

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCING JUDGMENT

CASE NO.: CC 6/2019

In the matter between:

THE STATE

and

BENEDICTUS KOPER

ACCUSED

Neutral citation: *S v Koper* (CC 6/2019) [2020] NAHCMD 448 (30 September 2020)

Coram: RAKOW, AJ

Heard on: 8 – 9 September 2020

Delivered on: 30 September 2020

Flynote: Criminal Procedure – Sentence – Plea of guilty – Murder with

direct intent – Offence committed in a domestic setting – The brutality in which it was committed – As well as their prevalence – The legitimate interest of society outweighed interest of the accused – Court's consistency in imposing long custodial sentences preferred.

Criminal Procedure – Sentence – Accused Person convicted of murder, defeating or obstructing the course of justice, attempted murder and of contravening section 2(1)(a) of the Combating of Rape Act, 8 of 2000 – Serious offences – Rape has a prescribed mandatory minimum sentence. Mandatory minimum sentences prescribed by the Combating of Rape Act 8 of 2000 – Objectives of punishment discussed and confirmed – Remorse is a factor when considering deterrence as an objective of sentence.

Criminal Procedure – Sentence – Substantial and compelling circumstances – Exceptional circumstances not required for finding of substantial and compelling circumstances – All factors to be considered – Present circumstances – Victims subjected to brutal assaults with the infliction of grievous bodily harm and death – No substantial and compelling circumstances found to exist justifying a lesser sentence.

Summary: The accused initially appeared on four charges, the two charges on which this matter proceeded on trial and another set of charges relating to a murder committed in the Gobabis area and defeating or obstructing the course of justice. He pleaded guilty on the murder charge and the charge of defeating or obstructing the course of justice and not guilty on the charges of attempted murder and of contravening section 2(1)(a) of the Combating of Rape Act, 8 of 2000 and was convicted on these latter charges on 24 July 2020.

The offence of attempted murder and contravening section 2(1)(a) of the Combating of Rape Act, 8 of 2000 took place during the evening of 24 November 2014 in a resettlement area known as Satco close to the town of Karasburg. The

victim, Lucia Jaartze was on her way to some festivities at a nearby house, for the celebration of an upcoming wedding when she was grabbed by the accused, who pulled off her underwear, strangled and raped her.

The accused pleaded guilty on the charges of murder and defeating the course of justice. In his plea explanation he admitted stabbing Kalista Erastus all over her body with a knife and hitting her with an axe on her head resulting in her death on 3 October 2016. He also hit her several times with his fists over her body and kicked her. When he did so, he had the direct intention to kill her. After he killed her, he set her body alight using sticks, grass and matches. He intended to conceal her body.

Held that the principles of punishment were 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*, being deterrent, preventative, reformatory and retributive.

Held that there is no way for the accused to escape the consequences of his actions and for the plea of guilty to be of any weight in mitigation, it should be accompanied by genuine remorse.

Held further that it is in the interest of society that the accused receives a suitable sentence as society expects to be protected against persons who continuously perpetrate violence and in this instance the violence committed by the accused escalated from assault with intent to do grievous bodily harm to murder.

Held accordingly, taking into account all the facts and circumstances, the aggravating circumstances and the circumstances in mitigation, and then considering whether the prescribed sentence is justified, the court comes to the conclusion that in this instance it is indeed justified and no circumstances were found to allow for a lesser sentence to be imposed on the accused.

ORDER

In the result I make the following order:

Count 1: Murder — life imprisonment.

Count 2: Defeating the course of justice — 5 years' imprisonment.

Count 3: Contravening section 2(1)(a) of the Combating of Rape Act, 8 of 2000 - 15 years imprisonment.

Count 4: Attempted murder – 5 years imprisonment.

JUDGMENT

RAKOW, AJ

[1] The accused initially appeared on four charges, the two charges on which this matter proceeded on trial and another set of charges relating to a murder committed in the Gobabis area and defeating or obstructing the course of justice. He pleaded guilty on the murder charge and the charge of defeating or obstructing the course of justice and not guilty on the charges of attempted murder and of contravening section 2 (1)(a) of the Combating of Rape Act, 8 of 2000, but was convicted on these charges on 24 July 2020.

[2] During the sentencing procedure the State called two witnesses to testify with regard to the murder and defeating and/or obstructing the course of justice charges on which the accused pleaded guilty and subsequently convicted on the plea of guilty.

[3] The offence of attempted murder and contravening section 2(1)(a) of the

Combating of Rape Act, 8 of 2000 took place during the evening of 24 November 2014 in a resettlement area known as Satco close to the town of Karasburg. The victim, Lucia Jaartze was on her way to some festivities at a nearby house, for the celebration of an upcoming wedding when she was grabbed by the accused, who pulled off her underwear, strangled and raped her. She managed to free his hands from her neck. She feared for her life during the attack. During the attack he hurt her on her breasts and mouth. He also bit her on her arm and she had abrasions on her knees. He bit her after she tried to remove his hand from her neck. At the time of the attack, Ms Jaartze was 40 years old and knew the accused very well. He was treated as a child in her home and was the son of her neighbour. At the time of the attempted murder and rape, the accused was 24 years old. She suffered various injuries.

[4] The accused pleaded guilty on the charges of murder and defeating the course of justice. In his plea explanation he admitted stabbing Kalista Erastus all over her body with a knife and hitting her with an axe on her head. He also hit her several times with his fists over her body and kicked her. When he did so, he had the direct intention to kill her. After he killed her, he set her body alight using sticks, grass and matches. He intended to conceal her body.

[5] During the sentencing process the State presented evidence with regard to the death of Kalista Erastus on 3 October 2016. She was the girlfriend of the accused and on the day of her death she travelled with the accused, her cousin Martha Erastus, who came to testify and Martha's young son. Martha testified that they were on their way to Vuurslag but decided to overnight at Meerwerde post on their way from Gobabis. The witness testified that they were putting out their bedding and the deceased was sitting on the mattress when the accused returned from outside with a knife and started to attack the deceased without any reason and without a quarrel between them. Earlier that afternoon he was aggressive towards all of them after which he was reprimanded for the way he spoke to one of the workers at the farm.

[6] The deceased asked for help from the witness and was standing behind the witness when she was stabbed by the accused. The witness ran away and later came back to collect her son. She further testified that the deceased told her that the accused beats her and that she showed her some blue marks on the side of her body. She asked the witness to talk to the accused about the assaults, which the witness then did, but the accused did not answer her, when she asked him about the assaults. She further testified that the deceased had a son who is currently staying with his grandmother and who is approximately 6 – 8 years old. He is attending school at Aminius.

[7] The State then called Gawie Jantjies who is the divisional head of the Serious Crime unit in Gobabis and who attended to the murder scene where the accused pointed out certain points to him. He also prepared a photo plan and drawing of these various points. The accused told him that he collected a knife and an axe from a corrugated iron shack and then returned to the house where they were going to sleep. He left the axe at the gate of the yard of the house where they were going to sleep. He made an attempt to stab the deceased at this house where after the two of them walked away from the house next to a fence where he stabbed the deceased. He left the deceased there and then returned to the place where he left the axe, collected the axe, returned to the deceased and beat her over the head with the flat side of the axe. From there he went to the dam to rinse off the blood where he left the axe at the side of the dam. He also took some measurements from the distances between these points. From the first house where the knife and axe was collected, to where the deceased and her cousin were, were 399 paces. From the second house to where the deceased was stabbed by the accused, was 134 paces. From where the deceased was stabbed and beaten with the axe till the point where the axe was collected at the gate of the yard were 109 paces. He saw the accused a day after the pointing out in the corridors of their offices and the accused informed him that he was sorry for what he did.

[8] The State also handed up a photo plan of the scene and the subsequent post mortem and the report on a medico-legal post-mortem examination of the deceased conducted by Dr. S.K. Ikandi. He found that the body had eight stab wounds on the back, two stab wounds on the right side penetrating into the chest cavity, two more stab wounds on both shoulders, two deep stab wounds on both sides of the neck and a deep cut around the left zygomatic area. She further had lacerations on the left parietal region and underneath those depressed areas multiple skull fractures with fragments crushed into the left lobe of the brain. He concluded that the cause of death was due to stabbing.

[9] The State further proved two previous convictions for the accused, which was admitted by the accused. He was convicted on 20/10/2014 on a charge of assault with intent to do grievous bodily harm read with the provisions of the Domestic Violence Act, 4 of 2003 and sentenced to N\$3000 or 12 months imprisonment. He was also convicted on 23/3/2015 on a charge of assault with intent to do grievous bodily harm and sentenced to 6 months imprisonment.

[10] The accused elected to testify in mitigation. He is currently 30 years of age and was employed as a farm worker up until the time of his arrest on the murder charges. He has no children. He further asked to be taken to the family of the deceased to ask their forgiveness by the investigation officer but was informed to wait until after the funeral to do so. This never materialised. He expressed his remorse for what happened. During cross examination he admitted previously hitting the deceased because she was jealous of another girl. He could not explain why he stabbed the deceased, only that he saw black or had a blackout. He did not provide any testimony on the first two charges of rape and attempted murder.

[11] Mr. Ipumbu for the accused argued that what the Court has to take into account is that remorse does not need to be demonstrated to the Deceased's

family in Court, that itself is sufficient to say that the Accused has demonstrated remorse, and that is a mitigating factor. The accused also expressed his remorse to Inspector Jantjies outside his office when they met up a day after the incident. He further pointed out the age of the accused, which makes him quite youthful. The Accused has further expressed remorse and pleaded guilty and that is very important because it prevents the situation where the relatives of the Deceased have to be called in to testify and go through the ordeal remembering again what happened.

[12] The State argued that these offences that the accused is convicted of are serious offences. It was further pointed out that the accused, seemingly without any provocation or quarrel attacked the deceased and stabbed her. He stabbed her approximately 12 times, then walked some distance to collect the axe he previously left at the gate, returned and then beat her over the head with the axe. The Accused person testified in mitigation and he has provided absolutely no reason to at least give the Court an idea as to what brought about this barbaric attack. The barbaric attack on Lucia Jaartze on the night of the 27 of November 2014 cannot in any manner be mitigated. With regard to the substantial and compelling circumstances which are required for one to deviate from the rape minimum sentence of 15 years, the Accused person was asked by his Legal Representative to give any reason to do so to the Court, but he could not. Both the Complainant in that count and the Accused person gave evidence as to the affection between the two, an affection which seemingly had existed for a long time. The Complainant testified that the Accused person grew up in front of her, they have been neighbours, and she took him in as a child of her own. He would visit them and she would feed him. The Accused says the Complainant was a mother figure to him. What can cause the Accused person to brutally rape and assault the Complainant in the manner he did is still unexplained. One thing for sure is that this is not the conduct of a person that this Court should allow to go back into society. Clearly un-stiff sentences have not worked to rehabilitate him. Short imprisonment term was imposed on him and was unable to reform the

Accused. His criminal career of violence has been over four years and it has been brutal.

The sentencing process

[13] Van Niekerk J said the quoted Kruger with approval as follows in *S v Munyama*¹

'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. Before I deal with the evidence presented I wish to quote what the learned author A Kruger states in the authoritative work Hiemstra's Criminal Procedure (Service Issue 3 of May 2010 at 28-5) with regard to the sentencing process. He contrasts this with the approach during the prior phase of the trial dealing with the merits and the conviction, which he characterizes as 'a fully-fledged accusatorial process which results in a finding.' He then continues:

'At the sentencing phase other considerations apply. Now it is the judicial officer's difficult task to determine fairly the accused's fate. While it is still part of the trial and consequently subject to the general provisions there anent, the process of sentencing is of a different nature:

- (a) it is not a clinical exercise as is that of determining the merits;
- (b) there are no demarcated points in dispute and formal satisfaction of burdens of proof;
- (c) impressions are central, not facts;
- (d) it is possible to have regard to considerations which were irrelevant to the merits (such as, for instance, motive);
- (e) the person of the accused is specifically considered, including his or her character and general conduct in life, not only the act in question;

and

¹ 2011 (1) NR 53 (HC).

- (f) it is mainly a probe into the future, while in respect of the merits the court considered past conduct;
- (g) a complex value-judgment must be made in which the four aims of punishment must be considered in conjunction with each other and with regard to the Zinn-triad. [The reference is to the well-known case of *S v Zinn* 1969 (2) SA 537 (A) in which Rumpff JA expressed the following dictum, which has become trite: "What has to be considered is the triad consisting of the crime, the offence and the interests of society."

'It is also inherent in the assessment of sentence that some factors will be relatively minor whereas others may be decisive. Also, some factors are uncontentious or difficult to rebut and others not.'

[14] In *S v Sparks and Another*,² the principles of punishment were 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 Tcoeib*,³ being deterrent, preventative, reformative 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.

[15] 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.⁴ In this instance the fact that the accused pleaded guilty on the first and the second count was put forward by his counsel as mitigating

² 1972 (3) SA 396 (A) B at 410H.

³ 1991 NR 263.

⁴ *S v Van Wyk* 1993 NR 426 (SC).

under the circumstances. The court however endorses the remarks by *S v Landau*⁵ where Kuny J said the following:

‘Courts often see as significant the fact that an accused chooses to ‘plead guilty’. This is sometimes regarded as an expression on the part of the accused of genuine co-operation, remorse, and a desire not to ‘waste the time of the court’ in defending the indefensible. In certain instances a plea of guilty may indeed be a factor which can and should be taken into account in favour of an accused in mitigation of sentence. However, where it is clear to an accused that the ‘writing is on the wall’ and that he has no viable defence, the mere fact that he then pleads guilty in the hope of being able to gain some advantage from that conduct should not receive much weight in mitigation of sentence unless accompanied by genuine and demonstrable expression of remorse, which was absent *in casu*.’

[16] Having regard to the conduct of the accused when he committed the murder and the offence of defeating the course of justice, it must be clear that for him, the writing was definitely on the wall. There was in my opinion no way for the accused to escape the consequences of his actions and for the plea of guilty to be of any weight in mitigation, it should be accompanied by genuine remorse. When considering the question of remorse it is important to be reminded of comments made by the court in *S v Matyityi*⁶ at para 13 when the learned judge examined the question of remorse by stating the 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

⁵ 2000 (2) SACR 673 (W).

⁶ (695/09) [2010] ZASCA 127 (30 September 2010).

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...'

[17] The court further took into account that the accused was living in a domestic relationship with the deceased Kalista Erastus. Although they had no child together, she was the mother of a child who is now living with his grandmother because his mother is no longer alive. The accused also previously assaulted the deceased. This was not the first time he perpetrated violence in a domestic relationship as he already has a conviction for assault with intent to commit grievous bodily harm read with the provisions of the Domestic Violence Act, in 2014. He was afforded the opportunity to rehabilitate himself after this sentence but choose not to do so. He has a propensity towards violence as he also has another previous conviction for assault with intent to do grievous bodily harm for which he was sentenced in 2015.

[18] In *S v Kadhila*⁷ this court stated the following on the interests of society in matters of this nature:

'We live in an orderly society which is governed by moral values and obligations with respect for one another. It is expected of all members of society to uphold and respect these values. It is therefore not in the interest of society when persons like the accused trample on the values and rights of their spouses, life companions and loved ones only to make their authority felt. The sanctity of life is a fundamental human right enshrined in law by the Namibian Constitution and must be respected and protected by all. The courts have an important role to play in that it must uphold and promote respect for the law through its judgments and by the imposition of appropriate sentences on those making themselves guilty of disturbing the peace and harmony enjoyed in an ordained society; failing which might lead to anarchy where the aggrieved take the law into their own hands to take revenge. '

⁷ (CC 14/2013) [2014] NAHCNLD 17 (12 March 2014).

It is therefore also in the interest of society that he receives a suitable sentence as society expects to be protected against persons who continuously perpetrate violence and in this instance the violence committed by the accused escalated from assault with intent to do grievous bodily harm to murder. He had previous opportunities to rehabilitate and amend his behaviour which he did not use.

[19] When considering the appropriate sentence for contravening section 2(1) (a) of the Combating of Rape Act, 8 of 2000 the court needs to consider whether there is any substantial and compelling circumstances present that allows for not imposing the prescribed minimum sentence of 15 years. In considering this, it is important to bear in mind the approach as set out in *S v LK*⁸ as to whether substantial and compelling circumstances or factors are present to allow for a lesser sentence than the prescribed minimum sentence.

‘What is required by the above cases are a consideration of all the facts and circumstances, also those which traditionally were part of the sentencing process, to balance them with the aggravating circumstances, and then to consider if the prescribed sentence is justified in the interest of the victim as well as the accused and the needs of society.’

The attack by the accused on Ms Jaartze was a violent one. She feared for her life and at some stage concluded that she was going to die at the hands of her attacker. She is also significantly older than the accused and she trusted him as she treated him like a child in her house. He did not give any explanation for the offence; neither did he show any remorse. Taking into account all the facts and circumstances, the aggravating circumstances and the circumstances in mitigation, and then considering whether the prescribed sentence is justified, the court comes to the conclusion that in this instance it is indeed justified and no circumstances were found to allow for a lesser sentence to be imposed on the accused.

⁸ 2016 (1) NR 90 (SC).

[20] In the result, in view of the accused's personal circumstances on record, the nature and extent of the offences of which he stands convicted, the legitimate interests of society, and retribution and deterrence as objectives of punishment, I find appropriate the following sentences:

Count 1: Murder — life imprisonment.

Count 2: Defeating the course of justice — 5 years' imprisonment.

Count 3: Contravening section 2(1) (a) of the Combating of Rape Act, 8 of 2000 - 15 years imprisonment

Count 4: Attempted murder – 5 years imprisonment

E RAKOW
Acting Judge

APPEARANCES:

FOR THE ACCUSED:

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FOR THE STATE:

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