



**NOT REPORTABLE**

CASE NO: SA 8/2021

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**STATE**

**Appellant**

and

**JOHANNES SHETEKELA WERNER**

**First Respondent**

**KLEOPHAS SHIIKALEPO KAPALANGA**

**Second Respondent**

**ELIA PEINGONDJABI NAKALE**

**Third Respondent**

**Coram:** DAMASEB DCJ, MAINGA JA and SMUTS JA

**Heard:** 14 June 2023 and 13 July 2023

**Delivered:** 28 July 2023

**Summary:** The respondents in this appeal were members of the Windhoek City Police when on 16 April 2013, while on duty, they arrested a 17 year old, Mandela Ramakutla (the deceased) on suspicion of the commission of theft of a laptop computer from City Police headquarters. A few hours later, the deceased was handed over to the charge office of the Namibian Police at the Windhoek Police Station for incarceration. The deceased was handed over in a comatose state. When they did so, one of the respondents informed the duty police officer at the charge office that the

deceased was drunk and feigning injuries. The deceased was taken to the hospital an hour or so later after his father's remonstrations – the deceased never recovered from his comatose state despite resuscitation efforts and intensive care by hospital staff. The deceased died nine days later in hospital. The respondents were each charged with a count of murder, obstructing the course of justice or attempting to do so and kidnapping (which charge they were acquitted of).

Medical evidence at the trial showed that the deceased sustained massive and widespread injuries consistent with severe and sustained assaults upon his body. The medical evidence was demonstrably incompatible with the respondents' version that the injuries sustained by the deceased were self-inflicted. The respondents were correctly convicted of murder with constructive intent and attempting to obstruct the course of justice. The trial court however incorrectly formulated the requirement of *dolus eventualis* (by stating that the respondents ought to have foreseen the consequences of their vicious assaults upon the deceased). In imposing their sentences, the trial court found that it was 'common practice' that a murder entailing *dolus eventualis* and not direct intent resulted in a lesser custodial sentence being imposed. On murder *dolus eventualis*, the trial court sentenced each respondent to 14 years imprisonment of which four years imprisonment are suspended for five years on condition that they are not convicted of murder, committed during the period of suspension. On obstructing the course of justice, the respondents were each sentenced to 12 months imprisonment to run concurrently with their sentence for murder.

The issues on appeal are firstly whether the trial court misdirected itself concerning its approach to *dolus eventualis* and secondly, with respect to the principles governing sentencing, whether there is a 'startling' or 'disturbing' disparity between a sentence imposed by the trial court and that which the appellate court would have imposed to justify interference with the trial court's sentence.

*Held*, this Court has repeatedly affirmed the fundamental principle that punishment is pre-eminently a matter for the discretion of a trial court. The powers of a court on appeal to interfere with sentencing are limited to instances where a trial court has not exercised its discretion judicially or properly. 'Where there is a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which an appellate

court would have imposed, interference is justified' – (see *S v Scheifer* 2017 (4) NR 1073 (SC)).

*Held that*, the trial court viewed the fact of a murder conviction with constructive intent (*dolus eventualis*) as constituting a mitigating factor in sentencing the respondents by referring to this as the 'common practice' in respect of such convictions, attracting lesser sentences than those with direct intent.

*Held that*, to approach sentencing of those convicted of murder on the basis of a 'common practice' to view that a murder with constructive intent would of itself justify a lesser sentence amounts to misdirection on the part of the trial court. The facts of each case must be considered in determining whether the absence of direct intent (and not the mere existence of *dolus eventualis*) would constitute a mitigating factor and this Court has dispelled the notion that murder committed with *dolus eventualis* can itself amount to a mitigating factor (see *S v Gariseb* 2016 (3) NR 613 (SC)).

In this matter the absence of direct intent would need to be considered in the context of the several aggravating factors of this murder – the plainly brutal and cruel attack over a sustained period where the respondents foresaw the death of the deceased as a clear possibility and reconciled themselves to that. These appalling features of the crime are compounded by the further aggravating factors that the deceased was a healthy 17 year old youth who was handcuffed and in their custody as police officers which also amounted to an egregious abuse of power.

*It is held that*, whilst the trial court correctly stressed that police officers must be held accountable for their actions, the court misdirected itself in regard to the presence of *dolus eventualis* as a mitigating factor instead of considering the absence of direct intent as a potential mitigating factor but then with the need to have proper regard for all the circumstances of the crime before doing so.

*It is furthermore held that*, there is a striking or startling or disturbing disparity between the sentence imposed by the trial court and it justifies interference by this Court. The trial court failed to accord the aggravating features of the murder perpetrated by the respondents their appropriate weight, resulting in this disparity.

Taking into account the respondents' mitigating factors and particularly being first time offenders, the cumulative impact of the aggravating features of this murder, a sentence of a long term of imprisonment and of considerably greater duration than the effective ten year's imprisonment imposed upon them is warranted.

This Court imposes on each respondent an effective term of 18 years' imprisonment without any suspension. The sentences are dated back to 8 July 2020.

---

## APPEAL JUDGMENT

---

SMUTS JA (DAMASEB DCJ and MAINGA JA concurring):

### Introduction

[1] The State appeals with the leave of this Court against the sentences for murder imposed by the High Court upon the three respondents. They were each convicted of murder with constructive intent (*dolus eventualis*) and also of attempting to obstruct the course of justice. The High Court on 8 July 2020 sentenced each of the respondents to 14 years imprisonment on the murder count with four years suspended. They were each sentenced to 12 months imprisonment on the charge of attempting to defeat or obstructing the course of justice. This latter sentence was ordered to run concurrently with the sentence for murder.

[2] This appeal was originally set down for 14 June 2023. Shortly before the date of hearing, the respondents' legal practitioner withdrew. The respondents applied at that time for representation funded by the Legal Aid Directorate. The appeal was postponed to 13 July 2023 for hearing. The respondents also endeavoured to raise funds to pay for their legal representation. Mr Namandje, who together with Mr Amoomo, appeared for the respondents explained that those funds were not as yet forthcoming and that they were appearing *pro bono* for the respondents. The court is

grateful to them for doing so and for their industry in preparing for and arguing the appeal.

### Background facts

[3] At the time of the murder, the three respondents were members of the Windhoek City Police. They were on duty at the time. On the early evening of 16 April 2013, they arrested a 17 year old youth, Mandela Ramakutla (the deceased) on suspicion of the commission of theft of a laptop computer from the City Police headquarters. A few hours later they handed him over for incarceration in a comatose state to the charge office of the Namibian Police at the Windhoek Police Station. When they did so, one of them informed the duty police officer at the charge office at that police station that the deceased was drunk and feigning injuries.

[4] An hour or so later the deceased's father came looking for him and insisted that his injured son be taken to the hospital which eventually occurred after this was initially declined for want of transport. The deceased never recovered from his comatose state despite the application of resuscitating efforts and intensive care on the part of hospital staff. Nine days later he died in hospital.

[5] It was not disputed that the deceased was in a healthy condition when he was picked up by the respondents. After arresting him and in the course of questioning the deceased, the respondents took him to his grandmother's home and after that to his father's home. Several witnesses testified seeing him at either of these two locations and observed that the deceased looked as if he had been assaulted and appeared to be impaired and injured. One of the witnesses was so concerned about his condition that he contacted the deceased's father who eventually tracked down the deceased to

the Windhoek Police Station where he discovered him in the holding cells in a severely injured condition. As a result of his remonstrations, the Namibian Police were eventually persuaded that the deceased should be taken to the hospital.

[6] The medical evidence at the trial revealed that the deceased had sustained massive and widespread injuries consistent with severe and sustained assaults upon him. His injuries were on his head (on both sides), earlobe, shoulder, arms, buttocks, forehead, lips, chin and abdomen. There was blood in his urine and nose. Severe trauma was observed to his kidneys. His head injuries were described as severe.

[7] The medical evidence was demonstrably not compatible with self-inflicted injuries – the respondents' version – before or after the deceased was dumped by the respondents at the Windhoek Police Station.

[8] The respondents' version that the deceased was drunk, gainsaid by several state witnesses, was found to be false and was in fact recanted by the first respondent in his evidence. The respondents all denied assaulting the deceased.

#### The approach of the High Court

[9] Although the court below incorrectly formulated the requirement for *dolus eventualis* (by stating that the respondents ought to have foreseen the consequence of their vicious assaults upon the deceased), the totality of the evidence plainly established by inference the requisite subjective foresight on their part of the deceased's death as a consequence of their conduct and that this inference is the only one which could be reasonably drawn from the facts viewed as a whole and that the respondents had reconciled themselves with that possibility.

[10] They were thus correctly convicted of murder with constructive intent and attempting to obstruct the course of justice. In imposing the sentences for murder upon the respondents, the trial court found that it was 'common practice' that a murder entailing *dolus eventualis* and not direct intent, resulted in a lesser custodial sentence being imposed.

[11] The respondents sought leave to appeal against their convictions and the State applied for leave to appeal against the sentences imposed by the trial court.

[12] Both applications for leave to appeal were refused by the court below. The respondents and the State separately petitioned the Chief Justice for leave to appeal. The respondents' petition was turned down and leave was granted to the State to appeal against the sentences imposed upon the respondents.

#### Application to place further evidence before this Court

[13] After this appeal was postponed, the respondents brought an application on 30 June 2023 to place additional evidence before this Court.

[14] The application comprises affidavits made by each of the three respondents. The additional evidence essentially relates to the respective participation by and performance of each of the respondents in programmes concerning rehabilitation, reformation and correctional matters in their respective correctional facilities since sentencing. In the case of the first appellant, he also testified that he had suffered a stroke after sentencing although no medical evidence to this effect is provided.

[15] The application to adduce new evidence is opposed by the State which has also provided answering affidavits by the officer in charge of the Windhoek Correctional Facility and the head of the nursing service at that facility dealing with the allegations raised in the respondents' affidavits. In some respects those affidavits gainsay what is stated by the respondents.

[16] Respondents' counsel submitted that the evidence sought to be provided was highly relevant concerning sentence as it provides information on the rehabilitation, reformation and correctional programmes the respondents have participated in and 'what an increased sentence will do' in the context of those 'well-meant programmes'. Reference was also made to the first respondent's medical condition.

[17] When it was pointed out to counsel that the material sought to be adduced was in respect of events subsequent to sentencing, he argued that the evidence also relates to the prevailing sentencing objectives under the Correctional Service Act 9 of 2012.

[18] Counsel for the respondents correctly accepted that the application to place the new evidence before this Court was not in terms of s 316 of the Criminal Procedure Act 51 of 1977 as the requisites for placing further evidence under that section were not met.

[19] Counsel instead relied upon s 19(a) of the Supreme Court Act 15 of 1990 for the application. That provision vests this Court with the power to receive further evidence on appeal and provides:



'The Supreme Court shall have the power-

(a) on the hearing of any appeal to receive further evidence, either orally or by deposition before a person appointed by the court, or to remit the case to the court of first instance, or to the court whose judgment is the subject of the appeal, for further hearing, with such instructions relating to the taking of further evidence or any other matter as the Supreme Court may deem necessary.'

[20] In the leading judgment dealing with s 19(a), this Court held:

'Although, by s 19(a) of Act 15 of 1990, this court is granted wide powers to receive evidence on appeal a reading of the cases has shown that this is a power which the court would exercise sparingly and only where certain prerequisites are complied with. These are firstly that a reasonable and acceptable explanation must be given why the evidence was not tendered at the trial. Secondly the evidence must be essential for the case on hand; and thirdly it must be of such a nature that it may probably have the effect of influencing the result of the case. (See *Staatspresident en 'n Ander v Lefuo* 1990 (2) SA 679 (A) at 691C-692C.)<sup>1</sup>

[21] The issue raised by this appeal concerns whether the trial court misdirected itself concerning its approach to *dolus eventualis* and with respect to the principles governing sentencing as to whether there is a 'startling' or 'disturbing' disparity between a sentence imposed by the trial court and that which the appellate court would have imposed to justify interference with the trial court's sentence.<sup>2</sup> The approach of this Court to s 19(a) as set out in *JCL Civils* presupposes evidence which could and should have been tendered at the trial and which was not so tendered and not evidence relating to subsequent events which can have no bearing upon the issues to be determined by the trial court.

---

<sup>1</sup> *JCL Civils Namibia (Pty) Ltd v Steenkamp* 2007 (1) NR 1 (SC) para 27.

<sup>2</sup> *S v Schiefer* 2017 (4) NR 1073 (SC) para 22.

[22] Circumstances concerning how the respondents are responding to incarceration are not relevant to those issues because they did not exist at the time of sentencing. Those circumstances may however have some relevance for enquiries and matters to be addressed under the Correctional Service Act but they can have no bearing on the enquiry before us.

[23] Counsel for the respondents strenuously argued that the evidence relates to principles of sentencing under the Correctional Service Act. Where reliance is sought to be placed upon principles and purpose of sentencing under that Act and whether the sentences imposed upon the respondents achieve or are appropriate for those purposes, counsel is at liberty to advance argument with reference to the provisions contained in that Act and not with reference to evidence as to the practical implementation of those principles as experienced by the respondents subsequent to being sentenced as is attempted in this application.

[24] A further problem faced by the respondents in this application is that certain of the factual matter in their affidavits is in any event gainsaid by the Correctional Service officials.

[25] More fundamentally however, the respondents have not remotely brought themselves within the requisites governing applications under s 19(a).

[26] It follows that the application is to be dismissed.

#### Counsel's submissions

[27] Counsel for the State stressed that the deceased was a child of 17 years when he was arrested and that the courts have repeatedly stressed that violence against

women and children is an aggravating factor, given the prevalence of such crimes in our society.

[28] Counsel also argued that the assaults upon the deceased were ruthless and callously inflicted as the deceased was vulnerable – being handcuffed – and was at their mercy.

[29] Counsel also contended that *dolus eventualis* would not necessarily be a mitigating factor, as considered by the trial court, given the multiple injuries sustained by the deceased and his age and vulnerable position and that the trial court misdirected itself in that respect. Counsel also argued that the trial court overemphasised the respondents' interests and mitigating factors as opposed to the effects of the brutality of the murder and the impact upon the deceased's family and the aggravating features of the murder.

[30] Counsel for the respondents stressed that the State would need to show that the trial court failed to properly exercise its judicial discretion when sentencing the respondents and contended that the State had failed to do so. Counsel submitted that the rehabilitative and reformatory aspects of sentencing are to be emphasised given that the respondents are first offenders. Counsel accepted that the commission of murder with constructive intent is not necessarily a mitigating factor but submitted that the degree of culpability on the part of the respondents because of *dolus eventualis* was 'somewhat lower' than culpability with direct intent.

[31] Counsel submitted that the position of the respondents was not an aggravating factor but could instead serve as a mitigating factor as police officers 'are made to

make difficult choices in their attempt to fight crime'. Counsel submitted that the trial court achieved an appropriate balance in that regard.

[32] Counsel for the respondents concluded that the appeal should be dismissed because the State failed to show any tangible misdirection on the part of the trial court to justify any interference with the sentences of the respondents.

#### Principles applicable to sentencing

[33] This Court has repeatedly affirmed the fundamental principle that punishment is pre-eminently a matter for the discretion of a trial court. The powers of a court on appeal to interfere with sentencing are limited to instances where a trial court has not exercised its discretion judicially or properly. As was said by this Court in *S v Van Wyk*:<sup>3</sup>

' . . . This occurs when it has misdirected itself on facts material to sentencing or on legal principles relevant to sentencing. It will also be inferred that the trial Court acted unreasonably if "(t)here exists such a striking disparity between the sentences passed by the learned trial Judge and the sentences which this Court would have passed (Berliner's case supra at 200) - or, to pose the enquiry in the phraseology employed in other cases, whether the sentences appealed against appear to this Court to be so startlingly (*S v Ivanisevic and Another (supra at 575)*) or disturbingly (*S v Letsolo 1970 (3) SA 476 (A) at 477*) inappropriate - as to warrant interference with the exercise of the learned Judge's discretion regarding sentence".

*S v Whitehead 1970 (4) SA 424 (A) at 436D-E*. Compare also *S v Anderson 1964 (3) SA 494 (A)*; *S v Letsoko & Others 1964 (4) 1993 NR p448 ACKERMANN AJA SA 768 (A) at 777D-H*; *S v Ivanisevic & Another 1967 (4) SA 572 (A) at 575G-H* and *S v Rabie 1975 (4) SA 855 (A) at 857D-F*.'

---

<sup>3</sup> *S v Van Wyk 1993 NR 426 (SC) at 447H-448A*. See also *S v Shikunga & another 1997 NR 156 (SC) at 173*; *S v Schiefer 2017 (4) NR 1073 (SC) para 20*.

[34] Hoff JA in *Schiefer*, stressed in this context that<sup>4</sup> ‘where there is a “striking” or “startling” or “disturbing” disparity between the trial court’s sentence and that which an appellate court would have imposed, interference is justified . . . .’

[35] The primary ground of appeal relied upon in oral argument by counsel for the State is the finding by the trial court in para 34 of its judgment in that:

‘It is common practice that murder by *dolus eventualis* attracts a far lesser custodial sentence than murder *directus* for reasons of the circumstances under which the offence would have been committed.’

[36] This statement is to be read in context of a prior statement in para 28 of the judgment to this effect:

‘The killing of the deceased herein was not premeditated in that the accused persons did not set out hunting for the deceased in order to kill him but they are guilty by virtue of *dolus eventualis*.’

[37] Counsel for the respondents argued that the court’s statement in para 34 concerned the degree of moral blameworthiness and was not stated as a mitigating factor.

[38] Paragraph 34 in the context of the earlier statement and the judgment on sentencing considered as a whole, it is clear that the trial court viewed the fact of a murder conviction with constructive intent (*dolus eventualis*) as constituting a mitigating factor in sentencing the respondents by referring to this as the ‘common practice’ in respect of such convictions, attracting lesser sentences than those with direct intent.

---

<sup>4</sup> Paragraph 22. See also *S v Sadler* 2000(1) SACR 331 (SCA) 335a-f.

[39] By approaching sentencing for murder with constructive intent on the basis of a 'common practice' that murder with constructive intent would of itself justify a lesser sentence without regard to all the circumstances amounts to misdirection on the part of the trial court. It would depend upon the facts of each case whether the absence of direct intent (and not mere existence of *dolus eventualis*) would constitute a mitigating factor.

[40] The notion that a murder committed with *dolus eventualis* can of itself amount to a mitigating factor was emphatically dispelled by this Court in *S v Gariseb*<sup>5</sup> in following well established authority to that effect:<sup>6</sup>

'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.'

[41] In this matter, the absence of direct intent would need to be considered in the context of the several aggravating factors of this murder. There is in this matter likewise a plainly brutal and cruel attack over a sustained period where the respondents foresaw the death of the deceased as a clear possibility and reconciled themselves to that. These appalling features of the crime are compounded by the

---

<sup>5</sup> *S v Gariseb* 2016 (3) NR 613 (SC) para 8.

<sup>6</sup> *S v De Bruyn & 'n ander* 1968 (4) SA 498 (A) 505, in essence followed by the High Court in *S v Kashamba* CC 05/2008 8 April 2009 para 16; *S v Shaningua* [2017] NAHCMD 247 (31 August 2017) para 17; *S v Scott* [2020] NAHCMD 274 (8 July 2020) para 7.

further aggravating factors that the deceased was a 17 year old youth who was handcuffed and in their custody as police officers which also amounted to an egregious abuse of power.

[42] It is to be stressed that the deceased was a healthy 17 year old youth when the respondents arrested him on suspicion of involvement in the theft of a laptop. Within a matter of hours he was handed over by them to the Windhoek Police Station charge office in a comatose state and died nine days later in hospital, never recovering his consciousness as a result of the severe injuries he sustained.

[43] The respondents not only denied assaulting him and equally implausibly asserted that his injuries were self-inflicted or obtained after they had handed him over at the Windhoek Police Station. They also expressed no remorse for their actions in causing the deceased's unfortunate death.

[44] Whilst the trial court correctly stressed that police officers must be accountable for their actions, the court misdirected itself in regarding the presence of *dolus eventualis* of itself as a mitigating factor instead of rather approaching the enquiry by considering the absence of direct intent as a potential mitigating factor but only then with the need to have proper regard for all the circumstances of the crime before doing so – in this instance perpetuated by police officers upon a 17 year old youth in their custody in the context of these further aggravating features.

[45] *That* is the enquiry for the court to engage in and not merely regard that the existence of *dolus eventualis* as necessarily being a mitigating factor without taking

into account all the circumstances of the crime. By approaching sentencing in this way, the trial court misdirected itself.

[46] A further ground of appeal raised by the State is that the sentence of 14 years with four years suspended for the murder in question is so lenient that it induces a sense of shock. Whilst a misdirection has been established with regard to the trial court's approach to the effect of *dolus eventualis* upon sentencing, I am of the view that there is furthermore a striking or startling or disturbing disparity between the sentence imposed by the trial court and that which should have been imposed which also on this basis would justify interference by this Court. The trial court failed to accord the aggravating features of the murder perpetrated by the respondents' appropriate weight, resulting in this disparity.

[47] The State did not seek leave to appeal against the sentence imposed for attempting to defeat or obstruct the course of justice. It is likewise extremely lenient but it is not open to us to interfere with it in the absence of an appeal against it.

[48] Taking into account the respondents' mitigating factors and particularly being first time offenders, the cumulative impact of the aggravating features of this murder would require the imposition of a long term of imprisonment and of considerably greater duration than the effective ten year's imprisonment imposed upon them. Had I sat as a court of first instance, I would have imposed an effective term of 18 years' imprisonment without any suspension upon the respondents. This proposed sentence differs markedly from that imposed by the trial court rendering the trial court's sentence as strikingly inappropriate and thus justifying interference by this Court.



[49] In the result the following orders are made:

1. The application to place further evidence before this Court is dismissed.
2. The sentences imposed on first, second and third respondents for murder are set aside and replaced with the sentence of 18 years.
3. The sentence imposed on the respondents on count 3 is confirmed.
4. The sentences are backdated to 8 July 2020.

---

**SMUTS JA**

---

**DAMASEB DCJ**

---

**MAINGA JA**

## APPEARANCES

APPELLANT:

C K Lutibezi

Instructed by Office of the Prosecutor-  
General, Windhoek

RESPONDENT:

S Namandje (with K Amoomo)

Instructed by Kadhila Amoomo Legal  
Practitioners, Windhoek