

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: CC 10/2014

THE STATE

v

WERNER JOHANNES SHETEKELA

1ST ACCUSED

KLEOPAS KAPALANGA

2ND ACCUSED

ELIA NAKALE

3RD ACCUSED

Neutral citation: *S v Shetekela* (CC 10/2014) [2020] NAHCMD 275 (8 July 2020)

Coram: USIKU, J

Heard: 08 June 2020

Delivered: 08 July 2020

Flynote: Sentence – Consistency – Such consistency promotes legal certainty – Court to balance interests of individual, society and purpose of sentence evenly – Accused persons police officers convicted of murder – wholly suspended sentence inappropriate under the circumstances – Nature of offence arouses moral indignation – Interest of accused secondary – custodial sentence inevitable.

Summary: The accused persons who are members of the Windhoek City Police were charged with a count of murder, kidnapping and defeating the course of justice

or attempting to do so. After a trial, they were each convicted of murder and of defeating the course of justice but acquitted of kidnapping.

ORDER

Count One – Murder *dolus eventualis*:

Each accused is sentenced to 14 years imprisonment of which 4 years imprisonment are suspended for 5 years on condition the accused is not convicted of murder, committed during the period of suspension.

Count Three:

Each accused is sentenced to 12 months imprisonment.

In terms of s 280 (2) of the Criminal Procedure Act 51 of 1977, the sentence on count three is ordered to run concurrently with the sentence on count one.

Further in terms of s 34 (1) B of Act 51 of 1977, Exhibit "1" is to be returned to the deceased's grandmother.

SENTENCE

USIKU J:

[1] On 19 March 2020, the accused persons who had pleaded not guilty to all charges preferred against them were subsequently found guilty on the charge of murder and of obstructing the course of justice and were accordingly convicted. They are now before court standing to be sentenced.

[2] Mr Isaacks initially appeared on behalf of accused one from whom Mr Cupido took over during the sentencing stage. Mr Visser appeared on behalf of accused two

and Mr Amoomo appeared for accused three whilst Mr Lutibezi represented the State.

[3] It is common cause that during the evening of Tuesday 16 April 2013, the accused persons collected the deceased from a drinking place at the Single Quarters in Katutura on suspicion of him having participated in an alleged crime of theft of a cell phone(s) and computer(s) from the City of Windhoek Head Office. The accused persons loaded the deceased into a pick up motor vehicle and handcuffed him.

[4] After driving around with the deceased from one place to the other, the deceased was later on driven to the Windhoek Police Station where he was left. The deceased at the time was injured. The accused reported to the officials on duty that the deceased was drunk or was merely pretending to be ill. The deceased was later on transported to the Katutura State Hospital where he died on 24 April 2013 due to soft tissue trauma secondary to the assault perpetrated on him by the accused persons. The accused also defeated or obstructed the course of justice when they informed the Namibian Police that the deceased was drunk or pretended to be ill. The accused persons were convicted of murder on the basis that they lacked direct intent to kill (*dolus directus*), but found to have subjectively foreseen the possibility of killing the deceased by assaulting him severely all over his body whilst reconciling themselves to such possibility (*dolus eventualis*).

The accused persons' personal circumstances are as follows.

[5] Mr Werner Johannes Shetekela

He is the first accused person, and did not testify in mitigation of sentence. However, his personal circumstances were placed before court through his attorney as follows:

[6] That accused one was relatively a young man at the time of the incident for which he has been convicted, having been aged 29 years old. He had been a member of the Windhoek City Police for a period of few months only after his

appointment in January 2013. He had no experience in the police force and was relatively a novice.

[7] Furthermore, that accused one was a first offender, with a spotless disciplinary record. He is a father of two minor children and is also looking after two other children whom he lives with and support.

[8] Other personal circumstances of accused one are that at the time of the commission of the offence, he was not married. He is currently 36 years old. He comes from a large family of seven siblings, six boys and a girl. His mother depends on him for support and only 3 of his siblings are gainfully employed.

[9] His highest level of education is grade 12, but he is currently pursuing further studies at the Namibia University of Science and Technology studying towards a Bachelor's Degree in Logistics and Maintenance. Certified copies of his studies as well as certified copies of birth certificates for his minor children were presented before court as proof. Accused one, it was submitted, is still young enough to contribute towards a greater society and to do so gainfully. Further that he wishes to improve the lives of those around him. He has been recently promoted.

[10] As alluded to, accused one did not testify. He apparently instructed his counsel to express to the Court and to the deceased's family that he accepts and respects the Court's judgment and felt sorry that the life of the deceased was lost at a relatively young age.

[11] The Court was referred to the matter of *S v George Ndemwoongela*,¹ where the accused was convicted on a charge of murder with *dolus eventualis* whereby on appeal, the sentence was reduced to a period of five years, wholly suspended. Having regard to the facts of this case however, in my view are quite distinguishable in that the deceased in the case referred to, was shot once in the head, whilst in the present case, the assault on the deceased had been a sustained assault as confirmed from the post mortem examination report handed in as exhibit "J" before Court. The accused ought to have had ample time to reflect, but went on

¹ *S v George Ndemwoongela* CA 43/2017.

continuously undisturbed by the possibility of death arising from that conduct, whilst the accused in the case referred to acted on a spur of a moment.

[12] I now move on to accused two. He testified under oath and called one witness to testify on his behalf. Accused two is aged 33 years old and is married. He has four children aged 16, seven, six and two respectively. All the children are staying with him and his wife. His highest level of education is grade 12 but he also obtained a Diploma in Criminal Justice during 2012. He obtained another Diploma in Hardware during 2014. He is currently pursuing a Bachelor's Degree in Information and Security at Namibia University of Science and Technology.

[13] He is still employed by the City Police with a monthly salary of N\$21000 per month. He has several financial obligations including a bond for the house, a vehicle instalment as well as some insurances. He supports his mother who is a pensioner and also assists her in buying medication. He has three farm workers who are also depended on him. After he has paid out all his financial obligations, his net per month is about N\$3000.

[14] Accused two maintained his innocence, persisting that he did not kill the deceased, though he has accepted the Court's findings. Accused two conceded to the fact that murder is a serious offence. He is a first offender and requests the Court to be lenient towards him. He implored the Court to impose a sentence which is suspended, alternatively that the Court should consider a fine.

[15] Accused two's witness, Mr Reinhold Asino, a Superintendent with the City Police, testified that he knew accused two for the past 14 years after he joined the force during 2006. He has been accused two's immediate supervisor. He also know accused one and three. According to the witness, accused two is of good character, well-mannered and had not been involved in bad incidences. He takes care of his mother wherever she gets unwell.

[16] Mr Asino implored the Court to impose an appropriate sentence which should not be a custodial one, and that suspended sentences should also be imposed on accused one and three respectively, because they are facing the same charges.

[17] He confirmed that it was the first time for him to ask for a suspended sentence on behalf of an accused charged with a crime of murder. He does not however condone assault and neither does his employer, the City Police.

[18] Accused three, Mr Elia Nakale, also did not testify in mitigation of sentence, but handed in a sworn affidavit through his attorney, Mr Amoomo. In the affidavit he states as follows:

[19] He was born 39 years ago at a village in the north. He is the father of two children born on 12 March 2017 and 29 May 2016 respectively. He is the primary care taker of the two children. The children's mothers are unemployed and reside in the north. Accused three is renting at Erf 9536 Mungunda Street, Katutura. He has a nanny who takes care of the children at a cost which he pays each month.

Educational background.

[20] Accused three attained his secondary education certificate at Negumbo Senior Secondary School in the year 2000 where after he enrolled for a Teaching Diploma at Ongwediva College of Education between 2005 and 2007. He underwent basic special reserve force training in 2002. In 2008 to 2012, he taught school for about three years. He resigned and joined law enforcement in 2013.

[21] Though not admitting to the crime, accused three explained that he has understood the significance of the fact that a young man lost his life. Further confirming that life is very precious and no one's life should be taken from them at all. Accused three encouraged the deceased's family to be strong and asserted that the loss of life of their child was regrettable.

[22] Copies of accused three's curriculum vitae, certificate of basic recruit training, certificate of achievement for special reserve force training, a copy of basic education teaching diploma, a copy of advanced certificate in Education in Mathematics, a copy of appointment as cadet constable in the City Police, a Copy of

a lease agreement, and copies of the children's birth certificates were all received as evidence in mitigation of sentence.

[23] Accused three's financial obligations were set out as follows:

That he is responsible for maintenance of both children, whereby he spends around N\$5000 per month. He is responsible for the financial maintenance of his extended family on whom he spends around N\$3000 per month. He pays rent in the amount of N\$3000 per month. He has a loan of N\$100 000 which he is paying for currently and also pays for a motor vehicle's hire purchase loan of N\$350 000. Accused three maintained that he is first offender. He has never been charged before and he is still a productive member of society who has a lot to contribute to the Namibian society.

[24] Accused three acknowledged the fact that as members of the police force, they are subjected to the harshest and most difficult working environments which the Court must take into account when considering the sentence to be imposed. He further touched on the media publicity which has brought stigma to him and also traumatised him. According to him, the trial which has dragged on for a number of years has been psychologically defeating towards him.

[25] It is now traditional when sentencing to strike a balance between the crime committed, the criminal and the interest of society and that the sentence to be imposed should be blended with a measure of mercy accordingly to circumstances. (*S v Kumalo*)²

[26] I am influenced by the following factors when I am about to impose the sentence on the accused persons: Firstly, the crime of murder for which the three accused persons have been convicted of does not need emphasis of seriousness. It is serious indeed that the deceased who at the time was a minor boy aged 17 years is no more, he is dead. His grandmother who testified during the trial and subsequently in aggravation of sentence can only see him on photographs, if any, and a visit to his grave.

² *S v Kumalo* 1973 (3) SA 69 (A) at 698 A–B.

[27] Sentencing remains indeed not an easy task. However, punishment should be such that it reflects the indignation of both the Court and society at large and particularly those who are directly affected by the deeds of the accused persons. Society in general has a legitimate expectation that justice should not only be done, but must be seen to be done.

[28] The killing of the deceased herein was not pre meditated in that the accused persons did not set out hunting for the deceased in order to kill him but they are guilty by virtue of *dolus eventualis*.

[29] While I have great sympathy for the accused persons who have so much in common. In that they are almost the same age, their educational background as well as their dependants who will have to suffer as a result of this case. Justice demand that they must pay for their evil deeds.

[30] All the three accused persons are first offenders. None of the accused, however, have shown any remorse in this matter. All of them candidly denied that they are the ones that killed the deceased. They did not therefore apologise to the deceased's family.

[31] Through their respective evidence, as well as submissions made on their behalf, each one is more concerned about himself, his dependants, such that the death of the deceased appear to be a secondary issue to all of them.

[32] For a Court to consider an accused's remorse, the penitence must be sincere and an accused must take the Court fully into their confidence. Unless that happens, the genuineness of contrition cannot be determined. As already indicated, none of the accused persons have shown any remorse at all.

[33] Our law requires that no life should be put at risk unless it is for the purpose of saving or protecting another life. Law enforcement officials equally have a duty to respect the human rights of all persons, without discrimination. There is yet another principle, which is accountability, requiring that individual law enforcement officers, like any other person must be held responsible for any failure to comply with the law.

When one looks at the manner in which the deceased was assaulted all over his body as evidenced by the Post-mortem examination report, it makes one to wonder whether these accused persons are worthy to have been officers of law enforcement.

[34] It must further be pointed out that it will be a travesty of justice if the accused persons, who have some fine credentials, should escape incarceration for that reason only. It is common practice that indeed murder, by *dolus eventualis*, attracts a far much lesser custodial sentence than murder *directus* for the reason of the circumstances under which the offence would have been committed.

[35] As alluded to, murder is a serious offence in nature. When Courts put emphasis on the right to life as the most fundamental right, that statement should therefore manifest itself in the sentences imposed to accentuate that right as held by the Courts and the society as the foremost valued, life being the most precious thing.

[36] The crimes committed by the accused persons indeed require the deterrent aspect of sentencing to be emphasised, "let others think the game is worth the candles". (*S v Sparks and Another*).³

[37] It is trite that lenient sentences do not achieve the purpose of punishment and lead to people taking the law into their own hands. Therefore, in cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving a substantial period of imprisonment, the questions whether the accused is married, or single, whether he has two children or three, whether or not he is in employment, are themselves largely immaterial to what the period should be.

[38] The accused's conduct to dump a seriously injured minor suspect, at the police station, instead of taking him for immediate medical attention, call for a custodial sentence. Their conduct can only be described as grossly inhumane.

[39] Consequently accused one, two and three are sentenced as follows:

³ *S v Sparks and Another* 1972 3(SA) 396 (A) at 410 G-H.

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Count Three:

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D N USIKU

Judge

APPEARANCES:

STATE : Mr Lutibezi
Of Office of the Prosecutor-General
Windhoek

ACCUSED ONE: Mr Isaacks
Of Isaacks & Associates
Windhoek

ACCUSED TWO: Mr. Visser
Of Dr Weder, Kauta & Hoveka Inc.
Windhoek

ACCUSED THREE: Mr Amoomo
Kadhila Amoomo Legal Practitioners
Windhoek