

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

Case No: CC 01/2015

**THE STATE**

v

**EBEN CLOETE**

**Neutral citation:** *S v Cloete* (CC 01/2015) [2018] NAHCMD 10 (30 January 2018)

**Coram:** USIKU, J

**Heard:** 10 October 2017

**Delivered:** 30 January 2018

**Flynote:** Criminal Procedure – Sentence – Domestic Violence be regarded as an aggravating factor in sentencing – Such offences too prevalent in this country – The duty of the courts to protect victims of domestic violence – The manner in which the crime was committed – aggravating.

**Summary:** The accused stood charged with the crime of housebreaking with intent to murder and murder read with the provisions of the Combating of Domestic Violence Act<sup>1</sup>. It is alleged that the accused did unlawfully and intentionally break open the door and enter into the room of the deceased with an intention to murder her. He killed the deceased by stabbing her at least eight times with a knife or other

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<sup>1</sup> Act 4 of 2003.

sharp object. The deceased died on the scene. The accused was convicted by this court on a charge of housebreaking with intent to murder and murder read with the provisions of the Combatting of Domestic Violence Act 4 of 2003. It is now the duty of the court to consider what an appropriate sentence would be under the circumstances.

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**ORDER**

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Accused is sentenced to 32 years imprisonment.

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**SENTENCE**

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USIKU J

[1] The accused was convicted on a charge of housebreaking with intent to murder and murder read with the provisions of the Domestic Violence Act 4 of 2003.

[2] There is no dispute that at the time of the incident the accused and the deceased were involved in an actual romantic relationship in that they had a child together and they were involved in an actual or perceived intimate relationship.

[3] On 13 August 2009 at the Neudamm Experimental farm in the district of Windhoek the deceased, upon seeing the accused approach her, entered her room at her parent's house and locked the door.

[4] The accused followed the deceased and hit and/or kicked the door open and entered the room where the deceased was. The accused stabbed the deceased at least eight times with a knife or other sharp object whereafter he fled the scene. The deceased died on the scene due to haemothorax caused by the stab wound injuries to her chest. The deceased's body was discovered later on the same date.

[5] It is settled law that the court when sentencing is required to weigh the crime committed, the interest of society against the personal circumstances of the accused, whilst at the same time also taking into account the mitigating and aggravating factors *S v Zinn*<sup>2</sup>. Furthermore, when sentencing, the court has the duty to exercise its own discretion as it finds appropriate in the circumstances of each particular case.

[6] In the same breath 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 repeating the same crime,
- (iii) rehabilitation of the offender; and
- (iv) retribution.

[7] Thus when the crime committed is viewed by society with abhorrence, the sentence should also reflect such abhorrence.

[8] A well-known principle regarding sentence was articulated in *S v Rabie*<sup>3</sup> where 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.’

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<sup>2</sup> *S v Zinn* 1969 2 SA 537 (A).

<sup>3</sup> *S v Rabie* 1975 4 SA 855 at 862 G – H.

### Personal Circumstances

[9] Accused testified under oath that at the time of the alleged crime he was 22 years old. He is single and a father of two children from different mothers. The children were aged 10 and 8 years respectively. The deceased's son being the youngest.

[10] Prior to the incident, he was employed and took care of his children. He had also enrolled his oldest child to get a social grant from Government which is N\$200 per month. The accused's mother died some time ago but his father is still alive aged about 57 years old. He attended school up to grade 10 only. He has two brothers and 3 sisters, he is the second eldest. He did not make any contribution towards the deceased's funeral because he was kept in custody after his arrest on the date of the incident. Neither did he meet the deceased's family in order to ask for forgiveness.

[11] Accused persisted in saying that he had been found guilty for a crime he never committed and as such he is heartbroken. He was granted bail during 2010 but his bail was cancelled due to his failure to appear before court at the Hosea Kuutako periodical court and was re-arrested on 21 September 2013. Since then he has been kept in custody which translates to about five years.

[12] Accused in cross-examination denied to have killed the deceased stating that he left the deceased and their child alive. He therefore sees no reason to ask for forgiveness.

[13] During the course of the proceedings accused showed no remorse for what he had done whatsoever. He testified that he was convicted of a crime he never committed. His counsel however pleaded with the court to consider his personal circumstances, most importantly the fact that at the time the crime was committed accused was a youthful offender aged about 22 years.

[14] The accused in *casu* although he can be said to have been a youth, it is trite law that young offenders cannot always hide behind their youthfulness when they are guilty of committing serious crimes. The message should also be clear to young

people that they will not simply be excused by the courts on account of youthfulness and go scot-free, but where justice will not otherwise be done, they will be held accountable and be punished accordingly for the pain and misery caused to others as a result of serious crimes committed by them.<sup>4</sup>

[15] The fact that an accused acted in a brutal or brazen fashion endangering not only the legal order but imposing on the rights of others should be regarded as an aggravating factor by the sentencing court. The sanctity of life is a fundamental human right enshrined in the law by the Constitution and must be respected and protected by all. In my view it is not only the accused who must be deterred by a heavy sentence but others too 'let others think the game is worth the candle'.<sup>5</sup>

[16] The deceased herein is said to have been stabbed at least eight times with a knife, which is clearly an indication of the cruel inhumane treatment by the accused on a person with whom he had been involved in a domestic relationship from which a child was born. The deceased was left alone and died while the accused walked away bragging about what he had done and inviting the people he met to go and see for themselves what he had done.

[17] Accused showed a callous disregard for the integrity and privacy of the deceased's household when he broke into the deceased's room and killed the deceased. The treatment meted out by the accused on the deceased who was unarmed was uncalled for. She was repeatedly and viciously stabbed until she died on the scene.

[18] It is common cause that detention prior to sentence is a mitigating factor, that the sentencing court must take into account though no statutory provision provides for such. It has become a practice in our courts to accept that such detention may lessen the punishment.

[19] Accused on the other hand testified and persistently told the court that he could not ask for forgiveness because he did not kill the deceased. Accused showed no remorse whatsoever for what he had done. Remorse as an indication that the

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<sup>4</sup> S v K (2011) 1 NR 1.

<sup>5</sup> Sparks 1972 3 SA 396 (A).

offence will not be committed again, is obviously an important consideration, in suitable cases, when the deterrence effects of a sentence on the accused is adjudged. In *casu* accused did not take the court fully into his confidence, as he is still protesting his guilt.

#### The crime and the interest of society

[20] Housebreaking with intent to murder and murder is indeed a very serious crime that calls for severe deterrent punishment. In *S v Drosky*<sup>6</sup> it was held:

'The crime of housebreaking with intent to steal and theft is prevalent and also serious. It is regarded by the law and society as a particularly serious form of theft because it is said that a man's house is his castle. If there is one place where a person should feel safe and secure, it is in his/her home. Housebreaking and theft strikes at and destroy the sense of safety and security which the occupants are entitled to enjoy.'

[21] In the case before court, the accused after he had broken into the deceased's room he went on and killed her. An innocent life was lost. Accused and deceased were in a domestic relationship when he murdered her, which is also an aggravating factor.<sup>7</sup> Violent crimes which are being committed against women and children have reached a crisis point.<sup>8</sup> Although the courts have repeatedly pronounced themselves about such evil, these crimes continue unabated, despite the severe sentences being imposed. It is clear that the community in general expects the courts to impose severe sentences for murder in order to be responsive to the outlook of the community.

[22] The court is mindful of the fact that the accused is a first time offender who must be treated with leniency. However, the crime committed is of such a serious nature. Crimes of violence against women being on the rise county-wide. The courts must therefore pass sentences that have a retributive effect, and which will send a clear and unequivocal message to society that such behaviour cannot be tolerated or condoned.

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<sup>6</sup> *S v Drosky* 2005 NR 487 (HC).

<sup>7</sup> *S v Bohitile* 2007 NR 1 137.

<sup>8</sup> *S v Ruben* CC 21/2013 (2017) NAHCM delivered on 20 June 2017.

[23] Having taken into account the accused's personal circumstances, the nature of the crime committed, the interest of the society as well as the objectives of sentencing, the accused is sentenced as follows:

Accused is sentenced to 32 years imprisonment.

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D N USIKU  
Judge

**APPEARANCES****STATE:**

P. Khumalo

Office of the Prosecutor-General, Windhoek

**ACCUSED:**

M. Engelbrecht

Instructed by Directorate of Legal Aid, Windhoek