

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 17/2017

In the matter between:

THE STATE

v

ZENOBI SEAS

ACCUSED

Neutral citation: *S v Seas* (CC 17/2017) [2018] NAHCMD 245 (17 August 2018)

Coram: LIEBENBERG J

Heard: 13 August 2018

Delivered: 17 August 2018

Flynote: Criminal Procedure – Sentence – Maternal filicide – Accused's motive for murdering child was to get back at ex-partner – Accused's action irrational – Persons who fail to take control of their emotions will not be rewarded and weight would not be attached thereto in determining sentencing.

Criminal Procedure – Sentence – Courts are not only under a duty to uphold the rule of law but also have a duty to reflect society's indignation and antipathy towards those making themselves guilty of heinous crimes – Aggravating factors – Murder is a serious offence – Offence committed against innocent child – Accused is the sole provider and protector of minor child – Commission of offence premeditated – These factors weigh heavily against the accused.

Criminal Procedure – Sentence – Mitigating factors – Accused pleaded guilty – Accused showed remorse during the trial – Accused will have to live with pain and feelings of guilt for as long as she lives – Accused regrets what she has done to her own child and will carry this heavy burden for the rest of her – This weighs heavily in accused favour.

Summary: The accused admitted that on 26 September 2016 and at Henties Bay she unlawfully and with intent to cause the death of her biological three year old child, suffocated her. She further admitted that on the same date the murder took place she attempted to set alight the motor vehicle in which she and the deceased were, with the intention to defeat or obstruct the course of justice. She was then accordingly convicted on one count of murder, r/w the provisions of the Combating of Domestic Violence Act 4 of 2003 and attempting to defeat or obstruct the course of justice on the strength of her guilty plea in terms of s 112(2) of the Criminal Procedure Act 51 of 1977.

In mitigation she testified that at the time of the incident she was enraged at her family and her ex-partner and felt anger towards them. This was evident from the inscriptions in her diary. It was submitted on the accused's behalf that given her state of mind and absolute rejection and feeling of worthlessness, coupled with filicide, the court should find that her blameworthiness has been significantly diminished when she committed murder.

Held, that, the accused's actions on that day were irrational, and she was driven by anger and completely lost perspective.

Held, further that, what would appear trivial or unimportant to others, was devastating to the accused. However, persons who fail to take control of his or her emotions regarding challenges of life shall not be accorded much weight in determining sentencing. The accused had reason to be disappointed and frustrated with the manner in which she has been treated by her ex-partner, but she clearly overreacted.

Held, further that, it is aggravating that the three year old victim was murdered by her biological mother.

Held, further that, Courts are not only under a duty to uphold the rule of law and to give effect to the fundamental rights of all persons as enshrined in the Namibian Constitution but equally has the duty to reflect society's indignation and antipathy towards those making themselves guilty of such heinous crimes.

ORDER

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 25 years' imprisonment.

Count 2: Attempting to defeat or obstruct the course of justice – 1 (one) year imprisonment.

In terms of s 280(2) of the Criminal Procedure Act 51 of 1977 it is ordered that the sentence imposed on count 2 be served concurrently with count 1.

SENTENCE

LIEBENBERG J:

[1] On 13 August 2018 the accused pleaded guilty to one count of murder, read with the provisions of the Combating of Domestic Violence Act¹ and attempting to defeat or obstruct the course of justice. Mr *Dube* from the Directorate: Legal Aid represented the accused and filed a statement prepared in terms of section 112(2) of the Criminal Procedure Act² on her behalf. The pleas tendered by the accused were accepted by the State, being represented by Ms *Verhoef*.

[2] The accused admitted that on 26 September 2016 and at or near Henties Bay, in the district of Swakopmund, she unlawfully and with the intent to cause her death, killed her biological three year old child, Ava Antoinette Owoses, by suffocating her. She further admitted that on the same date and place she attempted to set alight the motor vehicle in which she and the deceased were, with intent to defeat or obstruct the course of justice, in that she foresaw the possibility that her act may frustrate or interfere with the police investigation into the death of the deceased child.

[3] In amplification of her plea on the murder count the accused, in her statement and evidence given in mitigation, explained the background and events that preceded that fateful day. Her testimony was essentially corroborated by her biological father, Mr Dirk Seas, who in his testimony attempted to give some perspective on the person of the accused and the circumstances that likely influenced her actions on the day. Whereas the accused still maintains that she to some extent suffers from amnesia as regards events prior to the killing, there remains gaps in her testimony which leaves crucial aspects of her testimony unexplained. However, the evidence presented to some extent shed more light on her actions at the relevant time from which certain deductions could be drawn.

¹ Act 4 of 2003.

² Act 51 of 1977.

[4] During pre-trial proceedings and at the instance of the defence, the accused was referred for psychiatric evaluation conducted by two psychiatrists. Psychiatric reports from Drs Ndjaba and Sieberhagen were received into evidence by agreement and, in respect of each, the accused was found not to suffer from any mental illness or defect. The accused's referral was based on the psychological report of Ms Estelle Bailey, an educational psychologist, dated 04 March 2017, which report was prepared earlier for purposes of a bail application.

[5] During Ms Bailey's evaluation she observed that the accused was struggling with a depressive episode complicated by feelings of emptiness and loss pertaining to her grief for her daughter and furthermore having had to deal with issues related to her detention. These feelings were to be expected in the circumstances she was in. She was at the time suffering from complicated grief, depressed episodes, post-traumatic stress disorder (PTSD) and dissociated amnesia.

[6] Dr Sieberhagen in his report and with specific reference made to the psychologist's findings on the 16 PF personality test performed on the accused's interactive ability, remarked that the outcome is highly suggestive of an attempt to manipulate the test outcome. As regards the alleged amnesia Dr Sieberhagen found that it starts and ends abruptly, covering exactly the period during which the crime was committed. He further found nothing in the accused's history that may have caused emotion intense enough to generate a dissociative or trance-like state that may indicate that the accused acted in such state on the said date. She was therefore found to have the ability to execute an act of will.

[7] Dr Ndjaba in her report captured the accused's narrative of events preceding and during the day of 26 September 2016. Though the accused did not make any mention to her abusive relationship with the deceased's father, Dumba, before they broke up in January 2014, she recounted in some detail about what transpired after she was informed by her sister over the weekend that Dumba was unlikely to attend his daughter's birthday party arranged by the accused for the 28th of September. Apparently this was because his

current girlfriend (Ellen) planned on having a caesarean section done on the same day. The accused said she had been overwhelmed with anger which resulted in the exchange of text messages between her and Dumba over the weekend. She then decided that Ava from then on should go and live with her father in Windhoek, but failed to make her plans known to anyone. On Monday the 26th of September she recalls going to town but could not account for her actions except that she picked up Ava from the day-care centre and was of the opinion that they were heading for Windhoek. As regards the accused's state of mind on that day, she denied experiencing any symptoms suggestive of a depressive mood, only that she was angered by the deceased's father. She further denied having been under the influence of alcohol or any other substance, although she could not remember whether she had bought anything from town.

[8] It would appear from both psychiatric reports that it can safely be accepted that the accused, at the time of committing the offences she stands convicted of, did not suffer from any mental defect, disorder or dissociative or trance-like state of mind that could possibly have impacted on her actions.

[9] The accused is 34 years of age and a first offender. Though single, she has one other daughter, aged 7 years who at present is in the care of her parents with whom the accused and her children had been staying since January 2014 after she was retrenched from work. This coincided with the breakup between her and Dumba. The accused obtained her matric certificate in 2002 where after she furthered her studies in finance and partly in accounting. At the time of her arrest she was employed at Husab Uranium mine as a haul truck operator and backup dispatcher, earning a basic salary of N\$11 000 per month. She has been in custody since her arrest, a period of almost two years. The accused provided in the upkeep of her two children with the assistance of her parents. Though she received financial support from the deceased's father, it was sporadic and not by order of court. She said she had a close bond with Ava and they were inseparable. She is heartbroken and her life destroyed as she now realises that nothing could possibly bring back Ava. She also appreciates that she should have sought

professional help and begged the court for forgiveness as she was guilty, being the reason why she pleaded guilty.

[10] In her plea statement the accused gave a detailed account of her relationship with Dumba which extended over a period of 13 months. She described the relationship as abusive and violent, which on two occasions escalated to physical assaults on her. These incidents were accompanied by alcohol abuse and infidelity towards her, despite their relationship. During altercations she was ridiculed and made to feel worthless. She terminated the relationship when she discovered that he had started a new relationship with Ellen, who were to give birth to his child on the same date as Ava's birthday. She testified that she felt betrayed and angry at the time. This seems to contradict her earlier testimony that after the separation, these feelings were something of the past. It does not appear to me to have been the case, though.

[11] As could be expected, the accused and Dumba maintained contact despite their breakup but the relationship was marred by disagreement, discontent and what appears to be jealousy on both sides towards their new partners. The hostile and intimidating relationship between them peaked when the accused learnt about the birth of his and Ellen's child being scheduled to be on the same day she had planned for Ava's birthday. To the accused this meant that he would no longer be able to attend Ava's birthday party. She described the relationship between father and daughter as one where he hardly came to visit her, from which she deduced that he no longer loved his child. Her perception on this score stands in sharp contrast with her decision to take Ava to Windhoek on that day to go and live with her father. It certainly begs the question why she would abandon her own child with whom she had strong bonds, to go and stay at a different place with the father who, until then, has shown no or little affection for his child?

[12] But there is more. If the accused had already made up her mind over the weekend as to Ava having to stay with her biological father, why was no one else informed thereof i.e. her parents or the child's father? One would also have expected of her to first collect the child's clothes and personal

belongings from her parents' home where they had been staying, before departing for Windhoek. These issues remained unanswered due to the accused's alleged amnesia. Questions were raised by Mr Seas as to what prompted the accused to buy toys, clothes and food in town before fetching Ava if she intended killing the child and herself. Only the accused could answer that. On the other hand, also found in the boot of her motor vehicle was, amongst other goods, firewood and charcoal which is consistent with the accused's evidence that she intended using it to set the vehicle alight; moreover where one piece of wood was found inside the vehicle at the foot well.

[13] For the aforesaid reasons and in the absence of any satisfactory explanation by the accused, it seems to me inevitable to come to only one conclusion, and that is that the accused planned the murder on the deceased since earlier in the day. She went into town to buy the goods mentioned and the decision to drive out on the Henties Bay road with Ava was not taken on the spur of the moment, it was planned. She clearly premeditated the commission of the murder and drove about 200km to a remote area off the main road going north of Henties Bay where she executed her plan. This is fortified by text messages she sent to one Imms (apparently the father) that his child is dead and that it was her early birthday present to them. Also that she would die soon and be out of their lives. From these communications it is evident that when suffocating the deceased with a blanket as she says, the accused had undoubtedly acted with direct intent.

[14] The accused's rage and resentment towards Dumba, his girlfriend and her own family is evident from the diary inscriptions in which insults and swearing in the most vulgar language were hurled at them. In cross-examination she said she was enraged and felt anger towards them. This much is evident from a reading of the inscriptions made in the pocket diary. She explained that she made these entries and sent the text messages after suffocating Ava. She felt rejected and torn between her own family and the situation with Dumba. She therefore decided to end Ava's life as well as her own. Not much came from her plan to commit suicide, though. She was found late in the night by members of the neighbourhood watch still seated in the

vehicle. She got out and after handing over the pocket diary she got back into the vehicle where after she locked the doors. It was only then that she attempted to start a fire inside the vehicle but her plan was thwarted by those present. It would appear that she earlier lacked courage to bring an end to her own life. Be that as it may, although an attempted suicide could be indicative of the person's state of mind at a particular stage, it does not distract from the seriousness of the offence committed against another, or should be regarded as mitigating.

[15] It was submitted on the accused's behalf that given her state of mind and absolute rejection and feeling of worthlessness, coupled with the unnatural act of a mother killing her own child and referred to as filicide,³ the court should find in the accused's favour that her blameworthiness had been significantly diminished when she committed the murder.

[16] In the authoritative work of SS Terblanche: *Guide to Sentencing in South Africa* (2nd Edition), the learned author discusses the blameworthiness or culpability of the offender and states that according to modern views the seriousness of the offence is affected by the extent to which the offender is accountable for the harm caused or risked by the crime. It should also include those subjective factors which would normally lessen (or increase) the blame that can be attributed to the offender.⁴

[17] Despite the accused having a different view and denying it as such, there is one central theme in her explanation for taking her daughter's life, and that is that her actions were aimed at taking revenge on Dumba and Ellen for wanting to spoil Ava's birthday by arranging their child's birth to take place on the same date. This much is evident from the diary inscription that Ava's death is an early birthday present to them. Though in the group text message sent to her family she also expressed the view that she was tired of the manner in which they treated her and which made her feel worthless, she held a different view during her testimony when saying that her parents have

³ Filicide is the deliberate act of a parent killing their own child and derives from the Latin words *filius* meaning 'son' or *filia* meaning 'daughter' and the suffix *-cide* meaning 'to kill'.

⁴ At p 150.

always been supportive of her and the children, financially and emotionally. This much was confirmed by her father during his testimony. The accused's feelings of rejection and inferiority by the family then seems to be without substance and somewhat misplaced. In view thereof, it seems inevitable to come to the conclusion that the accused's motive for the murder was mainly to get back at Dumba. This conclusion is fortified by the accused's decision not to end the life of her other child whom she could have taken along when fetching Ava. This is clearly one of the rare instances of maternal filicide where the mother kills her child specifically to emotionally harm the child's father.

[18] There can be no doubt that the accused's actions on the day were irrational as far as it concerned ending the life of her young child and abandoning her older daughter if she were to take her own life. She was driven by anger and in a fit of rage, completely losing perspective. Though the knowledge of the birth of Dumba's next child cannot objectively be seen as provocation, it would appear to have had that same impact on the accused's state of mind, sufficient to trigger such irrational and unjustified behaviour. In my view it is a factor that the court in sentencing should take into consideration.

[19] What could possibly appear trivial or unimportant to an outsider was devastating to the accused. However, being at risk to reward an accused person who fails to take control of his or her emotions as regards challenges experienced in daily life, one should be careful not to accord too much weight thereto when determining sentencing. I accept that the accused had reason to be disappointed and frustrated with the manner in which she had been treated by Dumba, but her situation was far from being helpless and she clearly overreacted on the news. One might have had sympathy with her had she directed her anger at Dumba or his girlfriend, but there is simply no justification for taking it out on her innocent and helpless child. If she was willing to leave her first born in the care of her family, why then not also the deceased? The accused maintained a good relationship with her parents and

nothing has been said about any effort made to seek their assistance in finding an amicable solution to the unhealthy relationship that existed between the accused and Dumba. I am convinced that by murdering her own child was not the only option open to the accused. She now concedes that she instead should have sought professional help; unfortunately it is too late to undo the consequences of her actions.

[20] Both murder and an attempted obstruction of the course of justice are serious offences which would normally attract severe punishment. Moreover, where a young life was snuffed out for the accused's own selfish reasons. What is more aggravating is that the victim was murdered by her biological mother; the very person who was her provider and protector and with whom she had strong bonds. It seems unbearable to imagine what went through the young child's mind whilst being suffocated and the extent to which she suffered, based on the haemorrhage spots inside the mouth and finger mark pressure spots on the face; moreover, accused's entry that it took Ava one hour to die. The accused's actions were calculated, brutal and inhuman, which shocked society to the core. Even as a mother, she had no right to assume for herself the right to decide over life and death of her child, for whatever reason she deemed justified. The murder was furthermore committed in circumstances where there existed a domestic relationship between the offender and the victim as defined in the Combating of Domestic Violence Act, 2003. These are all aggravating circumstances likely to impact severely on the punishment to be meted out for the accused.

[21] Courts are not only under a duty to uphold the rule of law and to give effect to the fundamental rights of all persons as enshrined in the Namibian Constitution – the rights of children and the right to life – but equally has the duty to reflect society's indignation and antipathy towards those making themselves guilty of such heinous crimes. This usually finds expression where retribution and deterrence are the main objectives of punishment. It was submitted that society would not benefit from the accused being given a lengthy custodial sentence; that it might have a deterrent effect, but it would not bring back the child. I respectfully do not agree with counsel's submission.

Though nothing in life could possibly bring Ava back to life, society expects that offenders be punished for the pain and suffering caused to others and that the sentences imposed should serve as a deterrence to other likeminded criminals. Retribution as a purpose of punishment is a concept that is premised on the understanding that once the balance of justice in the community is disturbed, then the offender must be punished because that punishment is a way of restoring justice within that community. It is only when the offender has paid his or her dues and has reformed that they would be welcomed back to take up their rightful place in society.

[22] The Supreme Court in the matter of *S v Schiefer*,⁵ on the question of rehabilitation, adopted with approval the view expressed by Harms JA in *S v Mhlakaza*⁶ as to whether long-term imprisonment has any rehabilitative effect, and remarked as follows at 519h-i:

'Whether or not this scepticism is fully justified, the point is that the object of a lengthy sentence of imprisonment is the removal of a serious offender from society. Should he become rehabilitated in prison, he might qualify for a reduction in sentence, but it remains an unenviable, if not impossible, burden upon a court to have to divine what effect a long sentence will have on the individual before it. Such predictions cannot be made with any degree of accuracy.'

In the context of the present case, I find these remarks apposite.

[23] In the court's determination of what punishment should be meted out in the circumstances of this case, regard will be had to the *triad* of factors namely, the personal circumstances of the accused; the offences, taking into account the circumstances in which it was committed; and the interests of society.⁷ It has been said that '*Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.*'⁸ I shall as far as possible endeavour to strike a balance between the interests of the accused and that of society. Though all the general principles applicable must be considered and balanced

⁵2017 (4) NR 1073 (SC).

⁶ 1997(1) SACR 515 (SCA).

⁷ *S v Zinn*, 1969 (2) SA 537 (A); *S v Tjiho*, 1991 NR 361 (HC).

⁸ *S v Rabie*, 1975 (4) SA 855 (AD) at 862G-H

and harmonised when applied to the facts, it need not be given equal weight or value as it might become necessary to emphasise one or more at the expense of others. This will largely depend on the circumstances of the case.⁹

[24] In her testimony in mitigation of sentence the accused sought forgiveness from her family and that of the deceased's father and asked the court to show mercy on her. Whilst testifying she regularly broke down in tears and it was evident that she struggled emotionally to contain herself. I have no doubt that the accused upon reflection regrets what she has done to her own child and will carry this heavy burden for the rest of her life. She will have to live with this pain and feelings of guilt for as long as she lives. This in itself is likely to bring about additional hardship over and above the sentence meted out by the court today. Remorse is a valid consideration in mitigation of sentence when the accused takes the court fully into his or her confidence, and the court being satisfied that contrition is sincere. Though the accused in this case did not fully take the court into her confidence, I have no doubt that she accepted that what she has done to the deceased and her family was wrong and would not likely be repeated in future. This, in my view, constitutes a mitigating factor.

[25] Besides the accused's personal circumstances alluded to, the courts lately lean towards a reduction in sentence where the accused pleads guilty in cases where serious crimes were committed. In circumstances where the court is satisfied that the accused's contrition is sincere and had manifested itself in a plea of guilty, this in itself should have a significant impact on the sentence to be imposed. Firstly, it must be emphasised that there is no duty on an accused person to plead guilty on any charge. But, by pleading guilty and confess to the offence committed, the court takes the view that the accused should gain some benefit from a guilty plea without wasting time and, in suitable circumstances, is likely to be given a lesser sentence. A reduction in sentence should therefore serve as an incentive to the accused when knowing that he or she is guilty of the offence and a conviction inevitable.

⁹ *S v Van Wyk* 1993 NR 426 (HC).

[26] The accused in the present instance admitted her wrongdoing in open court. This, coupled with her pleas of guilty, constitutes a mitigating factor that weighs heavily in her favour and which will significantly bear on the sentence to be imposed.

[27] It is trite that the period an accused spends in custody, especially if it is lengthy, is a factor that normally leads to a deduction in sentence.¹⁰ The accused is in custody pending trial for almost two years now and this factor must be considered together with all other factors to arrive at an appropriate sentence in the circumstances of the case.

[28] After due consideration of the accused's personal circumstances and accompanying mitigating factors, and having weighed these up against the offence of murder and the circumstances under which it was committed, I have come to the conclusion that the accused's personal circumstances simply do not measure up to the gravity of the offence and the interests of society. The imposition of a lengthy term of imprisonment on the charge of murder is therefore inescapable.

[29] As regards the second count pertaining to an attempt to defeat or obstruct the course of justice when the accused attempted to set alight her vehicle whilst she and the deceased's body was still inside, one does not get the impression that she was ever going to achieve her goal, as there were members of the neighbourhood watch standing outside and would not have allowed that to happen. As to be expected, they intervened and put out the flames without any real damage done to anyone or the vehicle. Though this offence is usually deemed to be of serious nature, I do not think that in the present circumstances it should attract any harsh sentence.

[30] Taking all the relevant factors and circumstances into account, I consider the following sentences to be appropriate:

¹⁰ *S v Kauzuu* 2006(1) NR 225 (HC).

Count 1: Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – 25 years' imprisonment.

Count 2: Attempting to defeat or obstruct the course of justice – 1 (one) year imprisonment.

In terms of s 280(2) of the Criminal Procedure Act 51 of 1977 it is ordered that the sentence imposed on count 2 be served concurrently with count 1.

JC LIEBENBERG
JUDGE

APPEARANCES:

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