**REPORTABLE**

CASE NO.: SA 15/2007

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**MARTIN JASON** **FIRST APPELLANT**

**ANTON VENASI** **SECOND APPELLANT**

and

**THE STATE** **RESPONDENT**

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| Coram: | Strydom, AJA, Chomba, AJA *et* Mtambanengwe, AJA |
| Heard on: | 2008/04/15 |
| Delivered on: | 2008/07/14 |

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**APPEAL JUDGMENT**

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**STRYDOM,** AJA: The two appellants, together with a third person, appeared in the High Court on the following charges:

1. Murder.
2. Housebreaking with intent to rob and robbery.
3. Robbery.
4. Housebreaking with intent to steal and theft;

Alternatively: Contravening sec. 2 of Act 7 of 1996 – possession of a fire arm without a licence.

5. Contravening sec. 138(1) of Ord. 30 of 1967 – reckless or negligent driving.
6. Contravening sec. 56(1) of Ord. 30 of 1967 – driving without a driver's licence.

In the Court *a quo* appellant No. 1 appeared as accused No. 1, appellant No. 2 as accused No 2 and the third person as accused No. 3. For the sake of convenience I will refer to the appellants as they appeared in the Court below.

After a lengthy trial accused 1 and 2 were convicted of various charges and accused No. 3 was found not guilty and discharged.

After the two accused were convicted and sentenced they both applied for leave to appeal to the Court *a quo.* Those applications, which included convictions and sentences, were unsuccessful. They thereupon petitioned the Chief Justice and were given leave to appeal against the sentences only. Mr. Mostert appeared on behalf of first and second accused and Mr. Sibeya on behalf of the State.

For purposes of this appeal it is therefore relevant to see what the accused were convicted of and what sentences were imposed by the Court *a quo.*

<u>First Accused:</u>

This accused was convicted as an accessory after the fact to the following counts:

Count 1: Murder

Count 2: Robbery

Count 3: Robbery

Count 4: Contravening section 2 of Act 7 of 1996 – Possession of a firearm without a licence.

He was found not guilty and was discharged on Counts 5 and 6.

Second Accused:

This accused was convicted as follows:

Count 1: Murder

Count 2: Robbery

Count 3: Robbery

Count 4: Contravening sec. 2 of Act 7 of 1996 – Possession of a firearm without a licence.

Count 5: Contravening section 138(1) or Ord. 30 of 1967 – Negligent driving.

Count 6: Contravening sec. 56(1) of Ord. 30 of 1967 – driving without a driver's licence.

The accused were sentenced as follows, namely:

First Accused:

Count 1: Thirteen (13) years imprisonment.

Count 2: Eight (8) years imprisonment.

Count 3: Eight (8) years imprisonment

Count 4 (Alt): Two (2) years imprisonment.

The Court further ordered the sentences imposed on Counts 2 and 3 to run concurrently with the sentence imposed on Count 1. The actual period of imprisonment to be served by the first accused was therefore 15 years.

Second Accused:

Count 1: Twenty six (26) years imprisonment

Count 2: Fifteen (15) years imprisonment.

Count 3: Ten (10) years imprisonment.

Count 4 (alt): Two (2) years imprisonment.

Count 5: Six (6) months imprisonment.

Count 6: Six (6) months imprisonment.

The Court further ordered that five (5) years of the sentence imposed on Count 2 and the whole of the sentence imposed on Count 3 were to run concurrently with the sentence imposed on Count 1. In the instance of this accused the actual period of imprisonment to be served by him was thus 39 years.

The first three Counts arose out of events which took place on the 7th October 1999 near the farm Osona in the district of Okahandja. During this night the deceased, one Johannes Fransiscus Bergh, was murdered outside his house which was then ransacked and many articles were loaded on his pick-up and taken away. The body of the deceased was also loaded and second accused, after picking up the first accused, traveled via Karibib and Omaruru to Khorixas. The second accused was the driver of the vehicle which overturned on the gravel road to Khorixas, seemingly after second accused lost control over the vehicle on a bend in the road. Two people, who were hitching a lift to Khorixas, as well as

the second accused, were injured in the accident. First accused was able to get a lift back to Omaruru where he reported the incident. To make a long story short, both accused were then arrested by the police and it was established that the pick-up belonged to the deceased. Investigating officers from Windhoek went to the scene and it was established that on their way from Karibib, the two accused hid the body of the deceased under a culvert in the road. With the assistance of the first accused the police were able to find the body.

On the evidence, accepted by the Court, it seems that the first and second accused knew each other as they both worked on the farm of one Kesslau near Kamanjab. Second accused subsequently obtained work on a plot in the district of Okahandja and the first accused later also joined him at Okahandja in search of work. He stayed together with the second accused on the plot and tried to find work with the assistance of the second accused. At the time when the murder occurred the first accused was still unable to find work. On the night in question he was already asleep when he was woken up by the second accused and told by the latter that he was going to take him back to Kamanjab and that he should wait for him at the tarred road which passed close by the plot.

Second appellant arrived at the road in a pick-up and the two then traveled together. He, first accused, said that the second accused did not tell him anything and that he was completely unaware of what had happened prior to him being fetched by the second accused. On their way between Karibib and Omaruru the second accused told him to get out of the car because he heard a strange sound. When he got out the second accused drove away for some distance, back in the

direction from which they were coming. He saw that the car stopped and the lights were put off. After some time the second accused came back and they resumed their journey. He did not ask the second accused for any explanation for this strange behaviour nor was any explanation offered.

At Omaruru second accused told first accused that they were running out of petrol and he was asked whether he knew any person in the town who could help them. First accused was able to assist and with his help they bartered the stolen Television set for money which they then used to buy petrol.

The Court *a quo,* correctly in my view, did not accept the story of the first appellant that he was totally unaware of what had happened prior to their journey to Khorixas. The Court also did not accept that the first accused was unaware of the body of the deceased and that the first accused did not assist in hiding it underneath the culvert. When the second accused testified he told the Court that he informed the first accused of what had happened earlier during the robbery and the murder of the deceased. What was uncertain was what and how much was told by the second accused to the first accused. Second accused also told the Court that the first accused assisted him in hiding the body of the deceased.

Although the second accused was a poor witness the fact is that the first accused was able to assist the police in finding the body of the deceased notwithstanding the fact that they off-loaded the body when it was dark. The evidence is further that the deceased was a big man and it would have been nearly impossible for one person to have moved the body underneath the culvert. It is also highly

improbable that the first accused, who knew the second accused well, would not have asked for some or other explanation why he was left on the side of the road if that had happened at all.

When the police arrived on the scene where the vehicle overturned they found that some of the stolen items, such as a rifle and cell phone, were hidden underneath some bushes. As the second accused was unconscious after the accident, and only regained consciousness much later when at the hospital, the first accused was the only person who could have hidden the items found by the police. This showed that he knew that these items were stolen.

From the above facts it is clear that the first accused did not participate in the killing of the deceased and the robberies which followed. Although the Court accepted that the first accused was 18 years old when he committed the crimes and that he was in the company of a much older person, and that he was a first offender, he was nevertheless, on the first count of being an accessory after the fact to murder, sentenced to 13 years imprisonment.

There is no doubt in my mind that this was an exemplary sentence. I could find no instance in our case law where such a robust sentence was imposed. In fact the cases referred to by the learned Judge himself, and where the circumstances were, to say the least, rather more aggravating than the present instance, the accused persons were there sentenced to eight and seven years imprisonment respectively.

I am mindful of the fact that, in regard to sentencing, a Court of Appeal can only interfere with the discretion exercised by the trial Court in certain limited instances. The reason being that the discretion to be exercised is that of the trial Judge and not the Appeal Court and it is therefore not an issue whether the sentence is right or wrong. The question is whether the discretion was judicially exercised by the trial Judge. In *S v Ndikwetepo and Others,* 1993 NR 319 at 322H-I, Chomba, AJA, pointed out as follows:

> "…….the discretion may be said not to have been judicially or properly exercised if the sentence is vitiated by an irregularity or misdirection. Another case in point is *S v Ivanisevic and Another,* 1967 (4) SA 572 (A) in which Holmes JA stated at 575F-G that
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> > '….it has more than once been pointed out that the power of a court of appeal to ameliorate sentences is a limited one; see *Ex parte Neethling and Another,* 1951 (4) SA 331 (A) at 335H; *R v Lindsay,* 1957 (2) SA 235 (N); *S v de Jager and Another,* 1965 (2) SA 616 (A) at 629. This is because the trial Court has a judicial discretion and the appeal is not to the discretion of the Court of appeal: on the contrary in the latter Court the inquiry is whether it can be said that the trial Court exercised its discretion improperly.'"

The grounds on which a Court of Appeal is entitled to interfere with the discretion of the trial Court were conveniently set out in *S v Tjiho,* 1991 NR 361 (HC) at 366A-B, namely:

> "The appeal Court is entitled to interfere with a sentence if:
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> (i) the trial court misdirected itself on the facts or on the law;
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> (ii) an irregularity which was material occurred during the sentencing proceedings;
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> (iii) the trial court failed to take into account material facts or over emphasized the importance of other facts;

(iv) 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."

(See further *Shikunga and Another v The State,* 1997 NR 156 (SC) at 173B-F).

In the present instance the Judge *a quo* misdirected himself when he sentenced the first accused to 13 years imprisonment on the first count. Mr. Mostert pointed out that the learned Judge said the following when he addressed the first accused during sentencing (see p. 1219 of the record):

> "Accused you must remember that to help a murderer in hiding or destroying real evidence is very serious. I know that accused 2 gave you more information about the murder. But because you were not sensitive with (sic) the death of the deceased you dug in your heels and refused to divulge the information parted to you by your friend, accused no. 2. If you had decided to be co-operative, I believe you would have **corroborated accused 2 in identifying the second killer of the deceased**. You decided to protect both killers in the matter and now you **have to pay for that with a punishment in order to teach you a lesson that it is wrong to help a criminal.**"
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> (my emphasis).

The second accused pointed out the third accused as the person who was instrumental in the killing of the deceased. The misdirection of the Court lies in the fact that whatever was told to the first accused by the second accused would have been hearsay as against the third accused and would have been inadmissible as evidence against that accused.

Mr. Sibeya conceded that the Court misdirected itself in this regard but submitted that the misdirection was insignificant and should be ignored by this Court. I do

not agree with this submission. The Court *a quo* clearly stated why it was imposing an exemplary sentence of thirteen years imprisonment. The learned Judge in effect said that if the first accused told the Court what he was informed by the second accused his evidence would have corroborated that of the second accused and because he did not do so he would now have to pay for that with a punishment which would teach him a lesson. It seems that the Court was of the opinion that the first accused could have corroborated the second accused in pointing out the third accused on the say so of the second accused, which would then have led to the conviction of that accused.

The misdirection of the Court seems to me to have directly led to the sentence of thirteen years imposed by the Court. In the circumstances this Court is entitled to interfere with that sentence. In my opinion a sentence of nine (9) years imprisonment would be appropriate in all the circumstances. The accused was 18 years when the crime was committed, he was a first offender and found himself, to a certain extent, in circumstances where he was told by an older man, one he trusted, to be ready to go back to where he had come from, and was then confronted with a situation which was not of his making. It is so that he could have refused to go with the second accused but his endeavour to find work was unsuccessful and the person whom he trusted to assist him, and with whom he was staying and who was giving him food, was leaving. He was not left with much of a choice and I think many an 18 year old youth would have acted similarly.

In regard to the sentence of two years imposed on the first accused on the alternative to count 4, being an accessory after the fact to the possession of a

firearm, Mr. Sibeya, correctly in my opinion, conceded that the sentence was inappropriate and suggested that a sentence of imprisonment of one year would suffice. It is so that the first accused hid the firearm under a bush where it was found by the police when they came onto the scene of the accident. Other than that he had not touched or handled the firearm. This sentence of two years was the same as was imposed on the second accused. In my opinion the blameworthiness of the second accused was much more than that of the first accused and had I sat in first instance I would not have imposed, on the evidence, a sentence in excess of one year.

In my opinion to reduce a sentence by half shows that there is a striking disparity between the sentence imposed and what this Court would have imposed had it sat in first instance. and consequently the sentence on this count is reduced to one year.

The situation of the second accused is different. He told so many stories that in the end he proved himself a most unreliable witness whose evidence was not to be believed. He started off in the sec. 119 proceedings by denying any knowledge of the murder and robbery. During the incarceration of this accused, before the start of the trial, the accused made a confession in which he admitted that he, together with the third accused, went to the house of the deceased where he called the deceased out and where the third accused, who was a police officer, held the deceased at gunpoint, assaulted the deceased and also forced him, i.e. the second accused, to assault the deceased. After the deceased was killed they loaded the body on the pick up together with various other items taken from the

house of the deceased. Second accused was given the pick up. He said that he decided to go to Khorixas to report the matter there to the police but fate interfered and they had the accident. Yet another story told by the second accused was that the deceased owed him money and when he asked for his money he was assaulted by the deceased. He then picked up a hammer and hit the deceased.

When, during the trial, the State attempted to hand in the statement by the second accused it was objected to and, after a trial within a trial, the Court found for the second accused and disallowed the statement. However, at a later stage, during the trial, the second accused stated that the statement was the truth and that that was what really happened.

A post mortem was held by Dr. Liebenberg on the body of the deceased. She stated that she could find at least five blows to the head and neck of the deceased which were executed with considerable force and which led to the death of the deceased.

In his evidence and statement the second accused said that he went to the house of the deceased together with the third accused. He said that he was told by the third accused to call the deceased out of his house, which he did. Thereafter the deceased was held at gunpoint by the third accused. At some stage the third accused hit the deceased on his head with the butt of the pistol. The deceased fell down and when he tried to get up he was again hit on his head by the third accused. The third accused also told him to hit the deceased. He took a piece of iron with which he hit the deceased. He only did so because he was afraid of the

third accused and he did not look where he hit the deceased. Thereafter the two of them loaded the body on the pickup of the deceased, as well as all the other goods from the house, which included various items such as a television, cameras, a rifle, a video cassette recorder and numerous other items.

The Court *a quo* rejected the evidence of the second accused in so far as it was not corroborated by other credible evidence or the facts and in so far as it was in conflict with the evidence tendered by the State.

It seems to me clear that the second accused throughout associated with the person who was present during the killing and the robbery. He was present when this third person threatened to kill the deceased and although this person and the deceased, on the evidence of the second accused, went into a different room and left him in the sitting room on his own, he did not utilise this opportunity to flee. That is what one would normally have expected an innocent person would do. He also took part in the vicious attack on the deceased. The Court *a quo* correctly accepted that the second accused was not under threat. Thereafter second accused assisted to load the body and was willing to drive away with the stolen vehicle loaded with stolen items. His story that he did not want to report the matter to the police at Okahandja because the third accused was a police officer attached to that office, is not to be believed. He stated that he was going to report the matter at Khorixas but on his way he passed police stations at Karibib and Omaruru. If it was his intention to report to the police at any stage one wonders how he would have explained the fact that the body of the deceased was hidden under a culvert on the road to Omaruru.

Mr. Mostert was not able to point out any misdirection on the part of the Court *a quo* nor was he able to argue that the sentence was one which this Court would not have imposed if it had sat in first instance. In the end Mr. Mostert left the matter in the hands of the Court.

The sentence is certainly a robust one but bearing in mind that a man was enticed out of his house, held at gunpoint, then clubbed to death, his body removed and put under a culvert and his house ransacked, I can find no reason to interfere with the sentence imposed by the Court *a quo.*

In this day and age where innocent people have to barricade themselves behind bars in their own homes in order to protect themselves, and their property, from the attention of murderous marauders and thieves who choose to enrich themselves at their cost, and often at the cost of their lives, of others, the duty of our Courts is clear, to send out a message that it would protect the public in the only way possible for them, namely long terms of imprisonment. That would effectively remove such criminals from our society and would, hopefully, bring it home to others, with similar intentions, that the risk is not worth it. (See generally *S v Immanuel Paulus,* unreported judgment by Maritz, J, (as he then was) delivered on 2000-03-24; *Gerson Tjivela v S,* unreported judgment of this Court by Chomba, AJA in which Mtambanengwe, ACJ and O'Linn, AJA, concurred, delivered on 2004-12-16 and *S v Matolo en 'n Ander,* 1998 (1) SACR 206 (O).

In the circumstances I am of the opinion that the appeal of the second accused must be dismissed.

I wish to thank both counsel for their industry in preparing their arguments in this matter. They have been of assistance to the Court.

In the result the following orders are made:

The first accused: i.e. the first appellant:

1. The appeal of the first accused is partly successful.

2. The following sentences are imposed:

   Count 1: The sentence of thirteen (13) years imprisonment is set aside and a sentence of nine (9) years imprisonment is imposed;

   Counts 2 and 3: The sentences of eight (8) years imprisonment on both counts are left undisturbed and it is ordered that both sentences run concurrently with the sentence imposed on Count 1.

   Count 4 (Alternative): The sentence of two (2) years imprisonment is set aside and a sentence of one (1) year imprisonment is substituted therefor.

3. It is ordered that the above sentences are backdated to 23rd November 2001.

The second accused: i.e. the second appellant.

The appeal of the second accused is dismissed.

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**STRYDOM, AJA**

I agree.

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**CHOMBA, AJA**

I agree.

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**MTAMBANENGWE, AJA**

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| COUNSEL ON BEHALF OF THE RESPONDENT: | Mr. O.S. Sibeya |
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