

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

SENTENCE

Case no: CC 11/2018

THE STATE

v

JOHANNES AMBONDO DAVID

ACCUSED

Neutral citation: *S v David* (CC 11/2018) [2020] NAHCNLD 82 (6 July 2020)

Coram: SALIONGA J

Heard: 10 June 2020

Delivered: 6 July 2020

Flynote: Criminal Procedure – Sentence— Double Murder—Accused 65 year old first offender –has been in custody for four years awaiting trial – Apology offered not genuine – Accused not accepting consequences of his actions – Not remorseful.

Nature of offences – Serious offences – Prevalent – One count committed in a domestic setting and pre-meditated – Aggravating factors—Accused grabbing and pulling deceased from the shebeen and kicking her – Stabbing a heavily pregnant deceased nine times with a knife –Accused had time to reflect—Stabbed Taapopi once in the chest in the process of intervening – Deterrent and retribution sentence called for.

Interest of society – Court not to over emphasize certain interest at the expense of the other – Balance to be struck between the interests of the accused and those of the society— Having considered both interests – Court finding that interest of society outweighs personal interest of accused – Accused found a danger to society – Greater need of removing him from society.

ORDER

1. Count 2: Murder with dolus eventualis accused is sentenced to 30 years' imprisonment.
2. Count 3: Murder with direct intent accused is sentenced to life imprisonment.

SENTENCE

SALIONGA, J

[1] On 9 March 2020, this court convicted accused on two counts of murder, of which one count is read with the provisions of the Combating of Domestic Violence Act 4 of 2003. It is now the duty of this Court to consider appropriate sentences. According to the charge sheet you murdered Ndapanda Nekwaya, the mother of your two biological children by stabbing her with a knife nine times after kicking her several times. On the same day you also stabbed Taapopi Uukongo to death who was preventing you from kicking a heavily pregnant deceased. The deceased Uukongo died at the scene few metres from where he was stabbed and Ndapanda died the following day at the Oshakati State Hospital due to stab wounds.

[2] In considering an appropriate sentence, I must have serious regard to the three factors generally known as the Zinn triad, namely the crime itself, the accused's personal circumstances and the interests of society. Besides the above, the Court has to think through the objectives of punishment such as deterrence, prevention, retribution and prevention.

[3] Balancing the aforesaid factors is a challenging task as Miller J in *S v Gool* 1972 (1) SA 455 (NPD) stated: 'The result of over-emphasis of any of the relevant factors is often under-estimation or even a total disregard of one or more of the other factors. A mind tending to pre-occupation with the desirability of deterring others from committing an offence is apt to give insufficient attention to other factors which in the particular circumstances of the case may be more important for the purposes of assessing a just and proper sentence for the accused than standing in the dock. It is necessary to always avert to that danger'.

[4] The above being true, considering what Straydom CJ in *S v Van Wyk* 1993 NR 426 (SC) at 450 G remarked that;

'It may be that the trial court in balancing the principles applicable to sentencing gave more weight to the deterrent and retributive aspects of sentencing but as was pointed out by Lategan (council for the State) this is sometimes unavoidable and depending on the circumstances, does not amount to a misdirection.'

[5] The convict, Johannes Ambondo David, mitigated under oath. He testified that he was 61 years at the time of the commission of the offences which he is still vehemently denying after conviction. He is now 65 years old and a first offender. The accused is not married but a father of seven children, two of whom were for Ndapanda, now deceased and they are minors. He further testified that he was looking after his children when he was still together with the deceased and before he was incarcerated. After his incarceration the kids were with their maternal grandmother and does not know who supports them. Although he could not remember their exact dates of birth, two of his children are five and eight years old and still attending school. He is unemployed but is receiving a social grant in the amount of N\$ 1300 from the government due to old age. He used this grant to pay the necessities for his two school going children.

[6] Accused further testified that he is of poor health. He injured his spine in 1999. He is HIV positive and is now on antiretroviral treatment for four years. During his testimony in mitigation the accused apologized to the Court and the family of the deceased. He also contributed ten thousand to the funeral costs from his pocket. He

begged the deceased's family to accept his apology as he did not get a chance to formally apologize to them. He has been in custody since 14 August 2017 to date. He knows what he did is wrong and blames himself for what he did. He stated that he will not repeat it again.

[7] Selma Amadhila, a sister to the accused and a manager of the accused's financial affairs testified in mitigation for the defence. She stated that she recalls she was instructed to withdraw ten thousand dollars from the accused's account which together with the family's contribution totaling N\$ 45 000 she paid to the traditional authority. She expresses remorse on behalf of the family and offers an apology to the deceased's family from God. She however could not suggest what an appropriate sentence could be and she left the sentencing part to the court to decide.

[8] In substantiating the case counsel for the defence submitted that accused led a blameless life for 61 years and had learned a lesson. He has shown genuine remorse. He further submitted that accused is not a violent person and is not a danger to the Namibian society. Counsel further submits that the offences committed were not premediated. In view of the accused's advanced age, counsel referred this Court to what Geier J, in *Appolus v The State* (CA 32/2012) [2013] NAHCMD 37 (12 February 2013) posed that '... and where the related questions: 'to deter him? To reform him? Because he is a danger to society? or because an example needs to be made of him?--all should be answered in the negative.' Therefore counsel submitted that when regard is had to the accused's advanced age, deterrence, prevention and reformation will not serve the purpose of sentencing and should not be overemphasized. In as far as I am in agreement with the findings of my brother Geier J, in my view that case is distinguishable from the instant matter in that the appellant (in *Appolus's* case) was provoked over a long period of time.

[9] The State in mitigation before sentence called Ms. Selma Amakali, a cousin to the deceased Johannes Taapopi Uukongo and a niece to the deceased Ndapanda Nekwaya. She testified that the death of the two deceased had an impact on the family that they lost two family members at once. They feel bad for losing them and that Ndapanda left two minor children who are now staying with their maternal grandmother. The witness could not enlighten the Court whether the

accused had apologized to the family but they contributed the drinks for the funeral. As a last born, Ndapanda was looking after her mother and was helping her in all chores. Uukongo was also not working but was assisting his mother as his father is no longer with the mother. Personally the witness will not forgive him and it will be difficult for the family to forgive the accused either. She wants the court to sentence the accused to life imprisonment.

[10] Counsel for the prosecution in submission argued that sight should not be lost that accused is found guilty of double murder, that two human lives were lost; that society expects severe sentences for people who intentionally kill others, that in light of the circumstances of this crime, a non-custodial sentence would not only send out a wrong message into society, but also fail to achieve the general deterrence purpose of sentencing which if one has regard to the increase in violent crimes endemic in our society coupled with the blatant lack of respect for human life should be emphasized. Counsel persuaded the Court (due to the seriousness of the offences) to sentence the accused to 30 years and life imprisonment respectively.

[11] As indicated earlier in my judgement, accused is convicted of two counts of murder which are serious offences and undoubtedly warrant severe punishment. In the context of the present case, the most aggravating factors were that one of the offence was committed in a domestic set up as defined in the Combating of Domestic Violence Act, 2003. The death of the two deceased has a serious impact on the family as testified to in mitigation. This Court has in numerous judgments reiterated that crimes committed in domestic relations have to be considered in a serious light by imposing heavier sentences. I am inclined to follow those judgments well noting the principles of individualization and uniformity.

[12] Argument was advanced that the accused has shown genuine remorse but am not persuaded that accused has shown genuine remorse for his actions. When asked why he stabbed the deceased persons, accused reiterated that he acted in self defence despite a finding of guilt by this Court. Even though the evidence proved that the accused had killed the deceased on count two in the spur of the moment;

same cannot be said when he stabbed the deceased on count three. The actions of pulling Ndapanda from the shebeen and then kicking her before stabbing are clear manifestation of intention to kill. At no stage was the accused provoked nor was there any justification for his actions. I therefore do not agree with counsel that the offences were not pre-meditated and accused is not a danger to society.

[13] With regard to the interest of society, members of society need to be protected from dangerous individuals like the accused. At the same time society equally will not condone a sentence which is inappropriate long as Frank AJA, in *Gaingob v The State* (SA 7 and 8- 2008) [2018] NASC (6 February 2018) found that 'fixed term sentences longer than 37 and a half years 'is materially misdirection and can be rightly described as inordinately long liable to be set aside.' That makes the balancing of these interests more difficult. In the end the right to life is the most sanctified, the most precious right and must be jealously guarded.

[14] In searching for an appropriate sentence I have considered that accused is a first offender at the age of 61 years and prior to his arrest he was providing for his two minor children. Accused has been in custody now for four years awaiting trial. He is of poor health as he got a spinal injury in 1999 and is on antiretroviral treatment now for four years.

[15] While agreeing with counsel for the defence that the age of the accused is a factor to be considered and may lead to a substantial reduction in the sentence, accused in the present case fails to conduct himself in a manner one would expect of a person of his age. The killing was the most barbaric, inhumane, gruesome and cruel in that, accused not only did he stab the mother of his two children, who as a result lost the pregnancy as depicted in Exhibit "G", but he also stabbed an innocent and defenceless Uukongo in the process of stopping him from kicking a heavily pregnant woman. Accused has no respect for human life. He had time to refrain from his barbaric acts, but instead pursued Ndapanda and stabbed her to death. In light of the above, the imposition of lengthy custodial sentences is inevitable and necessary to mark the seriousness of the offences and the resentment of society despite his advanced age.

[16] Having considered the personal circumstances of the accused, the seriousness of the offences, the interest of society, and the circumstances under which the offences were committed as well as cases cited by both counsel, I have serious reflection that deterrence and retribution are the only answer for what accused person has done.

[17] In the result I find the following appropriate sentences:

1. Count 2: Murder with dolus eventualis accused is sentenced to 30 years' imprisonment.
2. Count 3: Murder with direct intent accused is sentenced to life imprisonment.

J T SALIONGA
JUDGE

APPEARANCES:

FOR THE STATE:

Mr T Gaweseb
Of Office of the Prosecutor-General,
Oshakati

FOR THE ACCUSED:

Mr P Grusshaber
Directorate of Legal Aid,
Oshakati