REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

SENTENCE

Case No: CC 12/2018

In the matter between:

THE STATE

v

MALAKIA PENDA NANYEMBA **ACCUSED**

Neutral citation: *S v Nanyemba* (CC 12/2018) [2021] NAHCNLD 42 (27 April 2021)

Coram: SMALL, AJ
Heard: **16 April 2021**
Delivered: **27 April 2021**

Flynote: Criminal Procedure – Sentence – Culpable Homicide and Assault by Threat –Almost 4 years spend in custody awaiting trial considered when deciding the appropriate sentence – Time spent in custody pending trial can be adequately addressed by a partial suspension of the sentence.

Summary:
On 9 March 20201, after evidence was led, this court convicted the accused of Culpable Homicide and two counts of assault by threat.

Held that, the triad principles of sentencing revisited: the crime, the offender and the interest of society as well as the fourth element of mercy, but which should not be misplaced pity.

Held further that, time spent in custody awaiting trial should be judicially considered in meting out an appropriate sentence

Held further that, only real and deeply felt remorse is a mitigating factor. If an accused does not accept responsibility for what he has done the rehabilitation process of such accused has not commenced as it's indicative of having no remorse.

ORDER

Count 2: Culpable Homicide – Twelve (12) years imprisonment of which three (3) years imprisonment is suspended for a period of five (5) years on condition the accused is not convicted of culpable homicide or assault with the intent to cause grievous bodily harm committed during the period of suspension.

Count 3 and Count 4: Two Counts of Assault by threat – The counts are taken together for purposes of sentence-Two (2) years imprisonment of which one (1) year imprisonment is suspended for a period of five (5) years on condition the accused is not convicted of assault by threat committed during the period of suspension.

SENTENCE

SMALL AJ:

[1] On 9 March 2021, this court convicted the accused of culpable homicide and two counts of assault by threat.

[2] *Ms M. Nghiyoonnanye* appeared for the State while *Mr. S. Aingura* appeared for the accused.

[3] In sentencing, courts should consider the distinguished triad factors of sentencing, the crime, the offender, and society's interests. [1] The court must consider the personality of the offender, his age, and personal circumstances, together with the crime and the interests of society.[2] Then there is the element of mercy or compassion or basic humanity. The latter has nothing in common with overemotional sympathy for the accused. Recognising that fair punishment may have to be robust, mercy is a balanced and humane quality of thought that softens one's approach when considering the fundamental factors of letting the punishment fit the criminal and the crime and being fair to society.[3]

[4] Sentencing requires a balancing exercise between the competing factors to be steered to an appropriate punishment. It is, however, settled law, that in the process, it may sometimes be unavoidable to emphasise one factor at the expense of the others.[4]

[5] With a background of the aforesaid sentencing guidelines, I proceed to consider the circumstances of this matter relevant to sentencing. The accused testified in mitigation of sentence. He stated that he is 33 years old, unmarried and has 2 sons and 2 daughters. The accused was not sure of their specific ages and in what grades these children were as they all reside with their mothers. From the years of birth of the children provided by the accused it appears as if the eldest son is between fifteen and sixteen years old, the two daughters respectively ten and eleven years old, and his youngest son between eight and nine years old. The last time he saw any of the children was in 2015.

[6] The accused completed grade ten in school. He attempted to increase his marks by studying through Namcol. When he did not manage that he was assisted by an uncle in Oshakati to do a computer course. This assisted him to secure employment for a while. He left his employment and returned to his village where he stayed for a while. He later went to Walvis Bay where he was employed in

---

[1] *S v Zinn* 1969 (2) SA 537 (A).

[2] *S v Jansen* 1975 (1) SA 425 (A) 427-428.

[3] *S v Tcoeib* 1991 NR 263 (HC); *S v Khumalo* 1973 (3) SA 697 (A) at 698B; *S v Sparks and Another* 1972 (3) SA 396 (A) at 410H, *S v Rabie* 1975 (4) SA 855 (A) at 861C – D; *S. v Narker and Another*, 1975 (1) SA 583 (AD) at 586D.

[4] *S v Van Wyk* 1993 NR 426 (SC).

construction from 2007 until 2012. He returned to his village when the construction contract expired.

[7] On 21 October 2014 he was convicted of one count of assault with the intent to do grievous bodily harm and two charges of assault by threat. All three convictions related to family members with whom he had a domestic relationship as defined in the Combatting of Domestic Violence Act 4 of 2003. The convictions were taken together for sentence and he was sentenced to three years imprisonment. I will return to these previous convictions later in the judgement.

[8] He was released in November 2015 and after a short stay at his village he returned to Walvis Bay where he was employed at a precast and paving business until he left for Otjiwarongo in 2017 where he assisted his bother in a meat selling business until May 2017 when he returned to his home village. He was building traditional grain storing holders for mahangu millet at the time of the incident and when he was arrested. He has been in custody awaiting trial from 7 August 2017 until today. He also contributed N$1000 to a N$16 000 payment by his family under customary law to compensate the deceased's family for the latter's death.

[9] Mr Aingura pointed out that the accused spent three years and almost nine months in custody before his conviction and sentence today and urged the Court to consider it when sentencing the accused. Ms Nghiyoonanye, on the other hand, submitted that it should not play an essential role as it will trivialize the offences. She argued that his incarceration was orchestrated by himself by committing these crimes. He realized that applying for bail with his recent previous convictions for violent crimes will make such an application an exercise in futility.

[10] Before sentencing, a court must consider any substantial time spent in custody awaiting trial. I do not believe that it is a mitigating factor per se that lessens the severity of the criminal act or the accused's culpability. However, a court tasked with imposing an appropriate sentence cannot ignore the time the accused spent in custody pending his conviction and sentence if such period is substantial. A court must accord sufficient weight to such time spent in custody and should consider it together with other relevant factors to arrive at an appropriate sentence. Taking it

into account does not mean simply deducting the time spent in custody from the intended sentence. [5]

[11] As January J and I said in *Hamana v S*[6] : 'It is a given that a criminal trial takes time to finalize. A lapse in time between the commission of a crime and the resultant trial's finalization is inevitable.' If an unsentenced accused must be kept in custody while the judicial system processes his or her case, even the most fundamental principle of fairness requires that any substantial time spent in custody should be considered in arriving at an appropriate sentence. To disregard it, results in an unbalanced approach to sentencing. It should not be seen as trivializing the offence itself. If the criminal justice system takes a significant time to process the case against an accused and he is kept in custody for that time basic fairness requires that such period should be to his credit. The accused in this case played no role in delaying his trial. He therefore cannot be held responsible for the length of his incarceration prior to his conviction and sentence.

[12] Although this principle can now be considered trite, we regularly see judgements on review and on appeal where substantial pre-trial incarceration was not considered, given appropriate weight, or applied when sentencing accused. [7]

[13] Ms Nghinoonyanye referred the court to several culpable homicide cases in which sentences ranged from seven to ten years imprisonment. She further quoted other instances in which the courts imposed sentences ranging between three- and six months imprisonment after convictions of assault by threat. Although I appreciate her endeavours and enthusiasm in this regard, the exercise of comparison is not always as fruitful as its proponents believe as cases and convictions differ substantially as to their facts and surrounding circumstances. Even if matters are remarkably similar, a small difference in the circumstances of a given case can make

---

[5] *S v Kauzuu* 2006 (1) NR 225 (HC) at 232E-G quoting numerous South African cases that set this principle. See also *S v Seas* 2018 (4) NR 1050 (HC) paragraph 27 and *S v Mbemukenga* (CC 10/2018) [2020] NAHCMD 262 (30 June 2020) paragraph 11.

[6] (HC-NLD-CRI-APP-CAL-2020/00012) [2020] NAHCNLD 156 (12 November 2020) in paragraph 100

[7] See amongst others *Benjamin v S* (HC-NLD-CRI-APP-CAL-2020/00057) [2021] NAHCNLD 12 (8 February 2021) paragraph 15 and 21.

a similar sentence an inappropriate one for a subsequent case. Her efforts are however appreciated and did assist the court.

[14] Although it will not be improper for a judicial officer to have regard to the sentences imposed upon another accused in respect of the same offence, or to sentences generally imposed in respect of offence like the offence dealt with by him it is important to remember what was stated in *S v Reddy* [8]as follows:

'Though uniformity of sentences, that is of sentences imposed upon accused persons in respect of the same offence, or in respect of similar offences or offences of a kindred nature, may be desirable, the desire to achieve such uniformity cannot be allowed to interfere with the free exercise of his discretion by a judicial officer in determining the appropriate sentence in a particular case in the light of the relevant facts in that case and the circumstances of the person charged.'

[15] Mr Aingura argued that the accused has shown remorse as he on the evidence tried to assist the deceased after striking him. I however do not consider this as an indication of remorse. It is rather indicative of a realization that he went too far by beating the deceased on the head.

[16] I must say that I cannot find that the accused has shown remorse for what he has done. Not to the extent of remorse alluded to by the Supreme Court in *S v Schiefer* [9] where it quoted what Flemming DJP stated in this respect in *S v Martin*[10]:

'For the purpose of sentence, there is a chasm between regret and remorse. The former has no necessary implication of anything more than simply being sorry that you have committed the deed, perhaps with no deeper roots than the current adverse consequences to yourself. Remorse connotes repentance, an inner sorrow inspired by another's plight or by a feeling of guilt, eg because of breaking the commands of the higher authority. There is often no factual basis for a finding that there is true remorse if the accused does not step out to say what is going on in his inner self.'

[17] It was explained as follows in *S v Matyityi* [11]:

---

[8] 1975 (3) SA 757 (A) at 759H-760B; See also *R v Karg* 1961 (1) SA 231 (A) at 236G-237A and *S. v Ivanisevic and Another*, 1967 (4) SA 572 (AD) at p 575

[9] 2017 (4) NR 1073 (SC) paragraph 26

[10] 1996 (2) SACR 378 (W) at 383G – H

'Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing 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.'

[18] Furthermore if I consider what the accused said in cross-examination about his previous convictions, he clearly struggles to accept responsibility for what he has done. That can be the only reason for him minimizing those offences as 'something they say I did' and by explaining his guilty plea to those charges as doing so after accepting the advice of another inmate. Unfortunately, rehabilitation only starts once an accused accepts responsibility for what he has done wrong.

[19] I gained the impression throughout the case that the accused resorts to veiled and direct threats of violence easily. He must now realize that this can easily escalate into violence and even the death of another as it did on the evening of 7 August 2017 at Onyaanya village. Society must be protected against such anti-social conduct and the accused must be prevented from doing this again. If he does not heed this warning, he will suffer the consequences. Hopefully, the sentence will force the accused in the right direction.

[20] Society expects that convicted persons be sentenced appropriately. Courts must protect society, and when called upon to do so the community should not be disappointed by the imposition of too lenient sentences for crimes that are serious. Lest the community take the law into their own hands, a situation we cannot afford to have. On the contrary, the accused and prospective offenders must realize that threatening and killing someone is forbidden and will attract the appropriate sentences.

[21] The death of another person is always serious. Especially when the death is the result of an assault like in the present case. This demands a substantial sentence of imprisonment. It is only after paying for his deeds through appropriate punishment, that an accused can be said to be reformed and accepted back into society. The court have decided to impose a sentence that will not only punish the

[11] 2011 (1) SACR 40 (SCA) ([2010] 2 All SA 424; [2010] ZASCA 127) para 13; See also S v Schiefer (supra) paragraph 27

accused but will also hang over the head after his release to hopefully prevent a reoccurrence of these offences.

[22] I believe that the following two paragraphs from *Shetu v The State,* [12] a judgement of Salionga J and I, are to be considered here as to the general principles contained therein:

'[26] Although I agree with these general views expressed, courts should keep in mind that each sentence must be individualized to ensure an appropriate sentence. A proper exercise of the sentencing discretion requires duly considering other possible penalties before arriving at the appropriate one. This sentencing process is not satisfied by rubberstamping varying sentences of direct imprisonment on offenders for crimes in abstract labelled serious. Direct imprisonment is not the only appropriate punishment for corrective and deterrent purposes in this case. Straight imprisonment, in most cases, is only justified if the accused needs to be removed from society to protect the public and the seriousness of the individual case warrants it.[13] Fully or partially suspended imprisonment sentences in many instances can also serve the offence's nature and the public's interests.[14]

[27] The alternatives are either a fine or a partially suspended sentence. A fine was not appropriate in the circumstances of this case. A suspended sentence or partially suspended sentence of imprisonment has two beneficial effects. It first prevents the offender from going to jail or going to jail for an excessively long period. Secondly, he has the suspended sentence or the suspended part thereof hanging over him. If he behaves himself, he will not serve the suspended sentence or a portion thereof. On the other hand, if he subsequently commits a similar offence, the Court can put the suspended sentence into operation.[15]'

---

[12] (HC-NLD-CRI-APP-CAL-2020/00057) [2021] NAHCNLD 34 (1 April 2021)

[13] *S v Scheepers* 1977 (2) SA 154 (A) at 159A-C applied in *S v Paulus* 2007 (1) NR 116 (HC) paragraph 3; *Gideon v S* (HC-NLD-CRI-APP-CAL-2019/00094) [2020] NAHCNLD 174 (14 December 2020) paragraph 10.

[14] *R v Persadh 1944* NPD 357 at 358; *S v Goroseb* 1990 NR 308 (HC) at 309H-I. *S v Paulus* 2007 (1) NR116 (HC) paragraph 3; *Gideon v S* (HC-NLD-CRI-APP-CAL-2019/00094) [2020] NAHCNLD 174 (14 December 2020) paragraph 10.

[15] *R v Persadh* 1944 NPD 357 at 358; S v Goroseb 1990 NR 308 (HC) at 309H-I. *S v Paulus* 2007 (1) NR 116 (HC) paragraph 3; *Gideon v S* (HC-NLD-CRI-APP-CAL-2019/00094) [2020] NAHCNLD 174 (14 December 2020) paragraph 11.

[23] Duly considering the personal circumstances of the accused, aforesaid mitigating factors, time spent in custody, and weighing same with the nature and seriousness of the offences in conjunction with the above-mentioned aggravating circumstances, I find that personal circumstances are outweighed by the severity of the crimes and the interests of society. The conclusion is, therefore, inescapable, that the accused deserves a reasonably lengthy period of imprisonment on culpable homicide and to a lesser period of imprisonment in respect of the two charges of assault by threat.

[24] Considering all the aforesaid factors and conclusions, I hold the view that the sentences set out hereunder meets the justice of this case. In the result the accused is sentenced as follows:

Count 2: Culpable Homicide – Twelve (12) years imprisonment of which three (3) years imprisonment is suspended for a period of five (5) years on condition the accused is not convicted of culpable homicide or assault with the intent to cause grievous bodily harm committed during the period of suspension.

Count 3 and Count 4: Two Counts of Assault by threat – The counts are taken together for purposes of sentence-Two (2) years imprisonment of which one (1) year imprisonment is suspended for a period of five (5) years on condition the accused is not convicted of assault by threat committed during the period of suspension.

_____

D F SMALL

ACTING JUDGE

APPEARANCES:

STATE:	Ms M. Nghinoonanye Of Office of the Prosecutor General, Oshakati
ACCUSED:	S.Aingura Aingura Attorneys, Oshakati