CASE NO.: CA 20/10

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SMALLBOY HINDJOU **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **HEATHCOTE, A.J**
SCHIMMING-CHASE, A.J

Heard on: **11 JULY 2011**

Delivered on: **26 JULY 2011**

JUDGMENT

HEATHCOTE, A.J:

[1] In the early morning hours of 22 December 2004, Mr. Paul Sabastian Figaji (the deceased) was murdered. A sharp object penetrated his neck. At the same time, he was robbed of some money and a cellphone worth approximately N$ 2000.00.

[2] The deceased's assailant had a light blue shirt on and also wore blue jeans. On the same day, approximately 14h00, the appellant was arrested. He was found in the presence of one of the State witnesses, Ms. Rooi. The appellant pleaded not guilty and remained silent, but when the trial commenced, it was recorded in terms of section 220 of the Criminal Procedure Act 1977, that the person killed was indeed Mr. Figaji and that his body did not sustain any further injuries when it was transported to the morgue.

[3] During cross examination two very important statements (instructions received by the appellant's legal practitioners from the appellant) were put to the State witnesses. It was put to the first State witness ("Mostert") that the appellant, on that fateful evening, was **"wearing a white tracksuit and white takkies/shoes"**. It was also put to Mostert that the appellant will testify that **"the only thing he knows about this whole incident was when people came running past Wika when he came out of Wika, the shop at Wika (sic). He denies stabbing and/or robbing the deceased".**

[4] During the evening of 21 December 2004, the deceased and his friend Mr. Mostert, were together. Earlier that evening, they were playing pool, and if we understand the evidence correctly, it was time for them to go home. At that stage, they were more or less in the centre of town. The deceased withdrew N$ 100.00 at the FNB ATM close to Ausspannplatz. From there, they proceeded in a northern direction towards the Wika Service Station. On their way to the Wika Service Station, they met Ms. Rooi (the second State witness). She joined them. While still proceeding to the Wika Service Station, Ms. Rooi, Mostert and the deceased, met another lady; Ms. Esterhuizen. She was in the presence of the appellant and another man, called "Blackie".

[5] While Ms. Rooi had some or other conversation with Ms. Esterhuizen, the deceased and Mostert did not pay much attention to the conversation, but proceeded on their way to the Wika Service Station. What Ms. Rooi later on testified during the trial, is that when she saw the appellant there in the street, whom she knew, (by the name Smallboy Hindjou), he was wearing a light blue shirt and blue jeans. This was also subsequently confirmed by State witness (Esterhuizen). However, it must be pointed out that Mostert did not know the appellant, and his identification of the appellant only relates to the clothes the appellant wore that evening.

[6] When the deceased and Ms. Esterhuizen arrived at the Wika Service Station, Ms. Rooi was still in their presence. Then Ms. Esterhuizen, the appellant

and Blackie joined them in the Wika Service Station's shop, where Ms. Rooi persuaded the appellant and Oosthuizen to buy her a beer. As a result, the deceased used the N$100.00, which he previously withdrew to buy three beers, and it appears a portion of chips as well.

[7] The deceased, Mostert and Ms. Esterhuizen then left the Wika Service Station and proceeded in a southerly direction, but not along the street. They went into an open space, somewhere behind the Wika Service Station. From this open space they could also go back to the main road by climbing through a hole in a precast wall. This they did. Mostert appeared first; thereafter Esterhuizen followed. The two of them then turned in a southern direction towards the traffic lights, where according to Mostert, they would have stopped a taxi for the deceased to go home, and whereafter he, Mostert, would have proceeded on foot to his nearby residence. It appears from the evidence that Mostert was approximately 08-12 meters from the hole in the precast wall when he suddenly heard Ms. Esterhuizen scream that **"they stabbed your friend"**. The deceased also shouted. More or less at this moment the deceased was fatally wounded. Mostert could not see the facial features of the assailant, but, he could see that the assailant was wearing a light blue shirt and the blue jeans. Comparing the assailant with the person he saw earlier in the presence of Ms. Esterhuizen, he testified that;

> ***"Yes, they had the same clothes with the light blue jeans and the light blue hat which he had on".***

[8] Later on, again with reference to the clothes of the assailant, Mostert testified;

> ***"He had the white bluish shirt with blue jeans on".***

[9] It is clear from Mostert's evidence in chief that the assailant had a hat on, but while under cross examination, and questions posed to him by the presiding officer, he simply referred to a bluish shirt with blue jeans. Much emphasis was placed on this contradiction (on behalf of the appellant) during the argument in the *court a quo*, as well as in this appeal. We return to this aspect later.

[10] According to Mostert, he then gave charge after the assailant but the assailant ran away, past the Wika Service Station into a darker spot where Mostert could not find him. He further testified that, while the assailant ran away, he also saw the lady, for whom they bought the beer (i.e. Rooi) joining up with the assailant, and the two of them ran away.

[11] The State then called Ms. Rooi. She testified that while she was still in the shop at Wika Service Station, Ms. Esterhuizen, Mostert and the deceased left the shop. A short while later, after she came out of the Wika Service Station, she

suddenly saw **"Smallboy and Blackie"** running towards her. The one had a blue jeans and light blue shirt on. It was the appellant. His shirt was full of blood and he had a small knife in his hand. At some stage, Blackie was also running towards her, but that is the last information we have about Blackie. When the appellant came close to her, he said;

> ***"Let us go I made shit"***

[12] The appellant and Ms. Rooi then proceeded into the darker corners of the Wika Service Station where they hired a taxi and departed to Katutura. She further testified that when she told the appellant that she did not have any taxi money, he used a N$ 50.00 note, which he did not have earlier to pay for the taxi. On their way to Katutura, they first stopped at a garage where they purchased some food, whereafter they preceded to Ms. Rooi's residence. When they arrived there, the appellant asked her to wash the clothes he had on. The clothes were full of blood, and she put it into water.

[13] That same day at approximately 14h00, the police arrived at Ms. Rooi's residence. There the police found Ms. Rooi and the appellant playing cards. When they arrived, Ms. Rooi immediately told them what happened. Shortly thereafter a statement was taken from her. In this statement she confirmed that the appellant ran towards her; that he said to her that he had **"made shit"**, and that his jeans was blood stained. In this statement, however, nothing was said by

her about the fact that the appellant had a knife in his hand when he approached her that previous evening (while running); or that his shirt was also full of blood; or that he later on admitted to her that he stabbed a person. This additional information, which she subsequently testified about at the trial, also came under heavy criticism by Mr. Karuaihe acting for the appellant.

[14] Ms. Esterhuizen also testified that the appellant had a light blue shirt and blue jeans on. She could not recall whether he also had a hat on during the fateful evening.

[15] After the State closed its case, the appellant testified. In essence, he testified that he went to the Wika Service Station, bought some food there, and then left by taxi together with Ms. Rooi. He denied stabbing the deceased or that he stated to Ms. Rooi that he had stabbed a person, or that he had a knife in his possession that evening.

[16] Importantly, the following was then asked and answered;

> ***"Yes, did you see any other commotion there outside the service station? No".***

This is in direct contradiction to what was previously put to the State witnesses. From the statement which was put to Mostert, it appears that the appellant's

defence was that he did see somebody running, (which would have fitted in with the stabbing of the deceased and the running away of the assailant), but it was not him. When he testified, however, he knew of no such incident. More importantly he testified the following;

> ***"Sir, let us start with that evening. What did you say, what clothes were you wearing did you say? Can you just repeat that for me please?... it was a white t-shirt and a brown tracksuit pants and black Nike shoes".***

This is a far cry from what was put to the State witnesses by his attorney. According to that statement, which we have already referred to, appellant had a white tracksuit and white takkies on.

[17] The learned Magistrate rejected the version of the appellant as false. For a number of reasons, we cannot fault that conclusion. Three witnesses testified that appellant had a light blue shirt and blue jeans on. Admittedly, Mostert also referred to a hat which the assailant had on, but in our view, the person who ran away from the incident, who had a light blue shirt and blue jeans on, was indeed the appellant. That was proven beyond reasonable doubt. On top of it, his light blue shirt and blue jeans were now covered in blood. A few moments before, someone killed the deceased. It is apparent from the photographs handed in during the trial that a lot of blood was spilled. The appellant furthermore, did not,

during cross examination, deny that he has uttered the words **"I have made shit"** or that, when he arrived at home with Ms. Rooi, she washed his clothes. The appellant placed himself on the scene when he originally said that the person (beyond a doubt another assailant which he wanted to create) ran towards him or passed him. That was not his version under oath. We are satisfied that the learned Magistrate correctly concluded that the State proved beyond a reasonable doubt that the appellant murdered the deceased that evening, and immediately thereafter, robbed him of the N$70.00 and a cellphone. The additional information tendered by Ms. Rooi during her evidence does not detract from this finding. The omissions in the statement taken by the police were explained by Ms. Rooi during cross examination.

[18] The appellant was sentenced to 20 years imprisonment on the count of murder, and 15 years imprisonment on the count of robbery with aggravating circumstances. The learned Magistrate ordered 5 of the 15 years (in respect of the robbery charge) to run concurrently with the murder sentence. During argument, the Magistrate was referred to the Supreme Court case of S v Alexander 2006(1) NR 1, where the Supreme Court, per Maritz A.J (as he then was); dealt with the approach when sentencing an accused in similar circumstances. The learned Magistrate had this to say about that Supreme Court judgment (i.e. where murder and robbery is committed in the same action);

"In this matter the motive of murder was clearly robbery, and I must say that I find the facts of this matter distinguishable from the case of Paulus Alexander v State, a judgment by Mr. Acting Justice Maritz, Supreme Court of Appeal, 5/99, handed down in 2003 on 13 February".

[19] A further very important factor, in our view, is that the appellant was 18 at the time the murder and robbery took place. Clearly, from a perusal of the reasoning in the judgment on sentence, handed down by the learned Magistrate, he wanted to give an exemplary sentence. No doubt, the deeds perpetrated by the appellant were callous. But the distinguishing factor, relied upon by the Magistrate for purposes of distinguishing the facts of this case from the facts of the Alexander-matter (for purposes of sentencing), is not convincing at all. In our view it does not matter that the robbery in the Alexander-matter took place moments before the murder, whereas in this particular case, it appears that the deceased was first stabbed and thereafter (but in one and the same movement so to speak) dispossessed of his money and cellphone. The whole purpose of carefully dealing with matters such as these in order to avoid double jeopardy was explained in detail by Maritz A.J. At page 15 paragraphs D-F, where the learned judge said the following;

"Having taken the murder (and therefore also the death) of the victim into account for purposes of sentencing the accused on the count of

robbery, the trial Judge clearly misdirected himself and the sentence cannot be sustained".

[20] In my view the learned Magistrate, (in this matter), erred in exactly the same respect, when he said;

"In this matter the motive of murder was clearly robbery".

[21] As a result of this misdirection, a sentence (which we would have imposed) can now be imposed. See S v Gurirab and Others 2008 (1) NR 316SC and S v Jason and Another 2008 (1) NR 359 SC. In all the circumstances, and particularly given the youth of the appellant at the time the offences were committed, we have come to the conclusion that the appeal against sentence on the robbery charges should succeed to a limited extent.

[22] In imposing a fresh sentence, we think it to be appropriate that the sentence in respect of the murder charge and the robbery charge should run concurrently. In all the circumstances the following order is made;

[22.1] the appeal against the appellant's conviction on the charge of murder and robbery with aggravating circumstances, is dismissed.

[22.2] the appeal against the sentence of 20 years on the murder conviction is dismissed.

[22.3] the appeal against the sentence in respect of the conviction for robbery with aggravating circumstances partially succeeds and is partly set aside. The Magistrates Court's sentence is substituted with the following;

"1. In respect of the murder conviction, the accused is sentenced to 20 years imprisonment;

2. In respect of the robbery with aggravating circumstances conviction, the accused is sentenced to 15 years imprisonment, 7 years of which is wholly suspended for a period of 5 years, on condition that the appellant is not convicted of an offence which contains an element of violence..

3. The sentence in respect of the murder the sentence in respect of the robbery conviction are to run concurrently.

4. The sentence is antedated to 29 August 2008."

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HEATHCOTE, A.J

I agree

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SCHIMMING-CHASE, A.J

ON BEHALF OF THE APPELLANT:
KARUAIHE LEGAL PRACTITIONERS

ON BEHALF OF THE RESPONDENT:
OFFICE OF THE PROSECUTOR-GENERAL