

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT (SENTENCE)

Case No: CC 23/2017

In the matter between:

THE STATE

v

DAWID AMSEB

ACCUSED

Neutral citation: *S v Amseb* (CC 23/2017) [2019] NAHCMD 57 (19 March 2019)

CORAM: NDAUENDAPO J

Heard: 6 March 2019

Delivered: 19 March 2019

Flynote: Criminal procedure – Sentencing – Convicted of murder with direct intent and common assault – Accused father of deceased, caused his death – Assaulted the mother of the deceased - Domestic relationship – Life imprisonment – 1 year imprisonment for common assault.

Summary: The accused was convicted of murder with direct intent. He caused the death of his own 3 months old baby boy by smashing his head against the floor. He also assaulted the mother of the deceased. The accused has shown no remorse whatsoever.

Held, that, murder is very serious offence and the fact that the accused caused the death of the deceased is aggravating.

Held further, that the fact that he had shown no remorse is also aggravating.

Held, further, that the appropriate sentence for murder is life imprisonment.

Held, further that, for common assault, the accused is sentenced to 1 year imprisonment.

Held, further, that the sentence on the assault will run concurrently with the sentence in murder.

ORDER

Count 1 – Murder with direct intent – life imprisonment.

Count 2 – Common assault – 1 year imprisonment.

It is ordered that the sentence in count 2 be served concurrently with the sentence in count 1.

JUDGMENT

NDAUENDAPO J;

Introduction

[1] On 20 February 2019 this court convicted the accused of one count of murder with direct intent read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003 and one count of common assault, read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003.

[2] The accused threw the deceased, who was 3 months old, head on to the ground with such brutal force that he died as a result of head injury.

[3] 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

[4] 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.

[5] The prevention of crime, otherwise known as 'direct prevention' is premised on the notion that by making it impossible for the offender to commit at least a certain type of crime again, crime would be reduced, however, other jurists advocate for 'indirect prevention' which school of thought postulates that the offender is persuaded to cease his activities 'voluntarily' by means of three different methods; namely through retribution, deterrence and rehabilitation.²

[6] In *S v Rabie*³ 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'.

Counsel for the accused placed his personal circumstances before court as follows:

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

² DP Van Der Merve. Sentencing Service 5. 1996 at 3-11.

³ *S v Rabie* 1975 (4) SA 855 at 862 G-H.

The accused person was born on 16 May 1993 to Magdalena Amses and his estranged unknown father in Gobabis. His father raised him till the age of 3 and ever since then have not met and have therefore not played any significant role in his upbringing. The accused attended school up to grade 6, starting first at Johannes Toreb Primary School where he commenced with grade one and then moving to Vergenoeg Primary School where he went up to grade 6. At the time of the incident the accused person was 25 years of age and was employed at farm Morester, in the Gobabis District. The accused has been kept in custody since 30 March 2017, almost 2 years to date. The accused person is a first time offender who have not had previous brush with the law and ought to be treated with a measure of leniency particularly if one has regard to the fact that the offence in question was an unfortunate and isolated and the offender deserves a chance to reform himself and to conform in the future with the dictates of society.

[7] Counsel for accused submitted that ‘when looking at the nature of the crime and the context within which this particular one was committed, the court should assess the moral blameworthiness of the accused in relation to the crime. It was undisputed fact that the accused had been called to come from the farm in order to register the child and then before the child was even registered it was insinuated that the child was not his and further he was chased out of the house.’ Counsel further argued that the court should exercise some sympathy towards the emotional agony the accused may have suffered as the result or influenced the way he acted next in the causation of events.

[8] Counsel for the state argued that the seriousness of a crime of murder perpetrated in a domestic domain has been echoed in a plethora of cases. Endorsing such seriousness, Smut AJ (as he then was) in the matter of *S v Bothile*⁴ said the following:

‘The prevalence of domestic violence and the compelling interest of society to combat it, evidenced by the recent legislation to the effect, required that domestic violence should be regarded as an aggravating factor when it came to imposing punishment. Sentences imposed in this context, whilst taking into account the personal circumstances of the

⁴ *S v Bothile* 2007 NR (1) 137.

accused and the crime, should also take into account the important need of society to root out the evil of domestic violence and violence against women. In doing so, these sentences should reflect the determination of courts in Namibia to give effect to and protect the constitutional values of the inviolability of human dignity and equality between men and women. The clear and unequivocal message which should resonate from the courts in Namibia was that crimes involving domestic violence would not be tolerated and that sentences would be appropriately severe.'

[9] Counsel argued that in light of the above and if one have to weigh up the accused's personal circumstances and accompanying mitigating factors against the offence of murder and the circumstances under which it was committed, one can only come to the conclusion that the accused's personal circumstances simply do not measure up to the gravity of the offence and the interests of society. Hence, it's the state's submission that the only appropriate sentence would be a lengthy period of imprisonment or a life imprisonment term.

[10] Murder is a very serious offence and in the present case committed with direct intent against a defenceless boy. The accused in this matter smashed the head of the deceased against the floor and thereby causing severe head injury which caused his death. The pain must have been unimaginable. He was only 3 months old and died at the hands of his own father, a person who was supposed to protect him. That is aggravating. Worst of all the accused had shown no remorse whatsoever and that also is aggravating. I have considered his personal circumstances and as counsel for the state put it 'there is nothing in it to outweigh the seriousness of the offence. Gender based violence against children and women continues unabated and the courts must play their role in combating gender based crimes by imposing lengthy sentences.

[11] I have considered the personal circumstances and the seriousness of the offence and the interest of society and the appropriate sentences will be as follows:

Count 1 – Murder with direct intent – life imprisonment

Count 2 – Common assault – 1 year imprisonment

It is ordered that the sentence in count 2 be served concurrently with the sentence in count 1.

G N NDAUENDAPO
Judge

APPEARANCES:**FOR THE STATE:**

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FOR ACCUSED:

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