



CASE NO.: CC 25/2007

SUMMARY

THE STATE v ALFRED SIMASIKU SEZUNI

MULLER, J

22 September 2008

- Criminal proceedings
- Charges:
 1. Murder
 2. Importation and/or possession of a machine gun, to wit an AK 47 from Zambia into Namibia (s 29(1)(a) of Act No 7 of 1996)
 3. Possession of ammunition without a licence (s 33 of Act No 7 of 1996).
- Accused plea guilty to all 3 charges not accepted in respect of charge 1 murder. Accused convicted on charges 2 and 3.
- Trial proceeded in respect of murder charge. Evidence consisted of oral evidence by State witnesses and accused, as well as a) record of s 119 proceedings (CPA) and b) two written statements – “confessions” by accused handed in by State without objection by defence;
- Evidence of State witness accepted and that of accused analysed, against statements made during the s 119 proceedings, with reference to S v Hubert Shikongo & 2 Others , Case No SA 3/1999, and 2 conflicting statements by accused;
- Accused found guilty of murder on basis of *dolus directus* on 28 July 2008;
- Sentence on 19 September 2008;
- Evidence of accused and 2 witnesses in mitigation considered;
- Evidence by wife of deceased, called by State in aggravation considered;

- Statements made by deceased, which would normally be hearsay, considered to establish the state of mind of accused. However, such evidence only to be accepted if accused is a credible witness. Accused not found to be a credible witness in respect of the what deceased said of did without corroborating evidence;
- Corroboration of accused in respect of what deceased said to him limited to one day, 28 February 2005 with corroboration by 2 other witnesses. Existence limited provocation accepted.
- Factors relevant of sentence and approach of Court confirmed of sentence discussed to imposing. (*S v Zinn* 1969 (2) SA 537 (A); *S v Rabie* 1975 (4) SA 855 (SA); *S v Tjiho* 1991 NR 361; *S v Victor Musweu* unreported judgment of 17 October 2007, Case No CC 01/2007).
- Elements of retribution, prevention or deterrence and reformation or rehabilitation discussed and confirmed;
- Not possible to strike a balance between the relevant factors. Such factors does not imply that it should carry equal weight. Personal circumstances of accused outweighed by other factors. *S v van Wyk* 1993 NR 426 (HC) at 448 D-E followed.
- Importation of AK 47 from Zambia for purpose to kill the deceased Sentence a custodial sentence to be imposed to run consecutively to sentence on murder conviction.
- Sentence imposed:
 - a) for murder – 26 years imprisonment
 - b) for s 29(1)(a) Act No 7 of 1996 conviction of AK 47 – 6 years imprisonment
 - c) for s 33 Act No 7 of 1996 conviction of ammunition – 1 year to run concurrently with sentence on second conviction.
 - d) accused declared unfit to possess a firearm for 5 years after completion of his sentences;
 - e) forfeiture to State of AK , ammunition and other exhibits relating to the AK 47.



CASE NO.: CC 25/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

**ALFRED SIMASIKU SEZUNI
ACCUSED**

CORAM: MULLER, J

Heard on: 16 September 2008

Delivered on: 19 September 2008

SENTENCE

MULLER, J.: [1] On 28 July 2008 the accused was convicted of murder on the basis of *dolus directus* on the first charge. Previously, on 03 June 2008 the accused had been convicted on charges 2 and 3, namely of contravening s 29(1)(a) and s 33 of the Arms and Ammunition Act, No 7 of 1996 by the unlawful importation of and/or possession of a machine gun, to wit an AK47 and the unlawful possession of ammunition, respectively.

[2] The case was postponed until 16 September 2008 for the purpose of sentence. Mr Karsten still represented the accused on the instructions of the Directorate of Legal Aid and Mr Shileka appeared for the State. The reason for this postponement was to afford the accused the opportunity to obtain the evidence of witnesses to testify in mitigation of sentence.

[3] Apart from the evidence of the accused himself, two other witnesses were called by the defence to testify in mitigation of sentence, namely Ms Mary Mabuku and Mr Eugene Sanduna.

[4] In his testimony the accused dealt with his personal circumstances, as well as the attitude of the deceased towards him since he lost a head of cattle, until the time when he shot the deceased. The accused also told the Court how he felt before the incident and thereafter. The accused's personal circumstances are the following:

- a) he is now 31 years old, 27 years at the time when the offence was committed;
- b) he is married and has two young children of a month and 3 months old, respectively. The children have different mothers;
- c) He used to maintain his own wife and child and since October 2004 he provided the mother of the other child with N\$150.00 per month.

His wife was not employed and the accused was the sole breadwinner;

- d) At the time he was employed as a farm labourer at Katima farm where the deceased was the foreman and he earned N\$400 per month with rations;
- e) He has a clean record;
- f) He feels very “bad” about what happened and concedes that he acted wrongly and must be punished for his deed. He accepts that he will receive a direct custodial sentence. He also feels “bad” about the loss that the deceased’s family suffered because of his deed; and
- g) He was already spent more than three years in custody since the shooting of the deceased.

[5] The accused testified that because of the deceased’s attitude towards him after the loss of the head of cattle, he did not feel “okay”. Without his salary he was in a difficult position to maintain his family. He testified that he approached Ms Mabuku, the labour inspector on 28 February 2005 and explained his problems to her, namely that the deceased refused to pay his salary. After Ms Mabuku managed to stop the vehicle of the deceased, the latter was confronted by Ms Mabuku. The deceased enquired why the accused was there and Ms Mabuku then continued with a discussion in respect of the accused’s complaint that he was not paid. The deceased replied that the accused did not work

properly and lost cattle. After a discussion in that regard, the deceased said that he **“will kill (the accused) and bury him on the tarmac”**. Ms Mabuku cautioned the deceased not to get angry, but the deceased repeated his threat to kill the accused. That made the accused to feel not **“okay”**. The deceased then drove off. During cross-examination the accused mentioned that the deceased also called him a **“baboon”** in the sense that he **“will just kill this baboon.”** Because of the attitude of the deceased and threats made by him, the accused and Ms Mabuku went to the charge office to lay a charge against the deceased. It is not exactly clear what the charge was. The accused, however, felt that because the police failed to follow up the complaint that evening, he had no option than to obtain the AK 47 to force the deceased to pay his money. This he did the next morning. The accused had problems to explain his previous statements to the magistrate, the first exonerating himself and blaming everything on another person (Shaft) and the second in which he related what occurred, but blamed it on the deceased because of the attitude of the deceased towards him. He also had problems to explain what he said in the s 119 proceedings in his statement, namely that he obtained the AK 47 on 25 February 2005 and in his statement of 05 March 2005 that he already obtained it in November 2004. The degrading remarks made by the deceased in calling him a **“baboon”** or **“kaffir”** are also not very clear. In his statement of 05 March 2005 the accused stated that already at the time when he lost the head of cattle the deceased threatened to kill him and he repeated this on at least three occasions. According to his statement of 05 March 2005 the accused’s complained about

“ill treatment and offending words said to me by Jack”, even before he went to fetch the AK 47 in Zambia. In his statement he did state that the deceased threatened to kill him and **“that he does not care about baboons.”** Nothing was said in this statement about **“kaffir.”** The accused further stated: **“Hearing this words that’s when I made up my mind to shoot him”**. In cross-examination the accused responded to a question of why did he murder the deceased, by saying that he was angry because the deceased did not want to pay him his money and called him a **“baboon”**. In his evidence in mitigation he did not mention that he was called a **“kaffir”**, which is regarded as a racially degrading word.

[6] The labour inspector, Ms Mary Mabuku told the Court that the accused approached her on 27 February 2005, but because she was not available he was asked to return the next morning, which he did. On 28 February 2005 he informed her about the deceased refusing to pay his salary. She drove with the accused to the deceased’s farm. The deceased, was found driving a vehicle. After attempting to stop the deceased, she eventually met him at Caprivi College of Education. When she got out of the car, she talked to the deceased about the accused’s salary. However, when the deceased saw the accused, he became angry and threatened to kill and bury the accused and then shoot himself. He repeated this and used words like **“kaffir, baboon and you black people are destroying my animals.”** The deceased then drove off and Ms Mabuku and the accused drove to the police station to lay a charge, mainly because of the

deceased's threat to kill the accused. The statement that she made at the time to the police was discussed with her in Court and it was pointed out words like "**baboon**" and "**kaffir**" do not appear therein. She admitted it, but said that although she did mention it, the police officer omitted it. In a later statement, made more than a year later, she apparently stated that these words were used.

[7] Eugene Sunduna testified that he was driving with the deceased on 28 February 2005 when they were stopped by Ms Mabuku and the accused. According to him Ms Mabuku discussed the complaint with the deceased, who was angry and aggressive. He testified that the deceased threatened to shoot the accused and bury him. He also testified that the relationship between the deceased and the workers was usually "**okay**". According to him the deceased used to get angry and swore at workers when they made mistakes, whereafter he calmed down, in particular after Mr Rocher, the owner of the farm, talked to him. In respect of the oppressive words, he only mentioned that the deceased said to Ms Mabuku that once the accused has left there he would "**kill the baboon.**" Eugene testified that he was paid the end of February 2005, but the accused not.

[8] The State called the wife of the deceased, Mrs Erasmus. She testified that she is currently employed at Otjiwarongo where the minor child, Jaydee, born of the marriage between her and the deceased on 25 May 2001, will start attending school next year. At the time she was employed in Katima Mulilo and lived with

her husband at Katima farm. Currently herself and the minor child are dependent on her salary. She testified that the deceased and the minor child had a very good relationship and his death is a loss to the minor child, who now has to grow up without a father. The child needs therapy because of his loss. She does not know the accused and was not aware of any salary or other dispute between the deceased and the accused. She accepts that the accused's family is also facing financial difficulties due to the maintenance that the accused used to provide to his dependents as breadwinner. She knew about the cattle that got lost. According to her, her husband was a **“soft guy”** and would give everything to his friends, even his life.

[9] In considering what an appropriate sentence for the accused should be, the Court considers the elements of retribution, prevention or deterrence, reformation or rehabilitation and attempts to incorporate a combination thereof in the sentence to be imposed. Furthermore, a balance of the circumstances relating to the accused, the crime(s) committed, and the interest of society, coupled with a blend of mercy, where appropriate, is the aim that the Court attempts to achieve when imposing a suitable sentence. (*S v Zinn* 1969(2) SA 537 (A); *S v Rabie* 1975 (4) SA 855 (A); *S v Tjiho* 1991 NR 361; *S v Victor Musweu*, Case No.: CC 01/2007, an unreported judgment delivered on 17 October 2007).

[10] The element of retribution should not be over-emphasised, but cannot be ignored. The offender should experience by the sentence imposed on him that he is punished. From the side of the offender, it has been said, that retribution amounts to the atonement for his crime through the punishment he receives. From the side of the community, it amounts to an “emphatic denunciation” of the offender and his crime and the infliction of pain to the degree he deserves. By serving his sentence it is regarded that his debt to society has been paid. (*du Toit – Straf in Suid Afrika* – 1st edition, page 108). If the punishment is too lenient the accused is not “hurt”, as the element of retribution had been described. *In S v Ndlovu* 1969 (2) SA 23 (R), Young J said:

“The object of punishment is to hurt him sufficiently to prevent him from committing a similar offence.”

The elements of prevention or deterrence touches on both the community and the accused. The accused has to be deterred from committing a similar offence again and members of society are made aware of the sentence imposed for this type of offence and cautioned to refrain from committing a similar offence. To summarise, the accused has to be prevented to repeat this type of offence and the sentence should deter others from committing such an offence.

Finally, the rehabilitation element should be considered, namely that the possibility exists that the accused may be rehabilitated in prison and become a useful citizen after his release. The weight of this element of course depends on

the human material, namely the accused himself. (*S v Victor Musweu*, supra, page 6-7).

[11] Mr Karsten referred to the accused's version of how badly he was treated by the deceased, namely that because he lost cattle, he was humiliated, had to do inferior work, was not paid and his personal belongings (including documents) were taken away, he was insulted and his life was threatened. As a result of this behaviour on the part of the deceased and despite the accused's efforts to resolve this dispute with the deceased by trying to involve the farm owner, the police, or even a labour inspector, did not produce any result, the accused had no other option than to obtain the AK 47 and force the deceased at gun point to pay him. This type of conduct by the deceased would normally have a mitigating effect by reducing the perpetrator's moral blameworthiness.

[12] What was said by a deceased person would normally constitute hearsay. It is trite that in order to show the state of mind of the person, such evidence may be admissible. However, the accused must be a credible witness in that regard.

[13] In this particular case the Court is confronted with the unique situation where the accused made a voluntary statement before magistrate on 02 March 2005 in which he totally exonerated himself and blamed everything on another person, Shaft. In that statement all that he now says involving the conduct of the deceased towards him, was in fact what Shaft experienced and which led Shaft

to take the law into his own hands and shoot the deceased. Three days later, on 05 March 2005 the accused made another voluntary statement before the same magistrate in which he then involved himself and incriminated himself. In that statement he related the alleged behaviour of the deceased towards him, which eventually led to his obtaining of the AK 47 and the shooting of the deceased. Furthermore, the accused made a statement before the magistrate in the s 119 proceedings in which he said he obtained the AK 47 already on 25 February 2005, three days before the incident in which the deceased allegedly threatened to kill him and calling him names in front of the labour inspector, which caused him to lay a charge at the charge office. In his own statement before the magistrate on 05 March 2005 the accused made the situation even worse. In that statement he said he already obtained the AK 47 in November 2004 in Zambia for the purpose of carrying out his plan to kill the deceased. These allegations were put to him, during his evidence in mitigation on sentence, but he could not recall what he said in either statement.

[14] The problem that faces the Court, is whether the accused can be regarded as a credible witness in respect of what occurred between him and the deceased, as well as the behaviour of the deceased towards him. Nobody else was present or called to testify what happened or what the deceased said or did until 28 February 2005. If the accused already obtained the AK 47 in order to shoot the deceased, the events of 28 February 2005 could not have been the cause for him to resort to such a drastic measure. Another factor to be

considered, is if he obtained the AK 47 to shoot the deceased **before the end of the month**, he did so at the time when he was not certain whether he would be paid or not. I have earlier herein referred the effect of this type of behaviour of the deceased or the accused's state of mind, but that is clearly dependent on whether the accused can be believed or not. Having regard to statements made by the accused, the time factor of obtaining the AK 47 and fact that he carried out his plan the very next day, I do believe that without corroboration by other plausible evidence that what the accused wants the Court to accept in mitigation, is the truth and influenced his state of mind.

[15] In the light of the testimony of Ms Mabuku and Eugene I shall accept that there was some provocation, but limited to the 28 February 2005. Although accused's retaliation was immensely out of proportion, I do accept that the conduct of the deceased on that day did to some extent influence the accused's state of mind. In this regard I accept that there was some disagreement between the deceased and the accused because of the loss of cattle and that he was not paid for February 2005, while his co-workers were. The accused himself acknowledges that he should not have acted in the way he did and that he has accepted that he will suffer the consequences of his deed. Unfortunately his family will also so suffer these consequences.

[16] What aggravates the situation is that the accused's action did not only deprive his own family of the maintenance and support relied on by them, but

caused the deceased's son to grow up without a father and his wife to carry the burden of supporting herself and her son from only her salary. The accused's actions are directly to blame for this. What is further aggravating, is the fact that the killing of the deceased, was not done on the spur of the moment. It was carefully planned and premeditated. He went to Zambia to obtain a machine gun, returned with it, oiled it, and hid it until he could use it. After shooting the deceased he hid it again and went to Choto where he spent time his girlfriend, not his wife. I have already referred to the personal circumstances of the accused, which I accept, as well as the fact that he did show remorse, that he already spent three years in custody and that there was some provocation, although limited to 28 February 2005. The community expects that a Court should pass a suitable sentence to deter not only the accused, but also members of the community. The accused committed a hideous and premeditated murder. The personal circumstances of the accused do not weigh up to the seriousness of the offence he has committed in the manner in which he had planned and executed his plan to commit it. It is not always possible to strike a balance between the factors of the well known triad, referred to before, namely the accused, society and the crime. In *S v van Wyk* 1993 NR 426(HC) Ackerman AJA dealt with the weight to be attached to these factors as follows on page 448D-E:

“As in many cases of sentencing the difficulty arises, not so much from the general principles applicable, but from the complicated task trying to harmonise and balance these principles and to apply them to the facts. The duty to harmonise and balance does not imply that equal weight or value must be given to the different factors. Situations can arise where it is

necessary (indeed it is often unavoidable) to emphasise one at the expense of the other.”

[17] I have considered the examples of sentences imposed by this Court in the past as suggested by the State, as well as the applicability thereof. However, such sentences are mere guidelines and each case should be determined on its own merits as far as sentencing is concerned. In the circumstances an appropriate sentence for the conviction of murder with *doulus directus*, after taking all the relevant factors as mentioned into consideration, should involve a long term of imprisonment.

[18] In respect of the accused's conviction on the second charge, namely the importation of a machine gun, to wit, an AK 47 from Zambia into Namibia and the unlawful possession thereof, the penalty of that offence is a period of imprisonment not exceeding 25 years. (*S v Likuwa* 1999 NR 151 (HC)). The accused imported the AK 47 into Namibia to kill the deceased. His version that he only wanted to use the AK 47 to force the deceased to pay him, is clearly untruthful. In his previous statements, referred to earlier, he stated he wanted to kill the deceased. That was the plan that he had. The fact that he disguised himself when he approached the deceased on the morning of 01 March 2005 negates any inference that he only wanted to confront the deceased to pay him his salary. Why would he then wear mask? In its judgment on the merits the Court accepted the testimony of the State witnesses that there was no discussion about payment of money before the shooting. The accused wanted to kill the

deceased and used the AK 47 that he imported for that purpose. Direct imprisonment on the second conviction is the only appropriate sentence, which should be served consecutively (after) the sentence imposed for murder.

[19] In respect of the third conviction, the State conceded that the sentence to be imposed for that conviction may run concurrently with the sentence for the second conviction. The penalty provision for this offence is one of a fine not exceeding N\$40 000.00 or imprisonment not exceeding 10 years, or both.

[20] In the result the accused is sentenced as follows:

- a) on the conviction of murder – **26 years imprisonment;**
- b) on the second conviction – **6 years imprisonment;**
- c) on the third conviction – **1 year imprisonment**, which sentence shall run concurrently with the sentence on the second conviction;
- d) the accused is declared unfit to possess a firearm for a period of 5 years, commencing from the date that the accused completes his sentence; and
- e) the AK 47 and Magazine (**exhibit 1**) and Ammunition (**exhibit 3**), spent cartridges (**exhibit 4**), the Rifle Butt and Bayonet (**exhibits 5 and 7**) handed in as Exhibits during the trial, are declared forfeited to the State.

MULLER, J

ON BEHALF OF THE STATE:

MR R.

SHILEKA

INSTRUCTED BY:

OFFICE OF THE PROSECUTOR-

GENERAL

ON BEHALF OF THE ACCUSED:

MR L. J.

KARSTEN

INSTRUCTED BY:

DIRECTORATE OF LEGAL

AID