



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 11/2014

THE STATE

versus

HERMAN RUKERO

BENEDICTUS AFRIKANER

MALEACHI SEIBEB

Neutral citation: *S v Rukero and 2 Others* (CC 11/2014) [2017] NAHCMD 169 (22 June 2017)

Coram: USIKU, J

Heard: 8 May 2017

Delivered: 22 June 2017

Flynote: Criminal Procedure – Sentence – Previous convictions – Aggravating factor – Relevance of – Court to consider these – Offence committed in a Correctional facility by inmates – Whether sentences imposed had any deterrent effect on them – Prevention and retribution as objectives of punishment to be reflected in the sentence – The court’s duty to combat crimes especially those committed in correctional facilities which are meant to rehabilitate offenders.

Summary: The accused persons were jointly charged with the crime of murder and defeating or obstructing the course or attempting to defeat/obstruct the course of justice. Each accused was convicted of these crimes after a lengthy trial.

ORDER

- (a) Count one – Murder with dolus directus: Each accused is sentenced to 26 years imprisonment.
 - (b) Count two:- Each accused is sentenced to three years imprisonment.
 - (c) It is ordered that the sentence on the second count must run concurrently with the sentence on the first count.
 - (d) It is ordered further that Exhibit one and two which were the weapons used in the commission of the crime are forfeited to the state and must be destroyed immediately.
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SENTENCE

USIKU, J:

Introduction

[1] The three accused persons were convicted of murder with direct intent on the first count, as well as defeating the course of justice on the second count. In that on or about the 18th January 2012 and at or near the Windhoek Correctional Facility they jointly stabbed and stomped on the head, of the deceased, one Eddy Gomxob, thereby causing his death inside the toilet at the Windhoek Correctional Facility. They were also each convicted on a charge of defeating or obstructing the course of justice in that after the killing of the deceased, they each threatened fellow inmates not to talk about what had transpired.

Submissions

[2] Mr Siyomunji made submissions on behalf of accused one and three in mitigation of sentence and cited relevant authorities in support of his submissions: It must be noted that accused one testified in mitigation of sentence: That he is 29 years of age and single, he has no children. Accused one attended school up to grade five. He did not go further because he opted to stay with his parents on the farm. He lived on the farm with both of his parents where life has not been easy. They had to struggle for survival. He is currently serving a sentence after he was convicted and sentenced at the age of 17 years during 2007. Accused one also testified that he feels bad about the death of the deceased, as it was not his intention to cause it. Accused one further testified that after the killing of the deceased he did not meet any of the deceased's family to ask for forgiveness though he had tried by all means to do so.

[3] Accused one confirmed that he has had no responsibility towards anyone and was also not employed at any stage before his conviction. Accused one retaliated his claim that he met the deceased during 2008 and they had been together for three years within which the deceased had mistreated him by insulting him. He placed the blame on the Correctional Facility personnel whom he accused of failing to act even after he had reported the maltreatment by the deceased which could have made them to act, whereby the incident could have been prevented.

[4] Accused one further claimed that the weapon he used belong to the deceased and he had taken it from him in order to defend himself. He admitted to have made a mistake, with regard to him not having apologised. Accused one testified that he did not know any member of the deceased's family. Though suspecting a certain lady to be related to the deceased, he never approached her because he feared her reaction.

[5] With regard to accused three he also testified that he is 47 years of age and single. He has fathered seven children of which two are under his care. The first child is a women aged 26 years while the second one is a boy aged 17. He could not recall the ages of his other five children. Accused three attended school up to

grade five which was standard three at the time. He could not pursue his education because his mother died and he had to take care of his siblings. He grew up with his parents and life was not easy. Accused three testified further that he is currently serving a sentence after he was convicted during 2009 at the age of 38. He feels bad about the deceased's death. He too did not meet the deceased's family. He did not make any request to meet them. He claims that he is innocent and found no reason why he should meet the deceased's family in order to ask for forgiveness. In the same vein he does not accept the Court's findings.

[6] According to accused three, his other children who are younger than the first and second child, all grew up with other people as he has been in custody since 2009 to date. He also confirmed that he has done nothing for his children as he is now in custody for the past eight years. He admitted to his previous convictions ranging from 1994 to 2009. His sister had been taking care of some of his children. Accused three also questioned why he should be remorseful as he had not done anything wrong except to separate the fight between the deceased and accused one and two.

[7] As regards to accused two he did not testify in mitigation of sentence however Mr Engelbrecht who appeared on his behalf addressed the court. That accused two is 31 years old and at the time of the incident he was aged 26 and three months. He is single but a father of two children aged 13 and 12 respectively. The one child is apparently living with his sister in Witvlei whilst the other one is with its mother in Dordabis.

[8] Accused two's mother passed away in 2005 and his father is a pensioner aged 77 years, he lives in Witvlei. He dropped out of school at an early stage as his parents could not afford to pay school fees at the time. He had been employed on a farm in Witvlei as a general worker prior to his arrest and earned a salary of N\$750 per month. He was maintaining his minor children by contributing N\$300 towards their maintenance.

[9] At the time of the incident accused two was in custody for escaping from lawful custody. He was to be released on 4 October 2012 but has since been a trial

awaiting inmate as a result of this incident. He is in custody for four years and eight months to date.

[10] Mr Engelbrecht implores the court to consider the triad which are the offender, the crime and the interest of society when considering an appropriate sentence under the circumstances. Also for the Court to have regard to the objectives of punishment which are prevention, deterrence, rehabilitation and retribution. He too cited relevant authorities in support of his submissions. I had perused those authorities and I am of the opinion that some are distinguishable from the matter before me in several respects, the one in point being *S v Kauzuu*¹. In that case the accused was not a serving prisoner but a trial awaiting which was considered by the trial court to be an important mitigating factor which persuaded the court to take such period of custody into consideration when imposing sentence. Accused two at the time of the incident was still serving a sentence which was to run until October 2012, he was only to be released after October 2012 and indeed the period after the serving of his sentence must be considered.

[11] Mr Siyomunji agreed with Mr Engelbrecht about the objectives of punishment. He submitted that the court need to take into account the personal circumstances of each accused person as they have each testified under oath. He also submitted about the youthfulness of accused one at the time the offences were committed and that he had shown real remorse for what he had done.

[12] With regard to accused three, he was sentenced at the age of 38 and has been in custody ever since. Mr Siyomunji conceded that the accused persons have been convicted of serious crimes and must be punished accordingly but at the same time the court must extend a measure of mercy to each one of them. He requested the time spend in custody to be taken into account when determining the sentences to be imposed. Accused one has been a serving prisoner at the time of this incident and as such he could not be regarded as a trial awaiting inmate at the time.

[13] Ms Ndlovu on the other hand, referred this court to relevant case law where it was held that where a direct intent to kill was proven, it would be an aggravating

¹ *S v Kauzuu* 2006 1 NR 225 (HC)

factor when it comes to sentencing. The nature of the weapon used in the commission of the crime and the position on which it was directed would also be taken into account as an aggravating factor.

[14] It is trite that the reason for punishing convicted persons is to deter them and others from committing similar crimes and if they are capable of being reformed of reforming them. Society expects that people who have done wrong must be punished, that is, the retributive purpose in punishment is of importance.

[15] In this case the accused persons were in custody and one would have expected that to have had an impact on them to rehabilitate, but went on to commit a serious crime within a Correctional facility. The viciousness of the attack that was perpetrated upon the deceased was barbaric to say the least.

[16] Though accused one was indeed a youthful offender having been aged about 17 years at the time of the incident, it must also be noted that young offenders cannot always hide behind their youthfulness when they are guilty of committing serious crimes. The message should be clear to young people that they will not simply be excused by the Courts on account of youthfulness and go scot-free, but where justice will not otherwise be done, they will be held accountable and be punished accordingly for the pain and misery caused to others as a result of serious crimes committed by them. *S v K*². I respectfully agree with the above sentiments.

[17] As I have said, this case is distinguishable from the cases of *S v Kauzuu*³ supra and *S v Hange*⁴, where it was held that the period the accused spend in custody awaiting trial will lead to a reduction in sentence. It cannot be said herein. Furthermore, none of the accused showed genuine remorse as none of them acknowledged his wrongful conduct towards the deceased.

[18] In fairness both Mr Siyomunji for accused one and three and Mr Engelbrecht for accuse two, have conceded that the accused persons cannot escape a prison

² *S v K* 2011 (1) NR 1.

³ *S v Kauzuu* supra and *S v Hange* CC 12 of 2015 NAHCMD 90 delivered on 16 April 2015.

⁴ *S v Hange* CC 12 of 2015 NAHCMD 90 delivered on 16 April 2015.

sentence, but they had asked the Court to be guided by the principles enunciated in *S v Sparks and Another*⁵, which reads:

'... and, in addition to the matter of punishment, the deterrence aspect calls for a measure of emphasis, least others think the game is worth the candle. Nevertheless, the appellants must not be visited with punishment to the point of being broken. Punishment should fit the criminal as well as the crimes be fair to the state and to the accused and be blended with a measure of mercy'.

[19] It must further be pointed out that the requirement of mercy does not mean that the courts must be weak or must hesitate to impose a heavy sentence were it is justified by the circumstances. The wave of crimes sweeping through our country and the need to effectively combat such crimes call for our Courts to change the emphasis from individualization to deterrence, in particular, where serious offences are committed within correctional facilities where offenders are supposed to start their rehabilitation processes. The sanctity of life is a fundamental human right enshrined in the law by the Constitution and must be respected and protected by all.

[20] Taking into account the mitigatory as well as aggravating factors of the case the outcome is as follows:

- (a) Count one – Murder with dolus directus: Each accused is sentenced to 26 years imprisonment.
- (b) Count two: Each accused is sentenced to (3) three years imprisonment.
- (c) It is ordered that the sentence on the second count must run concurrently with the sentence on the first count.
- (d) It is ordered further that Exhibit one and two which were the weapons used in the commission of the crime are forfeited to the state and must be destroyed immediately.

⁵ *S v Sparks and Another* 1972 (3) SA 396 at 410.

D N USIKU

Judge

APPEARANCES

STATE : Ms Ndlovu
Of Office of the Prosecutor-General, Windhoek

ACCUSED'S 1 and 3 : Mr Siyomunji
Siyomunji Law Chambers
Instructed by Directorate of Legal Aid, Windhoek

ACCUSED 2 : Mr Engelbrecht
Engelbrecht Attorneys
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