

IN THE HIGH COURT OF NAMIBIA

In the matter between

**THE STATE**

versus

**WILBART MBANZE NANKEMA**

**CORAM: O'LINN, J.**

Heard on: 1993/10/26,27,28

Delivered on: 1993/10/29

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JUDGMENT

O'LINN, J.: The accused Wilbart Mbanze  
Nankema

according to the indictment a 30-year old male of Namib  
nationality. He is accused of:

- (1) Murder;
- (2) Attempted murder;
- (3) Arson; and
- (4) Arson.

The first count, count 1 is set out as follows:

"In that on or about the 10 October 1992 and at o near  
KAPARARA in the district of KAVANGO th accused  
unlawfully and intentionally kille MAGDALENA KASIKU  
KUDUMU, a female person.

Count 2:

near KAPARARA in the district of KAVANGO the accused unlawfully and intentionally attempted to kill PETRUS NANKEMA, by shooting him with a bow and arrow."

Count 3:

"In that on or about the 10 October 1992 and at or near KAPARARA in the district of KAVANGO the accused did unlawfully and with intent to injure ADRIAAN NANKEMA in his property set on fire and thereby did damage a bedroom being an immovable structure and the property of the said Adriaan Nankema."

Count 4:

"In that on or about the 10 October 1992 and at or near KAPARARA in the district of KAVANGO the accused did unlawfully and with intent to injure PETRUS NANKEMA in his property set on fire and thereby did damage the bedroom being an immovable structure and the property of the said Petrus Nankema."

On the first charge of murder the accused explained that he did not know that he was killing her, that is his mother, "I killed but I did not know that she would die". On the second charge, that one of attempted murder he said, "I shot him but did not intend to injure him". On the third charge, one of arson he said, "I was confused, I did not know how I did it." And the fourth charge, also of arson, he said, "I am guilty but I don't know how I did all those things".

In the case of all the charges the Court noted a plea of not guilty. The result was that the State had to prove all the

elements of various crimes beyond all reasonable doubt. Advocate Lategan appeared for the State, that is for the prosecution and Dr Mtopa appeared for the accused on instructions of the Legal Aid Counsel. The Defence did not at the time of pleading or at all provide the Court with a written or other understandable explanation of plea in order to limit the issues.

The State called three witnesses, namely Adriaan Nankema, who is the younger brother of the accused; Petrus Nankema, who is apparently an older brother of the accused and Detective Sergeant Petrus, who was then an investigating officer at Nkurenkuru Police Station. The State did not call Dr Edson who did a post mortem examination of the deceased, but the post mortem report by Dr Edson was handed in with the consent of the Defence. It may be mentioned that Dr Edson was not called by the State and also not called by the Court because the Court was informed that Dr Edson no longer resides in Namibia and is residing and practising somewhere in the Republic of South Africa. That would have meant great expense and other problems to attempt to get him to give evidence.

Although the Defence did not initially make any admissions in terms of article 220 of the Criminal Procedure Act, the defence did at the time of the handing in of the post mortem report admit (1) the identity of the deceased, and (2) the contents of the post mortem report which obviously included its important findings.

The Defence called only the accused. After the accused had testified the Court mero motu recalled the witness Petrus Nankema, in view of evidence given by the accused which was not fully or properly put to the witness Petrus Nankema and Adriaan Nankema when they testified. After the call of Petrus Nankema both State and Defence counsel had a further opportunity to question this witness. Obviously inherent in the situation the Defence would have been given the opportunity to recall the accused should Dr Mtopa have asked for such an opportunity. Dr Mtopa declined to recall the accused or to call any further evidence.

It was clear from the evidence on both sides that the State's allegation was not in dispute that the deceased, Magdalena Kudumu had been shot and killed with the arrow after it was fired with the bow. It was also not disputed that the accused was a person who had a bow and arrow and that he was a person who actually shot his mother, the deceased. What the accused of course stated throughout was that he did not know that one of the persons he shot at was his mother and in that sense he did not intend to shoot her. He thought he was shooting at his brothers, that is Adriaan Nankema and Petrus Nankema. At the end of the State case it was also not disputed that the accused had shot and hit Petrus Nankema with his bow and arrow and that the arrow had struck Petrus slightly from behind and that the head of the arrow went right through the thick flesh of his upper leg. It was also not disputed that one of the arrows fired at Petrus Nankema just missed him and struck the tree behind him. It was also not in dispute that the accused had set

light to the room of Adriaan Nankema and the room of Petrus Nankema. On these two counts the defence never got further than putting forward some sort of alleged ignorance of the deed owing to either drunkenness, insanity or some such-like cause. But there was no dispute of the fact that the accused had used matches to set these houses on fire by throwing the burning matches in the dry grass roofs of these houses.

The State witness, Adriaan Nankema testified that on the day, the 10th October 1992 he was selling a certain type of liquor at the house of his mother. The liquor was sold to family and friends and other persons who came to visit the house. The proceeds according to Adriaan was used by his mother to pay for the schooling of the younger children.

On that particular day Adriaan as well as his brother Petrus and the accused and the mother of these three brothers were on the premises in the kraal of the deceased, Magdalena Kudumo. Petrus Nankema and the accused were two of those who did drink a considerable amount of the said liquor and apparently this liquor was fairly strong as far as its alcoholic content is concerned. There was a friendly, gay atmosphere during that day. There was some singing and some of the younger people were also dancing.

Late in the afternoon the accused started quarrelling, first with his wife. This quarrel was about the fact that the wife was still remaining at the party whereas, according to the accused, she had to go home to look after the children.

According to the accused his wife protested that she did not need his admonition. He insisted that she had to follow his orders, and at one stage he apparently assaulted her with some wooden stick or plank. At that stage his mother intervened and talked to him and wanted to know why he was assaulting his wife. The accused did not take that very well and started assaulting his mother. First he slapped her in her face and later he knocked her down with a fist, according to Adriaan, several blows. It was then that the brothers Adriaan and Petrus intervened whereupon the accused knocked down Petrus Nankema with his fist. Thereafter the two brothers, Adriaan Nankema and Petrus Nankema pushed the accused out of the house and apparently out of the kraal of the deceased. The accused then started running towards his house which was at a different kraal not too far distant from the kraal of the deceased and the kraal of Petrus Nankema. When the accused ran to his house, he said to Petrus and Adriaan that they must wait, he would come back. When the accused said those words Petrus Nankema realised that the accused was going to make trouble and because of his previous conduct on other occasions according to Adriaan, he expected the accused to go and grab weapons and to come back to injure the other people. As a result of this Adriaan Nankema and Petrus Nankema and the deceased, Magdalena, ran out of the kraal and into a nearby fairly thick bush area where they tried to hide. The accused however blocked them off from the other side and moved towards them with his bow and arrows. According to Adriaan, the deceased tried to hide in the bush and he himself tried to hide in the vicinity and his brother Petrus was also in

the vicinity but not exactly the same spot. Adriaan then heard his mother crying out and saying something like "Willie killed me", or words to that effect. Adriaan then moved in the direction where he heard his mother crying or crying out but then he saw the accused coming from the other side with his bow and arrows, some of his arrows in his one hand and one of the arrows on the string as if ready to shoot. Adriaan then ran away and tried to hide from the accused. After a while he heard his brother Petrus Nankema also cry out that he had also been shot, and after hiding for some time he went to Petrus and saw that an arrow had gone right through the upper leg of Petrus. At a later stage he went to the home of Petrus where Petrus had gone in the meantime. Adriaan saw the accused going to the room of Adriaan in the kraal of the deceased, and there set fire to his hut by using a match, lighting the match and throwing it in the grass roof. He then saw the accused going back to the bush and hiding there and looking around as if he wanted to see who goes to the fire. After some time the accused also went to the house of Petrus Nankema where he set on fire in the same way a so-called room belonging to Petrus, but which was also described as a kitchen. After he had set the kitchen of Petrus alight, he, the accused ran away and Adriaan didn't see him again that night or the next day. Adriaan and Petrus stayed together through-out the night. Petrus was bleeding profusely from the wound and was suffering a lot of pain and could not walk properly. The two of them lay down in the house but they didn't really sleep that night. The next morning Adriaan and some other family member went into the bush to look for the deceased.

They found the deceased lying near the place where he had the previous night heard her scream. She was already dead, and the arrow with which she was shot was still in her body, in the area of the chest and she was shot from the front. Adriaan said that Petrus was drunk and that Petrus could not properly run away from the accused and that apparently that was the reason why the accused managed to shoot Petrus. Petrus testified and generally corroborated Adriaan. Petrus did not agree that he was very drunk. He said that he had been drinking but he was not so drunk that he was unable to run or that he didn't know what he was doing. He however went one step further than Adriaan in that according to him, he actually saw the accused shooting at the deceased, his mother. What is also important is that he says that she cried out that she had been killed or was being killed and then ran a few paces and fell down. He also saw the accused setting fire to some of the huts already described. At this stage it must be noted that the huts were fixed structures according to the evidence and this was never placed in dispute. They were movable structures for the purposes of the crime of arson. Both Adriaan, and Petrus strongly denied any assault by them on the accused except that according to Adriaan he at one stage, after his mother had been hit by the accused, he slapped the accused twice but simultaneously with an open hand in the face.

The State's third witness. Sergeant Petrus, said that he removed the body of the deceased on the evening of the Sunday in which the incident happened and returned to the scene of the crime the next day. He also took Petrus



Nankema to the hospital. Petrus had said that as a result of the wound he had to stay in hospital for treatment for three weeks and according to Sergeant Petrus, the witness Petrus Nankema stayed in hospital for at least two weeks. Sergeant Petrus also prepared a rough sketch plan of the scene of the alleged crimes and prepared a key to the plan. This plan and key were helpful to the Court but nothing in particular turns on anything contained in the plan and the key and there is no dispute as far as I could discern arising from anything appearing in the plan and the key to the plan. Sergeant Petrus admitted that the accused had told him two things, one, that he was drunk, and two, that he had been assaulted by some of his brothers. According to Petrus, when he asked the accused whether he had any injuries he could not point out any injuries. In any case Sergeant Petrus looked whether he had injuries and he saw none.

The accused gave evidence which ranged from excuses of anger for his deeds to self-defence to confusion and lastly insanity. He first denied that he hit his mother with a fist or at all and alleged that she just fell down when he pushed her. He then told the Court that he was very seriously assaulted by his two brothers, he was bleeding all over, and at one stage he showed the Court about five old scars on his body, one on his head, one on his chest, one behind the left shoulder and some on the elbows, and some of those scars could actually be split into a number of small scars and lacerations. He told the Court that all those scars were the result of wounds inflicted by his two brothers on the day in question. He said he told the police

when he was brought to the police station that he had been badly beaten and he showed them the blood etc. and they didn't want to know a thing. They took no notice of his story and just locked him up. At stages he explained how the brothers had assaulted him. He even remembered during his evidence that the one brother pulled him along and the other one hit him, so he could distinguish between who pulled him and who hit him. He said at stages that he went and took his bows and arrows because he wanted to fight with them. Now when it was put to him that his two brothers apparently didn't want to fight with him because they ran away, he said: "Why wouldn't they fight with me, they injured me, so they must fight with me." At times he said that he ran after them when they were running away and he shot at shadows which he thought to be the shadows of his brothers. He also said at an initial stage that he shot at what he thought to be his brother Adriaan because he wanted to shoot him but that that was probably his mother and not his brother Adriaan. He also shot at the other shadow a second time, but according to him he never went there to see whether he had hit anyone. He also never heard his mother scream and never went to her where she lay. Then again he began to tell the Court that he was so confused that he doesn't even know that he ran to his house. He doesn't even know if that's his bow and arrow. He doesn't even know that he shot at anyone, that he had a bow or that he had arrows, and he does not know that he set alight the two houses. Because all his scars were not put to the State witness, the Court, as I have indicated, recalled Petrus. Petrus again emphatically denied that any of the scars were a result of

any injuries inflicted by him and his brother on the 10 October 1992. As to the various scratches and types of marks on the arms of the accused, Petrus said that all the scars are very old. Those on the arms were for instance caused by thorns and bush in the Kavango because where they farm and where they have to tend their cattle, there is thick bush. He also said that one of the scars was due to the fact that when the accused was a young man he was riding a cart and there was some injury there. But, most important and most decisive, he said that this scar on the accused's head was caused when the accused was in a fight with his brother-in-law and the headman investigated that incident and found the accused guilty of being the real cause of the fight, and the result of that was that the witness Petrus, being family and brother of the accused, had to pay the other side as a fine, one head of cattle. It was not suggested by Counsel for the accused that Petrus has made up the story and he could not contest the evidence of Petrus on this point. The accused in his evidence also denied that he had ever been in a fight with anyone, so according to him his scars could only have been caused by the two brothers who assaulted him on the 10 October.

The evidence of Petrus and Adriaan that the accused hit his mother with a fist is further corroborated by the medical post mortem report of the doctor, according to which the deceased had a swollen right eye and with blood under the skin. The evidence that she was killed by an arrow is also corroborated by the post mortem finding, namely that she had a wound in her chest between the sixth and seventh ribs on

the left side, that there was a wound through the right ventricle of the heart and that her death was caused by a wound through her heart. In addition it was stated that the entrance wound was an oval shaped wound which fits in well with the other allegations that it was an arrow and the arrow was found in the body. It is clear that she would at most have been able to move a short distance after being shot.

All the State witnesses made really an excellent impression on the Court. In substance it appeared that they were honestly and fairly telling the story of that day. The accused on the other hand was a hopeless witness. He didn't give me the impression that he was stupid but rather that he was using all his intelligence to lie to the Court. It is in any case very difficult to establish what his defence really is because of all the inconsistencies. It is clear, even from his evidence, that there are no grounds to uphold a defence or self-defence. Even if one could extract the highlights of his story and accept that, then it will still not amount to any justifiable self-defence, because even if his brothers did seriously assault him, he was the original aggressor from the start and what they did was at most to get him out of the way. In any case, at the time he had his bow and arrow in his hands they were unarmed and had tried to evade him. In the case of his mother, she was at the time when she was shot apparently hiding there in a bush or behind a bush. She was shot even from the front, so she was probably not at that stage running away, but trying to hide behind the bush. As to the defence of drunkenness, that he

didn't know what he was doing, it is clear to the Court that he was grossly exaggerating drunkenness and the effect of it. The question of drunkenness is not confined to the question of whether he drank strong liquor, it must be tested in the first and last instance on evidence of what he was doing, how was he walking, how was he running, how was he talking, was he talking abnormally, was he falling down when he tried to run? And then of course, when you go and run to your hut, you take a bow and arrows and you are capable of shooting at people and you actually manage to hit them, the one through the heart, the one through the leg, and the only other arrow that we know about, missed Petrus Nankema but struck the tree behind him. When you then, after doing all that, go to a hut and pull out your matches, and light a match, and throw it in dry grass and set it on fire, and set on fire particularly the houses of the two people with whom you have a problem, then it is clear that you could not have been as drunk as you pretend that you were and that you were physically capable of doing all those things; that you were mentally able to know what you were doing and to understand the consequences of your deeds.

You also said at one stage that you tried to injure, you wanted only to injure them, and not to kill them. At a subsequent stage you again said you didn't even want to injure them. But then, when you were asked whether you aimed at any particular part of these people or their shadows, you said no, you just shot in their direction, with other words, you did not care whether you shot through the heart, through the head or through the leg. It is quite

clear that you knew very well that a bow and arrow is a dangerous weapon. You were yourself, according to your evidence, a maker of arrows, so you are acquainted with the weapon obviously. You know it can go right through the body of a human being, and so you must have known and you knew that if you shoot at the body of a person it is reasonably possible that that person can die as a result thereof.

I have indicated that I accept the evidence of the State witnesses. I reject your evidence insofar as it is inconsistent with the State's evidence. I reject your plea of self-defence as without substance. I reject your explanation of being so drunk that you didn't know what you were doing as false, and at least grossly exaggerated. I obviously also reject your evidence of some sort of insanity which you had at a time, butterflies going into your head when you drink etc. Even on your own version, the witch doctor told you that this butterfly when you drink will make you do the wrong things, and make you violent. So, if that is so, you knew in advance when you drank that day that that is what will happen. Perhaps the witch doctor only meant to tell you by using a language which you could understand, that by drinking much a person may commit certain crimes and wrong deeds.

In any case, your brother Petrus explained that all of you did go at one stage to the witch doctor but that was because one of your brothers had died and there was some sort of belief that in such a case you must go to the witch doctor to spit out perhaps the evil spirit which may be in the

family and which caused the death of your brother. Now I asked your counsel whether in the light of that story he wanted to make an application that you are insane or that you must be sent for observation, and he indicated to the Court that he does not intend to bring such an application or to raise such a defence if I understood him correctly. So the effort you made to pretend at times that you were insane, the Court also rejects. Even your story that when you shot your mother, you did not know it was your mother, but you actually thought that you were shooting at Adriaan, I also reject. The real reason for your action that day was that you were aggressive, you were under influence of liquor to some extent, and you wanted to take your aggression out on whoever crossed you. That is why you assaulted your wife, you assaulted your own mother by knocking her down brutally, and then when you found them in the bush you were still angry and aggressive and you shot whoever of them you could find. So I don't believe that you did not intend to shoot your mother, but even if I am wrong in that finding, then you would nevertheless be guilty of the murder of your mother, because in our law, when you intend shooting one person, person A, and you mistakingly shoot another person, person B, it is also murder even if you made a mistake in regard to the identity of the one you actually killed.

In the result you are found guilty of the crime of murder, charge no. 1, guilty of having murdered your mother by shooting her. You are found guilty of attempted murder, count 2, in that you attempted to kill Petrus Nankema. You are found guilty on count 3 of arson in that you set fire to

IN THE HIGH COURT OF NAMIBIA

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**CORAM: O'LINN. J.**

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**SENTENCE**

**O'LINN. J.**: The facts which are relevant to sentence are mostly already stated in the judgment on conviction. At the sentence stage Dr Mtopa for the accused called the accused to give evidence.

The accused said that he was thirty years old, he was self-employed, he was married ten years ago and he had two children, one from his present wife and another as a result of a relationship with another person. He has dependants including his mother and sisters-in-law and the two children. He said that the only people who could work in his kraal was himself and he did not know what would happen to his family if he is in prison. Dr Mtopa also addressed the Court and pointed out that the accused was under the influence of liquor, that he had responsibilities to certain



people in the sense of having to maintain them and that he would probably suffer for the rest of his life mentally or emotionally because he has inter alia killed his own mother.

The problem as to this is that before he killed his mother he did not hesitate to beat her with his fists and knock her to the ground. So it's difficult to see or to know what happened to his love for his mother at that stage already.

Miss Lategan for the State has argued that the liquor did not play a great role on the available evidence, that the accused through-out acted without respect for others and that he was cunning in the way he executed these crimes. So for instance, the State counsel pointed out that after he had shot his mother and his brother Petrus, he was looking around to find Adriaan so that he could shoot him. That is his younger brother. Then after setting fire to one of the huts, he moved back to the bush and there he waited and watched probably to see whether Adriaan or the others would not go to the fire and so reveal themselves and become a target for his bow and arrows.

Although the Court found that he was under influence of liquor or he must have been because of the amount of liquor consumed over a relatively long period, it is quite clear from the findings of the Court and all the available evidence that he acted with intent and in the possession of all his faculties. He could tell the Court how he argued with his wife and how he assaulted her. The only sin his

good mother was guilty of was to attempt to remonstate with him when he argued with his wife and assaulted her. For this interference by a good mother he first slapped her and later on knocked her to the ground. He also was powerful enough to knock down his brother Petrus. He was then removed by Petrus and Adriaan but he was strong enough and in possession of his physical, certainly also his other faculties, to run to his house to go and get his bow and arrows. He came back with his bow and arrows with the intention to fight and to take revenge and he clearly regarded his mother and his two brothers as three opponents who placed obstacles in his way.

In Court the accused showed that he is not a very stupid man but a relatively intelligent person with a fair amount of natural cunning. Whenever he noticed that something he said may be adverse to him he had no scruples to turn around with a new story. So he was not only a cunning person at the time of committing the crimes but he was lying to the Court most of the time in the course of the conduct of his case and when he gave evidence. In his evidence on sentence he also said that he repents the deed. Now, this is a typical case where his repenting is not very persuasive. I have no indication that he is not primarily sorry for himself. If he really wished to repent one would have seen evidence of such a state of mind if he told the Court the truth.

Now, Namibian Courts are well aware that Namibians are reeling under the onslaught of criminals. Namibian society is increasingly demoralised by the escalation of crime.

Namibians are repeatedly brutally murdered by criminals who have no respect for the fundamental rights or for the right to dignity and life of others. They also show no respect for the law or for the government or for the police or the Courts of Law. They also do not fear these institutions.

The Courts cannot alone prevent this, because although the Courts play a very important role, there are many other institutions including the government, its police forces and society itself. These institutions should take an honest and in depth look at the problem, sweep aside the holy cows, identify the causes and then act in a determined and robust way to eliminate or at least minimize some of the root causes of crime and its escalation.

It can also be helpful if Courts are as consistent as possible in their sentences, notwithstanding the approach that Courts must consider every case individually and give due weight to its particular circumstances. The general approach of the Court in sentencing is that the Court considers the individual criminal, the crime and the interest of society. Inherent in this consideration is also the deterrent, retributive and rehabilitative aspects of punishment. There is continuous debate about the role of the retributive consideration. I can do no better than to quote from a decision by me in this Court in the case of S v Tcoeib reported in the 1993(1) SACR, p. 274. I wish to repeat for the purpose of this case what I said at p. 278 -279, beginning at paragraph I:

"Although the Namibian Constitution has abolished the death sentence, it at the same time provided as the first fundamental human right the protection of the life of all its citizens. (See article 6). In article 5 it is provided that all fundamental rights and freedoms, including the right to life, shall be respected and upheld by the Executive, the Legislature and the Judiciary.

In these times where more and more people talk of "people's justice" and taking the law into their own hands, the words of Schreiner JA in R v Karg 1961(1) SA 231 (A) at 235 - 6 should be borne in mind and I quote:

'The circumstances, or more properly, considerations, that were claimed to have been irregularly taken into account are to be found in passages in which Snyman AJ said (i) that the Courts should impose such sentences as will not tempt aggrieved persons to seek private vengeance and (ii) that a sentence should be imposed that would do justice not only to the community but also to the parents of the child who had been killed.' Schreiner JA continued:

'I do not agree with the submission that these considerations are irrelevant. While the deterrent effect of punishment has remained as important as ever it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of

retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences the Courts impose, and it is relevant to bear in mind that if sentences for serious crimes are too lenient, the

administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment. Snyman AJ was bringing home to the appellant and other persons the seriousness of the offence and the need for a severe punishment, and I can find nothing in his remarks to show that he gave undue weight to the retributive aspect.' A similar sentiment was expressed by Steward J in 1972 in the United States Supreme Court case of Furman v Georgia 4008 US 238 (1972) 92 S CT 2726, 33 L Ed 2nd 346 (1972) where the death penalty was debated and the learned Judge commented as follows on the retributive objective of punishment and I quote:

'On that score I would say that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve', then there are sown the seeds of anarchy - of self-help, vigilante justice and lynch law.'"

I remain convinced that the approach in the cases above quoted is the correct one.

Mr Nankema, your crime was a brutal and a heinous one. It wasn't just a question of picking up a knife and stabbing a person on the spur of the moment but it was a case where you

started with aggressive and violent conduct at a time when everybody around were trying to enjoy themselves. So, you had every opportunity to reconsider your actions but you took each step consistently and notwithstanding the opportunity to reconsider your actions.

The State and the Court has accepted for the purpose of sentence that there are no previous convictions. Nevertheless there is evidence that you normally act violently as soon as you have some drinks. The knowledge of that violent attitude and the fact that you indicated that you will be coming back was a reason for your mother and your two brothers to try and flee and to hide in the bush. That however was not sufficient to protect them. You searched for them. You blocked their escape.

So for the serious series of crimes that you committed on that day you will have to be punished properly, and the punishment that I am going to impose takes due cognisance of the principles and the approach as to sentence which I have already set out in my judgment.

In the result your punishment will be as follows:

For the crime of murder, life imprisonment. For the crime of attempted murder, five years imprisonment. For the crime of arson, charge no. 3, two years imprisonment and for the charge of arson, charge no. 4, another two years imprisonment.

be served concurrently with the life imprisonment. I also recommend in so far as it may be relevant that because of the nature of your crimes and the other factors stated in the judgment, I recommend that you should not be released on parole or otherwise unless you have at least served sixteen years of your sentence.

  
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O'LINN, JUDGE

REVIEW JUDGMENT

CRIMINAL PROCEDURE - *ty^hs&Q&^isTijcfer*

Accused convicted on main and alternative charges.



IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

SAMUEL MUSIALELA

(HIGH COURT REVIEW CASE NO. 1850/93)

CORAM: STRYDOM, J.P. et MULLER, A.J.

Delivered on: 1993.09.10 REVIEW JUDGMENT

MULLER, A.J.: The accused was charged with contravening section 138(1) (Negligent driving), section 140(1)(a) (drunken driving), as well as section 140(2)(a) of Ordinance 30 of 1967 in the alternative (driving with excessive alcohol in blood).

He pleaded not guilty to all charges. On behalf of the State Detective Sergeant Likando of the Namibian Police at Katima Mulilo, an experienced police officer, testified that after being called out he found a Toyota Land Cruiser, GRN 4881, which hit a tree. It was a public road. The accused introduced himself as the driver of the vehicle but was in such a state of drunkenness that he could hardly speak or walk and smelled of liquor. There was also a heavy smell

of liquor inside the vehicle. The steering wheel and brakes of the vehicle were in order but the bumper and radiator were damaged in the accident.

A plan of the scene and a key were compiled by this witness and handed in. A blood alcohol sample was taken, labelled and sent for analysis. The result was 0,27 per 100ml.

The accused testified that he was the driver of the vehicle. Except that he is aware that he had made an accident he does not know anything else.

The accused should have been convicted of drunken driving on this evidence. However, he was convicted on all three charges. When queried about this by me, the Magistrate conceded that he erred and that the accused should only have been convicted of drunken driving.

In the result the convictions in respect of contravening sections 140(2)(a) and 138(1) of Ordinance no. 30 of 1967 as well as the sentences imposed in respect of these convictions are set aside and the conviction of contravening section 140(1)(a) and the sentence imposed in respect of this conviction, are confirmed.

A handwritten signature in black ink, appearing to be 'MULLER', written over a horizontal line.

**MULLER, ACTING JUDGE**

I agree

A handwritten signature in black ink, appearing to read "Strydom", written over a horizontal line.

STRYDOM, JUDGE PRESIDENT