REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 06/2020

In the matter between:

THE STATE

and

SIMON SHIDUTE JEROBEAM **1st ACCUSED**

FABIAN HIPUKULUKA TANGE-OMWENE LAZARUS **2nd ACCUSED**

Neutral citation: *S v Jerobeam* (CC 06/2020) [2022] NAHCMD 617 (14 November 2022)

Coram: LIEBENBERG J

Heard: **01 – 02 November 2022**

Delivered: **14 November 2022**

Flynote: **Criminal procedure** – Sentence – Murder, robbery, conspiracy, theft and defeating or obstructing the course of justice – Accused acting with common purpose – Principles to sentencing applied – Seriousness of crimes considered – Personal circumstances of accused recedes into background with serious crimes committed – Custodial sentences inevitable – Cumulative effect of individual sentences considered against moral blameworthiness of accused.

Summary: The accused persons, together with a former co-accused who absconded before the trial, planned a robbery on an elderly couple to steal cash from a safe of theirs. After failing to convince the housekeeper to provide them with an alarm control of the house, they gained access to the house by pouncing the elderly female victim when she unlocked the back door and forced her inside. Though their initial intent was to tie up their victims which would have rendered them inactive, this changed when she screamed for help which prompted her assailants to strangle her with a rope/strapping, resulting in death. The elderly male victim was tied up and sustained superficial injuries to his arms.

Held that, the commission of the crimes was premeditated and executed with foresight of their victims being present who had to be neutralised by the application of force. This was considered an aggravating factor.

Held further that, factors such as the vulnerability of the victims and the brutality of the attack on one of the victims regarded as aggravating. The seriousness of crimes such as murder and robbery justifies lengthy custodial sentences.

Held that, a balance must be struck between the totality of individual sentences imposed and the blameworthiness of the accused.

Held further that, the court has a discretion to ameliorate the cumulative effect of sentences imposed.

ORDER

Count 1: Murder – Accused no.1 and 2 each: 28 years' imprisonment.

Count 2: Common Assault – Accused no.1 and 2 each: 6 months' imprisonment.

Count 3: Robbery (aggravating circumstances) – Accused no.1 and 2 each: 10 years' imprisonment.

Count 4: Theft – Accused no.2: 1 year imprisonment.

Count 5: Conspiracy to commit housebreaking with intent to rob and robbery (C/s 18(2)(*a*) of the Riotous Assemblies Act 17 of 1956 - Accused no.1 and 2 each: 3 years' imprisonment.

Count 6: Defeating or obstructing the course of justice – Accused no.1 and 2 each: 2 years' imprisonment.

It is further ordered in terms of s 280(2) of the Criminal Procedure Act 51 of 1977 that:

Five (5) years of the sentence imposed on count 3 (Robbery) to be served concurrently with the sentence imposed on count 1.

Sentences imposed on counts 2, 4, 5 and 6 are to be served concurrently with the sentence imposed on count 1.

Each accused to serve an effective term of 33 years' imprisonment.

SENTENCE

LIEBENBERG J:

Introduction

[1] On 12 October 2022 the accused were convicted on several counts and we have now reached the stage where the court must decide what sentence(s), in the circumstances of the case, would be appropriate. Accused no.1 elected not to give evidence in mitigation and was content with the submissions made on his behalf by Mr Kaurivi. Accused no.2, however, testified in mitigation of sentence and placed his personal circumstances on record, to which I will return shortly.

[2] Both the accused stand convicted of murder; robbery (with aggravating circumstances); conspiracy to commit housebreaking with intent to rob and robbery in contravention of s 18(2)*(a)* of the Riotous Assemblies Act 17 of 1956; and defeating or obstructing the course of justice. In addition, accused no.2 is convicted of theft.

[3] The offences convicted of either led up to or derive from an incident that happened on 02 August 2017 at Swakopmund, when an elderly couple were overpowered in their home during the early hours of the morning and robbed. As borne out by the evidence, the accused persons, together with a certain Daniel (who escaped from police custody and still at large), acted with common purpose when planning and executing a robbery on the couple. In the process Mrs Strzelecki (deceased) was brutally assaulted and strangled which resulted in death, while Mr Strzelecki was trussed up and merely sustained minor injuries during the assault. He, however, died of cerebrovascular aneurism some days later which could not be linked to the assault he was subjected to earlier. The accused persons fled the scene but were arrested later that same day. It is not in dispute that accused no.2 escaped from police custody during 2019 and was on the run for one week before apprehended. He was subsequently convicted of unlawful escaping and finished serving his sentenced of 18 months' imprisonment before finalisation of the trial.

Mitigating factors

[4] The accused persons are first offenders which, in itself, is generally considered a mitigating factor. Despite the salutary principle that first offenders should not easily or lightly be sent to prison, it is trite that there is no rule that every offender, irrespective of what he/she has done, is automatically entitled to receive a

suspended sentence on a first conviction. It would clearly be against public policy to adopt such automatic approach to crime, especially where a serious crime has been committed. In such instance it is usually impossible to give the accused the benefit of a suspended sentence.[1]

[5] The accused further remained in detention pending finalisation of the matter since their arrest, spanning a period of just over five years. As already mentioned, the position of accused no.2 differs in that he, during this period, served a sentence of 18 months' imprisonment. It is trite that the period an accused spends in custody, especially if it is lengthy, is a factor that normally leads to a deduction in sentence.[2]

[6] It was further submitted that, given their relatively young ages at the time when the offences were committed, this should be a factor to be taken into consideration at sentencing. It is trite, as was stated in *S v Erickson*[3] and the cases cited therein, that youthfulness of an offender is, as a matter of course, a mitigating factor; the reason being that youthful offenders are *prima facie* considered to be immature, for they often lack maturity, insight, discernment and experience.[4] It is to this end that counsel submitted that the accused persons' moral blameworthiness is lessened by youthfulness. However, although the youthful age of an accused is a weighty factor when considering sentence, the view of our courts, as regards youthful criminals making themselves guilty of serious crimes, has to some extent shifted away from the blanket approach followed in the past namely, that youthful offenders *per se* 'lack maturity, insight, discernment and experience', to a position where a youthful offender can no longer escape punishment simply because of his/her young age.[5] Also, that such persons cannot go out scot-free on account of youthfulness and, where justice will not otherwise be served, they will be held accountable and punished accordingly for the pain and misery caused to others as a result of their criminal conduct. Therefore, the weight to be accorded to youthfulness as mitigating

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[1] *S v Vilakazi* 1974 (1) 79 (TPA) at 83A-B.
[2] *S v Kauzuu* 2006 (1) NR 225 (HC).
[3] *S v Erickson* 2007 (1) NR 164 (HC) at 166E-H.
[4] *S v Ngoma,* 1984 (3) SA 666 (A) at 674F.
[5] *Andries Lippe and Others v The State,* (unreported) Case No RC1/93 at p 10.

factor, must be considered together with all other factors, inclusive of aggravating factors in the circumstances of the case.

[7] At the ages of 23 and 25 years, respectively, the accused persons clearly fall outside the category of 'youthful offenders', though relatively young when committing the present crimes. Both the accused fathered one child and maintained themselves as independent adult persons. Whereas no argument was advanced by either counsel to the effect that the lack of maturity, insight, discernment or experience must be attributed to the accused persons and their being no evidence before court from which such inference may be drawn, it appears to me that, as a mitigating factor, little weight can be attributed to them being young offenders.

[8] In the court's determination of what punishment should be meted out in the circumstances of this case, regard must be had to the *triad* of factors namely, the personal circumstances of the accused; the crimes (taking into account the circumstances in which it was committed); and the interests of society.[6] 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'.[7] I pause to observe that the showing of mercy as an independent factor, must be decided in the circumstances of the case and is not for the mere asking. As far as it is possible, the court will endeavour to strike a balance between the interests of the accused and that of society. Though all the general principles applicable must be considered and balanced and harmonised when applied to the facts, it need not be given equal weight or value, as it might become necessary to emphasise one or more of the factors at the expense of others. This will primarily depend on the circumstances of the case.[8]

Personal circumstances of the accused

Accused no.1

[9] As already mentioned, accused no.1's personal circumstances were placed on record from the bar which are: He is currently 28 years of age, single with one

[6] *S v Zinn,* 1969 (2) SA 537 (A); *S v Tjiho,* 1991 NR 361 (HC).
[7] *S v Rabie,* 1975 (4) SA 855 (AD) at 862G-H.
[8] *S v Van Wyk* 1993 NR 426 (HC).

child aged 8 years, who lives with his mother and whom he supported prior to his arrest. No further particulars of the accused were placed on record.

Accused no.2

[10] The accused testified in mitigation of sentence which amounts to the following: He is single with one child currently aged 8 years, who lives with the accused's parents in the north. He has not seen the child for the past five years as a result of his detention and the family not having brought the child to visit him. At the time of his arrest he had a monthly income of N$7000, generated from construction work and being self-employed. At the time he provided financial support to his family and child, the latter attending school.

[11] The accused further testified that his conviction came as a shock to him as he was not involved in the crimes committed; though he has sympathy for the family for their loss. He prayed for a 'lesser sentence' in light of his dream to one day have a construction company of his own. This, he said, would not be possible if given a lengthy sentence of imprisonment.

The crime

[12] Both sides are in agreement that crimes of murder and robbery are serious and when it comes to sentencing, that the imposition of custodial sentences is an inescapable consequence. Defence counsel propose a sentence ranging between 17 and 25 years' imprisonment, partly suspended, on the murder charge. Contrary thereto, state counsel holds the view that 30 years' imprisonment is justified in view of several cases cited where the norm for murder, committed in similar circumstances, is in the range of 30 years' direct imprisonment. As for robbery, counsel are in agreement that a sentence of ten years' imprisonment would be fair and just.

[13] Whereas no two cases are identical, one has to look at the circumstances in which the crimes were committed, weigh the mitigating and aggravating factors against each other, whilst having full regard to the accused persons' personal circumstances and moral blameworthiness.

[14] As set out and discussed in the court's earlier judgment, the robbery was premeditated and executed, having acted with common purpose. It started off with accused no.2 getting hold of a safe key belonging to the victims, knowing that it contained a large sum of cash. When their plan to get hold of an alarm remote control of the house with help of the victims' housekeeper failed, the accused decided to jump the boundary fence, hide themselves in the yard and wait for the right moment to gain access into the house. This came when the deceased opened the door, allowing them the opportunity to pounce on her and dragging her back into the house, unnoticed. As could be expected, the deceased put up resistance which could not have been strong in view of her advanced age of 79 years. When she however started screaming for help, despite her mouth being covered with tape, this prompted more drastic action by her attackers who then strangled her with rope/strapping, resulting in death.

[15] Based on evidence that the deceased was trussed up and attempts made to cover her mouth, it may reasonably be inferred that the accused persons' initial intention was only to render her inactive or neutralise her but, when she managed to raise the alarm, their intent changed and she was killed. This appears to have been a decision taken on the spur of the moment; a factor to be taken into account in sentencing. In similar vein, Mr Strzelecki was equally tied up and in the proses sustained superficial injuries to his arms.

[16] The fact that the robbery was not committed on the spur of the moment but only after careful planning, is well recognized as an aggravating factor. The court in *S v Qamata*[9] where the accused persons were sentenced to lengthy prison terms for robbery, stated the following:

'There are many aggravating features which would justify this sentence in this case. The accused deliberately planned the invasion of the home of a defenseless elderly man and woman in order to rob them. … Accused No 1 acted with direct intention to kill, which is in addition aggravation.'

[17] The sentiments expressed above find equal application in the present matter as far as it concerns the robbery of the elderly couple and the murder of the deceased. They were defenceless when attacked in their own home, a place where

[9] *S v Qamata* 1997 (1) SACR 479 (E) at 481f-g.

they were supposed to feel safe and protected against unscrupulous criminals like the accused. It is evident that the accused foresaw that they would likely encounter resistance and thus had to use physical force to overpower their victims in order to get to the safe. As far as the deceased is concerned, they lodged a brutal attack on her. Given the vulnerability of the elderly couple (aged 87 and 79 years respectively), the killing of the deceased was not only brutal and cruel, it was completely unnecessary in the circumstances.

[18] It seems apposite to repeat what the court said in *S v Kadhila*[10] at par 17:

'We live in an orderly society which is governed by moral values and obligations with respect for one another. It is expected of all members of society to uphold and respect these values. It is therefore not in the interest of society when persons like the accused trample on the values and rights of [others] ….. only to make *their* authority felt. The sanctity of life is a fundamental human right enshrined in law by the Namibian Constitution and must be respected and protected by all. The courts have an important role to play in that it must uphold and promote respect for the law through its judgments and by the imposition of appropriate sentences on those making themselves guilty of disturbing the peace and harmony enjoyed in an ordained society; failing which might lead to anarchy where the aggrieved take the law into their own hands to take revenge.'

[19] Though in agreement with the submission that the offences in the remaining counts are of less serious nature, the court is alive to the fact that these crimes are still serious to the extent that they usually attract custodial sentences. Moreover where it is either aimed at inciting others to commit serious crimes or, to destroy evidence to avoid prosecution.

[20] During oral submissions Mr Engelbrecht argued that in light of the accused having pleaded not guilty at the beginning of the trial, it would not make sense to him if he were to express any remorse in mitigation when he intends lodging an appeal. The court, as submitted, should therefore not find against accused no.2 for not expressing any remorse, as that would impact adversely on his intended appeal. In response, the court remarked that an accused must decide whether he accepts responsibility for his misdeeds and show contrition or, whether he persists in his stance of claiming innocence with the view of lodging an appeal; he cannot have it

[10] *S v Kadhila* CC 14/2013 [2014] NAHCNLD 17 (12 March 2014).

both ways. In the latter instance where there is no remorse, there can equally be no mitigation in favour of the accused. As for accused no.1, counsel made no attempt to offer remorse or seek forgiveness on behalf of his client. Thus, neither of the accused demonstrated any remorse for the pain and suffering they had caused, not only to their victims, but also to the family who lost a loved one.

[21] All these are aggravating circumstances weighing heavily against the accused persons, especially pertaining to their moral blameworthiness. Terblanche, in his work titled *Guide to Sentencing in South Africa* (2nd Ed.), stated that a morally unacceptable motive may be regarded as an aggravation factor in sentencing. A good example is where the crime is motivated by greed and the court in *S v Randall*[11] viewed the fact that an offence committed for monetary reward, is indeed an aggravating factor. In the present case, the crimes the accused stand convicted of were driven by greed ie to steal money from the victims' safe. It is neither of the accused persons' case that they were suffering financially and were in some way forced to turn to crime to survive. Quite the contrary, as accused no.2 had an income of N$7000 per month. Their motive was solely to enrich themselves at the expense of innocent vulnerable people.

Interest of society

[22] Turning next to the interests of society, the courts are under a duty to uphold and promote the rule of law in society and give effect to the fundamental rights of all persons as enshrined in the Namibian Constitution. By way of judgments prepared and delivered, the courts are equally duty bound to consider and reflect on society's indignation and antipathy towards those making themselves guilty of heinous crimes. This usually finds expression where retribution and deterrence are the main objectives of punishment. Where serious crimes are involved – as in this instance – an offender's personal circumstances and the objective of rehabilitation often recedes into the background. See *The State v Katjivi.*[12]

[23] Though nothing in life could possibly undo the wrongdoing of the accused persons when killing the deceased, society expects that offenders be punished for

[11] *S v Randall* 1995 (1) SACR 559 (C) at 566b-d.

[12] *The State v Katjivi* (CC 01/2016) [2016] NAHCMD 258 (09 September 2016).

the pain and suffering caused to others and that the 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. It is only when the offender has paid his/her dues and are reformed, that they would be welcomed back to take up their rightful place in society.

Conclusion

[24] Counsel for the defence contend that, although the imposition of sentences of imprisonment seems inevitable, the concurrent serving of the individual sentences should be ordered.

[25] In deciding what sentences, in the circumstances of the case, would be just and fair, not only to the accused persons but also to society, a balance must be struck between the interest of the accused and that of society, whilst at the same time the court must decide which of the sentencing objectives it wishes to achieve when sentencing.

[26] After thorough consideration of these weighty and somewhat competing factors, it seems inescapable to come to the conclusion that the seriousness of the crimes and the interest of society outweigh the personal circumstances of the accused persons and that lengthy sentences of imprisonment is called for, at least in respect of the murder and robbery counts. While the remaining offences are, as stated, of less serious nature, in my view they are serious enough to warrant the imposition of custodial sentences on each count. When dealing with crimes of this nature, deterrence and retribution as objectives of punishment come to the fore.

[27] In coming to this conclusion, the court is mindful of the accused persons' concerns that their children would grow up without the financial support, presence and comfort of a father when they are to be given prison sentences. The court is equally sensitive to the distress and hardship which sentences of direct imprisonment – especially when lengthy – must necessarily bring upon the family, friends and relations of the offender. But, punishment being an inevitable consequence of crime,

this is one of the penalties which convicted persons must pay and is not something the court can consider as a mitigating circumstance.

[28] During oral submissions Mr Engelbrecht argued, in view of the court's alleged failure to articulate (in its earlier judgment) the specific actions taken by each accused when committing the crimes, that the moral blameworthiness of accused no.2 is distinguishable from that of his co-accused, rendering his level of punishment considerably less. As authority counsel relies on the matter of *S v Claasen*[13] which, in my view, is clearly distinguishable from the instant matter in that the remarks made therein was in the context of the accused no.1 having been found guilty of robbery as an accessory after the fact and not as perpetrator. In the present instance the accused were convicted on the doctrine of common purpose where the unlawful actions of co-perpetrators are attributed to one another. It was therefore not required of the court to determine a causal connection between the acts of each of the accused and the ultimate outcome of the crimes. In these circumstances, the same level of blameworthiness can be attributed to the accused persons.

[29] Where an accused stands to be sentenced in respect of two or more related offences, as in this instance, the accepted practice is to have regard to the cumulative effect of the sentences to be imposed, thereby ensuring that the total sentence the accused in the end has to serve, is not disproportionate to his/her blameworthiness in respect of the offences committed. By ordering in terms of s 280 (2) of Act 51 of 1977 the concurrent serving of some of the sentences, this will appropriately ameliorate the cumulative effect of the individual sentences imposed. The court therefore has a discretion to exercise in favour of the accused where multiple related offences has been committed and where failure to make the appropriate order would result in an injustice. In view of the circumstances of the present case, it seems appropriate to order the concurrent running of some of the sentences to ameliorate the severity of the cumulative effect of the individual sentences imposed.

[30] In the result, the accused are sentenced as follows:

Count 1: Murder – Accused no.1 and 2 each: 28 years' imprisonment.

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13 *S v Claasen* (CC 12/2018) [2020] NAHCMD 184 (20 May 2020).

Count 2: Common Assault – Accused no.1 and 2 each: 6 months' imprisonment.

Count 3: Robbery (aggravating circumstances) – Accused no.1 and 2 each: 10 years' imprisonment.

Count 4: Theft – Accused no.2: 1 year imprisonment.

Count 5: Conspiracy to commit housebreaking with intent to rob and robbery (C/s 18(2)(*a*) of the Riotous Assemblies Act 17 of 1956 - Accused no.1 and 2 each: 3 years' imprisonment.

Count 6: Defeating or obstructing the course of justice – Accused no.1 and 2 each: 2 years' imprisonment.

It is further ordered in terms of s 280(2) of the Criminal Procedure Act 51 of 1977 that:

Five (5) years of the sentence imposed on count 3 (Robbery) to be served concurrently with the sentence imposed on count 1.

Sentences imposed on counts 2, 4, 5 and 6 are to be served concurrently with the sentence imposed on count 1.

Each accused to serve an effective term of 33 years' imprisonment.

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JC LIEBENBERG

JUDGE

APPEARANCES:

STATE:	T. Itula Office of the Prosecutor-General, Windhoek
ACCUSED 1:	T Kaurivi TK Kaurivi Legal Practitioners, Windhoek
ACCUSED 2:	M Engelbrecht Of Engelbrecht Legal Practitioners, Windhoek.