"Special Interest"

CASE NO.: CC 26/2010

IN THE HIGH COURT OF NAMIBIA

HELD AT OSHAKATI

In the matter between:

THE STATE

and

KAFURO THEOHILIE KANGURO

CORAM: LIEBENBERG, J.

Heard on: 04 July 2011

Delivered on: 07 July 2011

SENTENCE

LIEBENBERG, J.: [1] The accused stands convicted of the offence of murder, read with the provisions of the Domestic Violence Act, 2003 in that she murdered her one year old boy on the 6th of June 2008 at Kahanga

village, Rundu, by stabbing him four times on the neck with a knife. The accused pleaded not guilty to the charge but was convicted at the end of the trial. During the trial it emerged that, after stabbing her son, the accused tried to commit suicide by stabbing herself twice on the neck and abdomen, respectively. The proceedings have reached the stage where the Court must decide what punishment to impose in the circumstances of this case – to which I must confess, I find extremely difficult due to its peculiar and exceptional circumstances.

[2] In its determination of what punishment, in the particular circumstances of this case, should be meted out, regard is had to the *triad* of factors namely, the personal circumstances of the accused; the offence and the circumstances in which it was committed; and the interests of society.[1] It has been said that *"Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances."*[2] I shall as far as possible endeavour to strike a balance between the interests of the accused and that of society.

[3] The personal circumstances of the accused were placed before the Court from the Bar and which amount to the following: The accused is currently almost twenty-two years old (she was nineteen years and ten months when committing the offence) and is a first offender. She progressed up to grade 8 before she left school. Thereafter she stayed with her parents at Kahanga village and did seasonal work at Shadigongoro Irrigation Project. The income

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[1] *S v Zinn,* 1969 (2) SA 537 (A); *S v Tjiho,* 1991 NR 361 (HC)
[2] *S v Rabie,* 1975 (4) SA 855 (AD) at 862G-H

she earned from the project was partly used to maintain herself and her two children. The deceased was the younger of the two and at the time of his death he was merely one year old. The first born would turn six in September of this year and although his present whereabouts have not properly been established, it would appear from what was conveyed to the Court by defence counsel, that he is currently in the custody of the accused's grandparents, with whom the accused has a good relationship. The grandparents and the accused, as well as the accused's parents, are of the same household and whereas the accused's children were staying with her up to the time of her arrest, it would appear that the eldest remained with the family, who now takes care of him.

[4] Regarding the personal health of the accused it is common cause that she suffers from epilepsy since childhood for which she receives treatment. She also receives antipsychotic treatment during episodes of confusion which follow the epileptic fits and the treatment is aimed at calming her down as she would become restless after these attacks.

[5] During the trial the Court admitted into evidence a psychiatric report compiled by Dr. Mthoko in terms of section 79 of the Criminal Procedure Act 51 of 1977, according to which it was found that the accused, at the time of committing the offence, was suffering from mental defect and that her ability to appreciate the wrongfulness of the offence and to act in accordance with such appreciation, was *diminished*. This was mainly due to the longstanding history of epilepsy with accompanying episodes of confusion. The accused's

medical condition makes her vulnerable to "stressors" which, in this instance, was the fight between her and her mother the previous day. Dr. Mthoko in her testimony described the accused's emotional state of mind at the relevant time as "a feeling of hopelessness".

[6] In determining what an appropriate sentence in the circumstances of this case would be, the accused's mental condition, and more specifically her state of mind at the time of committing the offence, is a crucial factor in the Court's determination of the accused's moral blameworthiness. It is trite that the degree of moral blameworthiness should be reflected in the sentence imposed on the offender. In *Terblanche: Guide to Sentencing in South Africa,* (Second Ed.) at p. 150 para 7.2.2 the following is said:

> *"The modern view of the seriousness of crime generally also refers to the blameworthiness of the offender. According to this view, the seriousness of the offence is affected by the extent to which the offender can be blamed or held accountable for the harm caused or risked by the crime. This is a partly objective assessment. It should also include those subjective factors which lessen (mitigate) or increase (aggravate) the blame that can be attributed to the offender. Typical examples include the youth of the offender, or any other factor which reduces or diminishes her criminal capacity."* (Emphasis provided)

[7] Despite the seriousness of the offence committed by the accused, the Court must be mindful of her diminished capacity to appreciate the wrongfulness of the offence and to act in accordance with such appreciation;

a factor which lessens her blameworthiness and which is crucial for purposes of sentencing. The accused's state of mind is evinced by the self-inflicted injuries which, according to the medical evidence, were life threatening. It must however be borne in mind that the accused, notwithstanding, had the required capacity to appreciate the wrongfulness of the offence (by stabbing her son to death with a knife) and to act in accordance with such appreciation – albeit, diminished. The Court was further satisfied that the accused when so acting, acted with direct intent. I further take into account that the accused, to some extent, must have planned the execution of the offence in that she did not act on the spur of the moment (during or immediately after the fight with her mother), but that she only acted the following morning, after she had time to think things through in the safety of her grandparents' home. She returned to her parents' home in the morning from where she took the knife and then proceeded to the cemetery with the deceased where she killed him.

[8] The offence of murder is undoubtedly serious, more so, when it involves the life of a young child who died at the hands of his own mother, who believed that the easy way out would be to kill her son and herself in circumstances where there was no need to direct her anger (for her mother) at her child. This, in my view, was a selfish act on the part of the accused who decided to kill her youngest son and then herself. If she was willing to leave her first born in the care of her family, why then not also the deceased? The accused maintained a good relationship with her grandparents and nothing has been said about any effort made to seek their assistance in finding an amicable solution to the unhealthy relationship that existed between

mother and daughter at the time. I am convinced that by murdering her son in such a cruel manner and thereafter attempting to kill herself, was not the only option open to the accused. I shudder to think what went through the deceased's mind when the accused started stabbing him with a knife on the neck; a barbaric act committed by his own mother, the one who was supposed to love and protect him. The young age of the deceased and the brutality of the offence are indeed aggravating factors weighing heavily against the accused.

[9] The interests of society is a factor that deserves due consideration in sentencing and as was stated in *S v Karg*[3], it would not be wrong for the sentencing court to recognise the natural indignation of interested persons and of the community at large when deciding what an appropriate sentence would be, as the element of retribution remains part of the modern approach. It is of relevance for the courts to bear in mind that, if sentences for serious crimes are too lenient, the administration of justice will fall into disrepute and aggrieved and injured persons may be inclined to take the law into their own hands. Courts, through the sentences they impose, promote respect for the law and uphold the Rule of Law within society.

[10] I was unable to find any cases on point reported in this jurisdiction, but in the matter of *S v Mnisi*[4] the Court considered several cases where that Court found that the fact that the accused was found to have acted with diminished responsibility, warranted the imposition of a less severe

[3] 1961 (1) SA 231 (A)
[4] 2009 (2) SACR 227 (SCA)

punishment. On appeal against sentence of eight years imprisonment imposed for murder in circumstances where the accused shot the deceased, who had an adulterous relationship with his wife, the sentence was reduced to five years imprisonment. However, Maya, JA, delivering a dissenting judgment, considered the trial court's sentence to be appropriate in the circumstances, and at page 235D- 236B (para [22] – [23]) states the following:

> *"[22] In a more recent judgment in **Director of Public Prosecutions, Transvaal v Venter**[5], Mlambo JA, writing for the majority, evaluated various past cases of this court[6], including some of those referred to in para [4] above, which involved family murders committed in emotionally stressful circumstances in which the accused were found to have acted with diminished criminal responsibility. The learned judge described the sentences imposed in these cases, which ranged between three and eight years' imprisonment, as 'very lenient' and cautioned that it must be borne in mind when the cases are invoked that they were 'decided at a time when it was "business as usual" and the sentencing discretion of the courts was as yet unfettered by the minimum sentencing legislation.'*
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> *[23] In Mlambo JA's view, an effective sentence of ten years' imprisonment - eight years' imprisonment for the attempted murder of the appellant's wife, ten years' imprisonment for the murder of his five-year- old daughter and 15 years' imprisonment of which five years were conditionally suspended for the murder of his four-year-old son, ordered to run concurrently - which he promptly replaced with an effective prison term of 18 years, was 'shockingly*

[5] 2009 (1) SACR 165 (SCA)

[6] *S v Laubscher*,1988 (1) SA 163 (A); *S v Smith*, 1990 (1) SACR 130 (A); *S v Kalogoropoulos*, 1993 (1) SACR 12 (A); *S v Shapiro*, 1994 (1) SACR 112 (A); *S v Di Blasi*, 1996 (1) SACR 1 (A).

light' and did not reflect the interests of society which viewed the conduct in a very serious light and the need for deterrent sentences. The learned judge continued at paras 31 and 32:

> *'In my view this matter calls for a sentence cognisant of [the respondent's] personal circumstances, but which takes account of the seriousness of the offences and the need for appropriate severity and deterrence. This latter element is at the core of the community interest in how courts should deal with violent crime. This is a matter in which the respondent's personal circumstances are outweighed by society's need for a retributive and deterrent sentence.' "*

[11] Unlike in the South African context, there are at this stage no prescribed (minimum) sentences applicable to the offence of murder in Namibia. However, the right to life is enshrined in Article 6 of the Namibian Constitution and must at all times be respected and protected. Society is entitled to demand such respect and protection and failure to provide same could lead to anarchy. I therefore associate myself with the remarks of Mlambo JA (above) that besides giving due regard to the personal circumstances of the accused, the Court, in circumstances as the present where the accused is found to have acted with diminished capacity, *still* has to look at the severity of the offence and the need to impose deterrent sentences where it involves serious offences.

[12] I was referred by defence counsel to the case of *Maria Akwenye v The State*[7]*,* a case in which this Court considered and discussed sentences

[7] Unreported Case No. CA 117/2010 delivered on 08.04.2011

imposed in several other similar cases of infanticide. It was contended that because of the deceased's young age (one year), the Court should adopt the same approach and impose a sentence that would be in line with that imposed in the *Akwenye* matter i.e. a partly suspended custodial sentence of eight years' imprisonment, of which three years were suspended.

[13] I do not believe that the age of the victim *per se* is the determining factor, but rather what the state of mind of the offender was at the time of committing the offence; and how this impacted on the accused's blameworthiness. I have already alluded thereto and given the circumstances of this case, I am satisfied that the accused, as a result of the stress she was under since the fight with her mother the previous day; the threats uttered towards her that she would be killed; and her diminished appreciation of the wrongfulness of the offence and to act in accordance with such appreciation, was *so* distressed and in such an unbalanced emotional state of mind, that she acted with diminished responsibility which, in itself, is a mitigating factor, justifying the imposition of a less severe punishment.

[14] Although the age of the offender is a factor to be taken into consideration when sentencing – especially when dealing with a youthful offender – I do consider the age of the accused at the time namely, nineteen years and ten months, to be relevant; however, I shall not give too much weight thereto as she was the mother of two children who worked independently and to a certain extent maintained her own family. Despite her suffering from a mental defect at the stage of committing the offence, the

accused, according to the psychiatric report, was cognitively intact; of average intelligence; and her insight and judgment preserved. Hence, the relatively young age of the accused does not appear to have played a significant role at the relevant time.

[15] Despite the peculiar facts *in casu,* the Court must still strike a balance between the interests of the accused and that of society; and having done so, I firmly hold the view that the accused's personal circumstances are outweighed by society's need for a retributive and deterrent sentence – more so, where the accused, as in this instance, directed her anger at her son, an innocent vulnerable one year old child, and not at her mother, the person who caused her becoming upset. In these circumstances the accused, in my view, cannot today escape a custodial sentence. The sentence should serve as deterrence to the accused (who might, as a result of her medical condition re-offend), as well as to persons in general. Taking the life of another cannot be allowed to go unpunished and where justified, the Court shall ameliorate the sentence according to the circumstances of the case. In my view, had it not been for the accused's diminished responsibility, a sentence of thirty years' imprisonment, in the present circumstances, would have been an appropriate sentence.

[16] Although the accused was fully entitled to plead not guilty to the charge and to challenge the prosecution to prove her guilt, it was not disputed that the deceased was killed by the accused. In these circumstances one might have expected from her to show contrition – however, there was nothing

forthcoming from the accused. It has been said that remorse, as an indication that the offence will not be committed again, is an important consideration in suitable cases when the deterrent effect of punishment is adjudged.[8] In my view, this is indeed a case where the accused's lack of remorse has to be considered in sentencing.

[17] It is trite that the period an accused spends in custody, especially if it is lengthy, is a factor which normally leads to a reduction in sentence.[9] In the present instance the accused is in custody awaiting trial for a period of three years, a factor the Court takes into consideration when sentencing.

[18] The accused was convicted of the offence of murder, read with the provisions of the Combating of Domestic Violence Act, 2003 and although this would usually be an aggravating factor, I am unable to come to such conclusion in the circumstances of this case. There is no history of violent behaviour perpetrated by the accused within her family structure and it seems to me that the opposite is rather true; namely, that she was a victim and as a result of ill-treatment and threats uttered against her by her mother, she lost interest in life and decided to kill her child and herself. I therefore do not consider the accused's killing of her child in the circumstances of this case, to fall within the ambit of the Combating of Domestic Violence Act.

[19] In the result, the accused is sentenced as follows:

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[8]*S v Seegers*, 1970 (2) SA 506 (A) at 511G-H
[9]*S v Kauzuu*, 2006 (1) NR 225 (HC) at 232F-H

Twelve (12) years' imprisonment of which four (4) years' suspended for a period of five (5) years on condition that the accused is not convicted of murder; attempted murder; or culpable homicide involving an assault, committed during the period of suspension.

In addition, the Court makes the following order:

1. The Deputy Registrar of this Court is directed to provide the officer in charge of the institution where the accused will be serving her sentence with a copy of the judgment delivered and the sentence imposed herein.
2. Exhibit 1 is forfeited to the State for destruction.

LIEBENBERG, J

ON BEHALF OF THE ACCUSED	**Mr. G.F. Bondai**
Instructed by:	**Directorate: Legal Aid**
ON BEHALF OF THE STATE	**Mr. R. Shileka**
Instructed by:	**Office of the Prosecutor-General**