

REPUBLIC OF NAMIBIA

HIGH COURT
WINDHOEK
SENTENCE



OF NAMIBIA MAIN DIVISION,

Case No: CC 29/2019

THE STATE

versus

KAZANA NICOLAUS MANGUNDU HAUSIKU

ACCUSED

Neutral citation: *S v Hausiku* (CC 29/2019) [2022] NAHCMD 508 (28 September 2022)

Coram: SHIVUTE, J

Heard: 12 September

Delivered: 28 September 2022

Flynote: Criminal Procedure – Sentence – Accused convicted of murder with direct intent – Robbery with aggravating circumstances – Rape contravening section 2(1)(a) of the Combating of Rape Act – Kidnapping – Driving a motor vehicle without a licence contravening section 31(1)(a) of the Road Traffic and Transport Act - Reckless driving contravening section 80(1) of the Road Traffic and Transport Act.

Remorse – Accused claiming he is remorseful through submission by his counsel from the Bar – Accused not testifying in mitigation – For remorse to be a valid consideration in sentencing – Penitence must be sincere – Accused must take court fully into its confidence – Otherwise court would not be able to determine genuineness of the contrition accused claims to have.

Mandatory Sentence – Rape – No substantial and compelling circumstances placed before court for court to deviate from imposing mandatory sentence – However, court deviating from imposing mandatory sentence - Accused convicted of multiple offences - Interest of Society and that of offender will not be served if sentence imposed goes beyond life expectancy of accused – Cumulative effect of sentence amounting to substantial and compelling circumstances – Court justified to deviate from imposing mandatory sentence prescribed.

Summary: The accused is convicted of multiple offences as stated above. His counsel submitted from the Bar that the accused is remorseful. The accused did not testify to show that he was truly remorseful. For remorse to be a valid consideration in sentencing, the penitence must be sincere and the accused must take the court fully into its confidence, otherwise the court would not be able to determine the genuineness of the contrition the accused claims to have. In connection with the rape charge, the accused did not place evidence before court that amounts to compelling and substantial circumstances to enable this court to deviate from imposing the mandatory sentence. However, this court is of the opinion that the cumulative effect of sentence on all counts amounts to substantial and compelling circumstances that may render the mandatory sentence to be unjust as sentence may go beyond the life expectancy of the accused which is termed to be cruel, inhumane and degrading. The interest of society and that of the offender will not be served by an inordinate long term of imprisonment. This court is therefore, justified to deviate from imposing the mandatory sentence prescribed.

SENTENCE

- Count 1: Murder with direct intent:
21 years' imprisonment.
- Count 2: Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977:
6 years' imprisonment 3 years of which to be served concurrently with the sentence on count 1.
- Count 3: Rape contravening section 2(1) (a) read with sections 1 - 3, 5 and 6 of the Combating of Rape Act 8 of 2000:
10 years' imprisonment.
- Count 4: Kidnapping
2 years' imprisonment.
- Count 5: Driving a motor vehicle without a driving licence contravening section 31(1) (a) read with sections 1, 50, 86 and 105 – 109 of the Road Traffic and Transport Act 22 of 1999:
4 months' imprisonment.
- Count 6: Reckless driving contravening section 80(1) read with sections 1, 50, 80 (2) (3), 86, 106 – 109 of the Road Traffic and Transport Act of 1999:
18 months' imprisonment. The sentence on count 5 is to be served concurrently with the sentence on count 6.

Order:

Furthermore, it is ordered that in terms of section 51 (3) of the Road Traffic and Transport Act 22 of 1999, the accused is declared to be disqualified from obtaining a

learner's licence or driving licence for a period of 6 months from the time he finishes serving his sentence.

SENTENCE

SHIVUTE J:

[1] The accused stands convicted of a single count of murder with direct intent; one count of robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 as amended; rape contravening section 2(1)(a) read with sections 1,2,3,5 and 6 of the Combating of Rape Act 8 of 2000; kidnapping; driving a motor vehicle without a licence contravening section 31(1)(a) read with sections 1, 50, 86 and 106-109 of the Road Traffic and Transport Act 22 of 1999 and reckless driving contravening section 80(1) read with sections 1, 50, 80 (2), (3), 86, 106 – 109 of the Road Traffic and Transport Act 22 of 1999.

[2] Counsel for the State called one witness, the deceased's widow who is also a victim in this matter in aggravation of sentence. She testified that the deceased was 59 years old and was a professional soldier in the Namibian Defence Force. He was a soldier for 42 years. She further testified that she could not come to terms with her husband's death. The husband was looking after her and the family. She is still traumatised by the deceased's death. She again testified that she felt violated and degraded by the rape the accused perpetrated on her and still has flashbacks of what happened. Currently, she is under psychological treatment as she could not come to terms with what the accused did to her.

[3] The deceased loved his children and his grandchildren. He was a respectful and disciplined person as well as a religious person. Concerning the sentence to be imposed on the accused, she testified that the accused committed serious offences and

he killed the deceased in cold blood. Therefore, the court should impose sentences that befit the crimes he had committed. In respect of the vehicle that was involved in the accident it was written off. Although the insurance paid the bank, there was an outstanding amount that had to be settled from the deceased's estate. Furthermore, she testified that the accused never apologised to her.

[4] On the side of the defence, the accused did not testify in mitigation. His counsel addressed the court from the Bar. The accused is 31 years old. He schooled at Sizongoro village in Okavango West. His level of education is grade seven. He has six siblings and he is the first born. His parents are still alive and he is the breadwinner in the family. The accused is a drug user who was convicted of found in possession of cannabis that was found in his possession at the time he was arrested in connection with this matter. It was submitted that he had smoked cannabis on the day of the incident and he had been smoking it over a period of time. Therefore, in sentencing the accused the court should consider the fact that the accused was on some dependence producing substance which in a way diminished his criminal culpability in the commission of the offence. The accused is also apologising for what he did and he is remorseful.

[5] Counsel continued to submit that at the time of the commission of these offences, the accused was about 26 years old. He was relatively a young person and he deserves a second chance as he is capable of being integrated in the society. The accused has been in custody for almost four years and the court should take the time he has been in custody awaiting his trial into consideration when sentencing. Counsel suggested that the accused should be sentenced to not more than 20 years' imprisonment on the count of murder. He also suggested various sentences that should be imposed on the accused as regards the other counts. Counsel further submitted that, the sentence to be imposed on counts two, three, four, five and six be ordered to run concurrently with the sentence on the murder count.

[6] Counsel for the State argued that the accused is convicted of serious offences. He murdered the deceased with the direct intent. Based on the facts, it appeared he killed the deceased with a view to commit further offences. After the accused murdered the deceased, he raped his wife, robbed her of their goods, kidnapped the deceased's wife drove the vehicle without a licence and drove in a reckless manner. Concerning the accused's age, at the time of the commission of the offence, he was not a youthful offender. He was 26 years old, employed and he had the responsibility of looking after his family. Although the accused was 26 years old, his actions cannot be said to be those of a youthful mind. Furthermore, counsel contended that there is no evidence that on the day of the commission of the offence the accused had taken some dependence producing substance that intoxicated him. Instructions from the Bar cannot be equated to evidence under oath, so it was argued.

[7] With regard to the accused's remorse, the accused did not testify in mitigation to show that he was remorseful. The accused is not remorseful and the court should not find mercy on his part. The deceased's wife who is a victim herself is still suffering as a result of the accused's actions. Counsel again argued that the accused committed crimes against his employers. Therefore, he deserves to be given at least 30 years' imprisonment for the crime of murder. She also suggested various sentences to be imposed by this court in connection with the other counts.

[8] In deciding what a proper sentence should be, the court will consider the personal circumstances of the offender, the crime and the interest of society. At the same time regard must be also be had to objectives of punishment, namely prevention, deterrence and the reformation of the offender. Although the court must endeavour to strike a balance between these factors, the circumstances of a case might dictate that one or more of the factors must be emphasised at the expense of the others. *S v Van Wyk* 1993 NR 426 at 448.

[9] Although the accused has a previous conviction, this previous conviction was committed after the commission of the offences in this matter. However, the accused's

subsequent convictions is a clear indication that he is a person of a bad character; someone who has no respect for the law. Furthermore, although it was submitted on his behalf that he was apologising to the family of the deceased and the Namibian society at large and that he was remorseful for what he did, the accused did not testify in mitigation. For remorse to be a valid consideration in sentencing, the penitence must be sincere and the accused must take the court fully into its confidence otherwise the court would not be able to determine the genuineness of the contrition the accused claims to have. *S v Seegers* 1972 (2) SA 506 (A) AT 511 G – H.

[10] True remorse must be shown by the accused himself not from what his counsel is placing before court from the Bar. Since the accused has failed to testify, this court will attach very little weight to his alleged remorse. It was argued on behalf of the accused, that the accused's criminal culpability at the time of the commission of these crimes was diminished because he was under the influence of dependence producing substance and therefore the court should exercise mercy on him. This court will not take into consideration the alleged diminished criminal culpability because apart from a mere address from the Bar, there is no evidence to that effect. The accused killed his employer by chopping him with an axe. Thereafter he went to rape his wife, robbed her of their valuables and kidnapped her. The accused did not exercise mercy on his victims who happened to be his employers. It is an aggravating factor that the accused committed these atrocities against his employers who were kind to give him employment which is very scarce in Namibia. He repaid the kind hearted employers by committing unimaginable horrors against them. He literally bit the hand that fed him.

[11] As far as the nature of the offences committed by the accused are concerned, it is undoubtedly so that some of them are extremely serious, namely murder, rape, robbery and kidnapping and would normally attract severe punishments. The accused violated the fundamental rights of the deceased and his wife. Therefore, there is a need for this court to impose a stiff sentence on him to deter not only the accused but would-be offenders as well.

[12] Concerning the interest of society, there can be no doubt that society views the crimes of murder, rape, robbery and kidnapping with abhorrence. Therefore, the sentence to be imposed should reflect this fact and the seriousness of these offences. Although the accused has been in custody for about four years prior to conviction - a factor in his favour - this court should not lose sight of the victims of the crimes who lost their beloved one. The court should not reduce the appropriate punishment in order to exercise mercy on the offender although it is trite that mercy is contained within a balanced and humane approach to consideration of the appropriate sentence.

[13] The accused committed multiple offences or crimes which are closely related. For the punishment not to result in inordinate long-term or fixed imprisonment, that could extend beyond the accused's life expectancy which may amount to inhumane, cruel or degrading punishment this court will order some of the sentences to run concurrently with each other.

[14] With regard to the charge of rape, there is no evidence placed before this court that amounts to substantial and compelling circumstances that may call for a deviation from the mandatory sentence prescribed under section 3 of the Combating of Rape Act. However, the approach taken by the South African Court of Appeal in *S v Malgas* 2001 (2) SA 1222 (SCA) and adopted by this court in *S v Lopez* 2003 NR 162 (HC) at 173 has been accepted as the guiding principles in determining what are substantial and compelling circumstances in rape matters. These include the following considerations:

- (a) The minimum prescribed sentence is not to be departed from lightly or for flimsy reasons;
- (b) For circumstances to be substantial and compelling, they must be such as cumulatively to justify a departure from the standardised response chosen by the legislature; and
- (c) If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to

the crime, the criminal and the needs of society so that injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'

[15] Taking into consideration the above legal principles, this court is of the view that if the mandatory sentence of not less than 15 years' imprisonment is imposed, this would render the prescribed sentence unjust taking into consideration the cumulative effect of the sentences to be imposed on other counts. The interest of society and that of the offender will not be served if the sentence imposed goes beyond the life expectancy of the accused. Injustice will be done by imposing a sentence that is cruel, inhumane and degrading as held in *S v Gaingob & others* 2018 (1) NR 211. Therefore, this court will deviate from imposing the mandatory sentence prescribed. However, it should be noted that as there are no prescribed circumstances defined as substantial and compelling circumstances each case should be considered on its own facts. In this matter, if the accused was only convicted of less serious offences that do not call for a severe punishment this court was not going to deviate from the sentence provided for.

[16] In the premise the accused is sentenced as follows:

Count 1: Murder with direct intent:

21 years' imprisonment.

Count 2: Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977:

6 years' imprisonment 3 years of which to be served concurrently with the sentence on count 1.

Count 3: Rape contravening section 2(1) (a) read with sections 1 - 3, 5 and 6 of the Combating of Rape Act 8 of 2000:

10 years' imprisonment.

Count 4: Kidnapping

2 years' imprisonment.

Count 5: Driving a motor vehicle without a driving licence contravening section 31(1) (a) read with sections 1, 50, 86 and 105 – 109 of the Road Traffic and Transport Act 22 of 1999:

4 months' imprisonment.

Count 6: Reckless driving contravening section 80(1) read with sections 1, 50, 80 (2) (3), 86, 106 – 109 of the Road Traffic and Transport Act of 1999:

18 months' imprisonment. The sentence on count 5 is to be served concurrently with the sentence on count 6.

Order:

Furthermore, it is ordered that in terms of section 51 (3) of the Road Traffic and Transport Act 22 of 1999, the accused is declared to be disqualified from obtaining a learner's licence or driving licence for a period of 6 months from the time he finishes serving his sentence.

N N Shivute
Judge

APPEARANCES:

THE STATE:

Ms Ndlovu

Office of the Prosecutor-General

ACCUSED:

Mr Kanyemba

Of Salomon Kanyemba Legal Practitioners

(Instructed by the Director of Legal Aid)