REPUBLIC OF NAMIBIA

CASE NO. CC11/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

LAZARUS NATANGWE SHADUKA **Accused**

CORAM: **VAN NIEKERK, J**

Heard: 25 August 2010

Delivered: 30 August 2010

SENTENCE

VAN NIEKERK, J: [1] On 23 August 2010 the accused was convicted of culpable homicide after he was initially charged with murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003. The deceased was his wife, Selma Mirjam Shaimemanya. The Court also convicted the accused of a second count of attempting to defeat or obstruct

the course of justice.

[2] The State called the deceased's father, Mr Leopold Shaimemanya to testify with regard to sentence. He informed the court that his daughter was born in 1975 and that she would have been 35 years old this year. At the time of her death on 13 July 2008, she was employed as the personal assistant to the Minister of Defence. She and the accused are the parents of a little girl now aged about three years old. The latter has been living with the deceased's maternal grandmother since the incident. The deceased's family intends applying for her custody now that the accused has been convicted, as the family does not wish her to grow up with the person who was responsible for her mother's death.

[3] Mr Shaimemanya informed the Court that the deceased was his second child and that she left behind several siblings. He described the deceased in the following words:

> "I loved my daughter very much and we had a very close father-daughter relationship. She could confide in me about anything. Selma was always ready with a smile and a joke. One can never be angry if she was around. She could brighten up any day – and any situation. She was the life of our home and our family. Even after I gave her away in marriage she would never miss a family event. Her siblings adored her and she was their unifying force, the cement that held them together. I have a large close-knit family and Selma was the family pillar of joy."

[4] He also informed the Court about the profound impact that her death and the surrounding circumstances have had on him and the family. He described himself as traumatized; that he has suffered sleepless nights; that he has lost a lot of weight; and that his wife is experiencing migraines after

the tragedy. What has deepened the emotional and psychological scars is that the family, and especially the father, have been searching for answers about how and why the deceased was killed in an attempt to reach some closure. The Court accepts unreservedly that the hurt and suffering caused by the tragic events must have been immeasurable.

[5] In his testimony Mr Shaimemanya expressed in a proper manner how difficult it is for him to accept the Court's finding that the deceased was killed unintentionally. The main reason for this is, according to him, that the deceased had made several reports to him that she feared for her life because the accused had allegedly made constant death threats against her. I have already ruled that his testimony on the contents of these reports is inadmissible because it is hearsay if it is presented to prove the truth of the contents of the reports. However, I wish to explain that it often happens that those close to the victim or the accused have much more information than the Court about events which may explain the causes, motivation and reasons for the victim's death or the accused's actions. This information is not filtered by the rules of the law of evidence. The Court is bound by these rules to allow only certain information as evidence upon which it may rely for its findings.

[6] In this case I may and I do accept the evidence that the deceased was assaulted by the accused at least on one occasion in their bedroom. This occurred while Ms Mbangula could hear them arguing and struggling inside. When deceased emerged from the room, she was crying and had injuries to her eye for which she received stitches. These injuries were also seen by the

deceased's father. However, as I indicated in general in the main judgment, even if I accept this evidence and even if I were to accept that Ms Mbangula overheard accused threatening to kill the deceased on previous occasions, this does not necessarily mean that on the day in question the accused assaulted the deceased with the firearm or pulled the trigger with intention to kill. Of course the evidence of previous assaults and threats provide suspicion and an additional reason for the police, the prosecution and the Court to have approached the matter on the basis that it may have been a case of murder, but at the end of the day it remains a matter of applying the rules of inferential reasoning and the rules of evidence.

[7] Be that as it may, I may take cognisance of the fact that all was not well in the marriage of the Shaduka couple; that there had been problems occasioned by his use of drugs; that the deceased laid a complaint of assault by threat with which she did not proceed; that the accused made allegations of spying against the deceased; and that there had been instances of abuse and violence by the accused toward the deceased. On the other hand, there are also indications that the couple were trying to make the relationship work and that the accused was willing to change for the better. The relevance of these aspects at the sentencing stage is merely to indicate the nature of the relationship as part of the background against which to consider the sentence.

[8] The accused testified in mitigation of sentence. He is 37 years old and a first offender. Apart from the child from his marriage with the deceased, he has another daughter, aged 12. She visits him in custody twice per

month. She has difficulty coming to terms with his current situation and is receiving psychological treatment. He has not seen the baby since the day of the incident. There are also 6 orphaned children (5 of his late sister and 1 of his late brother) who are dependent on the accused. He has instructed his relatives who are running his gambling house while he has been in custody to see to it that the children are maintained from income derived from the business. His father passed away last December, but he supports his elderly mother who is still alive.

[9] The accused is well educated. He holds a Bachelors degree in Economics from the University of Namibia and a Masters in Financial Economics from the University of London. He has set up businesses in building construction and trade and investment. Since his arrest and incarceration in this matter, the businesses have suffered and are not operating any longer. He is also a shareholder in a life insurance business which appears still to be functioning. His main source of income at the moment is Pub Ketu, the gambling house which is being run by his relatives on his behalf. However, this business suffers because he is not there to give his full input. He has an investment of N$500 000 in a 32 day call account and holds several Government bonds, which have been pledged. While in custody he has been experiencing financial problems and at least one default judgment has been taken, but it appears that all debts have been satisfied, either from sale in execution or from private sales of his assets. He is financing the costs of his legal defence in this matter.

[10] The accused suffers from malignant hypertension, which is not

responding to the current medical treatment. He needs to consult a specialist, but cannot finance the costs involved at the moment.

[11] When asked how he felt about the deceased's death during evidence in chief, the accused stated that he experiences the deceased's death as a huge loss; that he is feeling lonely; and that he has not yet healed emotionally. Although he sent money to pay for her funeral, he does not know where deceased is buried and would like to be released so that he could begin to deal with the events on an emotional level. I was struck by the fact that the accused only spoke about his feelings and how he was suffering. He did not offer any apology or express any remorse about his actions or their devastating effect. This was pointed out by State counsel during cross examination. Accused responded that he is waiting for the right time to apologize, which is at the end of the case and that he intends doing so. When he had already been excused from the witness box, the accused asked for permission to speak, whereupon he apologized to the deceased's family and the community. He also asked for their forgiveness. I think by this time it must have been pretty obvious to a man as intelligent as the accused that the fact that he had not yet apologized could count against him.

[12] Mr Shaimemanya also testified about the fact that the accused never since the incident offered any explanation or apology to him or the deceased's mother. During cross examination it was suggested to the witness that this omission is to be explained by the fact that there was no opportunity for the accused to have done so because he was incarcerated since the date of the deceased's death and because the parents-in-law never

visited the accused. Accused repeated this under oath, but added that when he sent the money for the funeral he also sent a message with his relatives that the death was an accident.

[13] I am not at all impressed with the accused's explanation. Although it may not be as easy as being outside, the fact that the accused was in custody could not have been a real obstacle to him communicating with his parents-in-law during the past two years. If he really wanted to do it, he would have and could have communicated with them. Apart from obvious means of communication like a letter, he had ample opportunity to send messages with relatives and lawyers at least to his father-in-law, who lives in Windhoek. I agree with Mr Shaimemanya that it was clearly the responsibility of the accused to have approached the deceased's family first. He should not have waited for the parents to approach him, as he appears to suggest. Apart from factors like tradition and the family relationship which place the onus on him, he was the person who handled the gun when the shot was fired and he was the only witness to the events. Accused testified that he wanted to explain face to face. In my view there was no reason why the accused could not have requested a meeting with them while he was in custody. Adopting what was stated with regard to remorse in *S v Seegers* 1970 (2) SA 506 (A), it has often been said in our courts that remorse, to have meaning and effect, should be genuine and sincere. The failure of the accused to explain or apologize to the deceased's parents, coupled with his very belated public apology, does place a question mark over his professed remorse.

[14] In deciding what an appropriate sentence should be, I must make a balanced assessment of the accused, the crime committed and the interests of society. As far as the crime of culpable homicide is concerned, it has been held by this Court in *S v Bohitile* 2007 (1) NR 137 (HC) (at para. [16]) that the proper approach with regard to sentence is that as set out by CORBETT, JA (as he then was) in *S v Nxumalo* 1982 (3) SA 856 (A) at 861H - 862B in the following way:

> "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."

[15] The same approach was followed in the case of *S v Simon* 2007 (2) NR 500 (HC) where the Court said:

> "[77] In our opinion, the extent of the tragedy resulting from the negligence of the appellant should not be allowed to obscure the true nature of the

crime with which he has been charged, culpable homicide. .....

[84] It appears to us that in the present case in determining an appropriate sentence the court must have regard to the degree of culpability or blameworthiness exhibited by the appellant in committing the 'negligent act' for which he was convicted. And, in doing so, the court ought to take into account the appellant's unreasonable conduct in the circumstances, foreseeability of the consequences of his negligence and the consequences of his negligent act. (*S v Nxumalo* (*supra* at 861G - H).) Indeed, the community expects that a serious offence will be punished, but also expects at the same time that mitigating circumstances must be taken into account, and the accused person's particular position deserves thorough consideration: that is, sentencing according to the demands of our time. (*S v Van Rooyen and Another* 1992 NR 165 (HC) at 188E - F, approving *S v Holder* 1979 (2) SA 70 (A) at 72.)"

[16] Mr Strydom referred me to the case of *S v Rademeyer* 1981 (1) SA 1205 (O) in which a regional magistrate's sentence of 2000 hours periodical imprisonment was confirmed on appeal. In this case the accused was a corporal in the army who had fired two shots at a tree trunk about 30-40 metres away during shooting exercises. After he fired the first shot, he observed two persons moving out from behind the tree trunk. He nevertheless fired a second shot at the tree which penetrated the truck and struck the deceased, a service man standing behind the tree, in the head and killed him. The regional magistrate found, *inter alia*. that the accused should have foreseen after the first shot that there may have been other persons behind the tree; that he was handling a powerful and deadly firearm, an R1 rifle, which he had been trained to use; that it was part of his duties to train other servicemen in the handling of this particular firearm;

and that he was showing off by playing the fool with the service men in a dangerous manner by firing shots to give them a fright. As a result he found him guilty of culpable homicide based on gross negligence. On appeal the court confirmed the conviction and the sentence and held (at 1211A) that the interests of the community required that all persons in the army, and particularly by officers in the army, should display a large measure of caution in the handling of firearms: where such caution is not displayed and a serviceman's death is caused by negligence, the interests of the community require that heavy sentences should be imposed in order to deter others from the commission of similar offences. In this case the magistrate found that effective imprisonment was appropriate, but that a continuous period of imprisonment would cause too much hardship, *inter alia,* the loss of the accused's employment, and therefore imposed periodical imprisonment.

[17] Counsel submitted that in the matter before me the circumstances were less serious because the accused was not similarly employed as Rademeyer was and because he was not specially trained or employed in the use of firearms. Yet, counsel pointed out, in the *Rademeyer* case the appellant was not sent to prison for a continuous period of imprisonment. He submitted that effective imprisonment is not appropriate on the facts of the present case, more so because the accused has already spent two years in custody awaiting trial. He echoed the accused's testimony that further effective imprisonment would not serve a purpose. The accused asked that he be given a suspended sentence, or a fine, or a sentence which requires of

him to perform community service. No specific suggestions of the kind of community service were made in an effort to assist the Court and I do not intend to impose this kind of sentence.

[18] Mrs *Wantenaar*, on the other hand, urged me to find that the accused was in fact reckless or grossly negligent in his handling of the firearm, and that he should, on that basis be sentenced to a further period of effective imprisonment. I found in the main judgment that the deceased did not fall back onto the firearm. In fact, accepting that the deceased was not knowledgeable about the handling of firearms and bearing in mind that she had previously taken steps for the weapon to be removed from their home and held in police custody, I have doubt that she would have played with the firearm at all, let alone cocked it. However, the fact that I have doubt about this aspect is not enough. I must be satisfied beyond a reasonable doubt that she did not handle the firearm and that accused's evidence must be rejected as false beyond a reasonable doubt. On the available evidence this is not the only reasonable conclusion I can reach. In the absence of other relevant and credible evidence and for the reasons given in the main judgment, I must rely on the contents of the warning statement. According to this, the shot went off when the accused was standing up while the cocked firearm was in his hand. At that stage he held the firearm in hard contact with the deceased's body while she was most probably in a seated position. The fact that he thought that the shot had gone off into the floor tends to confirm that she was seated while he was getting up. He did not activate the safety pin, although he could have done so at the flick of his

right thumb. The other fingers of his right hand must have been close to or on the trigger. He was fully aware, as he had admonished her about this aspect moments before, that the handling of a cocked firearm is dangerous. Albeit that she, according to him, did not know how to handle firearms, he should have realized the most precarious position in which she was when he got up from the couch while holding the firearm facing her from behind and at some stage pressing hard against her body. He could easily have pointed the firearm away from her in a way which did not pose any danger to himself or the baby and/or put on the safety pin. I think that in the circumstances and without the accused having given an acceptable explanation, the conclusion must be that he acted with gross negligence.

[19] It is accepted that the accused in this case carried the pistol on his person that day with the legitimate purpose to protect himself and his property. Nevertheless, the interests of society require that persons who handle dangerous weapons such as firearms should do so with the great care, especially where they are handled in the confines of a home where there are other persons in close proximity. Where a person does not do so with the requisite degree of care required, and a person is injured or killed as a result, a serious crime is committed. Where the degree of negligence is gross, the crime is obviously more serious. As was pointed out in the *Bohitile* case, the statement made in the *Nxumalo* case quoted above was made in the context of culpable homicide caused by negligent driving. In *Bohitile's* case SMUTS AJ continued to say:

> "As is stressed in the work Sentencing by DP van der Merwe (1991) at 7-4,

> culpable homicide caused by an assault as opposed to being caused by negligent driving is correctly generally treated with a heavier hand. There are clearly sound reasons for doing so."

[20] In my view culpable homicide caused by assault should generally also be treated with a heavier hand than culpable homicide caused by the negligent handling of a firearm where no assault is involved. I also think that a distinction should be made between cases where a shot is deliberately fired causing the death of a person in circumstances of negligence (as in e.g. the *Rademeyer* case), and cases where the shot itself is negligently or inadvertently triggered.

[21] In this case there is no evidence of an assault or a deliberate firing of the shot. While the grossly negligent handling of the firearm in this case calls for a deterrent sentence, the question arises whether this aim of punishment can only be achieved by the imposition of effective imprisonment in the circumstances of this case. I have given anxious consideration to this matter. Although I expressed some doubt about the accused's remorse, I must take into consideration that he tried to save the life of the deceased and was clearly emotionally distraught because of the incident and more so when he realized that she had died. Although he initially sought to deflect the attention from him by creating the impression that she or someone else had shot her, he made a statement implicating himself in her death the very next day. He is a person who seems to be able to make a useful contribution to society and especially as a business man, in the economic affairs of the country. Bearing in mind that he is a first

offender who has already been in custody for two years and that it is not unlikely that he has indeed learned a lesson as he has stated, I am not persuaded that he must be ordered to serve a further period of imprisonment. In my view a stiff fine should serve the purposes of sentence in this matter, which is mainly deterrence, but also to afford the accused a chance to mend his ways.

[21] As far as the second count is concerned I bear in mind that the conviction is for attempt and that his conduct of lying at the hospital and the attempt to get rid of the live rounds did not have any lasting effect on the course of justice. I also bear in mind that this offence was committed soon after the shooting occurred in an attempt to shift the attention from his own involvement.

[22] By committing the offence of culpable homicide by using a firearm, the accused is in terms of section 10((6)(a) of the Arms and Ammunition Act, 7 of 1996, deemed to have been declared unfit to possess a firearm unless the Court determines otherwise. The Court is in terms of section 10(7) of the Act enjoined to inform the accused of the relevant provisions and to afford him the opportunity to advance reasons and present evidence why he should not be deemed to be declared unfit to possess a firearm for a period of not less than two years as may be fixed by the Court in terms of section 10(8) of the Act. This was done and the accused has indicated that he abides the decision of the Court. I have decided to declare him unfit to possess a firearm for a period of 10 years.

[23] I also declare exhibits 1, 2, 3, 4, 5, 6 and 7 forfeited to the State as

requested by the prosecution.

[24] The sentence which I have decided to impose after a consideration of all the relevant circumstances in this case is as follows:

Count 1: A fine of N$25 000 (Twenty-Five Thousand Namibia Dollars) or 1 (one) year imprisonment.

Count 2: A fine of N$2000 (Two Thousand Namibia Dollars) or 2 (two) months imprisonment.

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VAN NIEKERK, J

Appearance for the parties:

For the State: Mrs B Wantenaar

Office of the Prosecutor-General

For the accused: Mr A Strydom

Instr by Hennie Barnard & Partners