



NOT REPORTABLE

CASE NO.: CC39/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

BOTH

CORAM: PARKER J

Heard on: 2010 November 19

Delivered on: 2010 November 30

JUDGMENT (SENTENCING):

PARKER J:

[1] In this case, Mr Lisulo represents the State, and Mr Hengari represents the accused. In my judgment on conviction delivered on 22 September 2010, I convicted the accused on one count of murder (committed with *dolus directus*) and on one count of attempt to commit rape (as competent verdict to count 2). The facts bearing on the conviction are set out in the judgment on conviction.

[2] In imposing an appropriate sentence, I ought to take into account the hackneyed

triadic factors, consisting of the crime, the offender and the interests of society (*S v Zinn* 1969 (2) SA 537 (A) at 540G). There is a fourth element, which is 'mercy' (*S v Khumalo* 1973 (3) SA 697 (A); that is, 'a measure of mercy' and not 'misplaced pity' (The *Director of Public Prosecutions, Kwazulu-Natal v P* Supreme Court of Appeal Case No. 363/2005 (1 December 2005) at p. 10 (Unreported)). In considering an appropriate sentence, I must strike a reasonable balance between these competing factors in order to do justice; and in doing so, I may give more weight to certain factors than to others (*S v Van Wyk* 1993 NR 426 (SC) at 450G, 451C). Moreover, it is necessary to consider the main purposes of punishment, namely, deterrent, preventive, reformatory and retributive (*S v Tcoeib* 1991 263 at 266I). In *State v Gert Hermanus Hansie Losper* Case No. CC 11/2007 (Unreported) I accepted counsel's argument that in the case of a cold-blooded murder committed with *dolus directus*, as in the present case, it is appropriate for the Court to emphasize the retributive purpose of punishment. In sum, a court is expected to impose a condign punishment on offenders, taking into account the personal circumstances of the offender, the nature of the crime and the interests of society and a measure of mercy - according to the circumstances of the particular case.

[3] I now proceed to consider the personal circumstances of the accused. The accused is 35 years of age, and he went up to Grade 9 in school. He left school in 1993 because of financial problems at home and he subsequently did odd jobs in the Karas Region until 1996 when he secured permanent employment with a Government Ministry. He worked in that Ministry until the first incident of the alleged rape. Furthermore, the accused person cared for his four children and his mother. I must say there is nothing out of the ordinary in his personal circumstances.

[4] I pass to consider the crime, which is murder committed with direct intention. Doubtless, murder is one of the most serious crimes known to our law. *In casu* -and I do

accept Mr Lisulo's submission on the point under consideration - there are aspects of the commission of the crime which aggravate the seriousness of the offence, not necessarily because the accused has been found guilty of the crime of murder, committed with direct intention. This conclusion disposes of Mr Hengari's submission that murder committed with direct intention should not necessarily serve as an aggravating or a mitigating factor. In the circumstances and on the facts of the instant case, the fact that the crime of murder was committed with direct intention must without a doubt serve as an aggravating factor. The aspects are the following: the accused killed the deceased in pursuit of the accused's attempt to commit an equally serious crime, viz. rape. The deceased was unarmed, defenceless and harmless. The accused targeted a vulnerable part of the anatomy of the deceased, i.e. her throat, in his brutal attack on the deceased. Furthermore, after strangulating the deceased with his 'both' hands - pardon the pun - the accused continued with his murderous enterprise, undeterred, by dragging the deceased on gravel ground for a considerable distance. These aspects must weigh heavily negatively against the accused when considering the aforementioned elements, particularly the element of mercy. I therefore dismiss as irrelevant and carrying very little weight the fact that the accused had been imbibing alcoholic drink and, according to Mr Hengari, the accused was 'heavily intoxicated' before his murderous attack on the deceased. In my opinion, the accused cannot pray in aid for leniency his voluntary drunkenness.

[5] Now it is to the interests of society that I direct the present enquiry. It would be overstating it if I said that society can no longer tolerate the senseless and callous violence perpetrated against women in our society. The society is for ever crying hard for the courts to play their part in the society's attempts to stamp out this evil scourge which appears to be unending. Accordingly, as I see it, society expects the courts to impose sentences that not only punish accused persons convicted of such horrendous crimes but

also serve to send a strong and unmistakable message that the society expects courts to punish severely persons who commit such hard-hearted crimes; otherwise the society might lose confidence in the administration of the criminal justice system, and if they did that some members of the public may be inclined to take the law into their hands (*R v Karg* 1961 (1) SA 231 (A) at 236A-B; *State v Ronny Noabeb* Case No.: CC 26/06 at p. 7 (Unreported); *Losper*, supra, at para [5]). Thus, on this point I accept Mr Lisulo's submission as well founded. Additionally, in considering the interests of society I must also take into account the anguish of the deceased's family, which has suffered very greatly as a result of losing their family member at the hands of the accused.

[6] The accused has asked for forgiveness from this Court. Mr Hengari submitted that the accused has become a 'born again' Christian since the 22 May 2010. Prior to becoming a 'born again' Christian, counsel submitted further, the accused was indeed a regular churchgoer, and he has become a committed Christian since murdering the deceased and further that whilst in custody the accused does attend church services and bible studies. The accused informed the Court that he wished to add his voice to that of his counsel. I granted him his wish. The accused informed the Court, 'Even the heavenly Father forgives those who trespasses and has mercy on them. That is why I am asking this Honourable Court to apply the same principle.' That is true; but we must give to God what is God's and to Caesar what is Caesar's. I have also taken into account, as Mr Hengari urged me to do, the fact that the accused pleaded guilty to murder, based on *dolus eventualis*; save that the State did not accept it.

[7] As I opined in *Losper* supra at para [8], here, too - I am afraid - I must state the obvious: I am painfully alive to the sad reality that no amount of punishment will bring the deceased back to her family. Nevertheless, the accused must all the same be

punished for this terrible crime; and punished severely, considering the circumstances of the commission of the crime, as I have mentioned previously. It was the submission of Mr Lisulo that a sentence of 30 years' imprisonment would meet the justice of the case. On his part, Mr Hengari submitted that a sentence of 20 years' imprisonment would be an appropriate sentence. Mr Lisulo and Mr Hengari referred a number of authorities to me in support of their respective submissions on what would be an appropriate sentence. I am grateful to counsel for their industry in that regard. I have consulted the authorities. In any case, as Mr Lisulo submitted - correctly, in my view - the overriding principle in all this is that each case must be considered on the facts and circumstances of the particular case.

[8] I have taken into account all the considerations discussed previously and all the facts and circumstances of the instant case. I have also taken into account the fact that the accused was admitted to bail so soon after his arrest; and so up to 22 September 2010 when I revoked the accused's bail, the accused had not spent any appreciable length of time in custody. Having done so, I think imposing a sentence of 25 years' imprisonment on count 1 would be appropriate; it would meet the justice of this case. I pass to consider count 2. I think as respects this count, a sentence of five years' imprisonment for attempt to commit the crime of rape would be an appropriate sentence, as prayed for by Mr Lisulo. And as a measure of mercy, I think I should order the two sentences to run concurrently.

[9] In the result, I pass the following sentence:

1) Count 1: 25 years' imprisonment

Count 2: five years' imprisonment

I order that the sentences for count 1 and count 2 shall run concurrently.

PARKER J

COUNSEL ON BEHALF OF THE STATE:

Adv D Lisulo

Instructed by:

Office of the Prosecutor-

General

COUNSEL ON BEHALF OF THE ACCUSED:

Mr U A Hengari

Instructed by:

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