

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

SENTENCE

Case No: CC 4/2015

In the matter between:

**THE STATE**

v

**UUNANDAPO ELIASER**

**ACCUSED**

**Neutral citation:** *S v Eliaser* (CC 4-2015) [2020] NAHCNLD 126 (8 September 2020)

**CORAM:** TOMMASI J

**Heard:** 7 September 2020

**Delivered:** 8 September 2020

**Flynote:** Criminal Procedure – Sentence – murder and rape – gender based violence – not only grievous bodily harm but murdered the complainant – prescribed minimum sentence – 15 years’ imprisonment - no compelling and substantial circumstances - lengthy custodial sentence for murder – mindful of the cumulative effect and requirement not to impose a sentence which would be considered as an inordinately lengthy term of imprisonment as envisioned in *S v Gaingob and Others* 2018 (1) NR 211 (SC).

**Summary:** The accused was convicted for murder with direct intent and rape in terms of the combating of rape act. The court found no substantial and compelling circumstances existed and the prescribed minimum sentence of 15 years' imprisonment is therefore imposed. The accused is sentenced to 30 years' imprisonment for murder whereof eight years' imprisonment is ordered to run concurrently with the mandatory 15 years' imprisonment imposed on the count of rape.

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### ORDER

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1. Count one –Murder- 30 years' imprisonment,
2. Count three- Rape- 15 years' imprisonment;
3. It is ordered that eight (8) years' imprisonment imposed in respect of count 1 must run concurrently with the sentence imposed in respect of count three.

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### JUDGMENT

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TOMMASI J:

[1] The accused was convicted on count one Murder - murder with direct intent and count three- Contravening section 2(1)(a) read with sections 1, 2(2), 2(3), 3, 4, 5, 6 and 7 of the Combating of Rape Act, 8 of 2000 – Rape.

[2] The factual background is that the accused on 19 March 2012 was seen in the company of the deceased at Okanyothi *cuca* shops in the district of Ondangwa. The next morning the body of the deceased, half naked, was found near a water pond with her belongings scattered in the vicinity of her body.

[3] The accused was convicted after medical evidence which showed that a savage and fatal attack was perpetrated on the deceased, furthermore he was seen leaving with the deceased and his DNA was found to have been present in the vestibule of the deceased. The accused was then duly convicted of rape and murder.

[4] Counsel for the state submitted no previous convictions and the accused is therefore a first offender before this court.

[5] It is now my duty to sentence the accused for the crimes he committed. In terms of our law, there are three factors to be taken into account, namely: (a) the personal circumstances of the accused; (b) the nature of the crime and (c) the interest of society.<sup>1</sup>

[6] At the same time the sentence to be imposed must satisfy the objectives of punishment which are: (i) the prevention of crime; (ii) deterrence or discouragement of the offender from re-offending and would be offender from committing crimes; (iii) rehabilitation of the offender and (iv) retribution. Thus, if the crime is viewed by society with abhorrence, the sentence should also reflect this abhorrence.<sup>2</sup>

[7] In *S v Rabie*<sup>3</sup> the court held 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’.

#### State in aggravation

[8] The State called one witness in aggravation Mr. Thomas Itamala, the husband of the deceased. He testified that he works at Ehangana Seafood, Walvis Bay, he has two minor children and that they have been severally affected by the death of his wife. He told the court that the youngest child has not accepted the passing of her mother, in that she keeps asking for her late mother. He testified that his family has

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<sup>1</sup> *S v Zinn* 1969 (2) SA 537 (A) at 540G.

<sup>2</sup> *S v Puleni* (CC 7/2013) [2018] NAHCMD 204 (6 July 2018).

<sup>3</sup> *S v Rabie* 1975 (4) SA 855 at 862 G-H.

been broken down. His wife used to work the mahangu field before her death. The children are now being looked after by the family of the deceased.

[9] Mr Itamala testified that he did not receive any assistance from the accused in preparation of the funeral of his late wife nor did he receive an apology from the accused. He acknowledged that N\$10 000 was paid by the mother of the accused to the parents of his late wife through the office of the Traditional Authority.

[10] Mr. Pienaar, counsel for the State, maintained that the accused committed a heinous crime against society and that a custodial sentence would be fitting. He submitted that on count one the accused should get a sentence of 35 years' imprisonment of which 5 years' imprisonment is suspended and the prescribed minimum sentence of 15 years' imprisonment in respect of the rape count and that the sentence should run consecutively.

#### Personal circumstances of the accused

[11] The accused elected to remain silent and called no witnesses. Mr Grushabar submitted on behalf of the accused and stated that the accused person was 24 years old at the time he committed the offence and he is currently 32 years old. Before his arrest he did upholstery jobs and was earning N\$ 500 per month. He is a father of two minor children. The two children stayed with the accused and his 85 year old mother. He has one sibling, who is unemployed and the mother of the children has passed on.

[12] He submits that an amount of N\$ 10 000 and one cow was given to the family of the deceased. He contends that the accused is suffering from tuberculosis and that he sustained a back injury during an assault. He prayed that the court shows leniency when sentencing the accused. Mr Grushabar proposed a sentence of 25 years' imprisonment on count one, 10 years' imprisonment on count three and that count three should run concurrently with count one.

[13] It is common cause that the accused is a first offender and that he was detained in custody for period of approximately 3 years and 9 months.

### Nature of the Crime and interest of society

[14] There is no doubt that murder and rape are very serious crimes that call for severe punishment. Gender based violence has reached a crisis point. It is continuing unabated despite the harsh sentences that the courts impose. Society is crying for the courts to impose more severe sentences against those who commit violent crimes against women.

[15] In *S v Motolo en 'n Ander* 1998 (1) SACR 206 OPD the court held that:

'In cases like the present the interest of society is a factor which plays a material role and which requires serious consideration. Our country at present suffers an unprecedented, uncontrolled and unacceptable wave of violence, murder, homicide, robbery and rape. A blatant and flagrant want of respect for the life and property of fellow human beings has become prevalent. The vocabulary of our courts to describe the barbaric and repulsive conduct of such unscrupulous criminals is being exhausted. The community craves the assistance of the courts, its members threaten, inter alia, to take the law into their own hands. The courts impose severe sentences, but the momentum of violence continued unabated. A court must be thoroughly aware of its responsibility to the community and by acting steadfastly, impartially and fearlessly announce to the world in unambiguous terms its utter repugnance and contempt of such conduct.'

[16] I agree fully with the sentiments expressed in the case above. The court has an important role to play in that it must uphold and promote respect for the law through its judgments and the imposition of appropriate sentences on those making themselves guilty of serious crimes such as the present one.

### Sentencing

[17] In cases of serious crimes where it is evident that the crime deserve a substantial period of imprisonment, the personal circumstances of the offender will necessarily recede into the background, thus the offender's personal circumstances such as his employment or the number of his dependants largely become immaterial. That does not necessarily mean that the Court will ignore it, because it

will still remain relevant in another respect such as to determine whether the accused is likely to repeat the same offence or not.<sup>4</sup>

[18] In terms of the provisions of section 3 (1) (a) (iii) (aa) of Combatting of the Rape Act the court must impose the mandatory prescribed sentence of 15 years' imprisonment in respect of the count of rape since the accused not only caused grievous bodily harm but actually murdered the deceased. The accused declined the opportunity to persuade this court that there are substantial and compelling circumstances and there are no factors on record which shows that substantial and compelling circumstances exists in this case. The prescribed minimum sentence of 15 years' imprisonment in this case is fitting.

[19] The accused showed no remorse for the barbaric acts he has committed and having considered both the factors in mitigation and aggravation. The court questions the likelihood that the accused could be rehabilitated.

[20] The court is mindful that it should guard against imposing inordinately long terms of imprisonment<sup>5</sup>. The offences herein were committed that same evening and at the same place. The accused in all likelihood raped the deceased and murdered her during or soon after the committed the sexual act. An order that a portion of the sentence for murder run concurrently with the sentence imposed for the rape would ameliorate the cumulative effect of sentences the court would impose.

[21] In the result I sentence the accused as follows:

1. Count one –Murder- 30 years' imprisonment;
2. Count three- Rape- 15 years' imprisonment.
3. It is ordered that eight (8) years' imprisonment imposed in respect of count 1 must run concurrently with the sentence imposed in respect of count three.

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<sup>4</sup> *S v Swartz* (CC 15/2018) [2019] NAHCMD 128 (30 April 2019), para 14 at page 5.

<sup>5</sup> See *S v Gaingob and Others* 2018 (1) NR 211 (SC).

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M Tommasi  
Judge

## APPEARANCES:

FOR THE STATE

Mr. Pienaar

Of the Office of the Prosecutor General,

Oshakati

FOR THE ACCUSED:

Mr. Grusshabbaer

Of the Directorate of Legal Aid,

Oshakati