

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 19/2022

In the matter between:

THE STATE

and

JUSTUS MBIRIMUJO

ACCUSED

Neutral citation: *S v Mbirimujo* (CC 19/2022) [2023] NAHCMD 319
(14 June 2023)

Coram: LIEBENBERG J

Heard: 3 – 4 April 2023

Delivered: 14 June 2023

Flynote: Criminal procedure – Sentence – Murder read with provisions of the Combating of Domestic Violence Act, 2003 – Applicable principles

restated – Triad of factors – Objectives of punishment – Personal circumstances of accused outweighed by gravity of the offence and interests of society – Lengthy custodial sentence inevitable.

Summary: The accused pleaded guilty to one count of murder on his life partner by strangling her with his bare hands to death. The deceased was the mother of four minor children and the accused being the father of the two youngest, still being babies. In mitigation of sentence the accused sought forgiveness from the family and children of the deceased and the nation in general. The deceased was the breadwinner of her immediate and extended family while the accused was unemployed and worked part-time as a taxi driver. The children were since the deceased's death in the custody of her parents who now take care of them. In deciding what sentence in the circumstances of the case would be fair, the court applied the established principles to sentencing.

Held that, despite the accused's apologies to the family during his testimony, it did not come across as sincere as he did not fully take the court in his confidence. Hence, it should be accorded little weight.

Held that, the plea of guilty to be considered against the background where the accused virtually had no other option and therefore accorded less weight as mitigating factor.

Held further, the personal circumstances of the accused is outweighed by the gravity of the offence and the interests of society and that the imposition of a lengthy custodial sentence is inevitable.

ORDER

Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 28 years' imprisonment.

SENTENCE

LIEBENBERG J:

[1] The accused was convicted consequential to a plea of guilty on one count of murder when, on 21 October 2021 in the district of Windhoek, he wrongfully, unlawfully and intentionally killed Kauaa Karuumombe (hereafter 'the deceased') by strangulation. At the time of the murder he and the deceased were in a domestic relationship as defined in the Combating of Domestic Violence Act 4 of 2003.

[2] Mr Mwakondange appears for the accused whilst Ms Verhoef represents the state.

[3] In amplification of his plea explanation, the accused elucidated the circumstances under which the murder was committed. The state is in agreement with the stated facts. In summary, it amounts to the following:

On the evening of 21 October 2021 the accused and the deceased were at home when joined by family and friends for drinks. Sometime later the deceased left home, leaving the accused alone with their child. When she had not returned by 23h00 he went looking for her and she accompanied him home. The deceased was upset about the accused's decision to go and look for her and a heated exchange broke out between them during which the deceased swore and flung insults at the accused. She made it clear that she was a police officer and that there was nothing he could do to her. Upon arrival at home a brawl erupted during which the accused pressed the deceased down on the bed, placed his hands on her neck and strangled her with the intention of killing her. He continued strangling her until she died.

[4] According to the post-mortem examination report issued by Dr Guriras, the cause of death was asphyxiation due to manual strangulation, confirming the admitted facts as per the accused's plea explanation.

[5] The state in aggravation of sentence led the evidence of Mr Josua Humbu, the husband to the deceased. Although they were in a relationship since 2014, they only got married on 1 October 2021, some 20 days prior to the deceased's death. At all times he lived at Otjimbinde in the district of Gobabis, whilst the deceased was attached to the Special Reserve Force, initially deployed at Walvis Bay and later stationed in Windhoek. She was 29 years of age at the time of her death and the mother of four minor children, none of which fathered by Mr Humbu. It is common cause that the accused is the father of the two youngest children, one then aged just over one year and the other a few months old. The parents of the deceased reside at Otjimbinde and they have taken custody of all four children after the deceased's death. According to the witness he contributes financially towards the upkeep of the children and will continue doing so as he and the deceased were related. He explained that the deceased was the breadwinner of her family and took care of her parents and family back home.

[6] The accused testified in mitigation of sentence which was primarily consumed by apologies extended to the deceased's parents, her children and the women of Namibia in general. No personal information pertaining to the accused was divulged except for stating that he remained in custody since his arrest on 22 October 2021. He disputed that the deceased's marriage troubled him as he was unaware of it. He and the deceased were living together since February 2019 and, except for a period of four months when she lived with her family, they cohabited until the time of her passing.

[7] The accused is currently 33 years of age, a divorcee and the father of four minor children aged, 9, 6, 3 and 2 years, respectively. The two oldest children live with their respective mothers. The accused was not formally employed at the time of the incident and made a living from driving taxis on a part time basis. He is a first time offender and has been in pre-trial incarceration for a period of one year and six months.

[8] Relying on the matter of *Harry de Klerk v The State*¹ counsel for the accused submitted that particular regard should be had to the accused being

¹ *S v De Klerk* (SA 18/2003) [2006] NASC 5 (8 December 2006).

a first offender at the age of 31 and therefore without a record of criminal inclinations. In such instance the court would generally be reluctant to imprison a first time offender if the same sentencing objectives can be achieved by the imposition of another adequate punishment. Though realising that a custodial sentence in this instance is inescapable, it was proposed that a partly suspended sentence be considered.

[9] With regards to the accused having pleaded guilty to the charge of murder, the state submitted that the accused had his back against the wall and was left with no other option. Therefore, though the guilty plea must be taken into account at sentencing, it should not be accorded much weight. In this regard it is apposite to re-state what has been said in *S v Landau*² about the court's view when an accused chooses to plead guilty. The following appears at 678a-c:

'Courts often see as significant the fact that an accused chooses to 'plead guilty'. This is sometimes regarded as an expression on the part of the accused of genuine co-operation, remorse, and a desire not to "waste the time of the court" in defending the indefensible. 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, which was absent in casu.'

[10] In circumstances where the court is satisfied that the accused's contrition is sincere and had manifested itself in a plea of guilty, this in itself should have a significant impact on the sentence to be imposed. Firstly, it must be emphasised that there is no duty on an accused person to plead guilty on any charge. But, by pleading guilty and confessing to the offence committed, the court takes the view that the accused should gain some benefit from a guilty plea without wasting time and, in suitable circumstances, is likely to be given a lesser sentence. A reduction in sentence should therefore serve as an incentive to the accused when knowing that he or she is

² *S v Landau* 2000 (2) SACR 673 (WLD).

guilty of the offence and a conviction is inevitable. The question then is whether the accused's contrition is sincere and what weight should be accorded to the accused's guilty plea?

[11] A further aggravating circumstance is that the accused stood in a domestic relationship with the deceased as defined in the Combating of Domestic Violence Act 4 of 2003. This court already expressed its concerns in several judgments about the prevalence of domestic violence and that the courts, when it comes to the imposition of punishment, should fully take into account the important needs of society in general 'to root out the evil of domestic violence and violence against women'.³ 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 cases will be appropriately severe. See also: *S v Mushishi*.⁴

[12] When considering the nature of the offence committed by the accused, there can be no doubt that murder is regarded by the courts as very serious and would normally attract lengthy custodial sentences, unless there are compelling circumstances to divert from the norm.

[13] In this instance the accused did not advance any reason as to the motive for the killing, besides stating in his plea explanation that he and the deceased had an argument on their way home during which she swore at him and insulted him. When they reached home a scuffle ensued during which he pressed her down and strangled her to death. On the accused's bare admissions it seems incomprehensible what prompted such drastic response and what the actual reasons were for killing the deceased. Whatever it was, it could never justify the taking of another person's life. Society expects that persons in intimate relationships should not let their frustrations and emotions dictate their actions, especially not against the other person in the relationship. This case is just another example of the senseless killing taking place within the family structure where the accused, for absolutely no reason, ended the life of his children's mother and virtually left them without both parents.

³ *S v Bohitile* 2007 (1) NR 137 (HC) at 141E.

⁴ *S v Mushishi* 2010 (2) NR 559 (HC) at 564.

[14] As stated, the factor of remorse or contrition is also important in the sense that it tends to show that an accused has a greater capacity for rehabilitation. The accused *in casu* tendered his apologies to those mostly affected by the deceased's death and to society in general; it did not go beyond that. What was placed before the court barely covered the elements of the offence and falls significantly short of having taken the court into his confidence and admit to what exactly happened between him and the deceased which led to her death. The distinct impression is left with the court that crucial information was withheld from the court.

[15] In the oft quoted case of *S v Seegers*⁵ it was said that 'in order [for remorse] 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'. Despite the apology extended in open court by the accused during his testimony, it did not strike me as sincere where the accused fully took the court into his confidence. In any event, no argument to that effect was advanced by his counsel.

[16] The general approach of our courts in considering what an appropriate sentence would be in the circumstances, is to strive for a balance, taking into account the personal circumstances of the accused, the nature and gravity of the offence committed and the interests of society. At the same time sight should not be lost of the objectives of punishment viz, prevention, deterrence, rehabilitation and retribution in the determination of an appropriate sentence.

[17] It has been 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.'⁶ This court will as far as possible endeavour to strike a balance between the interests of the accused and that of society. Though all the general principles applicable must be considered and balanced and harmonised when applied to the facts, it need not be given equal weight or

⁵ *S v Seegers* 1970 (2) SA 506 (A).

⁶ *S v Rabie* 1975 (4) SA 855 (AD) at 862G-H.

value, as it might become necessary to emphasise one or more at the expense of others. This will largely depend on the circumstances of the case.⁷

[18] Where the accused in this instance did not rely on provocation in mitigation of sentence, it must be accepted that the altercation preceding the murder, from his perspective, was not such that he felt incited, prompting the irrational decision to kill the deceased. In fairness to the accused, it would appear that the accused was annoyed with the deceased for not returning home and him having to look after the child. However, in the absence of evidence showing otherwise, this proposition could only have played a minor role in the accused's decision to kill the deceased. It is therefore deemed of lesser importance and inconsequential to sentencing.

[19] An inescapable consequence of the accused's actions is that the deceased's four minor children are robbed of the love and care of a mother and, as for the accused's own children, they, in addition, will be without a father for years to come. One can but only hope that somewhere in the future he will have the opportunity to make it up to them. Regrettably, this is one of the consequences of crime and one cannot allow one's sympathy for the family to deter one from imposing the kind of sentence dictated by the interests of justice and that of society. Neither is it considered a mitigating factor for purposes of sentence.

[20] After due consideration of the accused's personal circumstances and accompanying mitigating factors, and having weighed these up against the offence of murder and the circumstances under which it was committed, I have come to the conclusion that the accused's personal circumstances simply do not measure up to the gravity of the offence and the interests of society. The imposition of a lengthy term of imprisonment on the charge of murder is therefore, inevitable.

[21] With deference to counsel for the defence, the proposed sentence of 15 years' imprisonment of which 5 years suspended, would exclusively serve the interests of the accused and completely disregard the legitimate interests and expectations of society pertaining to the crime committed. Neither do I

⁷ *S v Van Wyk* 1993 NR 426 (HC).

consider a suspended sentence, albeit partly, appropriate in the circumstances.

[22] It is trite that the period an accused spends in custody, especially if it is lengthy, is a factor that normally leads to a deduction in sentence.⁸ The accused *in casu* is in custody pending trial for one year and six months, a factor that must be considered together with all the other factors.

[23] In the result, I consider the following sentence to be just punishment in the circumstances:

[24] Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 28 years' imprisonment.

JC LIEBENBERG
JUDGE

APPEARANCES

STATE: A Verhoef
Of the Office of the Prosecutor-General,
Windhoek.

⁸ *S v Kauzuu* 2006 (1) NR 225 (HC).

ACCUSED:

E Mwakondange

Of Mwakondange & Associates Incorporated.

Instructed by the Directorate of Legal Aid,
Windhoek.