



CASE NO.: CC 05/2011

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

In the matter between:

THE STATE

and

NAHUM DANIEL

CORAM: LIEBENBERG, J.

Heard on: 23 November 2011

Delivered on: 25 November 2011

SENTENCE

LIEBENBERG, J.: [1] The accused is an forty-eight year old male and stands convicted of the offence of murder, read with the provisions of the Combating of Domestic Violence Act¹ in that he on 24 November 2008 killed

¹ Act 4 of 2003

his customary wife Hileni Soodaha Thomas, by stabbing her with a knife. Despite pleading not guilty to the charge the accused, at the end of a trial, was convicted of murder on the basis of having acted with intent in the form of *dolus eventualis*. The Court now has to pass sentence.

[2] It is trite that in sentencing the courts have regard to the personal circumstances of the offender, the crime committed and the circumstances under which it took place, and the interests of society. These factors are generally referred to as the *triad*. The courts are simultaneously enjoined to consider the objectives of punishment being prevention, deterrence, reformation and retribution and must decide what punishment would best serve the interests of justice. When coming to that conclusion, a balance must be struck between the interests of the accused person and that of society. It is a well-established principle that these factors need not be given equal weight and one may be emphasised at the expense of the other. This would usually be the case when it involves serious offences and where the interests of justice dictate that in the circumstances of a particular case, specific punishment must be meted out. The rule is 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 In determining an appropriate sentence the Court should not be over-influenced by the seriousness of the type of sentence under consideration and fail to properly consider other factors relevant to sentence.³

²S v *Rabie*, 1975 (4) SA 855 (AD) at 862G-H

³S v *Fass*, 1980 (4) SA 102 (C) at 104A-B

[3] The accused's personal circumstances were placed before the Court from the Bar. He was forty-five years of age when committing the offence and is a first offender. The accused had no formal education and managed to maintain the deceased and their six children of the proceeds he generated from part-time work he did in their village repairing fences and cultivation. Two of the children are deceased whilst the eldest maintains herself financially. The one son has since dropped out of school and now remains at home; whilst another has been taken in by the neighbours who care for her. The youngest is currently staying with the grandparents. These changes were necessitated by the death of the deceased followed by the accused's arrest and subsequent incarceration for a period of fifteen months before he was released on bail.

[4] The accused committed the offence against his own wife whom he attacked with a knife and stabbed her once on the external genitalia. According to the medical evidence contained in the post-mortem report handed in, it was a deep penetrating wound which ended up in the bladder. The seriousness of the injury is evident from the deceased's death which ensued shortly after she sustained the injury. Whereas the Court rejected the accused's version of events which led to the stabbing incident, it is not known what happened between the accused and the deceased that culminated in her being stabbed and her subsequent death. From the evidence it would appear that the deceased was not armed as no weapon, other than that of the accused, was found at or near the scene. It then seems reasonable to infer that the deceased was a defenceless and vulnerable person making her way home when attacked by her husband for reasons unknown. It was submitted

that it would appear that there was no motive for the murder, however, there must have been a reason why the accused acted in the manner he did. Had he taken the Court into his confidence, there would not have been any uncertainty as to what circumstances gave rise to the killing of the deceased. The accused was the husband of the deceased and although the accused is unable to tell for how long they had been together, he said it was for a considerable period of time. Against this background the accused's behaviour that night becomes even more reprehensible; for instead of being her protector, he became her attacker. Not only is he responsible for ending an innocent and productive life, but he also deprived their children – especially the young ones – of the affection and care of their mother.

[5] These factors, when considered together with the provisions of the Combating of Domestic Violence Act, are indeed aggravating and must reflect in the punishment to be imposed on the accused today. This Court, in various judgments, have said that it views crime committed in a domestic relationship in a serious light and would increasingly impose heavier sentences in order to try and bring an end thereto.⁴ Unfortunately this trend in society seems to continue unabated. I believe that the message to would-be offenders, who simply disregard the rights of others and who treat their spouses or partners like property belonging to them, must get the message loud and clear: That the Courts will not shy from its duty to impose severe punishment in deserving cases; and will not hesitate to remove from society, for considerable periods of time, those persons making themselves guilty of committing heinous crimes

⁴*S v Bohitile*, 2007 (1) NR 137 (HC)

against others – more so when these offences are committed within the family structure or what is considered to be a domestic relationship.

[6] Murder in itself is considered by the courts to be a serious offence and one which would normally attract severe punishment. It is only in exceptional circumstances that a custodial sentence would not be imposed. I do not consider this case to fall in the latter category. Whereas the accused and the deceased had been visiting the cuca shops since early that day and enjoyed themselves in the drinking of tombo until late, there seems to be a possibility that intoxication could have played a role in the accused's commission of the crime – despite his denial of that possibility. Although it would, in the absence of reliable evidence, be difficult to determine the extent it might have impacted on the accused and lessened his moral blameworthiness, the Court cannot ignore this possibility and therefore, should take it into consideration as a mitigating factor when sentencing. However, I do not think, in the circumstances of this case, that too much weight can be given thereto as the accused, during his testimony claimed that in his view he could walk properly and was not drunk. Hence, limited weight should be given thereto.

[7] The circumstances under which the crime was committed are relevant and in this instance a knife was used against a defenceless person. The deceased was stabbed only once on the genitalia and in order to inflict a penetrating wound as described in the post-mortem report, undoubtedly would require moderate force. Unfortunately there is no evidence before the Court as to whether or not the deceased was stabbed through her clothes – as one

would expect to find in the circumstances – for that would have required substantial force. Be that as it may, although the assault was not directed to those parts of the body which normally would be considered to be exceptionally vulnerable (such as the head and upper body), the nature of the injury i.e. a penetrating stab wound, is indeed such that it resulted in death shortly thereafter. There could not have been any justifiable or acceptable reason for the accused to use a knife against his wife – let alone killing her. Any disagreement that may have arisen between the two on their way home could have been sorted out amicably and the use of a lethal weapon against a defenceless spouse/partner in these circumstances bears testimony of disrespect and cowardice on the part of the accused.

[8] The Court takes a serious view of people resorting to the use of lethal weapons to settle scores – more so in a domestic relationship – and in this case and many others, lives are consequently lost unnecessarily. Unfortunately that practice is prevalent all over Namibia and it must be discouraged and the only way the courts can do that is by means of passing stiff sentences. There can be no doubt that the minor children of the accused and the deceased have already suffered tremendously as a result of the deceased's death; unfortunately this situation will not improve in the near future due to the punishment to be imposed on the accused today. These children have to forgo the care and support they used to get from their parents – not as a result of their doing. One cannot but feel deeply for the children who now live apart and with different families under different circumstances;

regrettably, one cannot allow one's sympathy for them to deter one from imposing the kind of sentence dictated by the interests of justice and society.

[9] Society justifiably expects that the accused be punished for the crime he committed and in the circumstances of this case a lengthy custodial sentence seems inevitable. The accused is a first offender and had an unblemished record for forty-five years before committing this offence. This is indeed an important factor weighing in his favour in sentencing. It does not appear to me that the accused is a threat to society and the incident was clearly an isolated one. In these circumstances the emphasis should fall on deterrence rather than prevention. I am further of the view that this is a case where the Court should show mercy in sentencing the accused and afford him the opportunity to reform and again become part of society once he has served his sentence.

[10] The period of about fifteen months the accused has stayed in custody during the pre-trial stages is taken into account when considering sentence and would lead to a reduction in his sentence.

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

Twenty-three (23) years' imprisonment of which five (5) years' imprisonment is suspended for a period of five (5) years on condition that the accused is not convicted of the offences of murder or culpable

homicide (involving an assault), committed during the period of suspension.

LIEBENBERG, J

ON BEHALF OF THE ACCUSED

Mr. G. F. Bondai

Instructed by:

Directorate: Legal Aid

ON BEHALF OF THE STATE

Mr. D. M. Lisulo

Instructed by:

Office of the Prosecutor-General