CASE NO.: CC 19/2010

IN THE HIGH COURT OF NAMIBIA HELD
AT OSHAKATI

In the matter between:

THE STATE

and

JAMEN PETRUS GAOSEB
JOAHASEL GAMASEB

CORAM: LIEBENBERG, J.

Heard on: February 22 - 23, 2011.
Delivered on: February 25, 2011.

SENTENCE

LIEBENBERG, J.: [1] The accused were jointly convicted on two counts, namely, murder and housebreaking with intent to rob and robbery, with aggravating circumstances. They pleaded not guilty to both charges but in the end, were convicted on both charges. In respect of the murder charge, they were convicted on the basis of constructive or legal intention *(dolus eventualis).* We have reached the stage of the proceedings where the Court must decide what sentence, in the circumstances of this particular case and with full regard to the interests

of the accused persons, would be appropriate and just.

[2] It is trite law that a trial court has a judicial discretion in sentencing and this discretion must be exercised in accordance with judicial principles. The sentencing court must keep in mind the purposes or objectives of punishment referred to in *S v Khumalo and Others,*[1] and must endeavour to strike a balance in respect of the interests of the accused, and the interests of society, in relation to the crime itself and in relation to those purposes or objectives. This requires that the personal circumstances of the accused be weighed in relation to the interests of society. It is in the interest of society that the punishment meted out by the court is appropriate. It has also been said that, should society feel that the punishment imposed is inadequate, it may well hesitate or be reluctant to accept the offender back into society *(S v Tjiho*[2]*).*

[3] Both the accused gave evidence in mitigation, without calling any witnesses.

[4] The personal circumstances of first accused are the following: Although unable to state his exact age, he said he was twenty-one years of age when arrested in 2005. That would currently make him about twenty-six years of age. He is not married and fathered a daughter, now five years old, who lives with his mother in Otavi. Prior to his arrest, accused used to contribute towards the maintenance of his child by buying milk and clothing; a responsibility now fully lying with his mother, who is employed. It would appear that she also supports the child's biological mother. He is illiterate and never received any formal education. He was employed by the deceased where he had been working for only two-and-a-half months and earned N$220 per fortnight. He resigned one day before the incident took place in which the deceased got killed, and explained his resignation by saying that the deceased deducted

1 1984 (3) SA 327 (A).
2 1991 NR 361 (HC).

monies from his salary, which she was not entitled to do. This he said, was the reason why he returned to the farm the following day in order to steal the money she had earlier refused to give him. He was unable to explain why he did not instead file a complaint with the Labour Commissioner; other than saying that he did not think of that at the time. He further said that he felt very bad for having caused the death of the deceased and that the incident haunts him in his dreams. He otherwise enjoys good health. Accused has been in custody since his arrest on 16 October 2005; a period of five years and four months. Before this incident, he had not brushed shoulders with the law.

[5] Second accused was unable to state his age, but confirmed that he was an adult. He is single and without dependants. His formal education went as far as grade three when he dropped out of school because his school fees remained unpaid. He had also worked for the deceased for just over two months (prior to accused no.1 taking up employment with the deceased) and voluntarily terminated his services. Second accused thereafter did some casual work elsewhere, but, on the date of the incident, he was unemployed. He thereafter became financially dependent on his mother, whose house he was staying in at the time, in Otavi. He equally felt very bad about the deceased's death, which, to him, came unexpected. He explained that, although he had no earlier quarrel with the deceased over money, he decided to go with first accused, hoping that he would share in the money they planned on stealing. The N$4-80 actually stolen was spent on cigarettes. From the remaining stolen items, he took curtains, duvet covers and bed-sheets. The firearm, he said, remained with accused no. 1, who did not indicate to him what he intended doing with it. Second accused is also a first offender and remained in custody since their arrest.

[6] It is a well-established principle that, for remorse to be a valid consideration, penitence must be sincere and the accused must take the Court fully into his confidence; unless he does that, the genuineness of his alleged contrition cannot be determined *(S v Seegers* [3]). *In casu,* both accused testified that they 'felt very bad that the deceased had died', nothing more. They

3 1970 (2) SA 506 (A).

clearly did not accept the blame for having killed the deceased - albeit with intent in the form of *dolus eventualis;* and just kept on saying that they did not 'think' (foresee) that the deceased would die. I accept that the concept of constructive intent may be difficult for them to grasp, but even as laymen, they did not express themselves from which it can be said that they take full responsibility for the consequences of their actions. In the light of their pleas of not guilty on both charges; first accused's persistent dishonesty (endorsed by second accused) throughout the trial and (even) at the stage of sentencing; and, their superficial expressions of feelings of remorse for the heinous crimes they committed, could these be considered to be sincere and, hence, a valid consideration when sentencing? I believe not, as they clearly did not take the Court fully into their confidence - neither during the trial, nor during their testimony in mitigation. They never accepted their guilt and, as was shown during the judgment, evidence was fabricated to favour their version. It has been said[4] that *"The sooner after the commission of a crime remorse is expressed and reparation steps are under taken, the more genuine the expression thereof will fall on the ears of the Court. It requires of a suspect not only to express it, but also to conduct himself in such manner that his remorse is evident from his actions."* I fully endorse the sentiments expressed by Maritz, J (as he then was) and in this case, I am unable to find genuine remorse on the part of both the accused and, in the circumstances, I am unable to give any weight to their alleged feelings of remorse.

[7] From their evidence in mitigation it is clear that both the accused struggled to make an independent living for themselves; and at all relevant times, were dependent on the assistance and financial support of their respective mothers. This unfortunate situation might have been brought about by their poor background and lack of formal education - or possibly, might have been a contributing factor. Notwithstanding, at the time they committed the crimes convicted of, first accused had resigned and second accused, although unemployed, was financially supported by his mother. If accused no. 1 honestly believed that he was unfairly treated by the deceased when she deducted money from his salary not due, then he could have the matter addressed through the local labour office. Instead, he decided to take the law into

4 *The State v Willem Swartz and Others*, Case No. CC 08/89 (HC).

his own hands and got accused no. 2 to join forces with him in the execution of their plan. There was simply no need for that - more so second accused, who was unaffected by the issues between the deceased and first accused. However, greed took the better of him, as he was hopeful of sharing in the spoils -which he did. Although the circumstances, in which both accused found themselves in at the time of committing the crimes, are far from ideal, it cannot, in my view, be said that they, as a result thereof, were forced to turn to crime. In this country there are a large number of people whose circumstances are similar to that of the accused persons and who, from one day to the next, struggle to eke out a livelihood with very little to their disposal - yet, not all of these persons turn to crime to help themselves to what belongs to others. They consider themselves as law abiding citizens, choosing to respect the fundamental rights of others, irrespective of their circumstances. In this case both accused *chose* to trample on the rights of others; with complete disregard to the sanctity of human life.

[8] That they planned their actions in advance is evident from the facts: They decided to enter the house at night when they knew the deceased would be asleep; both knowing the set-up at the house and how they could easily gain forced entry into the house because of their previous employment with the deceased; they knew she was living on the farm alone; and therefore prepared themselves by taking along tools, such as a screwdriver and knife, in order to achieve their aims. The planning of a crime is generally regarded to be an aggravating factor, and in the present case, there is sufficient evidence to find that the accused planned their actions well in advance.

[9] Both crimes committed are viewed in a serious light by the courts, and where these share common ground, I take the following into consideration: From their earlier employment on the farm, both were familiar with the circumstances on the farm and, it is also from this prior knowledge, that they knew they could gain access to the house through the window in the store room where the burglar bars were widely spaced to readily allow access for someone to pass through when breaking the windowpane. They knew that the deceased was living alone

and given her advanced age, she was particularly vulnerable. This much was conceded by their counsel.

[10] Turning to the crime and the circumstances in which it was committed, it is noted that the deceased was attacked in the sanctity of her home. She was surprised in bed and stood no chance against the accused persons. In these circumstances, if the accused meant no harm to the person of the deceased (as they claimed), they could simply have locked her up in one of the rooms without injuring her in any way; temporarily incapacitating her. She was a frail and sickly, elderly person; subjected to an assault which fractured some of her ribs and during which assault she sustained injuries on her head and neck. The latter injuries are not viewed to be of serious nature. A garment was tightly tied around the head, covering her mouth and nose, probably preventing her from breathing properly. She was further securely trussed up to such an extent that she probably was unable to move any of her limbs and remained in that position until she died. She must have been in extreme pain and agony before she died. She was helpless and defenceless and had to pay with her life; only so that the accused persons could rob her of a handgun, N$4-80 in cash, and goods only of sentimental value to the family i.e. linen. Judging from the photographs forming part of the photo plan handed in as exhibit during the trial, depicting the manner in which the deceased was lying in when found the following day, one can only describe that scene as undignified -something no person should be subjected to.

[11] It must be borne in mind that the accused were convicted of the offence of murder with intention in the form of *dolus eventualis* and not in the form of direct intent *(dolus directus).* Such finding in itself, however, does not constitute amitigating factor, as it will all depend on the facts of each particular case, and not only because direct intent is absent.[5] Regard must be had to the crimes committed and the circumstances of the particular case; and it has been said

5 *S v de Bruyn en „n Ander* 1968 (4) SA 498 (A) at 505; *S v Joseph Gariseb and Another* (unreported) (HC) delivered 24.10.2006.

that murder, committed with constructive intent of a certain nature, may even be morally more blameworthy than murder by direct intent[6]. The crimes committed *in casu* are not only serious, but also heinous and deserve severe punishment. The murder was committed during a housebreaking and robbery, with aggravating circumstances.

[12] Because the two charges are in time closely connected and the assault and ensuing death being common factors, it might create the impression that there is a risk of punishing the accused twice for the same misdeeds, called 'double jeopardy'. In this regard Maritz, AJA (as he then was) in *S v Alexander*[7] stated:

> *"I agree with the approach favoured by Van den Heever JA [in S v Maraisana and Another 1992 (2) SACR 507 (A)]: the accused must be sentenced on the count of robbery as if he has not been convicted on the count of murder and is not in jeopardy of such a conviction in future. In many instances the result may be the same as that of the earlier approach applied by that Court, i e to think the death of the victim away when sentencing the accused on the count of [robbery], but its substratum is different and founded on the principle that the sentence should always be designed to fit the crime (and it is not to say that it should not also incorporate the other elements of* ***Zinn's*** *triad). While this approach may be criticised for not removing the risk of double jeopardy altogether, it remains, for the reasons I have already referred to, the preferred option. To the extent that an element thereof remains, this can be addressed adequately by directing that the sentences (or portions thereof) will be served concurrently. "*

[13] Crimes such as murder, rape, robbery and housebreaking are all serious crimes. The sanctity of life expressed by the Constitution must be protected and the only way in which this Court could make a contribution to that end, is by meting out appropriate and suitable

6 *S v Sebeko* 1968 (1) SA 495 (AD); applied in *The State v Hendrik Swartz and Another* (unreported) Case No. CC 48/2007, delivered on 29.02.2008.

7 *S v Alexander* 2006 (1) NR 1 (SC)

punishment. Courts will certainly fail in its duty, should it not impose severe punishment in deserving cases; thereby sending a clear message to society, to the accused in particular, and al would-be offenders, who may consider committing crimes of this nature. Given the grave escalation of crimes of violence committed lately against the most vulnerable in society like the elder; women and young children, the deterrent aspect of sentencing and deterrence, as one of the objectives of punishment, must be emphasised. There is a general outcry from the public for protection against criminals and it is more often than not reported in the media, that aggrieved members of society have taken to the streets to protest their dissatisfaction against criminals in society who show no respect for life and the rights of others. I am alive to the fact that the courts should not give in to public expectation - which is not synonymous with public interest - because, what the public may perceive as being fair and just, may not, necessarily, be in its best interest; neither in the interest of justice.

[14] When balancing the interests of the accused, the seriousness of the crimes and circumstances under which it was committed, against the interests of society, I am satisfied that the aggravating factors by far outweigh the mitigating factors placed before the Court by both accused. It is well-known that the sentencing court has the often difficult and complicated task to harmonise and balance the general principlesapplicable to sentencing when applying these to the facts of the particular case. However, it does not imply that equal weight must be given to the different factors, as situations may arise where it is necessary to emphasise the one at the expense of the other *(S v Van Wyk*[8]*).* It is therefore not uncommon, when dealing with cases involving serious crime, that the emphasis falls on deterrence and retribution, and that rehabilitation plays a lesser role. It, however, does not imply that the personal circumstances of the offender are ignored - it still has to be considered with the totality of the facts before the Court. Although their personal circumstances may not be overlooked, the gravity of and the circumstances in this case, involving crimes of murder and housebreaking and robbery with aggravating circumstances, dictate that severe punishment be

8 1993 NR 426 (HC) at 448D-E

imposed on the accused today. A lengthy custodial sentence seems inevitable.

[15] That would not only bring hardship to the accused persons who, most probably, would spend the greater part of their productive life behind bars; but also to their families, especially the child of first accused, who will grow up without a father figure in her life. For the moment this child is cared for by her grandmother and the child's biological mother; however, things might chance for the worse in future as it would appear that they are mainly dependent on his mother's income. Regrettably, one cannot allow one's sympathy for the family to deter one from imposing the kind of sentence dictated by the interests of justice and society.

[16] The accused have been in custody awaiting trial for five years and four months. It is trite that the period an accused spends in custody awaiting trial, especially if it islengthy, is a factor which normally leads to a reduction in sentence.[9] That would obviously apply to this case.

[17] Where the accused is sentenced in respect of two or more related offences - like murder and robbery - the accepted practice is that the court, in sentencing, should have regard to the cumulative effect of the sentences imposed, in order to ensure that the totality of the sentence is not disproportionate to the moral blameworthiness of the offences, for which the accused stands to be sentenced.[10]

[18] In the result, accused no's 1 and 2, you are <u>each</u> sentenced as follows:

9 S *v Engelbrecht* 2005 (2) SACR 163 (WLD) para 31 at 172C; *S v Mtimunye* 1994 (2) SACR 482 (T); *S v Goldman* 1990 (1) SACR 1 (A).

10 *S v Coales* 1995 (1) SACR 33 (A) at 36e-f; *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 523g-h.

Count 1 - Murder: 27 years imprisonment.

Count 2 - Housebreaking with intent to rob and robbery, with aggravating circumstances: 15 years imprisonment.

In terms of s 280 of Act 51 of 1977 it is ordered that 7 years of the sentence imposed on count 2 be served concurrently with the sentence imposed on count 1.

LIEBENBERG, J

ON BEHALF OF THE ACCUSED	**Mr. S. Skakumu**
Instructed by:	**Directorate: Legal Aid**
ON BEHALF OF THE STATE	**Mr. D. Lisulo**
Instructed by:	**Office of the Prosecutor-General**