

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 10/2018

In the matter between:

THE STATE

and

UNAARO MBEMUKENGA

ACCUSED

Neutral citation: *S v Mbemukenga* (CC 10/2018) [2020] NAHCMD 262 (30 June 2020)

Coram: SIBEYA, A.J.

Heard: 23 June 2020

Delivered: 30 June 2020

Flynote: Criminal Procedure – Sentence – Murder with *dolus directus* – Accused stood in a position of trust towards the deceased – Society calls for severe sentence – Failure to show remorse aggravates the sentence – Time spent in custody pending trial mitigates the sentence.

Criminal procedure – Murder gruesomely perpetrated against an employer by an employee – pre-meditated violent attack on the deceased – Lengthy custodial sentence inescapable – Accused sentenced to 32 years' imprisonment. Robbery with aggravating circumstances committed against the employer – Accused allowed

at the scene out of trust from the employer – Offence calling for a custodial sentence – Accused sentenced to 10 years' imprisonment – The principle regulating taking different counts together for purpose of sentence revisited. The sentence on count 2 ordered to be served concurrently with the sentence on count 1.

Summary: The accused was indicted in the High Court on the following charges: 1 – murder and 2 – robbery with aggravating circumstances. He pleaded not guilty to both counts, did not provide a plea explanation but opted to remain silent.

On 11 June 2020, after evidence was led, this court convicted the accused as charged on murder with *dolus directus* for killing a 79 years old male. He hit the deceased with a brick on his head, tied up his hands behind his back and tied a robe around his neck next to a urinal. The deceased died of hanging. The accused was further convicted of robbery with aggravating circumstances after assaulting the deceased, ransacking his house and stealing his properties.

Held that, the triad principles of sentencing revisited: the crime, the offender and the interest of society as well as the fourth element of mercy, but which should not be misplaced pity.

Held further that, employment contributes to economic growth, and employers should be honoured and cherished for providing employment to better the livelihood of the employees.

Held further that, time spent in custody awaiting trial should be judicially considered in mitigation.

Held further that, the accused was in a position of trust towards the deceased, which he abused out of greed.

Held further that, murder and robbery cases are a daily occurrence on our court roll, and courts should severely punish offenders in condemnation of such offences.

Held further that, remorse is a mitigating factor but if not expressed, it aggravates the sentence.

Held further that, the cumulative effect of sentences should not be disproportionate to the blameworthiness of the offences convicted of.

ORDER

Count 1: Murder – 32 (thirty-two) years' imprisonment.

Count 2: Robbery with aggravating circumstances – 10 (ten) years' imprisonment.

In terms of section 280(2) of the Criminal Procedure Act 51 of 1977 it is ordered that the sentence imposed on count 2 be served concurrently with the sentence on count 1.

In terms of s 34(1)(b) of Act 51 of 1977, Exhibits 1, 2 and 3 are returned to the person that may lawfully possess the articles.

SENTENCE

SIBEYA AJ:

[1] The provision of a safe and secure work place enhances economic stability. Employment therefore, contributes to economic growth. Workers dedicate their time and energy to produce goods for and render services to the employer, who in turn remunerates them. Workers, subsequently utilise the funds earned to purchase goods or pay for other services rendered to them. This encourages money circulation within the economy and creates greater economic returns for the country. High employment rate therefore, means that, a large number of valuable goods may be produced and required service rendered. High employment is a vital pillar to the economy of a country. When our country at present, experiences a high level of unemployment, it is a privilege to be employed. An employee should thus cherish his

employment and jealously guard it, for, should it slip through his fingers, such opportunity may not be available in future.

[2] This court, in *S v Katanga*¹ discussed the importance of employment and the honour that should be accorded to the employers and stated the following in para1:

‘Working is advantageous to people’s well-being. Work keep people busy and creates opportunities for human development. Remunerated work escalates the benefit of such work to human kind as it enables people to better support themselves and their families. It is therefore a privilege to be employed, which privilege should be cherished and the employers who are the architect of such privilege should be honoured and respected. Where an employee affronts the said privilege by murdering the employer, such person does not only kill the employer, but offends the enjoyed privilege, the trust accorded to him by the employer and his own well-being coupled with that of his family.’

[3] On 11 June 2020, this court convicted the accused on count 1 - murder with direct intent and count 2 – robbery with aggravating circumstances. He was found guilty as charged after a fully-fledged trial, where he was persistent in his innocence.

[4] It is now opportune for the court to pass sentences which suit the offences convicted of.

[5] *Mr. C Lutibezi* appeared for the state while *Mr. V Lutibezi* appeared for the accused.

[6] It is settled law that in sentencing, courts should consider the distinguished triad factors of sentencing, being the crime, the offender and the interests of society.² The court is therefore duty bound to consider the personality of the offender, his age and personal circumstances, together with the crime and the interests of society.³ As stated in *S v Khumalo*,⁴ there is a fourth element of mercy which should be considered. Notwithstanding, mercy should not be misplaced pity. In *S v Sparks and Another*,⁵ it was held that punishment must fit the criminal, the crime, be fair to society, and be blended with a measure of mercy according to the circumstances. The above-mentioned factors should be considered in conjunction with the purposes

¹ (CC 23/2018) [2019] NAHCMD 66 (27 February 2020).

² *S v Zinn* 1969 (2) SA 537 (A).

³ *S v Jansen* 1975 (1) SA 425 (A) 427-428.

⁴ 1973 (3) SA 697 (A) 698.

⁵ 1972 (3) SA 396 (A) B at 410H.

of punishment, being deterrent, preventative, reformatory and retributive which are of critical importance to sentencing and this court takes them into consideration.⁶

[7] Sentencing requires a balancing exercise between the competing factors in order to be steered to an appropriate punishment. It is, however, settled law, that in the process, it may sometimes be unavoidable to emphasise one factor at the expense of the others.⁷

[8] At the backdrop of the aforesaid sentencing guidelines, I proceed to consider the circumstances of this matter relevant to sentencing. I opt to commence with the personal circumstances of the accused. The accused testified in mitigation of sentence. He stated that he is 28 years old, unmarried and has 1 daughter aged 4 years old. She lives with her mother in Outjo. Prior to his arrest, he supported his daughter, his parents and his sister. He dropped out of school in grade 8 due to economic hardships.

[9] He testified further that, he was employed by the deceased for about 2 – 3 months immediately prior to his arrest, where he carried out tiling and plumbing work. He was remunerated with N\$100 daily. He described his relationship with the deceased as having been good. His testimony was further that, he was disgruntled by his conviction, as he did not kill or rob the deceased. During arrest, he was shot in the leg by members of the police. He is presently handicapped and walks with crutches. He is a first offender and begged the court through *Mr. V. Lutibezi*, for mercy in sentencing.

[10] When pressed in cross examination by *Mr. C. Lutibezi*, the accused conceded that, it was out of goodwill of the deceased that he employed the accused together with the accused's girlfriend. He further conceded that such a person should not have been killed.

[11] It was submitted by *Mr. V. Lutibezi* that, the accused has been in police custody pending trial since his arrest on 18 August 2017, calculating to 2 years and 10 months. A substantial amount of time spent in custody awaiting trial should be considered as a material mitigating factor.⁸ It has become part of our law, that, time spent in custody pending trial should be considered during sentencing. There is,

⁶ *S v Tcoeib* 1991 NR 263.

⁷ *S v Van Wyk* 1993 NR 426 (SC).

⁸ *S v Kauzuu* 2006 (1) NR 225 (HC).

however, no mathematical formula to the calculation of the effect of such custody pending trial on sentencing. A court should not approach this principle blindly from a mathematical stand point, where the equivalent time spent in custody is deducted from the intended sentence. A court should exercise its sentencing discretion judiciously and accord sufficient weight to such time, together with other factors, subject to the surrounding facts of each case. I will therefore consider the time spent as a mitigating factor in conjunction with other relevant factors to sentencing.

[12] The crimes of murder and robbery with aggravating circumstances perpetrated on the deceased are very serious offences. While taking cognisance of the fact that there can be no dignified act of killing another person, the barbaric manner in which the murder was carried out is aggravating. The deceased, a 79 years old male, was assaulted with a brick on his head, his arms were tied with a robe behind his back while his neck was tied to the urinal. Subsequently, the accused ransacked the house of the deceased and robbed him of several properties.

[13] *Mr. C Lutibezi* submitted that, it is aggravating that the deceased trusted the accused and offered him employment at his place of safety (his residence). He further submitted that, the deceased employed the accused and his girlfriend when unemployment was high and the accused literally bit the hand that fed him and his girlfriend. He abused the trust accorded to him by the deceased. This court endorses the said submissions as indicative, not only of the ungratefulness of the accused, but of his abuse of such trust for greed. It was the duty of the accused to protect his employer and not to brutally attack him. His actions are deserved of condemnation in the strongest sense possible.

[14] Few days before the offences were committed, the accused requested the assistance of *Mr. Efraim Tjiveze*, to tie-up a white man as he had money. This request was declined by *Mr. Tjiveze* who stated that, nowadays white people do not store money in their houses. Truth to form, few days later, the deceased was discovered dead while tied up and his house ransacked. The accused premeditated the commission of the murder and robbery with aggravating circumstances. This court finds that, the accused properly and meticulously calculated the manner in which he committed the offences in question. Where time and energy, is spent on planning and executing the commission of offences, the offender should be severely punished to discourage him and other would be offenders from ever considering

such evil deeds in future. The perpetration of such brutal murder on an employer by an employee exacerbates the sentence.

[15] Notwithstanding his conviction, the accused persisted in his innocence. He proffered a stubborn refusal to the commission of the offences in spite of the overwhelming evidence against him. Remorse is a critical component of mitigation as it constitutes an undertaking by the accused, that he acknowledges his fault and vows not to repeat his deeds. *In casu*, the absence of an expression of remorse leaves the court in darkness as to what his inner feelings are, regarding the commission of the offences. Whether the accused person regrets his actions or not, or whether he is likely to recommit similar offences in future or not, are questions that are within the domain of the accused and the accused only. For the above reasons, I find that the accused is not remorseful. Failure to express remorse aggravates the sentence.

[16] With regard to the interests of society, it should be understood that, society expects that convicted persons should be sentenced accordingly. Murder and robbery cases on our court roll are a daily occurrence. Courts retain a duty to protect society, and when called upon to do so, in serious cases, the community should not be disappointed by the imposition of lenient sentences. Lest the community take the law into their own hands, a situation we cannot afford to have. To the contrary, a message should be sent out to the accused and prospective offenders that killing someone is forbidden and robbery does not pay.

[17] It is only after paying for his deeds through appropriate punishment, that an accused can be said to be reformed and accepted back into society. It is sentences that are not laughable which society will appreciate to be commensurate to the offences convicted of.

[18] After due consideration of the personal circumstances of the accused, inclusive of his aforesaid mitigating factors and time spent in custody, and weighing same with the nature and seriousness of the offences in conjunction with the above-mentioned aggravating circumstances, I find that personal circumstances are by far outweighed by the seriousness of the offences and the interests of society. The conclusion is therefore inescapable, that the accused is deserved of a sentence of a lengthy period of imprisonment on the murder.

[19] The offence of robbery with aggravating circumstances is closely related to the murder in time, space and circumstance. Subsequent to assaulting the deceased, the accused robbed the deceased of his two bags, the Lenovo laptop, 1 x pair of prescription glasses, the leather jacket, 2 x denim trousers, a pillow case, a duvet cover, an underwear, a pair of shoes and a Samsung J7 cellular phone. These items were recovered. Notwithstanding, and as correctly submitted by *Mr. C. Lutibezi*, the recovery of such items does not count in favour of the accused, as the accused deprived the deceased of the benefit of his properties by killing him. The accused played no part in the recovery of the said properties and can therefore not jump on the recovery bandwagon and enjoy the accolades of such recovery process.

[20] Both parties invited the court to consider ordering the sentence to be imposed on robbery, to either fully or partly run concurrently with the sentence on the murder. This court is mindful of the principle that, the cumulative effect of the sentences should not be disproportionate to the blameworthiness of the offences convicted of. This court in *Hango v S*,⁹ stated as follows in para 20:

[20] In *S v Akonda*,¹⁰ this court, differently constituted, discouraged the practice of taking counts together for purposes of sentencing, particularly where the offences are unrelated. In the *Akonda* case, it was further stated that:

“Although that procedure is neither authorised nor forbidden by the Criminal Procedure Act 51 of 1977, it has emerged as a matter of practice. In principle, however, the practice should be resorted to in exceptional circumstances only, such as where various counts are part of a single transaction or are closely connected or similar in point of time, place and circumstance. See *S v Young* 1977 (1) SA 602 (A) at 610E; *S v Mofokeng* 1977 (2) SA 447 (O) at 448H; *S v Keulder* 1994 (1) SACR 91(A) at 93i-j.”

[21] Taking into consideration the above-mentioned principle on the cumulative effect of sentences, this court finds that counts 1 and 2 are closely related in time, space and circumstance. Counts 1 and 2 therefore fits hand in glove with the profile of sentences imposed thereon to be served concurrently.

[22] Considering all the aforesaid factors, reasoning and conclusions, I hold the view that the sentences set out hereunder meets the justice of this case. In the result the accused is sentenced as follows:

⁹ (HC-MD-CRI-APP-CAL-2020/00090) [2020] NAHCMD 201 (29 May 2020).

¹⁰ 2009 (1) NR 17 (HC). *S v Mwebo* 1990 NR 27 (HC).

Count 1: Murder – 32 (thirty-two) years' imprisonment.

Count 2: Robbery with aggravating circumstances – 10 (ten) years' imprisonment.

In terms of section 280(2) of the Criminal Procedure Act 51 of 1977 it is ordered that the sentence imposed on count 2 be served concurrently with the sentence on count 1.

In terms of s 34(1)(b) of Act 51 of 1977, Exhibits 1, 2 and 3 are returned to the person that may lawfully possess the articles.

O S SIBEYA
ACTING JUDGE

APPEARANCES:**STATE:**

C Lutibezi
Of Office of the Prosecutor General
Windhoek

ACCUSED:

V Lutibezi
Of K Kamwi Law Chambers
Windhoek