

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

JUDGMENT

Case no: CC 06/2015

In the matter between:

THE STATE

v

ELIA SHITUWA IIPINGE

ACCUSED

Neutral citation: *S v Iipinge* (CC 06/2015) [2018] NAHCNLD 28 (09 March 2018)

Coram: JANUARY J

Heard: 12 February 2018

Delivered: 09 March 2018

Flynote: Sentence – Culpable homicide – Domestic violence – Kicked deceased – Cause of death ruptured liver and ruptured diaphragm – Deceased had an enlarged liver.

Summary: The accused was indicted for murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. He was convicted of culpable homicide

committed in a domestic setting. This court rejected his version that the deceased fell on a rock with her stomach causing the rupture of the liver and diaphragm. The court found that he kicked the deceased. He admitted in mitigation that he kicked the deceased because of anger. The accused spent 5 years in custody trial awaiting. He is sentenced to 10 years' imprisonment of which 5 years' are suspended on condition.

ORDER

10 years' imprisonment of which 5 years are suspended for a period of 5 years' on condition that you are not convicted for the crime of assault during the period of suspension for which a sentence of imprisonment without the option of a fine is imposed.

JUDGMENT

JANUARY J;

[1] The accused is convicted for culpable homicide, a competent verdict to a charge of murder for which he was indicted. The allegations in the indictment are that on or about 21st February 2013 and at or near Oluhalu Village in the district of Outapi, the accused did unlawfully and intentionally assault Nangombe Indongo, a female human being, thereby inflicting upon her certain injuries as a result of which the said Nangombe Indongo died at or near Oshakati Hospital, in the district of Oshakati on the 22nd February 2013 and thus the accused did unlawfully and intentionally kill the said Nangombe Indongo.

[2] The accused pleaded not guilty and alleged that the deceased went to fetch water at a water well, fell with the water container, fell on her stomach and injured herself causing a rupture of the liver with intraparenchymal haemorrhage with clots and

a ruptured diaphragm. The deceased was also swollen on the face and both cheeks. This court rejected the accused's version and found that he negligently kicked the deceased. Mr Pienaar, representing the State, proved a previous conviction of stock theft of one goat on which the accused was convicted and sentenced on the 03rd of February 1997.

[3] The accused testified in mitigation. He is 45 years old. The accused is not married but has 5 children of which the eldest is 23 years old and the youngest 7 years old. Before his arrest the accused assisted the children by paying their school fees, buying school uniforms, paying hostel fees and buying food for them. He testified that since his arrest it is now tough for them. The accused schooled to standard 3, which is now grade 5. He has an elder sister who is now looking after the children. He was not employed but ran a small business where he sold recharge vouchers, soft drinks and other small staff like Oros et cetera. The accused extended his apology to the family of the deceased, her children, brothers and sisters.

[4] He feels angry with himself. His loved one died because he kicked her. He blames himself. He admitted that because of anger he kicked her but did not expect that she would die. When he realized that she was injured he slept at her place, reported the incident the following day, took steps the following day to take her to hospital and paid N\$70 for transport.

[5] Mr Pienaar, representing the State, called a witness in aggravation of sentence. He alerted the court that he intended to call the witness in terms of section 25 of the Combating of Domestic Violence Act, Act 4 of 2003 (the Act). I reminded him that culpable homicide is not listed as one of the crimes of domestic violence. He submitted that sections 21 and 25 of the Act are applicable despite the fact that culpable homicide is not listed as one of the crimes in the first schedule in that act. I have considered Mr Pienaar's submission and came to the conclusion that that it may be an oversight that culpable homicide (where an assault with violence is perpetrated against a person) is not included as a domestic violence offence.

[6] I came to this conclusion, after having read the said Act especially considering the definitions and crimes that are listed in the first schedule thereof. I only quote the relevant part of the sections in the act.

'2 Definition of domestic violence

(1) For the purposes of this Act, "domestic violence", within the context of a domestic relationship, means engaging in any of the following acts or courses of conduct-

(a) physical abuse, which includes-

(i) physical assault or any use of physical force against the complainant;

(ii) ...

(iii) ...;

3 Definition of domestic relationship

(1) For the purposes of this Act a person is in a "domestic relationship" with another person if, subject to subsection (2)-

(a) ...;

(b) they, being of different sexes, live or have lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other;

(c) they have, have had or are expecting a child together, excluding situations-
....;

21 Domestic violence offences

(1) The offences listed in the First Schedule are domestic violence offences when they are committed or alleged to have been committed against a person, or in relation to a person, with whom the person charged with those offences has a domestic relationship.

(2);

First Schedule

Offences

- 1 Common assault.
- 2 Assault with intent to do grievous bodily harm.
- 3 Any offence under section 1 of the Trespass Ordinance, 1962 (Ordinance 3 of 1962) where the necessary permission contemplated would be permission from the complainant.
- 4 Contravention of section 14 of the Combating of Immoral Practices Act, 1980 (Act 21 of 1980).
- 5 The offence under section 38(1)(i) of the Arms and Ammunition Act, 1996 (Act 7 of 1996) where the fire-arm is pointed at the victim or someone else in the presence of the complainant.
- 6 *Crimen injuria*.
- 7 Kidnapping.
- 8 Malicious injury to property-
 - (a) owned by the complainant; or
 - (b) jointly owned by the complainant and the alleged offender; or
 - (c) in which the complainant has a substantial interest.
- 9 Murder.
- 10 Rape, including rape as defined in the Combating of Rape Act, 2000 (Act 8 of 2000).
- 11 Indecent assault.
- 12 Robbery where violence or threats of violence are used against the complainant or in the presence of the complainant.
- 13 Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.'

[7] In my view it is clear that in this case the accused assaulted the deceased with whom he had been in a domestic relationship and they had a child born out of that

relationship. Moreover he was convicted on a competent verdict for murder. I thus find that the Act is applicable.

[8] The witness in aggravation of sentence is the deceased's sister. She stated that the death of the deceased left a gap in their family as no one can take her place. They feel bad and sad about the death of the deceased. The 3 children of the deceased are now alone. The children are 18, 8 and 6 years old respectively. The eldest boy of 18 years stays with the witness's parents, in other words his grandparents who are pensioners of 60 and 70 years old respectively. The one of 8 years old has health problems and stays with the witness. The youngster stays with another sister. The deceased was not employed but used to help crush mahangu, fetch water, cultivating and harvesting mahangu. She stated that she knows the accused as a violent man and he used to beat the deceased. He was according to her not employed but used to assist himself by chopping poles and ploughing.

[9] In *S v Bohitile* 2007 (1) NR 137 (HC) Smuts AJ (as he then was) without deciding the non-listing of culpable homicide in the Act, increased the sentence of five years' imprisonment with one year suspended imposed by a Regional Court for culpable homicide taking into account that, that crime was committed in a domestic relationship. The sentence was increased to eight years' imprisonment of which two years are suspended for a period of five years on condition that the appellant does not commit the crime of assault during the period of suspension for which a sentence of imprisonment without the option of a fine is imposed.

[10] I endorse what Smuts JA stated in the *Bohitile* case where he stated;

'[16] I agree with Mr Muvirimi, counsel for the State, that culpable homicide is a very serious crime. After all, the death of a person has been caused by the perpetrator. I agree that the approach in sentencing for culpable homicide was, with respect, succinctly set out in *S v Nxumalo* 1982 (3) SA 856 (A) (by Corbett JA, as he then was) at 861H - 862B in the following way:

"It seems to me that in determining an appropriate sentence in such cases the basic criterion to which the Court must have regard is the degree of culpability or blameworthiness

exhibited by the accused in committing the negligent act. Relevant to such culpability or blameworthiness would be the extent of the accused's deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence. At the same time the actual consequences of the accused's negligence cannot be disregarded. If they have been serious and particularly if the accused's negligence has resulted in serious injury to others or loss of life, such consequences will almost inevitably constitute an aggravating factor, warranting a more severe sentence than might otherwise have been imposed. It is here that the deterrent purpose in sentencing comes to the fore. Nevertheless, this factor, though relevant and important, should not be over-emphasised or be allowed to obscure the true nature and extent of the accused's culpability. As always in cases of sentencing, where different and sometimes warring factors come into play, it is necessary to strike a balance which will do justice to both the accused himself and the interests of society.

[11] This pronouncement was made in the context of the culpable homicide caused by negligent driving. As is stressed in the work *Sentencing* by DP van der Merwe (1991) at 7- 4, culpable homicide caused by an assault as opposed to being caused by negligent driving is correctly generally treated with a heavier hand. There are clearly sound reasons for doing so.

[12] In this case the culpable homicide arose from the violent assaulting of the deceased in a domestic context. The regional magistrate pointed out that crimes of that nature are on the increase in the district in question. She also referred to the public outcry against crimes involving domestic violence. It is indeed a notorious fact and one which I can take judicial notice of, that domestic violence and in particular violence against women, is widespread throughout Namibia. Mr *Mokhatu* correctly conceded this. This important factor, in my view, gives cause for appropriate deterrent sentencing. The prevalence of and the social problems connected with domestic violence have given rise to specific legislation passed by Parliament in 2003 in the form of the Combating of Domestic Violence Act 4 of 2003.” ‘

[11] The moral blameworthiness of the accused is obviously less for culpable homicide than it would have been had he been convicted for murder. The crime still is serious. His previous conviction was about 10 years ago and not related to violence against another person. The fact, however, is that he previously had a brush with the law and can distinguish between what is lawful and unlawfulness.

[12] The traditional approach to sentence as spelt out by Holmes JA in the South African case of *S v Rabie* 1975 (4) SA 855 (A) at 857D-F is well known. It has been stated and re-stated in numerous decisions in our Courts that:

[17] The task of the trial court is to consider the nature of the crime which will include the circumstances under which it was committed, the personal circumstances of the accused so convicted and the interests of society and then to impose, in the words of Holmes JA, a sentence that —

“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. [*S v Rabie* 1975 (4) SA 855 (A) at 862G – H.]”¹

It hardly needs repetition in this case. I heed to the admonition spelt out in that case.

[13] Both Mr Pienaar and Mr Nsundano referred this court to cases of culpable homicide where sentences ranging between the maximum of 12 years imprisonment, 12 years imprisonment with 3 years suspended and a minimum of 4 years with 3 years suspended were imposed. In one of the cases, *S v Britz* 1994 NR 25 (HC) a sentence of 5 years imprisonment was wholly suspended.

[14] In sentencing the accused I considered his personal circumstances, the offence and the circumstances in which it was committed.² I also keep in mind the purposes of punishment which are prevention, retribution, reformation and deterrence. The sentence should also be blended with a measure of mercy, be consistent and individualized.

[15] Mr Nsundano submitted that the accused is remorseful. In mitigation he testified that he pleaded not guilty as he kicked the deceased because he was angry and did not expect her to die. He admitted in mitigation that he kicked the deceased. He also took steps to assist the deceased when he realized that she was injured. Mr Pienaar on the contrary submitted that the accused does not have genuine remorse as he pleaded not

¹ *S v Lang* 2014 (4) NR 1211 HC at p 1216.

² *S v Rabie* 1975 (4) SA 855(A) and *S v Zinn* 1969 (2) SA 537 (A).

guilty. I remind myself that the accused has the right to plead not guilty. I am however, not convinced that he indeed has genuine remorse. I take into account that he is now in custody for more than 5 years since his arrest on 27 February 2013. He has a previous conviction. The injuries sustained are in my view an indication of the excessive force and violence used to inflict them. It could not have been one kick considering the different injuries in the face, cheeks and abdominal cavity.

[16] The accused testified that the deceased asked him to accompany her to the water well. It is common course that it must have been dark at the time. Be that as it may, in all probability the deceased wanted the accused's company to protect her. The accused on the contrary was the danger and assaulted her causing her death negligently. There is in fact evidence that this was not the first time that he assaulted the deceased.

[17] I reiterate that death in a domestic setup is very serious. This court undertook to impose sentences to sufficiently reflect the seriousness with which these crimes are viewed. I considered the time that you spent in custody trial awaiting, your personal circumstances, the crime, the interest of society, the purpose of sentencing and the fact that the crime was committed in a domestic setting.

[18] In the result:

Mr Ipinge, you are sentenced to; 10 years' imprisonment of which 5 years are suspended for a period of 5 years' on condition that you are not convicted for the crime of assault during the period of suspension for which a sentence of imprisonment without the option of a fine is imposed.

H C January
Judge

APPEARANCES:

For the State:

Mr Pienaar

Office of the Prosecutor-General, Oshakati

For the Accused:

Mr Nsundano

Directorate Legal Aid, Oshakati