CASE NO.: CC 42/2008

IN THE HIGH COURT OF NAMIBIA
HELD IN OSHAKATI

In the matter between:

THE STATE

and

SHITAATALA VEIKO

***CORAM*: LIEBENBERG, AJ**

Heard on: 06 April 2009
Delivered on: 09 April 2009

SENTENCE

LIEBENBERG, A.J.: [1] The accused stands convicted of the offence of culpable homicide in that he negligently caused the death of Wilbard Ndeshipanda Angala on the 1st of July 2007 by firing a single shot with his 9 mm pistol into the ground where after the bullet hit a corrugated iron; and from there it ricocheted, hitting the deceased - being beyond that point. What the

exact position of the deceased was the time he was struck by the bullet remains a mystery.

[2] In considering what an appropriate sentence for the accused would be, the Court takes into consideration those circumstances relating to the offender; the crime committed and the interests of society, coupled with a blend of mercy where appropriate. (*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)

[3] The Court at the same time must endeavour through the sentence it imposes to satisfy the objectives of punishment which are prevention, deterrence, reformation and retribution. As it was stated in *S v Van Wyk* 1993 NR 426 (HC) at 448 D-E, the difficulty in sentencing arises when the court has to harmonise and balance these principles and apply them to the facts; which does not imply that they are to be given equal weight as situations can arise where it becomes necessary to emphasise the one at the expense of the other. This obviously, will depend on the circumstances of each case.

[4] The accused testified in mitigation and his personal circumstances are the following: Accused is 48 years old, married and fathered three children whose ages are 20, 17 and 7 years respectively. The mother of his children is not the person to whom he is currently married and the two youngest children reside with their biological mother while the eldest is a student at UNAM in Oshakati. Accused makes financial contributions as per orders of court towards the maintenance of the three children in the amount of N$ 700 per month. Besides his own children the accused also maintains his stepson aged 10 years; his sister and her child, the latter staying at their parents' house.

Accused since 2002 is employed with the Namibian Defence Force (NDF) and is attached to the Presidential Guard, earning a salary of N$ 3600 per month. It was submitted that because of the accused's specialised duties, the Court should not declare the accused unfit to possess a firearm as this will have a direct impact on his employment with the NDF.

Accused is also a part time communal farmer and owns a total of 13 goats and 5 donkeys. The deceased resided at the accused's village home and amongst other duties, also took care of his live stock.

Accused is a first offender and told the Court that he felt very bad about what had happened and accepts responsibility for his misdeed; which is evident in his initial plea of guilty on the same charge for which he was eventually convicted. Because he was convicted it is custom that the family of the deceased will now claim damages from the accused. This was confirmed by the accused's wife who testified in mitigation. She is unemployed and has two children of her own, the oldest of school going age and she confirmed that the accused was maintaining this child as the biological father had passed away.

[5] The crime of culpable homicide is indeed very serious in that the death of a person, in this instance a boy aged 19 years, had been caused by the accused. I respectfully agree, when sentencing for culpable homicide, with the approach followed in *Nxumalo v The State,* 1982 (3) SA 856 (A) at 861 H – 862 B where Corbett JA (as he then was) said:

> *"It seems to me that in determining an appropriate sentence in such cases the basic criterion to which the Court must have regard is the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act. Relevant to such culpability or blameworthiness would be the extent of the accused's deviation from the norms of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence. At the same time the actual consequences of the accused's negligence cannot be disregarded. If they have been serious and particularly if the accused's negligence has resulted in serious injury to others or loss of life, such consequences will almost inevitably constitute an aggravating factor, warranting a more severe sentence than might otherwise have been imposed.*
>
> *It is here that the deterrent purpose in sentencing comes to the fore. Nevertheless, this factor, though relevant and important, should not be over-emphasised or be allowed to obscure the true nature and extent of the accused's culpability. As always in cases of sentencing, where different and*

> *sometimes warring factors come into play, it is necessary to strike a balance which will do justice to both the accused himself and the interests of society."*

I will adopt this approach when considering the present facts.

[6] Accused testified that he was trained in the use of firearms years back and being a member of the Namibian Defence Force he handles firearms on a daily basis, albeit not being the same weapon he had used in the commission of this crime. It then seems reasonable to accept that the accused is not only familiar with the use of firearms, but also with the standard safety measures applicable to the handling of firearms. In view thereof the accused materially deviated from the norms of reasonable conduct to be expected from a person with his training and experience, by negligently discharging a firearm in circumstances where other persons were present. As regards the foreseeability of the consequences of his negligent conduct the Court is satisfied that the accused in those circumstances simply did not foresee that he would fatally wound another, least of all, that it would be from a ricocheting bullet; hence his surprise when his wife reported that he had shot a child. This, in my view, reduces the degree of culpability or blameworthiness on the part of the accused substantially. However, the Court should not lose sight of the actual consequences of the accused's negligent act where a young man aged 19 years, who almost had his whole life still lying ahead of him, had it taken away from him without him contributing thereto in any way.

[7] The seriousness of the crime dictates that the accused be punished for the wrong he has done and although the element of retribution should not be over-emphasised, it can neither be ignored. In *S v Ndlovu* 1969 (2) SA 23 (R) it was said:

> *"The object of punishment is to hurt him sufficiently to prevent him from committing a similar offence."*

From the side of the offender retribution amounts to the atonement for the crime he has committed while 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. What the *"degree of pain"* should be will obviously depend on the circumstances of each case and it need not necessarily be in the form of a custodial sentence; just as long as he pays his dues to society.

[8] Although this case is distinguishable from the run-of-the-mill murder and culpable homicide cases dealt with in our courts on a daily basis, it remains necessary to impose a sentence that will deter the accused from again committing a similar offence; while at the same time members of society are made aware of the sentence imposed for this type of crime and are thereby deterred.

[9] Ms. Ndalulilwa, appearing for the accused, submitted that the circumstances of this case is such that the Court should impose a fine while Mr. Shileka for the State, submitted that the seriousness of the offence dictates that a custodial sentence be imposed. The seriousness of the crime indeed weighs heavily against the accused but the circumstances in which the crime was committed cannot be ignored and as was stated earlier, it substantially diminishes the moral blameworthiness of the accused. Punishments in the form of lengthy custodial sentences were imposed by our courts in the past where it was appropriate to do so, but fines were equally imposed in many instances where the circumstances did not require the offender to be sent to gaol. In the latter instances the courts were satisfied that the objectives of punishment could be achieved without having to resort to the imposition of custodial sentences, while at the same time, satisfying the interests of justice and society.

[10] In my view the present case is such an instance where deterrence as an objective of punishment, will sufficiently come to the fore by imposing a stiff fine on the accused instead of sending him to prison. I do not find it to be in the interest of society to send a productive citizen, from whom a number of people are dependent to make a living, to prison, where the circumstances surrounding the commission of the crime, although serious, are mitigating and

do not require such action. The facts of this case simply do not justify the imposition of a custodial sentence.

[11] Accused testified on his financial means and other than his bail money of N$ 2000 he has nothing more to pay for a fine. He therefore urged the Court to defer any fine to be imposed on him. Having decided to afford the accused the opportunity to pay a fine, thereby escaping a custodial sentence, it seems meaningless not to allow him time to find sufficient funds to pay the court fine. There should however be limitations thereto, otherwise the sentence will not sufficiently punish the accused for the wrong he has done.

[12] Regarding the State's application to have the accused declared unfit to possess a firearm under section 10 (6) of the Arms and Ammunition Act, Act 7 of 1996 the Court after due consideration, has come to the conclusion that given the personal circumstances of the accused, as well as the circumstances in which the crime was committed, that the Court should exercise its discretion and decline making an order declaring the accused unfit to possess a firearm under the act.

[13] In the result, the accused is sentenced as follows:

1. N$ 15 000 or 3 years imprisonment plus 3 years imprisonment, which imprisonment is suspended for 5 years on condition that the accused is not convicted of murder or culpable homicide, involving an assault, committed during the period of suspension.
2. Payment of the fine is deferred as follows:
   i) N$ 2000 to be paid on or before 15 April 2009;
   ii) The balance of N$ 13 000 to be paid on or before 01 June 2009.
3. Accused to report himself today to the Registrar (Oshakati) and submit his personal particulars.

LIEBENBERG, A.J.

ON BEHALF OF THE STATE Adv. R. Shileka

Instructed by: Office of the Prosecutor-General

ON BEHALF OF DEFENCE Ms. E.T. Ndalulilwa

Instructed by: Lorentz Angula Inc.