REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 9/2020

In the matter between:

THE STATE

and

ERNST JOSEF LICHTENSTRASSER **ACCUSED**

Neutral citation: *S v Lichtenstrasser* (CC 9/2020) [2024] NAHCMD 197 (29 April 2024)

Coram: LIEBENBERG J

Heard: **14 November 2023 & 25 April 2024**

Delivered: **29 April 2024**

Flynote: Criminal Law – Charges – Double Murder – Possession of a firearm without a licence – possession of ammunition – Unauthorised supply of a firearm and ammunition – Attempting to defeat or obstruct the course of justice.

Criminal Procedure – Sentence – Triad factors, objectives of punishment considered and restated.
Criminal Procedure – Sentence – Mercy – Not to be earned or demanded – Punishment to be blended with a measure of mercy only in deserving cases – Remorse – Lack thereof – Moral blameworthiness – Degree thereof – Crucial factors in sentencing.
Criminal Procedure – Sentence – Age of accused – One of several factors for consideration – Not determining factor.
Criminal Procedure – Sentence – Life expectancy – *S v Gaingob* discussed – *Stare decisis* – Parole – Not a factor for consideration in sentencing.
Criminal Procedure – Sentence – Life imprisonment – Discretionary – When appropriate – Extreme circumstances.

Summary: On 2 November 2023 the accused was convicted on a total of eight counts, to wit: two counts of murder (acting with direct intent); two counts of possession of a firearm without a licence; possession of ammunition; unauthorised supply of a firearm and ammunition; theft; and attempting to defeat or obstruct the course of justice.

The court at this stage of sentencing stands guided by a *triad* of factors comprising the personal circumstances of the accused, the crime(s) and the interests of society. The suitability of a sentence needs to be decided in light of the particular circumstances of the case, a sentence that would be just and fair to the accused. To arrive at an appropriate sentence, the court must consider the evidence presented and the mitigating and aggravating factors which requires the weighing up of the personal circumstances of the accused in relation to the crimes committed as well as the interests of society. The court is further enjoined to consider and, in its discretion, include such mercy as it may find suitable in the circumstances of the particular case, regard being had to the primary purposes of punishment.

Held: That planned criminality is considered morally more reprehensible than unplanned criminality.

Held further that: In cases involving serious crimes, society's sense of outrage and the deterrence of the offender and other potential offenders deserve considerable weight.

Held that: The violent, irrational and unpredictable behaviour of the accused renders him a danger to society. Society, in turn, may therefore legitimately exact protection from this court against the accused.

Held further: That this is not an instance where the court ought to have mercy on the accused for reason that his brazen, merciless execution of the deceased was unjustified and unworthy of any form of sympathy by the court.

Held: That it is settled that life imprisonment *per se*, does not constitutionally violate the dignity of the offender; neither does it constitute an invasion of the right of every person to be protected from cruel, inhuman or degrading treatment or punishment. Further, that in our law there is simply no basis that proscribes the imposition of a custodial sentence for murder, even a lengthy sentence of direct imprisonment, in circumstances as the present.

Held further that: Whilst the age of an offender at sentencing is indeed a factor, the court must take it into consideration – normally as mitigating factor – but the same does not apply to parole (as a factor). It is irregular for a sentencing court to consider parole as a factor when determining what an appropriate sentence would be in the circumstances of the case. Accused's present age is not the decisive factor in the court's quest to do justice, it is merely one of several factors for consideration at sentencing.

Held that: If this court were to align itself with the approach adopted in *Gaingob* where life expectancy forms the crux of the inquiry as to what would be suitable punishment – as this court by reason of the *stare decesis* rule is bound to do – it would mean that a sentence in excess of 6 years' effective imprisonment in this instance (the accused being 62 years old) would 'amount to cruel, degrading and inhuman punishment' and infringe the accused's right to human dignity for reason that it exceeds his life expectancy

Held further that: The accused stands convicted of double murder and where the crimes were premeditated and the lives of innocent, productive citizens brutally and mercilessly snuffed out, a sentence taking into account the life expectancy of the accused in this case, would make a mockery of the seriousness of the crime of murder and the interests of society.

Held that: A sentence of life imprisonment on the counts of murder is justified and appropriate, despite the advanced age of the accused.

ORDER

Count 1: Murder: Life imprisonment.

Count 2: Murder: Life imprisonment.

Count 3: Possession of a firearm without a licence (c/s 2 of Act 7 of 1996): Three (3) years' imprisonment.

Count 4: Possession of ammunition (c/s 33 of Act 7 of 1996): One (1) year imprisonment.

Count 5: Attempting to defeat or obstruct the course of justice: Four years' imprisonment.

Count 6: Theft: Four years' imprisonment.

Count 7: Possession of a firearm without a licence (c/s 2 of Act 7 of 1996): Three years' imprisonment.

Count 8: Unauthorised supply of a firearm and ammunition (c/s 32(1)*(a)* and *(b))*: One (1) year imprisonment.

It is further ordered:

In terms of section 10(6) of the Arms and Ammunition Act 7 of 1996 the accused is declared unfit to possess an arm for a period of five years, such period to commence only after the accused has been released on parole.

In terms of section 34(1) of the Criminal Procedure Act 51 of 1977 exhibit 1 to be returned to Mr De Villiers (complainant in count 6);

In terms of section 35(1)*(a)* of the Criminal Procedure Act 51 of 1977 exhibits 4 – 9 are declared forfeited to the State;

Exhibit 10 (.38 Rossi revolver) and 3 x live .38 live rounds of ammunition; and Exhibit 'B' (firearm licence book) to be handed over to the designated person in the Namibian Police, against the issuing of a receipt to the accused, for safekeeping until the lapsing of the forfeiture order.

SENTENCE

LIEBENBERG J:

Introduction

[1] On 2 November 2023 the accused was convicted on a total of eight counts, to wit: two counts of murder (acting with direct intent); two counts of possession of a firearm without a licence; possession of ammunition; unauthorised supply of a firearm and ammunition; theft; and attempting to defeat or obstruct the course of justice.

[2] I pause to observe that the accused, at that stage of the trial, terminated the services of his legal aid counsel and opted to represent himself. After his testimony in mitigation of sentence, proceedings were adjourned to allow the accused the opportunity to call witnesses. However, when proceedings were to continue towards the end of November 2023, the

court was informed that the accused was not in attendance but in intensive care in a Windhoek hospital after an attempted suicide. After his discharge during December of last year, he was transferred to the Maximum Forensic Unit of Mental Health Care at Windhoek Central Hospital where his condition was reviewed by psychiatrists and clinical psychologists. A mental status examination conducted on 13 December 2023 revealed that the accused still had depressive symptoms and suicidal ideations and was accordingly treated for Persistent Depressive Disorder. This information derives from medical reports issued on 20 December 2023 and 3 January 2024 by medical officers and a specialist psychiatrist who treated and examined the accused at the time. These undesirable circumstances obviously impacted adversely on the finalisation of the matter, which was delayed by about five months. It seems to me necessary to further observe that the setback in the accused's health at that stage was self-created.

[3] When the accused returned to court on 29 January 2024 for a status hearing, he gave the assurance that he was fit to proceed and proceedings were adjourned until 12 March 2024 for finalisation. However, on this date the accused informed the court that the matter could not proceed and gave three reasons: Firstly, that he was on a hunger strike for the past 12 days and not taking his medication. Secondly, that the Directorate of Legal Aid declined a further application for legal representation and that he wanted to 'appeal' that decision. The third reason was that he sought the presiding judge's recusal in an application brought in terms of section 317 of the Criminal Procedure Act 51 of 1977[1] (the CPA) which had not yet been heard.

[4] Based on these assertions, it was decided to have proceedings stand down to the next day and for a medical doctor from the Windhoek Correctional Facility to conduct a medical examination on the accused and report back to court.

[5] Regarding the issue of legal aid, the court was of the view that the refusal by the Directorate of Legal Aid to grant the accused further assistance was likely prompted by him having earlier terminated the services of his legal

[1] Section 317 of the CPA – Application for special entry of irregularity or illegality.

aid counsel after conviction and that any further action the accused intended taking against the Directorate of Legal Aid or by approaching the Ombudsman, falls outside the court's powers. After the earlier dismissal of his lawyer, the accused decided to act in person and was unrepresented when giving evidence in mitigation of sentence. All that remained to conclude pre-sentence proceedings, was the hearing of oral submissions. The second reason advanced was therefor found to be without merit.

[6] As for the recusal application, the court took the decision to consider the application only after sentence, as the application has no bearing on sentence. Moreover, in circumstances where the accused limited the application to only the s 317 application and not the trial.

[7] With the commencement of proceedings on 13 March 2024, Dr Jona, a medical doctor attached to the Windhoek Correctional Facility, gave evidence on the medical status of the accused as on 12 March 2024, following a medical examination and interview conducted with the accused. As borne out by the letter/report handed into evidence, the accused's stated psychological history was acknowledged and formed the basis of the doctor's examination. It further confirmed that the accused was on a hunger strike for 12 days 'to get at least four weeks for him to prepare for his trial as soon as this is granted he promised to stop the hunger strike'. When the court sought clarification on the reason stated for the hunger strike, the doctor qualified his report by stating that four weeks were actually required for the accused to regain his strength as he was dehydrated, experienced dizziness and not communicating properly. The report further reads that the accused's mental state 'showed signs of depression, incoherent speech and inconsistency in concentration, suicidal ideations'. Based on the medical evidence presented, it was clear to the court that it would not have been in the interest of justice to proceed in these circumstances, especially where the accused was appearing in person.

[8] It is against this background that a further remand was granted for the requested period, provided that the accused's condition and progress be

reported on every fortnight, while any indication that the accused was uncooperative, be reported to the court.

[9] With the commencement of proceedings on 25 April 2024 the accused brought another application for postponement, raising two grounds: Firstly, that on 3 April 2024 he filed a petition to the Chief Justice under s 317 of the CPA, the outcome he had not been informed of. Secondly, that on 17 April 2024 he addressed a letter styled 'Aggrieved person Article 25(2) of the Namibian Constitution'. After hearing oral arguments and after due consideration of the facts presented, the court delivered its ruling and found that it would not be in the interest of justice to postpone proceedings for reasons relied upon by the accused when making the application. The court, thus, refused the application and directed that the accused and counsel for the state to address the court on sentence. The accused at this juncture placed it on record that he was not waiving his right to legal representation and persisted with the view that proceedings should be adjourned until such time he has received feedback from the Chief Justice and the Ombudsman.

[10] In light of these circumstances, the court deemed the accused to have waived his right to make oral submissions. Ms Verhoef then addressed the court on sentence and pointed out factors considered to be in aggravation of sentence.

[11] With regard to the well-known *triad* of factors relevant to sentence, it is the state's position that, given the gravity of the crimes committed on counts 1 – 5, significant weight should be accorded to the interests of society. Also how the lives of the deceased persons' family were torn apart and for the court to have specific regard to the evidence led of their pain and suffering, consequential to the brutal murdering of their loved ones. Counsel further submitted that there is nothing on record that substantially reduces the accused's moral blameworthiness in circumstances where the murders were premeditated and not committed on the spur of the moment. In the end, counsel prayed that, mindful of the *dicta* enunciated in *S v Gaingob and Others,*[2] the accused be sentenced to a long term of imprisonment.

[2] *S v Gaingob and Others* 2018 (1) NR 211 (SC).

[12] We have finally reached the stage where the court needs to decide, in light of the particular circumstances of the case, what sentence would be just and fair to impose on the accused. To arrive at an appropriate sentence, the court must consider the evidence presented and the mitigating and aggravating factors. It requires the weighing up of the personal circumstances of the accused, in relation to the crimes committed and the interests of society.[3] It has also been said that in sentencing, the court is enjoined to consider and, in its discretion, include such mercy as it may find suitable in the circumstances of the particular case.[4] Regard must equally be had to the primary purposes of punishment (also referred to as the objectives of punishment), namely, prevention, deterrence (individual and general); reformation and retribution.

[13] As stated in *S v Van Wyk,*[5] the difficulty often arises from the challenging task of trying to harmonise and balance these principles and to apply them to the particular facts of the case. Equal weight or value need not be given to the different factors and, depending on the facts of the case, situations may arise where one principle needs to be emphasised at the expense of others. That is called the principle of individualisation, where punishment is determined in relation to the person before court, the facts and circumstances under which the crime was committed and, what sentence would equally serve the interests of society. The purpose is to determine whether, based on the relevant facts and personal circumstances of the accused before court, it distinguishes the crime and the criminal from other (similar) cases.

Evidence presented on sentence

[14] Ms Verhoef, in aggravation of sentence, led the evidence of three witnesses, namely, Mrs Sabine Helwig, the wife of the late Helwig and Mrs Sieglinde Jacobs, the daughter of the late Mueller, and that of Mr Ralph Bussel, currently the Executive Director of NIMT.

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[3] *S v Tjiho,* 1991 NR 361 (HC); *S v Zinn,* 1969 (2) SA 537 (A).
[4] *S v Rabie,* 1975 (4) SA 855 (A).
[5] *S v Van Wyk* 1993 NR 426 (HC).

[15] The evidence of the first two witnesses primarily relates to their relationship with the deceased persons and the role the deceased played in their lives and that of their families. They also narrated the impact the death of the deceased had on their lives and how they still struggle to come to terms with the loss of their loved ones and how it adversely affects them. They also elaborated on the type of person the deceased persons were.

[16] Mrs Helwig testified that they had been married for five years at the time of her husband's death and described him as her soulmate. The deceased was 60 years of age and held the position of Deputy Director of NIMT for about 23 years. She explained that her husband was dedicated and invested all his energy in his work, aspiring to provide the students with a bright future. Two daughters were born from a previous marriage and, according to Mrs Helwig, these daughters, now adults, could not bear attending the trial and still receive counselling as they struggle to come to terms with their father's death, particularly the manner in which he died, ie having been brutally murdered. In addition, the deceased's elderly mother, aged 103, equally struggles to deal with her son's death.

[17] In turn, Mrs Jacobs is the youngest of five children born to the deceased, Mueller, from his first marriage. She said her elderly mother (the first wife to the deceased) was financially dependent on the deceased and since his death, she and her siblings took over that responsibility as their mother became destitute and emotionally fell apart. The deceased's second wife died only a few months earlier, due to illness. The witness gave detailed evidence on the person her father was and what he meant to his family, especially to her being the only daughter. The deceased was 72 years of age when he met his death and was the backbone of the family. His passing, therefore, impacted severely on them as they felt lost and heartbroken. This spiralled down to her own children who are left without the love and care of a grandfather. She said she had a close relationship with her father and they were soulmates. The cruel manner in which the deceased was gunned down exacerbated the situation and, despite going for counselling, there was no healing. Neither could she find any forgiveness in her heart towards her father's murderer.

[18] Mr Bussel, in 2019, held the position of principal in engineering at NIMT Arandis and closely worked with Mueller since the inception of the institution, spanning over a period of 18 years. He testified that Mueller had put his whole life into building up the institution and was adamant to ensure discipline and maintain a high standard of education. He was passionate to develop the Namibian youth, especially the previously disadvantaged who made up about 95 percent of the students; he also took trainees into his house and provided in their needs. As for Helwig, he held him in high regard and described him as a person with high values and standards.

[19] The personal circumstances of the accused is that he is 62 years old, married with three children, the youngest aged 18 and born from a previous marriage. At the time of his arrest, the boy was staying with his biological mother in Tsumeb for the school holidays, but was actually living with the accused and his wife at Otavi. The boy struggled with school and they decided that he should live in with them in order to help him. The accused further elaborated on his own background and, having been involved in the liberation struggle he, as a young man, was exposed to violence more than the average person and described himself as ‘impressionable’ at the time. He always cared for the plight of other people, especially the disadvantaged. Despite his exposure to violence and continued accessibility to armaments, he was adamant there was no history of violence in his past. Equally, during his divorce, which he described as ‘tumultuous and traumatic’, he lived a clean and honest life.

[20] It is common cause that the accused was an instructor at NIMT Northern Campus in Tsumeb and, according to him, was initially impressed with Mueller during their interactions in 2009 – 2015. He was particularly grateful for making an exception by allowing his elder son to enrol for a second course at NIMT, which was against the institution’s policy. Their relationship, however, deteriorated over time to the point where the accused was of the opinion that Mueller was jeopardising the interests of student trainees for financial reasons.

[21] The accused said his wife was devastated by his arrest and they have no hope of ever reuniting. Given his age, he is of the view that he would die a 'much undignified death in prison'. He compared his circumstances to that of the deceased persons and said that, although they died in an undignified manner, (at least) it was quick and painless – if that could be any consolation. He foresees that his committal to prison where, according to him gangs rule the roost, would subject him to undignified assaults. Therefore, he would prefer a sentence of death, alternatively, house arrest. Notwithstanding, the accused maintains his innocence and sees himself as a victim of unfortunate circumstances.

[22] With regards to his one previous conviction of theft in 1995, the accused submitted that it should be disregarded for sentence in this matter. Although the accused stands convicted of a similar offence, it is this court's considered view that little weight (if any) should be accorded to this conviction in aggravation of sentence.

[23] Turning next to the crimes of which the accused stands convicted, it is obvious that the majority of these are of serious nature, especially murder which, generally, would attract punishment in the form of lengthy custodial sentences. Moreover, in this instance where it was found that the murders were committed in circumstances where the accused acted with direct intent. Add thereto, that the accused, as borne out by the evidence, premeditated and carefully planned the execution of the murders, going undetected. This is evinced by the fact that the accused, before leaving his home in Otavi, had armed himself with a pistol that was unregistered with the serial number machined out and replaced by a new number punched over the original one; he drove into the desert covertly the previous day from where he proceeded to the main road leading to the campus; there he lay in waiting for the victims to arrive at work early morning. He pounced on them after they disembarked their vehicle and whilst on their way to the main entrance – the time they were in the open and vulnerable, clearly taken by surprise. This much is evident from the accused's narrative during his confession made to the police. He killed the deceased persons by firing several shots into their bodies and heads, execution style, where after he fled the scene and returned to the

desert where he hid the murder weapon at a rocky outcrop after dismantling it. From his actions it would appear that he planned on collecting the firearm at a later stage.

[24] An established principle of our law is that the offender's state of mind at the time of committing the crime and, thus, his moral blameworthiness, becomes a crucial factor at sentencing. It is trite that the degree of moral blameworthiness should be reflected in the sentence imposed on the offender. In *Terblanche:* Guide to Sentencing in South Africa*,* (Second Ed.) at 150 para 7.2.2, the learned author states the following:

> 'The modern view of the seriousness of crime generally also refers to the blameworthiness of the offender. According to this view, the seriousness of the offence is affected by the extent to which the offender can be blamed or held accountable for the harm caused or risked by the crime. This is a partly objective assessment. It should also include those subjective factors which lessen (mitigate) or increase (aggravate) the blame that can be attributed to the offender.'

[25] As stated, in the present instance it can be inferred from the evidence that the murders were committed after careful planning as to the method, place and timing of execution. This undoubtedly constitutes an aggravating factor for reason that, planned criminality is considered morally more reprehensible than unplanned criminality. (See *Terblanche* (*supra*) at 187 fn. 26.)

[26] A disquieting aspect of the accused's actions on the day is that, what would have happened if Mr Koekemoer was with the deceased persons (as would have been the case), had he not gone to bring another vehicle back to the campus? Despite the accused's grievances only levelled against Mueller, did he expect Helwig to be in Mueller's company, or was he merely at the wrong place at the wrong time? Unfortunately, these questions will remain unanswered. According to the accused, as per his confession, the biggest mistake the deceased persons made was to ask him what he was doing there and telling him to leave. This, according to the confession, triggered his actions, being an automatic process of firing which kicked in as he was trained.

[27] As stated, the triad of factors for consideration includes the interests of society. A sentencing court must attempt to take a balanced view of the aggravating and mitigating factors, the personal circumstances of the accused and mindful of its duty to protect and uphold the interests of society. I find it apposite to restate the *dictum* enunciated in *S v Di Blasi*[6] where the Supreme Court of Appeal in our neighbouring country said at 10f-g:

> 'In my view the learned trial Judge did not give due consideration to the aspects of deterrence and retribution. The requirements of society demand that a premeditated, callous murder such as the present should not be punished too leniently lest the administration of justice be brought into disrepute. The punishment should not only reflect the shock and indignation of interested persons and of the community at large and so serve as a just retribution for the crime but should also deter others from similar conduct. In my view the sentence imposed by the learned Judge does neither, and I consider it to be shockingly inappropriate.'

It is well settled in this Jurisdiction that in cases involving serious crimes, society's sense of outrage and the deterrence of the offender and other potential offenders deserve considerable weight.

[28] In the same vein, this court in the unreported judgment delivered in *S v Kadhila*[7] stated the following at para 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.'

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[6] *S v Di Blasi* 1996 (1) SACR 1 (A).
[7] *S v Kadhila* CC 14/2013 [2014] NAHCNLD 17 (12 March 2014).

[29] Though nothing in life could possibly undo the accused's wrongdoing, pain and suffering caused to the family and loved ones of the deceased in general, society expects that offenders be punished for the harm done to others in society and by sentencing the offender, the sentence should serve as a deterrence to the offender and other criminals alike. 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 punishment is a way of restoring justice within the community. It is only when the offender has paid his or her dues and has reformed, that they would be welcomed back to take up their rightful place in society.

[30] In the absence of any explanation from the accused for his actions, it can only be described as callous and extreme; where no respect for the sanctity of human life was shown. The accused did not take the court into his confidence when presenting his case; neither during sentence. Instead, he continued proclaiming his innocence and denied any involvement in the crimes, claiming to have been falsely incriminated by the investigating team who concocted evidence implicating him as the culprit – despite condemning forensic evidence proving a direct link between him and the crime scene. He throughout persisted with the stance that he was at the wrong place at the wrong time. In the end, he blamed the court for infringing his right to a fair trial.

[31] The evil deeds the accused stands convicted of undoubtedly adversely reflect on the character of the accused. Though disgruntled with NIMT management's decision to discontinue certain courses at Tsumeb which prompted the accused's transfer, there was simply no justification for such revolting action. The motive for the murders appears to have been to eliminate Mueller, who persisted with the transfer and, in the process, was extended to Helwig who was also at the scene. This much is evident from the accused's confession. It is my considered view that such violent, irrational and unpredictable behaviour renders the accused a danger to society. Society, in turn, may therefore, legitimately exact protection from this court against the accused.

[32] This conclusion is fortified by the accused's continued irrational behaviour during the trial and whilst in police custody where he repeatedly went on a hunger strike to demonstrate and enforce his personal perceptions. After being convicted, he attempted to end his life through an overdose of medication. Subsequent thereto, he again went on a hunger strike and refused to take his medication. What is evident from the accused's conduct is to what extremes he is willing to go to assert himself. It would appear that not only is the accused a threat to society, he is also a danger to himself.

[33] With regards to the question of mercy and whether this is an instance where the court ought to have mercy on the accused, it is my considered view that it is not. This, for reason that the accused's brazen, merciless execution of the deceased was unjustified, extreme and unworthy of any form of sympathy at sentencing. Though mercy is not to be earned or demanded, it will only be extended in deserving cases; the present is not such case.

[34] In its endeavour to find a suitable sentence based on the personal circumstances of the accused, considered against the mitigating and aggravating factors present, the imposition of lengthy custodial sentences seems inevitable. In this regard, the court stands guided by the Supreme Court judgments of *S v Tcoeib*[8] and *S v Gaingob and Others* (*supra*). In the former, the court had to decide on the constitutionality of life imprisonment in general, whilst in the latter, whether 'inordinately long' fixed terms of imprisonment deprive an offender of the hope of release during his or her lifetime and thus constitutes cruel, inhumane or degrading treatment or punishment which renders it inconsistent with Art 8(1) of the Constitution. In the recent judgment of *Gariseb and Others v State,*[9] the Supreme Court repeated the principles applicable to sentence laid down in *Tcoeib* and *Gaingob,* respectively.

[35] It is settled that life imprisonment *per se* does not constitutionally violate the dignity of the offender; neither does it constitute an invasion of the

[8] *S v Tcoeib* 1999 NR 24 (SC).
[9] *Gariseb and Others v State* [2024] NASC (28 March 2024).

right of every person to be protected from cruel, inhuman or degrading treatment or punishment.[10]

[36] Turning to the objectives of punishment in light of the crime committed, this court *per* O'Linn J, in the earlier judgment of *S v Tcoeib*[11] stated at 269D-F thus:

'Although the Namibian Constitution has abolished the death sentence, it at the same time provided as the first fundamental human right the protection of the life of all its citizens. (See art 6.) In art 5 it is provided that all fundamental rights and freedoms, including the right to life, shall be respected and upheld by the Executive, the Legislature and the Judiciary.

In these times when more and more people talk of "people's justice" and taking the law into their own hands, the words of Schreiner JA in *R v Karg* 1961 (1) SA 231 (A) at 235-6 should be borne in mind:

"The circumstances, or, more properly, considerations, that were claimed to have been irregularly taken into account are to be found in passages in which Snyman AJ said (i) that the Courts should impose such sentences as will not tempt aggrieved persons to seek private vengeance, and (ii) that a sentence should be imposed that would do justice not only to the community but also to the parents of the child who had been killed [similarly a spouse or children of a parent killed]."

Schreiner JA continued:

"But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is relevant to bear in mind that, if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.'" (Emphasis provided)

[37] Contrary to the respective ages of the appellants in *Tcoeib*[12] and *Gaingob*,[13] the accused before court is currently 62 years of age. Whilst the

[10] *S v Tcoeib* (supra) at 37C-D.
[11] *S v Tcoeib* 1991 NR 263 (HC).
[12] Estimated by the court to be between 23 and 25 years.
[13] Ranging from 21 to 36 years.

age of the offender has always been a factor relevant to sentence, this court needs to decide what weight should be given to the accused's age in the present circumstances at sentencing and whether it would amount to inhuman or degrading treatment, alternatively, constitute a violation of the accused's dignity.

[38] In his testimony in mitigation of sentence, the accused said that he will die an undignified death in prison. To this end the Supreme Court in *Tcoeib* (supra) at 38C-D stated:

'The obligation to undergo imprisonment would undoubtedly have some impact on the appellant's dignity but some impact on the dignity of a prisoner is inherent in all imprisonment. What the Constitution seeks to protect are impermissible invasions of dignity not inherent in the very fact of imprisonment or indeed in the conviction of a person *per se*. No such protection in this case has been invaded.' (Emphasis provided)

[39] I respectfully endorse these sentiments. In our law there is simply no basis that proscribes the imposition of a custodial sentence – even a lengthy sentence of direct imprisonment – in circumstances as the present. The vexed question is what such sentence should look like. A sentence that is just and appropriate to both the offender and society; one that values and upholds the fundamental rights of the offender.

[40] Difficult as sentencing is, the court in *Gaingob,* without examining the issue of life expectancy in Namibia, brought this factor into the equation at sentencing. The life expectancy of an offender in the appeal was clearly a material (if not determining) factor which influenced the court when deciding whether the lengthy sentences imposed on the appellants erased all realistic hope of them ever being released during their lifetime. Life expectancy of the appellants was based on their respective ages when becoming *eligible for consideration of parole*. In this regard the judgment at 226G-I reads:

'[68] These sentences amount to informal life sentences imposed upon the appellants by having no realistic prospect of release in the sense of fully engaging in society again — if at all — during their lifetimes, bearing in mind their respective ages. They would become eligible for consideration for parole at the ages of over 80

years in the case of the first appellant, 69 and a half years in the case of the second appellant, 77 and a half years old for the third appellant and 66 and a half years for the fourth appellant.

[69] These sentences effectively remove from all of the appellants the realistic hope of release, in the sense referred to, during their lifetimes. They thus amount to cruel, degrading and inhuman punishment and infringe their right to human dignity enshrined in art 8.'

[41] Whilst the age of an offender at sentencing is indeed a factor, the court must take into consideration – normally as mitigation – same does not apply to parole. On the contrary, as stated by Levy J in *S v Tjiho*[14] at 368B-C:

'The fact that he may be released on parole is no answer. In the first place for a judicial officer to impose any sentence with parole in mind, is an abdication by such officer of his function and duty …'

[42] It is a well-established rule of law that it would be irregular for a sentencing court to consider parole as a factor when determining what an appropriate sentence would be in the circumstances of the case. In this regard the court in *Gariseb* (supra) stated the following at para 4:

'Generally speaking a court determines the maximum time an offender is to be in prison but it has no control of the actual period served by such offender. This is because when and whether he or she may be released on parole or probation or even pardoned is a matter for the Executive or the Legislature.[15] Courts restrict themselves to their sentencing function and cannot prescribe to the Executive or Legislature how long an offender must be detained as that would offend the constitutional principle of separation of powers.'[16]

[43] When sentencing the accused in this instance, I do not intend following an approach where the suitability of the sentence is essentially determined by the accused's eligibility for parole. Neither do I consider the accused's present age to be the decisive factor in the court's quest to do justice. The accused's age is merely one of several factors for consideration of sentence.

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[14] *S v Tjiho* 1991 NR 361 (HC).
[15] *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 520c-523b; *S v Nkosi* (2), *S v Mchunu* 1984 (4) SA 94 (T) at 98 and *S v Botha* 2006 (1) SACR 105 (SCA).
[16] *S v Smith* 1996 (1) SACR 250 (O) at 255e-g.

[44] Taking into account their respective ages at the time the appellants in *Gaingob* were to become eligible for consideration of parole, the court found, as regards second and fourth appellants, that at the ages of 69 and 66 years, respectively, the appellants had 'no realistic prospect of release in the sense of fully engaging in society again . . . during their lifetimes, bearing in mind their respective ages'. Unfortunately there is nothing in the judgment that shows how the court determined that the sentences imposed exceeded the life expectancy of the appellants, especially the two appellants of younger age.

[45] It is no secret that politicians and even judges, more often than not, hold office at more advanced ages, whilst still being fully engaged in society. Against this background, it seems to me that a sentencing court, taking a superficial view of the life span of human beings without any scientific proof to base a conclusion on, is not on firm ground. In any event, even if the court is presented with statistics on the average life expectancy of Namibian males in general, what weight should the court attach to such information where the sentencing court is compelled to consider the personal circumstances of *the person before court* and not in general? Each case must be determined on its own merits and personal circumstances of the offender and should not be left to speculation and conjecture. That said, would the sentencing officer be required to insist on the leading of scientific evidence pertaining to the expected life span of the accused up for sentence, moreover, where that person is of senior age?

[46] If this court were to align itself with the approach adopted in *Gaingob* where life expectancy forms the crux of the inquiry as to what would be suitable punishment – as this court by reason of the *stare decesis* rule is bound to do – it would mean that a sentence in excess of 6 years' effective imprisonment[17] in this instance (the accused being 62 years old) would 'amount to cruel, degrading and inhuman punishment and infringe [the accused's] right to human dignity enshrined in art 8' of the constitution for reason that it exceeds his life expectancy. In circumstances where the accused stands convicted of double murder, where the crimes were

[17] The accused having to serve two-thirds before becoming eligible for parole.

premeditated and the lives of innocent, productive citizens were brutally and mercilessly snuffed out, such sentence would make a mockery of the seriousness of murder and the interests of society – the latter having a direct interest in punishment meted out by the courts, especially in circumstances where the right to life enshrined in the constitution was regarded as not important or non-existent.

[47] It is on this basis that I now turn to consider what sentence would be appropriate to impose on the accused before court.

[48] As stated, sentencing is not a consideration of the rights of the offender only. It requires a fine balancing act of other (usually competing) factors, namely, the personal circumstances of the offender weighed up against the crime and the rights and interests of society. In the present circumstances and, full regard being had to: the circumstances in which the murders were committed; the accused's actions having been premeditated; his lack of remorse; and the accused being a threat to society, it is my considered view that the protection of society becomes imperative. This view conforms with what the court stated in *Tcoeib* (at 394a), namely: 'The sentence of life imprisonment is thus a *discretionary* sentence in Namibia, available for a Court to impose should such Court believe that the particular circumstances of a particular case warrant the imposition of such a sentence'.

[49] With regards to the gravity of the crimes committed, it appears to me that this court must consider whether or not life imprisonment, being the most severe and onerous sentence that could be imposed, would be justified on the murder counts. Put differently, is this an instance where the circumstances are exceptional or extreme to the point that society legitimately needs to be protected against the risk of a repetition of such conduct by the accused, or because the crimes committed by him are so horrendous as to legitimise an extreme degree of condemnation which the community seeks to express through a sentence of life imprisonment? (See *Tcoeib* at 32B-C)

[50] That court further stated:

'(T)here is no escape from the conclusion that an order deliberately incarcerating a citizen for the rest of his or her natural life severely impacts upon much of what is central to the enjoyment of life itself in any civilised community and can therefore only be upheld if it is demonstrably justified.'[18] (Emphasis provided)

[51] This accords with the approach followed by the Supreme Court of Appeal in the matter of *S v Siluale en 'n Ander*[19] where the headnote reads:

'If the circumstances of a case require that an offender should receive a sentence which for all practical purposes removes him permanently from society, life imprisonment is the only appropriate sentence. It is intended to be the most severe sentence that can be imposed, although there are acknowledged procedures which make parole possible in appropriate circumstances, eg where the offender (contrary to all expectation) genuinely reforms.' (Emphasis provided)

[52] As in *Tcoeib*, the acts of the accused towards his victims were brutal and merciless; add thereto that it was premeditated. The cruelty of the murders is best captured by photos taken of the crime scene as depicted in the photo plan handed into evidence – as the saying goes: 'a photo speaks a thousand words'. The lack of remorse lessens the possibility of rehabilitation and, having come to the conclusion that the accused is a danger to society, it is this court's considered view that a sentence of life imprisonment on the counts of murder is justified and appropriate, despite the advanced age of the accused. It is for this reason that I decline to impose a determined sentence in its stead.

[53] With regards to the period of just over four years of pre-trial incarceration this factor becomes a lesser consideration and is accorded less weight once the conclusion is reached that a sentence of life imprisonment is appropriate.

[54] Section 99 of the Correctional Service Act 9 of 2012 governs the commencement, computation and expiry of sentences and for present purposes, subsection (2) finds application. It reads:

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[18] At 32D-F.
[19] *S v Siluale en 'n Ander* 1999 (2) SACR 102 (SCA).

'(2) Where a person sentenced to life imprisonment or who has been declared a habitual criminal is sentenced to any further term of imprisonment, such further term of imprisonment is served concurrently with the earlier sentence of life imprisonment or declaration as a habitual criminal, as the case may be.'
(Emphasis provided)

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

Count 1: Murder: Life imprisonment.

Count 2: Murder: Life imprisonment.

Count 3: Possession of a firearm without a licence (c/s 2 of Act 7 of 1996): Three (3) years' imprisonment.

Count 4: Possession of ammunition (c/s 33 of Act 7 of 1996): One (1) year imprisonment.

Count 5: Attempting to defeat or obstruct the course of justice: Four years' imprisonment.

Count 6: Theft: Four years' imprisonment.

Count 7: Possession of a firearm without a licence (c/s 2 of Act 7 of 1996): Three years' imprisonment.

Count 8: Unauthorised supply of a firearm and ammunition (c/s 32(1)*(a)* and *(b))*: One (1) year imprisonment.

[56] It is further ordered:

In terms of section 10(6) of the Arms and Ammunition Act 7 of 1996 the accused is declared unfit to possess an arm for a period of five years, such period to commence only after the accused has been released on parole.

In terms of section 34(1) of the Criminal Procedure Act 51 of 1977 exhibit 1 to be returned to Mr De Villiers (complainant in count 6);

In terms of section 35(1)*(a)* of the Criminal Procedure Act 51 of 1977 exhibits 4 – 9 are declared forfeited to the State;

Exhibit 10 (.38 Rossi revolver) and 3 x .38 live rounds of ammunition; and Exhibit 'B' (firearm licence book) to be handed over to the designated person in the Namibian Police, against the issuing of a receipt to the accused, for safekeeping until the lapsing of the forfeiture order.

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JC LIEBENBERG

Judge

APPEARANCES

For the STATE: A Verhoef

	Of the Office of the Prosecutor-General, Windhoek.
For the ACCUSED:	In person