



REPORTABLE

CASE NO: P 8/2015

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ESEGIËL GARISEB

Appellant

and

STATE

Respondent

CASE NO: SA 11/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

FRANS BASSON

Appellant

and

STATE

Respondent

CASE NO: SA 80/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MANFRED GARISEB

Appellant

and

STATE

Respondent

CASE NO: P 13/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ELIA AVELINU

Appellant

and

STATE

Respondent

CASE NO: SA 22/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

JAKOBUS JOSSOP

Appellant

and

STATE

Respondent

CASE NO: SA 97/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SAKARIAS MATHIAS

Appellant

and

STATE

Respondent

CASE NO: SA 81/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CHARLES NAMISEB

Appellant

and

STATE

Respondent

CASE NO: SA 23/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SYLVESTER LAURENCE BEUKES

Appellant

and

STATE

Respondent

CASE NO: SA 30/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

IAN JONES

Appellant

and

STATE

Respondent

CASE NO: SA 47/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ALOYIS DITSHABUE

Appellant

and

STATE

Respondent

CASE NO: SA 65/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ELIFAS NDALUSHA

Appellant

and

STATE

Respondent

CASE NO: SA 31/2020

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

TUHAFENI BERENDISA KATUMUDI

Appellant

and

STATE

Respondent

CASE NO: SA 5/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

FILEMON NKANDI

Appellant

and

STATE

Respondent

CASE NO: SA 7/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

GABRIEL JONA PETRUS

Appellant

and

STATE

Respondent

Coram: FRANK AJA, ANGULA AJA, and MAKARAU AJA
Heard: 12 July 2023; 13 July 2023 and 15 November 2023
Delivered: 28 March 2024

Summary: Life imprisonment is the most severe and longest sentence reserved for extreme cases where an offender poses a significant threat to society or where there is little hope for the offender's rehabilitation. The court reaffirms *S v Tcoeib* which dismissed a challenge to the constitutionality of life imprisonment. *Tcoeib* was based on the possibility of an offender's release on parole or probation despite being sentenced to life imprisonment, precluding incarceration for life 'without any hope of release, regardless of the circumstances'. In *Gaingob*, the court held that *Tcoeib*'s reasoning also applies to inordinately long fixed periods of imprisonment. Thus, where the fixed periods (taking into account eligibility for parole) are such that it would mean an offender will spend the rest of his or her life in prison without any prospect of lawful release, such sentences would be contrary to the right to dignity under Art 8 of the Constitution.

The court in *Gaingob* noted that a person sentenced to life imprisonment under the current legislation becomes eligible for parole after having served 25 years of the sentence pursuant to s 117 of the Correctional Service Act 9 of 2012 (the 2012 Act). However, offenders in respect of certain scheduled crimes, who have been sentenced to more than 20 years imprisonment, become eligible for parole or probation after having served two-thirds of their terms of imprisonment. Thus, an effective sentence of more than 37 and a half years would mean that the offender becomes eligible for parole more than 25 years subsequent to being sentenced. Such offender is then worse off than one who was sentenced to life imprisonment. Sentence periods beyond 37 and a half years for any one offence should be avoided if possible because such sentences undermine the fact of life sentenced by the most severe sentence. Courts should thus justify sentences in excess of 37 and a half years even when they are dealing with multiple serious offences and explain why a life sentence was not appropriate in such cases.

This Court in *Kamahere* pointed out that where a right to parole is in place at the time of sentencing this right is not altered by subsequent legislation unless this intention is

clear from such legislation. In terms of the provision of the Prisons Act 17 of 1998 (the 1998 Act) no provision for parole was stipulated in respect of life imprisonment and certain other sentences in respect of certain specified offences. These offences included, among others, offences involving violence to women and children, murder, rape, robbery, housebreaking with intent to commit a crime where a remission of the sentences could be granted in certain prescribed circumstances. In respect of these stipulated offences in s 92(2)(b) and (c) of the 1998 Act the provisions stipulated in the 2012 Act is thus applicable, as offenders in respect of such offences are now granted an eligibility to parole in the 2012 Act.

Held that, save for one, all current appeals involve appellants sentenced to imprisonment beyond 37 and a half years. Following *Gaingob's* reasoning, appellants argue for adjustments to their sentences that would make them eligible for parole or probation after 25 years. While *Gaingob* does not explicitly prohibit sentences surpassing 37 and a half years, it holds that such sentences should be an exception. Hence, it is necessary to revisit the sentences appealed against.

Held that, this Court, aiming for consistency, decided to revisit all sentences that, on the face of it, fell foul of the *Gaingob* judgment. Consequently, in the interest of justice, there is no need to address condonation and reinstatement applications for the late noting of appeals, as all sentences will be re-evaluated based on the approach articulated in *Gaingob*.

Held that, where the sentences are to be brought in line with the approach in *Gaingob*, the respective appellants should be sentenced to the maximum period allowed as per *Gaingob* and the only changes that need to be made are to alter these sentences so that their effect does not exceed the maximum period stipulated in *Gaingob* save where exceeding the maximum period can be justified.

APPEAL JUDGMENT

FRANK AJA (ANGULA AJA and MAKARAU AJA concurring):

Introduction

[1] Where a court imposes a sentence of life imprisonment what is intended is that the offender must spend the rest of his life in prison. It follows that, it is the longest sentence that can be imposed on anyone.¹ As stated by Mohamed CJ, life imprisonment 'is resorted to only in extreme cases either because society legitimately needs to be protected against the risk of a repetition of such conduct by the offender in the future or because the offence committed by the offender is so monstrous in its gravity as to legitimise the extreme degree of disapprobation which the community seeks to express through such sentence'.²

[2] Life imprisonment is thus the appropriate sentence when a court is of the view that an offender must effectively be removed from society or there is little hope that the offender will be rehabilitated.³

[3] An attack on the constitutionality of life imprisonment was dismissed by this Court in *S v Tcoeib* on the basis that, the fact that an offender sentenced to life imprisonment may be released on parole or probation and thus that such offender would not necessarily be incarcerated for life 'without any hope of release, regardless of circumstances'.⁴

[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.⁵ Courts restrict themselves

¹ *S v Tcoeib* 1999 NR 24 (SC).

² *Tcoeib* at 32B and 33E-F.

³ *Gaingob & others v State* 2018 (1) NR 211 (SC) para 46, *S v T* 1997 (1) SACR 496 (SCA) at 508 and *S v De Kock* 1997 (2) SACR 171 (T) at 181.

⁴ *Tcoeib* at 33E-F.

⁵ *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 520c–523b; *S v Nkosi* (1), *S v Nkosi* (2), *S v Mchunu* 1984 (4) SA 94 (T) at 98 and *S v Botha* 2006 (1) SACR 105 (SCA).

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.⁶ It follows that a court cannot order that an offender should not be considered for parole but apparently may stipulate a period during which an offender may not qualify for parole.⁷

[5] Whereas a court may be aware of the possibility that an offender may be released on parole or probation at some point in the future, it cannot accept that such offender will be released on parole or probation and hence this fact traditionally played no role in sentencing, or to put it another way, could not affect the severity of a sentence.⁸ Furthermore, the release policy regarding offenders sentenced to life imprisonment has changed frequently and the court cannot second guess what the policy will be when imposing a life sentence.⁹ This latter comment applies in general to all sentences of imprisonment.

[6] *Tcoeib* in using the parole provisions relevant at the time (it should be pointed out that in respect of life imprisonment there has already been changes made through legislation which I discuss below) to justify the constitutionality of sentences of life imprisonment thus looked at the position holistically and not from the perspective of a sentencing court which does not give prominence to how long a sentence must be served before eligibility for parole will arise as this is not the court's function.

⁶ *S v Smith* 1996 (1) SACR 250 (O) at 255e-g.

⁷ *S v Mokoena* 1997 (2) SACR 502 (O) at 504f, *S v Maseko* 1998 (1) SACR 451 (T) at 457h-i and 459h-j and *Tcoeib* when an order *a quo* the appellant could not qualify for parole until he has served 18 years imprisonment was not queried by the Supreme Court.

⁸ *S v S* 1987 (2) SA 307 (A) at 314H-J.

⁹ *Mhlakaza* at 522i.

[7] It seems that this general principle has not changed when it comes to sentencing. As it is clear from both *Tcoeib* and *Gaingob* that a sentence which 'locks the gates of prison irreversibly for the offender without any prospect whatever of any lawful escape from that condition for the rest of his or her natural life and regardless of any circumstances which might subsequently arise'¹⁰ and would be 'contrary to the values and aspirations and the right to human dignity protected in Art 8 of the Constitution . . . as being cruel, inhuman or degrading punishment'.¹¹ This means that courts, when sentencing persons, must have regard to this aspect so as to avoid passing sentences that will not pass constitutional muster.

[8] In *Gaingob*, this Court found that the reasoning in *Tcoeib* also applies to inordinately long fixed periods of imprisonment. In other words, where the fixed periods (taking into account eligibility for parole) are such that it would mean an offender will spend the rest of his or her life in prison without any prospects of lawful release such sentence would be contrary to Art 8 of the Constitution. It was pointed out that where a court was of the view that an offender has to be effectively removed from society, a sentence of life imprisonment was the appropriate sentence and also pointed out that the imposition of inordinately long sentences so as to circumvent the potential premature release of prisoners by the Executive constitutes an irregularity. It is in this context, taking into account that a person sentenced to a period of life imprisonment under the current legislation becomes eligible for parole after having served 25 years imprisonment, that the court concluded that 'an effective sentence of more than 37 and a half years would mean that such offender is worse off than those sentenced to life imprisonment'.¹² Such lengthy sentences would not be appropriate

¹⁰ *Tcoeib* at 32E-H and 33E-F.

¹¹ *Gaingob* para 66.

¹² *Gaingob* para 74. Certain offenders serving long sentences will only become eligible for parole after serving more than 25 years as will become apparent in this judgment.

and are to be discouraged. Depending on their length and the circumstances of an offender, they may also infringe on an offender's right to dignity under Art 8. The latter position would apply where the sentence of imprisonment is so long as to remove the offender's hope for release prior to his or her death.¹³

[9] The decision in *Gaingob* relies on the Correctional Service Act 9 of 2012 (the 2012 Act) as the statutory backdrop to its decisions. The Act is the one currently in force. The history with regards to parole provisions in Namibia was summarised in *Kamahere & others v Government of the Republic of Namibia & others*.¹⁴ At independence the Prisons Act 8 of 1959 (the 1959 Act) was applicable. This 1959 Act (together with its subordinate legislation) provided that a prisoner sentenced to life imprisonment had to be regarded as a person serving a minimum sentence of 20 years and became eligible for parole after serving ten years of his or her sentence. It is not clear what the provisions relating to parole were in respect to prisoners sentenced to fixed terms of imprisonment. The whole Act 8 of 1959 together with its subordinate legislation was repealed by the Prisons Act 17 of 1998 (the 1998 Act). This 1998 Act provided that persons sentenced to fixed terms of imprisonment for more than three years imprisonment would be eligible for parole after serving one-half of their sentences. The 1998 Act did not create an eligibility for parole in respect of sentences of life imprisonment at all.¹⁵ The 1998 Act came into operation on 15 August 1999 and governed the position regarding parole until it was repealed by the current 2012 Act, which came into force of 1 January 2014.

¹³ In South Africa lengthy sentences exceeding the life expectancy of offenders are also frowned upon and have been substituted by sentences of life imprisonment. See eg *S v Siluale & ander* 1999 (2) SACR 102 (SCA) and *State v Nkosi & others* 2003 (1) SACR 91 (SCA).

¹⁴ *Kamahere & others v Government of the Republic of Namibia & others* 2016 (4) 919 SC.

¹⁵ Section 92(2)(b) in fact expressly excludes persons sentenced to life imprisonment from the parole provisions but allows for a remission of part of the sentence (s 92(2)(c)(aa)).

[10] In *Kamahere*, the dispute turned on which Act is applicable when the law changes as to the entitlement to apply for parole after a prisoner has been sentenced but prior to the time he would have been eligible for parole in terms of the law applicable when he or she was sentenced. This Court held that law applicable at the time of sentencing is the relevant one and not the law in existence at a later stage, where the right to be considered for parole was acquired in terms of the law existing at the time of sentencing.¹⁶

[11] *Kamahere* was not referred to by counsel in either *Gaingob* or in this appeal, but it seems clear from it that where we deal with sentences passed prior to 2014, it must be borne in mind that persons sentenced after 15 August 1999 up to 2014 are entitled to be dealt with, when it comes to parole, in terms of the 1998 Act. In *Kamahere*, this Court refers to the position in the 1998 Act in passing and states that when it comes to fixed term imprisonment of more than three years, the eligibility for parole arises after having served one-half of such fixed term sentences. However in *Gaingob*, the prisoners who were sentenced in 2002, and hence had to be dealt with pursuant to the 1998 Act, were dealt with as if their parole provisions would kick in after serving two-thirds of their sentences.¹⁷

[12] It must be borne in mind that in *Kamahere*, the court had to determine the parole provisions for persons sentenced to life imprisonment and not for those sentenced to fixed term periods of imprisonment and hence the provision in relation to fixed term imprisonment was mentioned in passing and not to determine the position in

¹⁶ *Kamahere* paras 48 and 49.

¹⁷ All counsel involved in this appeal were given an opportunity to, through further heads of argument filed by 2 February 2024, make further submissions as to the potential effect of *Kamahere* on their client(s). Only counsel for the accused in *S v Nkandi* availed himself of opportunity. Further heads of argument were filed on behalf of the State (not by counsel who represented them at the hearing) on 22 February 2024, without any explanation or condonation for its late filing and while I was finalising my final draft of the judgment. I thus ignored it.

respect of such sentences. What was not mentioned in *Kamahere* is that there is a provision in the 1998 Act which removed certain offences from the ambit of the general provision of s 95 of the 1998 Act which provides that prisoners serving three years or more can apply for parole or probation after serving one-half of their sentences. There are exceptions to this rule and these were mentioned in s 92(2)(c) of the 1998 Act which lists a number of offences where this situation would not apply, eg any offence involving violence against a woman or child, murder, rape, robbery, stock theft, escaping from lawful custody, theft of a motor vehicle and housebreaking with intent to commit a crime. Persons convicted of such offences would in certain circumstances be given remission of their sentences up to 30 per cent of the total sentence.¹⁸ This means that in respect of life imprisonment and sentences in respect of the s 92(2)(c) exceptions are to be dealt with under the 2012 Act which grants prisoners the eligibility for parole in respect of all offences. This position was clearly spelled out in *Shigwedha & others v Commissioner General Namibian Correctional Service: Hamunyela & others*¹⁹ and I thus do not deal with it in any detail.

[13] As is evident from *Gaingob*, all the offences relevant to the calculation of the period, the prisoners would have to serve prior to becoming eligible for parole were offences listed in s 92 of the 1998 Act and the use of the two-thirds benchmark in the current 2012 Act was thus apposite. The 1998 Act must however be kept in mind, in that where the 1998 Act applies, one must distinguish between offences where parole entitlement arises after serving half the fixed term of imprisonment and other offences where such entitlement only arises after serving at least two-thirds of their sentences under the current 2012 Act.

¹⁸ *Kamahere* para 39.

¹⁹ *Shigwedha & others v Commissioner General Namibian Correctional Service: Hamunyela & others* 2020 (4) NR 984 (HC).

[14] Three further factors relating to sentences of life imprisonment need to be mentioned. First, s 99(2) of the 2012 Act provides as follows, as far as it is relevant to these appeals:

‘Where a person sentenced to life imprisonment . . . is sentenced to any further term of imprisonment, such further term of imprisonment is served concurrently with the earlier sentence of life imprisonment . . .’ (My underlining)

It follows from s 99(2) that there is no need for a court in such circumstances to order the sentence to run concurrently as the section provides for this. In this judgment where terms of life imprisonment are imposed on various counts, the life imprisonment in respect of the subsequent counts must thus be served concurrently with the life sentences imposed on prior counts. The section also makes sense as an offender cannot serve a subsequent sentence after having served a life imprisonment sentence in full, ie up to his death in prison. It must also be noted that where an offender is already serving a term of imprisonment and then receives a sentence of life imprisonment the latter kicks in subsequent to the serving of the prior sentence as the prior sentence cannot be a further term of imprisonment to an ‘earlier sentence of life imprisonment’ as envisaged in s 99(2).

[15] Second, in terms of s 117 of the 2012 Act read with reg 281(1),²⁰ a person sentenced to life imprisonment becomes eligible for parole or probation ‘after serving at least 25 years in a correctional facility without committing and being convicted of any crime or offence during that period’. Sections 114 and 115 of the Act deal with the requirements for parole or probation with regard to fixed terms of imprisonment. Where a person is serving a term of 20 years or more or any term in respect of scheduled

²⁰ Namibian Correctional Service Regulations, GN 331, GG 5365, 18 December 2013.

offences, the eligibility of parole or probation arises after having served two-thirds of the sentence. Scheduled offences include treason, murder, rape, assault where a dangerous wound is inflicted, robbery, possession, conveyance or supply of drugs, hunting of specially protected game over a certain value, and dealing in controlled game products over a certain value and certain offences relating to dealing and smuggling arms and ammunition. Offenders who have been sentenced to imprisonment for non-scheduled offences or crimes for less than 20 years, the eligibility for parole or probation arises after having served one-half of the term of imprisonment. In respect of the appeals under consideration, we need not consider offences where offenders had been sentenced on non-scheduled crimes for a period of less than 20 years. I must just point out that in *Gaingob* the same position applied as all the offences committed involved scheduled offences.

[16] Third, where a prisoner serving a sentence of life imprisonment is granted parole and he or she contravenes their conditions of parole, such person may, as a consequence of such contravention, end up in prison again to continue serving his or her sentence for a period determined by the President before such offender can again be considered for release.²¹

[17] This Court in *Gaingob*²² held that life imprisonment is the most severe and onerous sentence that can be imposed on convicted persons. Such persons however become eligible for release on parole or probation after serving at least 25 years of the sentences pursuant to s 117 of the 2012 Act. In contrast to this, offenders in respect of certain scheduled crimes who have been sentenced to more than 20 years imprisonment become eligible for parole or probation after having served two-thirds of

²¹ Section 117 of the 2012 Act.

²² See also *S v Tcoelib* 1999 NR 24 (SC).

their terms of imprisonment. It goes without saying that being eligible for parole or probation does not, in itself, give rise to a right to parole or probation as various considerations come into play when such parole or probation is considered.²³ It follows that when an offender in respect of a scheduled crime is sentenced to more than 37 and a half years, his or her eligibility for parole or probation will only arise more than 25 years subsequent to being sentenced. This creates an anomaly in that those persons who have received the 'most severe and onerous sentence' will be eligible for parole prior to those who have received very lengthy terms of imprisonment in respect of scheduled offences. It is this anomaly that *Gaingob* addresses by pointing out that such inordinately long fixed term sentences are inappropriate and are to be discouraged and may also infringe on the right to dignity of such offender.²⁴

[18] It thus follows from *Gaingob* that a direct term of imprisonment for a period longer than 37 and a half years in respect of any one offence is to be avoided. Such term would, *prima facie*, indicate the desire to circumvent the provisions relating to parole in respect of such sentence when compared to a sentence of life imprisonment. Where such sentences are imposed, the reason for such sentences must be very clear and should justify why a sentence of life imprisonment was not resorted to.

[19] Where an offender is convicted of multiple offences, the position becomes more complicated. In such instances the cumulative effect of imprisonment must be considered to ensure a proper sentence is given suited to the circumstances of the situation. This is not a new principle and has always been the position. Thus, the nature of the offences or the periods between them may be such as to justify a sentence (and even a lengthy sentence) in respect of all such offences. Apart from

²³ *Gaingob* paras 39 and 34.

²⁴ *Gaingob* para 74.

stating the obvious that a sentence of 37 and a half years (for a single offence and also as a cumulative sentence for multiple offences) is indeed a very severe sentence, it would be for the court to justify sentences composite in excess of 37 and a half years even where it is dealing with multiple serious offences.

[20] Lastly, and in summary: the sentencing court has a discretion when it comes to sentencing. In so far as the High Court is concerned, this discretion is fettered by statutes prescribing minimum sentences and by the Constitution forbidding certain sentences, ie the death penalty (Art 6) and cruel, inhuman or degrading punishment (Art 8). As far as Art 8 is concerned, corporal punishment and sentences which remove from a prisoner any hope of lawful release prior to his or her death have been declared to be contrary to the provisions of Art 8. Save for the aforesaid limitations, sentencing courts may exercise their discretion judicially and in accordance with the applicable guidelines developed by the courts over decades.

[21] Save for one, all of the present appeals and or petitions concern cases where the appellants were sentenced to terms of direct imprisonment exceeding 37 and a half years and where, based on the reasoning in *Gaingob*, the submission is made by all the appellants that their sentences should be adjusted so as to comply with the law as spelled out in *Gaingob*, ie the direct term(s) of imprisonment to be altered so as to ensure that they will become eligible for parole or probation after having served 25 years of their term(s) of imprisonment. As is apparent from what is stated above, *Gaingob* has not laid down a principle that no sentence can exceed 37 and a half years. Nevertheless, a sentence in excess of this period should be the exception, it is therefore necessary to revisit the sentences appealed against.

[22] Some of the appellants have already unsuccessfully engaged in appeal processes to have their sentences reduced or have unsuccessfully appealed against their sentences. Most, but not all of the appeals, are out of time. Subsequent to the *Gaingob* judgment and in an attempt to ensure that all sentencing would be in line with this judgment, this Court decided to, in the interest of justice, revisit all sentences that, on the face of it, fell foul of the *Gaingob* judgment. It follows that in respect of all the appeals there is no need to deal with the condonation and reinstatement applications relating to the late noting of the appeals as it is in the interest of justice that all of the sentences should be reconsidered in view of the approach articulated in *Gaingob*.

[23] With the above general remarks, I now turn to deal with the individual appeals. Before doing so it is worth mentioning that, flowing from the length of the sentences imposed, it is obvious that in all cases, very serious crimes were committed and this will obviously be a relevant factor when those sentences are reconsidered herein below when dealing with the individual appeals. In short, the sentences where they cannot be justified with reference to the approach in *Gaingob* will be reassessed to determine whether there are compelling reasons for not adhering to the approach in *Gaingob* and, if not altered so as to comply with the requirements spelled out in *Gaingob*. In all cases where the sentences are to be brought in line with the approach in *Gaingob*, it is clear that the respective appellants should be sentenced to the maximum period allowed as per the approach in *Gaingob* and the only changes that need to be made is to alter those sentences so that the effect of such sentences does not exceed the maximum period stipulated in *Gaingob*.

[24] The one appeal where the criteria in *Gaingob* is of no relevance was also brought on the basis of an erroneous belief that *Gaingob*'s principle was breached and

hence it was enrolled with the other appeals. Leave to appeal was assumedly also granted on this basis and I deal with it herein below based on the normal principles relating to the appeals against sentences.

Esegiël Gariseb v State

[25] The appellant was convicted on five (5) charges which all relate to events that took place on the night of 12 – 13 May 2002 on a farm in the Windhoek district. In essence he, together with an accomplice, committed robbery on the premises of a farm that night and in the process killed the farmer, a 67 year old male. Appellant was convicted of murder (count 1), housebreaking with intent to rob a farm house (count 2), housebreaking with intent to rob a small house (count 3), housebreaking with intent to rob a shop on the farm (count 4), and robbery of a vehicle (count 5).

[26] The appellant, aged 44 years, was sentenced as follows:

Count 1: 40 years imprisonment;

Count 2: 12 years imprisonment;

Count 3: 10 years imprisonment;

Count 4: 6 years imprisonment;

Count 5: 3 years imprisonment.

[27] Ten years in respect of count 2 was to run concurrently with the sentence imposed on count 1. The sentences on counts 3 to 5 were to run concurrently with the sentence on count 1. It follows that the direct imprisonment was for 42 years.

[28] In sentencing the appellant, the court *a quo* mentioned that a period of life imprisonment was considered in respect of count 1 but would not be imposed as this would be too long and thus imposed a term of 40 years. As pointed out above, the terms of the 1998 Act which were in force at the time, did not allow for parole in respect of sentences of life imprisonment. However in terms of the approach in *Gaingob* the sentence is too severe. In my view, this is the only aspect of the sentence that needs to be addressed.

[29] In the result, I make the following order:

The sentences imposed by the High Court in respect of Esegiël Gariseb on 24 October 2006 are herewith set aside and substituted with the following sentences:

- (i) On count 1: Murder: 30 years imprisonment;
On count 2: Robbery of farmstead: 12 years imprisonment;
On count 3: Robbery of the small house: 10 years imprisonment;
On count 4: Robbery of the shop: 6 years imprisonment;
On count 5: Robbery of the vehicle: 3 years imprisonment.

Four and a half years of the sentence on count 2 to run concurrently with the sentence imposed on count 1. The sentences on counts 3 to 5 to run concurrently with the sentence imposed on count 1.

- (ii) The above sentences are antedated to 24 October 2006.

[30] The appellant was convicted of murder and of assault with the intent to cause grievous bodily harm. He was sentenced to 45 years imprisonment for the murder and one year imprisonment in respect of the assault with intent to cause grievous bodily harm. The latter sentence was ordered to run concurrently with the sentence in respect of the murder count. At the time he was sentenced appellant was 27 years old. The judge *a quo* stated that a period of life imprisonment was considered but was thought not to be appropriate as being too severe in the circumstances.

[31] The appellant upon returning home found his girlfriend in the presence of another man, Viasco Heinrich. He stabbed this man with a knife in the leg and then turned on his girlfriend with whom he lived with at the time and with whom he had a child. The judge *a quo* described the manner of his assault on his girlfriend as follows:

‘The manner in which Irene Matlatla was killed by Frans Basson makes even a hardened judicial officer – one that has had to sit in so many murder cases, gasp with revulsion. Frans Basson quite literally stoned Irene Matlatla to death. He treated her in the most inhumane manner imaginable by dragging her around on rough, rocky terrain and then stoning her to death.’²⁵

[32] In short, it was a brutal attack forming part of the gender based violence that is, sadly, prevalent in our society and this also played a role in the sentencing of the appellant.

[33] To bring his sentence in line with *Gaingob*, the appellant will have to be sentenced to a term of imprisonment that will not exceed 37 and a half or life imprisonment. In both cases his eligibility for parole will then arise after serving 25 years of his imprisonment. The difference is that if he is not granted parole he may

²⁵ *State v Basson* (CC 23/2010) [2011] NAHC 186 (1 July 2011) para 3.

potentially have to serve more than 37 and a half years in respect of the life imprisonment whereas he would be entitled to his release after 37 and a half years if sentenced to such a term of imprisonment. In view of the comments of the sentencing judge a fixed term of imprisonment would be appropriate in this matter.²⁶

[34] In the result, I make the following order:

The sentences imposed by the High Court in respect of Frans Basson on 1 July 2011 are herewith set aside and substituted with the following sentences.

- (i) On the count of murder of Irene Matlatla his sentence is one of 37 years imprisonment.
- (ii) On the count of assault to cause grievous bodily harm to Viasco Heinrich he is sentenced to one (1) year imprisonment. This sentence is to run concurrently with the sentence imposed on the count of murder of Irene Matlatla.
- (iii) The above sentences are antedated to 1 July 2011.

Silas Nero v State

Manfred Gariseb v State

[35] When his appeal was called on 12 July 2023, Silas Nero requested his appeal to be removed from the roll. The court made an order to this effect and his appeal thus needs no further consideration. The appellant (and his co-accused Silas Nero) were

²⁶ *Nowoseb v S* (CC 06/2016) [2023] NAHCMD 754 (21 November 2023) paras 11–16.

convicted of murder and a number of other offences related thereto and each of them was sentenced as follows:

- Count 1: Murder: 30 years imprisonment;
- Count 2: Robbery with aggravating circumstances: 15 years imprisonment;
- Count 3: Kidnapping: 9 years imprisonment;
- Count 4: Pointing of a firearm: 3 years imprisonment;
- Count 5: Possession of a firearm without a licence: 1 year imprisonment.

[36] Five years on count 2 were to run concurrently with the sentence on count 1 and 4 years on count 3 were to run concurrently with the sentence on count 1. The sentences imposed thus in effect amounted to direct imprisonment of 49 years. The appellant was 31 years when he was sentenced.

[37] The appellant and Silas Nero intercepted a vehicle with four tourists in it. The Stoltz and Meboldt couples. After forcing the vehicle to an isolated spot they sought money. When not satisfied with the response, Mr Meboldt was shot and died next to his wife. The position thereafter is sketched in the words of the judge *a quo* as follows:

'One only need to mentally put oneself in the position of Dr and Mrs Stoltz and Mrs Meboldt to appreciate the terror they experienced not only seeing their companion killed in cold blood but in being held at gun point by two strangers in a strange place with no hope of any help. Dr Stoltz described their experience at one stage, as you took them further into the unknown; as follows:

“Then with the guns they forced me to head towards the riverbed. My wife was shouting he an old man, he is ill, which in fact I am, I'm suffering from some sort of cancer. Which she explained to them but they didn't care at all and they pushed me forward and they took my wife as well.

Bound with other laces their hands to the back as well and Mrs Meboldt was left with her dead husband in the car. She began to shout you can't leave me alone here in the middle of nowhere and then I don't know what was the motivation. But one of them asked her for a knife, as he took the Swiss army knife of her husband and throw it to him. No. 2 opened the knife and put the open knife to my wife's throat and threatening her if there is no more money we cut the throat. The other one pointed the gun at me. So the situation was for us desperate and hopeless. They went towards Mrs Meboldt, get her out of the car, bound the hands with laces as well and the three of us were pushed forward across the riverbed into some sort of kraal, which is a horse-shoe shaped little bush. So if we had gone into that we would have disappeared totally. So the two ladies went in, my wife came immediately back and said no I'm not going inside, and I said I'm so sick I cannot move forward any more. So in that situation the gang had again some discussions among themselves. I forgot to say that few minutes before when the situation was escalating no. 1 said I've killed one I don't mind to kill you all, that he said over and again and we had the feeling he meant business." (*sic*)

That aptly describes the manner in which you carried out both the robbery and the kidnapping, as well as the pointing of the gun. The sheer terror and hopelessness that your victims experienced under those circumstances cannot be over-stressed.

You eventually dumped the motor vehicle with the corpse of the deceased in the bush apparently after ransacking it and removing everything of value that you could lay your hands on. I find these actions of yours, all motivated by greed, callous in the extreme and worth of the strongest condemnation one can express.¹²⁷

[38] Taking into account the seriousness of the offences and the manner in which these crimes were committed namely the 'sheer terror and hopelessness your victims experienced' as expressed by the judge *a quo*, his previous convictions in respect of violent crimes and the lack of remorse shown coupled with the public interest it is clear that a lengthy sentence was called for. In view of the nature of the offences and the number of victims involved coupled with the crimes that were committed, I am of the

²⁷ *State v Manfred Gariseb & another* (CC 126/99), unreported, delivered on 22 September 2000.

view that the court *a quo* was correct to deal with the crimes as separate and distinct. In addition, the court *a quo* considered the cumulative effect of the sentences and hence ordered some sentences to run concurrently with others. Further, the sentences were imposed in September 2000 predating the 2012 Act by more than a decade and *Gaingob* by more than two decades.

[39] The appellant's eligibility for parole will arise after having served two-thirds of the sentence imposed on the murder and robbery counts. Here it must be borne in mind that five years on the robbery count are to run concurrently with the murder count. This means that after serving 20 years on the murder count when he can potentially claim parole on this count he would have already served five years of the robbery count and he must serve another five years to become eligible for parole for the robbery count.²⁸ Furthermore, when he has served 20 years in respect of the murder count, he would have already served four years of the kidnapping sentence which means a further half year needs to be served in this regard to have served half that sentence to become eligible for parole,²⁹ to this must be added another six months as half his sentence for the possession of a firearm and one and a half years in respect of pointing of a firearm. If my calculation is correct, one is looking at 27 and a half years before the eligibility of parole will arise. In my view, for the reasons stated above, this was an appropriate sentence in the circumstances as it does not offend any principles of sentencing. This is an example of a case where the multiple offences, although linked, were so serious and gruesome that the sentence in excess of the *Gaingob* benchmark was justified.

²⁸ Robbery is a scheduled offence in terms of s 112(10) of the 2012 Act and hence two-third of this sentence must be served before an eligibility for parole arise (s 114).

²⁹ Kidnapping is not a scheduled offence and as the prisoner was sentenced to a term of imprisonment for less than 20 years at least half the sentence must be served for the eligibility for parole to arise (s 112). The same position applies to the other offences dealt with above and where I use half of the sentence as a benchmark.

[40] The appeal against his sentence is dismissed.

Elia Avelinu v State

Elifas Ndalusha v State

[41] The appellants together with two other accused were convicted of murder, two counts of robbery with aggravating circumstances and a count of defeating or obstructing the course of justice.

[42] The crimes were committed when four persons conducted an armed robbery in the People's Inn Gambling House in a suburb of Windhoek. After entering the premises an off duty policeman present there was shot and killed. The patrons of the business were told to lie down and the cash present at the business was taken. In addition, the pistol of the policeman and a shotgun belonging to the owner were also taken.

[43] The first appellant, Elia Avelinu who was accused no. 1, was sentenced as follows on 9 December 2005:

Count 1: Murder: 30 years imprisonment;

Count 2: Robbery involving the policeman: 12 years imprisonment;

Count 3: Robbery of the business: 10 years imprisonment;

Count 4: Obstructing the course of justice: 2 years imprisonment.

[44] In respect of counts 2 and 3, 5 years of imprisonment was ordered to be served concurrently with the sentence imposed on the murder conviction.

[45] The second appellant Elifas Ndalusha was convicted on counts 1, 2 and 3 only and in respect of these counts received the same sentence as his co-accused Elia Avelinu.

[46] The upshot of the above means that the total direct term of imprisonment amounts to 44 years, ie 30 + 7 + 5 + 2 in respect of Elia Avelinu and 42 years in respect of Elifas Ndalusha. When regard is had to the eligibility for parole in respect of all the charges, it means that the appellants will have to serve more than 25 years for such eligibility to arise even if marginally so. It is thus appropriate that the sentences be altered to ensure that the benchmark set out in *Gaingob* is adhered to.

[47] In the result, the sentences imposed on the appellants by the High Court on 9 December 2005 are herewith set aside and substituted with the following:

(i) In respect of both appellants

Count 1: Murder: 30 years imprisonment;

Count 2: Robbery involving the policeman: 12 years imprisonment;

Count 3: Robbery of the business: 10 years imprisonment.

(ii) In respect of the first appellant, Mr Elia Avelinu only

Count 4: Obstructing the course of justice: 2 years imprisonment;

(iii) Seven years of the sentence imposed on count 2 is to be served concurrently with the sentence on count 1. Seven and a half years of the sentence imposed on count 3 is to be served concurrently with the

sentence on count 1. The whole of the sentence imposed on count 4 is to be served concurrently with the sentence on count 1;

(iv) The above sentence is antedated to 9 December 2005.

Jakobus Jossop v State

[48] The appellant was convicted on two counts of murder, one count of attempted murder, three counts of assault with intent to do grievous bodily harm, malicious damage to property and attempting to defeat or obstruct the course of justice.

[49] The facts leading to his conviction were succinctly summarised by the judge *quo* as follows when he sentenced the appellant:

'During the evening of 23 January 2009 the accused were drinking with family and friends and a fight erupted between him and Gregorius Morongwe. Accused hit him with his head against his head and he lost consciousness. When the deceased Isak Shikongo tried to stop the fight the accused said he will stab him and the deceased Johannes Matroos. Accused stabbed the deceased Isak Shikongo several times with a sharp object/or knife in his chest, face, and head. He died as a result of multiple stab wounds. The accused went to collect a sheep shears and stabbed deceased Johannes Matroos on his neck, chest head, back and shoulder. He died as a result of acute loss of blood caused by the stab wound to his chest.

On 29 November 2011 and pending his trial in the High Court in Windhoek on the above-mentioned charges the accused was granted bail. On 21 December 2011 and at Keetmanshoop the accused stabbed the complainants mentioned in counts 5 and 6 in the indictment after verbally threatening to kill them. The accused also informed the complainant in count 5 that he is a problem to the accused in his pending High Court case. The accused's additional intention by stabbing these complainants were to defeat or obstruct the course of justice as set out in count 8 in the indictment. When the complainant in count 7 came to the assistance of the complainant in count 6 the

accused hit her with a bottle threatening that he will rather go to jail for a dead person than one who is alive.³⁰

[50] As far as malicious damage to property is concerned, this related to the breaking and burning of movable property belonging to the victims.

[51] On 9 April 2015, the appellant was sentenced by the High Court as follows:

- (i) Count 1: Murder with direct intent: 30 years imprisonment;
Count 2: Murder with direct intent: 30 years imprisonment;
Count 3: Assault with intent to do grievous bodily harm: 5 years imprisonment;
Count 4: Malicious damage to property: 1 year imprisonment;
Count 5: Assault with intent to do grievous bodily harm: 5 years imprisonment;
Count 6: Attempted murder: 10 years imprisonment;
Count 7: Assault with intent to do grievous bodily harm: 5 years imprisonment;
Count 8: Attempting to defeat or obstruct the course of justice: 1 year imprisonment.
- (ii) The sentences in count 3 – 8 were ordered to run concurrently with the sentences imposed on counts 1 and 2.

[52] It follows that the appellant was sentenced to 60 years imprisonment. It further follows that the sentence is an inordinately long one which in addition means that the

³⁰ *S v Jossop* (CC 01/2011) [2014] NAHCMD 82 (9 April 2015) para 2.

appellant will have to serve more than 25 years before becoming eligible for parole and thus falls foul of the criteria spelled out in *Gaingob*. The sentence was clearly structured so as to avoid the appellant being eligible for parole after serving 25 years which would have been the case had he been sentenced to life imprisonment. Assuming for the moment that the authorities will consider the first sentence to have been fully served after 20 years he would have to start serving the second sentence thereafter, and again assuming that he would be granted parole after serving another 20 years it would mean that he would serve 40 years which would still be an extremely long sentence. As he was sentenced when he was 27 years old, a 60 year period would be tantamount to a life sentence as it means he would be released at age 87 (if he is alive). Even if assuming that he qualifies for parole after serving two-thirds of his murder sentences he would still have to serve 40 years and he will be released at age 67 (if he is alive). It thus follows that sentences of life imprisonment in respect of the two murder charges were appropriate.

[53] In the result, the sentences imposed by the High Court on Jakobus Jossop on 9 April 2015 in respect of the murder charges (counts 1 and 2) are set aside and substituted with the following sentences: (the sentences in respect of the other courts remain in place and shall be served concurrently with the life sentences imposed):

- (i) Count 1: Murder with direct intent: 21 years imprisonment;
Count 2: Murder with direct intent: Life imprisonment. This sentence is to be served concurrently with seven years of the sentence imposed on count 1; ie this sentence will commence after 14 years of the sentence on count 1 has been served;

- (ii) Counts 3 – 8: The appeal against these sentences is dismissed save that these sentences are to be served concurrently with the sentences imposed on counts 1 and 2;
- (iii) The above sentences are antedated to 9 April 2015.

Sakarias Mathias v State

[54] The appellant was convicted of murder, attempted murder, possession of a firearm without a licence, unlawful possession of ammunition and attempting to defeat or obstruct the course of justice. The sentences imposed add up to a total period of imprisonment of 35 years as will become apparent below.

[55] The sentences in this case do not fall foul of the *Gaingob* principle as the total period of imprisonment does not exceed 37 and a half years. As such it is to be dealt with as a normal appeal against sentence. In fact, the appellant sought leave from the court *a quo* to appeal his convictions and sentences which was refused. He then petitioned the Chief Justice pursuant to the provisions of s 316(6) of the Criminal Procedure Act 51 of 1977. The petition to appeal the convictions was declined but he was granted leave to appeal against his sentences and only this aspect thus needs to be determined.

[56] Because sentencing is essentially a function that falls within the discretion of the trial court, this Court will not interfere with the decision of the trial court merely because it disagrees with the trial court. This Court will only interfere if the trial court misdirected itself on the facts or the law, where a material irregularity occurred during the sentencing proceedings or where the trial court failed to take into account material facts or over emphasised the importance of certain factors or where the sentence is

startlingly inappropriate, or induces a sense of shock which must be accepted to be the case if there is a striking disparity between the sentence imposed by the trial court and that which this Court would have imposed.³¹

[57] The appellant, in his mid-fifties, was standing in the BSK Bar in Katutura, Windhoek talking to a 21 year old woman Magdalene Fredericks. Patrick Hawala accompanied by his two friends also arrived at the bar. Ms Fredericks saw them and greeted them. Mr Hawala and his friends proceeded to the counter at the bar where they shared drinks. Ms Fredericks, bringing a bottle of liquor, joined them there where they were all socialising together. After a while Mr Hawala got up and went to the toilet. When Mr Hawala exited the toilet he saw Ms Fredericks in front of him on her way to the door that would lead back to the bar. He then realised she must also have gone to the ladies toilet. When he opened the door to the bar area after Ms Fredericks had already entered he heard a person shouting 'beware' in the Afrikaans language. Virtually immediately thereafter the appellant who had a handgun in his hand said to Ms Fredericks 'I gave you my money and now you are buying alcohol to your man'. Appellant then shot Ms Fredericks who was standing at the bar and then turned around and fired a shot in the direction of Mr Hawala which hit him in the groin. Ms Fredericks was hit in the abdomen and passed away later that day.

[58] It is in the above context that the appellant was convicted and sentenced as follows:

Count 1: Murder with direct intent: 28 years imprisonment;

Count 2: Attempted murder: 5 years imprisonment. 2 years of which was to be served concurrently with the sentence imposed on count 1;

³¹ *S v Tjiho* 1990 NR 361 (HC) at 366.

Count 3: Unlawful possession of a firearm: 2 years imprisonment;

Count 4: Unlawful possession of ammunition: 1 year imprisonment to be served concurrently with the sentence imposed on count 4;

Count 5: Attempting to defeat or obstruct the course of justice: 2 years imprisonment.

In addition, the appellant was declared unfit to possess a firearm for a period of 10 years from his release from prison.

[59] At the time of his conviction the appellant was a married businessman aged 59 with children and a farming operation with livestock. Although the State proved previous convictions these were all more than ten years old and not directly relevant to the crimes he had been convicted of as they did not involve cases of which violence was an element. Although a businessman, he only had a rudimentary education of standard five or grade seven as it is currently known.

[60] The judge *a quo* gave great weight to the seriousness of the crimes and correctly so. He further found that aggravating circumstances were also present as the deceased was a defenceless woman who was yet a further victim of the scourge of gender based violence and an unlawful weapon was used. The judge *a quo* concluded that this was a case where a deterrent sentence was called for.

[61] It is clear that murder is a serious offence and to simply shoot a woman because one felt one's advances had been wrongly spurned clearly cannot be countenanced. This does not however mean that one can ignore the other circumstances relevant to the murder such as that the appellant clearly felt aggrieved

by the conduct of the deceased in circumstances where he probably also had a drink or two and that his act was not a carefully designed one prior to the incident but more in line with a sudden impulsive act driven by his perception that his advances were wrongly spurned by the deceased who shortly before still welcomed them. This was also why he turned his eye to the person he perceived as the cause of him being spurned by the deceased. He does in essence react on the spur of the moment to what he perceived was an insult to him by the deceased and caused by Mr Hawala. Whereas the deceased was a woman, the conduct of the appellant was caused by envy and anger and must be seen in this context rather than in the context of gender based violence.

[62] In the above circumstances I am of the view of that a reasonable sentence in respect of the murder count would lie in the range between 16 and 22 years.³² I shall impose a period of 18 years imprisonment as I deem this would be an appropriate sentence in the circumstances.

[63] As far as the attempted murder charge relating to the shooting of Mr Hawala is concerned I am of the view that, that punishment was appropriate and so was the decision to make any two years thereof run concurrently with the murder sentence. Whereas this was part of one incident, Mr Hawala was a separate victim and the punishment in respect of his shooting was apposite. As far as the possession of a firearm and ammunition is concerned: the use thereof was for the perpetuation of the murder and attempted murder and in my view, in the present circumstances and taking cognisance of the cumulative effect of the sentences in respect of a single incident the sentences in respect thereof should be ordered to run concurrently with the sentence

³² See *David Shilunga v S* (SA 1/2000), unreported, delivered on 8 December 2000 and *Tobias Nandago v S* (SA 3/2001), unreported, delivered on 6 March 2002.

imposed on the murder. The attempt to defeat or obstruct the course of justice relates to the disposal of the firearm by the appellant and in this regard there should at least be an element of recognising this act as an offence separate from the other offences. However, taking into account the cumulative effect of the sentences in respect of what was in essence one incident, part of the sentence should also run concurrently with the sentence in respect of the murder charge.

[64] In the result, I make the following order:

The sentences imposed on the appellant in the High Court on 5 December 2019 are herewith set aside and substituted by the following sentences:

- (i) Count 1: Murder with direct intent of Magdalena Fredericks: 18 years imprisonment;
Count 2: Attempted murder on Patrick Hawala: 5 years imprisonment, 2 years of which is to be served concurrently with the sentence on count 1;
Count 3: Unlawful possession of a firearm; and,
Count 4: Possession of a firearm without a licence in contravention of s 2 read with ss 1, 8, 10, 38 and 39 of the Arms and Ammunition Act 7 of 1996: 2 years imprisonment. This sentence is to be served concurrently with the sentence on count 1;
Count 5: Possession of ammunition in contravention of s 33 read with ss 1, 8, 10, 32 and 39 of the Arms and Ammunition Act 7 of 1996: 1 year imprisonment. This sentence is to be served concurrently with the sentence on count 1;

Count 6: Attempt to defeat or obstruct the course of justice: 2 years imprisonment. One year of this sentence is to be served concurrently with the sentence on count 1;

The appellant is declared unfit to possess a firearm for a period of 10 years after his release from prison.

- (ii) The above sentences are antedated to 5 December 2019.

Charles Namiseb v State

[65] The appellant was convicted of rape (three counts) and two counts of assault with intent to do grievous bodily harm and a count of robbery with aggravating circumstances. He was sentenced to 57 years imprisonment in total. The sentence is clearly outside the parameters mentioned in *Gaingob*. The appellant appeals his sentence with leave from the court *a quo*.

[66] The offences for which the appellant was convicted of have their origin in the events that took place on 3 October 2010. The appellant and his accomplice brutally assaulted an elderly couple at their residence in the town of Uis during a robbery in which they stole property and money belonging to the couple. In the process the appellant sexually assaulted the woman whereafter he also raped her. He also assisted his accomplice to rape the woman.

[67] It needs to be pointed out that in terms of the Combatting of Rape Act 8 of 2000, the sexual assault perpetrated by the appellant as well as his assistance to his accomplice to also rape the woman is defined as rape. It should also be borne in mind

that in the absence of 'substantial and compelling circumstances', the Act prescribes a minimum sentence of 15 years imprisonment for rape.

[68] The court *a quo* sentenced the appellant as follows:

Count 1: Rape: 15 years imprisonment;

Count 2: Rape: 15 years imprisonment;

Count 6: Rape: 15 years imprisonment;

Count 7: Robbery with aggravating circumstances: 12 years imprisonment;

Count 8 and 9: taken together for sentencing: 6 years imprisonment which is to run concurrently with the sentence imposed in respect of count 7.

[69] As pointed out above the cumulative effect of the sentences imposed amounts to imprisonment of 57 years and this needs to be addressed taking into account the principles laid out in *Gaingob*. Furthermore, it must be borne in mind that the rape sentences cannot be reduced as they are the prescribed minimum sentences.

[70] In the result, the following order is made:

The sentences imposed on the appellant in the High Court on 20 May 2019 are set aside and substituted with the following sentences:

(i) Count 1: Rape: 15 years imprisonment;

Count 2: Rape: 15 years imprisonment;

The sentences on count 1 and 2 are to be served concurrently.

Count 6: Rape: 15 years imprisonment;

Count 7: Robbery with aggravating circumstances: 12 years imprisonment.

Four and a half years of the sentence is to be served concurrently with the sentence on count 1;

Count 8 and 9: Assault with intent to do grievous bodily harm: 3 years imprisonment in respect of each count. These two sentences are to be served concurrently with the sentence imposed on count 1.

- (ii) The sentences are antedated to 20 May 2019.

Sylvester Laurence Beukes v State

[71] The appellant was the perpetrator of multiple murders on an isolated farm. He went to the farm to kill Mr and Mrs Erasmus because of a grudge he had against them. He took his accomplices with him who were also his co-accused. At the farm they met and killed the mentioned couple and all the other people they found there and thus killed eight people on that specific day.

[72] It is necessary that I quote from the judgment on sentence from the court *a quo* so as to illustrate the brutality and savagery of the attack on those found at the farm on that fatal day. I refer to the following three extracts from the judgment:

‘ . . . you made two conscious decisions: the amount of people you are going to kill, and how you are going to kill them. Both reveal your evil minds. As regards the first, you chose to kill as many people as possible – in fact everyone who was at the farm: no one was to be spared – not children, not even a pregnant woman. As for the second: you chose to carry out your crimes in the most brutal fashion imaginable. It is clear to

me that you wanted your victims to suffer emotionally and physically. You wanted them to know that they were going to die and to die experiencing unthinkable pain.’³³

And

‘ . . . The manner of execution of the victims named in the eight counts of murder was particularly cruel and brutal. You shot some of your victims at close range and burnt them alive. You did not even spare a 4-year old girl or a pregnant woman. Both of you have shown no remorse for your actions’³⁴

And

‘ . . . [Appellant] admitted that he committed the murders in the following sequence: He first killed the Erasmus couple, thereafter he killed the five people whom he at gunpoint led into the outside room and then shot and set the room alight. After forcing Sunnybooi Swartbooi to help him and Accused 3 load the stolen goods on the stolen vehicle and trailer, he took Sunnybooi into the farm house and then killed him’³⁵

[73] The appellant was sentenced as follows by the court *a quo* on 21 November 2011: he received 45 years imprisonment in respect of each of the eight murder charges he was convicted of. In respect of housebreaking with the intent to rob and robbery taken together with the robbery with aggravating circumstances he was sentenced to 15 years imprisonment. On a count of defeating or obstructing the course of justice he received 6 years imprisonment. For arson he was sentenced to 10 years imprisonment and for the possession of a firearm and possession of ammunition without a licence he was given 4 years imprisonment. In respect of some of the counts it was ordered that the sentences imposed in respect thereof would run concurrently with those imposed in other counts. The net effect of this was that the appellant was

³³ *State v Neidel & others* (CC 21/2006) [2011] NAHC 347 (21 November 2011).

³⁴ *Ibid* para 23.

³⁵ *Ibid* para 24(i).

sentenced to imprisonment for an effective term of 105 years. Appellant was 34 years old at the time of his sentencing.

[74] It goes without saying that an effective term of imprisonment of 105 years does not fall within the parameters spelled out in *Gaingob* and *Tcoeib* and that the sentences will have to be altered so as to not fall foul of the guideline articulated in *Gaingob*. The crimes however were such that they could only be described as monstrous and extreme and this can be said in respect of every murder committed and but for *Gaingob* and *Tcoeib* it would have been correct to ensure the permanent removal of the appellant from society. As this cannot be achieved, the appellant deserves an effective sentence that far exceeds the parole eligibility benchmark sentences for life imprisonment but does not negate his Art 8 constitutional rights. This is what I intend to do in altering his sentences.

[75] The appeal succeeds and the sentences imposed on appellant by the High Court on 21 November 2011 are herewith set aside and substituted by the following sentences:

- (i) Count 1: Murder: 30 years imprisonment;
- Count 2: Murder: 35 years imprisonment: 15 years whereof it is to be served concurrently with the sentence on count 1, ie this sentence will commence after 15 years of the sentence on count 1 has been served;
- Count 3: Murder: Life imprisonment;
- Count 4: Murder: Life imprisonment;
- Count 5: Murder: Life imprisonment;
- Count 6: Murder: Life imprisonment;

Count 7: Murder: Life imprisonment;

Count 8: Murder: Life imprisonment;

Count: 9 and 10: Housebreaking with intent to rob and robbery, and robbery with aggravating circumstances: 15 years imprisonment;

Count 11: Defeating or obstructing the course of justice: 6 years imprisonment;

Count 12: Arson: 10 years imprisonment;

Count: 14 and Count 15: Unlawful possession of a firearm and unlawful possession of ammunition: 4 years imprisonment.

- (ii) The sentences of life imprisonment imposed on counts 3 to 8 are to be served concurrently with the sentence imposed on count 2.
- (iii) The sentences imposed on counts 9 to 15 are to be served concurrently with the sentence of life imprisonment imposed on count 3.
- (iv) The abovementioned sentences are antedated to 21 November 2011.

Ian Jones v State

[76] The appellant and his accomplice (who was his co-accused) were convicted of murder, housebreaking with intent to rob and robbery with aggravating circumstances, kidnapping, and defeating or obstructing the course of justice. In addition, the appellant was also convicted of the contravention of s (2)(a) of the Departure from Namibia Regulation Act 34 of 1955 as amended by Act 4 of 1993 in that he left Namibia for South Africa without a passport.

[77] Appellant who visited the house which was broken into shortly prior to the incident to visit someone he knew there convinced his brother (his co-accused) that it would be a worthy premises for them to break-in and steal items. Appellant at the time

already had convictions of housebreaking with intent to steal and theft and a conviction of housebreaking with intent to rob and robbery.

[78] Appellant broke into the premises and opened a door for his brother to enter the premises. They took clothes of the occupier and put it on and started eating food that they found in the house. While busy fitting on clothes of the occupier of the house, he arrived. Appellant pointed a firearm towards him while his brother forced him to the ground where they tied his hands behind his back. Appellant got hold of the safe keys and emptied its contents including N\$880 000 in cash. They then put the occupier in the boot of a car and drove around with him for a while before they found a suitable spot outside the city where the appellant executed him with the firearm and his body was hidden in the veld covered with plant material. They then abandoned the vehicle at a shopping mall. Appellant stole a passport from a third person and used this to travel to South Africa where he was eventually apprehended.

[79] Appellant, aged 29, was sentenced on 8 November 2005 as follows:

Count 1: Murder: 40 years imprisonment;

Count 2: Housebreaking with intent to rob and robbery with aggravating circumstances: 12 years imprisonment;

Count 3: Kidnapping: 5 years imprisonment;

Count 5: Leaving Namibia for the purpose of proceeding to another country without a passport in contravention of s 2(a) of Act 34 of 1955 as amended by Act 4 of 1993: One (1) year imprisonment.

[80] As is apparent from the sentences imposed, the total period of imprisonment of the appellant's sentences amounts to 58 years which falls foul of the approach set out in *Gaingob* and *Tcoeib* and hence need to be altered so as to conform thereto. The judge *a quo* pointed out that the appellant's parents have given up on him and informed the court that they did not want to see him. The judge concluded that the prospect that the appellant 'would rehabilitate and reform are very minimal if not poor' and hence the cumulative period of imprisonment.

[81] In the result, the sentences imposed on the appellant by the High Court on 8 November 2005 are set aside and substituted by the following sentences:

- (i) Count 1: Murder: 30 years of imprisonment;
Count 2: Housebreaking with intent to rob and robbery with aggravating circumstances: 12 years imprisonment of which 7 years is to be served concurrently with the sentence imposed on count 1;
Count 3: Kidnapping: 5 years imprisonment of which two and a half years is to be served concurrently with the sentence imposed on count 1;
Count 5: Leaving Namibia without a passport: One (1) year imprisonment to be served concurrently with the sentence imposed on count 1.
- (ii) The aforesaid sentences are antedated to 8 November 2005.

Aloyis Ditshabue v State

[82] The appellant was convicted of two murders and sentenced to 30 years imprisonment in respect of each murder. The result is that the appellant was sentenced to 60 years imprisonment in total. He was 43 years old when he was sentenced. This clearly is an inordinately long period and in addition is probably

contrary to the appellant's right to dignity envisaged in Art 8 of the Constitution. It is likely that, even when taking his eligibility for parole into consideration, that he will spend the rest of his life in prison when regard is had to the criteria set out in *Gaingob* and his sentences thus need to be corrected.

[83] Appellant was convicted of the murder of his wife whom he found in a compromising position with another man. He strangled his wife to death. About two and a half years later while he was out on bail in respect of the murder charge of his wife he killed his girlfriend for reasons unknown whilst she was asleep.

[84] In the result, the sentences imposed by the High Court on 7 April 2014 in respect of the appellant are set aside and substituted by the following sentences:

- (i) Count 1: 21 years imprisonment;
Count 2: Life imprisonment. The life imprisonment is to be served concurrently with 11 years of the sentence imposed on count 1; ie this sentence will commence after 10 years of the sentence on count 1 has been served.
- (ii) The sentences are antedated to 7 April 2014.

Tuhafeni Berendisa Kutamudi v State

[85] The appellant was convicted on three counts of murder committed during the evening of 4 September 2002 and in the morning of 5 September 2002. He was sentenced as follows:

Count 1: Murder: Paulus Polycapus: 24 years imprisonment;

Count 2: Murder: Ndahafa Frans: 30 years imprisonment but 10 years of this sentence is to be served concurrently with the sentence imposed on count 1;

Count 3: Murder: Eunice Kambwali: 35 years imprisonment.

As is evident from the mentioned sentences it adds up to a sentence of 79 years imprisonment.

[86] The appellant had a dispute with Mr Polycapus in connection with a traditional knife which he said was his property and which was used by Mr Polycapus. The appellant took another traditional knife and with it went to the house of Mr Polycapus where he commenced to viciously attack the latter with his knife. When the elderly Mrs Frans tried to intervene, the accused turned on her and viciously assaulted her with a knife as well. Both of the victims of the assault died on the spot. Early the next morning Ms Kambwali shared the same fate as the previous two persons at the hands of the appellant. The appellant's only explanation was that he was angry.

[87] The cumulative effect of the sentences imposed is such that it is clear that the judge *a quo*, for all practical purposes, intended to permanently remove him from society. The sentences taken cumulatively do not meet the requirements set out in *Gaingob* and will thus have to be set aside and be substituted with sentences that meet the requirements.

[88] In the result, I herewith set aside the sentences imposed by the High Court on 5 July 2005 on the appellant and substitute them for the following sentences:

- (i) Count 1: Murder: Paulus Polycapus: 30 years imprisonment;

Count 2: Murder: Ndahafa Frans: 30 years imprisonment to be served concurrently with 25 years of the sentence imposed on count 1;

Count 3: Murder: Eunice Kambwali: Life imprisonment to be served concurrently with the sentence imposed on count 2.

- (ii) The abovementioned sentences are antedated to 5 July 2005.

Fillemon Nkandi v State

[89] The appellant was convicted on two counts of murder, a count of unlawful possession of a firearm and a count of unlawful possession of ammunition.

[90] He was sentenced to 35 years imprisonment in respect of each murder and to one year imprisonment in respect of unlawful possession of a firearm and one year imprisonment in respect of unlawful possession of ammunition. These latter two sentences were ordered to run concurrently with those imposed on the one murder count. The sentences in regard to the murder counts were expressly stated 'to run consecutively'.

[91] The appellant had some grievance with the two deceased persons who seem to have been in the business of selling a traditional drink referred to as marula or *omagongo*. It was on the afternoon of 8 March 2012 that the appellant, who was at the place where this drink was sold and where other persons were also present consuming this drink, took a shotgun and initially shot Aino Johannes Nuujoma who died there and whereafter he shot Mr Nuujoma's mother Martha Salom as she attempted to run away and she also succumbed to her wounds. The appellant,

pleaded guilty to the charges, did not testify as to what caused him to act as he did and the cause of his actions remains a mystery.

[92] The judge *a quo* described the actions of the appellant as 'brutal and vicious in the extreme' and he referred to the fact that it was premeditated. On the basis of this finding she determined that the appellant 'should be permanently removed from society' and sentenced appellant effectively to a total period of imprisonment of 70 years. Here it must be borne in mind that the appellant was 46 years old at the time he committed the murders in 2012 and was sentenced on 5 June 2020 which means that his sentence commenced when he was 53 or 54 years old and if he must serve two-thirds of 70 years prior to being considered for parole it would take nearly 47 years from the date of his sentencing. This was clearly a sentence designed to let the appellant live out the rest of his life in prison and to avoid the stipulations in the 2012 Act dealing with release on parole.

[93] As indicated in the introduction to this judgment, where the intention is to remove someone permanently from society a period of life imprisonment is an appropriate sentence and any attempt to circumvent the provisions with regard to parole in respect of life imprisonment would be an irregularity as per the findings in *Gaingob*.

[94] In the result, the sentences imposed on the appellant by the High Court on 5 June 2020 are herewith set aside and substituted with the following sentences:

- (i) Count 1: Murder: Life imprisonment;
- Count 2: Murder: Life imprisonment;

Count 3: Unlawful possession of a fire-arm: 1 year imprisonment;

Count 4: Unlawful possession of ammunition: 1 year imprisonment.

The sentences imposed on counts 3 and 4 are to be served concurrently with the sentence imposed on count 1.

- (ii) The above sentences are antedated to 5 June 2020.

Gabriel Jona Petrus v State

[95] The appellant was convicted of murder and kidnapping. He was sentenced to 40 years in respect of the murder and 5 years imprisonment of the kidnapping.

[96] The appellant was romantically involved with the deceased. This relationship ended shortly prior to the deceased being murdered. Appellant went to the room where the deceased stayed and there he proceeded to strangle her to death after locking up the deceased's roommate in a wardrobe in the room. After unlocking the deceased's roommate the appellant went to the floor where the deceased was lying and removed a tie from her neck with which he strangled her, touched her, called her name and when there was no response said that he wanted to make sure she was dead as he did not want to leave her alive on this earth. The kidnapping charge related to the locking up of the roommate.

[97] The sentences imposed on the appellant is not in line with the approach spelled out in *Gaingob* and thus need to be altered so as to comply with it.

[98] In the result, the sentences imposed on the appellant by the High Court on 20 June 2014 are herewith set aside and substituted with the following sentences:

- (i) Count 1: Murder: 35 years imprisonment;
Count 2: Kidnapping: 5 years imprisonment, one-half of which is to be served concurrently with the sentence imposed on count 1.
- (ii) The above sentences are antedated to 20 June 2014.

FRANK AJA

ANGULA AJA

MAKARAU AJA

APPEARANCES

APPELLANTS:

M Siyomunji

Esegiël Gariseb

Instructed by Legal Aid

Frans Basson

Manfred Gariseb

Elia Avelinu

Jakobus Jossop

Charles Namiseb

Ian Jones

Aloyis Ditshabue

Tuhafeni Berendisa Kutamudi

APPELLANTS:

Sylvester Laurence Beukes

S Kanyemba

Elifas Ndalusha

Instructed by Legal Aid

Gabriel Jona Petrus

APPELLANT:

Fillemon Nkandi

G Mugaviri

Instructed by Legal Aid

APPELLANT:

Sakarias Mathias

S Namandje

Of Sisa Namandje & Co. Inc.

RESPONDENT:

W Mokhare, SC (with him V
Alexander)

Instructed by Government Attorney

