

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

SENTENCE

Case no: CC 05/2015

In the matter between:

THE STATE

v

LUKAS KASIMEYA KASIMEYA

ACCUSED

Neutral citation: *S v Kasimeya* (05/2015) [2018] NAHCNLD 29 (06 April 2018)

Coram: JANUARY J

Heard: 18 February 2018

Delivered: 06 April 2018

Flynote: Sentence – Murder read with the Combating of Domestic Violence Act, Act 4 of 2003 – Guilty plea - First offender – Deceased helpless – Lying on bed with 3 year old child – Chopped on head with a formidable axe and panga – Personal circumstances accorded less weight – Life imprisonment

Summary: The accused was indicted for murder read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003. He pleaded guilty. He was convicted as charged. The accused stated that the deceased insulted him and locked him out of the common bedroom. He got angry, went and took an axe and a panga and chopped the deceased on the head. The deceased sustained the most gruesome wounds any of which could have caused the death. The court rejected his plea of having remorse, accorded less weight to his personal circumstances and sentenced him to life imprisonment.

ORDER

Accused is sentenced to life imprisonment.

JUDGMENT

JANUARY J

[1] The accused in this matter pleaded guilty to murder, read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003. In that upon or about the 13th of February 2014 and at or near Etilyasa village, in the district of Outapi the accused did unlawfully and intentionally kill Helena Shivute a female adult. The accused is represented by Ms Boois and the State by Mr Shileka.

[2] The summary of substantial facts in terms of section 144(3)(a) of the Criminal Procedure Act, Act 51 of 1977 (hereafter referred to as the CPA) are:

'The accused and deceased were involved in a domestic relationship as boyfriend and girlfriend and to their relationship was born a daughter who was about four years old at the time of the commission of the offence.

On 08 February 2014, accused came from Okahao to visit the deceased at Etilyasa village. On 13th February 2014, at a cucashop accused alleged that deceased was having sexual relationships with other men and threatened to assault deceased. Accused, deceased, their daughter and Maria lipinge proceeded home from the cucashop. Thereafter after Maria had left and in the presence of the couple's daughter accused struck deceased on the head with an axe, and panga, leading to her death soon thereafter. The couple's daughter rushed to alert relatives who summoned the police. Accused fled the area after committing the offence and was only arrested on 15th March 2014, at a shebeen in Oshikango, Ohangwena region.'

[3] Ms Boois submitted a statement in terms of section 112(2) of the CPA, as amended.

[4] This statement reads as follows:

'STATEMENT IN TERMS OF SECTION 112(2) OF THE CPA, ACT 51 OF 1977, AS AMENDED

I the undersigned, Lukas Kasimeya Kasimeya

Being sober and at all my full senses, hereby pleads as follows:

1. I am the accused in the matter.
2. The charge in this matter of murder, read with the provisions of the combating of Domestic violence Act 4 of 2003, the charge has been read and explained to me by my legal representative of record and I do understand same.
3. I plead guilty to the above charge brought against me, and I therefore expressly plead that I did wrongfully, intentionally and unlawfully on the 13th February 2014 and at or near Etilyassa village, in the district of Outapi, kill Helena Shivute, who was my girlfriend at the time. I took an axe and struck her on the head and also used a panga. I knew that by striking her with the axe on her head I would cause her death.
4. I confirm that at the time of the incident I was involved in a domestic relationship with Helena Shivute.
5. I further confirm that on the 13th of February 2014, I was (at) Etilyassa cuca shop with the deceased- Helena Shivute, as well as our daughter who was 3 years old at the time.

6. I further confirm that the deceased – Helena Shivute and I drank 6 x 750ml of Carling Black Label beer as well as traditional home brew liquor referred to as Okanyatu.
7. After consuming the liquor the deceased and I left the cuca shop together to the traditional homestead which belonged to the deceased and/or her relatives.
 - 7.1 At the time we left the cuca shop we were with our daughter, who was 3 years old at the time. I was carrying the child as we walked home.
 - 7.2 Upon our arrival at the homestead I then sat outside of the homestead and did not enter. The deceased – Helena Shivute – and our daughter entered the homestead and locked themselves in the room.
 - 7.3 I begged them to open the door, as I wanted to sleep.
 - 7.4 The deceased finally opened the door. I entered and the deceased swore at me. I then left the room and went to the traditional kitchen. It is in the traditional kitchen that I collected the panga and axe. I wanted to cut the deceased with the axe.
 - 7.5 When I returned to the room, I found the deceased lying on the bed; I started to chop her with the axe. I do not know how many times as I had consumed alcohol earlier.
 - 7.6 I also chopped her with the panga but I cannot remember which part of the body it is.
 - 7.7 I feel terrible about my actions I feel bad because the deceased is no more.
8. I confirm that the consequences of my plea of guilty have been explained to me by my legal representative and I fully understand the repercussions that will flow from tendering same and still intend to tender this plea of guilty on the said charge.
9. I confirm that I plead guilty out of my own free will and that I have not been forced or threatened to do so.
10. I respectfully offer my sincere apology to this Honorable (sic) Court for my actions and pleas (sic) for the courts (sic) mercy in this regard.

DATED AND SIGNED AT OSHAKATI ON THIS 18TH DAY OF JANUARY 2018

SIGNED BY LUKAS KASIMEYA KASIMEYA’.

[5] Mr Shileka accepted the plea on the elements of the crime. I was satisfied with the plea of guilty and convicted the accused as indicted.

[6] The prosecution handed up a bundle of documents respectively marked as Exhibits 'A' to 'J' without any objections by the defence. These documents are: 'A'- the indictment; 'B' – Summary of substantial facts and list of witnesses in terms of section 144 (3) (a) of the CPA; 'C' – State's pre-trial memorandum compiled in terms of the High Court Consolidated Practice Directives (CPD) dated 15 April 2014; "D" – Accused reply to the State's pre-trial memorandum filed on the 03rd October 2017; 'E'- Accused plea explanation in terms of section 112 (2) of the CPA; 'F'- Affidavit in terms of section 212 (4) of the CPA together with medical examination report compiled by Dr Mary Nandjebo in respect of Helena Shivute dated 18th February 2014; 'G'- Photo plan and the key thereto with reference Outapi Neg. no 21/2014 compiled by D/Sgt Mutumbulwa of the Scene of Crime Unit, Outapi dated 10th October 2014; 'H'- A psychiatric report in terms of section 79 of the CPA on the psychiatric observation of the accused. The defence had no objection.

[7] The State did not prove any previous convictions. The State called a witness on the facts and another witness in terms of section 25 of the Combating of Domestic Violence Act, Act 4 of 2000.

[8] Maria Ndahafa lipinge is a witness who sold items like eggs, home brew beer i.e. Katokele, Ginger beer and heads of pigs with the deceased. She knows both the accused and the deceased. She stayed with the deceased. On 13th February 2014 the accused and the deceased left the witness in the house. The deceased was the wife (girlfriend) of the accused. The accused escorted the deceased to the Okahao road a short distance from the house. The witness could not see them. After a short while the accused came back, came into the house, found the witness bathing and went outside to sit on the stoep. The accused made clicking sounds whilst shaking his head.

[9] The witness left the house and went to her cuca shop. She did not speak to the accused and he also said nothing. Her village is Etiyasa. The deceased came back from Okahao and found the witness at the cuca shop. The deceased enquired on the

whereabouts of the accused. Thereafter she went to a different cuca shop to cook eggs. The accused came in the afternoon to the cuca shop where the witness was and enquired about the whereabouts of the deceased. The witness told him that the deceased went to cook eggs somewhere in the location. The accused went to the deceased in the location.

[10] A short while thereafter the deceased arrived at their cuca shop where the witness was. At that time only the two of them were at their cuca shop. The accused came later and started accusing the deceased of having several relationships with other men. The accused did not reveal where or from whom he received the information. He only accused the deceased of several other sexual relationships. The deceased denied this accusation but the accused insisted that it was true. The deceased went back into the location with the accused following. They came back after quite a while. The accused after some time went back into the location with the deceased and the witness remaining at their cuca shop. The deceased at that time said that she will lock the accused out of their home because he was accusing her.

[11] It became dark and late. The accused came in the meantime. The two of them went home. After a short while the witness locked the cuca shop and followed them home. She did not reach them but only went half way home. She came home only at 03h00 because she went to her boyfriend. The last time the accused came from the location he appeared normal. There was no smell of alcohol and he only smelled of cigarettes. The deceased only drank ginger beer.

[12] In cross-examination the witness admitted that one can buy liquor at other places in the location. It is therefore possible that the accused and deceased could have consumed liquor somewhere else. The witness was the friend of the deceased for 1 year. The general relationship was that they used to beat each other. The witness was confronted with her witness statement wherein she stated that she accompanied the deceased going home while the accused was in front carrying the child. The witness stated that the statement was wrong.

[13] Historia Ekandji is the sister of the deceased. She is 24 years old. The deceased did not stay with the witness and was employed as a domestic worker. The deceased has 2 children. She took care of the children buying food, clothes and school books. That responsibility is now taken care of by the grandmother and relatives. The witness emphasized that the deceased was murdered in front of her daughter. The child received counselling but still kept on asking for her mother. When she is reprimanded about anything she usually ran into the bushes. She is now staying with the grandmother. The mother of the deceased is seriously affected by the death that she has developed high blood pressure and is paralyzed. The family was compensated with N\$15 000 of which N\$5000 went to the Traditional Authority. The witness never received any apology or heard of any apology from the accused. The witness statement of the witness was handed up as Exhibit 'J' in court.

[14] The accused testified in mitigation. He is 32 years old. He grew up with his parents. He schooled until grade 10. He was employed in the building construction business. He was arrested on 15th March 2014 and is now more than 4 years in custody. He admits that he was with the deceased in a relationship as boy- and girlfriend and they have 1 child. He stated that he pleaded guilty because he is the one that caused her death. He will apologize to the child when he sees her. He apologized to the parents and siblings of the deceased in court. He stated that he did not plan for what happened. The incident affected his health in that he now has high blood pressure and irregular heartbeats.

[15] In cross-examination the accused admitted that after the crime he fled to Ohangwena. He did that because he was not himself as he stated it. He fled because he heard on the radio that if apprehended he will be buried alive. He further stated that he was under the influence of alcohol at the time of the incident. He stated that the witness who testified that he appeared normal and that he only smelled of cigarettes was not truthful. He stated that alcohol and anger overpowered him. He stated that the deceased insulted him by stating that she will put him back into his mother's vagina.

[16] The Post Mortem report, Exhibit "F", reflects that the chief findings were:

1. History of hacked on the head;
2. The fatal wounds are wound number 1, 2 and wound number 3;
3. The right frontal lobe, right temporal occipital lobes are destroyed.
4. Liver, kidney and spleen are pallor.

The cause of death was; hacked with an axe on the head.

The external appearance of body and conditions of limbs are:

1. Wound no 1 - is a transversal incised wound of 30mm deep, 140 mm length, 10 mm wide which cut the right mandibular bone and the right occipital bone, penetrating in the brain on the occipital area.
2. Wound no 2 – is a transversal penetrated incisal wound cutting the cigomatic bone on the right side, cutting the right ear and the temporal-occipital bones, penetrating in the right temporal-occipital lobe.
3. Wound no 3 – is a concurve incised wound on the right frontal area which penetrating into the brain, deep: 20mm, length 145mm, wide 60mm.

Head and neck

1. Skull – subgaliar haemorrhage on the right frontal area, right temporal-occipital area;
2. Intracranial contents: The brain, right frontal lobe and right temporal lobe are destroyed;
3. Orbital nasal and aural cavities: There is a fracture on the temporal bone, on the base of the craneo;
4. Mouth tongue and pharynx: There is a transversal incised wound from the corner of the lips to the temporal-occipital area.'

[17] The photo plan, Exhibit "G" includes photos taken of the deceased as she was found in the room where the murder took place. I have difficulty in finding appropriate descriptive words to truly reflect what is depicted in the photos. "Most shocking, most horrendous, most unbearable, most gruesome" and words to that effect are, in my view, still euphemistically describing the scene depicted. The axe is one with a long handle, a

formidable one that are used in chopping down trees. It is depicted into the head of the deceased like when an axe is stuck in a log with the blade into the wood. The panga is lying next to the axe with blood on it. In the post mortem depictions of the skull wounds 1 and 2 are two linear fractures of the bones. In my view in all probability these wounds were inflicted by the panga. The accused admitted that he also used the panga in the assaults.

[18] The body of the deceased is depicted on a bed lying on her side in a foetal position as if to sleep and in an innocent and vulnerable sleeping position. Helpless to say the least.

[19] The psychiatric report in terms of section 79 of the CPA, Exhibit "F" reflects that the accused was observed in terms of sections 77 and 78 of the CPA. The accused does not have a history of mental illness, epilepsy or underlying physical condition. During observation he did not have signs of/or symptoms of mental illness. The report reflects as follows on his mental state during observation:

'Appearance and behaviour: He appeared well kempt, and maintained good eye contact during the interviews.

Speech: His speech was spontaneous, understandable, and to the point.

Emotional expression: He demonstrated a full range of appropriate emotional expressions.

Perception: He had no perceptual disturbances.

Thought: His thoughts were goal directed. He responded relevantly to questions. He had no thought disorder.

Orientation: He was well orientated to place, time and person.

Attention and concentration: His ability to focus on matter at hand and to sustain that focus was not impaired.

Conclusion: No mental illness.

79(4) (c) At the time of writing the report Lukas Kasimeya Kasimeya is fit to stand trial.

79(4) (d) At the time of commission of the alleged crime, he was able to appreciate the wrongfulness of the alleged offences and act in accordance with such appreciation.

The above is the unanimous opinion of the constituted panel.

Signed: Nd. F Mthoko

Qualifications: M.D. M.Med (psych)

[20] Ms Boois submitted in mitigation that the court has to attach weight to the fact that the accused pleaded guilty to the crime; that he has remorse; he realizes that what he did was wrong and asked for forgiveness and had been trial awaiting for four years. She referred the court to cases of murder committed in domestic setting where the accused pleaded guilty and where this court imposed sentences of 25 and 27 years' imprisonment. (*S v Kadhila* (CC 14/2013) [2014] NAHCNLD 17 (12 March 2017); *S v Mushishi* (CC 07/2010) [2010] NAHC 43 (21 June 2010). She also referred the court to *Zedekeus Geingob & others v The State SA 07 & 8/2008* a Supreme Court judgement delivered on 06 February 2018 where it was held that:

'Held, the phenomenon of what academic writers have termed 'informal life sentences' where the imposition of inordinately long terms of imprisonment of offenders until they die in prison, erasing all possible hope of ever being released during their life time is 'alien to a civilised legal system' and contrary to an offender's right to human dignity protected under Art 8 of the Constitution.

Held, the absence of a realist hope of release for those sentenced to inordinately long terms of imprisonment would in accordance with the approach of this court in *Tcoeib* and other precedents offend against the right to human dignity and protection from cruel, inhumane and degrading punishment.' Ms Boois submitted that a sentence of 20 years imprisonment would be appropriate in the circumstances.

[21] Mr Shileka submitted that the court should not attach much weight to the guilty plea because in the present matter the accused did not have any other option but to plead guilty as the evidence against him is so overwhelming that the accused had no

other option but to plead guilty. He submitted that a sensitive part of the body was targeted and in circumstances where the deceased was helpless to defend herself. He further submitted that the accused did not take the court into his confidence by not disclosing the true motive why he committed the murder. Mr Shileka submitted that more weight should be afforded to the interest of society. With reference to the *Geingob* case (supra), Mr Shileka submitted that in the cases referred to by Ms Boois, knives were used, differentiating this case where an axe and panga were used. He suggested a sentence between 30 and 35 years and submitted that the ceiling, on his understanding of the *Geingob* judgement is 37 years imprisonment and that 35 years imprisonment is still within the ceiling.

[22] The sentence to be imposed is in the discretion of this court guided by well crystalized principles of sentencing and the objectives of sentencing. This court needs to consider the well-known triad in sentencing of the crime(s), the offender(s) and the interest of society as was also repetitively emphasized in numerous Namibian cases.¹ The punishment must fit the offender, the crime, be fair to society and blended with a measure of mercy.² I remind myself that the purposes of punishment are prevention, retribution, reformation and deterrence. The sentence should be consistent and individualized in accordance with the circumstances. It is required that a balanced sentence should be imposed considering the particular circumstances of the crime against the personal circumstances of the accused and interest of society.

[23] In my view, the interpretation by Mr Shileka that there is a ceiling of 37 (and a half) years' imprisonment is wrong and in contrast to the additional judgement of Frank, AJA. In my view Frank AJA wrote the additional judgment to warn against such interpretation. I know that there are thoughts that the *Geingob* judgement is now limiting the High Court's unlimited jurisdiction. In my view it is not. I agree that life imprisonment is the most severe form of imprisonment and that it is not unconstitutional. Frank AJA stated as follows in the *Geingob* judgment:

¹ *S v Zinn* 1969 (2) SA 537 (A).

² *S v Rabie* 1975 (4) SA 855 (A) at 857D-F: For example: *S v M* 2007 (2) NR 434 (HC); *S v Nakale & others (No 2)* 2007 (2) NR 427 (HC).

[82] The references in the cases referred to by Smuts JA to the fact that imprisonment for life without the hope (prospect) of release prior to death renders such imprisonment cruel and inhuman and deprive such person of his or her dignity cannot, in my view, be read in isolation [my underlining] but must be seen in the context of the implementation of life imprisonment only.

[83] It follows from both *Tcoeib* and the judgment of Smuts JA that if a person sentenced to life imprisonment does not meet the relevant criteria to be granted parole such prisoner must remain in prison and live out the rest of his life in prison. [my underlining] It follows that the condition of being a prisoner does not, in itself, amounts to a cruel, inhuman or degrading treatment or punishment. It cannot be otherwise else no one can be imprisoned for any crime committed. What is cruel, inhuman and degrading is to be given an inordinately lengthy terms of imprisonment with the purpose of preventing release at all (because the term of imprisonment would obviously, even taking the parole provisions into consideration, extent beyond the life expectancy of the prisoners, eg 150 years) or to circumvent the provisions governing the right to apply for parole after having served 25 years of imprisonment. Where an elderly Namibian Clark³, or Madoff⁴ is sentenced to, say, 15 years imprisonment the fact that such person will probably or may die in prison (barring a release on compassionate grounds) will not be a reason to attack such sentence. This is so because different considerations will apply seeing that one is not dealing with a sentence of life imprisonment.'

[24] The fact that a person is sent to life imprisonment certainly does not mean that he is then only sent to imprisonment of automatically 25 years. It is clear from Frank's AJA judgment that if a person is sent to life imprisonment and if he/she does not qualify for parole at any stage after 25 years on application to the parole board, that he/she may well serve imprisonment for his or her natural life. The term life imprisonment has in this context its normal interpretation and it is only that the prisoner has the hope of applying for parole after a minimum of 25 years' of imprisonment. Courts do not have a say on the authority to grant parole or not.

³ Ralph Clark was convicted at the age of 101 in respect of 21 historic sex offences involving young children. The English court sentenced him to 13 years imprisonment.

⁴ Bernie Madoff was convicted of defrauding the clients of his asset management firm of US\$64.8 billion at the age of 71 and sentenced to 150 years imprisonment in the USA.

[25] The seriousness of the crime, the circumstances in which it was committed in this case before court and the interest of society are in my view of such a nature that the personal circumstances of the accused need to be accorded less weight. I am alert to the fact that the accused is a first offender at the age of 32 years old and that he spent 4 years' trial awaiting in custody. He in all probability did not have a choice but to plead guilty. His conduct after the crime does not point to a person having remorse. He had the opportunity for about a month to apologize to the family of the deceased or hand himself to the police to expressly show remorse. This he did not do.

[26] Having considered your personal circumstances, the crime and interest of society and reminding myself of the objectives of punishment being prevention, retribution, reformation and deterrence, in my view, this crime of murder read with the Combating of Domestic violence Act, Act 4 of 2003, justifies the most severe sentence in this court's jurisdiction.

[27] Mr Kasimeya, you in the most unimaginable severe, violent, brutal and barbaric manner mutilated the head, face and skull of the deceased and in an unconstitutional manner took away her life, the mother of your child, a person that you were supposed to protect and love. I find it is a passion murder because of jealousy, in accordance with evidence presented.

[28] In the result Mr Kasimeya you are sentenced to:
Life imprisonment.

H C

January

Judge

APPEARANCES:

For the State:

Mr Shileka

Office of the Prosecutor – General, Oshakati

For the Accused:

Ms Boois

Instructed by Inonge Mainga Attorneys, Ongwediva