

REPUBLIC OF NAMIBIA

Reportable



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

Case No: CC 3/2014

In the matter between:

STATE

and

JUSTIN MUNSU SIMATAA

ACCUSED

Neutral citation: *State v Simataa* (CC 3/2014) [2016] NAHCMD 122 (20 April 2017)

CORAM: NDAUENDAPO J

Heard: 5 April 2017

Delivered: 20 April 2017

Flynote: Criminal Procedure – Sentence – Murder with *dolus directus* – Taking into account – The nature of the crime – The interest of society – The objectives of sentencing – The fact that the accused was provoked – Accused is sentenced to – An effective prison term of 25 years imprisonment.

Summary: The accused, a 31 year old Constable in the Namibian Police Force was convicted in this court, of murder, attempted murder, malicious damage to property and discharge of a firearm in a public place or on a public road in contravention of s 38 (1) read with ss 1, 38 (2) and s 39 of the Arms and Ammunition Act 7 of 1999 on 30 March 2017. On 26 October 2012 at Club Image in Khomasdal, the deceased and his friends found the accused at the bar counter. The deceased requested for space at the bar counter to place his order. A quarrel ensued soon thereafter. This altercation continued outside the club and independent witnesses testified that the deceased and his friends were the initial aggressors. The deceased and his friends continued beating and kicking the accused even after he had fallen to the ground. The accused as a result of this attack lost consciousness, but soon after regained consciousness. At this point the deceased and his friends were already seated in their motor vehicle. The accused walked towards the security guard, got his pistol and returned to the vehicle where the deceased and his friends were seated. The accused then fired the semi-automatic pistol. The deceased was hit by eight bullets while Mr. Likando was hit by five. The deceased succumbed to those injuries, while Mr. Likando survived. However, one bullet is still lodged in Mr. Likando's lung as doctors feared for his life should the bullet be removed.

Held, having taken into account the personal circumstances of the accused, the nature of the crime, the interest of society, the objectives of sentencing and the fact that the accused was provoked, the accused is sentenced to an effective jail term of 25 years.

ORDER

1. Count 1: Murder with *dolus directus* – 30 years of which 5 years are suspended on condition that the accused is not found guilty of murder or attempted murder during the period of suspension.
2. Count 2: Attempted murder – 15 years.

3. Count 3: Malicious damage to property – 2 years
4. Count 4: Discharging a firearm in a public place or on a public road – 1 year.
5. It is further ordered that the sentences in counts 2, 3 and 4 will run concurrently with the sentence in count 1. The accused is therefore sentenced to an effective jail term of 25 years imprisonment.

JUDGMENT

NDAUENDAPO, J

[1] The accused was convicted of murder with *dolus directus*, attempted murder, malicious damage to property and discharge of a firearm in a public place or on a public road in contravention of s 38 (1) read with ss 1, 38 (2) and s 39 of the Arms and Ammunition Act 7 of 1999 (hereafter, the Act).

[2] It is now my duty to sentence the accused for the crimes he committed. In terms of our law there are three factors to be taken into account, namely: (a) The personal circumstances of the accused; (b) The nature of the crime and (c) The interest of society.¹

[3] At the same time the sentence to be imposed must satisfy the objectives of punishment which are: (i) the prevention of crime; (ii) deterrence or discouragement of the offender from re-offending and would be offenders from committing crimes; (iii) rehabilitation of the offender and (iv) retribution. Thus, if the crime is viewed by society with abhorrence, the sentence should also reflect this abhorrence.

¹ *S v Zinn* 1969 (2) SA 537 (A) at 540G.

[4] In *S v Rabie*² the court held that: '*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.*'³

Personal circumstances

[5] The accused testified that he is 31 years old. He was brought up by a single mother without the support and care of his father. He finished grade 12. He is single and has a nine year old boy who resides with him. At the time of his conviction, he was a Constable in the Namibian Police for the past seven years. He testified that he feels very bad for having caused the death of the deceased. It is something that he always think about, 'it is constantly on his mind.' He tendered his apology to the mother of the deceased for causing her son's death. He also apologized for having attempted to murder Mr. Likando. He told the court that the apology was from the bottom of his heart. He never planned to kill the deceased, he said. The accused is a first offender.

Nature of the Crime and interest of society

[6] There is no doubt that murder and attempted murder are very serious crimes that call for severe punishment. The deceased, who was in the prime of his life, (he was 25 years old), was brutally murdered with a semi-automatic gun whilst seated in the motor vehicle. He had no chance to survive the barrage from the bullets coming from the semi-automatic gun. It was a life cut short unnecessarily at the hand of the accused. According to his mother, the deceased was a joyful human being 'with lovely eyes' and was looking forward to the joy of being a father, as his girlfriend was expecting a baby. What makes this case so tragic is the fact that he died at the hand of a police officer, who is expected to protect civilians and not take their lives. It was an act of revenge on the part of the accused as the attack on him had ended. Society expects the courts to punish offenders severely and to send a clear message that murderers will be dealt with severely.

² *S v Rabie* 1975 (4) SA 855.

³ *S v Rabie* at 862 G-H.

[7] Counsel for the accused submitted that the court must take into account the personal circumstances of the accused that he feels remorseful for what he did and that mercy is also an element of punishment.

[8] Counsel for the State, in aggravation, argued that the fact that the accused was convicted of serious crimes, the nature of the weapon used being a semi-automatic gun, and the number of projectiles that hit the upper part of the body of the deceased are aggravating. She further argued that the accused did not voluntarily stop firing the pistol, but only stopped because he ran out of projectiles. She further argued that after the commission of the offences, the accused did not assist in anyway – Mr. Likando was still alive and he could have done something. After the shooting the accused went to his house to reload his gun. What was he going to do with a reloaded gun? She further argued that the accused did not show remorse throughout the trial.

[9] She further argued that although the accused is a first offender, sight must not be lost that a young man in the prime of his life was murdered. Furthermore, that in the case of Mr. Likando a bullet is still lodged in his lung as it could not be retrieved for fear of risk to his life. She further submitted that the deceased's girlfriend gave birth after his demise and the responsibility of this child's upbringing is now thrust upon the deceased's mother who is an elderly person. She urged this court to impose a severe sentence on the accused.

[10] Mr. Golden and Ms. Fisher testified that the deceased and his friends were the initial aggressors as they started attacking the accused whilst standing with Mr. Golden. According to the witnesses, they assaulted him so badly that he fell to the ground and whilst on the ground they kicked and beat him up. He lost consciousness and when he regained it, he went to the security guard, got his pistol and started shooting at the deceased and Mr. Likando. Those witnesses were independent witnesses and the court believed their testimonies. Mr. Masule also testified that he saw the accused on the

ground being kicked by more than one person. The deceased and his friends in essence provoked the accused when they started assaulting and beating him.

[11] ‘. . . for the purposes of sentence, provocation is regarded as a mitigating factor because the crime was committed impulsively and not premeditated and therefore regarded to be morally less blameworthy than one committed with premeditation. . . .’⁴

[12] ‘The Court on the other hand, is mindful of the fact that people in any society, on a daily basis, encounter situations in which they are angered, humiliated or provoked, but have to control their emotions without yielding to the urge of taking the law into their own hands and punish their wrongdoers. Although one might feel for the accused in the circumstances, his uncontrolled conduct, as testified on during the trial, however, cannot be condoned by the Court; who also has a duty to uphold the law and protect other law abiding citizens living in an orderly society.’⁵

[13] Having taken into account the personal circumstances of the accused, the nature of the crime, the interest of society, the objectives of sentencing and the fact that the accused was provoked, the accused is sentenced as follows:

1. Count 1: Murder with *dolus directus* – 30 years of which 5 years are suspended on condition that the accused is not found guilty of murder or attempted murder during the period of suspension.
2. Count 2: Attempted murder – 15 years.
3. Count 3: Malicious damage to property – 2 years
4. Count 4: Discharging a firearm in a public place or on a public road – 1 year.
5. It is further ordered that the sentences in counts 2, 3 and 4 will run concurrently with the sentence in count 1. The accused is therefore sentenced to an effective jail term of 25 years imprisonment.

[14] On application by the State, the following exhibits are forfeited to the State in terms of s 35 of the Criminal Procedure Act 51 of 1977:

⁴ *The State v Ndafapawa Johannes* case no. CC 11/2009 delivered on 13.11.2009, Liebenberg AJ (as he then was) at 6.

⁵ *The State v Ndafapawa Johannes* above.

- a) CZ pistol with serial number 138772;
- b) 10 spent cartridges;
- c) 2 projectiles.

[15] Further, in terms of ss 10 (6), (7), (8) of the Arms and ammunition Act,⁶ the accused is prohibited from possessing a firearm for 20 years after serving his sentence.

G N NDAUENDAPO
Judge

⁶ *Arms and Ammunition Act 7 of 1996*

APPEARANCES

FOR THE STATE

Ms. C. Moyo
Of the Office of the Prosecutor General

FOR ACCUSED

Mr. M. Siyomunji
Of Siyomunji Law Chambers, Windhoek