REPUBLIC OF NAMIBIA

CASE NO. CC 24/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NAHSON MUVANGUA

APPLICANT

and

THE STATE

RESPONDENT

CORAM: **SHIVUTE, J**

Heard on: 2011 June 06

Delivered on: 2011 July 05

RULING ON APPLICATION FOR LEAVE TO APPEAL

SHIVUTE, J: [1] The Applicant was convicted of murder with direct intent on 06 December 2010 and sentenced to 30 years' imprisonment. The Applicant is now seeking leave to appeal against sentence. The grounds of appeal are as follows:

> *2.1 "The honourable judge erred in law and/or on the facts in failing to strike a balance between the seriousness of the offence and society's interest to demand that courts impose harsh sentences.*
>
> *2.2 The honourable judge imposed a sentence on the applicant which is bound to take Applicant to breaking down.*
>
> *2.3 The honourable judge imposed a sentence, which is not indicative of the fact that the court took into consideration the period of 4 years of imprisonment the applicant was exposed to pending finalisation of his trial.*
>
> *2.4 The honourable judge erred in the law and/or on the facts in imposing a sentence which is totally inappropriate, in that it was shockingly severe.*
>
> *2.5 The honourable judge erred in the law and/or on the facts in totally over-emphasizing the retributive aspect of punishment at the expense of important elements of deterrence and reformation.*

[2] The Applicant appeared in person. Mr Nduna appeared on behalf of the Respondent.

[3] The Applicant in his heads of argument submitted that the sentence of 30 years' imprisonment is severe, considering that he is a first offender. His personal circumstances should be considered. He further argued that

he committed the offence because he was provoked by the deceased and he was also under the influence of liquor, therefore the court should reduce the sentence.

[4] Relying on the matter of *R v Müller* 1957 (4) SA "761 (A) at 765", the Applicant argued that the Court "should not allow its own view to cloud its better judgment about the prospects of the appeal court coming to a different conclusion. It was further the Applicant's argument that all that was necessary was that there should be a reasonable prospect that the appeal may succeed and the trial court need not be certain that the appeal court would come to another view. He also referred this Court in this regard to *S v Ackermann and Another* 1973 (1) SA 767 (G & H).

[5] Although the Applicant had referred to *R v Müller* 1957 (4) SA 761 at 765, the volume referred to unfortunately does not contain pages 761 – 765. The last page of that law report ends at 743. However, the case of *R v Müller* in that law report the citation is 1957 (4) SA 300 [AD] the following was stated:

> *"In determining whether or not to grant leave to appeal in a criminal case the trial judge must, both in relation to questions of fact and of law, direct himself specifically to the enquiry of whether there is a reasonable prospect that the judges of appeal will take a different view. In borderline cases the gravity of the crime and the consequences to the Applicant are doubtless elements to be taken into account, but even in capital cases the primary consideration for decision is whether or not there is a reasonable prospects of success."*

[6] In his written heads of argument, the Applicant correctly stated that the general principles of sentencing were set out in a nutshell in *S v Rabie* 1975 (4) SA 855 S (AD) at 862 as follows:

> *"Punishment should fit the criminal as well as the crime, be fair to society and blended with a measure of mercy according to the circumstances."*

This Court fully agrees with the general principles of sentencing.

[7] The Applicant further stated that the interest of society cannot be served by disregarding the interest of the convict. In deciding what a proper sentence would be I have considered a triad of factors namely, the offender the crime and the interest of society. I also had regard to the objectives of punishment, namely prevention, deterrence, rehabilitation and retribution. Although I had endeavoured to strike a balance between these factors, the circumstances of the case dictated that one or more of the factors must be emphasized at the expense of the others. The Applicant submitted again that the Courts should be very careful not to expose valuable human material to dangers, but rather to reform them and to succeed in that it requires a moderate sentence. He referred this Court to the matter of S v Kamati (NHC) unreported delivered on 30 January 2001.

[8] When imposing sentence on this Applicant I considered him to be a danger to the society. I arrived at this conclusion by considering the fact

that the Applicant stabbed the deceased 8 times and he further prevented the witnesses to enter the house so as to possibly rescue the deceased.

[9] The Applicant argued that sentence may fully be suspended for rape, robbery or murder. He went on to state that the fact that provision is made for a term of imprisonment (and no fine) does not mean that section 297 of Act 1977 (Act 51 of 1977) is not applicable. He referred the Court to the case of *S v Saunders* 1984 (2) SA 102 (T).

I fully agree with the legal principles stated in his heads of argument, but the matter referred to is distinguishable from the present case. In the Saunders case *supra* the Appellant an insolvent was convicted of a contravention of section 137 (a) of the Insolvency Act 24 of 1936, obtaining credit to an amount exceeding ten pounds whilst his estate was still under sequestration without previously informing the person from whom he had obtained such credit that he was an insolvent, and he did not prove that such person had knowledge of that fact. The Appellant was sentenced to 12 months' imprisonment part of which was suspended on certain conditions. The offence committed in the *Saunders* matter has no provision of a fine. As I earlier indicated that the case referred to above is distinguishable from the present case. The present case is serious and a precious life was lost. In these circumstances, it would be entirely inappropriate to impose a suspended sentence.

[10] The Applicant submitted that there were several options of punishment namely, suspended sentence coupled with a fine and

community service. He referred the court to matters of *S v Potgieter* 1994 (1) SA SACR 61 (A) and *S v Larsen* 1994 (2) SACR 149 (A). I have no quarrel with the legal principles set out in the authorities cited by the Applicant. However, I am of the view that the present case does not warrant an option of a fine or community service. Although the cases referred to by the Applicant are cases of murder, their facts and the circumstances in which the crimes were committed are different from the present case.

[11] The accused finally argued that the fact of possible pardon and parole should not be taken into account in imposing sentences. He referred the Court to several authorities. When this Court imposed sentence on the Applicant it never took into consideration the possibility of the Applicant being pardoned or released on parole. However, I have considered the time the Applicant spent in custody awaiting his trial as a factor in his favour.

[12] On the other hand counsel for the Respondent argued that the successful outcome for an application for leave to appeal is premised on there being prospects of success on appeal. He referred this court to several authorities in this regard.

[13] As regards the basis of this application, counsel for the Respondent argued that the Applicant seemed to suggest that the sentence imposed by the Court was disproportionately severe. The appropriate question therefore being whether the sentence imposed induces a sense of shock.

He responded to this question by referring the Court to the matter of *S v Tjiho* 1991 NR 361 (HC) at 367 where it was stated as follows:

"...According to our law, sentences are individualised and regard is had to personal circumstances of the offender and the nature of the crime. Consequently, sentences differ from one case to the next. There is a certain virtue in uniformity but in the case of murder the only principle which is uniform to all cases is that the Court regard murder as the ultimate crime deserving a severe punishment."

[14] In connection with the second ground of appeal by the Applicant that the severity of the sentence is aimed at breaking down his spirit, counsel for the Respondent argued that sight must not be lost of extremely aggravating features of this case which are common cause. Counsel for the Respondent referred the Court to some authorities whereby accused persons convicted of murder with direct intent have been sentenced to terms of imprisonment ranging from 30 to 35 years.

[15] On the ground that the Court over-emphasized the deterrent aspect of punishment at the expense of the important elements of retribution and reformation, counsel for the Respondent rightly submitted that this Court properly exercised its judicial discretion as regards the weighing of the mitigating and aggravating features, in arriving at the appropriate sentence. He further argued that violence against women had been on the increase over the years, a feature which had gained notoriety and

whose prevalence has reached epidemic proportions and has confronted our Courts on countless previous occasions. Given that scenario, it is inevitable that the emphasis on deterrence is inescapable with regard to sentence against an accused, such as the Applicant, who has brutally murdered the deceased (a woman).

[16] In an unreported judgment of this Court in the matter of *Hendrik Jason v The State* CA NO. 11/95 delivered on 18 March 1996 O'Linn J at p 5 of the cyclostyled judgment stated the following:

> *"The fact of the matter is when, a particular point in time in society and that includes a democratic society, there is an escalation of crime and as in this case an escalation of crimes of violence, then, and so it has been held repeatedly in the Namibian High Court, it is justified to give greater emphasis to the deterrence aim of sentencing ..."*

I respectfully agree with this dictum.

[17] Having stated the arguments advanced by the Applicant and Counsel for the Respondent, I wish to state that in an application of this nature, the Applicant must satisfy the Court that he or she has a reasonable prospect of success on appeal. See *S v Nowaseb* 2007 (2) NR 640.

[18] The Applicant stated that the sentence imposed by this Court is shocking or inappropriate. In the matter of *Harry De Klerk v The State SA*

18/2003, unreported, delivered on 08 December 2006 at p 4 it was stated as follows:.

> *"...[A] sentence is not inappropriate simply because a court of appeal considers that the imposition of another type of punishment might also have been appropriate in the circumstances of the case. It is also not inappropriate because the court of appeal would have imposed a slightly different sentence had the matter been called before it in the first instance. It is inevitable ... that different people will take different views on what an appropriate punishment would be in any particular case."*

[19] In sentencing the Applicant I gave due consideration to all the personal circumstances of the Applicant placed before me in mitigation on his behalf. I have also considered the arguments advanced by Counsel for the State, the law applicable to sentencing, the seriousness of the offence, the circumstances regarding this case and the prevalence of violence against women and the period the Applicant had been in custody awaiting trial as earlier stated. Having considered all the factors as mentioned above, I then sentenced the Applicant to 30 years' imprisonment because I considered it to be an appropriate sentence in the circumstances.

[20] Sentencing is a matter for the discretion of the court and I wish to quote the dictum of Levy J in *S v Tjiho* (*supra*) at 364 G-H where it was stated:

> *"This discretion is a judicial discretion and must be exercised in accordance with judicial principles. Should the trial Court fail to do so, the appeal Court is entitled to, not obliged to interfere with the sentence. Where justice requires it, appeal Courts will interfere, but short of this, Courts of appeal are careful not to erode the discretion accorded to the trial Court as such erosion could undermine the administration of justice. Conscious of the duty to respect the trial Court's discretion, appeal Courts have over the years laid down guidelines which will justify such interference."*

[21] For the foregoing reasons I am of the view that the Applicant has no reasonable prospect of success on appeal against sentence because the sentence imposed on the Applicant does not induce a sense of shock and it is not inappropriate.

[22] In the result, I decline to grant leave to appeal.

[23] Furthermore seeing that the Applicant argued the application in person, he is informed that if he is not satisfied with the decision of this Court he has a right to petition the Chief Justice within a period of 21 days by submitting his Petition for leave to appeal. Upon petitioning the Chief Justice, he must give written notice to the Registrar that he has done so.

SHIVUTE, J

Appearance for the parties:

For the Respondent:	**Mr Nduna**
Instructed by:	**Office of the Prosecutor-General**
For the Applicant:	**In Person**