

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case no: CA 27/2013

In the matter between:

MAGDALENA PIETERS

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Pieters v State* (CA 27-2013) [2013] NAHCMD 198 (17 July 2013)

Coram: UEITELE J and UNENGU AJ

Heard: 17 June 2013

Delivered: 17 June 2013

Reasons released on: 17 July 2013

Flynote: Criminal Procedure – Sentence – imposition of - factors to be taken into account – Sentence – Direct imprisonment – Appellant convicted of culpable homicide read with the Domestic Violence Act 4 of 2003 – Sentence confirmed but suspended for 5 years conditionally.

Summary: The appellant was sentenced to 18 months imprisonment after she was convicted of culpable homicide read with the Domestic Violence Act, 4 of 2003. In appeal, Court finds the appellant to be the victim than the abuser in the domestic relationship with the deceased. The court misdirected itself by over-emphasising the heinousness of the crime failing to consider the facts of the matter and the circumstances under which the crime was committed. Sentence of 18 months imprisonment confirmed but suspended for 5 years conditionally.

ORDER

In the result and for the aforesaid reasons, I confirm and stand by the order made by this Court on the 17 June 2013, to wit: 'The appeal succeeds, as the sentenced imposed in the court below is confirmed but suspended for 5 years, on condition that the appellant is not found guilty of culpable homicide committed during the period of suspension.

REASONS

UNENGU AJ (UEITELE J concurring):

[1] This appeal served before us on 17 June 2013 and after listening to submissions from counsel for the appellant and the respondent, we upheld the appeal by confirming the sentence imposed by the court below, but suspended the whole sentence for a period of 5 years on condition that the appellant is not found guilty of culpable homicide committed during the period of suspension and indicated that we shall provide reasons at a later stage. What follows hereunder are the reasons why we allowed the appeal suspending the sentence as a whole.

[2] The appellant (who was the accused in the court *a quo*) was charged with culpable homicide read with the provisions of the Domestic Violence Act, 2003¹ (the Act), in the Regional Court sitting at Rehoboth.

[3] She pleaded guilty to the charge against her and was convicted as charged pursuant to a statement² handed in on her behalf by Mr Christians who represented the appellant during the trial.

[4] Thereafter, the court below, after listening to submissions from the legal representative of the appellant, and the public prosecutor acting on behalf of the State, the respondent in this appeal, sentenced the appellant to 18 months direct imprisonment.

[5] The appellant is now appealing against that sentence by the Regional Court magistrate on the following grounds:

1. That the learned Magistrate erred and/ or misdirected herself by imposing a sentence of direct imprisonment which sentence is shockingly and disturbingly inappropriate under the circumstances.
2. That the Learned Magistrate further erred and/or misdirected herself by not considering imposing a totally suspended sentence or fine under the circumstances.
3. By not balancing the personal circumstances of the Appellant and the circumstances of this particular case against the seriousness of the offence of Culpable Homicide in general.
4. That the learned Magistrate erred and/or misdirected herself by over emphasizing the interest of the community and prevalence of the offence of Culpable Homicide in general.'

¹ Act No.4 of 2003.

² In terms of section 112(2) of the Criminal Procedure Act 51 of 1977.

[6] It is trite law that punishment is a matter for the discretion of the trial Court, which an appeal Court should not interfere with if such discretion was properly and judicially exercised by the trial Court. Since 1975³, this principle of law has been stated and quoted time and time again both by this jurisdiction and in South Africa.

[7] In *S v Rabie*⁴ Holmes, JA said:

'In every appeal against sentence, whether imposed by a magistrate or a judge, the Court hearing the appeal-

- (a) should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court.
- (b) should be careful not to erode such discretion, hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised'.

He concluded and said: '*punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances*⁵.'

[8] Similarly, Holmes, JA cautioned that⁶ one should guard against allowing the heinousness of the crime to exclude all other relevant considerations. What is needed is a balanced and judicial assessment of all factors. Needless to say that the guidelines laid in the matter of *S v Rabie* above, have been followed and are still followed in many cases⁷.

³ See *S v Rabie* 1975(4) SA 855 at 857 D-E.

⁴ *Supra*.

⁵ At 862D.

⁶ At 863 A-B.

⁷See *S v Holder* 1979 (2) SA 70-(A) 74H; *S v Pieters* 1987(3) SA 717 (A); *S v Van Wyk* 1992 (1) SACR 147 (NAM); *S v Scheepers* 1977 (2) 155 (A) 159 A-D.

[9] Coming back to this appeal, a brief survey of the facts has to be made to understand what transpired in the court below and why an effective imprisonment was imposed on the appellant. But before that, I must mention that the State's case is hanging on a thin thread due to the fact that the State did not place sufficient facts before the Regional Court other than the evidence contained in the Section 112(2) statement which was handed in by the appellant which reads as follows:

'THE STATE

VS

MAGDALENA PIETERS

PLEA I.T.O. ACT 51 /77 112 (2)

1. I am the accused in this matter.
2. I plead guilty to a charge of Culpable Homicide.
3. I admit that on or about 10 September 2011 at or near Farm Tweerivier in the district of Rehoboth I unlawfully caused the death of Petrus Kastoor by stabbing him with a knife once.
4. The deceased was my common law husband of the past 4 years prior to the incident. He assaulted me every time he was intoxicated. The marks I still bear today on my face and body are testimony to that. On the day of the incident he was intoxicated again and wanted to assault me again. I avoided him all the time but at one stage he cornered me inside the house and started beating me. I took a knife and stabbed him on his arm and upper chest. The wounds were not serious and I ran out of the house. He still chased me around and a certain Steven told me to put down the knife. I told him that the deceased will kill me if I did. However, later on I put the knife inside the house and left for Rehoboth. When I went through the river, on my way to Rehoboth he came running behind me and I then realized that he had a knife with him. He stabbed me and I

blocked the knife with my arm and got cut. I then grabbed hold of the knife and wrestled it from his hand whereby my fingers were cut open. He then grabbed me around my neck and started to strangle me. I then had no option but to stab him. I did not even notice where I stabbed him but it was only once where after he let go of me. He also had an open wound on his forehead where he fell while chasing me. It was not my intention to kill but only to get him away from me but unfortunately the blow seemed to be fatal but I had no other choice since he was on top of me and strangling me.

5. I know it is an offence to cause somebody's death negligently and that I could be punished for it.
6. I am very sorry for what I did and promise never to do such a thing again.

Signed: Magdalena Pieters'

[10] The State seemed to be in agreement with the contents of the statement handed in on behalf of the appellant and as such accepted the version of the appellant as the true version of the events which preceded the stabbing of the deceased. The court was also satisfied with the contents of the written statement and without further *ado*, convicted the appellant of the offence of culpable homicide, even though the court had a discretion to put questions to the appellant for clarification in case the magistrate had some doubts about the blameworthiness of the appellant concerning the offence she was charged with.

[11] The magistrate, during sentencing was supposed to consider the facts placed before court as per the written statement handed in by the appellant.

[12] That written statement, if carefully considered, the magistrate would have realized that there are a lot of mitigating factors contained therein. She informed the court that the deceased assaulted her every time he was drunk during the past 4 years they lived together as husband and wife. That on the fateful day, the deceased was again intoxicated and started the fight. She avoided him all the time but the deceased

cornered her and started beating her. She took a knife stabbed the deceased on the arm and upper chest.

[13] She, however, managed to run out of the house, leaving the deceased in the house. After running out of the house the deceased chased her around. A certain person named Steven persuaded her to put down the knife. She later put the knife in the house and decided to go to Rehoboth away from the deceased. But, the deceased followed her and when he tracked her down and again started fighting with her. This time, the deceased had a knife with him, which he aimed to stab the appellant with that knife. She blocked the stabbing with her arm (she got cut in the process) and managed to wrestle the knife from the deceased (her fingers were cut open in the process of wrestling the knife from the deceased), the deceased still overpowered her and was busy throttling her, it is in the process of the decease throttling her that she stabbed him.

[14] In these circumstances, in my view, the appellant was the victim rather than the aggressor. Both the public prosecutor and the legal practitioner for the appellant, in their submissions for sentence in the court below, urged the magistrate to impose a wholly suspended sentence, but the magistrate ignored their proposal.

[15] In her judgment on sentence the magistrate remarked that it was common cause that the offence the appellant was convicted of, was a serious offence, that the court must not lose sight of the fact that these types of crimes are now on the increase within Namibia as a country. Further, the magistrate was of the opinion that sentences imposed by courts do not have deterrent effects enough to deter the would be offenders, she therefore, expressed the view that it was hard time that cases like the present, are dealt with swiftly so as to ensure that killings, for whatever reasons, are not being repeated.

[16] The magistrate went further and pointed out that a clear message must be sent out (through the sentence on the appellant) in order to ensure that those who may be tempted to take the law into their own hands are curtailed.

[17] I agree. Generally, the statement of the magistrate, as indicated above, should be the norm. But, there are always exceptions to the rule. The facts in this appeal are such that the magistrate should not have placed more emphasis on the seriousness of the crime the appellant was convicted of at the expense of the circumstances in which the crime was committed. Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances⁸.

[18] When regard is had to the circumstances and the facts of this case, I am of the view that the punishment imposed on the appellant does not fit the appellant as the criminal. What happened is that the magistrate overemphasized the heinousness of the crime and excluded the other relevant considerations like the blameworthiness of the appellant in the matter, her personal mitigating factors and the fact she was abused by the deceased, that she had done what a reasonable person would have done in the circumstances, (that is by trying to get away from the deceased) and yet the deceased pursued her with a clear intent of hurting her. In the circumstances I am of the view that the magistrate misdirected herself on the facts and on the law.

[19] As indicated previously in this judgment, the appellant is attacking the sentence on four grounds. All these four grounds, which I do not intend to repeat, are suggesting that the magistrate misdirected herself to the main principles applicable to sentencing.

[20] Ms Ndlovu who argued the appeal on behalf of the respondent experienced some difficulties in justifying the direct imprisonment imposed by the court below. This was due to the facts of the matter and the circumstances under which the crime was committed. In my view, the sentence imposed is startlingly inappropriate, in the circumstances, it induces a sense of shock and there is a striking disparity between the sentence imposed by the magistrate and that which would have been imposed by this Court. That being the case, this Court has a reason to interfere with the sentence imposed in the trial court.

⁸ *S v Rabie* in paragraph 4 above; Also see *S v Tjiho* 1991 NR 361 (HC).

[21] In the result and for the aforesaid reasons, I confirm and stand by the order made by this Court on the 17 June 2013, to wit: 'The appeal succeeds, as the sentence imposed in the court below is confirmed but suspended for 5 years, on condition that the appellant is not found guilty of Culpable Homicide committed during the period of suspension.

EP Unengu
Judge, Acting

SFI Ueitele
Judge

APPEARANCE

APPELLANT:

WT Christians

RESPONDENT:

EN Ndlovu

Office of the Prosecutor-General