CASE NO. CC 35/2009

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

BIZZAH GERHARDT TSAMASEB MOOTSENG **ACCUSED NO. 1**

GOTFRIED GARISEB **ACCUSED NO. 2**

CORAM: HOFF, J

Heard on: 28 September 2010

Delivered on: 29 September 2010

JUDGMENT

Sentence

HOFF, J: [1]Accused No. 1 was convicted on one count of murder, four counts of rape in contravention of section 2 (1)(a) of

the Combating of Rape Act, 8 of 2000 and on one count of robbery with aggravating circumstances.

Accused no. 2 was convicted on one count of robbery with aggravating circumstances.

[2]Accused no. 2 was 17 years old and accused no. 2 was 16 years old at the time of the commission of their respective offences. Both the accused persons are first offenders. It is furthermore not disputed that both accused persons prior to the commission of the offences had consumed strong liquor and smoked cannabis.

[3]In respect of accused no. 1 a report by a social worker who was handed up by agreement between counsel appearing on behalf of accused no. 1 and counsel representing the State.

[4]It appears from this report which had been drawn up in anticipation of a bail application that the accused grew up in a relative dysfunctional family. His father is a very violent and aggressive person. His mother is mentally unstable and chronic on medication. When medication is not available she becomes confused and out of touch with reality and not always in a position to distinguish between right or wrong herself. In such a condition she is obviously not in a position to guide the accused to distinguish between right and wrong.

Accused no. 1 attended school up to Grade 9 which he did not complete since he decided himself not to attend school anymore. He socialized with

wrong friends and abused alcohol and drugs. On several occasions he stole things which he sold to buy drugs. The accused was screened by the social worker for 6 different cases against him including the 3 he had been convicted of. According to the evaluation by the social worker he is a habitual offender with no regard to the property of others or their well-being. The accused himself is very aggressive at times and unpredictable. In the professional opinion of the social worker *"the accused is a danger to his community and the lives of other people"*. It was recommended that the accused should remain in custody.

[5]This Court in considering an appropriate sentence must have regard to the *"triad" (S v Zinn 1969 (2) SA 537 (A) at 540 G)* consisting of the crime, the offender, and the interest of society. To these requirements the mercy factor must be added (*S v Rabie 1975 (4) SA 855 (A) at 861 C – D).*

In *Rabie (supra)* the approach to sentencing was explained as follows at *866 A – C:*

> "A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and interests of society which his task and objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with humane and compassionate understanding of the human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."

[6]The objects of punishment referred to which come into play in the consideration of an appropriate sentence are deterrence, prevention, rehabilitation and retribution.

[7]The mitigating factors that this court takes into account are the following: the youthfulness of accused no. 1; the fact that he was a first offender, the fact that strong liquor and cannabis had been used prior to the commission of the offences and the fact that accused pleaded guilty to some of the offences.

[8] It is trite that being a first offender is mitigating factor and so is youthfulness. The first offender is treated with mitigation because the offender may still be rehabilitative and not likely to repeat the crime.

Regarding youthfulness it was held in *S v Machase and Others 1991 (2) SACR 308 (A) at 318 h – i* that a court should not destroy the potentially healthy development of a young offender into an adult by imposing a very long term of imprisonment.

[10]It must however be emphasized that youthfulness and/or being a first offender do not guarantee non custodial sentences. Each case must be considered on its own merits.

In *S v Lehnberg en ‘n Ander 1975 (4) SA 553 (A) Rumpff JA said at 561 G – H* that a teenager is to be regarded as *prima facie* immature unless it appears that the viciousness of his deed rules out immaturity and in *S v Dlamini 1991 (4) SACR 655 (A) at 666 e – f* the court held that though at the time of the murder the accused was still in his teens, his history and nature of the crime,

however, showed that he was not an immature youth, but a man seasoned in crime.

[11]Although the State did not prove any previous convictions against accused no. 1 it is clear from the evidence on record that he had previously been detained by the police. Accused no. 1 himself testified that on the night of the stabbing they had been on their way to Narraville police station to retrieve their property which was still with the police after their release from detention. It was also mentioned in mitigation of sentence on behalf of accused no. 1 that he was unemployed since his previous employer dismissed him because he was in custody on a charge of theft. Furthermore the social worker in her report stated that the accused was screened by her for cases involving *inter alia* possession of cannabis (CR 10/08/07); housebreaking with intent to steal and theft (CR 98/08/07); and escaping from custody (CR 31/10/2008).
This is an indication of the character of the accused no. 1 and that he is less open to rehabilitation.

12]It is trite law that in crimes of violence (e.g. murder) the factors which may aggravate the crime include the degree and extent of the violence used, the nature of the weapon, the brutality and cruelness of the attack, the nature and character of the victim including whether the victim was unarmed or helpless.
(*See S v Qamata 1977 (1) SACR 479 ECD at 481 h; S v Mootseng en 'n Ander 1994 (1) 591 SACR (A) at 595 h – i).*

[13]This Court has indicated yesterday that a large amount of force was used when the accused stabbed the deceased and this in my view is also an indication of the viciousness of the attack on the deceased who was unarmed at that stage. This is taken into account as an aggravating factor. I am of the view that in the present case the youthfulness of accused no. 1 should not pay a major role in considering an appropriate sentence although this Court takes it into account as one of the considerations.

[14]I am accordingly of the view having regard to the circumstances under which the murder was committed and the other considerations referred to *(supra*) that accused no. 1 cannot escape a term of imprisonment.

[15]He is a danger to community as confirmed by the social worker report and I am of the view that it would be in the interests of society if he is removed from society for quite a number of years.

[16]Regarding the four counts of rape, in terms of the section 3 (1) of the Rape Act 8 of 2000 this Court must in the light of the circumstances under which the offences had been committed sentence accused person on each count to imprisonment for a period of not less than 15 years. This however in the particular circumstances of this case is subject to the provisions of section (3) ss (3).

[17]Rape is a serious and heinous offence. In *N v T 1994 (1) SA 862 (C) at 862 G – H Williamson J* described rape as follows:

> "Rape is a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of his victims …"

and in *S v C 1996 (2) SACR 181 (C) at 186 d – e Van Deventer J and Prest AJ* expressed themselves as follows on the crime of rape and its consequences:

> "Rape is regarded by society as one of the most heinous of crimes, and rightly so. A rapist does not murder his victim – he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life – a fate often worse than loss of life."

[18]I fully endorse this view as well as the view that society demands protection in the form of deterrent sentences from the Courts against such atrocious crimes.

[19]The social worker in her report stated that the complainant is living in fear and is trying to heal her psychological wounds.

[20]The complainant's uncontested evidence was that her ordeal lasted about one hour during which she was raped four times per anum by accused no. 1. Evidence led by the State was that the complainant was in such a state of shock that she refused to speak to anyone shortly after the incident.

One of the witnesses was only able to get the complainant to relate to her what had happened about two weeks after the event.

[21]In terms of section 3 (3) of the Combating of Rape Act the minimum sentences prescribed in subsection (1) shall not be applicable in respect of a convicted person who was under the age of eighteen years at the time of the commission of the rape and the court may in such circumstances impose any appropriate sentence.

[22]I must hasten to add that this section gives a Court a discretion to impose any appropriate sentence, which sentence may, depending on the circumstances of the case, exceed the minimum sentences prescribed in section 3 (1). Conversely, again depending on the circumstances of a particular case, a Court may impose a sentence less than the prescribed minimum.

[23]Accused no. 1 was born on 25 December 1990 and the rape was committed in the early hours of 1 November 2008. The accused no. 1 was thus at the commission of the offence of rape under the age of 18 and the minimum sentences prescribed in subsection (1) is therefore not applicable. Had accused no. 1 been above the age of 18 years he would have faced a period of imprisonment of not less than 15 years in respect of each count of rape.

[24]I agree with the sentiments expressed in *S v Iishuku Amunyela Case No. CC 01/2010* and unreported judgment of this Court as per Liebenberg J where at p. 5 the following appears:

> "Although in principle I agree with the submission that the youth cannot always hide behind their age when it comes to the commission of serious crime, it must be emphasised that it should not be stated as a general principle as each case must be considered on its own merits and where in one case the circumstances would justify a sentence of direct imprisonment for a young offender, it might in another case, be completely inappropriate and intolerable."

[25]I am of the view that in respect of accused no. 1 and regarding the charges of rape a custodial sentence is justified under the circumstances.

[25]Regarding the conviction of robbery with aggravating circumstances it w6as submitted on behalf of accused no .2 that he was 16 years old at the time of the commission of the offence, that he passed Grade 8 at Kuisebmond Secondary School in Walvis Bay, that he is remorseful and that he gave his co-operation to the police. It was further submitted in mitigation that he acted on the spur of the moment, there was no prior planning and that he was at the time of the commission of the crime under the influence of alcohol and drugs. Furthermore his participation in the crime consisted in him collecting goods in the flat and the accepted evidence is that he never threatened complainant or wielded a knife. Accused no. 2 has been in detention since the day of his arrest on 1 November 2008 and is now in custody just more than a month shy of two years.

[27]It must further be mentioned that most of the stolen goods had been recovered by the owner except an amount of N$2 100.00 in cash. It appears from Annexure A annexed to the charge of robbery that quite a number of goods had been stolen, however no evidence was led regarding the value of those stolen goods. What was undisputed was that the wallet contained an amount of N$3 500.00 in cash of which N$1 400.00 was recovered.

[28]I have already referred to the personal circumstances in respect of accused no. 1.

This Court will take into account the mitigating circumstances presented on behalf of accused no. 2 and will also consider those mitigating circumstances presented on behalf of accused no. 1.

I am of the view that in respect of charge of robbery a non-custodial sentence would serve the objects of punishment referred to *(supra)* and that it would not be in the interest of society to sentence them to a term of imprisonment.

[29]This Court is of the view that the following sentences are appropriate sentences in respect of the offences the accused persons had been convicted of:

In respect of Accused No. 1

Count 1: 20 years imprisonment

Count 2: 10 years imprisonment

Count 4: 10 years imprisonment

Count 5: 10 years imprisonment

Count 6: 10 years imprisonment

Count 12: 5 years imprisonment suspended in toto for a period of 3 years on condition the accused is not convicted of the crime of robbery with aggravating circumstances committed during the period of suspension.

The Court orders that 5 years imprisonment in respect of Count 2 and the sentences in respect of Counts 4, 5 and 6 should run concurrently with the sentence imposed in Count 1.

In respect of Accused No. 2

Count 12: Robbery with aggravating circumstances

5 years imprisonment suspended in toto for a period of 3 years on condition the accused is not convicted of the crime of robbery with aggravating circumstances committed during the period of suspension.

HOFF, J

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