

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case no: CC 16/2019

In the matter between:

**THE STATE**

and

**BENJAMIN GEORGE STRONG**

**ACCUSED**

**Neutral citation:** *S v Strong* (CC 16/2019) [2020] NAHCMD 231 (18 June 2020)

**Coram:** SIBEYA, A.J

**Heard:** 04 June 2020

**Delivered:** 18 June 2020

**Flynote:** Criminal Procedure – Sentence – Murder with direct intent committed in a domestic relationship – Accused in a position of trust towards the deceased – Society calls for severe sentence – Failure to show remorse is an aggravating factor – Time spent in custody pending trial mitigates the sentence – First offender at 58 years old counts in accused's favour as a relevant consideration in mitigation of sentence – The principle regulating taking different counts together for purpose of sentence revisited.

Criminal procedure – Murder in a domestic set up – Lengthy custodial sentence inevitable – Accused sentenced to 28 years' imprisonment. Assault with intent to do grievous bodily harm – Serious offence – Perpetrated on another person who

attempted to save the deceased from being stabbed further – Sentence not to run concurrently with sentence on murder as two different persons were stabbed – Calls for a custodial sentence – Accused sentenced to 2 years' imprisonment – Counts 3 and 4 – Common assault – Accused sentenced to 6 months' imprisonment on each count – The sentences on counts 3 and 4 ordered to be served concurrently with the sentence on count 1.

**Summary:** The accused was indicted in the High Court on the following charges: 1 - murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003; 2 - attempted murder; 3 - assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act; 4 - assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act and 5 – defeating or obstructing or attempting to defeat or obstruct the course of justice. He pleaded not guilty to all counts and did not offer a plea explanation but opted to remain silent.

On 04 June 2020, this court after hearing evidence convicted the accused of: 1 - murder with direct intent, read with the provisions of the Combating of Domestic Violence Act; 2 - assault with intent to do grievous bodily harm as a competent verdict; 3 – common assault, read with the provisions of the Combating of Domestic Violence Act as a competent verdict and 4 – common assault, read with the provisions of the Combating of Domestic Violence Act as a competent verdict. The accused was found not guilty and acquitted on count 5.

*Held* that, in sentencing, courts should consider the triad principles: the crime, the offender and the interest of society as well as the fourth element of mercy, but such should not be misplaced pity.

*Held further* that, the fact that the accused is a first offender at the age of 58 years old mitigates the sentence.

*Held further* that, time spent in custody pending trial should be judicially considered in mitigation, but there should be no mathematical calculation to the effect of such time on sentence.

*Held further* that, the accused was in a position of trust towards the deceased as they were in a domestic relationship and he should have protected her.

*Held further* that, the number of violent cases, committed in domestic set ups on our court roll is alarming, shows no signs of abatement and courts should pass severe punishment to deter would be offenders.

*Held further* that, remorse is a mitigating factor but failure to express remorse aggravates the sentence.

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### ORDER

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Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 28 (twenty-eight) years' imprisonment.

Count 2: Assault with intent to do grievous bodily harm – 2 (two) years' imprisonment.

Count 3: Common assault, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – 6 (six) months' imprisonment.

Count 4: Common assault, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – 6 (six) months' imprisonment.

In terms of section 280(2) of the Criminal Procedure Act 51 of 1977 it is ordered that the sentences imposed on count 3 and 4 be served concurrently with the sentence on count 1.

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### SENTENCE

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SIBEYA AJ:

[1] On 04 June 2020, this court convicted the accused on count 1 - murder with direct intent, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 (the Combating of Domestic Violence Act); count 2 – assault with intent to do grievous bodily harm; count 3 – common assault, read with the provisions of the Combating of Domestic Violence Act and count 4 – common assault, read with the provisions of the Combating of Domestic Violence Act. He was found not guilty and acquitted on count 5 – defeating or obstructing or attempting to defeat or obstruct the course of justice. His conviction on counts 1 - 4 resulted from a trial, after the accused pleaded not guilty to all charges and evidence was led. The accused persisted in his innocence throughout the trial, but this court found that the state proved its case beyond reasonable doubt on the charges convicted of.

[2] This court is now seized with the responsibility to pass sentences in keeping with the offences that the accused is convicted of.

[3] *Mr. Malumani* appeared for the state while *Mr. Engelbrecht* appeared for the accused.

[4] The established sentencing guidelines comes in handy in navigating through the sentencing process. I therefore take into consideration the celebrated triad factors of sentencing,<sup>1</sup> being the crime, the offender and the interests of society. The court's obligation in sentencing, therefore includes considering the personality of the offender, his age and personal circumstances, together with the crime and the interests of society.<sup>2</sup> As provided for in *S v Khumalo*,<sup>3</sup> I am mindful that there is a fourth element of mercy which should be considered. It has been pointed out further that mercy should not be misplaced pity. In *S v Sparks and Another*,<sup>4</sup> it was stated that punishment must fit the criminal, the crime, be fair to society, and be blended with a measure of mercy according to the circumstances. The aforementioned factors should be considered together with the main purposes of punishment, being deterrent, preventative, reformatory and retributive which are of critical importance to sentencing and this court considers same.<sup>5</sup>

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<sup>1</sup> *S v Zinn* 1969 (2) SA 537 (A).

<sup>2</sup> *S v Jansen* 1975 (1) SA 425 (A) 427-428.

<sup>3</sup> 1973 (3) SA 697 (A) 698.

<sup>4</sup> 1972 (3) SA 396 (A) B at 410H.

<sup>5</sup> *S v Tcoeib* 1991 NR 263.

[5] Courts are required to balance the factors of sentencing in order to arrive at an appropriate sentence. It is, however, settled law that in sentencing, it may sometimes be unavoidable to emphasise one factor at the expense of the others.<sup>6</sup>

[6] Equipped with the above sentencing guidelines, I proceed to apply same to this matter. I opt to commence with considering the personal circumstances of the accused. The accused did not testify in mitigation of sentence. His personal particulars were placed on record by *Mr. Engelbrecht*. The accused is aged 58 years old, unmarried and has 6 major children. At his advanced age, he is a first offender. He dropped out of school in standard 6 (grade 8). At the time of arrest on 18 September 2017, he worked as a painter at a Bed and Breakfast and earned a salary of N\$1000 per week. He has been in police custody ever since his arrest. The accused has therefore been in custody for 2 years and 9 months.

[7] *Mr Engelbrecht* submitted that the period spent in custody awaiting trial should be considered as a material mitigating factor and should lead to a reduction in sentence.<sup>7</sup> This court is in agreement that it has become part of our law, that, time spent in custody pending trial should be considered during sentencing. Courts should however not approach this principle blindly from a mathematical stand point, where if 1 year is spent in custody awaiting trial, then, 1 year is reduced from the sentence intended to be imposed. Courts should exercise its sentencing discretion judiciously and accord sufficient weight to time spent in custody pending trial depending on the surrounding facts of each case. I will therefore consider the time spent as a mitigating factor in conjunction with all other relevant factors to sentencing.

[8] The crimes of murder, read with the provisions of the Combating of Domestic Violence Act and assault with intent to do grievous bodily harm, perpetrated with a knife are serious in nature. The accused stabbed the deceased with a knife about 12 times for no reason. The accused further stabbed or cut *Mr. Phillip Gadi Matsaya (Mr. Matsaya)* with a knife several times when he attempted to stop the accused from continuing to stab the deceased. The offences in count 3 and 4 are not very serious. More serious, however, is the crime of murder committed in a domestic set up. Our law reports are replete with judgments abhorring violent crimes committed in

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<sup>6</sup> *S v Van Wyk* 1993 NR 426 (SC).

<sup>7</sup> *S v Kauzuu* 2006 (1) NR 225 (HC).

domestic relationships. The seriousness thereof is beyond question and the accused acknowledged same.

[9] The state led the evidence of *Ms. Marraine Bock (Ms. Bock)*. She is a daughter of the deceased. The deceased used to provide her with emotional support. She testified that the deceased is survived by two major children. The accused never apologised for the death of the deceased, neither did he contribute to the funeral arrangements. *Ms. Bock* requested the court to sentence the accused to a length term of imprisonment. In cross examination, she conceded to the assertion that the accused could not offer his sympathy to the deceased's family members because he was warned not to be in contact with them, and further that he was in police custody where he was not allowed to make phone calls.

[10] Notwithstanding, the accused in mitigation through *Mr. Engelbrecht* stated that, he could not say whether he was sorry for his actions or not. The reason advanced for this position is that, in the event that he appeals against conviction, his expression of apology might haunt him in future, as the state on appeal could cite the apology as acceptance of guilt.

[11] Remorse is a critical and weighty consideration in mitigation of sentence, as it demonstrates that the accused will not recommit similar offences. *In casu*, the accused expressed no remorse at all and this court is therefore left in darkness as to what his inner feelings are regarding the commission of the offences in question. Whether the accused person is likely to recommit similar offences in future or not is a question that the accused and only the accused is better suited to tell. He has, however opted not to reveal same to court, probably in fear of jeopardizing the prospects of success of his intended appeal against conviction, as expressed by *Mr. Engelbrecht*. For the foregoing reasons, I find that the accused is not remorseful. Failure to express remorse aggravates the sentence.

[12] *Mr. Malumani* reminded this court of the often-cited paragraph from *S v Bohitile*,<sup>8</sup> to the effect that, a domestic relationship aggravates the sentence sought to be imposed. This court accepts that crimes committed in a domestic setting should be considered in a serious light and severe sentences should be imposed in attempt to end such violence. A domestic set up therefore, obliges a court to impose a sentence which is severe than a sentence which would ordinarily have been

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<sup>8</sup> 2007 (1) NR 137 (HC).

imposed, had there been no domestic relationship in existence. This aspect was conceded by *Mr. Engelbrecht*.

[13] In view of the evidence on record, inclusive of the fact that there was a domestic relationship between the accused and the deceased, and further that the deceased would at times call on the accused to assist her with house chores (like fetching water), that the deceased would prepare food for the accused etc, I harbour no doubt that the deceased trusted the accused. It was incumbent on the accused to protect the deceased and not to violently attack her. I find that the accused abused this trust.

[14] When regard is had to the interests of society, it should be stated that, society expects that convicted persons should be sentenced accordingly. The number of cases of murder, read with the provisions of the Combating of Domestic Violence Act, assault with intent to do grievous bodily harm and assault on our court roll is alarming and shows no signs of abating. Society looks up to the courts for protection against perpetrators of such heinous crimes. The commission of such barbaric crimes of murder and assault with intent to do grievous bodily harm cannot be regarded as acceptable behaviour or behaviour just out of line, but it is behaviour that is condemned in the strongest possible manner. Severe punishment should be meted out to offenders of such crimes in order to deter them and other would be offenders from committing similar offences.

[15] Retribution and deterrence require that, during sentencing of the accused, the court should consider the pain and suffering caused to the injured party and other people, by the commission of the offence. The accused is further expected by the society to pay for his deeds through appropriate punishment. Only after serving the sentence and after being reformed can society welcome the accused back. The sentence passed should deter the accused and would be offenders from committing similar crimes.

[16] On rehabilitation, the Supreme Court in *S v Schiefer*,<sup>9</sup> adopted with approval the following remarks by *Harms JA* in *S v Mhlakaza*<sup>10</sup> on the effect of lengthy terms imprisonment on rehabilitation:

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<sup>9</sup>2017 (4) NR 1073 (SC) para 36.

<sup>10</sup> 1997(1) SACR 515 (SCA) 519h-i.

'Whether or not this scepticism is fully justified, the point is that the object of a lengthy sentence of imprisonment is the removal of a serious offender from society. Should he become rehabilitated in prison, he might qualify for a reduction in sentence, but it remains an unenviable, if not impossible, burden upon a court to have to divine what effect a long sentence will have on the individual before it. Such predictions cannot be made with any degree of accuracy.'

[17] I bear in mind that a lot of people were affected by the death of the deceased including the deceased's children. I am further bound by sentencing factors to be considered in order to judicially arrive at an appropriate sentence.

[18] After consideration of the personal circumstances of the accused which includes his mitigating factors and time spent in custody, and weighing same with the nature, seriousness and circumstances of offences, especially the offence of murder committed with direct intent, I find that personal circumstances of the accused are outweighed by the nature and circumstances of the offence and the interests of society. I therefore come to an inevitable conclusion that a lengthy period of imprisonment should be imposed on the charge of murder committed in a domestic setup.

[19] This court finds that, the sentences to be imposed should be reduced to a certain extent on account of a substantial period of time spent in custody awaiting trial. Accused being 58 years old at the time of sentencing coupled with all other mitigation factors qualifies the accused for mercy to be accorded to him. Our courts have further held that sentences should be individualized and accused persons should not be sacrificed at the altar.<sup>11</sup>

[20] In respect of count 2, the accused was convicted of assault with intent to do grievous bodily harm perpetrated on *Mr. Matsaya*. This offence in the circumstances of this matter also attracts a custodial sentence. Counts 3 and 4 relates to assaults perpetrated against the deceased committed in a domestic set up. *Mr. Engelbrecht* invited this court to order that the sentences imposed on counts 2, 3 and 4 should run concurrently with the sentence imposed on count 1. *Mr. Malumani* disagreed.

[21] With regard to the question whether the court can take certain offences together for purposes of sentence, this court is reminded that, where there are two or more charges on which the accused is convicted of, the court should consider the

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<sup>11</sup> *S v Katema* (CC09/2017) NAHCMD 125 (16 November 2018) para 12.



cumulative effect of the sentences. The said cumulative effect should not be disproportionate to the blameworthiness regarding the offences on which the accused stands to be sentenced. This court in *Hango v S*,<sup>12</sup> stated as follows in para 20:

[20] In *S v Akonda*,<sup>13</sup> this court, differently constituted, discouraged the practice of taking counts together for purposes of sentencing, particularly where the offences are unrelated. In the *Akonda* case, it was further stated that:

“Although that procedure is neither authorised nor forbidden by the Criminal Procedure Act 51 of 1977, it has emerged as a matter of practice. In principle, however, the practice should be resorted to in exceptional circumstances only, such as where various counts are part of a single transaction or are closely connected or similar in point of time, place and circumstance. See *S v Young* 1977 (1) SA 602 (A) at 610E; *S v Mofokeng* 1977 (2) SA 447 (O) at 448H; *S v Keulder* 1994 (1) SACR 91(A) at 93i-j.”

[22] Considering the above principle, this court finds that counts 1, 3 and 4, perpetrated on the deceased are closely linked to each other in time and space. Counts 1, 3 and 4 therefore, fits the profile of sentences imposed thereon to be served concurrently. Save for being perpetrated at about the same time and place with count 1, count 2, was perpetrated on a different person. A message should not be sent out that the accused is as good as not having been sentenced for his assault on *Mr. Matsaya*. This court holds the view therefore, that, a separate sentence should be imposed in respect of count 2.

[23] Taking all the aforesaid factors, reasoning and conclusions into account, I am of the considered view that the sentences set out hereunder meets the justice of this case. In the result the accused is sentenced as follows:

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 28 (twenty-eight) years’ imprisonment.

Count 2: Assault with intent to do grievous bodily harm – 2 (two) years’ imprisonment.

<sup>12</sup> (HC-MD-CRI-APP-CAL-2020/00090) [2020] NAHCMD 201 (29 May 2020).

<sup>13</sup> 2009 (1) NR 17 (HC). *S v Mwebo* 1990 NR 27 (HC).

Count 3: Common assault, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – 6 (six) months' imprisonment.

Count 4: Common assault, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – 6 (six) months' imprisonment.

In terms of section 280(2) of the Criminal Procedure Act 51 of 1977 it is ordered that the sentences imposed on count 3 and 4 be served concurrently with the sentence on count 1.

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O S SIBEYA

ACTING JUDGE

**APPEARANCES:**

**STATE:**

I Malumani

Of Office of the Prosecutor General

Windhoek

**ACCUSED:**

M Engelbrecht

Of Engelbrecht Attorneys(Instructed by Legal

Aid)

Windhoek