

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

SENTENCE

Case no: CC 4/2019

In the matter between:

THE STATE

v

FILLEMONT NKANDI I
ACCUSED

Neutral citation: *S v Nkandi* (CC 4/2019) [2020] NAHCNLD 62 (5 June 2020)

Coram: DIERGAARDT AJ

Heard: 1 June 2020

Delivered: 5 June 2020

Flynote: Criminal- Sentence-Two counts of murder – two counts of contravention of the Arms and Ammunitions Act- Guilty plea on all four counts-Custodial sentence.

Summary: The accused stands convicted of two counts of murder, contravention of section 2 of the Arms and Ammunition Act 7 of 1996 - possession of a fire arm and

The court states that if sentences for serious crimes are too lenient the administration of justice may fall into disrepute and injured persons may be disposed to taking the law into their own hands.

In mitigation counsel for the accused submitted that the accused was 49 years old at the time of the incident. He was in custody for 18 months. He is a first time offender and pleaded guilty to all the charges levelled against him. She submitted that the accused was not in a domestic relationship with neither of the deceased persons. He was merely provoked by the deceased persons. He shot the deceased persons because they insulted him three days prior to the incident. His health is not good and he did not have the opportunity to apologise to the family of the deceased persons as he had bail restrictions.

The State in mitigation, counsel submitted that both deceased died a brutal death at the hand of the accused. He submitted that their organs were severely damaged by the shotgun bullets. The mere fact that he cocked the gun and shot the second deceased is an indication that he knew what he was doing and aimed in their direction respectively. They had no opportunity to defend themselves.

The court held that: The crimes committed by the accused were brutal and vicious in the extreme and perpetrated with premeditation, justifying that he should be permanently removed from society as would be brought about by the combined sentence of 70 years imprisonment.

ORDER

Count 1 - 35 years' imprisonment;

Count 2 - 35 years' imprisonment;

Count 3 - 1 year imprisonment;

Count 4 - 1 year imprisonment;

Count 1 and count 2-sentences to run consecutively;

Count 3 and count 4- sentences to run concurrently with count 1.

In terms of the 10(7) of Act no 7 of 1996 the accused is declared unfit to possess a firearm for a period of 2 years starting from today 5 June 2020.

It is further ordered that the fire-arm (shotgun) and four rounds of ammunition is forfeited to the state in terms of section 35 of the Criminal Procedure Act, Act 51 of 1977.

SENTENCE

DIERGAARDT AJ

Introduction

[1] The accused stands charged with two counts of murder, contravention of section 2 of the Arms and Ammunitions Act 7 of 1996 - possession of a fire arm and contravention of section 33 of the Arms and Ammunitions Act 7 of 1996 - possession of ammunition. The conviction followed a plea of guilty on all four counts.

[2] Considerations that the court looks at when sentencing are well-established. In determining sentence, the court has to look at what has become known at the triad, namely, the crime, the offender and the interests of society.¹

[3] In *S v Rabie* 1975 (4) SA 855 (A), the court stated that the punishment should fit the criminal as well as the crime, be fair to the state and society and that it should be blended with a measure of mercy according to the circumstances of the case.

[4] Referring to *R v Swanepoel* 1945 (AD) 444, the court in *S v Khumalo & others* 1984 (3) SA 327 (AD) at 330 D-E held that deterrence was the 'essential', 'all important', 'paramount' and 'universally admitted' object of punishment. It further held that the other purposes of punishment are accessory to deterrence. The retributive theory has to do with punishing a past wrongful act, whilst reformative, preventive and deterrent theories are all about the future, '*in the good that would be produced as a result of the punishment*' as observed in *Rabie*.²

¹ See *S v Zinn* 1969 (2) SA 537 (A) at 540G.

² *Supra* at 862A-B.

[5] It was pointed out by the court in the case of *R v Karg* 1961 (1) SA 231 (A) at 236 A-B that while the deterrent effect of punishment has remained as important as ever, the retributive effect, whilst by no means absent from the modern approach to sentencing, has tended to yield ground to aspects of prevention and correction. The court went on further to state that if sentences for serious crimes are too lenient the administration of justice may fall into disrepute and injured persons may be disposed to taking the law into their own hands.

[6] It has been said, that although all factors relevant to sentencing must be given proper consideration, there are some competing factors that need not be given equal weight depending on the circumstances of each case. When a serious crime is involved one or more factors deserve emphasis and some factors should be given more weight at the expense of other factors. What is required from the court in sentencing is that a balance should be struck between the factors without undue over- or under emphasis of any of these factors.

Mitigating and aggravating circumstances

[7] The accused did not testify in mitigation but the defence led the evidence of his sister.

[8] The State on the other hand, during the sentencing proceedings, led the evidence of the deceased nephew and also pointed to factors that should be considered as aggravating.

[9] I deal with all the issues submitted by the parties during the sentencing proceedings, as well as the evidence that was led during the main trial.

The Accused

[10] Council submitted that the accused was 46 years old at the time of the incident. He was in custody for 18 months. He is a first time offender and pleaded guilty to all the charges levelled against him. She submitted that the accused was not in a domestic relationship with neither of the deceased persons. He was merely provoked by the deceased persons .He shot the deceased persons because they insulted him three days prior to the incident. She submitted that his family paid an amount of N\$ 21 000 to the family of the deceased persons through the traditional

authority. The traditional authority gave N\$ 1 000 towards cleaning of blood and N\$ 1000 back to the accused family. So an amount of N\$ 19 000 was given to the deceased persons family. She submitted that the accused could not approach the deceased family to express his remorse as he was granted bail with conditions that prohibited him from approaching them. She further submitted that the accused is HIV positive and suffers from high blood pressure and a problem with his ribs. He is also not employed.

[11] The defence asked for the court to impose a life sentence on the accused and not 45 years as requested by the family member of the deceased.

The State

[12] Council submitted that the deceased was a biological mother and her son .He further submitted that both deceased died a brutal death at the hand of the accused. He murdered both of them with direct intent by shooting them at close range. He submitted that their organs were severely damaged by the shotgun bullets. The mere fact that he cocked the gun after he shot the first deceased and then shot the second deceased is an indication that the new what he was doing and aimed in their direction respectively. They had no opportunity to defend themselves. The state also submitted that the accused was not the lawful owner of the fire-arm and ammunition. Council for the state asked for 35 years direct imprisonment on each murder count.

The nature of the offence

[13] Murder is undoubtedly one of the most serious crimes. The sanctity of a human life can never be overemphasized. The right to life is the most sacred and the most precious right and it must be guarded.

[14] The particular circumstances surrounding the killing of the deceased in this case are gruesome and need some special mention. The evidence indicates that the deceased was killed in a cruel manner by the use of a shotgun belonging to another person. He was approximately 10 metres away from the deceased when he shot them. It is evident that that both deceased organs was severely damaged.

[15] The medical report reflects the following injuries:

In respect of Martha Salmon:

1. Multiple wounds
2. Multiple rib fractures
3. Multiple pellet wounds in the heart
4. Multiple pellet wounds in the lungs
5. Multiple lacerations and pellet wounds on the liver
6. 6. Multiple pellet wounds on the aorta and diaphragm

In respect of Eino Nuyoma:

1. Fractured rib
2. Liver destroyed
3. Multiple pellet injuries in right lung
4. Right kidney destroyed
5. Left kidney shock

Impact on the deceased family

[16] The nephew of deceased, Maria Salmon testified that the deceased had 7 children of which the first deceased was her 7th child. She thus left 6 minor children behind. She was 61 years old at the time of the incident. He cannot forgive the accused for what he has done. He further testified that the accused never pleaded for forgiveness to the family of the deceased. He asked the court to impose a sentence of 45 years for each murder charge on the accused. He submitted that the family cannot get over the death of the deceased because of the brutal manner in which they were killed. He agreed that the accused family gave money to deceased family but he differed with the amount as submitted by the defence. He testified that they only received N\$19 000.

Interest of society

[17] Maria Salmon, deceased in this matter was a female and 61 years of age .It can be concluded that she was a vulnerable member of society.

[18] The position of woman was well-articulated in *S v Chapman* (345/96) [1997] ZASCA 45; 1997 (3) SA 341 (SCA); [1997] 3 All SA 277 (A); (22 May 1997) at page 4 when this court said the following:

‘Women in this country... have a legitimate right to walk peacefully on the streets, to enjoy their shopping and their entertainment to go and come from work and to enjoy the peace and tranquillity of their homes without the fear the apprehension and the insecurity which constantly diminish the quality and the enjoyment of their lives.’

[19] This senseless killing was not an immediate response to the provocation. The accused was provoked 3 days prior to the incident. By taking a rifle and approaching the deceased his conduct can be regarded as an execution .Both deceased was unaware of the attack and they were both defenceless. Even if Maria Salmon (deceased) had the opportune to defend herself she could not as a result of her vulnerability being her age

[20] Although the accused pleaded guilty to the charges the degree of remorse was not translated through his legal representative.

[21] The Court in *S v Matyityi* (695/09) [2010] ZASCA 127 (30 September 2010) *supra* at para 13 examined the question of remorse by stating the following:

‘...There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a knowing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia, what motivated the accused to commit the deed; what has since

provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions...' (Own emphasis)

[22] I therefore have my doubt as to whether indeed his penitence and sorrow is genuine for the plight of the deceased and for their demise.

[23] Lastly in the case of *S v Ronny Naobeb* case no CC 26/2006 an unreported judgment of Mainga J (as he then was) said that: 'Every law abiding citizen is shocked to the core at the rate of murders and rapes especially of defenceless women and children and the brutality and callousness that accompany them'.

[24] Although the accused pleaded guilty to the charge and took responsibility for his actions he had no other option as he had no defence. He killed the deceased in cold blood. Having outlined all the factors, I am of the view that aggravating factors outweigh mitigating factors in this case. Reasons for that are evident from what I have outlined above. The evidence given by the family member of the deceased gave the court some perspective of what they are enduring after the passing of their loved ones. Besides, the 6 children now left without a mother and older brother the court is convinced how severely the incident impacted on the family especially the gruesome and undignified manner in which the deceased person's lives were ended.

[25] It is common cause that the Court is confronted with a serious, violent and prevalent crime. It is so prevalent that I am of the view that this is an instance the court should exercise its discretion in imposing a severe sentence. This case is an example of how some fail to use the available means of resolving conflict and are quick to resort to violence that even leads to deadly consequences.

[26] The crimes committed by the accused were however brutal and vicious in the extreme and perpetuated with premeditation, justifying that he should be permanently removed from society as would be brought about by the following sentence:

Count1 - 35 years' imprisonment;

Count 2 - 35 years' imprisonment;

Count 3 - 1 year imprisonment;

Count 4 - 1 year imprisonment;

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It is further ordered that the fire-arm (shotgun) and four rounds of ammunition is forfeited to the state in terms of section 35 of the Criminal Procedure Act, Act 51 of 1977.

A H Diergaardt
Acting Judge

Appearances

For the State:

Mr R Shileka,
Office of the Prosecutor General, Oshakati

For the Accused:

Ms G Mugaviri,
Mugaviri Attorneys, Oshakati