



CASE NO.: CC 12/2011

**IN THE HIGH COURT OF NAMIBIA:
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

In the matter between:

THE STATE

and

BERNARD MAFENYEHO LIFATILA

CORAM: LIEBENBERG, J.

Heard on: 05 June 2012

Delivered on: 11 June 2012

SENTENCE

LIEBENBERG, J.: [1] On 05 June 2012 and after evidence was heard, the accused was convicted of murder and attempting to defeat or obstruct the course of justice, both offences read with the provisions of the Combating of

Domestic Violence Act¹. The convictions arose from an incident that happened on the 18th of August 2008 during which the accused stabbed the deceased several times with a knife, causing severe injuries from which she succumbed on the 20th of September.

[2] The State in aggravation of sentence presented the evidence of the deceased's elderly father, Mr Andrew Simubali, who testified that the deceased was his seventh born and twenty-two years of age when she died. He said the deceased was in grade 10 when she eloped in order to cohabit with the accused up to her death – a period of four years. It is common cause that she fell pregnant soon thereafter and gave birth to a boy who sadly died at the age of two. A second child was born from the relationship, this time a girl now approximately four to five years old. This child at present lives with her aunt, whilst her grandfather, Mr Simubali, takes care of her material needs. The deceased's elopement clearly saddened and upset Mr Simubali who, in Court, described feelings of anger towards the accused for not only robbing him of his daughter, but also for the loss of a Namibian citizen who was killed.

[3] He reminded the Court of the prevalence of cases involving domestic violence and raised his concern by saying that the majority of these cases are usually swept under the carpet, until one of the parties – usually the female partner or wife – ends up being killed. It is because of this, he said, the accused should be sent to prison. Mr Simubali was also upset by the fact that the accused did not inform him about the incident until he (Simubali),

¹ Act 4 of 2003

contacted the accused after two days, enquiring into what had happened. The accused then told him that the deceased was stabbed by other people. By that time the deceased was in hospital at Rundu and I will find in the accused's favour that, by deliberately lying to the deceased's father, this was done in agreement with the deceased; probably to keep their domestic problems under covers. Mr. Simubali further testified about letters sent to him by the accused whilst in custody and prior to her passing, pleading with him to have the charges withdrawn in exchange for cattle namely, one head of cattle for every stab wound inflicted. However, Mr Simubali never responded to this proposal and he thereafter had no further contact with the accused.

[4] In cross-examination Ms *Mugaviri* asked Mr Simubali whether he had heard of any incidents between the accused and deceased involving domestic violence, to which he replied that he indeed heard such rumours, but was unable to verify same as he did not witness it himself; neither did the deceased make any such report to him directly.

[5] The accused gave evidence in mitigation. He is currently forty-nine years of age and fathered nine children with five different women. The oldest child is about twenty-five and the youngest is the girl he fathered with the deceased. According to the accused all of his children are attending school (except one who is physically challenged). He is employed by the Ministry of Safety and Security as a police officer but since his suspension from duty in January 2009, had to forego his monthly salary. He has managed since then to make a living for himself and his children through cultivation and

subsistence farming at their home in the village. His elderly mother would also periodically provide financial assistance from the small pension she receives. The children are staying in her house, though within the same homestead as the accused.

[6] Accused described his relationship with the deceased as stable except for the last year when they started having their differences. This seems to confirm the rumours heard by Mr Simubali. He said he could not get married to the deceased as she intended returning to school. He further explained that the deceased's death aggrieved him and that she was like a child to him. He confirmed having written letters to Mr Simubali and says he had asked for his forgiveness; however, this was never put to the witness under cross-examination. Neither was the accused prepared to ask forgiveness from the deceased's family in open Court.

[7] To arrive at an appropriate sentence to impose upon the accused, the Court must consider the mitigating factors testified on by the accused and those made during oral submissions; so too, must the aggravating factors be taken into account. The Court is required to weigh up the personal circumstances of the accused against the crimes committed, and the interests of society.² It has also been said that in sentencing, the court is enjoined to consider and, in its discretion, include such mercy as it may find suitable and in the circumstances of the particular case.³ Regard must equally be had to the primary purposes of punishment (also referred to as the objectives of

²S v *Tjiho*, 1991 NR 361 (HC); S v *Zinn*, 1969 (2) SA 537 (A)

³S v *Rabie*, 1975 (4) SA 855 (A)

punishment) namely, prevention, deterrence (individual and general); reformation and retribution. It is trite that equal weight need not be given to the aforementioned factors as situations often arise where it becomes necessary to emphasis one or more of these factors at the expense of the others.⁴ Obviously that will differ from one case to the next and what is required is that the sentencing court must strike a balance between the interests of the offender and that of society; and impose a well balanced sentence, without over- or under-emphasising any one of these factors.

[8] In *The State v Johannes Amunyela*⁵ the Court endorsed the remarks made in *S v Ndlovu*⁶ per Young, J where he said:

“The object of punishment is to hurt the offender and to hurt him sufficiently to prevent him committing a similar offence.”

At the same time the punishment imposed must reflect the indignation of both the court as well as society; more so to those who have suffered at the hands of the accused, their family and the community in general, who have a legitimate expectation that justice will be done.

[9] In the present case the deceased's father, Mr Simubali, expressed his grief for the loss of his child; but also his anger for the accused, saying that whereas capital punishment is no longer an option, therefore, the accused must be sent to prison as he considers him to be a threat to society. He was

⁴S v *Van Wyk*, 1993 NR 426 (HC)

⁵ Unreported Case No CC 22/2006 delivered on 25.02.2008

⁶ 1967 (2) SA 230 (R)

particularly distressed by the manner in which the accused took the deceased, still a school going child, into his house without even consulting her parents; causing her to fall pregnant soon thereafter. I do not find these submissions without merit as it appears to me that the accused by so doing, has not only shown very little respect for the parents of his wife-to-be, but effectively brought an end to any aspiration the deceased might have had to finish secondary school. In the process the deceased became completely dependent on the accused while at the same time, she took care of the accused's children; though still being a child herself.

[10] The accused is a police officer stationed at Katima Mulilo and holds the rank of constable. As a result of the pending trial he has been suspended without remuneration since January 2009 and ever since, he has truly struggled to make ends meet. Unfortunately things will not improve for he, in all probability, having been convicted by this Court on serious charges, stands to be discharged from the police force – despite the accused having a different view. The courts are normally sensitive to the hardship and distress brought upon the family members of an accused person as a result of crime being committed; however, this is unfortunately one of the consequences of committing crime and particularly where such accused is sentenced to a lengthy term of imprisonment, there is not much that the court can do, except to ensure, as far as reasonably possible, that the dependants of the accused are not left destitute. In this case it appears to me that, between the accused's mother, who to a certain extent contributes to the maintenance and care of the children, together with the grown-up children of the accused

staying in the house and who would be able to continue making a living off the land, they will be able to provide in the needs of the younger children within the family structure. Though it might not be ideal, at least the minor children are not left destitute, requiring intervention by the Court.

[11] The accused expressed his remorse for having caused the death of the deceased and finds support for this contention in the letters he had written to Mr Simubali, while in custody. The testimony of Simubali however shows otherwise. According to him the purpose of the letters sent was not to ask for his forgiveness but to request him to have charges withdrawn against the accused in exchange for cattle – which Mr Simubali declined. When asked by his counsel whether he had anything to say for the witness who sat in Court, he replied in the negative saying that he had not prepared something and had nothing to say. In order for contrition to be a valid consideration in mitigation of sentence showing that the accused will not reoffend, the court must be satisfied that his penitence is sincere and the accused must take the Court fully into his confidence. It has been said in *S v Seegers*⁷, a case often cited in this jurisdiction with approval, that:

“Unless that happens the genuineness of contrition alleged to exist cannot be determined.”

When taking into account that the appellant throughout the trial denied guilt on both charges by implicating the deceased as the aggressor in count 1, and the cause for him to have given out false information to others in respect of

⁷1970 (2) SA 506 (A) at 511G-H

count 2, and the Court having rejected his evidence in that regard as being false; together with the accused's failure after being released from custody to make any attempt to approach the deceased's family to apologise to them for his misdeeds, I am not persuaded that the contrition the accused now claims to possess is sincere and that it should be considered in sentencing. Accordingly, no weight is given to the accused's alleged contrition as it is not borne out, either by the evidence presented, or the manner in which he conducted his defence.

[12] In respect of both charges he raised grounds of justification in his defence and though he admitted having stabbed the deceased, he set up a defence portraying him as the victim. Accordingly, I strongly associate myself with the remarks made by Griessel, J in *S v Eadie*⁸ where the following appears at 188b-c:

“While I do not doubt that the accused does have feelings of remorse, this factor unfortunately loses some of its weight due to the fact that to this day he remains unwilling to accept legal and moral responsibility for what he has done. He sees himself as the unfortunate victim of circumstances, who, as a result of such circumstances, landed [him] in the present disaster.”

[13] The accused at the age of forty-nine years is a first offender, a factor weighing heavily with the Court in his favour. As a police officer he was gainfully employed and accepts his responsibility towards his dependants; though, the fact that he fathered four of his children each with different

⁸ 2001 (1) SACR 185 (CPD)

women, none of which he was married to, displays some irresponsibility on his side. Be that as it may, he accepted the responsibility to raise these children; something that is likely to change as a result of his conviction.

[14] Turning to the crimes and the circumstances under which same were committed, I consider the fact that the accused is a police officer to be an aggravating factor. Society generally looks up to members of the forces for protection; and rightly so, for their main duties notably, *inter alia*, is to serve within the community and to protect its members against criminals. In this regard the accused sadly failed and instead of protect, he turned on the complainant, a defenceless woman and stabbed her several times on her upper body with a knife; inflicting serious injuries resulting in death almost one month later. The Court has rejected the accused's evidence as being false when describing an incident during which he alleged to have acted in self-defence. He did not take the Court into his confidence and came clean with what exactly transpired, and although the Court may be left in the dark in that respect, it found that the accused when making his statement to the police, in all probability, told the truth i.e. that the deceased insulted and threatened him whereafter he took a knife and stabbed her. In these circumstances, this was a shameless attack on a defenceless woman; the same person he took into his house as a young girl and the mother of two of his children, showing no respect for the person he was supposed to love and protect.

[15] When this Court considered sentence in *S v Mushishi*⁹ where the circumstances were similar to the present in that the accused also stabbed his

⁹ 2010 (2) NR 559 (HC) at 563-564

wife in the chest with a knife, resulting in death, I made the following remarks which I deem necessary to repeat:

“[10] How much longer must society still endure this unacceptable conduct of those amongst them who trample on the fundamental rights of others without blinking an eye; and how many more lives must unnecessarily go wasted before these criminals come to their senses and learn that spouses, partners and children also have rights? Our news media all too regularly report the terrible crimes committed in this country on a daily basis and a large number of our citizens live in constant fear that they might fall prey to violent crime. What purpose does it serve to have one's fundamental rights enshrined in our Constitution but in reality innocent and vulnerable citizens are treated as if their lives are unimportant and not worthy of respect, one may ask? This court plays an important role in applying the law in the community and to maintain law and order; therefore, it should not shirk from its duty by ignoring the widespread outrage and disapproval of society against serious crime, lest the community might take the law into its own hands. If there is one message that should go out from this court today, then it is that those making themselves guilty of committing serious crime against the vulnerable and innocent in this country, must not expect to be treated with soft hands. By that I do not intend singling out the accused as the scapegoat of all those guilty of committing similar crimes, but the message must be clear that the courts will continue imposing harsher sentences in cases like the present, which should serve as a serious warning to all and sundry.”

[16] Since the enactment of the Domestic Violence Act the courts have made itself clear that crimes committed within a domestic relationship will be

considered an aggravating factor and will not be tolerated; hence, sentences will be appropriately severe.¹⁰ In the present instance the deceased was at home when brutally attacked, and although the incident to a certain extent may have been provoked, there was nothing that could possibly have justified the accused's reckless conduct by stabbing the deceased several times with a knife; an object, in itself a dangerous weapon as it appears from the photo plan. When considering the moral blameworthiness of the accused I shall find in his favour that he did not act with direct intent (*dolus directus*).

[17] I consider the crime of attempting to obstruct or defeat the course of justice equally as serious; more so, where the accused is a police officer who is under a legal duty to uphold the law. Though evidence has shown that the deceased tried to cover-up the cause of her injuries up to some point, it cannot, without knowing what the reasons were for doing so, be viewed as a mitigating factor weighing in the accused's favour. For instance, it could reasonably be that she feared reprisal by the accused once she returns home.

[18] Society undoubtedly would expect this Court to seriously pay attention to the nature of the crimes and the circumstances under which it was committed; particularly when this happens within a domestic environment. These sentiments were echoed by the deceased's father, Mr Simubali, when he said too many cases involving domestic violence are simply swept under the carpet and at the end of the day, we find that women in these relationships are being killed. For that reason, he said, the accused must be punished. In view of the prevalence of cases of this nature coming before our courts and

¹⁰*S v Bohitile*, 2007 (1) NR 137 (HC)

the often senseless killing of defenceless women and children for no reason at all, I find myself in agreement with these sentiments. I further believe that the courts are under a duty to show to society that it will not shy away from protecting it against persons such as the accused; those who do not respect the rights of fellow beings and who trample on such rights, seemingly untouched.

[19] When weighing up the interests of the accused against that of society; due regard being had to his personal circumstances opposed to the aggravating factors that are present, and the seriousness of the crimes committed, it seems to me, after careful consideration of all factors relevant to sentence, an inescapable conclusion that the interests of the accused simply do not measure up to the other factors, and that punishment in the form of a lengthy custodial sentence is inevitable.

[20] Turning to the objectives of punishment, it is not uncommon to find that the courts, when sentencing in cases as the present involving serious crimes such as murder, rape and robbery, to emphasis deterrence – individually and generally – and retribution as main objectives; often at the expense of other considerations such as the offender's rehabilitation. Obviously, that will be determined by the circumstances of the case under consideration. In the present instance I believe that the main objective of punishment should indeed be deterrence and retribution which must come to the fore, and that rehabilitation plays a lesser role. One could only hope that the accused, during his incarceration, will learn to respect the rights of others.

[21] It was not brought to the Court's attention that the accused was in custody awaiting trial for a lengthy period, which the Court ought to take into consideration when deciding sentence.

[22] In the result, Mr Bernard Mafenyeho Lifatila, you are sentenced as follows:

1. Count 1 – Murder, read with the provisions of Act 4 of 2003: 27 years' imprisonment.
2. Count 2 – Attempting to defeat or obstruct the course of justice, read with the provisions of Act 4 of 2003: 3 years' imprisonment.

In terms of s 280 of Act 51 of 1977 it is ordered that the sentences imposed should be served concurrently.

LIEBENBERG, J

ON BEHALF OF THE ACCUSED

Ms G Mugaviri

Instructed by:

Directorate: Legal Aid

ON BEHALF OF THE STATE

Mr R Shileka

Instructed by:

Office of the Prosecutor-General