

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
SENTENCING JUDGEMENT

CASE NO: CC 18/2018

In the matter between:

THE STATE

and

VICTOR ELIA

ACCUSED

**Neutral citation:** *S v Elia* (CC 18/2018) [2021] NAHCMD 229 (12 May 2021)

**Coram:** RAKOW, J

**Heard on:** 20 April 2021

**Delivered on:** 12 May 2021

**Flynote:** Criminal Procedure – Sentence – unlawfully and intentionally killing committed in a domestic relationship – robbery with aggravating circumstances - defeating or obstructing or attempting to defeat or obstruct the course of justice – deterrent nature of sentences – Time spent in custody pending trial and the fact that the offender if a first

offender and is currently 40 years old is considered in mitigation.

**Summary:** The accused was convicted of unlawfully and intentionally killing Iyaloo Ndapandula Hainghumbi, who was his girlfriend, during the period of 16 – 17 January 2017 at or near Windhoek in the district of Windhoek, (count 2); robbery with aggravating circumstances in that he forced the said Iyaloo Ndapandula Hainghumbi into submission by hitting her with an unknown object on the head and/or by beating and kicking her over her body and then unlawfully and intentionally stole from her a cellular telephone, a sim card, a handbag, a jacket and a pair of shoes, and (count 3); defeating or obstructing or attempting to defeat or obstruct the course of justice.

*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.

Held further that, courts should strike a balance between the competing factors of sentencing in order to deliver sentences commensurate to the offences on which the accused is convicted.

Held that, appropriate sentences have the effect of deterring an offender, and other members of society from committing similar offences.

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## ORDER

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1. Count 1 – murder read with the provisions of the Domestic Violence act, Act 4 of 2003: 30 years imprisonment
2. Count 2, a charge of robbery with aggravating circumstances: 3 years imprisonment which is to run concurrent with the sentence under count 1
3. Count 3 being defeating or obstructing or attempting to defeat or obstruct the course of justice: 3 years imprisonment which is to run concurrent with the sentence under count 1

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## JUDGMENT

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### **RAKOW, J**

[1] The accused was convicted of the unlawful and intentional killing Iyaloo Ndapandula Hainghumbi, who was his girlfriend, during the period of 16 – 17 January 2017 at or near Windhoek in the district of Windhoek. He was further found guilty on count 2, a charge of robbery with aggravating circumstances in that he forced the said Iyaloo Ndapandula Hainghumbi into submission by hitting her with an unknown object on the head and/or by beating and kicking her over her body and then unlawfully and intentionally stole from her a cellular telephone, a sim card, a handbag, a jacket and a pair of shoes as well as count 3 being defeating or obstructing or attempting to defeat or obstruct the course of justice.

[2] The deceased and the accused were in a domestic relationship at the time of her death although she was also seeing someone else romantically. The deceased, Iyaloo Ndapandula Hainghumbi was 25 years old at the time of her death and a student at the International University of Management (IUM). She had no dependents and resided with her family in their house.

[3] The accused did not testify but his legal representative made certain submissions from the bar on his behalf. The legal representative informed that court that Mr Elia is a first offender and prior to this incident he worked for himself as a long distance taxi driver. He has no children and has aged parents who reside in the north of Namibia. He is currently 40 years old. It was also pointed out to this court that the accused has spend 4 years in custody pending the outcome of this trial.

The sentencing process.

[4] Van Niekerk J said the following and quoted Kruger with approval as follows in *S v Munyama*<sup>1</sup>

'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 characterises 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 thereanent, 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
- (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."

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<sup>1</sup> 2011 (1) NR 53 (HC).

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 uncontentionous or difficult to rebut and others not.'

[5] In *S v Sparks and Another*<sup>2</sup> the principles of punishment were summarized as follows; the 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*<sup>3</sup>, being deterrent, preventative, reformatory and retributive. These four themes of sentencing are 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.

[6] In *S v Kadhila*<sup>4</sup> 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] 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.

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<sup>2</sup> *S v Sparks and Another* 1972 (3) SA 396 (A) B at 410H.

<sup>3</sup> *S v Tcoeib* 1991 NR 263.

<sup>4</sup> *S v Kadhila* (CC 14/2013) [2014] NAHCNLD 17 (12 March 2014).

### Determining a suitable sentence

[8] The first leg of the Zinn triad – the crime: The crime of murder is a serious crime with the added weight of the fact that in this instance it took place between persons who were in a domestic relationship, although not staying together. The deceased suffered a number of very serious injuries and died as a result of blunt force trauma to the head. Dr. Vasin indicated that he examined the body and he observed a lot of dried blood on the clothing and head as well as lacerated wounds and abrasions placed on the hairy surface of the head. On the face, massive subgaleal contusions were observed and the base of the skull had a hinge fracture. Dr. Vasin further found bleeding under the skin itself and then underneath the skull, bleeding on the brain itself. The deceased was indeed subjected to a very serious attack.

[9] The second leg of the triad - the criminal: The accused is 40 years old. 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 was self-employed before being committed to custody at his arrest, as a long-distance taxi driver.

[10] The third leg – the interest of society: The interest of society is not just the reaction of members of society who cry 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.

[11] 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.

[12] After taking into consideration submissions made by Mr. Siyomunji and by Mr. Kanyemba on behalf of the state, the guidelines as set out in *S v Munyama* and the Zinn-triad as discussed above, I came to the conclusion that a period of direct imprisonment will be the appropriate sentence in this instance.

[13] In the result I order as follows:

1. Count 1 – murder read with the provisions of the Domestic Violence act, Act 4 of 2003: 30 years imprisonment.
2. Count 2, a charge of robbery with aggravating circumstances: 3 years imprisonment which is to run concurrent with the sentence under count 1.
3. Count 3 being defeating or obstructing or attempting to defeat or obstruct the course of justice: 3 years imprisonment which is to run concurrent with the sentence under count 1.

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E RAKOW  
Judge

APPEARANCES:

State:

S Kanyemba  
Of the Office of the Prosecutor-General  
Windhoek

For the Accused:

M Siyomunji  
Of Siyomunji Law Chambers  
Windhoek