

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

Case No: CC 3/2017

THE STATE

versus

SAKARIAS MATHIAS

ACCUSED

Neutral citation: *S v Mathias* (CC 3/2017) [2019] NAHCMD 530 (5 December 2019)

Coram: SHIVUTE, J

Heard: 21 November 2019

Delivered: 5 December 2019

Fly note: Murder – Sentence – Factors to be taken into account – Personal circumstances of accused – Accused 59 years old – Factor in his favour – Aggravating factors – Murder – Deceased’s life is lost and irreplaceable – Accused went in a bar and fired shots at the deceased and the complainant – No genuine remorse shown by accused for the crime he committed – There is a need to harmonise the balance

between the interest of the accused and that of society – Interest of society outweighs that of accused – Cumulative effect of lengthy sentence justifies court imposing concurrent sentences.

Summary: The accused was convicted of murder with direct intent, one count of attempted murder, one count of unlawful possession of a firearm without a licence, possession of ammunition without him being in lawful possession of an arm that is capable of firing such ammunition and attempt to defeat the course of justice. He had four previous convictions of theft, one previous conviction of attempted theft, one previous conviction of escaping from lawful custody and assault. All the previous convictions are older than 10 years. The court will thus not attach much weight to them. The accused is 59 years old. This is a factor which counts in his favour. The court aims to harmonise the balance between the interests of the accused and those of the society. The cumulative effect of the lengthy sentences justifies the court's consideration of imposing sentences that run concurrently.

SENTENCE

1st Count: Murder with direct intent, twenty eight (28) years' imprisonment.

2nd Count: Attempted murder, five (5) years' imprisonment. Two (2) years of which are to run concurrently with the sentence in the 1st count.

4th Count: Possession of a firearm without a licence contravening section 2 read with sections 1,8,10, 38 and 39 of the Fire Arms and Ammunition Act 7 of 1996.

Two (2) years' imprisonment.

5th Count: Possession of ammunition without him being in lawful possession of an arm that is capable of firing such ammunition contravening section 33 read with sections 1,8,10,38 and 39 of Act 7 of 1996:

One (1) year imprisonment.

The sentence in count 5 is to run concurrently with the sentence in count 4.

6th Count: Attempted to defeat or obstruct the course of justice.

Two (2) years' imprisonment.

In terms of section 10(7) of Act 7 of 1996, the accused is declared to be unfit to possess a firearm for 10 years from the date the accused finishes to serve his sentence.

JUDGMENT ON SENTENCE

SHIVUTE J:

[1] The accused was convicted of the following crimes and offences: murder with direct intent, one count of attempted murder, one count of unlawful possession of a firearm without a licence contravening section 2 read with sections 1,8,10, 38 and 39 of the Fire Arms and Ammunition Act, 7 of 1996, possession of 4 rounds of ammunition without him being in lawful possession of an arm that is capable of firing such ammunition contravening section 33 read with section 1,8,10 38 and 39 of Act 7 of 1996 and attempt to defeat the course of justice.

[2] The accused testified in mitigation. What is striking is that the accused had four previous convictions of theft, one previous conviction of attempted theft and one previous conviction of escaping from lawful custody. The accused was convicted and sentenced for all these cases in the late 1970 and late 1980's. His last conviction was of

assault whereby he was convicted in 2001. It is evident from his previous record that the accused is not a stranger to court although during the trial he told this court at one point that it was his first time to appear before court. I am alive to the fact that all accused's previous convictions are older than 10 years. I will therefore not attach much weight to them and I will not sentence him in light of his previous convictions.

[3] The accused is married with children. He was looking after them as well as his extended family. He is 59 years old. Before his conviction, the accused was running his business. This court was informed that since his conviction, his business was suffering as there was no one to take care of it. His level of education is Standard 5. He did not show genuine remorse for the murder of the deceased although he testified that he was apologising to the court and to the family of the deceased. He persisted to say that the death was caused accidentally. He asked the court to give him a fine, or periodical imprisonment so that he could report himself to a correctional facility during weekends or to be given community service or a suspended sentence. The accused further asked the court to exercise a measure of mercy on him because apart from the shop that he was running, he also had livestock and a farm to look after.

[4] The accused called his wife to testify in mitigation. Her testimony was that this case had a negative impact on their marriage as it happened six months after they were legally married although they have been in a romantic relationship for more than two decades. The case had financial implications that they had to meet and it causes them emotional stress. The wife is the one now looking after the children and the business is not doing well. The accused was also supporting orphans, the children of his late brothers. She further testified that if the business closes down, the four people whom they have employed will be unemployed.

[5] Counsel for the State argued that the accused was convicted of serious offences, especially the crime of murder. A life has been lost and it can never be replaced. The deceased's family had suffered a great loss. The deceased was a vulnerable member of the society since she was a defenceless woman. The offence falls under gender based

violence. Therefore, the sentence to be imposed must have a deterrent effect. The fact that the accused used a firearm which is a dangerous weapon is an aggravating factor. The firearm was also not licensed. Most of the unlicensed firearms are used to commit crimes. Therefore, there is also a need to impose a deterrent sentence in this respect. The same firearm was used in respect of count 2.

[6] Concerning the offence of attempt to defeat or obstruct the course of justice, counsel rightly submitted that society functions on the good administration of justice and the duty of courts is to protect society, including the accused. Anyone seeking to defeat the course of justice is in essence perpetrating an offence which affects not only the justice system but society at large because justice protects society at large. This court was referred to some authorities which I have perused. Although there are similarities in some of the cases referred to, they are not exactly the same. Each case is unique and it must be treated according to its own facts and circumstances.

[7] Counsel for the accused argued that the accused had taken the court into its confidence by testifying under oath and apologised for his actions that resulted in the deceased's death. The accused is a productive member of society. His family would suffer if given a custodial sentence. Concerning the interest of society, counsel argued that a life was lost and society would require the courts to impose appropriate sentence on offenders, but the court should also consider that the accused was taking care of about 25 people who depended on him. The lengthy sentence would have an impact on the members of his family who are also members of society.

[8] The accused will be turning 60 at his next birthday. This is a factor in his favour. Like any other person, he has a family and dependants whom he was taking care of. It is inevitable that his family members will suffer because of the accused's incarceration. Unfortunately this is always the consequence of committing a crime that calls for the imposition of a custodial sentence. The life that was lost is also irreplaceable. The accused went in the bar and fired shots at the deceased and the complainant in the 2nd count where people were supposed to relax and enjoy their drinks.

[9] I am required to consider the accused's personal circumstances and the circumstances in which the crimes and offences were committed as well as the interest of society when sentencing the accused. I have also considered that the accused committed serious offences, especially the crime of murder which is aggravated by the fact that he used a lethal weapon, namely a firearm. The accused's lack of genuine remorse counts against him. The murder victim was a defenceless woman, this is also an aggravating factor. Given the circumstances of the case, a deterrent sentence is called for.

[10] The court endeavours to harmonise the interest of the accused and that of the society. It is inevitable that the one may be emphasized at the expense of the other. In the circumstances of this case, especially upon a conviction for murder a custodial sentence is the only option open to the court. The sentences requested by the accused are not appropriate in the circumstances. However, given the cumulative effect of the lengthy sentences I will consider imposing sentences that may run concurrently.

[11] In the result, the accused is sentenced as follows:

1st Count: Murder with direct intent, twenty eight (28) years' imprisonment.

2nd Count: Attempted murder, five (5) years' imprisonment. Two (2) years of which are to run concurrently with the sentence in the 1st count.

4th Count: Possession of a firearm without a licence contravening section 2 read with sections 1,8,10, 38 and 39 of the Fire Arms and Ammunition Act 7 of 1996.

Two (2) years' imprisonment.

5th Count: Possession of ammunition without him being in lawful possession of an arm that is capable of firing such ammunition contravening section 33 read with sections 1,8,10,38 and 39 of Act 7 of 1996:

One (1) year imprisonment. The sentence in count 5 is to run concurrently with the sentence in count 4.

6th Count: Attempted to defeat or obstruct the course of justice.

Two (2) years' imprisonment.

In terms of section 10(7) of Act 7 of 1996, the accused is declared to be unfit to possess a firearm for 10 years from the date he finishes to serve his sentence.

NN Shivute
Judge

APPEARANCES:

THE STATE:

Mr Kumalo

Office of the Prosecutor-General

ACCUSED:

Mr Brockerhoff of Brockerhoff legal practitioners

Instructed by Legal Wise