



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 02/2016

In the matter between:

**RYHNO RICARDO DU PREEZ
RACHEL ELIZABETH RITTMAN**

**ACCUSED NO 1
APPLICANT**

and

THE STATE

RESPONDENT

Neutral citation: *S v du Preez* (CC 02/2016) [2020] NAHCMD 35 (04 February 2020)

Coram: LIEBENBERG J
Heard: 23 January 2020
Delivered: 04 February 2020

Flynote: Criminal Procedure – Leave to Appeal – Appeal lies against sentence of life imprisonment – Applicant relies on Generalised Anxiety Disorder (mood illness) as mitigating factor – Mere diagnosis of disorder *per se* not a as mitigating factor – Required that evidence be led showing the

extent to which her medical condition impacted on her mind-set and actions during commission of offence – Weight thereof to be determined by the court in light of the evidence adduced and not merely by the presence of the disorder.

ORDER

The application for leave to appeal is dismissed.

JUDGMENT

(Application for Leave to Appeal)

LIEBENBERG J

[1] The first and second accused (the applicant) were jointly charged with the murder of the applicant's husband. During the trial it emerged that the applicant and her co-accused planned to murder the deceased at his home in Gobabis. Evidence was adduced about changes made to the Will of the deceased and the changing of names of beneficiaries in respect of life insurance policies held under the deceased's name, from which the applicant stood to gain financially.

[2] The court found the first accused and applicant guilty on 29 August 2019 on counts of murder, conspiracy to commit murder, theft and defeating/obstructing the course of justice. Consequently they were sentenced on 22 October 2019 to lengthy custodial sentences, the applicant being sentenced to life imprisonment in respect of count 1 for murder.

[3] Disgruntled with the court's sentence (only in respect of count 1) the applicant lodged an application for leave to appeal. The application was filed within the time limit provided for in section 316 of the Criminal Procedure Act, 51 of 1977.

[4] The applicant listed a number of grounds of appeal on which, in her view, the court erred. The grounds enumerated by the applicant are summarised as follows:

- a) The first two grounds are similar and the applicant avers firstly that the court erred in finding that she masterminded or planned the killing of the deceased and further exclusively took the calculated decision when to murder the deceased, despite evidence showing that the applicant and her co-accused were both involved in the planning and taking of the decision when to execute the murder.
- b) With regards to the third ground of appeal listed, a number of issues are raised relating to the condition referred to as Generalised Anxiety Disorder (GAD) which applicant was diagnosed with. The applicant avers that the court erred in finding that the applicant's personality type is an 'obsessive compulsive personality' which is in sharp contrast to an earlier diagnosis by Dr Sieberhagen, the psychiatrist, that applicant's personality type is that of a personality with dependent personality traits. Moreover, the applicant goes on to aver that the court failed to give sufficient weight to applicant's medical condition of GAD. In addition, the court erred in finding that the applicant's commission of the offence was not at variance with the applicant's normal functioning.
- c) The fourth ground of appeal is that the court misdirected itself in concluding that the only end motive the applicant had for murdering the deceased was to inherit under the Will, whilst in the judgment on conviction, the court pointed out that jealousy was also a motive.

- d) Lastly, the court over-emphasised the lack of remorse and did not give sufficient weight to the fact that applicant was in custody for six years.

[5] The respondent opposed the application for leave to appeal on the bases that the grounds are without merit and therefore the applicant does not enjoy any prospects of success on appeal.

[6] The test in applications of this nature is whether, on the grounds set out in the notice, applicant has reasonable prospects of success on appeal. However, 'the mere possibility that another Court might come to a different conclusion is not sufficient to justify the grant of leave to appeal.'¹ As correctly stated by applicant's counsel, it is trite law that once it is accepted that a material misdirection has been made by the trial court on the facts or the law, then the court of appeal will be entitled to adjudicate the matter afresh.

[7] With regards to the first two grounds, the court had found that applicant and her co-accused jointly planned the killing of the deceased over a period of months. At no stage was it found that applicant planned the killing alone. Though correctly stated that they both agreed that the following day would be perfect to execute their plan, this only came about after applicant told accused no 1 that she learned that upon submission of the Will that day, changes thereto would become effective immediately. It should be borne in mind that the murder of the deceased was dependent upon the changing of the Will and life insurance policies which only involved the applicant and the deceased, not accused no 1. She was thus instrumental in taking the necessary preparatory steps which, once in place, sparked the decision to execute their plan.

[8] From a reading of both judgments on conviction and sentence, it is evident that the court was satisfied that the evidence supported the conclusion reached by accused no 1 that the applicant masterminded the killing of her husband. This was based on the changing of the Will together

¹ *S v Nowaseb*, 2007 (2) NR 640 (HC).

with the list of beneficiaries of policies held in the deceased's name; sending her daughter away from the common matrimonial home on the day of the planned murder; and the calling of the first accused to travel from Windhoek to Gobabis in order to murder the deceased. She arranged the meeting between them at home and guided him through the house into the bedroom where the deceased was asleep which was also brought about by the applicant who told accused no 1 over the phone that she gave her husband sleeping tablets to drink. As the court stated at para 75 of the judgment, given the extent of the detail in which the execution of the murder was planned, it required the input of someone familiar with the circumstances at the deceased's home with regards to the presence of their daughter and to facilitate access for accused no 1 into the house. To this end, applicant was the only link between the deceased and accused no 1 who could have provided such information. The extent of the applicant's preparatory steps became evident from the evidence of accused no 1 that on the morning of the planned murder, applicant had bought cleaning material and gloves to be used in the clean-up of the scene afterwards.

[9] The evidence clearly established that the applicant was the architect of the scheme to murder the deceased, whereas the first accused was the executioner. Against this background, I am unable to come to a different conclusion than the applicant having masterminded the killing of her husband and was instrumental in the timing thereof. The first and second grounds are therefore without merit.

[10] The third ground of appeal is premised on the medical report compiled by Dr Siebenhagen in connection with an enquiry conducted in terms of sections 77 and 78 of the Criminal Procedure Act 51 of 1977. In para 7.5 of the report it is indicated that the applicant suffers from a codeable mood disorder called Generalised Anxiety Disorder (GAD), but with no finding that her mood illness may have rendered her not accountable for her actions. The applicant's qualm is based on the fact that the court found that applicant's personality type is that of 'an obsessive compulsive personality' whilst the report stated that there are 'dependant personality traits' but 'No functional

deficit noted'. Paragraph 7.4 of the report reads that patients suffering from GAD may develop one of two personality types i.e. either 'obsessive compulsive personality' or the 'dependant personality'.

[11] Based on the evidence adduced by the first accused about the applicant's obsessive behaviour towards him, the court expressed the view that 'the former personality type *seems* to fit [applicant] rather than the latter ...'. Counsel's submission that this view is contrary to the diagnosis of Dr Sieberhagen loses sight of the fact that the court's opinion is based on evidence presented to court, whilst the psychiatrist's report was compiled prior to the trial and without the benefit of an evaluation of the evidence and established facts - facts from which the court was entitled to draw inferences.

[12] It is still this court's view that the anxiety disorder applicant suffers from cannot, for purposes of sentence, be assessed in isolation and without regard being had to the circumstances under which the crime was committed. Moreover, the manner in which the applicant conducted herself during the commission of the crime. The court then had to determine the extent to which her actions were influenced by her medical condition. For the applicant to simply rely on the diagnoses as a mitigating factor, is simply insufficient. Where the applicant intended to rely on her medical condition as a mitigating factor, then she should have led evidence to that effect, showing the extent to which her medical condition impacted on her actions; this she failed to do. Furthermore, there was no evidence to suggest that the applicant's mood illness may have rendered her less accountable for her actions prior to or during the commission of the alleged crime. It is for the aforesaid reason that the court found that her actions and decisions on the day were calm, goal directed and consistent with their earlier planning. Also that there was nothing showing that she was acting out of character – despite her condition of GAD. Equally, these grounds of appeal raised by the applicant are without merit.

[13] With regards to the forth ground of appeal it should be pointed out that in the court's judgment on conviction the court indicated at para 73 that there

were *three* possibilities as to why the applicant and the first accused might have murdered the deceased. Those motives included:

- a) The killing of the deceased from which the applicant would inherit money that could be used to refund the complainant in the fraud case against the applicant;
- b) To murder the deceased which would have brought an end to their abusive relationship; and
- c) According to applicant's counsel, it was done out of jealousy on the part of the first accused.

To say that the court concluded that the *only* end motive to kill the deceased was for the applicant to inherit, is thus not correct. However, in the sentencing judgment the court merely highlighted the point that crimes committed for monetary reward are aggravating in nature. By so doing it was not the court's intention to understate the importance of the other motives, but rather to put more emphasis on the killing of the deceased for monetary benefit. That was undoubtedly the main motive behind the murder.

[14] With regards to the fifth ground of appeal that the court overemphasised the lack of remorse on the part of the applicant, there is nothing in the judgment to support the contention made. All that the court remarked was that she did not express any remorse for her wrongdoing, either under oath or through her counsel. Based on that, the court found that she had no remorse for what she has done; a factor the court was entitled to take into account in sentencing.

[15] In respect of the applicant's detention for 6 years, this was alluded to in the sentencing judgment namely, that the period an applicant spends in custody, especially, if it was lengthy, is a factor that may lead to a reduction in sentence. However, when the court balanced all the competing interests it was found that the aggravating circumstances outweighed this factor and therefore called for the imposition of a lengthy custodial sentence. It is this

court's opinion that in light of the circumstances in which the murder was committed and the role played by the applicant in the execution thereof that the sentence imposed is appropriate and justified. Once the court came to the conclusion that life imprisonment is the only appropriate punishment in the circumstances of this case, the period of detention became a secondary consideration.

Conclusion

[16] In conclusion, with regards to the grounds raised in the application for leave to appeal, the court is not persuaded that the applicant has prospects of success on appeal.

[17] In the result, it is ordered:

The application for leave to appeal is dismissed.

JC LIEBENBERG
JUDGE

APPEARANCES

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