REPUBLIC OF NAMIBIA

CASE NO. CC5/2003

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ESEGIËL GARISEB
Applicant

and

THE STATE
Respondent

CORAM: **VAN NIEKERK, J**

Heard: 13 February 2012
Delivered: 20 February 2012

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK, J: [1] This is an application for leave to appeal against sentence. I convicted the applicant and his co-accused on 16 October 2006 after a trial on a count of murder, three counts of housebreaking with intent to rob and robbery with aggravating circumstances and one count of robbery with aggravating circumstances. On the count of murder I sentenced applicant to a prison sentence of 40 years. On count 2 the Court sentenced him to 12 years imprisonment and

ordered that 10 years run together with the sentence on count 1. All the other sentences of 10 years (count 3), 6 years (count 4) and 3 years (count 5) respectively were ordered to run concurrently with the sentence imposed on count 1. The effect is that the applicant must serve 42 years in total.

[2] The applicant applied for legal aid. When the matter was called there had not yet been a reply from the Directorate of Legal Aid. The applicant elected to argue the application in person. Later during the day a fax was placed on the court filed indicating that legal aid had been refused.

[3] Sentence was imposed in the main matter on 24 October 2006. The application for leave to appeal was filed only on 8 March 2011, about 4 years and 4 months late. There is no application for condonation. The applicant stated from the dock that he was informed by the inmate who drew up the application for leave to appeal that the application is complete. I reminded the applicant that when his co-accused appeared to argue his application for leave to appeal against sentence on 15 June 2009, the applicant was brought to court by mistake. At the time when I asked him why he was also present, the applicant replied: “I was just brought in this morning, I don’t know why. But I did not even launch any request for appeal or anything.” I reminded the applicant of this answer and suggested to him that he never had any intention to appeal. His

response was that earlier he did not understand properly what an appeal was all about.

[4] The fact that there is no application for condonation for the late filing of the appeal is unsatisfactory. This Court would have been entitled to strike the application from the roll without further ado. However, it has already been placed on the roll once before in September 2011, but removed as the applicant wanted legal aid. In order to finally dispose of the matter and as the respondent had no objection thereto, I permitted the applicant to address me on the prospects of success.

[5] The thrust of applicant's complaint is against the length of the period of imprisonment. He submitted that the sentence ought to be reduced by about half. He informed the Court that he has, since being sentenced, truly experienced remorse. The Court cannot take this into consideration. The application for leave to appeal is not a re-hearing of the issue of sentence. The applicant's current circumstances are not relevant. The Court must look at the facts and circumstances as they existed at the time that the applicant was sentenced in October 2006 and consider whether the Court erred then in any way which the applicant can point out.

[6] I now turn to a consideration of the applicant's application for leave to appeal. The first ground on which the applicant relies is that the Court erred in totally over-emphasizing the interests of society when passing

sentence. The second ground of appeal is that the Court failed "to strike a balance between the seriousness of the offence and society's interest." As formulated this ground does not make sense. I shall come to the applicant's assistance by considering whether the seriousness of the offences in this case was not over-emphasized. It is convenient to deal with the first two grounds of appeal together.

[7] To properly do this, it is necessary to state shortly certain important factual findings made during the trial. The applicant and his co-accused hatched a plan to attack and rob the deceased, a 67 year old farmer and shop owner living alone in the main house on his farm. They did so at sunset when they knew that he would probably be alone. They acted throughout with common purpose. The applicant took a large knife with him that day. It was used to assault the deceased. The two accused overpowered the deceased and tied him up. They broke into the main house, the shop and other buildings on the farm and stole a large variety of items, most notably some cash and firearms. The deceased was assaulted repeatedly at various spots in the house in order to force him to disclose the whereabouts of the keys to the safe in the house. Blood spatters and puddles were found at various spots. The applicant repeatedly stabbed the deceased with a homemade barbecue fork. The force was such that the prongs broke off. Eventually he was tied to his bed and burnt on his chest and hand when some substance was set alight on his body in order to make him talk. The deceased was also hit on the head with an exhaust pipe and kicked in the ribs. The main cause of death was the head injuries.

[8] The two accused attempted to dislodge a big safe from the wall in the main house and caused extensive damage to the wall. They succeeded in removing the door handle to the safe. They also caused extensive damage to the burglar bars of the shop window when they broke in there. After looting the house, shop and other buildings, they broke open the deceased's vehicle and loaded the stolen goods and drove away. They abandoned that vehicle in the veld next to the main road.

[9] The aggravating circumstances in this case and the seriousness of the crimes committed are so overwhelming that the applicant's personal circumstances and the few mitigatory factors do not carry a great deal of weight when viewed against the enormity of the crimes committed (Cf. *S v De Kock* 1997 (2) SACR 171 (T) 197*g-h; S v Skenjana* 1985 (3) SA 51 (A) 54A; *S v Alexander* 2006 (1) NR 1 (SC)). I agree with Ms *Verhoef* who appeared for the respondent, that the sentence of 40 years imposed on the murder count is in line with other sentences imposed in this jurisdiction in similar cases and that reducing it to 20 years would be entirely too lenient. As stated in the main judgment on sentence, the interests of society cry out for protection against the likes of the applicant who commit such unconscionable and violent attacks. In my view there is no merit in the first two grounds of appeal.

[10] The third ground relied on is that the Court erred by imposing a sentence on the applicant which is bound to take him to the point of being

broken. It is accepted in our courts that an offender "must not be visited with punishments to the point of being broken. Punishment should fit the criminal as well as the crime, be fair to the State and to the accused, and be blended with a measure of mercy." (*S v Sparks* 1973 (3) SA 396 (A) 410H). When sentencing the applicant this Court was at pains to distinguish his circumstances from that of his co-accused where appropriate, most notably when considering his record. The applicant received this benefit when sentences on the counts other than the murder count were imposed. Ultimately this led to him having to serve three years less than his co-accused. I realize that the applicant's complaint is mostly aimed at the sentence of 40 years for the murder count and that the effect of the long period of imprisonment may perhaps be more keenly felt as the applicant is much older than his co-accused. It should be noted that the applicant was 44 years of age when the sentence of 40 years imprisonment was imposed. As the applicant pointed out, if he is ever released, there will not be much left of his life. The problem here is his moral blameworthiness. When he was influenced by his co-accused to plan and execute the crimes, he did not use the wisdom that one could rightly have expected from him as the co-accused's uncle and senior by about 20 years. Although he did not plan to murder the deceased, there was ample time during the course of the night they spent looting the premises and assaulting the deceased to realize that he could very well die as a result of the injuries they inflicted. There are indications in the evidence that the applicant saw the profit to be gained from these heinous

crimes as the opportunity rise above his menial existence. As it turned out, his elation was of brief duration.

[11] An aspect about the case which I cannot ignore, is the extreme cruelty imparted to the deceased, a frail man of 67 years, who was an acquaintance of the applicant at the shop which the applicant regularly visited and a person who even shared a drink and a chat with him on occasion. The deceased was repeatedly and brutally assaulted by both accused over an extended period of time in each other's presence and while acting with common purpose. After they initially overpowered him and tied him up the only purpose of the assaults was to extract information from him about the location of the keys to the safe in which the applicant and his co-accused, motivated by greed, hoped they would find large amounts of money and other valuables. The murder committed in this case is so serious and the circumstances so aggravating that any significant reduction in the applicant's sentence would have been a misdirection. The age of the applicant at the time of sentence was also not such that on the score alone a much shorter period than 40 years would have been appropriate.

[12] The fourth ground of appeal is that the Court erred by failing to take the various counts together for sentence. There is no merit in this contention. Generally speaking, the taking together of various counts for the purposes of sentence is discouraged. This is so because difficulties may develop on review or appeal if some of the convictions are set aside

or if there is a misdirection in respect of sentence. The court of review or appeal may then have trouble in determining how the court *a quo* made up the sentence (*S v Young* 1977 (1) SA 602 (A) 610E-G). It is for this reason that I rather imposed a separate sentence on each count. However, I took into account the cumulative effect of all the sentences imposed by ordering that they run concurrently in the manner I set out at the start of this judgment (see para. 37 of the judgment on sentence).

[13] The fifth ground of appeal is that the Court erred by failing to take into account that the applicant pleaded guilty and showed remorse. This ground does not show the whole picture of what occurred during the trial. Although the applicant pleaded guilty, the respondent did not accept the pleas on counts 1 and 5. The Court then convicted the applicant on counts 2, 3, and 4. However, later during the trial pleas of not guilty were entered on all counts because the applicant testified that he was not guilty as he had acted under duress by his co-accused. The applicant also disputed various material facts of the State's case against him, which contributed thereto that the trial was not shortened in any way. Eventually his version was rejected on all material aspects. During the sentence stage counsel for the applicant offered an apology for the deeds which the applicant committed. The applicant did not testify under oath or make a clean breast of everything. The Court concluded that the remorse was not genuine in the sense that it was unconditional and accompanied by full disclosure (see para. [19] of the judgment on sentence). In my view no misdirection was committed.

[14] The last ground of appeal is that the Court erred by totally over emphasizing the retributive purpose of punishment. The Court did not single out the retributive purpose of punishment, but found that in this case the deterrent, retributive and preventative purposes of punishment must be emphasized at the expense of the reformative purpose of sentence (see para. [33] of the judgment on sentence). The approach that rehabilitation must take a backseat in the face of the overwhelming seriousness of the crimes committed has been followed in this jurisdiction, e.g. in *S v Gerson Tjivela* (Supreme Court Case No. SA 14/2003, unreported judgment delivered on 16/12/2004 at p. 4). I see no reason why the same approach should not have been followed in this case. The seriousness of the crimes and the interests of society called for the imposition of a long period of imprisonment in pursuance of the legitimate purpose to achieve deterrence and retribution and also to prevent the accused from committing further crimes. In my view it cannot be said that there was any error in the manner in which the Court approached the issue of sentence.

[15] The conclusion I have reached is that there are no prospects of success on appeal. This finding, coupled with the fact there is no proper application for condonation explaining the delay in filing the application for leave to appeal, means that the application must be struck from the roll.

[16] An explanation of the applicant's right to petition the Chief Justice is annexed to this judgment and will be read out to him when this judgment is delivered.

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VAN NIEKERK, J

Appearance for the parties

For the applicant: In person

For the respondent: Adv A Verhoef
Office of the Prosecutor-General