CASE NO.: SA 23/2003

IN THE SUPREME COURT OF NAMIBIA

In the matter between

THE STATE **APPELLANT**

And

SHIDUDE SHIHEPO **FIRST RESPONDENT**

SECOND RESPONDENT

HATUPOPI PAULUS

CORAM: Mtambanengwe, A.C.J., Shivute, A.J.A. *et* Chomba, A.J.A.

HEARD ON: 25/10/2004

DELIVERED ON: 25/11/2004

APPEAL JUDGMENT

MTAMBANENGWE, A.C.J.: The two respondents, both Namibian citizens, aged respectively 29 years and 23 years, were charged in the High Court with murder, housebreaking with the intent to commit a crime to the public prosecutor unknown. The second respondent was also charged with attempt to defeat the course of Justice. Both pleaded not guilty on all counts. Both were convicted on the murder charge but acquitted on the housebreaking charge. Second respondent was also found guilty on the charge of attempt to

defeat the course of justice. The charges which arose from an incident which took place at Flasch street in the district of Karibib were summarized by the State as follows:

> "During the night of 24 and 25 October 1997 the two accused persons broke into the house of the deceased. The deceased was assaulted and tied up in an outside toilet. The hands of the deceased were tied at the back with a blue cloth and a piece of wire as used to tie his hands to his left leg. The deceased died of strangulation. When accused no. 2 was arrested he provided the police with a false name."

On 25 October 1997 some friends of the deceased had tried in vain to contact him by visiting his home and on the telephone. The friend's son and a business colleague of the deceased then went to the home to investigate. They found the deceased's body in the toilet. The deceased's hands were tied with rope and so was his neck. The police who were called to the scene soon after described the scene as follows (as summarized by the Court *a quo*):

> "The body was in the outside toilet of the building. The body was on the flow facing downwards. The hands were tied with a rope and there were bloodstains on the curtains. Black spectacles and a purse were also on the flour. The toilet lid was broken out (lay) on the floor. Deceased's neck was fastened with a rope and there was also blood on the ground where the head touched the ground. One window at the back of the toilet was broken and broken glasses

were outside and inside the toilet. There was also a shirt next to the body of the deceased."

Doctor Agnew who carried out a post mortem examination on the deceased noted in her report and testified to finding a number of bruises on the knees, anteriorly sited, a number of contusions, abrasions and lacerations in various areas of the body, especially the neck, the right elbow, the front of the knees, and noted that the hyoid bone (bone in the neck) was fractured, that the hands of the deceased were tied together at the back with a blue cloth and a piece of wire was used to tie the hands to the left leg. The photographs taken at the scene confirm the state in which the deceased was found. The doctor's description of the injuries found on the deceased and the police description of the scenes in the toilets are evidence that the deceased had struggled against his assailants. Death resulted from strangulation.

The deceased's son who checked the rooms, in his father's house on 25th October 1997 found nothing missing, everything was intact, even the cash box which the deceased kept which was not locked had money in it.

Paulina Seibes, a domestic worker at a house opposite the deceased came out at between 23h00 and 24h00 on 25 October and saw two men standing in front of the deceased's gate. They were pulling the gate. When they saw her they both ran away. The fingerprints and palm prints of the two respondents were lifted from the scene. Respondents had no plausible explanation for the presence of their fingerprints there, except to suggest that the police planted them there. The Court *a quo* correctly gave no credence to that as against the police evidence on the issue which was clear and very credible. The

finger/palm prints were lifted from deceased's house a month before respondents were arrested.

When second respondent was arrested he gave his name as Josef Shishiveni. His real name came to light after he wrote a letter from custody to a friend instructing the friend to bring him some items and to ask for Joseph Shishiveni. The friend revealed the lie to the police. Respondent's feeble explanation was that it was the police who gave him the false name. In their evidence respondents persisted in their bare denials that they were in any way connected with the murder.

On conviction each respondent was on the murder charge sentence to "twelfe (12) years imprisonment four (4) years of which were suspended on condition second respondent was sentenced to another 1 year imprisonment" on the count of "defeating the course of justice".

The State’s application for leave to appeal against the sentence was refused by the Court a quo, no reasons were given. The Supreme Court subsequently granted leave to appeal against the sentence on the murder charge.

Ms. Lategan represented the appellant and Mr. Cohrssen appeared for the respondents as *amicus curiae*. The Court would like to express it’s appreciation for the assistance given by Mr. Cohrssen in this matter.

Both counsel made written submissions in which both correctly referred to a number of cases on the approach a court of appeal should adopt in matters of

sentencing. Again the Court would like expresses its appreciation for this assistance from both counsel.

Ms. Lategan referred to a number of murder cases decided in the High Court and in this Court, where the sentences imposed ranged from 18 years imprisonment to life imprisonment. Of particular relevance are cases where the murder involved was regarded as very serious for various particular reasons and where the need for deterrence was emphasized on the basis, *inter alia*, that the crime is very prevalent in this country. In *Raymond Landsberg v The State*, an unreported appeal judgment, delivered on 2 December 1994, it was said:

> "Crimes of violence, as well as others, are prevalent in Namibia. Robbery and murder top the list of crimes daily committed callously and with impunity and in contempt of the Namibian Constitution and society."
> Per O'Linn, J. and Teek, J.

In another unreported judgment delivered on 4 September 1995 per Strydom, J.P., as he then was, and O'Linn, J, *James Boetie Dawid v The State* the following was said:

> "The two accused were convicted of the crime of murder and robbery with aggravating circumstances. Both these crimes are most serious. A man was attacked and murdered in the sanctity and, what he thought, the safety of his own home. He was strangled to death with telephone cables and he died a horrible death. …. Considering the crimes committed by the accused and the circumstances surrounding the commission of those crimes one can barely imagine for oneself more serious crimes committed, and in my opinion the aggravating circumstances present in this case by far overshadow the mitigating circumstances placed before the Court. The society must know that in circumstances such as these the Court will step in and protect those who are peaceful and orderly… In regard to the murder there can in my opinion only be

> one appropriate sentence. It was a brutal, deliberate and calculated act executed mercilessly with the object in mind to be able to take the property of the accused and to escape detection…
>
> In the result the following sentences are imposed:
>
> Count 1 – Murder
>
> Both accused are sentenced to life imprisonment…"

In the present case a helpless old man of 84 years of age was attacked and killed in the sanctity of his home by two young men whose motive it seems was robbery which was interrupted only by the fact that the respondents were seen by a neighbour's servant before they completed their design. Since 1994 or 1995 the rate of prevalence of the crime of murder has not abated in this country.

In concluding her written submissions Ms. Lategan said:

> "(a) the Honourable trial court did not properly consider the deterrent and preventative function a sentence in the circumstances should have;
>
> (b) the sentences imposed on the Respondents are lenient to the extent of inducing a sense of shock if regard is taken of the circumstances and the nature of the offence committed thus that it can be described as startlingly inappropriate;
>
> (c) the sentences are so lenient to be totally out of line with sentences imposed in similar murder cases by the Courts of Namibia."

I will comment on this later.

In a recent case of murder and robbery with aggravating circumstances the appellant was sentenced by the Court a quo to 9 years imprisonment on the murder charge and to 7 years imprisonment on the robbery charge. In that case, *Tobias Nandago v The State,* delivered on 6 March 2002 per Chomba, A.J.A., with Strydom, C.J., and O'Linn, A.J.A. concurring the sentence on the murder charge was increased to 20 years imprisonment which was made to run concurrently with that on the robbery count. The Court took this step *mero motu* because if felt that the sentence was not stiff enough. At the hearing the State did not addresses the Court regarding sentence but had stressed in its heads of argument the aggravating circumstances and said that the sentence imposed by the trial Court was inadequate. In altering the sentence Chomba, A.J.A., remarked:

> "This was a particularly heinous homicide. The victim, Manyandero, was sleeping and although he seems to have woken up just before he was fatally shot, all for the sake of money, which the robbers wanted to steal, he had absolutely no chance of either defending himself or retreating to avoid being shot. The gun-wielding, murderous intruder blocked the only exit he could have used.
>
> These circumstances call for a much stiffer punishment than the one which was imposed by the trial judge in respect of the murder conviction. Moreover, the appellant was at the material time a soldier in the defence force of Namibia. His clear duty was to ensure the safety and security of Namibians. To the contrary he engaged in a homicidal venture purely to satisfy his avarice for easy money. In my view he deserves a condign prison sentence which should also be deterrent. Moreover society needs protection from criminals like the appellant. To ensure that the appellant needs to be incarcerated for a much longer period." (Emphasis supplied.)

In Ms. Lategan's concluding remarks and indeed in counsel's entire written submissions, she does not contend that the trial court committed any

misdirection. However, counsel's conclusion amounts to saying that the trial court exercised its discretion improperly. In *S v Rabie*, 1975(4) SA 855(D) Holmes, J.A., briefly stated how a court of appeal should approach the question of sentence thus:

> "1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal –
>
> (a) Should be guided by the principle that punishment is 'pre-eminently a matter for the discretion of the trial Court'; and
>
> (b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been 'judicially and properly exercised'.
>
> 2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

The learned Judge of Appeal went on to say at 864 F – G:

> "… contended that in any event the trial Court gave too much weight to the question of deterrence and too little weight to other matters, such as the mitigating factors personal to the appellant. The answer is that the degree of emphasis of any relevant factor is ordinarily a matter falling within the exercise of a judicial discretion. In this connection, it is only when the degree of emphasis is disturbingly inappropriate that it can be said that the judicial discretion had not been properly exercised, warranting appellate interference." (My emphasis.)

In an earlier judgment, *S. v Ivanisevic and Another*, 1967(4) SA 572A his Lordship had stated that the enquiry in the Court of appeal is whether it can be said that the trial court exercised its discretion improperly and proceed at 575 H – 576 A.

> “When can this be said, bearing in mind that reasonable men may differ? As reiterated recently in *S v Bolus and Another*, 1966(4) SA 575 (AD) at p. 581 E to 582, no hard and fast rule can be laid down; but a practical test (and there are others amounting to much the same) is whether the sentence appears to the court of appeal to be startlingly inappropriate.” (My emphasis.)

In the same vein Marcus, J.A., has stated in *S v Malgas*, 2001(1) SACR 469 (SCA), 2001(2) SA 1222 at p. 1232 para 12:

> "… A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be descried as 'shocking', 'startling', 'disturbingly inappropriate'. It must be emphasized that in the latter situation the appellate Court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation." (My emphasis)

In passing sentence in the present matter the trial court mentioned very few factors of mitigation in respect of each respondent, (and no others were placed before the Court). among which their age, and the fact that they both had been in custody for more than two years, in respect of first respondent, that he has 8 dependants who are with their mothers and his lack of education, in

respect of second respondent, that he is a first offender and has one dependant.

As against these the trial court went on to say:

> "However, accused you committed a very serious crime and have not shown remorse at all. You are persistent that the police planted your fingerprints in the toilets where the deceased was found dead. Alternatively you are saying it is not your fingerprints. Deceased was an old man of 84 years old who in my opinion could not put up a defence against two young strong men. Even more aggravating is the fact that he was attacked and killed in his own home.
>
> Our community is no longer safe even in their own homes even some barricaded as they are. Society demand that wherever the crime of murder occurs the offenders should be severely punished, and put away behind bars for a very long period. That where the community will be granted safety. And the Court will be seemed to bring about tranquility in our society."

If the sentence that the trial court went on to impose is not startling or disturbingly inappropriate, even when measured on the scale of the trial court's own sentiments (which I agree with) about the gravity of the offence, then I do not know what else can be so described. One looks in vain, in the trial court's judgment on sentence, for reasons to justify such a lenient sentence. The circumstances in this case clearly call for a much stiffer sentence.

In passing I would say it is remarkable that the trial judge found it unnecessary to give reasons for the dismissal of the application for leave to appeal against the sentence.

Mr. Cohrssen concluded his written and oral submissions by saying:

> "Although the sentence of each respondent refers to a term of imprisonment of effectively 8 years, the two years which the respondents had already essentially served whilst awaiting grail should also be factored in. This would then amount an effective term of imprisonment of 10 years which may well be considered to be on the lower end of the norm of sentences for murder, but this is not the test for this Honourable Court to apply. It is submitted that the sentence is not vitiated by irregularity, not is it not startlingly or disturbingly inappropriate."

However, if the two years spent by respondents in custody awaiting trial are factored in, I disagree that the sentence could then not be described as startlingly or disturbingly inappropriate.

In the result the appeal succeeds.

The sentence of twelve years imprisonment, four years of which are suspended is set aside and in its place I imposed one of eighteen (18) years imprisonment.

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MTAMBANENGWE, A.C.J.

I agree.

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SHIVUTE, A.J.A.

I agree.

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CHOMBA, A.J.A.

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