



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

Case No: CC 16/2016

THE STATE

and

ISRAEL KAPEPU

Neutral citation: *S v Kapepu* (CC 16/2016) [2017] NAHCMD 153 (6 June 2017)

Coram: SHIVUTE J

Heard: 16 May 2017

Delivered: 6 June 2017

Flynote: Criminal Procedure- Murder – Sentencing – Accused pleading guilty to murder with *dolus eventualis* – Lacking direct intent should not be automatically regarded as a mitigating factor – Each case to be treated on its own merits – In the present case accused committing domestic violence crime – Deceased not only assaulted with an axe once but thrice on the head – It can hardly be disputed that deceased died a cruel and painful death – Accused’s case with more aggravating factors than mitigating factors.

ORDER

In the result the accused is sentenced to 28 years' imprisonment.

SENTENCE

SHIVUTE, J

[1] The accused pleaded guilty to murder with dolus eventualis which the State accepted and he was convicted accordingly.

[2] In amplification of his plea, the accused explained that on the fateful day he had consumed intoxicating liquor with a few friends together with the deceased. They decided to go back home by midday to take a rest. After resting, the deceased had a bath and she wanted to go back to the drinking place. A heated argument ensued between the accused and the deceased. During verbal exchange, the deceased insulted the accused and the accused became enraged with anger and decided to discipline the deceased with a sjambok. He searched for the sjambok but could not find it. Instead, he took an axe and ran towards the deceased.

[3] The deceased ran to the bedroom and appeared to be picking up an object. The accused hit the deceased with the back side of the axe thrice on the head. The deceased fell and bled profusely. She died from loss of blood due to injuries caused. Although the accused said he took intoxicating liquor, this did not have effect on his mental culpability and takes full responsibility for the deceased's death.

[4] The court having convicted the accused, it is now its responsibility to sentence him. The accused's personal circumstances were placed before court by his counsel from the Bar. He is 44 years old and was raised by a single mother. His mother is now 85 years old. The accused's level of education is grade 5. However, he attended a

vocational course in welding. He met the deceased during 2011 and they had been dating for about 4 years before the fateful day. They have a three year old son. Apart from their biological son, the accused and the deceased had adopted a child who is now 7 years old. The children are now living with the deceased's mother. The accused person was the breadwinner at the time of the incident. He had apologized to the deceased's family, especially the deceased's mother and he is of the opinion that the family had accepted his apology and they had forgiven him. The deceased's mother assured him that if he wants to see his children, arrangements would be made to see them. Immediately after the accused killed the deceased, he reported himself to the neighbors and thereafter to the police. He cooperated with the police. The accused is a first offender who had spent about 15 months in custody awaiting the finalisation of his trial. His counsel prayed for a lenient sentence and suggested that the accused should be sentenced to 28 years imprisonment of which a portion should be suspended on usual conditions. He also referred this court to several authorities regarding sentencing, which I have considered.

[5] On the other hand, counsel for the State called the deceased's sister to testify in respect of sentence. The witness, Ms Garises, testified that the deceased is survived by three children. Two children were from a previous relationship and one child was fathered by the accused. The children are aged 15, 14 and 3 years respectively. These children are now staying with relatives. The accused's family assisted financially during the funeral. She further testified that the deceased was a very kind person, jovial, energetic and hardworking. The deceased's death had affected her emotionally. It was again her evidence that the deceased and the accused had a good relationship and they appeared not to have problems and she could not understand what went wrong.

[6] Counsel for the State argued that the accused was convicted of a heinous crime that was committed in respect of his girlfriend. He committed a domestic violence act which is an aggravating factor. The offence committed is serious and the accused assaulted the deceased on the head which is a vulnerable part of the body. The crime committed by the accused did not only have a serious impact on the deceased but to the orphaned children as well. Counsel further argued that the accused's actions

should be met with a substantial term of imprisonment. This court was referred to several authorities with regard to sentencing to which I have had regard.

[7] I will be guided by the triad of sentencing when imposing a sentence namely: the personal circumstances of the offender, the crime and the interests of society. The offence committed is serious and prevalent. It can hardly be disputed that the deceased died a cruel and painful death at the hands of the so called lover. The deceased was assaulted thrice with the back of the axe on her head which is a vulnerable part of the body. The deceased ran to the room where she was supposed to be safe and the accused followed her and assaulted her until she bled to death.

[8] Although the accused is a first offender who pleaded guilty, factors which are in his favour, this case has more aggravating factors than mitigating factors. As noted above, counsel for the defence submitted that the accused had shown remorse. However, the accused did not take this court into his confidence to testify under oath and show how remorseful he was. Therefore, this court is unable to determine the genuineness of the contrition alleged to have been shown by the accused. Cases of domestic violence have become a daily occurrence in our society and they should be viewed in a serious light. Although the accused pleaded that he lacked direct intent to kill the deceased, this should not be automatically regarded as a mitigating factor. Each case should be decided on its own merits. In the present matter, the accused did not assault the deceased once but he repeated his assaults. The deceased was unarmed and she posed no danger to the accused. The accused committed a senseless and callous murder. The sentence to be imposed should therefore, fit the crime as well as its circumstances.

[9] Society expects the courts to protect it against ruthless offenders by imposing appropriate sentences which fit the crime. If the courts fail to do so, members of society may be inclined to take the law into their own hands. I am therefore of the opinion that the following sentence is appropriate in the circumstances.

[10] In the result the accused is sentenced to 28 years' imprisonment.

N N SHIVUTE

Judge

APPEARANCES:**THE STATE:**

Mr Olivier

Of Office of the Prosecutor General

ACCUSED:

Mr Tjituri

Instructed by Directorate of Legal Aid