

**NOT REPORTABLE**



**CASE NO.: CC 06/2011**

**IN THE HIGH COURT OF NAMIBIA**

**HELD AT OSHAKATI**

In the matter between:

**THE STATE**

**versus**

**OSCAR JACOB**

**ACCUSED**

**CORAM: TOMMASI J**

Heard on: 21; 22 & 24 FEBRUARY 2012

Delivered on: 24 FEBRUARY 2012

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**SENTENCE**

**TOMMASI J:** [1] The accused pleaded guilty to murder and was convicted accordingly. The accused on 6 March 2010 unlawfully and intentionally killed Hilaria Frans , a 32 year old woman by chopping her with

a *panga* (machete) no less than 26 times. The Court is now tasked to sentence the accused.

[2] The accused in his plea in terms of section 112(1) of the Criminal Procedure Act, 51 of 1977, stated that the deceased was his common law wife with whom he had been living with for four years and that she bore him three children. He further stated that they were not living together during March 2010 because they were separated due to an “*earlier fight*”. On the day in question he was on his way to a *cuca* shop where he was doing stick work. He was carrying a *panga* with him which he had bought earlier that day. He intended to use the *panga* for cutting trees for his new house. He encountered the deceased near the house he had shared with her and she was carrying a stick at the time. He avoided talking to her as she had obtained a protection order against him. The deceased hit him with the stick on his neck and he fell to the ground. He momentarily blacked out and when he came to, he got so angry that he decided to chop her with the *panga* he was carrying.

[3] The State handed a bundle of documents into evidence which was not objected to. One of these documents is an interim protection order issued by the Magistrate for the district of Outapi in terms of section 8 of the Combating of Domestic Violence Act, 4 of 2003. The accused was ordered to

refrain from all acts of domestic violence against the deceased which included: no intimidation of any kind; no threats of any form; no harassment; no emotional, verbal or psychological abuse. The accused was further ordered to be accompanied by the Etunda police to collect his personal belongings from Etunda and Onganjera residences; and to stay away 100 meter radius from the complainant/deceased. This order was issued on 2 December 2009. The return date for the protection order was 19 January 2010. From the statement given by the accused it would appear that the interim order was confirmed. It can be safely assumed that the deceased sought this order to protect her against the abuse she was suffering at the hands of the accused.

[4] The State provided the court with the post mortem report and called Dr Armando Perez Ricardo to testify. This report was supplemented by a photo-plan which depicted not only the scene of the crime but also contained very graphic pictures of the wounds on the body of the deceased. This evidence tells a story of a truly horrific and gruesome crime. The deceased received ten (10) chop wounds to her head, two (2) at her back near the left shoulder blade and fourteen (14) to her arms, hands and wrists. The latter wounds Dr Ricardo described as defensive wounds i.e that the deceased used her arms to protect her head. Dr Ricardo also indicated that the force used must have

been severe given the multiple chop fractures observed. It is not hard to imagine that the deceased had suffered excruciating pain before her death.

[5] The record of proceedings in terms of section 119 of the CPA reflects that the accused pleaded not guilty to the charge of murder and when asked whether he wished to disclose the basis of his defense made the following statement:

*"I disclose that if the deceased did not open/seek a protection order against me, I was not going to commit the offence. I requested the police to accompany me to the house to obtain my documents but they did not assist me. I killed the deceased for the aforesaid reasons"*

[6] The State called Ms Shikongo, a cousin of the accused and Mr Onesmus Angula to testify in aggravation. From their testimony it transpired that the deceased ended the relationship between her and the accused during or about 2009 and that the accused started abusing the deceased. According to Ms Shikongo she saw the deceased with an injury on her chest at some point. Mr Angula who was the supervisor of both the accused and the deceased testified that he had called the accused in order to persuade him to desist from abusing the deceased after it came to his attention that she was injured by the accused. He testified that the accused however demonstrated soon thereafter that he would not heed to his advice as he overheard the accused threatening the deceased that he would teach her a lesson. It was his

testimony that after the deceased obtained the protection order, he arranged for her to live with his family where she could be better protected. The deceased returned to her house at the beginning of March 2010. The picture created by these two witnesses was that the deceased lived in constant fear of being harmed by the accused and had on a number occasions made complaints to the police. This evidence was not disputed.

[7] Ms Shikongo testified that the deceased had 6 children. The accused was the father of the three youngest boys. All the children are currently in the care of the maternal grandmother. The elder three children are attending school. The deceased was the only breadwinner who not only provided for her children but also took care of her mother who is unemployed. She indicated that the family of the accused contributed toward the funeral expenses and paid N\$7000.00 and 3 head of cattle to compensate the family for their loss. She testified that the accused had not approached them personally but that the family also would not accept an apology from him as they have no wish to see the accused. She testified that the death of her cousin left a gap that cannot be filled and that the children of the deceased are now left without the support and maintenance of their mother.

[8] Mr Angula in his capacity as a member of the community and NAMAC (Namibia Men Against Crime) signed a document titled "*petition: Murder, Hilaria Frans(Mpingana)*" which was addressed to the Magistrate of Ruakana. He testified that several members of the community signed the petition wherein they expressed their utter dismay at the cruel and horrific murder of the late Hilaria Frans. This document was handed into evidence. It contained allegations that the accused was released on bail of N\$800.00 shortly before he killed the deceased on charges that he was physically abusing and had threatened to kill the deceased.

[9] This allegation was not substantiated and the Court would not for the purpose hereof consider same. I would however like to digress to address this concern. Lip service is paid to the provisions of the Domestic Violence Act, 4 of 2003. Police officers are duty bound to keep a record of all complaints whether or not the complainant decides to press charges or not (see section 27). No such record was provided to this Court which clearly would be relevant under the circumstances. Prosecutors are reminded of their duty to have regard to section 24 and 25 of the Domestic Violence act, 4 of 2003 when they receive complaints of assault, malicious damage to property and assault by threat particularly a threat to kill, when perpetrated by a person in a domestic relationship with the complainant. In recent times it has become commonplace that threats made are executed as is the case

herein. The judicial officers should be furnished with all the relevant information and these charges should not be treated lightly. If proper attention is given to these initial complaints lives may be saved.

[10] The petition urges the court to protect the powerless citizens of this country from perpetrators of violent crimes and this witness requested, on behalf of the community, this Court to protect them.

[11] The accused did not testify under oath and his counsel addressed the Court on his behalf. She submitted that the accused, a 42 year old single male, has three children. The accused completed grade 9 and was employed at Etunda Irrigation Scheme where he earned N\$650.00 per month. The accused expressed remorse for his action. The accused is a first offender. The accused spent one year and 10 months in custody awaiting trial.

[12] It is trite law that the Court has to consider the offence, the offender and the interest of society whilst bearing in mind the objectives of punishment.

[13] The State submitted to the Court that there were no eyewitnesses to the killing of the deceased and the accused is therefore the only one who knows what happened and what drove him to commit this senseless killing.

[14] He gave two conflicting reasons as to why he had committed the offence. One version is that it was deceased was the initial provocateur who attacked him with a stick and that he on the spur of the moment decided that he was going to chop her with a panga. The other version was that he did it because she had obtained a protection order against him. The latter version corresponds with the evidence presented by the State in aggravation. There is undisputed evidence that the accused resented the fact that the deceased no longer loved him and relentlessly tormented the deceased for over a year driving her to the point of seeking a protection order. This action of the deceased deepened the resentment harbored by the accused. He carried this resentment for a period of over two months whilst the deceased was placed with a family in an environment that afforded her protection against him. The accused had earlier that day purchased a *panga* ostensibly to build a new house. He had previously threatened the deceased that he would kill her. I can only conclude that the accused had entertained the idea of killing the deceased prior to the incident and that he had executed it on 6 March 2006. The deceased wrestled with the accused over a distance of 25 meters in all likely hood in attempt to flee



from the accused whilst he was attacking her with a *panga*, chopping her on her arms she used to protect herself in order to reach her head. It was as aptly described by counsel for the State, horrific and gruesome. It filled the community with such revulsion that they communicated that they do not want the accused to return to that community.

[15] The accused failed to heed to the advice Mr Angula to stop his abuse of the deceased and the warnings of the police. He showed complete disregard for the court order and shifted blame for his conduct to the deceased who had dared to obtain a court order against him. Although the accused is a first offender, his conduct prior to the murder, makes him a poor candidate for reform.

[16] The accused pleaded guilty and expressed remorse at his conduct. He have instead of taking responsibility for his actions, chose to blame the deceased for having obtained the protection order and boldly stated that this would not have happened if she did not sought the protection order. I can do no better that quote what Maritz J (as he then was) said in the *S v Swartz and Others case No CC 08/89 (unreported) at 29*:

*“Real remorse for an injustice done to another must come from the heart and cannot be displaced by a desire to rather attempt in winning your freedom in an appeal. The sooner after the commission of a crime remorse is expressed and reparation steps are undertaken, the more genuine the*

*expression thereof will fall on the ears of the Court. It requires of a suspect not only to express it, but also to conduct himself in such a manner that his remorse is evident from his actions."*

The Court cannot attach much weight to the submission made by counsel for the accused that he was remorseful when there was no evidence of genuine contrition.

[17] Violent crimes committed by persons who are in domestic relationship is increasing at an alarming rate. Vulnerable women and children are increasingly becoming the target. Men who traditionally took responsibility to provide and protect now violently murder women who have a valuable role to play in society and orphan children who loses both parents in the process. It is to the Court the community now turns not only for retribution but also for protection. The need for general deterrence, prevention and retribution under these circumstances outweighs the personal circumstances of the accused. A lengthy custodial sentence under these circumstances is called for.

[18] This does not mean that the Court attaches no weight to the personal circumstances of the accused or that the fact that he, albeit belatedly, decided to own up to his deeds by pleading guilty. Although the Court may take into consideration the strong sentiments expressed by the community, it remains the duty of this Court to carefully balance the interest of society

against that of the individual whilst giving due consideration to the serious nature of the offence committed herein. The punishment should not be disproportionate to the offence nor should it be so lenient that the community would lose faith in the Courts ability to protect them and to exact retribution on its behalf.

[19] Having considered all these factors the Court sentence the accused to a term of 35 years imprisonment. Exhibit 1 (*panga*) and Exhibit 2 (hunting knife) are declared forfeited to the State.

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**Tommasi J**