REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 14 /2020

In the matter between:

THE STATE

and

DAWID NOWASEB **ACCUSED**

Neutral citation: *S v Nowaseb* (CC 14/2020) [2021] NAHCMD 86 (01 March 2021)

Coram: LIEBENBERG, J.
Heard: **23 February 2021.**
Delivered: **01 March 2021**

Flynote: Criminal Procedure – Sentence – Murder; Assault with intent to do grievous bodily harm; common assault, read with the Combating of Domestic Violence Act 4 of 2003 – Escape from lawful custody – Objectives of sentencing – Personal circumstances – First offender – Proclaimed remorse by tendering a guilty plea – Accused testified in mitigation – Remorse by tendering a guilty plea found not genuine – Alleged drunkenness as a mitigating factor for purposes of sentencing – Interests of

society – Crimes committed within a domestic setting call for deterrent sentences – Principle of individualisation when punishment is meted out – Accused murdered his 10 month old son – Taking a life of an innocent defenceless child – Accused acted irrationally and inexcusably – Considered aggravating factor –Retribution and deterrence emphasised – Period spent in custody before conviction – Taking together of counts not desirable – Cumulative effect of individual sentences.

Summary: The accused has been found guilty on charges of murder, acting with direct intent; assault with intent to do grievous bodily harm and common assault, all read with the Combating of Domestic Violence Act 4 of 2003. Accused also found guilty of escape from lawful custody. The accused assaulted his girlfriend Lusia Geinamses by slapping her once in the face at a shebeen and later again assaulted her with intent to cause grievous bodily harm by throwing a stone at her, hitting her on the back of her hand. He then killed his 10 months old son by hitting his head against the ground, an act of retaliation against his girlfriend. The state led evidence by the mother of the deceased while the accused testified in mitigation of sentence. The court followed the principle of individualization for purposes of finding a just and fair sentence that would not only serve the interests of the offender, but also that of society.

Held, that when it comes to sentencing, the court is required to consider the triad of factors comprising the crime, the offender and the interests of society. In addition, the court is enjoined, in the appropriate circumstances, to consider the element of mercy.

Held, further, that in the court's determination of what would be appropriate punishment, regard must equally be had to the objectives of punishment namely, deterrence, prevention, reformation and retribution.

Held, further, that it is trite that equal weight or value need not be given to the different factors and, obviously, depending on the facts, the situation may arise where one or more factors require emphasis at the expense of others.

Held, further, that if the accused's alleged drunkenness is a factor the court is expected to take into consideration for purposes of sentence, then the onus is on the accused to put evidence to that effect before the court; albeit in the form of his own

evidence; the veracity of which to be tested in cross-examination. Only then would the court be able to attach some weight thereto and whether it constitutes a mitigating factor.

Held, further, that the mere offering of a plea of guilty could only be considered a sign of remorse if the court, in light of the evidence presented, is satisfied that the accused fully took the court into his confidence and came clean on the wrong he has done. Only then would the sentencing court be inclined to find his guilty plea to be mitigating and accord the required weight thereto.

Held, further, that the evidence in the present instance showed that, during his testimony, the accused considerably downplayed the criminality and moral blameworthiness of his actions.

Held, further, that the guilty plea was offered on a different basis of intention (*dolus eventualis*), despite overwhelming evidence in possession of the state that the accused acted with direct intent when he murdered his son.

Held, further, that the guilty plea offered by the accused on the charge of murder lacks sincerity as a sign of remorse and carries no weight in sentencing.

Held, further, that the accused remains unwilling to accept legal and moral responsibility for his actions and that his proclaimed penitence is not sincere as he did not fully take the court into his confidence.

Held, further, that the courts, when it comes to punishment, should fully take into account the equally important need for the courts ‘to root out the evil of domestic violence and violence against women’.

Held, further, that as it is permissible for courts to take counts together for the purpose of sentence, it is discouraged and should be reserved for exceptional circumstances. The offences in this case are so dissimilar and of disparate gravity that it would not be appropriate to take them together for sentence.

Held, further, that where the court imposes individual sentences, the cumulative effect of the total sentences imposed must not be disproportionate to the accused's blameworthiness in relation to the offences in respect of which he has to be sentenced.

Held, further, it is trite that the period an accused spends in custody, especially if it is lengthy, is a factor which normally leads to a reduction in sentence.

ORDER

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – 35 years' imprisonment.

Count 2: Assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – 2 years' imprisonment.

Count 3: Assault, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – 6 months' imprisonment.

Count 4: Escape from lawful custody – 2 years' imprisonment.

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

SENTENCE

LIEBENBERG J:

[1] On 23 February 2021 and after hearing evidence, the court convicted the accused on the following counts: Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003; Count 2: Assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003; Count 3: Assault, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003; and Count 4: Escape from lawful custody.

[2] Mr *Shiikwa* represents the accused while Mr *Andreas* appears for the state.

[3] When it comes to sentencing, the court is required to consider the triad of factors comprising the crime, the offender and the interests of society. In addition, the court is enjoined, in the appropriate circumstances, to consider the element of mercy. In the court's determination of what would be appropriate punishment, regard must equally be had to the objectives of punishment namely, deterrence, prevention, reformation and retribution. In *S v Van Wyk*[1] it was said that some difficulty often arises when trying to harmonise and balance these principles, and to apply them to the facts of the particular case. It is trite that equal weight or value need not be given to the different factors and, obviously, depending on the facts, the situation may arise where one or more factors require emphasis at the expense of others. This is called the principle of individualisation where punishment is meted out with regards to the circumstances of the particular accused; the facts and circumstances under which the crime was committed; and what sentence would best serve the interests of society. The purpose is thus to find a just and fair sentence that would not only serve the interests of the offender, but also that of society.

[4] In aggravation of sentence the state led the evidence of Ms Lusia Gainamses, the mother of the deceased in count 1 and the complainant in counts 2 and 3. In turn, the accused testified in mitigation of sentence.

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[1] 1993 NR 426 (HC).

[5] The evidence of Ms Gainamses mainly concerns the effect the death of her 10 month old son had on her as a person. When asked to describe her feelings she said she gave birth to the deceased and loved him a lot; that his death was painful and she still hurts. She said she still does not understand why the accused killed their child and that she would never be able to forgive him for what he has done, even if he apologised – something he has not done to date.

[6] The accused in mitigation testified that he was born in 1992 (currently 28/29 years of age) and received no formal education. At the time of his arrest he was employed on a farm and earned a salary of N$1500 per month. He has fathered four children with Ms Gainamses, including the deceased, being the youngest, and that he had been maintaining his children up to the stage of his arrest but did not elaborate exactly how he managed to do so. He went on to say that he could not have apologised to the family as he was in detention awaiting trial; neither did they come to visit him. The accused's view on this point causes some discomfort with the court, as he relinquished the opportunity to apologise to Ms Gainamses whilst she was at court – irrespective whether she was amenable to accept his apology or not. The accused further testified that he is grieving the loss of his child. Regarding his health, the accused mentioned about a life-threatening operation he will have to undergo on his genitals; for which he currently takes medication. He did not, as could be expected of him, produce any documentation supporting this contention.

[7] With regards to the charge of unlawful escaping, the accused explained that he escaped whilst doing chores at the police station and went home to fetch his birth certificate, seemingly to apply for an identification card which he required in the then upcoming elections. He was arrested at home the next day. The accused was in custody awaiting trial for 28 months.

[8] Mr *Shiikwa* argued on behalf of his client that the court's approach to sentencing should be to focus on the individual before court, taking into account his personal circumstances. Besides stating that the accused is a first offender, counsel further submitted that the accused was under the influence of alcohol during the commission of the crimes he stands convicted of; except for the count of unlawful

escaping. Furthermore, that the accused has shown remorse by tendering pleas of guilty on counts 1 and 4 and also expressed remorse during his testimony.

[9] When questioned by the court what weight should be accorded to counsel's contention that the accused was under the influence of alcohol at the relevant time, in the absence of evidence concerning the accused's state of sobriety, counsel did not further develop his earlier submission and left it for the court to decide. It is common cause that at no stage during the trial or his evidence in mitigation was it even suggested that the accused was under the influence of liquor on that particular day. Though the evidence showed that he drank beer during the day, he never claimed to have been under the influence of alcohol or that the consumption of alcohol affected his mood, mental capacity or actions. It seems apposite to mention what the court in *Hangue v The State*[2] said on high blood-alcohol concentrations at para 42 namely, '… that different people under different circumstances respond differently to such high concentrations of alcohol in the bloodstream. The correlation between different persons' blood-alcohol concentrations and their conduct do not seem to be direct, uniform or universal'. If his alleged drunkenness is a factor the court is expected to take into consideration for purposes of sentence, then the onus is on the accused to put evidence to that effect before the court; albeit in the form of his own evidence; the veracity of which to be tested in cross-examination. Only then would the court be able to attach some weight thereto and determine whether it constitutes a mitigating factor. In the absence thereof, there is no basis for a finding that the accused was under the influence when he committed the present crimes. Accordingly, I decline to make such finding.

[10] Next I turn to consider counsel's contention that the accused has demonstrated and expressed remorse when tendering a plea of guilty on the murder charge, having stated same in his section 112(2) plea explanation. As for his testimony in court, he said that his heart was paining for the loss of his child.

[11] The mere offering of a plea of guilty could only be considered a sign of remorse if the court, in light of the evidence presented, is satisfied that the accused fully took the court into his confidence and came clean on the wrong he has done. Only then

[2] *Hangue v The State* (SA 29/2003) [2015] NASC (15 December 2015).

would the sentencing court be inclined to find his guilty plea to be mitigating and accord the required weight thereto.

[12] The evidence in the present instance showed that, during his testimony, the accused considerably downplayed the criminality and moral blameworthiness of his actions. Moreover, to the extent that he painted himself as the victim and that the death of his son was unintentional and unforeseen. The plea was offered on a different basis of intention (*dolus eventualis*), despite overwhelming evidence in possession of the state that the accused acted with direct intent when he murdered his son. The state, justifiably, rejected the guilty plea on the charge of murder. Against this background, it begs the question on what ground could it possibly be contended that the accused's offering of a guilty plea is indicative of remorse on his part?

[13] With regards to the weight to be accorded to the accused's proclaimed remorse it would appear that he was left with no other option but to plead guilty as the evidence against him was that of three eyewitnesses and thus condemning. This is consistent with the view taken in *S v Landau*[3] where the following appears at 678b-c:

> '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, …'

[14] The evidence clearly showed that the accused contradicted himself during his testimony at the trial and what he stated in his plea explanation; two irreconcilable versions. Ultimately, the accused's narrative of the incident that led to the death of his son was found to be false beyond reasonable doubt and rejected; equally the facts on which his plea was tendered. Consequently, the guilty plea offered by the accused on the charge of murder lacks sincerity as a sign of remorse and carries no weight in sentencing.

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[3] 2000 (2) SACR 673 (WLD).

[15] Despite the accused's testimony that the loss of his child pains him, the impression gained by the court is that he remains unwilling to accept legal and moral responsibility for his actions. He rather sees himself as the unfortunate victim of circumstances that landed him in the present situation. The Supreme Court in *S v Schiefer*[4] adopted, with approval, what was held in *S v Matyityi*[5], at 1081C-D:

'Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing 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.'

[16] From the above stated it seems to me that the accused's proclaimed penitence is not sincere and that he did not fully take the court into his confidence. On the contrary, he tried to mislead the court by presenting his own set of facts far removed from what actually transpired on that fateful evening. Such conduct does not connote 'repentance, an inner sorrow inspired by another's plight or by a feeling of guilt …'[6] I am therefore unable to find that the accused demonstrated any remorse for the crimes he committed.

[17] There can be no doubt that the courts view the offence of murder on a young child as extremely serious, moreover when committed in a domestic setting. The victim was the accused's own son, merely 10 months old, who was mercilessly killed when his head was forcefully hit against the ground in circumstances from which it may reasonably be inferred that this was an act of retaliation against his girlfriend and mother of his children. He acted in cold blood and with complete disregard for the sanctity of human life. The deceased was a helpless, baby who innocently became a weapon in the accused's hands to strike back at his girlfriend for not wanting to sleep with him. The killing was brutal, cruel and calculated. The motive was to hurt her feelings as she had to witness how her child's head was smashed against the ground and death ensuing shortly thereafter. The pain and suffering any mother would endure under these circumstances is inconceivable and to some extent explains Ms Gainamses's words when she said she had to bury the child she loved and gave birth

[4] 2017 (4) NR 1073 (SC).
[5] 2011 (1) SACR 40 (SCA) ([2010] 2 All SA 424; [2010] ZASCA 127) para 13.
[6] *S v Martin* 1996 (2) SACR 378 (W) at 383.

to; moreover, not understanding why the accused had any reason to kill the boy. One might have some understanding for her feelings when she said she could find no forgiveness in her heart for the accused and never will.

[18] As earlier alluded to, the murder and assaults were committed in circumstances where there existed a domestic relationship between the accused and the victims, as defined in the Combating of Domestic Violence Act 4 of 2003. This in itself is aggravating and even more so when considered in light of the unprecedented wave of serious crimes lately committed against vulnerable persons in our society.[7] This court in the past expressed its disapproval and shock in several judgments about the prevalence of domestic or gender based violence in this jurisdiction and that the courts, when it comes to punishment, should fully take into account the equally important need for the courts 'to root out the evil of domestic violence and violence against women'.[8] It was further said that the message from the courts must be that crimes involving domestic violence in Namibia will not be tolerated and that sentences imposed in these instances will be appropriately severe. The approach of this court would be no different.

[19] Notwithstanding, a sentencing court should be careful not to make the accused the scapegoat for all those making themselves guilty of similar conduct but, based on the crime and the degree of the accused's moral reprehensibility, the court must decide what punishment would be just and fair in the circumstances that brought the accused before court. To this end, the defence proposed an individualised sentence where some of the counts are taken together for sentence. The court was invited to take counts 1 and 4, and counts 2 and 3 together in sentencing.

[20] As pointed out to counsel during oral submissions, as it is permissible for courts to take counts together for the purpose of sentence, it is discouraged and should be reserved for exceptional circumstances.[9] The difficulty of taking counts together for sentence is succinctly stated by Corbett JA in *S v Immelman*[10] at 728H-729A:

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[7] *S v Seegers* 1970 (2) SA 506 (A) at 482c. Also see: *S v Mushishi.* 2010 (2) NR 559 (HC) at 564.
[8] *S v Bohitile,* 2007 (1) NR 137 (HC) at 141E.
[9] *The State v Tjikotoke* (CR 86/2012) [2012] NAHCMD 41 (29 October 2012).
[10] 1978 (3) SA 726 (AD).

'In my view, difficulty can also be caused on appeal by the imposition of a globular sentence in respect of dissimilar offences of disparate gravity. The problem that may then confront the Court of appeal is to determine how the trial Court assessed the seriousness of each offence and what moved it to impose the sentence which it did. The globular sentence tends to obscure this.'

[21] Guided by the approach set out above, it is my considered view that the offences in this case are so dissimilar and of such disparate gravity that it would not be appropriate to take them together for sentence. I therefore intend imposing individual sentences and then decide whether the cumulative effect of the total sentences imposed is not disproportionate to the accused's blameworthiness in relation to the offences in respect of which he has to be sentenced.[11]

[22] State counsel referred the court to the unreported case of *The State v Dawid Amseb*[12] where the facts are virtually similar to the present matter and where a sentence of life imprisonment was imposed on the count of murder. It invited the court to impose a lengthy term of imprisonment on count 1, alternatively, life imprisonment. As for the remaining counts, individual sentences to be imposed.

[23] The reaction of society, in my view, is a valid consideration in the court's determination of an appropriate sentence. In *S v Flanagan*[13] the court held that the interests of society are not served by a sentence which is too lenient. After all, it is the members of society who one day has to accept the accused back in their midst; which process might be troubled when there is a perception that the sentence given to the accused was too lenient and he or she does not deserve to be admitted back into society. The courts should not give in to the expectations of society (at the expense of the accused or the interests of justice) when it comes to sentencing; but, neither should the courts ignore society's reaction of indignation and public outcries against those who make themselves guilty of committing heinous crimes, for that, in my view, would be out of touch with reality and the legitimate expectations of society. It is in these circumstances that the sentencing court would consider it justified that retribution, as an objective of punishment, should come to the fore in cases of this

[11] *S v Sevenster* 2002 (2) SACR 400 (CPD) at 405A-B.
[12] (CC 23/2017) [2019] NAHCMD 57 (19 March 2019).
[13] 1995 (1) SACR 13 (A) at 17e-f.

nature. Furthermore, given the gravity of the murder count, a lengthy custodial sentence seems inevitable. Not only should it serve as specific deterrence to the accused, but also as a general warning to like-minded criminals.

[24] Despite the accused being a first offender, his personal circumstances and interests simply do not measure up to the gravity of the crimes committed and the aggravating factors present, coupled with the interests of society. In the circumstances of this case, reformation, as an objective of punishment, becomes a lesser consideration.

[25] In addition, it is trite that the period an accused spends in custody, especially if it is lengthy, is a factor which normally leads to a reduction in sentence. (See: *Abuid Kauzuu v The State).*[14] The accused was in detention awaiting trial for a period of 28 months which will be taken into consideration.

[26] When applying these principles to the present facts, it is my considered view that the total effect of the sentences imposed, must be ameliorated by invoking the provisions of s 280(2) of the CPA.

[27] After due consideration of the accused's personal circumstances, the seriousness of the crimes committed and the interest of society, I consider the sentences below appropriate.

[28] 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 – 35 years' imprisonment.

Count 2: Assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – 2 years' imprisonment.

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[14] *Abuid Kauzuu v The State* Case No. CA 19/2004 (HC): unreported judgment dated 2 November 2005 at p. 14.

Count 3: Assault, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 – 6 months' imprisonment.

Count 4: Escape from lawful custody – 2 years' imprisonment.

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

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JC LIEBENBERG

JUDGE

APPEARANCES

STATE	J N Andreas Of the Office of the Prosecutor-General, Windhoek.
ACCUSED	E T Shiikwa Directorate: Legal Aid, Windhoek.