

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
CIRCUIT COURT HELD AT



MAIN DIVISION
RUNDU

SENTENCE

Case No: CC 23 /2022

THE STATE

v

KANDJIMI KATJOTJO HAINGURA

ACCUSED

Neutral citation: *S v Haingura* (CC 23/2022) [2023] NAHCMDCR 482 (8 August 2023)

Coram: DAMASEB JP

Heard: 3 August 2023

Delivered: 8 August 2023

Flynote: Criminal Procedure – Conviction – Murder with *dolus eventualis* read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – Sentence – Mitigating factors – No previous convictions – Youthfulness – Did not waste the courts time – Viciousness of assault – s 25 of Act 4 of 2004 – Such witness is the Court’s witness and prosecution not bound by information witness provides to court – Sentenced to 18 years imprisonment.

Summary: The accused was convicted on 3 August 2023 of murder in the form of *dolus eventualis* for the murder of his biological mother.

In mitigation before sentence, the personal circumstances of the convict were placed on record, in that he is a young offender, he had no previous convictions, he pleaded guilty at the start of the trial and did not waste the courts time. He has shown remorse and regrets his actions.

The State in aggravation maintained that murder is a serious offence which evokes abhorrence amongst members of society especially if committed in a domestic setting. Counsel argued that the deceased was vulnerable and defenseless, yet the convict subjected her to whipping, slapping and kicking and after that ordeal dragged her to a pole and later to her hut and failed to render her assistance. The state maintained that there is a difference between remorse and regret and the convict maybe regrets his actions but showed no remorse.

In arriving at the sentence the court considered the trial and looked at the evidence in its totality and comparable sentences.

Held that, murder has become the currency for the resolution of interpersonal disputes. The viciousness of the assault on the victim and the callous conduct of not rendering assistance to the victim. His youthfulness, his poor upbringing and owning up to what he did, mitigate against a tariff higher than a recent comparable case of *S v Werner and others (SA 8/2021) [2023] NASC (28 July 2023)*.

Accordingly, accused is sentenced to 18 years imprisonment.

VERDICT

The accused is sentenced to 18 years imprisonment.

SENTENCE

DAMASEB JP:

Introduction

[1] The convict (Mr Haingura) appears before me for sentencing on a conviction of murder of his aunt who was 57 years old at the time of her death. He killed her because she accused him of taking liberties with other people's donkeys. On the version of Mr Haingura, which I accepted, the accusations by the deceased aunt happened over a period of time, including on the day he killed her – literally by kicking her to death.

[2] It is now my duty to sentence him. Since Mr Haingura and the deceased were in a domestic relationship, an important statutorily-ordained procedural step had to take place first.

Victim impact statement

[3] Section 25 of the Combating of Domestic Violence Act 4 of 2003 states:

'Complainant's submission in respect of sentence

25. (1) The court must, if reasonably possible and within reasonable time, notify the complainant or the complainant's next of kin, if the complainant is deceased, of the time and place of sentencing in a case of a domestic violence offence against the complainant.

(2) At the time of sentencing, the complainant, the complainant's next of kin, if the complainant is deceased, or a person designated by the complainant or the complainant's next of kin has the right to appear personally and has the right to

reasonably express any views concerning the crime, the person responsible, the impact of the crime on the complainant, and the need for restitution and compensation.

(3) A complainant, or the complainant's next of kin, if the complainant is deceased, who is unwilling or unable to appear personally at sentencing has the right to inform the court of his or her views on an appropriate sentence by means of an affidavit.'

(My emphasis)

[4] The section thus imposes on the court the obligation to invite a victim of the crime to come to court 'to reasonably express any views concerning the crime, the person responsible, the impact of the crime . . . and the need for restitution and compensation'.

[5] Such a witness is therefore not a State witness strictly speaking. He or she is a witness of the court. The State is therefore not bound by the information he or she provides to the court. It was in that light that Mr Shileka for the State informed the Court that an uncle of the accused (and a brother of the deceased) is available to express views to the court before sentence.

[6] The witness called was Mr Thimotheus Siwogedi Haingura. Although, strictly, it was not necessary, he was sworn in (which is preferable to remind the person of the solemnity of the occasion) and testified that he is the only surviving senior member of his family. He testified that unfortunate events had befallen his family and continue to happen. He testified that the incident that occurred between the accused and the deceased was one of those unfortunate events that have befallen his family.

[7] He testified that the deceased was his sister. She had five children, including the Mr Haingura who is the last born. Mr Haingura has two surviving siblings one of who is afflicted by mental illness. The witness testified that although greatly troubled by the death of the deceased, he and the rest of the family consider Mr Haingura a good boy who is always willing to assist with chores and does not turn down any instruction. The

witness pleaded with the Court to release Mr Haingura so that he can assist him at home and to help raise his nieces and nephews. He testified that the family had forgiven the convict and will welcome him back with open arms.

Submissions

The accused

[8] Mr Haingura elected not to testify. His counsel, Ms Hango, placed the following mitigating factors before the Court. The convict is a first offender. Both his parents are deceased. He is a man of poor upbringing without formal education and who grew up at the village looking after the family's livestock and attending to house chores. He is unmarried and has no children. Ms Hango further submitted that the youthfulness of the convict and the fact that the family is prepared to forgive him should impel the Court to blend the sentence with mercy.

[9] Ms Hango urged the court to find in favour of the convict, that he is of the youthful age of 23 based on his own recollection. His youthfulness, counsel says, is a factor that the court must take into account in formulating an appropriate sentence.

[10] Counsel proposes that an appropriate sentence would be one of 18 years imprisonment of which five years are suspended on conditions.

The State

[11] Mr Shileka submitted that murder is a very serious offence. Counsel submitted that the offence is prevalent in domestic relationships and thus evokes a sense of abhorrence amongst members of society.

[12] According to Mr Shileka, the convict subjected a vulnerable and defenceless old woman to vicious kicking, whipping and slapping. He also dragged her around when she was under severe pain. Counsel argued that particularly aggravating is the fact that Mr Haingura rendered no assistance to the deceased after he injured her. He submitted

further that the Court should not heed the victim impact witness' plea that the convict be released as that will set a dangerous precedent. He added that the youthfulness of the accused should not count for much because of the brutality with which he acted.

[13] Mr Shileka disputed that the convict had shown true remorse for his actions. Counsel relied on *S v Domingo*¹ where the court drew a distinction between remorse and regret as follows:

‘ . . . Regret is simply being sorry for what you have done. Its roots are no more profound than the current undesirable consequences of being tried and convicted of a crime. Remorse connotes repentance, an inner grief inspired by another's plight or by a feeling of guilt.’

[14] According to Mr Shileka, what the accused demonstrates is regret and not remorse when regard is had to the fact he did nothing to aid his aunt who was in pain due to his assault. He submitted that an appropriate sentence would be one of 22 years direct imprisonment.

Discussion

[15] The law requires the sentencing court, in formulating an appropriate sentence, to take into account the personal circumstances of the convict, the nature of the crime and the interest of society. I will consider them next but not necessarily in that order.

[16] *The crime.* This crime defies comprehension. It reveals traits of a convict who has what is colloquially referred to as a ‘short fuse’. It must offend society's sensibilities that he could act in such a violent fashion against one of his own on account of such a trivial matter, and with such ferocity. The convict is clearly a danger to society. The deceased died most painfully. She endured humiliating and painful whipping, slapping

¹ *S v Domingo* (CC 9/2020) [2021] NAHCNLD 115 (16 December 2021) para 19.

and ultimately kicking that rendered her immobile. A more cruel death is hardly imaginable.

[17] The callousness with which the crime was committed is shown by the fact that after the killing the accused dragged the deceased around, offered her no assistance (not even as much as inquiring about her wellbeing) and going on to see his uncle (the victim impact witness) as if nothing had happened. He had not even told his uncle what he had done to the deceased – the sister of the very man he went to see after brutalising the deceased.

[18] *Accused's personal circumstances.* Life has not been kind to this young man. He does not even know when he was born. Clearly, his parents did not take the time to attend to such a mundane yet important aspect of his life. Even the victim impact witness (the uncle) could not assist the court to determine the convict's age and that speaks to the lack of attention for his personal needs in his upbringing. It is a notorious fact that the Namibian Government offers free primary education to all children as required by the Namibian Constitution. Yet the convict did not attend school and spent the best part of his life tending to the family's livestock. He grew up in what can safely be described as poor conditions. He has no previous convictions and is therefore a first offender. The victim impact witness described him as otherwise obedient and helpful to the family. This witness stated that the family are prepared to forgive him for what he did and to welcome him back. According to this witness, there are now very few elders left in the family and the family will benefit from his return home so that he can do some work and contribute to the family's wellbeing.

[19] What also counts in his favour is that he has no history of previous aggressive behaviour. There is no evidence that he planned the killing of his aunt².

[20] *The interest of society.* Murder is very prevalent in our society, especially in rural communities. Most murders are regrettably amongst family members – especially by

² See *S v Schiefer* 2017 (4) NR 1073 (SC) para 52.

men against women and children. It will be most exceptional for a court to impose a non-custodial sentence for murder. Sentences should ideally be designed to achieve deterrence against the perpetrator and potential perpetrators.

[21] The spectre of violence by men against women and children looms large in our society and murder has become the currency for the resolution of interpersonal disputes. More so in domestic settings. Mr Haingura's case is a clear example. And it shows no sign of abating. On this Circuit I am presiding over four cases of murder, all of them perpetrated by men. Society's only saviour against this conduct are the courts. The courts must display society's revulsion for this menace. The sentences the courts impose although blended with mercy must be severe so as to reflect an appropriate measure of retribution. Would-be murderers must know that they face long terms of imprisonment should they commit callous acts of murder.

[22] With that in mind, I proceed to consider a sentence for Mr Haingura.

Comparable sentences

[23] An important value of sentencing is consistency. In other words, like cases must, as far as possible, be treated alike. The principle was reiterated by the constitutional predecessor to our Supreme Court in *S v Marx*³. That case is authority for the proposition that vast differences in sentences for comparable crimes is not consonant with justice and fairness. Vast disparities in sentences become even more untenable in our current constitutional dispensation which guarantees equality of all persons before the law. Article 10 of the Namibian Constitution decrees that 'All persons shall be equal before the Law'.

[24] The most recent sentence involving murder with *dolus eventualis* considered by the Supreme Court is that of *State v Werner and others*⁴. In that case, three City Police

³ *S v Marx* 1989(1) SA 222 (A).

⁴ *S v Werner and others* (SA 8-2021) [2023] NASC (28 July 2023).

officers arrested a juvenile suspect for theft and in order to induce a confession or admission from him beat him to a pulp, failed to render him medical assistance and engaged in an elaborate deception to divert attention away from them. They were found guilty of murder with *dolus eventualis*.

[25] The High Court, erroneously treating *dolus eventualis* as a mitigating factor, sentenced the police officers to 15 years and suspended five years. On appeal, the Supreme Court held that the reliance on *dolus eventualis* as a mitigating factor is a misdirection and imposed an effective sentence of 18 years imprisonment on the police officers.

[26] Like the present case, the *Werner modus operandi* was causing death by sustained physical assault. The police officers who were first offenders, lost their jobs as a result of the convictions and faced a bleak future. Their families suffered as a result of their incarceration. What aggravated their conduct was the position of trust as law enforcement officers and the youthfulness of their victim, the elaborate deception and the callousness of not assisting their victim to get medical help.

[27] Mr Shileka for the State urged the Court to impose a sentence of 22 years effective imprisonment. The circumstances of the convict, who is a youthful offender and an unsophisticated person from a poor background, are not even comparable to the *Werner* convicts. It would thus be unjust to impose a sentence more severe than what the *Werner* trio received.

[28] In *S v Schiefer*⁵, the appellant appealed against his sentence for being convicted of brutally killing both his parents while he was 19 years old. He was awaiting trial for a period of six years. He was sentenced by the court *a quo* to 28 years imprisonment on each of the murder counts. Eight years imprisonment in respect of the second count

⁵ *S v Schiefer* 2017 (4) NR 1073 (SC).

were ordered to run concurrently with the sentence imposed on the first count. Mr Schiefer therefore had to serve an effective 48 years imprisonment.

[29] The Supreme Court in reducing his sentence to an effective 38 years took the following factors into consideration:

‘that had this court sat as a court of first instance it would have considered the cumulative impact of the mitigating factors, namely the fact that the appellant was a first offender, and in particular that he was a youthful offender, the period he was detained awaiting trial, that the offences were committed without any premeditation, and that the appellant had no history of aggressive or violent behaviour.’⁶

[30] Compared with *Werner*, the comparable aggravating factors in the present case are the viciousness of the assault on the victim and the callous conduct of not rendering assistance to the victim. The vulnerability of Mr Haingura’s victim an old lady makes his circumstances comparable to that of the victim in *Werner*.

[31] On the other hand, Mr Haingura’s youthfulness, his poor upbringing and owning up to what he did, the fact that there was no prior planning, mitigate against a tariff higher than what the *Werner* convicts received.

[32] The cooperation of the convict streamlined the proceedings and made the proof of a great deal of factual matter unnecessary. Of the listed six witnesses only three were called. In considering a sentence, credit must be given to an accused who makes concessions and admissions which render unnecessary proof of facts which the prosecution would otherwise be required to prove as part of the State’s case through oral evidence. It would be injudicious for a sentencing court not to do so when – in the experience of trial judges – the criminal courts are overburdened on account of most accused persons placing in issue (which is their right to do) even the most obvious and materially insignificant factual matter and thus prolonging trials to the detriment of the administration of justice.

⁶ *S v Schiefer*, para 52.

[33] An appropriate sentence therefore would be the same as that imposed on the Werner case. Ms Hango had suggested a term of 18 years of which five should be suspended. In my view that would not be a path that leads to justice considering the gravity of the crime.

Sentence

[34] Mr Haingura, accordingly, I sentence you to 18 years imprisonment.

P.T. DAMASEB
Judge-President

APPEARANCES:

THE STATE: R. Shileka
Of Office of the Prosecutor-General

ACCUSED: P. Hango
Instructed by the Directorate of Legal Aid