REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

SENTENCE

Case no: CC 06/2013

THE STATE

v

RAPHAEL NAWA ILUKENA **ACCUSED**

Neutral citation: *S v Ilukena* (CC 06/2013) [2018] NAHCNLD 30 (06 April 2018)

Coram: TOMMASI J
Heard: **9 March 2018**
Delivered: **6 April 2018**

Flynote: Criminal Law – Sentence - Accused convicted of kidnapping and murdering the deceased who had an affair with his wife as well as assault by threat of wife - Accused found to have diminished responsibility when the latter two crimes were committed — Accused sentenced.

Summary: The accused was convicted of kidnapping, murder with diminished responsibility and assault by threat with diminished responsibility. The accused, a police officer kidnapped the deceased by handcuffing him and taking him, against his will to his house where he beat and tortured the deceased for over 4 hours. During this period he threatened his wife who was present throughout the assault on the

deceased. The deceased and the accused's wife had an affair. The court held that the emotional distress coupled with the excessive intake of alcohol are significant factors which diminished the criminal capacity of the accused to act in accordance with the appreciation of the wrongfulness of his act and that it mitigates the moral blameworthiness of his actions. The court agreed that the offences remain serious offences and the interest of society dictates that the court must have regard to the prevalence and increase of violent crime. The court concluded that a custodial sentence for all the offences is the appropriate sentence.

ORDER

1. Count 1 – the accused is sentenced to 1 years' imprisonment.

2. Count 2 – The accused is sentenced to 15 years' imprisonment of which 6 years are suspended for five years on condition that the accused is not found guilty of the offence of murder, attempted murder; or culpable homicide involving an assault committed during the period of suspension.

3. Count 3 – The accused is sentenced to 1 year's imprisonment wholly suspended for 5 years on condition that the accused is not found guilty of the offence of assault by threat committed during the period of suspension.

4. It is ordered that the sentence in count 1 run concurrently with the sentence imposed in count 2.

JUDGMENT

TOMMASI J:

[1] The accused herein is convicted of kidnapping, murder and assault by threat. In the count of murder and assault by threat the court found he was having diminished criminal responsibility.

[2] It is trite that the court when determining on appropriate sentence must have regard to the offence(s) which the accused committed; the personal circumstances of the accused and the interest of society described as the triad in *S v Zinn* 1969 (2) SA 537 (A). The court must give due weight to each mitigating and aggravating factor whilst not loosing sight of the objectives of punishment. The approach of a judicial officer when it comes to punishment has been aptly stated by Corbett JA, as he then was, in *S v Rabie* 1975 (4) SA 855 (A) at 866 A – C, who remarked as follows:

'A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case.'

The accused

[3] The accused testified under oath. He is currently 48 years old and he is the father of 15 children. He is married to the mother of 4 of the 15 children. The eldest is 29 years old and the youngest is 12 years old. He was previously married and 3 children were born of this marriage. He had 2 children outside the marriage. He is also responsible for 4 of his sisters' children. His one sister suffers from mental illness and one of his sisters died in 2004. He has been the sole breadwinner and he was responsible for their clothes, school fees, food and general wellbeing. His eldest brother became paralysed whilst he was incarcerated. The majority of the children are now self-supportive but at least three are still furthering their education. He lost his employment and I suppose also his ability to financially take care of his dependents.

[4] The accused has been held in custody since the date of his arrest on 20 July 2012 i.e. for 5 years, 8 months and 7 days to date hereof. This is a factor which

weighs in favour of the accused particularly given the fact that the period is substantial.

[5] The accused expressed dissatisfaction with the fact that the State denied him of his right to parenting by his prolonged incarceration even though he pleaded to be released on bail. The accused apologised for being overpowered but explained that the conduct of the deceased triggered anger within him when the deceased was unapologetic and insulted his wife. I infer from the accused's reasoning that he believes he is the aggrieved one. This is not genuine contrition but self-pity.

[6] According to the accused he felt shamed by the fact that his wife had taken his clothes and food to the deceased's house. He had paid for her education and he had nursed her through difficult times. They were involved in an accident during 2006 and she sustained brain damage and he had to take care of her every need. He paid *lobola* for her and they have 4 children. She was like a child to him and he had asked the deceased to stop doing what he was doing. The deceased came and destroyed the love he had for her. He felt that the deceased took advantage of her disability. According to him his wife still visits him and she is still his wife. He understands her medical condition. According to him this was not in his character and this would not re-occur. This statement must be seen in light of the accused's lack of genuine contrition. However the infidelity of his wife and the deceased cannot be ignored. It was indeed the proverbial trigger to the unfortunate events which ensued.

[7] A colleague who testified that the accused is a friendly, helpful and professional in his work and he related well to the members of the public and his colleagues. The accused is a first offender. This factor weighs considerably in mitigation.

<u>The offences</u>

Kidnapping

[8] The accused, a police officer on duty, not only made use of the government resources in an attempt to trace the deceased but also abused his office to detain the deceased. These are aggravating factors. The deceased, as a civilian, had limited power to resist the unlawful detention of the accused. At the time the accused

committed this offence he had been consuming alcohol but he was capable of appreciating the wrongfulness of his actions. His actions were deliberate and the accused intended for the deceased to have no choice but to interact with him in the manner the accused chose. A person's liberty is a fundamental human right and may only be interfered with in accordance with the law. The accused, a police officer, was well aware of the limitation of his powers to detain the deceased.

[9] The deprivation of the liberty of the deceased is considered to be serious. The deprivation of liberty becomes an even more serious offence when it is committed by a police officer. It is reminiscent of the arbitrary arrest and detention of the past. It would be in the interest of the society or just administration that the court shows its displeasure in the conduct of the accused herein.

Murder and assault by threat

[10] The offence of murder is a serious offence and the manner in which the deceased was tortured for over 4 hours may be described as horrific. Threat of violence which the wife of the accused had to endure, she described as terrifying. The accused's conduct as described by his wife may be described as utterly disgusting and despicable but the court must consider the circumstances surrounding the commission of the offence and determine the extent to which those circumstances diminished his criminal responsibility.

[11] The accused went looking for the deceased that morning with a colleague. I infer from this fact that his original intention was to take the deceased into police custody. When he found the deceased, he had already started drinking. In the absence of his colleague, he decided to take the deceased home. It is evident that the accused planned to do the deceased harm but I am not convinced that the accused planned the murder of the deceased. The intention to beat the deceased until he dies was formed once the deceased provoked the accused with his 'unapologetic' behaviour.

[12] The Psychologist called as a witness for the State indicated in her report that the alcohol, failure to control his anger, the infidelity of his wife and the injury to his masculinity and pride were contributing factors to the way in which he reacted that day. The assessment by the Psychologist for the defence was more explicit. He

concluded that the accused was suffering from significant emotional stress and provocation. His assessment was further that the accused was consuming alcohol excessively prior to the date of the incident to such an extent that it became an alcohol use disorder. He concluded that the consumption of alcohol on the date of the incident impacted on his conative functioning of his brain i.e. it impacted on his ability to control and direct his behaviour. His final conclusion was that the stresses coupled with the excessive intake are significant factors which impaired or diminished the accused's ability to distinguish right from wrong and the ability to control his actions. This neatly summarised the factors which lead me to conclude that the accused acted with diminished criminal capacity. It is also my view that these factors substantially lessen his blameworthiness.

Interest of society

[13] The offence of assault by threat was committed in respect of a person who was in a domestic relationship with the accused. Offences of this this nature are prevalent and on the increase. Society expressed its concern against gender based violence. The Combating of Domestic Violence Act 4 of 2003, was called into life to address this concern. The courts are enjoined to take into consideration the interest of society in respect of gender based violence.

[14] Violent crimes such as murder pose a serious threat to the peace of a nation. There is a general tendency to settle relationship issues by resorting to senseless violence and brutality. Families are destroyed and the moral fibre of our society is disintegrating. This court must do its part to protect and uphold the sanctity of life and to serve the interest of society.

[15] In *S v Kanguro* 2011 (2) NR 616 (HC) Liebenberg J stated as follows at page 618, paragraph 6:

'In determining what an appropriate sentence in the circumstances of this case would be, the accused's mental condition, and more specifically her state of mind at the time of committing the offence, is a crucial factor in the court's determination of the accused's moral blameworthiness. It is trite that the degree of moral blameworthiness [my underlining] should be reflected in the sentence imposed on the offender. In Terblanche Guide to Sentencing in South Africa 2 ed at 150 para 7.2.2 the following is said:

"The modern view of the seriousness of crime generally also refers to the blameworthiness of the offender. According to this view, the seriousness of the offence is affected by the extent to which the offender can be blamed or held accountable for the harm caused or risked by the crime. [my underlining] This is a partly objective assessment. It should also include those subjective factors which lessen (mitigate) or increase (aggravate) the blame that can be attributed to the offender. Typical examples include the youth of the offender, or any other factor which reduces or diminishes her criminal capacity.' [Own emphasis added.]."

And further in paragraph 11 of the same judgment he states as follows:

'Unlike in the South African context, there are at this stage no prescribed (minimum) sentences applicable to the offence of murder in Namibia. However, the right to life is enshrined in art 6 of the Namibian Constitution and must at all times be respected and protected. Society is entitled to demand such respect and protection and failure to provide same could lead to anarchy. I therefore associate myself with the remarks of Mlambo JA (above) that, besides giving due regard to the personal circumstances of the accused, the court, in circumstances as the present where the accused is found to have acted with diminished capacity, still has to look at the severity of the offence and the need to impose deterrent sentences where it involves serious offences.' [my emphasis]

[16] Mr Shileka, counsel for the State argued that the court adopts the above approach and to sentence the accused to a lengthy term of imprisonment. He referred this court to an unreported case, *S v Ngatjizeko* (CC 23/2008) [2013] NAHCMD 167 (18 June 2013) where the court imposed a sentence of 40 years' imprisonment. The facts of that case are distinguishable from the facts in this case. I may also add that the sentence in that case would be considered inhumane as the highest sentence which this court may impose is a life sentence. [1]

[17] Mr Nsundano, counsel for the accused, proposed a fine for count 1 and 3 and 5 years' imprisonment wholly suspended for count 2, murder with diminished responsibility.

[18] Whilst the court bears in mind that the accused's acted with diminished criminal capacity, it cannot overlook the interest of society and the nature of the offence he committed. The court must strike a balance and impose a sentence which

[1] See *Geingob & 2 Others v S* an unreported judgment Case No: SA 7/2008 & SA 8/2008; delivered on 6 February 2018.

will take due cognisance of the legitimate expectations of society. The court would send the wrong message if it punishes serious offences too leniently, particularly given the current climate of violence. A too severe sentence given the peculiar circumstances of this case, would also not serve justice.

[19] In the result the following order is made:

1. Count 1 – the accused is sentenced to 1 years' imprisonment.

2. Count 2 – The accused is sentenced to 15 years' imprisonment of which 6 years are suspended for five years on condition that the accused is not found guilty of the offence of murder, attempted murder; or culpable homicide involving an assault committed during the period of suspension.

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4. It is ordered that the sentence in count 1 run concurrently with the sentence imposed in count 2.

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M A Tommasi

Judge

APPEARANCES:

For The State:	R Shileka Office of the Prosecutor-General, Oshakati
For The Accused:	P Nsundano Directorate Legal Aid, Oshakati