

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

SENTENCE

Case no: CC 9/2018

THE STATE

v

DOMINGO AN-OABEB

ACCUSED

Neutral citation: *S v An -Aobeb* (CC 9 /2018) [2021] NAHCNLD 53 (8 June 2021)

Coram: SALIONGA J

Heard: 17-18 May 2021

Delivered: 8 June 2021

Flynote: Criminal Procedure — Sentence — Factors taken into account — Murder committed in domestic relationship — Accused stabbed the ex-girlfriend 11 times — Aggravating factors in sentencing balanced with personal circumstances — The manner in which the crime was committed-aggravating — Calls for custodial sentence.

Summary: The accused was charged with the crime of murder read with the provisions of the Combating of Domestic Violence Act.¹ He killed the deceased by stabbing her with a knife 11 times whereby she succumbed to the injuries sustained.

¹ Act 4 of 2003

ORDER

1. Accused is sentenced to 32 years imprisonment.

SENTENCE

SALIONGA, J

[1] On 24 March 2021, accused was convicted of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. The proceedings have now reached the point where this court has to sentence the accused for his unlawful deeds.

[2] In doing that, I have to take your personal circumstances, the crime you are convicted of and the interests of society into account. Closely connected to the above are the objectives of punishment namely (i) the prevention of crime; (ii) deterrence or discouragement of the offender from re-offending and would be offenders from committing crimes; (iii) rehabilitation of the offender and (iv) retribution. Care should always be taken not to over emphasize one factor over another though it is sometimes unavoidable.

[3] The court in exercising its discretion is guided by a well-known principle enunciated in *S v Rabie*² where 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.’

Personal circumstances

[4] Accused testified under oath that he was 22 years old at the time of the commission of the offence and he is now 26 years old. He has been in custody for 4 years since his arrest and was never given bail. He is aware that he was convicted of

² 1975 (4) SA 855 (A) at 862 G-H

a very serious offence which was perpetrated against the mother of his children and that the family of the deceased lost a child and they will never get her back.

[5] He has apologized to the family of the deceased, the community and to the court. He regrets his actions and if he is given a chance to go back to the scene he would not have done anything to her. He would have walked away. He is asking the court to consider imposing a custodial sentence of ten years so that he will go back, continue with his life and take care of his children alternatively he is asking for a lenient sentence that enables him to attend programs in prison, so that he becomes a productive member of society after his release.

[6] In cross-examination accused maintained his innocence but stated that he is remorseful because something like that happened and the family lost a child. He persisted in saying that the deceased was holding and assaulting him. In his view he believed his actions were justified to stabbing the deceased 11 times.

[7] According to counsel at the age of 22, accused was still immature and that factor was further compounded by the combined effects of alcohol in his system at the time of the incident, he is a candidate for the court's mercy. That accused has no prior evidence of an inclination towards violence which is confirmed by the testimony of the two witnesses called in terms of section 25 of the Act. Therefore he submitted that while society may probably desire to see perpetrators of crime punished in a certain way, the courts have a duty to serve public interests³ and not to blindly follow public expectations. Counsel pleaded with the court to consider the suspended sentence which has the effect of meeting the objectives of sentencing which counsel for the state did not share the same views.

[8] It is quite surprising to see the types of crimes the youth in this country are nowadays charged with committed under circumstances not different from that committed by adults. Accused being 22 years accused was old enough to appreciate and accept his action. It is trite law that young offenders cannot always hide behind their youthfulness when they are guilty of committing serious crimes. The message should be clear to young people that they will not simply be excused by the courts on

³ *S v Hanse –Imalwa* (CC 05/2018) [2019] NAHCMD 260 (31 July 2019)

account of youthfulness and go scot-free but where justice will not otherwise be done, they will be held accountable and be punished accordingly for the pain and misery caused to others as a result of serious crimes committed by them.⁴

[9] A lot has been said about the accused's diminished responsibility due to the alcohol he took however the extent of his insobriety that day was not properly canvassed in determining the weight to be attached, if any. It is therefore insufficient for accused to merely state how much alcohol he consumed without evidence on the effect of alcohol he took.

[10] On the issue whether or not this court can regard an offence committed in a domestic relationship as an aggravating factor, I can only re-iterate what was stated in *S v Bohitile* 2007 (1) NR 137 (HC) to illustrate the point. In that case the court held that the prevalence of domestic violence and the compelling interest of society to combat it, evidenced by the legislation to that effect, required that domestic violence should be regarded as an aggravating factor when it came to imposing punishment. Sentences imposed in this context the court held, whilst taking into account the personal circumstances of the accused and the crime, should also take into account the important need of society to root out the evil of domestic violence and violence against women. In doing so, these sentences should reflect the determination of courts in Namibia to give effect to and protect the constitutional values of the inviolability of human dignity and equality between men and women. The court further held that the clear and unequivocal message which should resonate from the courts in Namibia was that crimes involving domestic violence would not be tolerated and that sentences would be appropriately severe.

[11] Counsel for the prosecution in submission cited various authority relating to sentencing offenders for violence against defenseless women. He argued that sight should not be lost that accused is found guilty of murder and society expects severe sentences for people who intentionally kill others. In light of the circumstances of this crime a sentence of 10 years would not only send out a wrong message into society, but also fail to achieve the general deterrence purpose of sentencing. Counsel

⁴ *S v K* (2011) 1 NR 1.

persuaded the Court (due to the seriousness of the offences) to sentence the accused to 35 years.

[12] Regarding remorse it was submitted that accused showed remorse for what he had done. Generally whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. After all before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of what motivated him 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. Accused in cross-examination maintained that he still is innocent. He justified the stabbing in that the deceased was holding and assaulting him. I am not satisfied that accused showed genuine remorse for what he had done neither during the proceedings nor in mitigation before sentence.

The crime and interest of society

[13] The crime of murder is and remains undoubtedly the most serious and prevalent offence. The deceased posed no threat as she was not armed. Accused used an Okapi knife to stab the deceased first on the left side of the chest, thereafter the deceased fell on her knees. The accused continued to stab her several times despite the request from Martin Ella Geises to stop stabbing the deceased. The Namibian constitution guarantees and protect the right to life for everyone including those who transgress the law. Accused showed no respect for the deceased's right to life. In this case the deceased lost her life and no matter which sentence this court may impose upon you, it will never bring the deceased back to life.

[14] As counsel for the defence correctly submitted that courts ought to differentiate between public expectation and public interest. Further that society will not always get what they want. Regardless of public expectations Courts do exist solely to dispense justice to all. The accused on that day travelled around, got money and went on a drinking spree before travelling back to Otavi. By the time he reached Otavi he had had taken several beers and a bottle of brandy. As he made his way home he passed by Aru's corner pub with intent to purchase a beer and it

was at that pub where he brutally stabbed the deceased to death. I do agree that there is discord as to how exactly the encounter unfolded due to different versions of the witnesses but it could be accepted that an argument preceded the killing. It is therefore against this background that the interest of an informed society presented with all facts and circumstances of this case will not condone what the accused had done, will not accept the imposition of a too lenient sentence which in this case 10 years' imprisonment but demand that those who commit heinous crimes must be punished severely.

Conclusion

[15] The court has taken into account the mitigating factors of this case as against the aggravating factors. In my view the offence of which accused has been convicted of deserves a sentence that has a retributive effect and which will send a clear and unequivocal message to society that such behaviour cannot be tolerated.

[16] Consequently:

1. Accused is sentenced to 32 years imprisonment.

J T SALIONGA
JUDGE

APPEARANCES:

FOR THE STATE:

Mr L Matota

Of Office of the Prosecutor-General, Oshakati

FOR THE ACCUSED:

Mr P Shipila

Directorate of Legal Aid, Oshakati