important need of society to root out the evil of domestic violence and violence against women. In doing so, these sentences should reflect the determination of courts in Namibia to give effect to and protect the constitutional values of the inviolability of human dignity and equality between men and women. The court further held that the clear and unequivocal message which should resonate from the courts in Namibia was that crimes involving domestic violence would not be tolerated and that sentences would be appropriately severe.

[16] Having said this the court is mindful that “one cannot lose sight of the individualised nature of the sentencing process and it is irregular to sacrifice the accused on the altar of deterrence” as per PLASKET J in *S v Mako* 2005 (2) SACR 223 (E) on page 228.

[17] In *R v Karg* 1961 (1) SA 231 (A) at 236B - C: a balanced view has been expressed as follows:

“It is not wrong that the natural indignation of interested persons of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if the sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment.”

[17] In considering an appropriate sentence I have to consider the culpability of the accused i.e the extent of his deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence (See *S v Nxumalo* 1982 (3) SA 856 (A)). The accused acted negligently in using a knife and should reasonably have foreseen that this may cause the death of the deceased. He acted negligently in the manner that he approached the deceased and wrestled with her knowing full well that she was unstable due to the fact that she was under the influence of alcohol. The senseless loss of human life resulted and it must be seen as an aggravating factor. The life of this person whom the accused is said to have loved and who should have been cherished, leaves a vacuum in the lives of those persons near and dear to her.

[18] In *S v Bohitile supra* Smuts AJ referred to the work of Sentencing by DP van der Merwe (1991) at 7-4, where he submits that culpable homicide caused by an assault as opposed to being caused by negligent driving is correctly generally treated with a heavier hand. In this matter the court on appeal imposed a sentence of eight years' imprisonment of which two years were suspended for a period of five years on condition that the appellant does not commit the crime of assault during the period of suspension for which a sentence of imprisonment without the option of a fine is imposed.

[19] It is also the trend in our courts (See *S v NAFTALI* 1992 NR 299 (HC)). In this matter the accused was the initial aggressor and the deceased acted in defence of his daughter. The accused shot at the deceased and one of the bullets killed the deceased. On appeal the conviction of murder and the sentence of 18 years' imprisonment were set aside and substituted with a conviction of culpable homicide and a sentence of eight years' imprisonment.

[20] In *S v Zake* 2007 (2) SACR 475 (E) the accused, a 26-year-old man, was a referee at a soccer match who happened to have a firearm in his tracksuit pants whilst officiating. After he had awarded a penalty he was surrounded by players contesting his decision. As they advanced towards him, he felt threatened and fired a shot which struck someone in the hand, exited and struck the coach of one of the teams killing him. The accused had been in custody for just over one year and had one previous conviction for assault in respect of which he was cautioned and discharged. In respect of the accused's conviction of culpable homicide the court imposed a sentence of six years' imprisonment of which two years were conditionally suspended for five years.

[21] In *S v CROSSBERG* 2008 (2) SACR 317 (SCA) The court of appeal on a count of culpable homicide found that the degree of negligence to be high and the appellant was sentenced to five years' imprisonment, two of which were conditionally suspended.

[22] Having carefully considered the above I am of the view that in this matter, custodial sentence is inevitable and that an appropriate sentence would be as follow:

[23] The accused is sentenced to six years' imprisonment, two years of which are suspended for five years on condition that the accused is not convicted of culpable homicide, assault with intent to do grievous bodily harm or assault committed during the period of suspension.

TOMMASI J