REPORTABLE

CASE NO.: SA 6/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

JOSEPH GERSON GARISEB **Appellant**

and

THE STATE **Respondent**

Neutral Citation: Gariseb v The State (SA6-2014)[2016] NASC (12 May 2016)

Coram: SHIVUTE CJ, MAINGA JA and SMUTS JA

Heard: **1 March 2016**

Delivered: **12 May 2016**

APPEAL JUDGMENT

MAINGA JA (SHIVUTE CJ and SMUTS JA concurring):

[1] This appeal raises among other things, the question whether in the circumstances of this case the moral blame worthiness of a murder is reduced if it is committed with constructive intention, as distinct from intention to kill in the form of *dolus directus*.

[2] The appellant and a co-accused Esegiel Gariseb, who did not appeal, were convicted in the High Court, Windhoek on a count of murder, three counts of

housebreaking with intent to rob and robbery with aggravating circumstances relating to the main house, a shop and a flat which were counts 2, 3 and 4 respectively and count 5 robbery of a vehicle with aggravating circumstances. On the count of murder appellant was sentenced to 40 years imprisonment, and in respect of the housebreaking relating to the main house, the shop and a flat, he received 16 years, 14 years and 8 years respectively. On the robbery of a vehicle, appellant was sentenced to 3 years imprisonment. The sentence of 11 years on count 2, was ordered to run concurrently with the sentence on count 1, the murder count. The sentences on counts 3, 4 and 5 were also ordered to run concurrently with the sentence on count 1.

[3] The appellant's application for leave to appeal against the sentence was refused by the trial court and his petition to this court for leave to appeal was granted on the sentence imposed on the murder count.

[4] The events, which are not in dispute, giving rise to the convictions and the resultant sentences occurred on or about 12 and 13 May 2002. They are briefly as follows: On 12 May 2002 the appellant and his co-accused left farm Kransneus, their place of abode to Groot-Aub where they sold some home made goods. From Groot-Aub they proceeded to Oamites Farm No 2 where the deceased resided. At the farmhouse of the deceased, the duo with the intention to rob the deceased attacked the deceased outside and inside the main house with an exhaust pipe, wooden dropper, fork and other unknown objects. The deceased died from head injuries as a

result of the assaults. They thereafter broke into the shop, the flat and removed various items from the main house, the shop and the flat. They loaded all the items into the deceased's Ford van and drove to their residence at Farm Kransneus where they offloaded all the items. They drove the vehicle approximately 30 km from Windhoek where they abandoned it next to the main road.

[5] The state sought a conviction of murder with direct intent but the trial court found that 'the accused actually wanted information from the deceased and did not kill him outright from the start as they could have done . . .' and that 'there is no clear evidence of a single fatal blow to finish him off, if this was what they had planned' and that 'the act of setting him alight seems to have been a further attempt to extract information from him and in any event did not contribute to the death'. The trial Court went on to say, 'both accused acknowledged in evidence that they realised that the deceased, being elderly, might die if assaulted in the manner that he was . . . they, therefore had intention in the form of *dolus eventualis*'.

[6] The thrust of the attack on the sentence of 40 years turns on what the court *a quo* during sentencing had put as follows:

> '[29] Both your counsel pointed out that the murder was committed with *dolus eventualis* and that this is a mitigating factor. The relevant issue actually is not the fact that *dolus eventualis* is present but the fact that the direct intention to kill is absent (See in this regard *S v de Bruyn & 'n ander* 1968 (4) SA 498 (A) 505). Furthermore, it does not necessarily follow that in all cases where direct intention to kill is absent, but the accused had *dolus eventualis*,

> this fact would constitute a mitigating factor. It all depends on the facts of each particular case. In this case, where there was a sustained, brutal and cruel attack over a long period on the deceased by using different means, while both accused must have foreseen the deceased's death as an almost certain possibility, I am not prepared to find that the fact that direct intention was absent is a mitigating factor.'

[7] Counsel for the appellant, Mr Uirab, submitted that the trial court's finding above was a misdirection in law and/or on facts and that it is well established in our law that an unplanned murder is a mitigating factor. Counsel for the appellant relies for his submissions on *De Bruyn* and *S v Moses* 1996 NR 387 (SC). In *Moses* at 388H this court stated, '(a)lthough in passing sentence he (trial judge) considered all the personal circumstances of the appellant, and must have been alive to the fact that appellant pleaded guilty, he does not seem to have taken into account the fact that the appellant was found guilty of murder with *dolus eventualis*'.

[8] In my view the observations of the trial court above cannot be faulted. It is now settled law that trial courts in their determination of possible mitigating factors, in deserving cases, a verdict of murder with *dolus eventualis* is such a factor, either alone or together with other features, depending on the particular facts of the case. See *S v Sigwahla* 1967 (4) SA 566 AD at 571H. The trial court set out the relevant circumstances in its judgment, and came to the conclusion that it was a case of *dolus eventualis*, but declined to consider that factor as mitigating when sentencing the appellant and his co-accused given the circumstances of the case. The appellant and his co-accused set out from Groot-Aub at sun set to go to the deceased's farm. It is

not clear from the evidence of the appellant and his co-accused as to what happened when they arrived at the farm house, as they offered conflicting testimonies on the point. The appellant testified that when they arrived at the farm, they entered the yard through a small gate. Near the gate was a big tree, where his co-accused had requested him to wait for him while he went to buy paint and paraffin. While he was waiting under that tree, he heard someone screaming. He approached where the scream emanated from and saw his co-accused busy stabbing the deceased with a knife on his head. Appellant's co-accused testified that they arrived at the deceased's farm. They entered the shop. He bought the items he wanted to buy and he left the shop and waited for the appellant but the appellant called him back into the shop. When he entered the shop the appellant was grabbing the deceased from behind. From the evidence the deceased was accosted either between the main house and the shop or at the shop. Deceased was taken into the house where he was tied to a bed. The trial court found that both appellant and his co-accused tried to minimise their participation in the death of the deceased, by hurling accusations to each other. What is certain though is that they targeted a lonely, defenseless elderly person who lived by himself and they did so without any provocation. Not only did they assault him, they tied him up to a bed with an electrical cord, in the testimony of appellant's co-accused 'so that he could not move'. He was repeatedly, for a prolonged period assaulted and died from head injuries. They attempted to set him on fire. They dined and wined and broke into the shop as well as the flat. Bent on a calculated outrage of avarice, they removed various goods, including three firearms from the main house, shop and flat. They loaded the loot in deceased's van and offloaded the same at their

place of abode. They drove the van and abandoned it along the road, some 30 km from Windhoek, as already mentioned. Counsel for the appellant is in complete agreement with the findings of the trial court that the death of the deceased is aggravated more by the fact that the deceased was an elderly person and that his death was committed in a cruel and gruesome manner. That concession in my opinion, cancels the submission that a verdict of murder with *dolus eventualis* should have served as a mitigating factor. I am unpersuaded that it should have. One is aghast at the cowardliness and brutality of this assault and the trial court was correct to reject the invitation, which we also do, under the circumstances of this case, to consider as a mitigating factor, notwithstanding the fact that the offence was committed with constructive intention.

[9] There was also a submission that the sentence imposed by the trial court was severe and inappropriate, there is a striking disparity between the sentence imposed by the trial court and that which the appeal court would have imposed and that the trial court overemphasised the seriousness of the offence at the expense of the personal circumstances of the appellant. Particularly where the court said, '. . . the aggravating factors too far outweigh the few mitigating factors and that the interest of . . . accused persons must take a back seat against the very seriousness of the crimes . . . committed and against the weighty interests of society'. As to this submission, it must immediately be said, it is well settled and does not merit repetition, that the power of a court of appeal to ameliorate sentences is a limited one. This is because the trial court has a judicial discretion. In sentencing the appellant the

trial court went into finer details in placing his personal circumstances and previous convictions on record. The court carefully examined the appellant's previous convictions and held that the previous conviction of robbery which was ten years and more old was relevant and aggravating despite its age. The learned judge reasoned that, that robbery had very similar features to the robberies committed in this case. The conclusion cannot be faulted. The learned judge also took into consideration the other two previous convictions of malicious damage to property and housebreaking with intent to steal and theft, the latter having been committed a month before the commission of the offences which are the subject matter of this appeal. The trial court rejected the appellant's and his co-accused's apology which was tendered through their counsel. This too cannot be faulted, appellant and his co-accused did not show any remorse, they instead sought to blame each other for the crimes so much so that the court had to run a fully-fledged trial before appellant and his co-accused were convicted.

[10] On the crime the trial court found that the victim was an elderly person of 67 years old, who lived alone, a source of joy to the community he lived in. The crimes were very serious, that the housebreakings were premeditated which was an aggravating factor, that the deceased was treated shockingly, cruelly and brutally which counsel for the appellant also conceded. The motive for the crimes was sheer greed and personal gain. The trial court rejected the youthfulness of the appellant having played any role in the commission of the crime.

[11] I find nothing in these findings which justifies the misdirection attributed to the trial judge in this court, that she overemphasised the crimes. The findings were hard facts as gleaned from the evidence.

[12] When the trial court turned to the interests of society it considered the purposes of punishment and stated that generally the objects of punishment are not achievable in every sentence passed. It is the circumstances of each case which is determinative, the one triad of sentencing may weigh heavier than the other. It was at that point the trial court found that the aggravating factors far outweighed the few mitigating factors and that the interests of the appellant and his co-accused must take a backseat against the seriousness of the crimes and the manner in which they were committed and the weighty interests of society.

[13] The sentiment 'the interests of the accused must take a backseat' denotes no more than an emphasis of the crime and interests of society and deterrence as opposed to other objects of punishment. The court *a quo* was on point when it stated that generally the objects of punishment are not achievable in every sentence passed. In *S v Khumalo & others* 1984 (3) 327 SA at 330E, this was said of deterrence, '(d)eterrence has been described as the "essential" "all important", "paramount" and "universally admitted" object of punishment'. The other objects are 'accessory'. See also *R v Swanepoel* 1945 AD at 455, *S v Van Wyk* 1993 NR 426 (SC) at 448B. In *R v Karg* 1961(1) SA 231(A) at 236A, Schreiner observed that, while the deterrent effect of punishment has remained as important as ever, 'the retributive

aspect has tended to yield ground to the aspects of prevention and correction'. In *Van Wyk*, Ackermann AJA at 448D-E recognised the complicated task to harmonise and balance the general principles of sentencing and went on to say, 'the duty to harmonise and balance does not imply that equal weight or value must be given to the different factors. Situations can arise where it is necessary (indeed it is often unavoidable) to emphasise one at the expense of the other'. See also *S v Alexander* 2006 (1) NR 1 (SC) at 8B-C.

[14] Thus the submission that the appellant was regarded or visited with vengeance or that the court *a quo* completely disregarded the offender or that mercy was clearly absent notwithstanding the court *a quo* having said that in sentencing the appellant and his co-accused it would blend in a measure of mercy, is misplaced. Mercy is a concomitant element of sentencing, it tempers one's approach when considering the crime, the criminal, and society.

[15] It was contended that had the court *a quo* considered the appellant's age and background, the fact that the appellant consumed liquor prior to the commission of the offence, that the majority of the stolen goods were recovered and that appellant spent four years in custody before his conviction and sentence, the court *a quo* would have found mercy for the respondent. In my opinion and it is apparent from the record that the court *a quo* attended to all these complaints, the complaints are without merit.

[16] Appellant has three relevant previous convictions to the crime of murder and the crimes that constituted counts 2 to 5, he was a fugitive from justice at the time he committed the crime in question and the court *a quo* found that he was probably the leading figure in the crime which is the subject matter of this appeal and the crimes which formed counts 2 to 5. Appellant's co-accused at least pleaded guilty to the crime of murder *dolus eventualis* (which the state rejected) showing some form of remorse but appellant pleaded not guilty when there was overwhelming evidence of his participation in the crimes. Notwithstanding, appellant and his co-accused received the same sentence on the murder, the court holding that their moral blameworthiness was about equal. The remarkable difference in the sentences was in the crimes that formed counts 2 to 5 but those are not an issue in this appeal. I mention those sentences to show that while the court *a quo* followed the severity of laws it nevertheless exhibited a great moderation of generosity. The appellant received a total of 41 years on count 2 to 5, of which 36 years were ordered to run concurrently with the sentence on murder. Appellant's co-accused received a total of 31 years of which 29 years were ordered to run concurrently. It must be remembered that counts 2 to 4 were found to have been premeditated but the cumulative effect of the sentences was ameliorated by ordering that they run concurrently with the sentence on the murder count.

[17] There can be no doubt that the crimes were serious. Appellant and his co-accused set out to the deceased's farm with the actual intention to break in the premises of the deceased. On encountering the deceased on the premises they

attacked him with all sorts of weapons causing his death. They thereafter laid their hands on every item they could from the house, flat and shop which goods they transported in the deceased vehicle. After they offloaded the goods they abandoned the vehicle about 30 km from Windhoek. The murder of the deceased cannot be likened to a brawl/fight where emotions, anger and stress play some part, and a fatal blow is struck. Appellant and his co-accused targeted an elderly person who was living in isolation, attacked him with cruelty out of avarice and murdered him. The murder in the form of *dolus eventualis* cannot be a mitigating factor under those circumstances, the court *a quo* was correct in that regard.

[18] The sentence of 40 years gave some expression to the indignation aroused by the crime of murder in the deceased and in the society generally. It was sufficiently severe with some certain generosity to serve as a deterrent to others. It was consistent with other sentences in similar circumstances. Consequently this court is not competent to interfere with the sentence. The appeal is dismissed.

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MAINGA JA

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SHIVUTE CJ

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SMUTS JA

APPEARANCES:

Appellant:	B M Uirab Instructed by Director of Legal Aid
Respondent:	A T Verhoef For the State