



REPUBLIC OF NAMIBIA

CASE NO. CC 27/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

AXAROB BASSON

CORAM: SHIVUTE, J

Heard on: 2011 February 24, March 02

Delivered on: 2011 April 12

SENTENCE

SHIVUTE, J: [1] The accused was arraigned on an indictment containing two counts, being count 1: murder with direct intent and count 2: housebreaking with intent to contravene section 2(1) (a) - Rape and contravening section 2(1) (a), read with sections 1, 2, (2) and 3 of the Combating of Rape Act, 2000 (Act 8 of 2000) - Rape. Upon his own plea of guilty, he was convicted accordingly.

[2] Ms Wantenaar appears for the State and Mr Tjituri appears for the accused on the instructions of the Directorate of Legal Aid.

[3] In order to understand this matter fully, I deem it necessary to summarise the facts as contained in the accused's statement made pursuant to the provisions of section 112 (2) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

[4] The accused was in the company of the deceased together with other two persons at a farm house during the early night of the date of the incident. Whilst at the farm house, he propositioned the deceased which proposal she declined. The accused left the farm house but returned at a later stage. He stripped naked to blend in with the darkness of the night. He broke into the house where the deceased was sleeping by passing through a partially open window which he opened widely to enable him to enter. The accused walked to the deceased's room and tried to open the door but it was locked. The deceased was awoken by the accused's movements and so she emerged from the room to investigate. The accused went to hide in the kitchen to avoid detection. As the deceased came closer to the place where the accused was hiding, the accused pulled a pocket knife and stabbed her on the back for about seven times. The deceased fell down and bled profusely. The accused started to have sexual intercourse with her and when he had finished, he left her to die. He went to the bush where he spent a few nights before he was arrested.

[5] The accused did not testify in mitigation of sentence. However, his personal circumstances were placed before this Court by his legal representative. The accused is 47 years old. He is a first offender who

was employed for 8 years at the farm where the offences were committed. He is unmarried without children. No previous convictions were proved against him.

[6] It was submitted on behalf of the accused that, the accused is remorseful of his actions and this could be supported by the fact that he pleaded guilty to both charges. Therefore, so it was further submitted, the Court should consider it as a mitigating factor in his favour. As for the sentence in connection with the 2nd count, counsel for the accused fairly submitted that there were no compelling and substantial circumstances for the Court to deviate from imposing a mandatory sentence as prescribed by the Combating of the Rape Act. Counsel, however, prayed that the Court should impose a sentence on the 2nd Count which would run concurrently with the sentence to be imposed on the 1st count. The reason for this proposition being that if the accused was sentenced to a mandatory sentence of 15 years' imprisonment on the 2nd Count and if he is sentenced to 30 or more years' imprisonment on the 1st Count the cumulative sentence would amount to about 50 years' imprisonment. The South African case of *S v M* 1993 (1) SACR 126 at 129 was further cited in this respect.

[7] The facts of the *S v M (supra)* are that, the Appellant was convicted in the Cape Provincial Division of housebreaking with intent to rob (count 1), robbery with aggravating circumstances (count 2) and two Counts of rape (counts 3 and 4). The trial Judge took the counts of housebreaking

and robbery together for the purposes of sentence and imposed a sentence of 7 years' imprisonment. On the counts of rape he was sentenced to 15 years on count 3 and 23 years' imprisonment on count 4. The sentence on counts 1, 2 and 4 were ordered to run concurrently with the sentence on count 3. He further ordered that three years of the 23 years' imprisonment should run concurrently with the sentence of 5 years' imprisonment the accused was already serving. On appeal it was argued on behalf of the Appellant that the total cumulative sentence of 29 years and half imprisonment imposed on the Appellant were excessively severe and inappropriate in the circumstances. The appellate court held that the sentence of 23 years' imprisonment imposed on counts 3 was excessive for various reasons namely; that the complainant in that count did not sustain physical injuries, she was to some extent coping with the trauma; the rape in count 3 was not much worse than the rape in count 4 committed in respect of the daughter of the complainant on count 3 committed in similar circumstances. The Court was further of the opinion that a sentence of 15 years' imprisonment would be sufficed in respect of each count of rape.

[8] Counsel for the State argued that the accused was convicted of serious offences. The accused broke into the house where he knew that the deceased would spend the night alone with a young child. The accused planned to carry out his actions and he succeeded to achieve his objectives. He did not have any mercy on the deceased despite the fact

that the deceased grew up with him at the farm. The deceased was 20 years old at the time she met her death. The mere fact that he pleaded guilty does not in itself mean that the accused was remorseful. He might have been influenced by other factors such as the overwhelming strength of the State case. She urged the Court to take cognisance of escalating crime rate involving violence against women and the Court not to lose sight of the fact that two separate crimes were committed. Counsel for the State further argued against the sentence to run concurrently. She referred the Court to the matter of *Gerson Tjivera v The State* SA 14/2003 at 6 (unreported) delivered on 16/12/2004.

[9] I have considered the personal circumstances of the accused. Although the accused pleaded guilty to the two counts contained in the indictment, the offences he committed are very serious indeed. I have further considered the matter of *S v M supra* referred to by counsel for the defence. The case referred to is distinguishable from the present case. Its facts should be confined to it. In the instant case the deceased was not only raped, but she was also deprived of her precious life. The deceased was brutally killed as the accused has described in graphic detail. The post mortem report shows that the deceased was stabbed 7 times. The weapon was directed to the chest and abdomen where it was bound to cause serious injury at these sensitive parts of the body as it has indeed done so, resulting in the deceased's untimely demise. The accused's conduct was premeditated as it was calculated. The deceased

who was still in the prime of her life, met a terrible death at the hands of the person who knew her well. Although it was submitted that the accused was remorseful for his actions, the Court could only attach weight to that submission if the accused himself had expressed the sentiment from the witness stand where his sincerity and conviction in the making of that claim could be tested through cross-examination. I have further considered the matter of *Gerson Tjivera v The State (supra)* referred to me by the State when counsel rightly, in my view, argued against the sentence to be imposed on the 2nd count to run concurrently with the sentence on the 1st count.

[10] Having considered the personal circumstances of the accused; the seriousness of crimes; the circumstances under which the offences were committed; the fact that the accused pleaded guilty to the charges and that he was a first offender, I am of the opinion that the accused's personal circumstances are by far outweighed by the magnitude of the crimes committed. I am accordingly of the firm view that the interests of society demand that he be removed from society for a long time.

[11] In the result, I consider the following sentence to be appropriate in the circumstances:

1st Count : Thirty (30) years' imprisonment.

2nd Count : Fifteen (15) years' imprisonment.

SHIVUTE, J

Appearance for the parties:

For the State:

Mrs B Wantenaar

Instructed by:

Office of the Prosecutor-

General

For the accused:

Mr Tjituri

Instructed by:

Directorate of Legal Aid