

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT (SENTENCE)

Case no: CC 18/2017

In the matter between:

THE STATE

v

ELDRIN GOLIATH

ACCUSED

Neutral citation: *S v Goliath* (CC 18/2017) [2018] NAHCMD 407 (14 December 2018)

Coram: LIEBENBERG J

Heard: 12 December 2018

Delivered: 14 December 2018

Flynote: Criminal Procedure – Sentence – Trite that the personal circumstances of the accused must be considered and weighed against the seriousness of the crimes committed as well as the interests of society.

Criminal Procedure – Sentence – Accused raised the defence that he suffered from a blackout when committing the offence of murder – Submitted that the

accused was under the influence of drugs when committing offence – No evidence to that effect before court – Though court accepts that accused used cannabis prior to incident – Question whether he acted under the influence – Mitigating factor – Based on accused's own evidence and his ability to vividly recount the incident – Clear that accused was not under influence of cannabis

Criminal Procedure – Sentence – Youthfulness as mitigating factor – Accused 20 years of age when committing offences – Action not pre-mediated but acted on the spur of the moment – Cumulative effect thereof mitigating.

Summary: The accused was convicted on charges of murder, rape in contravention of s 2(1)(a) of the Combating of Rape Act 8 of 2000, and theft. The accused is a first offender, youthful (20 years when committing the offence) and was remorseful for what he has done. It was submitted in mitigation of sentence that the accused was under the influence of drugs when he committed the offences. However, no evidence was adduced showing that the accused committed the murder while under the influence of drugs. The State led the evidence of the deceased's mother who explained the extent to which the family was affected by the death of the deceased.

Held, whereas the accused himself did not say that he was affected in any way by the cannabis he used (which could neither be inferred from the evidence before court), his articulated evidence as to the commission of the murder is testament of a person who was lucid and goal directed when he acted. The court not persuaded that the fact of the accused having smoked cannabis prior to committing the offence, constitutes a mitigating factor. Neither would evidence suggesting that he was addicted to drugs be mitigating.

Held that, though mindful of the 'collateral damage' caused to the deceased's family as a result of the offences committed, one should guard against making the accused the scapegoat of everything negative or bad that happened to the family subsequent to the deceased's death.

Held, further that, the immature mind of the young offender is often susceptible and readily influenced by other factors in such a way that he or she can not readily withstand that influence, lost self-control, and proceeded to commit the offence.

Held, further that, factors having a bearing on the accused's blameworthiness are that the crimes were not premeditated and appear to have been committed on the spur of the moment.

Held, further that, the cumulative effect of these mitigating factors may be considerable in deciding what punishment would be fair and just in the circumstances of the case.

ORDER

Count 1: Murder – 23 years' imprisonment.

Count 2: Rape, in contravention of s 2(1)(a) of the Combating of Rape Act, 2000 – 10 years' imprisonment.

Count 3: Theft – 3 years' imprisonment.

SENTENCE

LIEBENBERG J:

[1] At the end of the trial the accused was convicted on charges of murder, rape in contravention of s 2(1)(a) of the Combating of Rape Act 8 of 2000, and theft. We have reached the stage in the proceedings where the court must pass sentence on the accused. This is indeed no easy task as the court is

faced with competing interests; on the one hand the interests of the accused, while on the other hand, that of society.

[2] It is trite that the personal circumstances of the accused must be considered and weighed against the seriousness of the crimes committed, as well as the interests of society. In suitable instances the court must also consider the element of mercy. With regard to the objectives of punishment, it must be determined what sentence, in the circumstances of the case, would be suitable. It has been said that *“Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances”*.¹

[3] The accused, now 22 years of age, testified in mitigation of sentence. He was two years younger when he committed the crimes and had been living with an aunt since the age of 10. His mother passed away when he was 5 years old and ever since he stayed with family members. Though his father lives at the coast, there was, and still is, no relationship between them as his father never took care of him. He progressed up to grade 10 but did not pass, where after he dropped out of school in 2012. During that time he got himself involved in drugs (cannabis) and besides smoking it himself, he assisted a dealer to peddle drugs from which he generated an income. This enabled him to maintain his addiction. Since his incarceration he realised that drugs gravely impacted on his life and that there was more to life than taking drugs. He expressed his devotedness to Christianity and regrets having made the wrong choices in life, but accepts full responsibility for his actions and is set on learning from his mistakes.

[4] The accused apologised in open court to family members of the deceased and the community in general. Prior thereto during his detention he approached a social welfare worker in the correctional facility to assist him to extend his apologies to the family of the deceased, but never got any feedback in that regard. He does not consider himself a danger to society as stated by Mrs Steyn, the deceased’s mother during her testimony. Although appreciating that he has to be punished, he begged the court to afford him a

¹ *S v Rabie*, 1975 (4) SA 855 (AD) at 862G-H.

second chance in life and to allow him the opportunity of correcting his injustices in society.

[5] Argument advanced on behalf of the accused in mitigation of sentence was that he was a first offender, his youthfulness and that he was under the influence of either liquor or drugs at the time of committing the crimes. I raised the issue of the accused having been under the influence of alcohol with his counsel, Mr *Tjituri*, and whether there was any evidence to that effect on record. Except for the accused saying that he drank from a 'half-jack' bottle he had in his rucksack *after* the incident (as he was in shock), there is nothing suggestive of him having been under the influence of alcohol during the commission of the offence. Accordingly, no weight should be accorded to the submission. The question as to whether or not the use of drugs that evening affected the accused's mind-set, will be discussed in more detail below.

[6] From the testimony of the deceased's mother one is able to gain some insight of the effect her daughter's death had on their entire family. Personally for the past two years she has been on medication and goes for counselling by a psychologist. Not only did this impact on her productivity at work, she also attributes this to her divorce recently. According to the witness it equally adversely affected the lives of her three sons. This was simply because the deceased was no longer in the house. She fondly referred to the deceased as being spontaneous and a person who had set high standards for herself and who wanted to become a Chartered Accountant. At the time of her death the deceased had completed writing her examination and from the Junior Secondary Certificate handed into evidence, it is evident that the deceased would have progressed at school with relative ease.

[7] Though mindful of the painful experience of having to give evidence about her only daughter and the suffering her death has brought upon the family, one should guard against making the accused the scapegoat of everything negative or bad that happened to the family subsequent to the deceased's passing. The family undoubtedly suffered an enormous loss with the death of the deceased and the extent of such hardship cannot fully be appreciated by an outsider, let alone by a court during sentencing

proceedings. Moreover, where the deceased was in the prime of her youth and her whole life lying in waiting. Also the abhorrent circumstances in which she met her death. However, while recognising that in cases of this nature there would normally be what best could be described as 'collateral damage' to the family of the victim, and same considered to be aggravating, the weight accorded thereto should be measured, justified and adjudged by the circumstances of the case. In this instance, the youthfulness of the deceased, her vulnerability when apprehended by the accused, the brutal raping and killing are indeed aggravating factors when it comes to sentencing and must be accorded considerable weight.

[8] The offences of murder and rape are serious and would normally attract severe punishment. Moreover, where the life of a young 16 year old girl was taken in circumstances which render this yet another senseless murder; something we as society shamefully has become accustomed to. And it need not, and should not, be the case. Crimes like murder and rape not only militate against society's most basic values and principles, it also trashes the victim's fundamental rights enshrined in the supreme law of the land, the Namibian Constitution. Society looks to the courts for protection and to uphold the rule of law; while the courts are under a duty to reflect in its judgments society's indignation and antipathy of those who are guilty of unbecoming and despicable behaviour, as encountered in this instance.

[9] Criticism might be levelled against the deceased, a young girl being out alone and on the streets of Rehoboth late at night; something that apparently had happened before. Also against the parents for not being more involved in and informed about their daughter's whereabouts at that time of night. But again, why must anyone feel unsafe on the streets at any time of the day? Have we become a nation who must align our lifestyles and freedoms to cater for criminals who roam the streets like predators in waiting for their prey? It saddens me to say that, judging from the increase of serious criminal cases coming before this court, it would appear that there is a significant increase in the number of rogue elements in society who exploit any possible situation to their own benefit, in all instances at the expense of innocent law abiding

citizens. From the court's perspective, the only way to try and turn the tide is to impose harsher sentences and to send out a clear message to likeminded criminals that such conduct will not be tolerated and will be met with severe punishment.

[10] The present offences emanate from one incident when the deceased was apprehended by the accused while on her way home late at night and taken onto the veranda of a vacant house under renovation. There she was first raped and strangled whereafter the accused took possession of her running shoes and cellphone. Whereas the court rejected the accused's evidence as regards him and the deceased having had consensual sexual intercourse, as well as him having suffered a blackout during the strangulation, regard was had to the injuries inflicted to the body of the deceased from which it was inferred that force had been used to overpower or subject the deceased before she was killed. The evidence further established that the accused when killing the deceased had acted with direct intent. I find all these circumstances to be aggravating.

[11] Mr *Olivier*, for the State, further submitted that besides her young age and vulnerability, a further aggravating factor is that the deceased was intoxicated at the time of her death as her blood alcohol test shows a concentration of not less than 0.18g of ethyl alcohol per 100 millilitres of blood. Although the result reflects that the deceased had indeed consumed alcohol, it falls short from constituting sufficient proof from which an inference may be drawn that she was intoxicated at the time, thus making her more vulnerable when attacked by the accused. In the absence of concrete evidence in support thereof, I decline to make such inference as it is not the only reasonable inference to be drawn from the proved facts.

[12] It was further submitted that the accused, having set off the deceased's cellphone for money and drugs to feed his addiction, is also aggravating. I believe that it is rather aggravating to steal from a dead person, and not necessarily the manner in which the spoils are disposed of. This must

obviously be seen in context with the position the accused found himself in, and his addiction.

[13] Though true that the accused did offer a guilty plea on the murder charge, it should be noted that he simultaneously raised the defence of non-pathological criminal incapacity by stating that he suffered a blackout and did not know what happened. He further pleaded not guilty to charges of rape and robbery which were closely linked in time to the murder. The limited plea offered on the murder count was not accepted by the State and, in my view, correctly rejected, as the charges were proved beyond reasonable doubt in the end, except for a conviction on the competent verdict of theft. The submission that the accused should be credited for offering a plea of guilty must therefore be viewed against this backdrop.

[14] State counsel argued that the accused's plea and apology to the family should be accorded no weight when it comes to remorse, as it was 'a prepared speech' and lacked sincerity. When the deterrent effect of a sentence is adjudged, remorse is an important consideration, provided that penitence must be sincere and the accused must take the court fully into his confidence.²

[15] The courts on numerous occasions expressed the view that the offering of a plea of guilty, depending on the facts of the case, is indeed a factor to be taken into account for purposes of sentence, and where accompanied by a sincere expression of remorse by the accused, this ought to be given considerable weight in mitigation of sentence (*S v Landau*).³

[16] The fact that the accused in the instant matter offered a guilty plea on the murder count, in my view, counts for little and therefore cannot be regarded as a mitigating factor. As regards his testimony in mitigation of sentence and his acceptance of blame for his wrongdoing and suffering caused to the deceased's family, there seems to be no basis for concluding that it was not sincere – even if he prepared it in advance. I do not believe that

² *S v Seegers* 1970 (2) SA 506 (A).

³ 2000(2) SACR 673 (WLD).

in all instances where an accused expresses remorse only after conviction, can it be said that it is not sincere. Much will depend on the circumstances of the case and I have no doubt that there could be circumstances in which the court would be able to find that remorse, albeit demonstrated only after conviction, is genuine and sincere. Though his expression of remorse would have carried more weight had he taken the court into his confidence and offered a genuine plea of guilty on the offences charged, it would appear that since his arrest and incarceration, he has had time to reflect on his life and committed himself to change. This could be the first step towards reformation.

[17] As regards the accused's evidence about him having smoked a crystal meth⁴ pipe immediately prior to the incident – evidence that was new and which had been omitted from his plea explanation – the court had reservations about the late introduction thereof; moreover where it seems to suggest that the accused was drugged when he committed the murder; alternatively, that the taking of Methamphetamine caused him to black out. However, the court found that in the absence of tangible evidence to that effect, not much weight should be accorded to the proposition.

[18] Based on the accused's own evidence and his ability to vividly recount the incident in fine detail before, during, and after the murder of the deceased, the court found his evidence about having suffered a blackout, to have been fabricated and a mere afterthought.

[19] The accused's evidence about his smoking of cannabis on that day was confirmed by State witnesses Nitschke and Elfrico. There is accordingly no reason why the accused should not be believed when he said that he also smoked cannabis on the night in question. This however does not mean that it necessarily constitutes a mitigating factor, as that will depend on the circumstances. In *S v Francis*⁵ the court of appeal considered evidence about the appellants having been under the influence of cannabis when committing crimes of kidnapping, robbery and murder. Regard was had to the fact that it

⁴ Methamphetamine is a type of drug.

⁵ 1993(1) SACR 521 (A) at 529c-d.

was the appellant's and confederates' evidence (which evidence had been rejected as false), and more particularly that the appellant's systematic actions and his ability to recount the incident in so much detail in his testimony, was supportive of the inference that the cannabis had not affected him to any significant degree.

[20] In this instance the accused himself did not say that he was affected in any way by the cannabis he used; neither could it be inferred from the evidence before court. On the contrary, his articulated evidence as to what happened between him and the deceased that night is testament of a person who was lucid and goal directed when he acted. In view thereof, I am not persuaded that the fact of the accused having smoked cannabis prior to committing the offence, constitutes a mitigating factor. Neither would evidence suggesting that he was addicted to drugs be mitigating.⁶

[21] The accused's age at the time of committing the offence was 20 years and although it is trite that the youthfulness of an offender would normally be mitigating, the exact extent thereof will depend on the circumstances of the case.⁷ Generally speaking, a court will not punish the deeds of an immature young offender in the same manner as it would an adult person. The Supreme Court in *S v Schiefer*⁸ endorsed the sentiments expressed in *S v Lengane*⁹ that regard should not only be had to youthfulness as an extenuating circumstance if the commission of the particular offence could solely be ascribed to the youthfulness of the offender, but not otherwise. The reason is that in reality, in the majority of cases involving youthful offenders, it has been shown that the immature mind of the young offender is often susceptible and readily influenced by other factors in such a way that he or she could not readily withstand that influence, lost self-control, and proceeded to commit the offence. The nature of these factors and the extent it impacted on the mind of the young offender will determine his or her level of maturity and, ultimately, the person's blameworthiness.

⁶ *S v S* 1995(1) SACR 267 (A).

⁷ *S v Erickson* 2007(1) NR 164 (HC).

⁸ 2017(4) NR 1073 (SC).

⁹ 1990(1) SACR 214 (A) at 220b-d.

[22] Factors that have a bearing on the accused's blameworthiness are that the crimes were not premeditated and appear to have been committed on the spur of the moment. Evidence about the accused inherently being a wicked or violent person is lacking and although the attack on the deceased was brutal, there is nothing suggesting that it ruled out immaturity on the part of the accused.

[23] Guided by the approach followed in *Schiefer* I am convinced that the cumulative effect of the aforementioned mitigating factors may be considerable in deciding what punishment would be fair and just in the circumstances of the case. Add thereto the period spent in custody pending finalization of the trial.

[24] Punishment in instances where serious offences have been committed involving the loss of life, usually finds expression where retribution and deterrence are the main objectives of punishment. Society expects that offenders be punished for the pain and suffering caused to others and that sentences imposed should serve as a deterrence to other likeminded criminals. Retribution as a purpose of punishment is a concept that is premised on the understanding that once the balance of justice in the community is disturbed, then the offender must be punished because that punishment is a way of restoring justice within that community. To this end Mrs Steyn's expectation that the accused should be removed from society is therefore not unrealistic or unreasonable, as imprisonment is an inescapable consequence of the crimes committed by the accused.

[25] On the rape count there is a mandatory sentence of not less than 15 years' imprisonment, provided the court finds no substantial and compelling circumstances present.¹⁰ Whereas it has already been found on the murder count that the cumulative effect of the mitigating factors must be accorded considerable weight, it undoubtedly should be accorded the same weight in respect of the rape count, as both offences were committed under the same

¹⁰ Section 3(1)(a)(iii)(aa).

circumstances. This in my view sufficiently constitutes substantial and compelling circumstances, justifying the imposition of a lesser offence.

[26] It was argued on behalf of the State that the sentence of life would in the circumstances of the case be suitable. I do not agree for reason that this is not an instance where the most severe sentence this court is entitled to impose, should be imposed on the accused. Though the seriousness of the offences and the aggravating factors present call for a deterrent sentence, this goal could equally be achieved by the imposition of a lesser sentence. As shown herein before, youthfulness of the accused, and the fact that the offences had been committed on the spur of the moment, are the two main factors which must significantly impact on the sentence to be imposed. To give insufficient weight thereto would constitute a material misdirection of the court's sentencing discretion, likely rendering the trial unfair.

[27] The accused has been convicted of serious offences, all of which are deserving of lengthy custodial sentences, particularly on the murder and rape charges. The court in sentencing has a discretion in ordering the concurrent serving of multiple sentences and would usually make the appropriate order, if satisfied that the cumulative effect of the sentences when taken together, is too harsh on the accused, thus exceeding the reasonableness of punishment in relation to his blameworthiness for the crimes committed.

[28] It is my considered opinion that the sentences to follow reflect that due regard was had to the personal circumstances of the accused, the seriousness of the crimes committed and the interests of society. I am further of the view that this is an instance where the circumstances are such that the court should show mercy on the accused.

[29] In the result, the accused is sentenced as follows:

Count 1: Murder – 23 years' imprisonment.

Count 2: Rape, in contravention of s 2(1)(a) of the Combating of Rape Act, 2000 – 10 years' imprisonment.

Count 3: Theft – 3 years' imprisonment.

In terms of s 280(2) of Act 51 of 1977 it is ordered that half of the sentence imposed on count 2, and the whole of the sentence on count 3 be served concurrently with count 1.

JC LIEBENBERG

JUDGE

APPEARANCES:

STATE

M Olivier
Of the Office of the Prosecutor-General,
Windhoek.

ACCUSED

M Tjituri
Instructed by Directorate: Legal Aid ,
Windhoek.