



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
REASONS SENTENCE**

Case no: CC 04/2017

THE STATE

and

SHITULEIPO MWAHAFA ESTUS

ACCUSED

Neutral citation: *S v Estus* (CC 04/2017) [2017] NAHCNLD 76 (7 August 2017)

Coram: TOMMASI J

Heard: 1 August 2017

Delivered: 4 August 2015

Reasons released: 7 August 2017

Flynote: Sentence — Murder — Youthful first offender — Weight thereof to be balance with interest of society — Plea of guilty not necessarily an indication of remorse — Accused's remorse cannot be gaged given his failure to testify in mitigation — Accepted as an acknowledgement of his wrongdoing — Murder barbaric and it is unavoidable to emphasise the deterrent and retributive at the expense of consideration of reform and the personal circumstances of the accused.

Sentence — Violating a dead body — Nature of violation of the corpse is offensive. Demonstrates his own contempt for body of the deceased and community values.

Summary: The accused pleaded guilty to and was convicted of theft, violating a dead body and murder. He visited the deceased after having consumed alcohol. When the deceased objected to his intrusion, he stabbed her with a knife, fractured her clavicle, and caused an injury which resulted in bleeding on the brain and swelling and bruising on the left eye area. She fled and died in a nearby mahangu field where the accused violated the body of the corpse by inserting his penis and sand into her vagina.

The accused age was estimated to be between 18 and 22 years as he is functionally illiterate. He was a first offender and pleaded guilty to the offence. It was difficult for the court to determine the genuineness of his remorse or the impact the alcohol had on his conduct given his failure to testify under oath.

The deceased was 3 months pregnant but it was not proven that the accused was aware of this fact. She was financially supporting her family and her family received no compensation and/or contribution to her funeral costs.

The court considered the murder heartless and barbaric, prevalent, and perpetrated against a vulnerable women in the privacy and security of her home. The violation of the corpse demonstrated the lack of respect and appreciation for community values; and the theft a further indication of his selfish desire for gratification.

The court, given the gravity of the offences he committed, emphasised the need for deterrence and retribution at the expense of his personal circumstances and consideration of his reform.

ORDER

1. Count 1 – theft – six (6) months’ imprisonment;
It is ordered that this sentence should run concurrently with the sentence imposed in count 3 - murder
2. Count 2 – Violating a dead body – three (3) years’ imprisonment;
It is ordered that two (2) years’ imprisonment of this sentence should run concurrently with the sentence imposed in count 3 – murder;
3. Count 3 – murder - Twenty (20) years’ imprisonment.

REASONS FOR SENTENCE

TOMMASI J:

[1] The accused pleaded guilty to and was convicted of theft, violating a dead body and murder. This court now has to consider an appropriate sentence.

[2] It is trite that the court has to be guided by the general principles of sentencing. The court must consider the circumstances under which the offence was committed and should endeavour to impose a punishment which would fit the offence and the offender and serve the interest of society. Ackermann AJA in his judgment in *S v Van Wyk* 1993 NR 426 (SC) stated that: 'the difficulty arises, not so much from the general principles applicable, but from the complicated task of 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 factors¹.'

[3] I shall endeavour to piece together the facts of this case from, the accused's statement in terms of section 112(2), documents handed into evidence by agreement, evidence adduced in aggravation and submissions in mitigation made from the bar.

[4] The accused, an Angolan national, was employed as a cattle herder at the farmstead where the offence was committed. He was orphaned at a young age and came to Namibia in order to obtain employment. He was employed at different places as a cattle herder. He was employed at the place where the offence was committed for a period of three months without being remunerated for his services. He somehow secured this employment without having a valid passport or identification. He never went to school and he is unable to read or write. He does not know his date of birth and his age was estimated to be between 18 and 22 years.

¹ *S v Van Wyk* 1993 NR 426 (SC)

[5] The deceased was employed as a domestic worker at the same homestead. She was 31 years old and was three months pregnant at the time of her death. It was not suggested that the accused was aware of this fact. She had no other children and, according to her aunt, this was her first pregnancy.

[6] On 14 April 2015 the accused went to the homestead of the deceased at night time after he had consumed some alcohol. The deceased “objected” to his intrusion and requested him to leave. She pushed him away from her homestead and an altercation *cum* scuffle ensued. He drew a knife and stabbed the deceased. The deceased fled and died in a nearby mahangu field. The accused admitted that the deceased died from the injuries he inflicted during the scuffle and stabbing. He followed her and found her where she had collapsed and died. He undressed her body and inserted his penis into her vagina. He put sand into her vagina and on her body. He stole her nokia phone after she had died.

[7] The post mortem report reveals that the deceased indeed sustained a ‘traumatic penetrating wound to left hypochondria and a left clavicular fracture.’ Given the fracture of the clavicle, it would be reasonable for this court to accept that the force which was used to inflict the stab wound was severe. Apart from this injury the deceased also had other injuries such as extradural hematoma and subdural haemorrhage (bleeding on her brain), and swelling to the area of her right eye socket (periobital region) with bruises on the left fronto parietal. The post mortem report recorded that she had sand in her mouth and the photos reflect sand over her body and on her vagina.

[8] It is not clear how the accused was arrested but he admitted that the police found the deceased’s nokia phone in his possession. He was arrested on 15 April 2015 and has been in custody ever since this date. This was his first offence.

[9] The accused’s youthfulness and the fact that he is a first offender are strong mitigating factors which the court cannot overlook or underemphasize. The weight of these factors must however be balanced with the gravity of the offences he committed and the interest of society. The court cannot risk the possibility that brutal murders would be repeated. The difficulty the court has is that the age of the accused is estimated. The least this court can do is to accept that the accused had some level of immaturity at the time. He was not a juvenile offender. He was employed and fending for himself for some time before he committed the offence. His conduct was that of a

common criminal and it is trite that an accused, under these circumstances, cannot hide behind his youthfulness.

[10] The court takes into consideration the fact that the accused is uneducated and that he had consumed alcohol prior to committing the offences. Mr Mbondai, counsel for the accused, submitted that although the alcohol did not render the accused incapacitated, it impacted on his conduct that evening. He referred this court to the remarks made the Author CR Snyman in *Criminal Law*, 5th ed at page 220 where he states that: 'It is well known that the consumption of alcohol may detrimentally effect a person's capacity to control his muscular movement, to appreciate the nature and consequences of his conduct, as well as its wrongfulness, to conduct himself in accordance with his appreciation of the wrongfulness of the conduct, or to resist the temptation to do wrong. It may induce conditions such as impulsiveness, diminished self-criticism, over-estimation of one's own abilities and underestimation of dangers.' This may be the case but insofar as it concerns the accused in this case it would amount to pure speculation as the accused did not testify under oath what impact the alcohol had on him that evening. I am however prepared to consider Mr Mbondai's submission from the bar that the accused may have had more restraint if he had been sober.

[11] The accused has been in custody from the date of his arrest and it is generally accepted that the time period spent in custody awaiting trial leads to a reduction in the sentence particularly if the period has been lengthy. The period of just over 2 years and 3 months can be considered as lengthy. This factor should not be viewed in isolation but cumulatively with all the other factors.

[12] Ms Amupolo, counsel for the State, reminded the court that it is not in all cases that a plea of guilty is a sign of remorse as the accused may not have a viable defence. In this instance the accused was the only eyewitness and it is not apparent from the evidence adduced that the 'writing was on the wall'. The only evidence availed to the court in this regard is the admission by the accused that the deceased cell phone was found in his possession. It is however difficult for the court to gage whether the accused has genuine remorse given his failure to testify in mitigation. I am not entirely persuaded that the accused has demonstrated genuine remorse but I am prepared to accept that his plea of guilty demonstrates an acknowledgment of his wrongdoing.

[13] The State called the aunt of the deceased to testify in aggravation. Her aunt considered the deceased to be her daughter although her own mother was still alive and living in Angola. The deceased, according to the aunt, financially supported her mother and her siblings. Mr Mbondai, on behalf of the accused, extended an apology but the deceased's aunt indicated that she was unwilling to accept such an apology. She testified that no compensation and/or contribution to the funeral expenses were given to the family of the deceased. The fact that the deceased was pregnant further aggravates the moral blameworthiness of the conduct of the accused. The court is however mindful of the fact that it was not proven that the accused was aware of this fact.

[14] The motive for the accused's visit to the deceased's house is not clear. His plea explanation merely states that the deceased objected to his presence. He fails to explain why the complainant objected to his intrusion. The deceased was in the privacy and safety of her own home when the accused intruded. Furthermore the full nature of the "altercation *cum* scuffle" is not given but the injuries speak volumes. The deceased's head was so traumatised that bleeding occurred inside her skull and there was the tell-tale swelling and bruising around her eye. It was a violent altercation in which the deceased was the only one who sustained injuries. The accused is less than frank with his description of the events. He violently attacked the deceased. The real reason for this he chooses not to disclose. Having fatally assaulted the deceased he continues to violate the body of the deceased, demonstrating his disrespect for her human remains by putting sand into the vagina of the corpse. He leaves the body naked and violated in the mahango field. The conduct of the accused can only be described as heartless and barbaric.

[15] The attack on the deceased was unprovoked. She was vulnerable and unarmed. There are numerous cases of violence against women which our courts are dealing with on a daily basis and the tragedy is, despite the harsh sentences imposed by the courts, it continues unabated. Mr Bondai conceded that the offence is serious and prevalent. He further concedes that a lengthy custodial sentence is called for in respect of the offence of murder.

[16] The nature of the violation of the corpse is offensive. The accused, having violated the bodily integrity of the deceased whilst she was still alive, continue to violate

her corpse. This demonstrates his own contempt for the body of the deceased and a lack of appreciation for the values of the community. His need for own gratification is further reflected in the theft of the deceased's cellular phone.

[17] The court is mindful of the fact that the sentence should not be grossly in excess of what in the particular circumstances of this case, would be a just and fair punishment² and that: 'the element of mercy, a hallmark of civilised and enlightened administration, should not be overlooked, lest the Court be in danger of reducing itself to the plane of the criminal...' ³

[18] A further aspect is the fact that the offences were all committed the same evening. The cumulative effect of the sentences ought to be ameliorated by ordering that they run concurrently with the sentence on the murder count.

[19] In this matter it is unavoidable, given the gravity of the offences committed, for the court to overemphasise the objective of deterrence and retribution at the expense of the accused's personal circumstances and considerations for his reform.

[20] Having considered all the mitigating and aggravating circumstances, the general principles and purpose of punishment I am of the view that he following would be an appropriate sentence in this matter:

1. Count 1 – theft – six (6) months' imprisonment;

It is ordered that this sentence should run concurrently with the sentence imposed in count 3 - murder

2. Count 2 – Violating a dead body – three (3) years' imprisonment;

It is ordered that two (2) years' imprisonment of this sentence should run concurrently with the sentence imposed in count 3 – murder;

3. Count 3 – murder - Twenty (20) years' imprisonment.

² See *S v Khulu* 1975 (2) SA 418 (N) at 521E

³*S v V* 1972 (3) SA at 614D - E.

MA TOMMASI J

Judge

APPEARANCES

The State :

Adv M Amupolo
Office of the Prosecutor-General

ACCUSED :

Mr Mbondai
Instructed by Legal Aid