



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 10/2021

In the matter between:

**THE STATE**

and

**INOCK MAZALA NALISA**

**ACCUSED**

**Neutral citation:** *S v Nalisa* (CC 10/2021) [2023] NAHCMD 137 (23 March 2023)

**Coram:** LIEBENBERG J

**Heard:** 1 March 2023

**Delivered:** 23 March 2023

**Flynote:** Criminal Procedure – Charges – Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – Defeating or obstructing the course of justice.

Criminal Procedure – Sentencing – Triad factors, objectives of punishment considered and restated – Principle of individualisation considered.

Criminal Procedure – Provocation, effect thereof on mitigation – Effect of expressing remorse after conviction.

**Summary:** The accused was convicted of the following offences: Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003; and Count 2: Defeating or obstructing the course of justice.

*Held:* It is trite that equal weight or value need not be given to the different factors and, depending on the facts and circumstances of the case, a situation may arise where one principle needs to be emphasised at the expense of others.

*Held that:* A sentencing court would usually consider provocation, when present, to be mitigating and weighing in favour of the accused but that this must be weighed against the accused person's reaction to the provocative behaviour.

*Held further that:* It is not in all instances where an accused expresses remorse only after conviction, that it can be said that it is not sincere.

*Held that:* Hardship brought upon the family and dependants of criminals is an inevitable consequence of crime and, therefore, does not constitute a mitigating factor.

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## ORDER

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Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 33 years' imprisonment.

Count 2: Defeating or obstructing the course of justice – 2 years' imprisonment.

In terms of s 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that the sentence imposed on count 2 is to be served concurrently with the sentence imposed on count 1.

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## SENTENCE

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LIEBENBERG J:

### Introduction

[1] On 14 February 2023 the accused was convicted of murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 (the Act) and defeating or obstructing the course of justice. The accused pleaded not guilty to both counts and after evidence was heard, the court found on the murder charge that the accused acted with direct intent when hitting the deceased multiple times with a hammer in the head and stabbing her with a knife multiple times in the upper-body, with fatal consequences. The murder was committed in a domestic setting in that the accused and the deceased were in a romantic relationship as defined in the Act. We have now reached the stage in the trial where the court has to consider what sentence, in the circumstances of the case, would be appropriate.

[2] What is required of the court at this stage of the proceedings is to consider the triad of factors consisting of the crime, the offender and the interests of society. In addition, the court must further decide which of the following objectives of punishment it wants to achieve namely, deterrence, prevention, reformation and retribution. In *S v Van Wyk*<sup>1</sup> it was stated that the difficulty often arises from the challenging task of 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, depending on the facts and circumstances of the case, a situation may arise where one principle needs to be emphasised at the expense of others. This is called the principle of individualisation where punishment is not meted out generally, but full regard being had to the offender before court, the facts and circumstances in which the crime was committed, and what sentence would best serve the interests of society. The purpose is thus to find a sentence that is just and fair, one that would not only serve the interests of the offender, but also that of society. In *S v Rabie*<sup>2</sup> the court said: ‘Punishment should fit the criminal as

<sup>1</sup> *S v Van Wyk* 1993 NR 426 (HC).

<sup>2</sup> *S v Rabie* 1975 (4) SA 855 (AD) at 862G-H.

well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances'. (Emphasis provided)

#### Accused's personal circumstances

[3] The accused at present is 32 years of age and the father of two minor boys who currently live with their respective grandparents in the northern regions of Namibia. He was married to the deceased and, with the deceased's daughter now aged 10 years, they lived at Okahandja Park in Windhoek. The accused had fixed employment until November 2019 whereafter he took up casual employment as driver from January – March 2020, which came to an end due to the Covid pandemic. At the time of the incident in October 2020 the accused was unemployed, ostensibly, much to the frustration of the deceased who had fixed employment. He is a first time offender.

[4] During his testimony the accused apologised to the court, the family of the deceased and the community in general for the taking of another person's life. He said he could not personally reach out to the family of the deceased due to his incarceration. He did however try to do so through Beauty, a cousin to the deceased, but she declined and suggested that the accused personally contact the elders of her family. To his mind some contact was established and that his family made a financial contribution of between N\$7000 and N\$10 000 to the deceased's family for funeral expenses. This was however disputed by the deceased's elder brother, Mr Mwilima Munikonzo, who said that no financial support was received from the accused's family. The accused did not present any form of proof or evidence showing the contrary.

#### The crime

[5] Turning to the murder at hand, the court is not privy to the actual circumstances that led to the killing of the deceased for reason that the accused's exculpatory evidence has been rejected as false. The evidence, however, shows that the killing was preceded by an argument between the accused and the deceased which, as asserted, provoked the accused. The evidence of Beauty Mbango, to a certain extent, supports the accused's version about an altercation and that the deceased was aggressive towards both the accused and Beauty, when telling her

not to interfere. Although the court found the accused's evidence about him having suffered a blackout to be false, the same cannot be said about his assertion that the deceased grabbed him by his genitals and this further provoked him.

[6] The following facts have been proved: The accused used a hammer and a knife when inflicting 15 scalp lacerations to the head and 22 stab wounds to the upper-body of the deceased, some with fatal consequences. The seriousness of the injuries inflicted is borne out by the fact that the deceased died on the spot. In an attempt to describe the nature and extent of the attack perpetrated on the deceased, words such as 'merciless', 'brutal' and 'inhumane' come to mind. Though mindful of the accused having sustained injuries during the altercation with the deceased, these were superficial and of little significance compared to what he inflicted on the deceased.

[7] The offence of murder undoubtedly falls within the category of serious crimes, moreover when committed in a domestic setting. In view thereof, it seems apposite to repeat what was said in *The State v Gowaseb*<sup>3</sup> at para 10:

'These crimes were committed in the context of a domestic relationship as defined in the Combating of Domestic Violence Act, 2003. This Court in past judgments made it clear that it considers crimes committed in a domestic setting in a serious light and would increasingly impose heavier sentences in order to bring an end to the spate of murders currently experienced. The present instance is just another example of the extent of abuse and crimes committed on a daily basis in our society, where the weak and vulnerable often pay with their lives for no reason at all. Differences between persons in virtually any relationship, moreover when of romantic nature, are likely to arise and as independent human beings we are often confronted with difficult situations which require emotional decision making – it is simply part of life. That obviously includes breakups in relationships and irrespective of how difficult and painful the process may be to the affected parties, they are bound by the fundamental rights enshrined in our Constitution, including the moral values endorsed and upheld by society. It is therefore in the interest of justice that these rights and mutual respect for one another be protected and upheld at all cost. To this end the court plays an important role in upholding the rule of law through its decisions and the sentences it imposes.'

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<sup>3</sup>*State v Gowaseb* (CC 05/2017) [2017] NAHCMD 193 (19 July 2017).

[8] As for his conviction for defeating or obstructing the course of justice, this offence is equally considered to be serious and the imposition by our courts of direct imprisonment for offences of this nature has now become the norm. In the present instance the accused discarded the knife used during the commission of the murder and to this end obstructed the course of justice.

#### Interest of society

[9] One only has to follow the media to come to realise that there exists wide spread outrage against the ghastly crimes committed in our society. This, despite warnings issued by the courts in the past against such behaviour and that the courts will increasingly impose heavier sentences. It is disquieting to see that these warnings seem to fall on deaf ears and that such repulsive behaviour, as demonstrated in the present matter, simply continues unabated. More and more voices are daily heard from society calling for an end to the unrelenting killing of vulnerable people in society. Mostly women fall prey to murderers who, in the end, are unable to own up or explain their deplorable behaviour, like in the present instance where the accused fabricated a story, justifying his inability to explain what happened, claiming loss of memory. It is for this reason that the 'natural indignation of interested persons and the community at large should receive some recognition in the sentences that courts impose' (*S v Karg*<sup>4</sup>). Harsh punishment is generally called for under these circumstances and it is only when exceptional that the crime of murder would not attract a lengthy custodial sentence. The objective of deterrence in these cases come to the fore: not only for the offender, but also to deter other likeminded criminals from committing similar offences.

#### Submissions

[10] During his submissions on behalf of the accused, Mr Kaurivi conceded that the nature of the crime of murder is serious as the right to life is fundamental and protected in the Namibian Constitution. Also that the brutality of the attack and the accused found to have acted with direct intent, are all aggravating factors weighing heavily against the accused. It was however argued that regard should still be had to the fact that the accused was provoked when he so acted.

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<sup>4</sup> *S v Karg* 1961 (1) SA 231 (A).

[11] It is trite that a sentencing court would usually consider provocation, when present, to be mitigating and weighing in favour of the accused. Depending on the circumstances of the case and, provided the court finds that it is reasonable in the circumstances, such provocation could be relevant to mitigation of sentence.<sup>5</sup> The accused's narrative of events preceding the incident which resulted in the deceased's death during the trial was clearly aimed at showing that he acted under provocation when acting against the deceased. During oral submissions I raised the question with counsel as to how much weight should be accorded to provocation in circumstances where the accused testified that he at first resisted the deceased's fight-picking and seemed to have been in control of his emotions up to the point when she squeezed his genitals. I agree that in the absence of evidence to the contrary, the accused's version on this point must be accepted and that he was indeed provoked by the deceased. However, that is not the end of the enquiry as the court must still consider whether the accused's reaction to the deceased's provocative behaviour could be seen to be reasonable in the circumstances.

[12] Counsel, in my view correctly, conceded that there can be no justification for the accused's actions, irrespective of him being provoked. He lodged a vicious attack on the deceased during which he switched between a knife and a hammer to inflict a large number of serious injuries to the head and upper-body of the deceased, with fatal consequences. Where the accused went on an uncontrolled rampage with intent to kill the deceased, there is simply no measure of reasonableness or understanding for his actions. In these circumstances the accused's actions render provocation as a mitigating factor, inconsequential and, in my view, should be accorded little weight.

[13] Turning to remorse as a mitigating factor, the accused in mitigation of sentence apologised for the wrong he has done to the family of the deceased and the community. Other than that, there is no tangible remorse on his part from which it may be deduced that his apology is sincere. The court in *S v Seegers*<sup>6</sup> as per Rumpff JA on remorse as mitigating factor said (at 511G-H):

'Remorse, as an indication that the offence will not be committed again, is obviously an important consideration, in suitable cases, when the deterrent effect of a sentence on the

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<sup>5</sup> *S v Mokonto* 1971 (2) SA 319 (AD).

<sup>6</sup> *S v Seegers* 1970 (2) SA 506 (A).

accused is adjudged. But, in order to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined.'

[14] In the present matter the accused pleaded not guilty to both counts and required of the state to prove the allegations set out in the indictment (as he was entitled to do) but was convicted in the end. I do not believe that in all instances where an accused expresses remorse only after conviction, can it be said that it is not sincere. Much will depend on the circumstances of the case and I have no doubt that there could be circumstances in which the court would be able to find that remorse – albeit demonstrated only after conviction – is genuine and sincere. I do not believe that this is such an instance, for reason that the accused's apology was nothing more than a bold statement. He certainly did not take the court fully into his confidence during his testimony and made no attempt to open up and explain how he genuinely feels about the murder he committed and how it impacted on his life. Moreover, what lessons he has learned from it and how it changed his life. Therefore, I am not persuaded that the apology extended by the accused in mitigation meets the criteria of being sincere. Hence, I do not consider it to be a mitigating factor for purposes of sentence.

[15] Lastly, the accused has been in custody pending finalisation of the trial for a period of just over two years. Though I do not deem the period unreasonably long, it remains a factor favourable to the accused and one the court should take into consideration in sentencing as it usually leads to a reduction in sentence.<sup>7</sup>

[16] On the other hand, the court must equally consider factors of aggravating nature when it comes to sentence. In the present instance one such factor is the taking of a life of the person with whom the accused was in a domestic relationship, his wife. That very same person whom he chose to spend the rest of his life with; a person only 30 years of age and the mother of a ten year old girl. The trauma this young child had to endure when witnessing what had happened and the difficulties she experienced subsequent thereto, was touched on during the testimony of the deceased's brother, Mr Munikonzo. Though comforting to know that the child's circumstances have improved in the meantime, the pain and hardship she still has to endure when growing up without the love and care of a mother, is immeasurable. It

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<sup>7</sup> *S v Kauzuu* 2006 (1) NR 225 (HC) at 232F-H.



should not just be accepted by the courts that the affected persons will be able to cope afterwards without taking into account the agony and suffering they and others must endure as a result of the emotional hurt and pain caused by the offender.

[17] The same sentiments, sadly, apply to the two boys of the accused who must also grow up without the support and love of a father at their side. Unfortunately, hardship brought upon the family and dependants of criminals is an inevitable consequence of crime and, therefore, does not constitute a mitigating factor. Whereas both boys have been living with their grandparents for some years now, the negative impact of an absent father in future may be more bearable. I am satisfied that the minor children of the deceased and the accused are not left destitute and are taken care of.

### Conclusion

[18] Regarding the objectives of punishment, the facts in the present instance dictate that the emphasis should fall on prevention, deterrence and retribution; rehabilitation being of lesser consideration. Though the court should never lose sight of the personal circumstances and needs of the offender, or accord too little weight to his interests, this court is equally under a duty to protect law-abiding citizens and innocent victims of crime. The only possible means to achieve this mammoth task is to mete out punishment that has the potential of deterring the offender and other like-minded criminals from reoffending. Where necessary, such persons must be removed from society for as long as justifiable in the circumstances. The aims of retribution and deterrence should be given the necessary weight, lest society will lose confidence in the criminal justice system which, in the end, will erode the principles of democracy.

[19] The seriousness of the crimes and the interest of society, considered together with the aggravating factors present, outweigh the accused's personal circumstances significantly. This obviously makes the imposition of custodial sentences on each count inevitable, moreover for murder, where a lengthy sentence of direct imprisonment is called for. The court will however endeavor to ameliorate the cumulative effect of these sentences by making the appropriate order to ensure that the level of punishment ultimately imposed, is not disproportionate to the accused's blameworthiness in relation to the crimes committed.

[20] When applying the principles stated above to the present facts and due regard being given to the interests of the accused, as well as that of society, I consider the following sentences to be just and appropriate.

[21] 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 – 33 years' imprisonment.

Count 2: Defeating or obstructing the course of justice – 2 years' imprisonment.

In terms of s 280(2) of the Criminal Procedure Act 51 of 1977, it is ordered that the sentence imposed on count 2 is to be served concurrently with the sentence imposed on count 1.

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JC LIEBENBERG

Judge

APPEARANCES:

STATE: E MOYO  
Of the Office of the Prosecutor-General, Windhoek.

ACCUSED: T K KAURIVI  
Of T K Kaurivi Legal Practitioners (Instructed by Legal Aid),  
Windhoek.