

REPUBLIC OF NAMIBIA

NOT REPORTABLE



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION

CASE NO.: CC 5/2019

In the matter between:

THE STATE

and

RYNARDT WYLIE ROELF

ACCUSED

Neutral Citation: *S v Roelf* (CC 5/2019) [2020] NAHCMD 358 (14 August 2020)

Coram: RAKOW AJ

Heard on: 26 June 2020 & 16 July 2020

Delivered on: 14 August 2020

Flynote: Criminal Procedure – Sentence – Murder – Accused first offender – Convicted of murder in the form of *dolus eventualis* – Domestic set up – 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 – Accused accordingly sentenced 25 years Imprisonment of which 5 years imprisonment is suspended for 5 years on condition that the accused is not found guilty of murder read with the provisions of the Domestic Violence Act, 4 of 2003, committed during the period of suspension.

Summary: The accused was convicted of one count of murder read with the provisions of the Domestic Violence Act 4 of 2003 on 12 June 2020 in that during the period of 22 to 23 January 2018 in Karasburg, the accused unlawfully and intentionally killed Kathrina Aloysia Alexander by repeatedly beating her, throwing her on the ground and strangling her with whom he was romantically involved. The deceased was a young lady, aged 20 and slightly build. The assault started in a room that the accused shared with the deceased. The accused threw the deceased on the floor with such force that she suffered an impacted head injury and other injuries over her face. She was further strangled with enough force to cause her hyoid bone to fracture and leave finger markings on her neck.

Held that punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances. These factors should be considered together with the main purposes of punishment in mind.

Held further that it is in the interest of society, specifically with regard to children that their interests be considered and the impact that a long custodial sentence will have on them. In this instance the child is currently taken care of by her maternal grandparents but with the assistance of her father. Although this is taken into account, it is unfortunately overshadowed by the seriousness of this offence.

Held furthermore that society will be best served if the accused receives an

appropriate sentence that will deter him, and other members of society from committing similar offences. Society look at the judicial system for their protection against perpetrators of the crime of murder and especially where it happens within a domestic relationship. In recent years the courts have seen a number of these murders taking place and the violence against women and children are further escalating.

Held further that the accused showed remorse and taken into account as a mitigating factor.

ORDER

Murder (*dolus eventualis*): 25 years Imprisonment of which 5 years of imprisonment is suspended for 5 years on condition that the accused is not found guilty of murder read with the provisions of the Domestic Violence Act, 4 of 2003, committed during the period of suspension.

JUDGMENT

RAKOW, AJ

[1] The accused was convicted of one count of murder read with the provisions of the Domestic Violence Act 4 of 2003 on 12 June 2020 in that during the period of 22 to 23 January 2018 in Karasburg, the accused unlawfully and intentionally killed Kathrina Aloysia Alexander by repeatedly beating her, throwing her on the ground and strangling her.

[2] He testified on his own behalf during the sentencing procedure and also called one witness, the mother of his deceased girlfriend (not the current deceased one) with whom his daughter is staying, Berthile Matroos. He testified that he was born on 29/10/1983 in Walvis Bay but never knew his father. He attended school up to standard two (grade four). When his grandfather passed away he moved to the farm to stay with his grandmother to help her. He learned about farming and stayed with his grandmother until her death. He then left the farm and moved to Karasburg and then to Windhoek. In Windhoek he worked as a driver for a builder and became a self-taught brick-layer. He eventually returned to Karasburg.

[3] He became romantically involved with the deceased in 2017. They loved each other and was good for one another initially. He feels bad for what happened to the deceased as he did not expect that she would die, but take responsibility for her death. They did not have any children together but he has a 9 year old daughter. The mother of his daughter passed away three years ago. He was an active father before he was incarcerated and stood in as a mother for his child. He further testified that she is in grade 3 and stays with her maternal grandmother but he is maintaining her. She is asking after him and where he currently is. She has no disabilities or diseases.

[4] He spoke to the family of the deceased, specifically her mother and father and asked their forgiveness. Whilst in custody in Karasburg he sent a message to them to come to him and they met in an office at the police station where he told them that the purpose of the meeting was for him to ask their forgiveness. He was arrested in January 2017 on the day that the deceased died and was released in April 2017.

[5] Berthile Matroos testified that she knows the accused from the time he was in a relationship with her daughter. They have a child together who is 9 years old. Her daughter passed away. The accused has been taking care of his

child since her birth. Whenever he did some work, he would call and ask what the child needed and then buy some things. The child resides with her and her husband. She and the accused have a good relationship. She continued to testify that the child is asking what happened to her father and when he is to return and she does not know how to answer the child. Her father's absence will have a huge impact on her. The accused did not stay with them but would come around and even eat with them. The child is staying with her although the accused asked for her to come and stay with him, she did not want to allow it. She is selling some things to generate money and her other children also contribute to the expenses of the household.

[6] The accused has no previous convictions. During his submission on behalf of the accused, Mr Haoseb pointed out that the court must strike a balance between the crime, the offender and the interest of society, and guard against over or under emphasizing these elements. This is the first time that the accused offended and he was gainfully employed when he still enjoyed his freedom. Although he had no formal vocational training, he taught himself the art of welding and brick laying. He is not a lazy vagabond who is an unnecessary drain on the taxpayer. The accused grew up without a father figure and the court is urged to consider the effect thereof on him.

[7] He has a minor dependant whose interest should not be overlooked. Court is the upper guardian of all children and should take their interest into account when deciding on an appropriate sentence. The accused is not an absent father but an interested father and investing in the life of his daughter. It is further unclear as to whether the elderly caregivers are up to the task of looking after the child in the approaching future.

[8] The court is also asked to take into account that the accused showed genuine remorse evident from the fact that he asked to speak to the parents of the deceased not long after the incident and asked their forgiveness. He further

did not shy away from taking the court into his confidence and to testify in his own mitigation before this court.

[9] On behalf of the State it was argued by Mr. Itula that murder is one of the most serious offences and the accused and the deceased were in a domestic relationship, which with reference to *S v Bohitile*¹ is seen as an aggravating circumstance. As to whether the fact that the type of intent the accused had when killing the deceased (*dolus eventualis*) should be seen as a mitigating circumstance, the State argued that it is not necessarily the case. It should depend on the attack on the deceased.² It should be taken into account that the accused kicked the deceased, strangled her and threw her on the floor.

[10] This matter arose some amount of indignation, the accused declares his undying love for the deceased and then kills her. In *S v Kaxui Katjivi*³ the court said that in serious cases the personal circumstances of an accused move to the background when considering an appropriate sentence but it does not mean that no weight is attached to it. In these instances a lengthy custodial sentence is unavoidable, things like that he is employed and takes care of his daughter takes the back seat to the interest of society and the seriousness of the offence. The interest of the deceased should also be considered although there is nothing this court can do that will bring back the life of the deceased, it is necessary to show that her life mattered.

The sentencing process.

[11] In our law there are a number of principles crystalized through various decisions of our courts which play a role or influence the sentencing process. One of the cases that today is still as applicable as it was in 1975 is the case of S

¹ 2007 (1) NR 137 (HC).

² See *State v Joseph Gerson Gariseb* Case SA6/2014 delivered 12 May 2016 ; *S v De Bruin* 1968 (4) SA 505.

³ 01/2016 delivered 9/9/2016 by Liebenberg J.

*v Rabie*⁴ where James JA stated seven general guidelines for consideration during sentencing:

'(a) *Let the punishment fit the crime - the punishment fit the crime*", sang the Mikado in 1885, echoing the British judicial sentiment of those days. (W.S. Gilbert was a barrister, who retained his interest, though not his practice, in the Courts). The couplet is still quoted in Britain, at any rate in relation to the retributive aspect of punishment; see *Criminal Law of Scotland*, by G.H. Gordon (1967), p. 50, line 3.

(b) That used to be the approach in this country, too; see, e.g., *R. v Motsepe*, 1923 T.P.D. 380 in fin.: "*The punishment must be made to fit the crime.*" However, in 1959 this Court pointed out that the punishment should fit "*the criminal as well as the crime*"; see *R. v Zonele and Others*, 1959 (3) SA 319 (AD) at p. 330E.

(c) The interests of society in punishment were noted in *R. v Karg*, 1961 (1) SA 231 (AD) at p. 236A - B, and *S. v Zinn*, 1969 (2) SA 537 (AD) at p. 540G.

(d) Then there is the approach of mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused. While recognising that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society; see *S. v Narker and Another*, 1975 (1) SA 583 (AD) at p. 586D. That decision also pointed out that it would be wrong first to arrive at an appropriate sentence by reference to the relevant factors, and then to seek to reduce it for mercy's sake. This was also recognised in *S. v Roux*, 1975 (3) SA 190 (AD).

(e) This quality of mercy or compassion is not something that has judicially cropped up recently. It was first mentioned in this Court some 40 years ago, by BEYERS, J.A., in *Ex parte Minister of Justice: In re R. v Berger and Another*, 1936 AD 334 at p. 341:

"Tereg word gesê dat na skuldigbevinding die Regter in 'n ander sfeer verkeer waar die oplê van die straf gepaard moet gaan met oordeelkundige genade en menslikheid ooreenkomstig die feite en omstandighede van die geval."

⁴ 1975 4 SA 855.

(In passing, BEYERS, J.A., pioneered the use of Afrikaans in the judgments of this Court; see *Souter v Norris*, 1933 AD 41 at p. 48 (dated 27 October 1932); followed by WESSELS, C.J., in *R. v Gertenbach*, 1933 AD 119 (8 March 1933). For an early judgment in Afrikaans by VAN DEN HEEVER, J. (subsequently a pillar of this Court), see *Ex parte Pieterse*, N.O., 1933 S.W.A. 4 (6 March 1933)).

Since then, the approach of mercy has been recognised in several decisions in this Court, with a number of Judges, in all, concurring; see *S. v Harrison*, 1970 (3) SA 684 (AD) at p. 686A:

"Justice must be done, but mercy, not a sledgehammer is its concomitant";

S. v Sparks and Another, 1972 (3) SA 396 (AD) at p. 410G; *S. v V.*, 1972 (3) SA 611 (AD) at p. 614H; *S. v Kumalo*, 1973 (3) SA 697 (AD) at p. 698A; *S. v De Maura*, 1974 (4) SA 204 (AD) at p. 208H; *S. v Narker and Another*, 1975 (1) SA 583 (AD) at p. 586. And does not Portia refer to the unstrained quality of mercy "*which season's justice*", in a memorable passage worthy of judicial study? (The Merchant of Venice, Act IV, Scene 1 - a court of justice).

(f) The main purposes of punishment are deterrent, preventive, reformatory and retributive; see *R v Swanepoel*, 1945 AD 444 at p. 455. As pointed out in Gordon, *Criminal Law of Scotland*, (1967) at p. 50:

"The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation... The other theories, reformatory, preventive and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment."

It is therefore not surprising that in *R. v Karg*, 1961 (1) SA 231 (AD) at p. 236A, SCHREINER, J.A., observed that, while the deterrent effect of punishment has remained as important as ever,

"the retributive aspect has tended to yield ground to the aspects of prevention and correction".

(g) it remains only to add that, while fair punishment may sometimes have to be robust, an insensitively censorious attitude is to be avoided in sentencing a fellow mortal, lest the weighing in the scales be tilted by incompleteness. Judge Jeffreys ended his days in the tower of London.

(h) To sum up, with particular reference to the concept of mercy -

- (i) It is a balanced and humane state of thought.
- (ii) It tempers one's approach to the factors to be considered in arriving at an appropriate sentence.
- (iii) It has nothing in common with maudlin sympathy for the accused.
- (iv) It recognises that fair punishment may sometimes have to be robust.
- (v) It eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger.
- (vi) The measure of the scope of mercy depends upon the circumstances of each case.'

[12] In *S v Sparks and Another*,⁵ the principles of punishment was summarized that punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances. These factors should be considered together with the main purposes of punishment in mind as reiterated in *S v Tcoelib*,⁶ being deterrent, preventative, reformatory and retributive. These four themes of sentencing is the cornerstones of a solid criminal justice sentencing system and should therefore be given weight in any sentencing procedure before arriving at a suitable sentence.

[13] It is further true that in sentencing, courts are called upon to strike a balance between the competing factors of sentencing in order to deliver sentences commensurate to the offences on which the accused is convicted. In so doing, it may sometimes be unavoidable to emphasize one factor at the expense of the others.⁷

Determining a suitable sentence

[14] The first leg of the Zinn triad – the crime: The crime of murder is a serious

⁵ 1972 (3) SA 396 (A) B at 410H.

⁶ 1991 NR 263.

⁷ *S v Van Wyk* 1993 NR 426 (SC).

crime with the added weight of the fact that in this instance it took place between persons who were in a domestic relationship. Although it seems that this relationship had some previous incidents of violence, not necessarily perpetrated by the accused on the deceased, it is still an aggravating factor. The deceased was a young lady, aged 20 and slightly build. She shared a room with the accused and that is also where the assault started. She was thrown on the floor with such force that she suffered an impacted head injury and had other injuries over her face. She was further strangled with enough force to cause her hyoid bone to fracture and leave finger markings on her neck.

[15] The accused testified that a struggle started between them and that she was also fighting with him. This version is in part supported by the other witnesses called by the state who indicated that there was a struggle between them. The deceased however from time to time asked to be helped and asked the accused to stop. It is also aggravating that the assault seems to have taken place over a period of time with the accused eventually dragging the deceased to their room and locking it. From the room pleas to stop could also be heard.

[16] The second leg of the triad - the criminal: The accused is 36 years old and was 34 years old at the time of the incident. He is a first offender, which is a mitigating factor as it indicates that he has never had a brush with the law before. He has one child who is not staying with him but he is looking after her needs. He was employed before being committed to custody at his conviction.

[17] The accused further expressed remorse during his evidence although he indicated that it was never his intention to kill the deceased but he takes responsibility for what happened. He also approached the family of the deceased and asked their forgiveness. When considering the question of remorse it is important to be reminded of comments made by the court in *S v Matyityi*⁸ at para 13 when the learned judge examined the question of remorse by stating the

⁸ (695/09) [2010] ZASCA 127 (30 September 2010).

following:

‘...There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a knowing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia, what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions...’

[18] In this instance the court takes the fact that the accused showed remorse into account as a mitigating factor.

[19] The third leg – the interest of society: The interest of society is not just the reaction of members of society who cries out against instances of domestic violence and murder but a broader sense of a sentence that serves the society. It is true that society is served when appropriate sentences are handed down, that takes into account the seriousness of the crime but also the fact that the offender should eventually become a productive member of society and be re-integrated into the society after he served his sentence.

[20] It is also in the interest of society, specifically with regard to children that their interests be considered and the impact that a long custodial sentence will have on them. In this instance the child is currently taken care of by her maternal

grandparents but with the assistance of her father. Although this is taken into account, it is unfortunately overshadowed by the seriousness of this offence.

[21] The society will be best served if the accused receive an appropriate sentence that will deter him, and other members of society from committing similar offences. Society looks at the judicial system for their protection against perpetrators of the crime of murder and especially where it happens within a domestic relationship. In recent years the courts have seen a number of these murders taking place and the violence against women and children are further escalating.

[22] After taking into consideration the evidence presented by the accused and on his behalf, submissions made by Mr Haoseb and by Mr. Itula on behalf of the State, the guidelines as set out in *S v Rabie* (supra) and the Zinn-triad as discussed above, I came to the conclusion that a period of direct imprisonment will be appropriate sentence in this instance.

[23] I therefore consider the following sentence to be appropriate:
On the count of murder with intent in the form of *dolus eventualis*: 25 years Imprisonment of which 5 years imprisonment is suspended for 5 years on condition that the accused is not found guilty of murder read with the provisions of the Domestic Violence Act, 4 of 2003, committed during the period of suspension.

E RAKOW
ACTING JUDGE

APPEARANCES:

STATE:

T IITULA
Of Office of the Prosecutor-General
Windhoek

ACCUSED:

Q S HAOSSEB
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