REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

HC-MD-CRI-APP-CAL-2020/00064

In the matter between:

EDMUND TSOWASEB **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Tsowaseb v The State* (HC-MD-CRI-APP-CAL-2020/00064) [2021] NAHCMD 140 (31 March 2021)

Coram: USIKU J, CLAASEN J concurring
Heard: **22 February 2021**
Delivered: **31 March 2021**

Flynote: **Criminal procedure** – Appeal – Criminal Procedure – Appeal – Sentence – Guilty plea to murder *dolus eventualis* – 16 years' imprisonment – Balanced sentence, appropriate to the gravity of the offence – Appeal is dismissed.

Summary: The appellant pleaded guilty in the Keetmanshoop Regional Court on one charge of murder. He was sentenced to 16 years' imprisonment. His appeal is against sentence only. In his notice of appeal he noted that the learned magistrate imposed a harsh sentence, not adequately considering his personal circumstances. The appellant indicated that he had pleaded guilty, thereby not wasting the court's time. Though the appellant did not testify in mitigation of sentence, his mother testified about his personal circumstances. The learned Magistrate considered the senselessness of the killing and the age of the deceased at the time of his demise. He equally considered the triad of factors in sentencing. The court a quo considered the appellant's age at the time of the incident as well as his current circumstances and arrived at sentence of 16 years' imprisonment. As such the learned Magistrate cannot be faulted as the sentence imposed is appropriate under the circumstances.

ORDER

The appeal against sentence is dismissed.

APPEAL JUDGMENT

USIKU, J. (CLAASEN, J concurring):

[1] The appellant was charged in the Keetmanshoop Regional Court with the murder of 18 year old Petrus Jakobus Gamatham (the deceased) by fatally stabbing him with a knife on the 28 August 2009. The appellant pleaded guilty on 20 February 2018 to the murder of the deceased by stabbing him with an Okapi knife in the neck which caused the death of the deceased.

[2] The appellant was convicted on a charge of murder on the basis of *dolus eventualis*. He was sentenced on 23 February 2018 to 16 years' direct imprisonment. The appellant lodged an appeal against his sentence only. The grounds *inter alia* are

that the learned Magistrate erred to not consider his personal circumstances and did not take into account the fact that the appellant pleaded guilty and did not waste the court's time.

[3] The appellant drew the court's attention to the fact that he assists his grandparents by looking after their livestock on the farm. Furthermore the appellant in his notice appeal stated that the learned Magistrate failed to consider that he is a father and the sole breadwinner of his 4 children. The appellant regarded it as an important mitigating factor which the learned Magistrate disregarded. He further indicated that he suffers from high blood pressure.

[4] He elected not to testify in mitigation of sentence, but called his mother Ms. Bonevantura to place his personal circumstances before the court. She testified about her son's hardworking nature as he assists his maternal grandparents with farm work as well as other household chores. She described the appellant as being non-violent, and obedient to authority, with a good temperament.

[5] The appellant's mother further testified that he is remorseful for having caused the death of the deceased. She told the court that he will never do such a thing again. In addition, the appellant's family sold three of his cattle and used the proceeds as contribution towards the funeral arrangements of the deceased. She testified that the deceased's family forgave the appellant for causing the death of the deceased.

[6] From a perusal of the Magistrate's reasons for sentence, it is clear that he considered all the information tendered in mitigation including the appellant's mother's evidence under oath, as well as other factors that were relevant to sentencing. The appellant pleaded guilty, which the Magistrate construed as indicative of his remorse. The Magistrate also duly considered that the appellant was a first time offender at the time of the offence was committed.

[7] The court did however take cognisance of the appellant's previous convictions, i.e. possession of potentially dangerous dependence producing drugs, dealing in a dependence producing drug and theft. The learned magistrate correctly

concluded that this goes to show that the appellant has a propensity towards committing crimes. The court also considered the fact that the appellant was 23 years old at the time of the commission of the offence, thus he is a youthful offender.

[8] However, the learned Magistrate held that youthfulness should not be the scapegoat for the youth to commit serious crimes. Thus punishment should not evade them. Youthfulness as a mitigating factor recedes when it comes to offences such as murder.

[9] The court a quo noted that murder is a serious offence in any society and the court correctly pointed out the sanctity of human life. The appellant deprived another human being of a fundamental right protected in the Constitution, i.e. the right to life. Murder invariably attracts a severe sentence. This is especially so as the killing in itself was a senseless one. The learned Magistrate describes senseless killings as very prevalent in the southern parts of Namibia.

[10] Although it was submitted on behalf of the appellant in mitigation that he consumed some alcohol, the court a quo found no justification for the appellant to attack the deceased as the latter simply refused to share his liquor with him. The reason for the stabbing was described '*as shocking as it is repugnant'*[1]. The appellate court fully concurs. The accused directed his knife towards sensitive parts of the human anatomy. A knife blow to the throat or neck area, is highly likely to result in serious injury if not immediate death.

[11] Mr Iipinge, appearing on behalf of the respondent, opposed the appeal and submitted that the appeal is without merit as the appellant failed to point how the learned Magistrate misdirected himself either on the law or facts. He further submitted that the learned Magistrate considered the triad of factors as stipulated in *S v Zinn* 1969 (2) SA 537 (A).The respondent was of the view that a deterrent sentence was called for, individually and generally and given the circumstances of the case, it was justified to emphasise the deterrent aspects of punishment.

[1] Page 52 of the record.

[12] Therefore when balancing between the interests of the appellant and that of society, a wholly or partially suspended sentence was not justifiable. The court agrees with the submissions made by the respondent that given the circumstances of this case, a custodial sentence was inescapable.

[13] In *Tomas v The State* (CA 27/2014) [2016] NAHCNLD 54 (1 July 2016) the court agreed with the sentiments of Ndauendapo J as set out in *S v Kapuire* 2015 (2) NR 394 (HC) at page 400 paragraph 17, regarding the approach of a court of appeal concerning a sentence imposed in a lower court.

'…that sentencing is pre-eminently a matter within the discretion of the court. The court of appeal will only interfere where the lower court (i) misdirected itself on the facts or on the law; (ii) if an irregularity, which was material, occurred during the sentencing proceedings; (iii) where the trial court failed to take into account material facts or overemphasized the importance of the other facts; (iv) if the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by a court of appeal (*S v Tjiho* 1991 NR 361 (HC) (1992 (1) SACR 639) at 366A – B); (v) or that the sentence is totally out of proportion to the gravity or magnitude of the offence; (vi) or that it was in the interest of justice to alter it. (Director of Public Prosecutions, *Kwazulu-Natal v P* 2006 (3) SA 515 (SCA) (2006 (1) SACR 243; [2006] 1 All SA 446) in para 22.) A trial court's sentence would only be set aside on appeal if it appears that the trial court exercised its discretion in an improper or unreasonable manner (*S v Pieters* 1987 (3) SA 717 (A) at 727F – H).'

[14] In *Muruti v S* (CC 10-2011) [2014] NAHCNLD 2 (15 January 2014) para 9, it was held,

'The court in its reasons on sentence referred to the triad of factors which must be considered when sentencing and in addition, the court is enjoined to consider the element of mercy. As for the objectives of punishment it was pointed out that punishment has to be determined in the circumstances of the case and whereas equal weight need not be given to the often competing factors, that one or more factors may be emphasised at the expense of the others. The discretion the court has in this regard must obviously be exercised judiciously and what the court is required to do is to impose a balanced sentence without over- or underemphasising any of these factors (para 3).'

The court a quo followed this approach in the imposition of the sentence.

[15] The personal circumstances of the appellant as set out were duly considered when deciding what sentence best would serve the interests of, not only the appellant, but also that of society. The appellant's youthfulness was found to be a mitigating factor counting in his favour. The Magistrate simultaneously weighed these factors against the young life lost as the deceased was merely 18 years old at the time. He lost his life for simply refusing to share his liquor with the appellant. It is my considered view that the Magistrate correctly concluded that a long custodial sentence was inescapable under the circumstances.

[16] Therefore, even though the appellant was found to have been a youthful offender the court was of the view that it would not be in the interest of justice to impose a partially suspended sentence. Courts should not give the impression that juveniles, found guilty of serious crimes, would go unpunished.

[17] Having considered the appeal objectively, I am satisfied that the court *a quo* meted out a balanced sentence, appropriate to the gravity of the offence.

[18] In the result:

The appeal is dismissed.

D N USIKU

Judge

C M CLAASEN

Judge

APPEARANCES

APPELLANT	MR. MBANGA SIYOMUNJI Siyomunji Law Chambers Windhoek
RESPONDENT	MR. HESEKIEL KUYE-AWIKE IIPINGE Of the Office of the Prosecutor-General, Windhoek