

NOT REPORTABLE



CASE NO.: CC 11/2011

IN THE NORTHERN DIVISION OF THE HIGH COURT OF NAMIBIA

HELD AT OSHAKATI

In the matter between:

THE STATE

and

ANDREAS SHIVUTE KARAPI SHANGEMWENE

ACCUSED

CORAM: TOMMASI J

Heard on: 3, 4, 23 & 27 July 2012;

Delivered on: 20 August 2012

SENTENCE

TOMMASI J:[1] The accused was convicted of murder and robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977).

[2] The accused on 20 November 2010, whilst carrying a knife in his pocket, walked into a *cuca* shop during the afternoon hours and found Saara Heita alone. Saara, a grade 12 pupil, was helping out a neighbor at the *cuca* shop. The neighboring shop

owner testified that she heard the screams of Saara and this must have been when the accused had confronted her with the knife which he pulled out of his pocket. She tried to ward off the attack but the accused stabbed her in her neck; slit her throat and threw her down on the ground. He took coins amounting to N\$33.00 from the counter and left the shop. When he came out the community members gave chase and managed to apprehend him. The community members severely assaulted the accused and reluctantly handed him over to the police together with the knife which they found on him.

[3] Saara was only 20 years old when her young life was brutally ended. Her 71 year old grandmother testified that she was a retired nurse and Saara was living with her at the time of her death. She had invested in her school fees and general maintenance. Saara was the one assisting her. She had every reason to believe that Saara would be the one who would take care of her financially once she had completed her studies. She testified that Saara's death had plunged her into poverty as she had to carry all the funeral costs. She indicated that she would forgive the accused as she is a Christian.

[4] The accused testified that his mother was living in Angola and his father had passed away. He does not know where he was born but recalled growing up in the house of his uncle. He went to grade 1 in the village where he grew up and he appears to have had a normal childhood. He is not married but has one child and he is not sure who is looking after the child. The accused expressed genuine remorse for his deed and apologized in open court to the grandmother and the family of Saara. He testified that he was not healthy but did not want to disclose the details of his ill health. He has been held in custody since November 2010 whilst awaiting his trial. The accused is 27 years old.

[5] The accused has been convicted of two serious offences i.e murder and robbery with aggravating circumstances. Although these two offences are closely linked in terms of motive they form two separate and distinctly different offences. It is well established that the Court has to consider the offender, the offence and the interest of society when sentencing an accused. At the same time the Court has to bear in mind the objectives of punishment and consider the weight to be attached to each factor placed before the Court in mitigation and in aggravation.

[6] The accused pleaded guilty to the offence of murder and had shown genuine contrition for killing Saara. He has one child but he was not entirely able to perform his duties as a father given the fact that he has been serving a sentence for a previous offence committed. He also appears not to have very close family ties. I shall accept that the accused suffers ill health as same was not contested. I have, however, reason

to believe that he will have access to proper medical care in prison. The accused has been held in custody from the date of his arrest which is a period of 1 year and 9 months and it is trite that the period spent in custody awaiting trial would lead to a reduction in sentence.

[7] The accused is, however, not a first offender. He was convicted twice of theft during 2007 and of housebreaking with intent to steal and theft on 4 August 2010. He was sentenced to 12 months imprisonment of which 6 months were suspended for a period of five years on condition that the accused is not convicted of housebreaking with intent to steal and theft committed during the period of suspension. The accused served three months imprisonment and was released on 3 November 2010. These previous convictions are relevant to the charge of robbery which he committed on 20 November 2010, the same month he was released from prison. As was argued by counsel for the State, the accused graduated from petty theft to robbery. Although the accused had shown contrition for having taken the life of the deceased no such contrition was evidenced in respect of the robbery he had committed. The accused in all probability, knowing that there was a suspended sentence hanging over his head in respect of the housebreaking with intent to steal and theft, decided to fabricate a story that he was in a relationship with the deceased, thus adding insult to injury to the family of the deceased. The Court has to consider his propensity to commit crimes of which dishonesty is an element when considering an appropriate sentence for robbery. The accused, in view of this pattern, has not responded well to sentences aimed at encouraging him to reform.

[8] The State applied to this Court to put into operation the suspended sentence imposed by the district court of Ondangwa. The Court was however not placed in possession of sufficient evidence in this regard. This Court is not in a position to determine whether the matter was reviewable and if so whether the conviction and/or sentence were interfered with on review or whether such an application was not already brought before the sentencing court. The State if it so wishes could approach the sentencing court to put the suspended portion of the sentence into operation.

[9] The murder committed by the accused was brutal and perpetrated against a vulnerable unarmed young woman. I have to look no further than the respons of the community on the date in question. Members of the community took the law into their own hands showing frustration and anger toward a perpetrator of a violent crime. It was the intervention of the police that saved the life of the accused. I wish to state in no uncertain terms that the Court in no way condones such vigilante action. I can, however, understand the anger and vengeful feelings of that community. The senseless killing of a young woman in broad daylight at a place of business disturbed the tranquility and peace of that community. The Courts have to recognize the feelings

of the community but should guard against having those feelings of righteous anger cloud its judgment¹. Life is precious and therefore deserving of protection. Whilst Saara had lost her life, the lives of many others may be saved if deterrent sentences are imposed. Our Courts have expressed itself on numerous occasions in respect of violent crimes and ruled that under such circumstances the personal circumstances and consideration of reform should receive less weight and more emphasis should be placed on deterrence and retribution.

[10] The Court takes into consideration that the accused stole only coins in the sum of N\$33.00. This Court was not given an explanation as to why the accused decided to rob the *cuca* shop. The Court, however, may infer from the facts that the accused, having recently been released from prison, decided to revert to stealing from others as a means of income. Robbery in itself is considered by the Courts as a serious crime. In *S v Paulus*², Maritz, J, as he then was, cited with approval the following from *S v Myute and Others*; *S v Baby*³:

“Magistrates should never lose sight of the fact that robbery is a most serious crime. The offence consists of the two elements of violence and dishonesty. Normally an individual can avoid situations which lead to violence and the danger of his being assaulted by taking the necessary precautionary measures. Similarly he can take steps to guard against his property being stolen. It is, however, a different matter when it comes to robbery. The victim cannot take precautions against robbery. In his day to day living he visits friends, goes to work and goes shopping. This is usually when robbers strike. Robbers often roam the townships in gangs, attacking innocent people, depriving them of their property and almost invariably injuring the victims, sometimes seriously. The persons robbed are more often than not women or elderly people who cannot defend themselves. It must also be remembered that robbery is always a deliberately planned crime.”

In this matter the Court once again expressed its concern for the “*rising wave of crime*”

1 R v Karg 1961 (1) SA 231 (A)

2 Unreported case, Case no CA114/98 delivered on 28 March 2000

3 1985 (2) SA 61 (CkS) at 62 D – G)

and reaffirmed its determination to combat it by imposing deterrent sentences.

[10] A further important consideration for the Court to take into account is the approach the Court should follow when an accused is convicted of both murder and robbery i.e. when the victim of the robbery died. In *S v Alexander*⁴ the Court held that the accused convicted of robbery and murder must be sentenced on the count of robbery as if he had not been convicted on the count of murder and was not in jeopardy of such a conviction in future; and that the risk of double jeopardy should be addressed adequately by directing that the sentences (or portions thereof) should be served concurrently.

[11] I can only echo what Maritz J, as he then was, stated in *S v Paulus, supra*:

“Of course, punishment should be individualised. The background, character, capacity to be rehabilitated, motives and other personal circumstances of the offender deserve careful consideration and will always remain an important factor in the formulation of an appropriate sentence. Our penal system is, however, not only offender orientated. It also requires an assessment of the specific nature and the seriousness of the offence; of how best to serve the interest, prevalence of the offence, compensation of the victim and, in general the objectives of punishment in modern society.”

[12] Having carefully considered all of the above stated I am of the view that the following sentence would be appropriate:

The accused is sentenced as follows:

Count 1 – Murder: 30 years imprisonment

Count 2 – Robbery 10 years imprisonment

In terms of section 280 (2) of Act 51 of 1977 it is ordered that five years of the sentence imposed on count 2 be served concurrently with the sentence imposed on count 1.

4 2006 (1) NR 1 (SC)

Tommasi J

ON BEHALF OF THE STATE

Instructed by:

Adv Wamambo

**Office of the Prosecutor-
General**

ON BEHALF OF THE ACCUSED

Instructed by:

Ms. Nathaniel-Koch

Directorate of Legal Aid

