

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 08/2015

In the matter between:

THE STATE

And

BRYAN RICKERTS

ACCUSED

Neutral citation: *State v Rickerts* (CC 08/2015) [2016] NAHCMD 47 (03 March 2016)

Coram: LIEBENBERG J

Heard: 25 February 2016

Delivered: 03 March 2016

Flynote: **Sentence** – Mitigating factors – Intoxication – Finding that accused's moral blameworthiness diminished as a result of consumption of liquor – Accused's mental faculties or judgement thereby impaired which was likely to have influenced accused in regard to crime.

Sentence – Aggravating factors – Previous convictions – Relevance of – Time lapse of 15 years – Accused already punished for crimes of the past – However, crimes of murder and assault relevant to murder subsequently committed – Reflects on character of the accused – Accused not rehabilitated.

Murder – Sentence – Accused unexpectedly and without reason killed the deceased – Seriousness of the offence and interest of society emphasised – Accused's background and with no prospects of rehabilitation makes him a danger to society – Prevention and retribution as objectives of punishment to be reflected in the sentence.

Summary: The accused had consumed liquor prior to the stabbing incident as a result of which the deceased died on the spot. Though the court had rejected his defence of having been incapacitated due to intoxication, it was accepted that his mental faculties or judgement had been impaired and thereby influenced him in regard to the crime. The State proved two relevant previous convictions against the accused, one of murder and another of assault, in the latter the accused had stabbed the deceased in the neck with a knife. Though the accused not now to be punished for crimes committed in the past, his previous convictions cannot be ignored in sentencing even where a period of 15 years had passed since the murder conviction. These reflect on the bad character of the accused who, in view of his criminal record, is regarded a threat to society who deserves protection against him.

Held, that, the seriousness of the crime and the interest of society outweigh the accused's interests by far.

Held, further, that the accused is a threat to society and as objectives of punishment prevention and retribution should be emphasised. Accused sentenced to 40 years' imprisonment.

ORDER

Accused sentenced for murder to 40 (forty) years' imprisonment.

SENTENCE

LIEBENBERG J:

[1] On 25 February 2016 and after evidence was heard, the accused was convicted on a single count of murder, having acted with direct intent. No evidence was presented in either mitigation or aggravation of sentence with submissions only made from the Bar. The State proved two previous convictions which are relevant to the present proceedings and which the accused acknowledged. I will return to the accused's criminal record later.

[2] In passing sentence regard will be had to those factors mentioned both in mitigation and aggravation of sentence, as rightly dealt with by counsel in their submissions. In order to determine what punishment in the circumstances of this case would be suitable, the court will take into account the accused's personal circumstances, the seriousness of the crime, the circumstances under which it was committed, and the interest of society. It is trite that these factors need not be given equal weight and where justified, one may be emphasised at the expense of others. The court is further enjoined to consider the element of mercy, the extent thereof mainly depending on the circumstances of the case.

[3] The personal particulars of the accused placed on record are the following: Accused is 37 years of age and though single, he has one child aged 16 years who lives with his maternal family. Accused dropped out of school at an early age (Grade 7) and lived on the streets where he started consuming alcohol at the early age of 14 years. The accused's report of previous convictions reflect that he was convicted on 25 May 1999 of murder

and, on the same day, sentenced to 15 years' imprisonment of which 3 years suspended on condition of good conduct. On 09 March 2011 he was convicted of assault and sentenced to a fine of N\$1 000 or, in default of payment, to 4 months' imprisonment. In this instance he had stabbed the victim with a knife in the neck. It was further submitted that accused and the deceased had been friends since childhood and that the accused feels very sorry for what he had done. Pertaining to his health, it was said that he suffers from tuberculosis; also that his HIV status is positive for which he is currently on treatment. The accused has been in custody pending finalisation of his trial for a period of one year and two months.

[4] The court in its earlier judgment found that there is evidence that the accused, at the time of the commission of the offence, was under the influence of alcohol. Though the intake of alcohol does not necessarily constitute a mitigating factor, regard must be had to the facts of each case in deciding whether or not it is mitigating. It is settled law that intoxication can operate as a mitigating factor in that the accused's moral blameworthiness is diminished and considered to be a mitigating factor.¹ Unlike the present case, the trial court in *Cele* had not been informed in the accused persons' guilty plea statements as to what quantity of liquor was consumed or when. On appeal Nestadt JA at 255 a-c said the following:

'But this lack of detail, important though it was, and though it made the Court's task more difficult, did not justify the learned Judge in disregarding intoxication as a mitigating factor. Full effect had to be given to it and, in particular, to the fact that accused's moral blameworthiness was thereby diminished. This was, in other words, not one of those cases where the accused is simply shown to have consumed some liquor. The finding that it diminished the accused's moral blameworthiness carried with it the corollary that intoxication had impaired or affected their mental faculties or judgment and thereby influenced them in regard to the crime.' (Emphasis provided)

¹*S v Moses* 1997 (2) SACR 322 (NmS); *S v Cele* 1990 (1) SACR 251 (A) at 255c-d

[5] Turning to the instant matter, it is evident that the accused was visibly intoxicated, though not to the degree he wanted the court to believe; his evidence on this point having been rejected. On the present facts the accused, prior to the stabbing incident, had made his intentions clear by saying that he intended killing 'strong persons' present and after identifying the deceased to be one of those, walked over to him and stabbed him in the chest with a knife. Without the benefit of having an acceptable explanation from the accused himself as to why he had acted as he did, one has to look at the evidence as a whole in order to decide whether or not his mental faculties had been impaired and the extent his moral blameworthiness was thereby diminished. In particular, regard is had to the fact that it had been found that the accused was not heavily intoxicated and despite his inebriation, still acted with direct intent. This would impact on the weight accorded to intoxication as a mitigating factor.

[6] The act was unprovoked and, regard being had to the fact that they had actually been friends since childhood (according to the accused), the accused's conduct in the circumstances appears to have been irrational. It seems to me that this is an instance where the result of the taking of liquor aroused the accused's senses and inhibited sensibilities which diminished his moral blameworthiness.² I have for these reasons come to the conclusion that the accused's inebriation indeed played a role in the commission of the offence. This, to some extent, diminished his blameworthiness and for purposes of sentence, is deemed a mitigating factor.

[7] The State has duly proved three previous convictions of which the crimes of murder (1999) and assault (2011) are relevant to the present case in that it involved violence towards another. It was argued on the accused's behalf that, in view of the lapse of time since the previous convictions and the instant

²S v M 1994 (2) SACR 24 (A) at 29h-i

case, not too much weight should be accorded to the accused's previous convictions as he had already been punished for the said crimes.³

[8] Though true that the accused had already been punished for crimes of the past, this is not a factor that should simply be taken out of the equation. The court is in terms of s 271 of the CPA obliged to take into account the accused's previous convictions.⁴ The significance of the previous convictions in this instance is that it shows that the accused in the past had made him guilty of a similar offence (murder) for which he was sentenced to a custodial sentence, partly suspended. Further, that the sentence so imposed seemed to have had no deterrent effect on the accused as he (seemingly shortly after his discharge) again made him guilty of assault by stabbing the victim with a knife in the neck. This tends to show that the accused has a propensity to commit violent crimes, coupled with the use of dangerous weapons. Having already served a lengthy custodial sentence for murder, one would have expected from the accused to have shown more restraint and refrain from carrying dangerous weapons on him. Whereas he and his friend seemingly were on a drinking spree since early that day, there was no need for him to carry weapons. In this instance there was no altercation or fight between him and the deceased which might have provoked his actions. His conduct on that day was obnoxious and when looking at the accused's profile, it appears to me inescapable to come to the conclusion that he is of bad character; a person who has no or little respect for life or limb; also that he has learned nothing from mistakes made in the past, which probably makes him less susceptible to rehabilitation.

[9] Where the accused has again made himself guilty of murder, and a knife having been used in the commission of this offence, the weight to be

³15 years in respect of the murder conviction and 4 years since the assault conviction.

⁴ Section 271 (4) reads: 'If the accused admits such previous conviction or such previous conviction is proved against the accused, the court shall take such conviction into account when imposing any sentence in respect of the offence of which the accused has been convicted'.

accorded to the previous convictions against this background, in my opinion, is strongly aggravating and must be taken into account in sentencing the accused. In *S v Mahachi*⁵ at 44i-45a the court in this regard said:

'Of particular concern is the fact that sentences of personal deterrence have failed to reform the accused by deflecting him from his criminal ways.'

I respectfully endorse these sentiments.

[10] The accused has shown absolute no remorse for his wrongdoing except for counsel asserting on his behalf that he felt sorry for what he had done. What lies at the heart of sincere contrition is that there is a real likelihood that an offender who genuinely repents, will not reoffend. Absent remorse and, given the accused's criminal history, there is no sign of him having reformed; neither is there any prospect of that happening in future. On the contrary, when looking at his approach towards society in the past, there rather seems to be a strong possibility that he will reoffend. His uncontrolled and unpredicted behaviour makes him a danger to society and in my view, this is an instance where society is entitled to seek protection from the courts against such unruly behaviour. The interest of society therefore deserves emphasis, even at the expense of other factors normally taken into account in sentencing.

[11] Murder is one of the most serious crimes that can be committed and the sanctity of human life is enshrined in our Constitution. And, more so where the killing was unprovoked and directed at an unarmed person, suddenly and unexpected being attacked and stabbed to death with a knife for no reason; a senseless killing. All these are aggravating factors weighing heavily against the accused when it comes to sentencing and which underscores the need to punish the accused who, yet again, committing such heinous and callous

⁵1993 (2) SACR 36 (Z)

crime. He has taken two lives too many and must be stopped. Retribution, as one of the aims of punishment, together with prevention, must therefore reflect in the sentence imposed.

[12] From the above, and particularly when looking at what objectives the court aims at achieving in punishing the accused, it seems inescapable to come to the conclusion that the accused, at all cost, must be prevented from any repetition of committing the heinous crimes he had made himself guilty of in the past. Also that general deterrence and retribution, in the present circumstances, are deserving of specific emphasis. To this end, a lengthy custodial sentence is inescapable. It was submitted on the accused's behalf that a sentence of 23 years' imprisonment, partly suspended, would be appropriate. I am, for reasons already stated, not in agreement with counsel and, respectfully am of the view that there is no justification in law for suspending any part of the sentence; hence, I decline to do so.

[13] The accused's poor health at the stage of sentence is indeed an important factor to be taken into account. He is currently under treatment and this unfortunate ailment is likely to continue in future during his incarceration. It was neither suggested, nor was evidence led to that effect, showing that further treatment during the accused's continued incarceration would be impossible or bring about additional hardship to him. The fact that the accused at present suffers from tuberculosis which is highly contagious (in its present stage), is equally acknowledged. However, he has already been kept in isolation during trial proceedings, for which further provision should be made when serving his sentence.

[14] The period the accused has been in custody awaiting finalisation of his trial i.e. 1 year and 2 months, must be taken into account and will lead to a slight reduction in sentence. The period so spent is not exceptionally long

and, therefore, will not have any material effect on the length of the sentence to be imposed.

[15] When balancing the mitigating and aggravating factors and the determination of the weight to be accorded to each factor, and full regard being had that the accused's moral blameworthiness was diminished due to intoxication, I have come to the conclusion that the crime and the interest of society by far outweigh the accused's personal interest. Accordingly, the sentence to be imposed has to reflect the court's finding in this respect.

[16] In the result, and after having given due consideration to all these factors, I am of the view that, in the circumstances of the case, the following sentence on a charge of murder is appropriate:

40 (forty) years' imprisonment.

JC LIEBENBERG
JUDGE

APPEARANCES

STATE

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ACCUSED

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