CASE NO.: CC 02/2012

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

In the matter between:

THE STATE

and

PAULUS TOMAS **ACCUSED**

CORAM: LIEBENBERG, J.

Heard on: 31.07.2012
Delivered on: 03.08.2012

SENTENCE

LIEBENBERG, J.: [1] On 30 July 2012 the accused was convicted of murder, read with the provisions of the Combating of Domestic Violence Act[1]

[1] Act No 4 of 2003

and it now remains to be considered what appropriate sentence should be passed on him.

[2] In determining what suitable sentence to impose on the convicted accused, a judicial officer is required to consider factors such as the personal circumstances of the offender, the crime where regard is had to the seriousness thereof and the circumstances under which it was committed, and the interests of society. The sentencing court at the same time must endeavour to satisfy the objectives of punishment namely prevention, deterrence, retribution and rehabilitation. It has been said that these factors need not be given equal weight as the circumstances of a particular case may be such that more weight ought to be given to any one or more of these considerations at the expense of the others, in order to impose a well-balanced sentence. By this is meant a sentence that reflects that due consideration was given to, not only the interests of the offender, but that the court also acknowledges the legitimate interests of society without over- or under emphasising any one of these competing interests.

[3] The accused's personal circumstances were placed before Court from the Bar as the accused elected not to give evidence in mitigation. Currently the accused is 28 years of age and was 26 when he committed the murder he now stands convicted of. He has four siblings and after the death of his parents he went to live with his aunt. It was not contended that his unfortunate circumstances of the past had any influence on the accused's mindset when the crime was committed. He progressed at school up to grade

10 but failed, the reason for this according to him, being that it came as a result of financial constraints. He was temporarily employed between 2009 and 2010 at a construction site but was unemployed at the stage of committing the murder. The accused had a romantic relationship with the deceased since 2008 and a daughter was born to them during this period, now aged 3 years. After the death of the deceased the child stayed with her maternal grandmother who, in the interim, has also passed away. The current whereabouts of the accused's child is unknown to him as he has been in custody since the day of his arrest. To date the accused has been in custody for a period of 1 year and 7 months, though bail was granted to him during this period but which, so it seems, he was unable to pay. Regarding his health it was said that he suffers from asthma for which he receives medical treatment. The accused has had no previous encounters with the law prior to this incident and therefore, is a first offender.

[4] His counsel, Ms *Kishi*, submitted that the accused is still youthful and whatever sentence the Court ultimately imposes, should not be such that it brings the accused to the point where he sees no future for himself, as there is still room for rehabilitation. Though, the seriousness of the offence he committed is appreciated.

[5] Mr *Lisulo*, appearing for the State, argued that due regard must be had to the circumstances under which the murder was committed and the weapon used in achieving that goal. In the absence of the Court knowing the prevailing circumstances which led to the killing of the deceased and which

only he could place before the Court but failed to do, and regard being had to the circumstantial evidence presented at the trial, counsel contended that from the proved facts the Court would be entitled to find that the murder was pre-meditated. Counsel for the defence, obviously, disagrees and holds the view that it is not the only inference that reasonably could be drawn from the facts. I shall revert to this later.

[6] The murder, and even more so, the circumstances surrounding it, undoubtedly makes it a very serious offence. The deceased was brutally attacked with a hoe and struck on the head several times with such force that the deceased succumbed to head injuries at the scene. The post-mortem examination report revealed several skull fractures from which this Court deduced that it required substantial force to inflict injuries of this nature. It was also found that the accused, when he so acted, had acted with direct intent (*dolus directus*). When deciding whether or not the murder was pre-meditated, in my view, regard must be had to two compelling factors. These are (i) that the deceased received a text message on her cellphone from the accused that she had to come to the fence (of the field) to fetch her money from the accused; and (ii) whether the hoe used during the assault was brought along by the accused or not.

[7] On this point Ms *Kishi* argued that it could very well be that the calling of the deceased to the fence was an honest gesture to give her some money and not necessarily for the purpose of killing her. However, this proposition must not be considered in isolation, but must be viewed together with other

circumstantial evidence that might possibly assist the Court in drawing certain inferences from the proved facts. One such circumstance is that the hoe used during the assault was subsequently found lying in the field where it was left abandoned. The owner of the hoe unfortunately remains unknown as that person might have shed some light on where it was kept before the incident. Ms *Kishi* contended that bearing in mind that the incident took place in a field and that the deceased's family had been working their fields at the time, it could reasonably be inferred that it was left behind in the field by them and need not have been brought there by the assailant. In this regard it was pointed out by Mr *Lisulo* that the incident was not in the muhangu field as such, but rather on a footpath crossing through an open space of land which is not cultivated.

[8] I agree, as it is clearly depicted in photo no. 1 that the deceased's body, when found in the morning, was not lying in any cultivated land; in fact, there is nothing showing in any of the photos forming part of the photo plan that there were cultivated fields in the vicinity of where either the incident took place, or where the hoe was later found. Furthermore, if the said hoe was used by the deceased's family as suggested in the argument, then one would have expected Saavi, who worked the field, to have said so; neither was she cross-examined in this regard. After all, she testified about the panga being from their house found in the area where deceased was lying. Why then, would she also not have identified the hoe as belonging to their household if it were to be the case? The foregoing reasons, in my view, significantly reduce the possibility raised by defence counsel that the hoe could already have

been at the scene *before* the murder took place. I respectfully consider the proposition as fanciful and one that fails to appreciate the immediate surroundings of the murder scene as depicted in the photo album handed in as evidence. Although it cannot be said to be impossible, it is in the light of the evidence adduced, most improbable.

[9] When applying the two cardinal rules of logic referred to in *R v Blom*[2] to the facts under consideration, the Court can reasonably infer that the hoe was brought to the murder scene by the accused. In the absence of any other evidence explaining its presence and use at the crime scene, it tends to show that the only reason why it was brought there was to use it during the assault. I accordingly so find. Thus, the evidence supports a further finding that the murder was pre-meditated.

[10] The accused at no stage during the proceedings advanced any explanation for the killing of the accused; neither expressed any remorse for what he has done. On the contrary, he relied on his constitutional right to be innocent until proven guilty, thereby obliging the State to prove its case against him, despite overwhelming evidence. Although the accused cannot be faulted for the course he has chosen, it is however clear that he has no remorse for the pain and hardship he has brought upon the deceased's family; more so, to his own child who now has to suffer unnecessarily because of his misdeeds.

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[2] 1939 AD 188

[11] Whereas the accused did not take the Court into his confidence and come clean as to what led to the incident during which the deceased was killed, the only conclusion to reach is that this was a senseless killing where a much weaker and defenceless person, the accused's own girlfriend and the mother of his only child, became the victim of the one who was supposed to protect and love her. The deceased died a violent death and after the assault was left at her own mercy until she succumbed. It seems unthinkable that any one could be driven to such anger or rage and is provoked to act in the manner the accused did; yet, he remains unwilling to share that reason, if there were to be any, with the Court. If that is done with the view of lodging an appeal, then it is something he has to live with, for the absence of remorse in the circumstances, is indeed an aggravating factor. Whereas the Court has already found that the murder was pre-meditated, this is another aggravating factor and one that weighs heavily with the Court when considering sentence.

[12] The prevalence of a specific or type of crime in a particular community (but not limited to) is another factor that may and ought to be taken into account in sentencing. The view taken by the courts when considering sentence in relation to the prevalence of specific offences is to impose heavier sentences; the *ratio* being that such sentences may deter other potential offenders. The increasing of sentences in respect of those offences which have become more prevalent, should serve as general deterrence to others in society.[3] The Court must however guard against making an accused the scapegoat of others who make themselves guilty of committing similar or relevant crimes, for the accused should not be sacrificed on the proverbial

[3] *S v Gaus,* 1980 (3) SA 770 (SWA); *S v Maseko,* 1982 (1) SA 99 (A).

altar of deterrence for crimes he did not commit. Though the objective of punishment in the present instance *inter alia* would be to impose a deterrent sentence, this factor should not be overemphasised, thereby completely ignoring the accused person's interests.

[13] The accused stood in a domestic relationship with the deceased during which their daughter was born. This Court already expressed its concerns in several judgments about the prevalence of domestic violence and that the courts, when it comes to imposing punishment, should fully take into account the important need of society *"to root out the evil of domestic violence and violence against women".*[4] It was further said that the message from the courts must be that crimes involving domestic violence in Namibia will not be tolerated and that sentences imposed in these cases will be appropriately severe. See also: *S v Mushishi.*[5] When regard is had to the present circumstances, I am of the view, despite the particular circumstances under which the offence was committed remaining unknown (as the accused elected to remain silent about it), that this is indeed a case where the crime was committed within a domestic relationship, a factor that should be taken into account in sentencing.

[14] The printed media in this country almost on a daily basis report on murders and rapes especially of defenceless women and young children all over Namibia. In a significant number of these cases the crimes are committed within a domestic environment where the one, usually the male,

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[4] *S v Bohitile,* 2007 (1) NR 137 (HC) at 141E.
[5] 2010 (2) NR 559 (HC) at 564.

turns on his female partner with such brutality and callousness that, more often than not, it shocks society to the core. What has gone wrong with society to have become so inhuman and cruel towards one another? In some cases the offender commits suicide, but others do not succeed in executing their plans and then has to face criminal charges. The same pattern was followed in the present case, except that the accused, though telling others that he were to commit suicide after having killed the deceased, seemingly had a change of heart. Whatever the cause for the assault might have been, the accused could have walked away from it without having resorted to violence and which ultimately led to the deceased's death.

[15] At present there is undoubtedly wide spread outrage against these murders in our society and lest the courts step in and impose proper punishment, society may decide to take the law into their own hands. It has therefore been said that the natural indignation of interested persons and the community at large should receive some recognition in the sentences that courts impose; and where sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and those injured may resort to taking the law into their own hands.[6]

[16] While recognising the principle of individualisation when it comes to sentencing and where the court has regard to the relevant facts and the personal circumstances of the specific offender, which may distinguish his case from others guilty of the same offence, there is also the principle of uniformity and equality. The latter requires from the court, where the crime

[6] *R v Karg,* 1961 (1) SA 231 (A) at 236B.

and the circumstances of the criminal are more or less similar to another case, as far as it is possible, to impose sentence in such a way that the public can have confidence therein.[7] Generally, serious crimes like murder and rape are such that they attract custodial sentences where the emphasis is mainly on specific and general deterrence, as well as retribution, as objectives of punishment. I consider this case to be no different and all that needs to be considered is the period of the custodial sentence to be imposed. That will largely be determined by an assessment of the accused as an individual, and the mitigating factors found to be present; opposed to the gravity of the offence, the interests of society and other aggravating factors that may be present. Unfortunately, as far as it concerns reformation of the accused being one of the objectives of punishment – particularly where he is a first offender – this has to happen whilst serving his sentence; obviously, not being the ideal situation, though not impossible.

[17] Accused, when committing the offence, was a first offender aged 24 years – both factors weighing heavily with the Court in favour of the accused in sentencing. Although the accused as a child may have suffered some hardship due to his parents' early passing, it has not been suggested that it in any way contributed to the commission of the crime – neither am I able to come to such conclusion on the information placed before Court in mitigation. The accused has not only left their young daughter motherless and hence, the deprivation of motherly love and care; she is also to be without her father for a long period of time, something that will hurt the accused as well. Unfortunately this is an inescapable consequence of crime and one which

[7] *S v Strauss*, 1990 NR 71 (HC) at 76

usually brings about more hardship to the offender's family than what is hoped for. Unfortunately, one cannot allow one's sympathy for the accused's family to deter one from imposing the kind of sentence dictated by the interests of justice and society.

[18] It is trite that the period an accused spends in custody, especially if it is lengthy, to be a factor which normally leads to a reduction in sentence.[8] In this case the accused is in custody awaiting trial for 19 months. The fact that he was admitted to bail during this period, but seemingly unable to raise the money, in my view, makes no difference.

[19] After giving due consideration to the personal circumstances of the accused, the gravity of the offence the accused was convicted of, the legitimate interests of society and the need to emphasise deterrence, specific and general, as well as retribution as the main objectives of punishment, I consider the following sentence to be appropriate.

> Murder, read with the provisions of the Combating of Domestic Violence Act No 4 of 2003 – 35 years' imprisonment.

It is ordered that Exhibits '1' and '2' are forfeited to the State.

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LIEBENBERG, J

[8] *S v Kauzuu*, 2006 (1) NR 225 (HC) at 232F-H.

ON BEHALF OF THE ACCUSED **Ms. F Kishi**

Instructed by: **Dr Weder, Kauta & Hoveka**

ON BEHALF OF THE STATE **Mr. D Lisulo**

Instructed by: **Office of the Prosecutor-General**