

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

SENTENCE

Case No.: CC 14/2019

In the matter between:

THE STATE

v

MUYEVU THIKUNDEKO JOHN

ACCUSED

Neutral citation: *S v John* (CC 14/2019) [2022] NAHCNLD 12 (22 February 2022)

Coram: SALIONGA J

Heard: 21 and 25 January 2022

Delivered: 22 February 2022

Flynote: Criminal Procedure – Sentence – Guilty plea – Factors to be taken account – Offences serious and prevalent in Namibia – Society expects Courts to protect the most vulnerable within the community – First offender – Less weight accorded to a plea of guilty – Evidence overwhelming – Assessed in light of circumstances of case and all other factors.

Summary: The accused, a 36 year old male was convicted in this court, of murder and assault by threat read with the provisions of the Combating of Domestic Violence Act 4 of 2003. He was also convicted of contravening section 1 of the Witchcraft Suppression Proclamation, 1993- Imputes to another the use of non-natural means in causing any disease in any person or property or in causing injury to any person or property or names or indicates another as a wizard or witch.

Accused admitted to have tied the deceased on the neck with a rope, pulled her out of the sleeping room and tied her tightly on the pole. The deceased died at the scene as a result of the lack of oxygen. He pleaded guilty and was convicted as charged. Accused opted not to testify in mitigation before sentence. Less weight was accorded to a plea of guilty as evidence was overwhelming and accused had no other choice. He is a first offender who has been in custody awaiting trial for 5 years. However the fact that accused took the law in his own hands and the offences were committed within a domestic relationship are aggravating factors warranting lengthy custodial sentence. The aggravating circumstances outweigh his personal circumstances.

ORDER

1. Count 1: Murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003: 30 (thirty) year's imprisonment of which 5 years imprisonment is suspended for 5 years on condition accused is not convicted of murder committed during the period of suspension.
2. Count 2: Contravening section 1 of the Witchcraft Suppression Proclamation, 1993- Imputes to another the use of non-natural means in causing any disease in any person or property or in causing injury to any person or property or names or indicates another as a wizard or witch : 2 (two) years imprisonment
3. Count 3: Assault by threat read with the provisions of the Combating of Domestic Violence Act 4 of 2003: 12 (twelve) month's imprisonment.

In terms of section 280 of the Criminal Procedure Act 51 of 1977 it is ordered that the sentence imposed on count three be served concurrently with the sentence on count one.

JUDGMENT

SALIONGA J

Introduction

[1] Accused before court was convicted following a plea of guilty tendered on a murder count read with the provisions of the Combating of Domestic Violence Act 4 of 2003, contravening section 1 of the Witchcraft Suppression Proclamation, 1993- Imputes to another the use of non-natural means in causing any disease in any person or property or in causing injury to any person or property or names or indicates another as a wizard or witch and on an assault by threat read with the provisions of the Combating of the Domestic Violence Act 4 of 2003.

[2] In amplification of his plea of guilty accused admitted to have killed the deceased by tying her with a rope around her throat and neck. He proceeded to tie the rope around a pole. He killed her because he was angry at her and knew his actions were wrong, intentional and punishable. On the second count accused agreed to have mentioned to the deceased and others that she is a witch and she bewitched his mother and his siblings who had already died. While on count 3 he did assault the complainants by threatening to beat each of them and admitted that his actions had caused each complainant to believe that he had the intent and means to forthwith carry out his threat to beat them. He regretted his actions. Accused is now before this court for sentencing.

[3] Ms Shigwedha represented the State while Mr Mukasa represented the accused.

[4] In terms of our law there are three factors that needs to be taken into account in the process of determining a suitable sentence, namely: (a) The personal circumstances of the accused; (b) The nature of the crime and (c) The interest of society.¹

[5] At the same time the sentence to be imposed has to satisfy the objectives of punishment which are: (i) the prevention of crime; (ii) deterrence of the offender from re-offending and would be offenders from committing crimes; (iii) rehabilitation of the

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

offender and (iv) retribution. A sentence to be considered should equally be blended with a measure of mercy.

[6] It is trite that although a balance should be maintained in assessing the aforesaid factors, there are situations where the court may emphasise one factor at the expense of the others for one reason or the other.

[7] Marovu Nahambo testified in terms of section 25 of the Combating of Domestic Violence Act 4 of 2003 that the deceased is her biological mother and an aunt to the accused. She was a pensioner who was receiving monthly pension. Prior to her death, she together with the accused stayed with the deceased in the same house. The deceased was the head of their household and was a bread winner. Now that the deceased is no more, she struggle to get assistance unless she goes to the riverside to do horticulture, fishing or weeds other people's mahangu in order to earn a living. She is not aware of any compensation paid nor did accused contribute anything to the funeral expenses. She will never forgive the accused and it is her wish that accused be kept in jail.

Personal circumstances

[8] The accused opted not to testify in mitigation before sentence. His personal circumstances were placed on record by his lawyer stating that accused is 36 years old and was 31 years at the time of the commission of the offence. He is married and a father of three kids aged 17, 7 and 5 years respectively. All the kids are schooling and are currently staying with their mothers. The accused was the sole bread winner for the family. He had other family obligation of taking care of his deceased sibling's children. He was self-employed and made a living by doing odd jobs. With the money he earned he was able to support these children.

The crime and interest of the public

[9] The deceased was an elderly person aged 86 years of age who was caring and supporting members of her family when necessary in buying them food. She was one of the most vulnerable and defenceless members of society. Accused went

in the deceased's room, tied her around the neck and pulled her out of the sleeping room and tied her tightly on a pole. She thereafter died due to suffocation / asphyxia.

[10] Indeed our society is currently experiencing high levels of violent crimes and it expects the courts to impose sentences that suitably match the gravity and prevalence of the offences committed. Although in all fairness the interest of society requires that offenders receive punishment which is neither too severe nor too lenient, the community will lose faith in the criminal justice if too lenient sentences are imposed. In the present case the accused's persistent and prolonged action of tying the deceased's neck, pulling her out of the sleeping room and then tying her tightly on a pole deserve condemnation in the strongest term. In this regard the interest of society should be protected as Silungwe J in *S v Sibitwani* Case no CC 24/2006 (HC) unreported judgement delivered on 14 March 2008 stated on page 5 at para 7 that;

'The interest of society is indeed a factor that plays a material role which requires not only serious consideration, but it must be jealously guarded. Our society is at mercy of unrepresented and unacceptable wave of cries of violence such as murder, homicide, robbery and rape, but it (society) is sick and tired of such crimes. A blatant lack of respect for the life of fellow human being has become rampant and is thus a matter of concern to society.'

Submissions by counsel

[11] Counsel for the State submitted that the offences accused is convicted of are serious warranting custodial sentences to be imposed. Counsel implored the court not to consider accused's plea explanation of acting out of anger as a mitigating factor suggesting that people should learn to control their anger whenever they are angered. Counsel argues that accused was faced with overwhelming evidence leaving him with no other choice but to face the consequences of his deeds by curtailing the proceedings. The offences in count 1 and 3 were committed in the presence of state eye witnesses. Thus his plea of guilty must not be seen as a sign of remorse and less weight should be attached to it. Counsel further submitted that for the aforesaid reason the court should not shy away from imposing harsher sentences as a way of protecting society against persons such as the accused person who do not respect the rights of fellow human beings. She therefore prayed that the accused be sentenced to 35 years imprisonment for murder; 2 years for

contravening section 1(a) of the Witchcraft Suppression Proclamation 27 of 1993 and 12 months for assault by threat.

[12] In the same vein counsel for the accused submitted that although taking the life of another person is serious and inexcusable the court must bear in mind that accused is a first offender at the age of 36 who pleaded guilty and did not waste the court's time. The accused has been in custody awaiting trial for 5 years and a further long incarceration will have an adverse effect on him when regard is had to the responsibilities of taking care his own and his deceased sibling's children. Counsel further submitted that although accused did not apologise to the deceased's family he extended his apology to the deceased's daughter when opportunity presented itself in court. The accused has shown huge degree of remorsefulness through his actions in court and does not pose any threat to the society. It is his submissions that when all above factors are properly considered, a term of 15 years imprisonment of which 5 years imprisonment is suspended will be an appropriate sentence.

Evaluation

[13] I have reminded myself that accused has pleaded guilty and has been in custody awaiting trial for 5 years. The accused is a first offender with no previous convictions until he was convicted in this matter. No doubt that the aforesaid factors count in his favour. He took the court into his confidence as to why he killed the deceased.

[14] Notwithstanding the aforesaid, the offences accused stands convicted of are prevalent and serious. Accused had sufficient time for a change of heart to retract from his actions of tying and pulling the deceased as well as of threatening people who wanted to salvage the deceased. Instead the accused went ahead with his actions causing the deceased to die by suffocation or lack of oxygen. One can only imagine the barbaric, inhumane and painful death the deceased had gone through/suffered.

[15] As if that was not enough, accused threatened to beat complainants in count 3 of the indictment if they were to come closer to him. The offences on count 1 and 3 were committed in full view of eye witnesses and the confession taken three days

after the incident marked Exhibit “P” says it all. It appears the state had overwhelming evidence and in that instance the accused had no other option or choice but to face the consequences of his deeds by pleading guilty. For that reason this court accords less weight on a guilty plea as mitigation before sentences.²

[16] Although accused apologised in court he failed to express his inner feelings towards the crime when he opted not to testify in mitigation before sentence. The aforesaid unprovoked attacks perpetrated against the deceased in the presence of family members are regrettable. The family members who were present at the scene could do nothing to save the life of the deceased as they were threatened with assault. Indeed accused was maintaining his and those of his deceased sibling’s children before his arrest but he ought to have thought of such a huge responsibility placed on him before he acted. This court finds at most aggravating that the deceased in this case was accused’s biological aunt, a vulnerable defenseless woman who was brutally and shockingly suffocated under the unconfirmed suspicion of witchcraft.

[17] I find the sentiments expressly in *S v Van Staden* (KS 21/2016) [2017] ZANCHC 21, resounding where the court states thereof that:

‘[14] Murder committed by a man on a woman should not be treated lightly. It becomes worse where the perpetrator, as in this instance, was the deceased’s partner, who had the duty and the responsibility to protect her and not to harm her. It is killings like the one committed by the accused which necessitate the imposition of sentence to serve not only as a deterrent but also to have a retributive effect. Violence against women is rife and the community expects the Courts to protect women against the commission of such crimes.’

Conclusion

[18] Considering the triad factors of sentencing and the circumstances surrounding the commission of these offences, I find no compelling circumstances to deviate from the normal sentences imposed in similar cases. I furthermore agree with counsel for

² The principle was applied in *S v Landau* 2000 (2) SACR 673 (WLD) & *S v Goliath* (CC 2/2021) [2021] NAHCNLD 01 (19 January 2021)

the state that it is high time that people should learn how to control their anger. The offences accused have been convicted of are serious and his personal circumstances are outweighed by the aggravating circumstances. The family of the deceased, people who witnessed the incident and society at large have a legitimate expectation that this court would exact retribution to send a clear message that violent crimes even out of anger are not tolerated.

[19] Consequently, the accused is sentenced to:

1. Count 1: Murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003: 30 (thirty) year's imprisonment of which 5 years imprisonment is suspended for 5 years on condition accused is not convicted of murder committed during the period of suspension.
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3. Count 3: Assault by threat read with the provisions of the Combating of Domestic Violence Act 4 of 2003: 12 (twelve) month's imprisonment.

In terms of section 280 of the Criminal Procedure Act 51 of 1977 it is ordered that the sentence imposed on count three be served concurrently with the sentence on count one.

J T SALIONGA

Judge

APPEARANCES

For the State

Ms. V Shigwedha

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For the Accused

Mr. G M Mukasa

Of Directorate of Legal Aid, Oshakati