

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

Case no: CC 17/2016

In the matter between:

THE STATE

and

ANASTANCIA NALUCHA LUBINDA

ACCUSED NO 1

DAVID KONDJARA

ACCUSED NO 3

DONALD HINDJOU

ACCUSED NO 5

Neutral citation: *S v Lubinda* (CC 17/2016) [2022] NAHCMD 86 (4 March 2022)

Coram: SALIONGA J

Heard: 23 November 2021, 6 December and 7 December 2021

Delivered: 4 March 2022

Flynote: Criminal Procedure–Sentence-- Murder with direct intent – Factors to be taken into account – Accused first offenders – Time spent in custody counts in their favour – Accused insisting they are not guilty after convictions – Accused not accepting

consequences of their actions – Accused not remorseful — No material difference in the liability and blameworthiness of all accused – All accused acted in common purpose — No different sentence considered — Aggravating factors outweigh personal circumstances of accused persons – Lengthy custodial sentences inevitable.

Nature of offence – Serious offence – Prevalent – Offence committed in a domestic setting in respect of first accused – Offence pre-meditated and planned properly – Conspiracy - Deceased lured to Goreangab dam, stoned and was left to die – Action of the killers imputed to others.

Interest of society – Court not to emphasize one interest at the expense of the other – Instead interests of the accused and that of society considered and balanced -- Interest of society outweighs personal interest of accused – Accused dangers to society – Contracted killers has no place in our society - Greater need to remove them from society.

Summary: The accused persons were convicted of murder charge and the charge against first accused is read with the provisions of Combating of Domestic Violence Act 4 of 2003. The court was tasked to determine an appropriate sentences for the accused persons. The court considered all the submissions, both oral and written and the authorities to which I was referred to as well the Zinn triad and finds no compelling circumstances to deviate from the normal sentences imposed in similar cases. Although the evidence in mitigation plainly establishes different personal circumstances of each accused, the participation, liability and blameworthiness of each accused were collective with the aim to kill Peter Muleke, which in my opinion does not warrant different sentences nor a suspended sentence to be imposed on each of the accused persons. The circumstances in which the offence was committed are aggravating that it outweigh personal circumstances and coupled with the interest of society length custodial sentences are inevitable.

ORDER

1. Count 1: Murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003 in respect of accused 1: Life Imprisonment.
 2. Count 2: Murder with direct intent in respect of accused 3 and 5: Life Imprisonment
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SENTENCE

SALIONGA J

Introduction

[1] I have already handed down the judgment in respect of the conviction¹. This judgment deals with the evidence led in respect of the appropriate sentence to be imposed. The two judgments should be read together for easy referencing and understanding the reasoning behind the sentences imposed.

[2] The State alleged that between the 29th - 30th day of March 2015 and at or near Penduka- Goreangab Dam in the district of Windhoek, six accused persons acted in the furtherance of a common purpose killed one Peter Riscoh Muleke. First, third and fifth accused persons were convicted of murder with direct intent. Second accused died before the trial commenced and accused four and six were acquitted due to lack of evidence. It should be noted that the deceased and the first accused shared a common residence as husband and wife. Third and fifth accused were approached by first accused to find people who can kill someone for her. The deceased suffered multiple injuries and died at the scene as a result of blunt force trauma to the head.

[3] It is now my duty to sentence the accused persons for the crime they have been convicted of. In terms of our law there are three factors to be taken into account when

¹ Judgment delivered on 15 October 2021

considering an appropriate sentence, namely: (a) The personal circumstances of the accused; (b) The nature of the crime and (c) The interest of society.²

[4] At the same time the sentence to be imposed must satisfy the objectives of punishment which are: (i) the prevention of crime; (ii) deterrence of the offender from re-offending (iii) rehabilitation of the offender and (iv) retribution.

[5] The determination of a suitable sentence is a complex exercise a presiding officer has to contend with. It does not involve a mechanical process in which predetermined sentences imposed for specific crimes in similar cases are to be considered. Even though following the said cases is an important consideration it is not overriding. Generally the sentencing court in each case must consider the factors referred to in *S v Zinn*³, afford an appropriate weight thereto and strike a balance between the aforesaid various interests.

[6] However due to the difficulty experienced in harmonising and balancing these interests and applying them to the facts, equal weight need not be given to different factors as it might become necessary to emphasise one or more factor/s at the expense of others. The above determination will largely depend on the circumstances of the facts of a particular case, See *S v Van Wyk*.⁴ In striving to strike a balance between various interest in this case, I find it appropriate to follow and apply what the court in *S v Rabie*⁵ had said that: 'Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.'

Evidence in terms of section 25 of the Combating of Domestic Violence Act⁶

[7] In aggravation, the state led evidence of Mr. Festus Tubazumbe the deceased's cousin. According to this witness, the deceased left behind three children, a 23 year old boy from a different mother and two sons the deceased fathered with his wife, ages 16

² *S v Zinn* 1969 (2) SA 537 (A) at 540G

³ Supra.

⁴ *S v Van Wyk* 1993 NR 426 (SC)

⁵ *S v Rabie*⁷ 1975 (4) SA 855 (AD) at 862 G-H

⁶ Act 4 of 2003.

and 11 years respectively. They are currently residing with the deceased's mother and sister in a village near Katima-Mulilo as a result of the death of their father and the incarceration of their mother.

[8] He stated that the children were severely impacted in that they struggled to learn Silozi the local language, that they failed a grade when they were transferred from Windhoek to the village but at the moment they are coping well and the fact that they had their parents looking after them, taking them to and from school and they just disappeared in a blink of an eye. In his opinion the offence mostly affected the second eldest child who was 7 years at the time of the incident now that he has grown up, can read newspapers and is aware that his mother is responsible for murdering their father. They have to live with that stigma for the rest of their lives. He indicated that the two younger children are receiving money from their father's pension (N\$1200 and 900 respectively) and is sufficient for their basic daily needs. He is not aware if accused or their families apologized and if they did tender an apology he was not privy to that.

[9] The death of the deceased further affects an 89 year old mother of the deceased in that she was traumatized to hear that the first accused is involved. The deceased's father died long time ago before the deceased passed on. The witness being a member of the family has trust in the Namibian justice system and is certain this court will impose an appropriate sentence on the accused. On what sentences to be imposed the witness stated that the court knows what suitable sentence to impose. He leaves the sentencing of the accused persons in the hands of this court.

Evidence in mitigation of sentence

[10] First accused testified in mitigation that she is 39 years old and was born in Katima- Mulilo on 11 December 1981. She has attended school up to grade/form 10. She was working and earned N\$ 7300 per month but was suspended shortly before her arrest. She was legally married to the deceased for 7 years and prior to their marriage they had been dating since 2002. She has two children with the deceased aged 16 and

11 respectively. She was arrested on 1 April 2015 while at her brother in law's house mourning her husband according to their tradition. At that moment her children were minors, Junior was 9 years old and the other child was 5 years. From the time she was arrested she did not see her children and are now residing at the village. No-one consulted her that the children were to go and school at the village. Both her parents passed on a long time ago. She has a brother who is at the village and her elder sister is residing in Windhoek.

[11] She further testified that she could not attend her husband's funeral. She was unhappy that she is in prison because she did not kill the deceased and that despite her denying all the allegations she was found guilty. She also feels bad to hear that her son Junior failed a grade. As a consequences of all these she is now suffering from heart and swollen feet problems. She did not ask permission to see her children except when she and Nuule enquired from Bornbright who told them the kids were not with him. She testified that she did not agree with the judgment on conviction as she was not guilty of murder. She maintained that she is innocent even God knows. She could not apologise either because she did not kill her husband. According to her the deceased was her beloved husband who was taking care of her and their children and had no reason to kill him.

[12] Third accused also testified in mitigation that he is 40 years old. He is unmarried with two children. He does not know how old his children are now but they were 15 and 5 years in 2015. The children are staying with their mother. Accused was in a romantic relationship with the mother of his children before his arrest and had future plans to live with her for the rest of his life. He has never seen his children since his incarceration, he has only been seeing their mother who was visiting him at Wanaheda police station. Prior to his arrest he worked as a barber and did odd plumbing job and was financially maintaining his children. He was earning N\$ 3500 per month from cutting hair and as a plumber he had no fixed income because he was just helping his uncle. He never attended school nor did he attend special training as a plumber. He only learned plumbing work from his uncle. He also learned to cut hair by himself when he was a sweeper. He had N\$ 1000 and a cell phone which was taken away from him on the day

he was arrested by Nuule. He also had cattle, cows and goats but they all died from drought. He has a recurring pain on top of the stomach straight to the chest. He is a first offender and he is not happy/satisfied with his conviction. He has been in custody for 6 years and 7 months.

[13] In mitigation, fifth accused testified that he is 32 years old. He attended grade 1 - 7 at Berthold Himumuine Primary School. He has five siblings, a sister and four brothers. His 61 years old mother stays at Katutura Shanghai Street and his father is in Okakarara. He was taking care of his mother and his younger brothers. Currently his mother is being cared for by other family members under difficult circumstances. He was informed that his mother at times goes to the extent of begging for food from other people. Accused had twins who passed on in 2014. He also had a girlfriend before his incarceration but she has also passed on in the meantime. The accused was doing mechanical work and building corrugated iron shacks in the location. His monthly salary range from N\$600-800 depending on how customers are paying him. He is a first offender.

[14] It was his testimony that subsequent to his arrest he attended bible studies course and obtained a certificate. He also did tailoring and manufacturing of clothes and caps while in detention. He is asthmatic, sometimes he faints and has a recurring pain as a result of the assault perpetrated on him during his arrest. He indicated that if he was to go out of custody he would get better treatment. He is a first offender and is aware that he is now convicted of murder. That after serving his sentence he would like to go and preach the word of God. He would also like to go and gather all young people involved in drugs to stop doing that and wants to go reach street children so that they should go back to their homes. He always pray for the mother and relative of the deceased to live in peace and to have strength. In other words he would like to go and work for the community.

[15] He implored this court to have mercy on him save to state that he strongly believes that the court's decision to convict him is wrong as he did not kill the deceased.

As an innocent man he places everything in the hands of the court in as far as the sentence is concerned.

The offence:

[16] The offence of murder is very serious, prevalent and generally attracts severe punishment. The deceased in this matter was lured to drive to Goreagab dam late at night. Evidence indicates that the deceased was fiercely grabbed and attacked. The injuries he sustained on his head are consistent with the cause of death indicated in the post mortem report. It further indicates that the deceased screamed but no-one could come to his rescue.⁷

[17] Unworried by her involvement in the commission of the heinous crime, first accused took the role of a concerned wife when she told the deceased's sister that her husband left home late in the middle of the night to go fill petrol and never returned back. At the same time she lied to the deceased's co-workers at the Municipality that she did not know where her husband was, well knowing that the deceased had been murdered. The death of the deceased is glaringly a loss to his children, his family and friends, the community circles in which he was working.

Interests of the community:

[18] With regard to the interest of society, members of society need to be protected from dangerous individuals like the accused. At the same time society will not condone a sentence which is inappropriately long as Frank AJA, in *Gaingob v S* (CSA 7 and 8-2008) [20018] NASC (6 February 2018) found that 'fixed term sentences longer than 37 and a half years 'is materially misdirection and can be rightly described as inordinately long liable to be set aside.'

While agreeing with the highest court's decision, in my view the right to life is the most sacred, the most precious right and must be bitterly guarded and protected. It is with great concern to see how many people are killed in domestic set up and in circumstances where people are hired to kill just as in the present case. In my view such behaviour should be condemned as society will definitely not accept and approve the same.

⁷ Page 6-7 of Exhibit "Q"

Counsel's submissions on sentence.

[19] Counsel for first accused submitted that although society expects offenders in serious cases to be punished, it does not expect courts to destroy the offenders. He proposed an unreasonable sentence of 18 years partly suspended sentence on certain conditions. While counsel for third accused submitted that when evaluating the evidence of the admissions made by accused 3 in the styled confession it should be noted that this accused left the scene during the assault of the deceased. That although he came back to the scene, his blameworthiness is diminished when considering the harm or physical harm caused to the deceased. His argument is found to be neither here nor there. In my opinion accused 3 cannot distance himself from the conspiracy to murder the deceased and the court reject outright his proposed sentence of 15 years imprisonment. At the same time counsel for fifth accused submitted that the case of *S v Du Preez*⁸ cited by the state for the reasons stated⁹ is distinguishable from the facts of the case before court. I equally disagree with the disproportionate sentence of 18 years suggested by counsel for fifth accused person for reasons stated in this judgment.

[20] Counsel for the State on the other hand submitted that the offence of murder is of a serious nature and this court is duty bound to ensure that the sentence to be imposed reflects that seriousness. The accused persons though they testified in mitigation before sentence no remorse was shown. It was counsel's submission that no evidence exists before this court that indicates that the accused persons are remorseful. Therefore a suitable sentence in the face of the serious charge that the accused persons face in his view would be a lengthy prison sentence of life imprisonment in respect of each accused person.

The aggravating features of the murder are as follows

[21] The learned author S S Terblance in the Guide to Sentencing in South Africa (2nd Ed.) at page 190 states that 'the offender is entitled to plead not guilty to challenge the prosecution to prove his guilt and to attack in cross-examination the witnesses' version of events.' This should never be held against him when sentence is imposed.

⁸ *S v Du Preez* (CC02/2016) [2019]NAHCMD 426 (22)October 2019)

⁹ Para 20.1-7 of accused 5 submissions on sentence

[22] Whilst I accept that the accused is entitled to plead not guilty and challenge the state to prove its case against him, a lack of remorse has often being referred to as being an aggravating factor. In *S v Brand*¹⁰ the court held:

‘...true remorse was an important factor in the imposition of sentence, as it suggested an offender who, firstly, realised that he had done wrong, and, secondly, undertook not to transgress again. True remorse led to accommodating punishment by our Courts.’ See also *S v Samuel Shigwedha* CC 12/2008 delivered on 13 March 2009.

[23] It is trite that remorse is only a valid consideration if the penitence is sincere and the accused takes the court into his or her confidence. Genuine remorse plays such an important role when one considers a sentence. It indicates an appreciation and acknowledgement of the extent of one's error and its effect on other people. It further accepts that the mistake made has consequences like a punishment that needs to be taken. It finally demonstrates that before the sentence commenced, such a person began with his internal rehabilitation process. In this regard I agree and endorse the sentiment expressed that with remorse in this proper sense, rehabilitation of the perpetrator is usually a given.¹¹

[24] Although it can be generally accepted that lack of remorse is not an aggravating circumstance, it is settled law that when the deterrent effect of a sentence is decided, remorse as an indication that the offence will not be committed again is considered as a mitigating factor. As Sibeya J rightly held in *S v Mbemukenga*¹² that ‘the presence of remorse is regarded as mitigating factor by the courts but if not expressed, it aggravates the sentence.’ In the present matter, the inescapable consequence to come to is that all accused persons did not express remorse for what they did.

[25] The commission of the crime was premeditated and planned well in advance during which various options were considered. The circumstances surrounding the

¹⁰ *S v Brand* 1998 (1) SACR 296 (C) at 299i-j.

¹¹ *S v Katsamba* (CC 14/2018) [2021] NAHCNLD 113 (6 December 2021) paragraph 25

¹² *S v Mbemukenga* (CC10/2018)[2020] NAHCMD 262 (30 June 2020)

commission of the offence are that first accused together with second accused (now deceased) initially planned to poison the deceased and went further to plan that should that 1st option fails, they will throw the deceased in a dam in Keetmanshoop. First and second accused (now deceased) in furtherance of their plan went to third and fifth accused enquiring the whereabouts of people who can be hired to kill a person. Third and fifth accused gave info of the killers and directed them where to find the people. Eventually third and fifth accused participated in the killing of the deceased. In the present case the murder was committed after a careful and proper planning; with all accused acting in the furtherance of a common purpose to kill the deceased with direct intent. Although the main culprits are unknown up until this stage the plan was embraced and executed and the actions of the killers are imputed on all other accused persons. This fact was also accepted as an aggravating factor in *S v Qamata* 1997 (1) SACR 479 (E) at 481 and I am inclined to consider the same as aggravating.

[26] Although it is common cause that these accused did not actually participate in the actual killing of the deceased at the dam they however conspired to kill the deceased, they knew the reason for going to Goreangab dam and they were present watching when the deceased was stoned to death. All three accused played an active role in the preparation and facilitating all it required to have the deceased killed. No doubt that the motive for killing the deceased for the first accused was to end the alleged violent domestic relationship as stated in her confession and confirmed in cross-examination. While the motive for the third and fifth accused assisting first accused was for financial gain as per each accused's admissions. This court in *S v Randall*¹³ justly viewed the fact that an offence was committed for monetary reward an aggravating factor.

[27] Dissimilar to third and fifth accused person, first accused was in a position of trust towards the deceased. Having stayed together with him in one house, she was in an excellent position to follow her husband's movement, the likes and dislike. She used that opportunity to hire people to kill her husband with whom she had been married for 7 years. It is disheartening to hear that the deceased upon their arrival at the scene of

¹³ *S v Randall* 1995 (1) SACR 559 © at 566 b-d

crime and after realising their safety was at stake screamed 'drive away, drive away home' little did he know it was a conspiracy by his beloved wife/first and other accused persons to kill him.¹⁴

[28] The offence in respect of the first accused was further aggravated by the fact that she was in a domestic relationship with the deceased as defined in the Combating of Domestic Violence Act 4 of 2003. I must point out that it is not only violence by men towards women that needs to be rooted out in our society but also violence of all sorts including violence by women against men. In this case the fact that the deceased is a male person should make no difference to the court's approach in sentencing accused convicted of crimes committed in domestic set up and the first accused is no exception.

[29] The Court has considered what the first, third and fifth accused have said in mitigation as well as what their counsel have submitted before sentence. What counts most in their favour is the fact that all accused have been in custody for a period of over 6 years and 7 months awaiting trial though same cannot be blamed solely on the state. All three accused have no previous record at their respective ages. I have noted with concern that first accused was pressurised by one Mr Matali¹⁵ not to report domestic violence but to get rid of her husband in a possible faster way. I have also taken note that all accused persons initially admitted their involvement in the killing of the deceased by confessing to the commission of the crime before different magistrates. The evidence that otherwise would not have become known, available and significantly assisted the court in its evaluation of the evidence. I further considered that indeed domestic violence was present as it was confirmed by first accused in her evidence, also in cross-examination by the state, and by counsel for accused 1 in his submission on sentence. However it appears that the first accused was not only ill-informed to withdraw all admissions she made in her replies to the state pre-trial memorandum but also not to testify about the domestic violence relationship she had in mitigation. I cannot take the issue of domestic violence too far as there is no evidence before this court regarding the extent of pressure used and that the decision on how to end the violence lied with her.

¹⁴ Page of first accused's confession marked exhibit "U"

¹⁵ Matali second accused but dies before a trial start and could not respond to the allegation in the confession of accused one.

Ill-advisedly all accused opted not testified on the admissions and confessions they made save to state that the above factors could have substantially mitigated in their favors.

[30] Even if it can be accepted that no prior agreement was proved to have existed as argued by counsel for fifth accused, in this case all accused acted together in furtherance of a common purpose to murder the deceased. The accused had sufficient time to call a halt to the schemes they had planned and facilitated. I am fully aware that no sentence will ever bring back the deceased but society expects that offenders be punished for the pain and suffering caused to others and the sentences imposed should serve as a deterrent to other would be offenders.

Conclusion:

[31] Having carefully considered all the submissions, both oral and written and the authorities to which I was referred to as well the Zinn triad, I find no compelling circumstances to deviate from the normal sentences imposed in similar cases. Society at large has a legitimate expectation that this court will not shy away from its duty to impose severe sentences and would exact retribution to send a clear message that contractor and contracted killers would not have a place in our society. In the instant matter accused persons were present at the scene of crime but they did nothing to stop the assault nor did they call for medical assistance, instead after realizing that the deceased was brutally stoned to death they left him in a secluded place where he died a horrible death. Even if the evidence of the accused persons in mitigation plainly establishes different personal circumstances, the participation, liability and blameworthiness of each accused were collective with the aim to kill Peter Muleke, and does not warrant different sentences nor a suspended sentence to be imposed on each of the accused persons. In my view the circumstances in which the offence was committed are aggravating that they outweigh personal circumstances of each accused and when coupled with the interest of society, the lengthy custodial sentences are inevitable.

[32] Accordingly the following sentences are imposed;

1. Count 1: Murder with direct intent read with the provisions of the Combating of Domestic Violence Act 4 of 2003 in respect of accused 1: Life Imprisonment.
2. Count 2: Murder with direct intent in respect of third and fifth accused: Each accused is sentenced to life imprisonment.

J T SALIONGA
JUDGE

APPEARANCES:

STATE

Mr Olivier
Office of the Prosecutor General, Windhoek

ACCUSED NO 1

Mr Engelbrecht
Instructed by Directorate of Legal Aid, Windhoek

ACCUSED NO 3

Mr Shikongo
Directorate of Legal Aid, Windhoek

ACCUSED NO 5

Mr Silungwe
Instructed by Directorate of Legal Aid, Windhoek