



**CASE NO.: CC 09/2010**

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

In the matter between:

**THE STATE**

**and**

**ACHILLES TIMONDITYE AMUPOLO**

**CORAM: TOMMASI, J**

Heard on: 14/01/2011; 20/01/2011; 25/02/2011&

Delivered on: 28 February 2011

**SENTENCE:**

**TOMMASI J:** [1] The accused was charged with murder read with the provisions of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) but was convicted on a competent verdict of assault with the intent to do grievous bodily harm.

[2] The accused assaulted his wife by kicking her twice, indiscriminately, not caring where the blows fell and by pushing her off the bed. The deceased sustained blunt force injuries to her head; mouth; and abrasions to her back and arm.

[3] The mother of the deceased was notified by the Court in terms of s 25 of the Combating of Domestic Violence Act, 2003 (Act 4 of 2003) since the accused and the deceased were in a domestic relationship as defined by the Act.

[4] She testified that the three children of the deceased are now living with her and that she is taking care of the children. The accused is the father of two of these children. She took the children to live with her after the death of her daughter. She has her own business and has been maintaining the children with her income. She received some clothing for the children from the accused but testified that the

accused has not been visiting the children after the death of her daughter. Although this witness indicated that she does not have a problem with the accused coming to visit the children, she clearly expressed her distrust for the accused. It was evident that this witness harbours feelings of hostility toward the accused. This is understood given the facts of this case. The two families have discussed compensation in the sum of N\$9000.00 which compensation is determined in terms of custom and/or tradition.

[5] The accused did not testify but his personal circumstances were placed before the Court by his legal representative. The accused is 47 years old. He worked as an unqualified teacher from 1988 to 1993 when his employment was terminated due to the fact that he was not qualified. From 1993 he worked as a labourer on a casual basis until 2002 when he was employed as a porter at the Oshakati Hospital. He was appointed as a Mortuary Assistant in 2004 to date, at the same hospital. He has nine children and two of them are living with him. Policies and payments for educational loans are deducted from his salary for the benefit of his children attending school. He is a first offender. His legal practitioner informed the Court that the accused was unable to talk to the mother of the deceased due to the condition attached to his bail which prohibited him from interfering with state witnesses. This Court is unimpressed with the fact that the accused, in the two years following the death of his wife, made very little effort to contribute to the wellbeing of his children with the deceased, nor with the efforts made to restore the relationship between him and the deceased's family.

[6] Considering the crime; the interest of society; the personal circumstances of the accused; and the objectives of sentencing this Court must now impose a sentence on the accused.

[7] This crime was committed within the privacy of a household where members of that household should feel safe, loved and protected.<sup>1</sup> It was committed out of sight of eyewitnesses. Such is the nature of domestic violence. It often goes undetected because it happens in the privacy of homes and because victims fear to speak out. Domestic violence has become an everyday occurrence before the courts and also arouses strong indignation from society. One way our Courts have dealt with this issue was to impose deterrent sentences to send a message that it will impose harsher sentences.<sup>2</sup>

---

1 See S v Tjiho 1991 NR 361 at page 366 J & 367 A-B

2 S v Bohitile 2007 (1)NR 137 (HC); The State v Johannes Mushishi CC07/2010 an unreported case delivered on 24/06/2010;

[8] I am reminded by counsel for the accused that the accused should not be sacrificed at the altar of deterrence; and that I should not overemphasise any one of the factors at the expense of the other. On the other hand I am encouraged by counsel for the State to, given the rise of violence against women, impose a robust sentence as a general deterrence. Both arguments are equally valid and the answer lies in harmonising the principles of sentencing taking into consideration the facts specific to this case.<sup>3</sup>

[9] The assault perpetrated on the deceased was meant to ward off the deceased. The accused was in a lying position when he kicked and pushed the deceased. There is no reliable evidence before this court that there were previous incidents of domestic violence perpetrated by the accused. This then was an isolated incident provoked by the deceased's unusual and strange behaviour during the day, the breaking of cellular phones and the persistent pulling of the accused's leg.

[10] The accused is gainfully employed and is supporting his children by providing payment for their education. He has been in some form of employment for most of his adult life. He is a first offender at the age of 47. These are important considerations. The fact that cases involving domestic violence have aroused the indignation of the society does not necessarily mean that the person of the accused must be ignored. In the final analysis the punishment must fit the crime and the offender. The assault was an isolated incident and there was no evidence that the accused is currently in another domestic relationship.

[11] When the duration of sentence is considered, what was stated in *S v*

*Brand and Various Other Cases*<sup>4</sup> by Levy J, at p357 D- E comes to mind i.e:

*"Society also expects that people who have done wrong will be punished, that is, the retributive purpose in punishment is important. This is particularly so in cases which involve violence or housebreaking where the indignation of the community has been aroused. Sentences which are too low do not achieve any of those purposes. The accused and the community laugh and scoff at such sentences and at the administration of justice. Such sentences lead eventually to the community taking the law into their own hands and meeting out the punishment they consider the accused deserves. Not all offences warrant a sentence of imprisonment and a first offender should not be sent to gaol if there is some other adequate punishment."*

[12] This does not mean that in deserving cases this Court would hesitate to impose a sentence of direct imprisonment upon a first offender; even where such person is

---

<sup>3</sup> *S v Van Wyk* 1993 NR 426 (SC)

<sup>4</sup> 1991 NR 356 (HC)

gainfully employed. However considering the nature of the assault and the circumstances under which it was committed; the injuries inflicted; the interest of society and the personal circumstances of the accused, this Court is of the view that the accused, who has been and still is a productive member of society does not fall in the category of offenders who, although he is deserving of punishment, should be removed from society. A short period of imprisonment would mean that the accused would lose his employment that he has held since 2002 and that would do more harm than good (See S v SIBIYA 2010 (1) SACR 284 (GNP)).

[13] In the premises the Court imposes the following sentence:

The accused is sentenced to 3 years imprisonment wholly suspended for a period of five years on condition the accused is not convicted of assault, committed during the period of suspension.

**TOMMASI, J**

**COUNSEL ON BEHALF OF THE STATE:**

**Mr Wamambo**

**Instructed by:**

Office of the Prosecutor General

**COUNSEL ON BEHALF OF THE ACCUSED:**

**Mr Greyling**