CASE NO.: CC 10/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

ERNESTUS AIBEB

CORAM: LIEBENBERG, J.

Heard on: 15 November 2011
Delivered on: 21 November 2011

SENTENCE

LIEBENBERG, J.: [1] The accused, a forty-one year old male, has been convicted of the murder of his girlfriend B U-K (B); two children, L G, a boy aged 3 years; and Simon N G, a boy aged 4 months. He also stands convicted on charges of attempted murder, housebreaking with intent to steal and theft, arson and attempting to defeat or obstruct the course of justice. These charges all arise from the same incident which happened in the town of Outjo during the early morning hours of 4 May 2009.

[2] The circumstances leading up to the tragic and horrific deaths of B and

these young children are fully set out in the s. 112 (2) statement[1] prepared by Mr *Bondai*, representing the accused, which was handed in to Court. I do not intend to traverse these facts in any detail in this judgment. What is of relevance from the statement for purposes of sentence, is that five days prior to the incident B, for reasons unknown to the accused, had moved out of the accused's parents' house where they had been living together. On the Friday B went to the house of her sister, Mrs Gabathuler, which is also situated in Outjo. Mrs Gabathuler, together with her husband, were working elsewhere over the weekend and had left their children in the care of a cousin, Ms Buthelezi Aibes, who had been living with the family for some time. In his plea explanation the accused said that his efforts during the course of the weekend to convince B to move back to his parents' house, were in vain. On the Saturday the accused went to the Gabathuler house where he found Ms Aibes, the complainant in the attempted murder charge, together with B, talking to an unknown person over the phone. They were not willing to disclose the identity of this person to him, which raised suspicion with him that B might secretly be seeing someone else. He thereafter returned home.

[3] The following day during the early morning hours he returned to the house to check and verify his suspicions. He gained entry into the house through an open bedroom window, but in the process woke up a child sleeping in the room, who started screaming. B then entered the room and when she started screaming, the accused stabbed her several times with a knife, resulting in her death.

1 Act 51 of 1977

[4] According to the post-mortem examination report prepared by a certain Dr Yero, a forensic specialist, the deceased, B, died of stab wounds to the chest. The chief post-mortem findings were: Abrasions to the trunk; cut wounds on the head, right hand and trunk; perforating wounds on the posterior aspect of the thorax, perforating the lungs; and haemothorax. These injuries are shown on the diagramme annexed to the report and are twenty-one (21) in number, positioned on the head and anterior as well as posterior aspects of the body. Of these, eighteen (18) are cut/stab wounds while three (3) are penetrating wounds, the latter resulting in death.

[5] After stabbing B the accused then stabbed Ms Buthelezi Aibes, the only other adult in the house, several times with a knife with the intention to kill her. The reason for stabbing her was because the accused suspected her of conniving with B, or encouraging her, to be unfaithful to him. The accused did not dispute that Ms Aibes, who was pregnant at the time, miscarried as a result of the assault. From a medical report (J88) handed in by agreement and which relates to Ms Aibes's admission to the Outjo State Hospital that day, it is plain that she sustained ten (10) open wounds on her upper body, of which one penetrated the right lung causing internal bleeding. The report further reflects that one wound penetrated the womb and terminated the six months pregnancy. She was transferred to Katutura State Hospital two days later where she was seen by a certain Dr Mureko, and from the medical report compiled by him and handed into evidence by agreement, it shows that the victim was stabbed four (4) times on the chest; twice on the left upper leg; once on the back of the neck; and thrice on the back. In her testimony Ms Aibes said she was in the Intensive Care Unit for three months and was a further one month in hospital.

[6] After stabbing the two victims the accused thereafter collected the storeroom keys from the kitchen and then unlawfully entered the storeroom with intent to steal petrol from the generator stored inside. He doused the sleeves of his jacket with petrol in the generator's petrol tank, whereafter he returned to the house and set the jacket and the house on fire. Whilst so doing, he appreciated the fact that there were two young children inside the house, unable to escape from the fire. He further knew, or at least foresaw the possibility, that his conduct would result in the death of the two children, who were the only persons remaining inside the house after B had moved outside up to the fence where she was later found dead; while Ms Aibes fled the house and went to the neighbours in search of help.

[7] Post-mortem examinations were performed on the bodies of Leonndele and Simon and the findings are contained in the reports handed in by agreement. Both bodies were charred and the chief post-mortem findings in respect of both were: Thermal skull fracture(s); loss of lower and upper limbs due to combustion; and tar (soot) in the trachea. In photo 16 of the photo plan, compiled by Sergeant Hoaeb and handed into evidence, is depicted the body of a child (apparently that of Leonndele) lying on the remains of a burnt out mattress; whilst on photos 17 and 18 is depicted the remains of an incinerated body, claimed to be that of baby Simon.

[8] It is further evident from the photo plan that except for the structure itself, the entire house with its contents was completely destroyed by the fire. Its owner, Mr Gabathuler, who is also the father of the deceased children, testified that although they had their property insured, they were subsequently found to be under-insured, as a result of which, they suffered a monetary loss of approximately N$200 000.

[9] The prosecutor, Mr *Wamambo*, called the parents of the deceased children, Mr Urs Gabathuler and his wife, Mrs Anastasia Gabathuler, and the victim of the assault, Ms Aibes, in aggravation of sentence. Their testimonies, particularly, that of Mrs Gabathuler who has not only lost her two children, but also her younger sister at the hands of the accused, were filled with emotion and the witnesses were tearful. It is common cause that the accused had been working for the Gabathulers' building contracting company in a supervising capacity and that he, according to Mrs Gabathuler, was received in their house as if he was a brother of the family. Prior to the incident they had a very good relationship and to her it appeared that the accused was fond of her children as he treated them like they were his own. Understandably, that raises more questions in her mind as to why the accused, against this background, decided to kill them by setting the house alight with the children inside. As for Ms Aibes, she testified that she was staying with the Gabathuler family since the birth of their first born and that she was severely traumatised by their deaths – to the extent that she has lost interest in life and has become suicidal. She miscarried (according to her at seven months) as a result of the stab wound to the womb and added that she had undergone an operation where after she is unable to have further children.

[10] Compared to Mr Gabathuler, who appeared to be at a loss for words when asked how he felt about the whole incident and how it impacted on his and his family's lives, said that he has no feelings of hatred towards the accused, who, according to him, had to remain in prison. Mrs Gabathuler felt differently and through her tears narrated to the Court that she had longed for children for two years before she fell pregnant with their first child; now both her children died at the hands of the person who was like a brother to her; whom she now hates for what he has done to her sister and children. She said she has become "sick" – that is psychologically – and can no longer concentrate on her work – and that she is unable to explain the sense of living anymore. The witnesses were in agreement that the accused should be given a custodial sentence.

[11] I pause here to observe that according to Mr Gabathuler they have a new born baby in the house and one can only hope that this child would give new meaning to the lives of these people, who, as a result of their terrible loss and suffering, seemed to have lost interest in life itself; and who lack courage to continue with their respective lives since their ordeal. Judging from the raw emotion exhibited by the witnesses in Court, it would appear to me that there is a need for psychological counselling, and it would be prudent to set in motion as soon as it is reasonably possible, in conjunction with the Ministry of Health and Social Services, a process of psychological assistance and guidance to the Gabathuler family. Without that, they might never be able to fully reclaim their lives and could endure emotional suffering for an unnecessary period of time.

[12] At this juncture I deem it necessary to state that, from a reading of this judgment on sentence, it might appear that I have become emotionally involved having heard the testimony of the parents of the victims and Ms Aibes, which may create the perception with the reader that objectivity has been lost and that there is an over-emphasis of the interests of society at the expense of the interests of the accused person. I am very much alive to the need for a sentencing court not to punish in anger, but to maintain its objectivity throughout, especially when sentencing, and for the Court to adhere to its duty to guarantee a fair trial for the accused person. However, the Court cannot ignore the evidence presented in aggravation of sentence, which includes the testimony of the victims; who are entitled to put before the Court their feelings and how the offences – committed by the accused and now stands to be sentenced – impacted on their lives; for that is one of the many factors the Court must take into consideration when deciding what sentence(s), in the circumstances of this case, would be appropriate. These persons are part of society and have a legitimate right to be heard, for they have a direct interest in the outcome of these proceedings. It does not mean to say that the courts must give in to public expectation, for public expectation

is not synonymous with public interest, and the courts only have a duty to serve the latter.[2]

[13] No evidence was led in mitigation and the accused's personal circumstances were placed before the Court from the Bar. He is single with two children, the oldest already being an adult while the youngest is still of school going age i.e. fourteen years, and lives with his mother in Otjiwarongo. The accused made financial contributions towards the maintenance of his youngest child. The accused progressed up to grade 9 at school and was gainfully employed as supervisor with the building contractor company of the Gabathulers. He is not a first offender and has a previous conviction of assault (common) for which he paid an admission of guilt on 08 February 1996, some thirteen years prior to the commission of the present offences. It was at first submitted by defence counsel that this Court should not consider this to be a previous conviction because it was a minor offence committed long ago, and that a considerable period of time has lapsed since. Counsel then contended that if the Court were to take it to be a previous conviction, then little weight should be given thereto. The accused was arrested on the 4th of May 2009 and has remained in pre-trial custody up until now – a period of slightly over thirty months. It was argued that a further factor that should weigh in favour of the accused is that he did not waste the Court's time and has from the outset intended pleaded guilty to all the charges – by so doing, he spared the witnesses the agony of having to give evidence and to relive the trauma when narrating to the Court what had happened. Coupled with the apologies extended to the victims in Court by defence counsel on behalf of the accused, this, it was said, should be seen as contrition on the accused's part. His continued incarceration prevented the accused from doing so sooner. As for the motive behind the killings, it was submitted that the accused was driven by jealousy which increased when B moved to the house of the Gabathuler family the previous Friday. It is conceded that the accused did not have any proof that she had been cheating on him by seeing someone behind his back, and the reason why he went to the house after midnight, was to see whether she was with someone. As it turned out, there was no one with her. Accused had been visiting B at the house on the Saturday and came upon B and Ms Aibes speaking on the phone with an unknown person. He did not address the issue at the time and later returned home – only to come back late at night or early the next morning. It was argued that the accused was frustrated by B's refusal to move back to his parents' place which, together with jealousy, triggered him and led to the commission of the offences.

[14] It must be said that, from the evidence of Ms Aibes, the reason why B moved to the house of the Gabathulers that Friday, was to assist with the children in the absence of their parents and not because she planned on leaving the accused or to enable her to secretly meet up with someone else.

2 *S v Mhlakaza and Another,* 1997 (1) SACR 515 (SCA); *S v Makwanyane and Another,* 1995 (2) SACR 1 (CC); 1995 (3) SA 391 (CC) at 431C-D

Her testimony was not challenged on this point and there is simply nothing showing that there was reason for the accused to become suspicious about his love relationship with B. Neither is there a suggestion from his side that he discussed the suspected unfaithfulness with B and all that was said is that he subjectively believed that she was having an affair with someone and that the accused tried to convince her to move back to him. In the light thereof, the motive proffered by the accused for the killing of B and the stabbing of Ms Aibes, is therefore baseless. It was further conceded that the motive would not have explained the accused's subsequent actions to burn down the house, knowing that the minor children were still inside, and it was submitted that the accused was so engulfed by jealousy that he became unstoppable, acting "automatically".

[15] To counter the possibility that the accused, when committing the offences, might have lacked the required criminal capacity, or have acted with diminished capacity, the Court, at the pre-trial stage, directed that the accused be evaluated in terms of sections 77 and 78 of the Criminal Procedure Act and reported on in terms of section 79 of the Act. In the report compiled by Dr Seddie Wilfred Alibusa, a Consultant Psychiatrist, the accused was found to be capable of understanding the proceedings and able to put up a proper defence; and does not suffer from any illness. At the time of the commission of the offences, he was not mentally ill and was capable of appreciating the wrongfulness of his actions, in accordance of which appreciation, he acted. Emanating from the evaluation report – which was not disputed and handed in by agreement – is the accused's admission that *"he could not recollect details of the entire incident and said it was not pre-arranged and had picked the knife from home"* (emphasis mine). This means that the accused arrived at the house already armed with a knife, and judging from the photo taken of the knife contained in the photo plan[3]; this undoubtedly was a lethal weapon.

[16] Mr *Wamambo* pointed out that it would not be correct to say that the

3 Photo No. 31

accused, from the outset, intended pleading guilty, as he in fact pleaded *not guilty* during the section 119 proceedings. The submission has merit, because from the record of proceedings, conducted in the Magistrate's Court at Outjo on 27 August 2009, the accused pleaded *not guilty* to all seven charges put to him – the very same charges he now stands convicted of. Subsequently, the accused's reply to the State's Pre-Trial Memorandum dated 23 March 2010 also reflects that the accused would plead *not guilty* to all the charges. Hence, it would not be correct to say that the accused, all along, appreciated the wrongfulness of his actions and acted accordingly by pleading guilty – an indication of remorse.

[17] In this regard it is apposite to re-state what has been said in *S v Landau*[4] about the court's view when an accused chooses to plead guilty and at 678a-c the following is stated:

> *"Courts often see as significant the fact that an accused chooses to 'plead guilty'. This is sometimes regarded as an expression on the part of the accused of genuine co-operation, remorse, and a desire not to 'waste the time of the court' in defending the indefensible. In certain instances a plea of guilty may indeed be a factor which can and should be taken into account in favour of an accused in mitigation of sentence. However, where it is clear to an accused that the 'writing is on the wall' and that he has no viable defence, the mere fact that he then pleads guilty in the hope of being able to gain some advantage from that conduct should not receive much weight in mitigation of sense unless accompanied by genuine and demonstrable expression of*

4 2000 (2) SACR 673 (WLD)

remorse, which was absent in casu." (emphasis provided)

[18] Turning to the present facts, can it be said that the accused's pleas of guilty should be seen as a sign of genuine remorse, coupled with the intention of not wasting the Court's time; or is it rather a matter of the accused seeing that he has no viable defence and hopes to gain some advantage by pleading guilty? Bearing in mind that Ms Aibes survived the attack and during a trial would have been able to implicate the accused in circumstances where it does not *prima facie* appear that he could proffer a viable defence on any of the charges preferred against him, it seems to me that this is not a case where his pleas of guilty should be considered to be a factor in his favour in mitigation of sentence. However, it is correct that by so doing, he did save the witness Aibes the agony of having to testify about her horrendous experience that night and to relive the whole incident.

[19] In the oft-quoted case of *S v Seegers*[5] it has been said that in order for penitence to be a valid consideration, it must be sincere and for that to be determined, the accused must take the court fully into his confidence by giving evidence to that effect. The accused *in casu* did not give evidence in mitigation and left it for his counsel to convey his remorse from the Bar. Some attempt was made to point out that the accused has requested his family to convey, on his behalf, his remorse to the victims for what he has done; but this, according to the witnesses, did not happen – neither did the accused call the person(s) whom he requested to do so, to confirm his contention. Against this backdrop, I am unable to determine the genuineness

5 1970 (2) SA 506 (A) at 511G-H

of the accused's alleged contrition, and in my view, little weight can be given thereto.

[20] In the South African context, s. 271A of the Criminal Procedure Act provides that certain convictions fall away as previous convictions after expiration of ten years[6]; however, this is not applicable to our jurisdiction where the courts are entitled to consider all previous convictions, irrespective of the time lapse after the date of conviction. The sentencing court may, however, decide the weight to be given to a previous conviction; which mainly would be determined by (i) the nature and seriousness of the offence previously committed and whether or not it is relevant to the offence for which the accused stands to be sentenced; and (ii) the period of time that lapsed between the commission of the offences, respectively. Whereas in this instance the accused paid an admission of guilt in the amount of N$100 – which does not suggest that the assault was at all serious in nature – some thirteen years prior to the commission of the present offences, I am not in agreement with State counsel's submission that it shows that the accused is "inclined to resort to violence". At most it shows that the accused is indeed not a first offender, but certainly not that he is inclined to resort to violence because of the offences subsequently committed. In view of the trivial nature of the offence previously committed and the time lapse in between, it is my considered opinion that the Court should give little weight to the previous conviction proved against the accused, and therefore, he should be on the same basis as a first offender.

6 Inserted by s. 12 of Act No. 5 of 1991 and amended by s. 6 (b) of Act No. 4 of 1992

[21] The offences committed by the accused are indeed very serious and I can hardly imagine something more horrid happening to human beings – more so, when the innocent victims are defenceless and helpless women and infants. In respect of counts 1 and 4, the accused stabbed his victims twenty-one and ten times, respectively, on their upper bodies with fatal and near fatal consequences. This in itself is indicative of the brutality of the attacks. When deciding to go to the house where they were, he had armed himself in advance with the knife – apparently expecting to find the person with whom his girlfriend had a suspected affair in the house. When it did not turn out to be the case, he, for no reason, started stabbing B and then Ms Aibes, suspecting the latter to be in cahoots with B concerning the alleged boyfriend. His actions were unprovoked, unexpected and brutal. They stood no chance against him and fled the house with Ms Aibes managing to get help from a neighbouring house. B was less fortunate and died an undeserving and undignified death. Ms Aibes lost her unborn baby as a result of the attack, for she was stabbed in the womb. From what she has narrated to the Court, she, due to medical complications arising from the injuries inflicted during the assault, is unable to have any future children. The loss of her unborn child and the permanent injury sustained by the victim, are aggravating factors weighing heavily against the accused in sentencing.

[22] Another aggravating factor is that the murder in respect of count 1 was committed in the context of a domestic relationship, as defined in the Combating of Domestic Violence Act, 2003. This Court in several judgments made it clear that it considers crimes, committed in a domestic relationship, in a serious light; and would increasingly impose heavier sentences in order to bring an end thereto. In the present instance, I find myself unable to come to a different conclusion. As Mr *Bondai* rightly submitted, the deceased B, had all the right to terminate her relationship with the accused – even though that does not appear to have been the case – without her becoming a victim for having taken that step. In this instance the accused was driven by nothing else but unfounded jealousy, and there is no justification for his actions against B and Ms Aibes. Unfortunately, it has in this country become a common phenomenon that partners, usually women, become victims at the hands of their male partners due to jealousy and that this too often leads to the death of one or both partners. This is completely unnecessary and must be censured in the strongest terms.

[23] What justification could there possibly have been for setting the house on fire, well knowing that there are two children, the one a toddler and the other a baby, inside the house? They had no role to play in the suspected unfaithful conduct of his girlfriend and Ms Aibes; there was simply no need to kill them as well, in the process of getting at B. The fear and excruciating pain these two innocent children must have gone through before being engulfed by flames, is unimaginable and shocks one to the core. They died cruel deaths which was unnecessary and which the accused could have avoided, but which he wittingly chose not to do so. These are the same children whom he, according to Mrs Gabathuler, had treated before as if they were his own by playing with them and putting them to bed at night. Against this background, the only reasonable explanation for the accused to set the

house alight with the children still inside, is that he was determined to defeat or obstruct the course of justice by destroying evidence – which he admitted.

[24] The offence of housebreaking with the intent to steal and theft is generally considered to be a serious offence; but given the circumstances of this case, I do not consider the present charge to be such, for what constituted a "breaking" – the fetching of the keys to the outbuilding from the kitchen and the accused's subsequent unlawful entering of the store room – was not, in the true sense, to steal petrol from the owner, but to use such petrol to set the house alight. Although his actions satisfies the requirements of the offence of housebreaking with the intent to steal and theft, regard must also be had to the *motive* behind the commission of the offence, and the accused should not be punished out of context with the facts of the particular case.

[25] The damage caused to the house is evident from the photo plan and although the house was since rebuild, Mr Gabathuler testified that they, in addition, suffered a pecuniary loss of N$200 000 as their property was under-insured. Arson is considered by the courts to be a serious offence for which custodial sentences are usually imposed. The circumstances of this case and the financial loss suffered as a result thereof, are indeed aggravating factors.

[26] I turn now to consider the third component of the *triad* namely the interests of society. The learned author *Terblanche: Guide to sentencing in South Africa, (2nd Edition),* at para 7.3 discusses the interests of society and from this work it appears that the courts, in sentencing, have mostly referred to society in two distinct senses: (i) The *reaction* of the members of the community to the commission of certain crimes – mostly in serious offences – with natural indignation or abhorrence and their subsequent expectations relating to sentence; and (ii) To state that the sentence to be imposed should *serve the interests of society* through the prevention of crime through deterrence, rehabilitation, or the protection of society in general by removing

the offender from society.

[27] Although the reaction of members of society might be nothing more than *"revisiting the crime component of the **Zinn** triad"*[7] and adds nothing to the other components, it, in my view, is a valid consideration in the court's determination of an appropriate sentence, as was held in *S v Flanagan*[8], namely, that the interests of society are not served by a sentence which is too lenient. After all, it is the members of society who one day has to accept the accused back in their midst; which process might be troubled when there is a perception that the sentence given to the accused was too lenient and he/she does not deserve to be admitted back into society. As stated earlier, the courts should not give in to the expectations of society (at the expense of the accused or the interests of justice) when it comes to sentencing; but, neither should the courts ignore society's reaction of indignation and public outcries against those who make themselves guilty of committing heinous crimes, for that, in my view, would be out of touch with reality and the legitimate expectations of society. It is in these circumstances that the sentencing court would consider it justified that retribution, as an objective of punishment, should come to the fore. In the instant case, I have no doubt that society has legitimate expectations that the Court imposes sentences that would reflect its indignation in the crimes committed in this case, and that the accused be duly punished for what he has done to its members. Furthermore, given the gravity of the offences, the interests of society would be served if future crime can be prevented and if society is protected against the accused. That would

7 *Terblanche* at para 7.3.2.2
8 1995 (1) SACR 13 (A) at 17e-f

require of him to be removed from society and in this instance the only appropriate manner to achieve this, would be to impose a lengthy custodial sentence. Not only should it serve as specific deterrence to the accused, but also as a general warning to like-minded criminals. The accused's personal circumstances and interests simply do not measure up to the gravity of the crimes committed and the aggravating factors present, coupled with the interests of society. In the circumstances of this case, reformation, as an objective of punishment, becomes a lesser consideration.

[28] Whereas the accused stands to be sentenced on several serious charges, each attracting severe punishment, the Court is mindful of the cumulative effect of the sentences to be imposed, and in order to ensure that the total sentence is not disproportionate to the accused's blameworthiness in relation to the offences – for these offences are related to one another – the Court will, also as a sign of mercy, make an appropriate order, ameliorating the totality of the sentences to be imposed.

[29] It is trite that the period an accused spends in custody, especially when it is lengthy, is a factor which normally leads to a reduction in sentence.[9] In this case the accused was in custody during pre-trial proceedings for a period of approximately thirty months; which period must be taken into consideration when determining sentence.

[30] After taking everything into consideration, I have come to the conclusion that the following sentences are appropriate.

9 *S v Kauzuu*, 2006 (1) NR 225 (HC) at 232F-H

[31] In the result, Mr Ernestus Eibeb, you are sentences as follows:

1. Count 1 – Murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003: 27 years' imprisonment.

Count 2 – Murder: 40 years' imprisonment.
Count 3 – Murder: 40 years' imprisonment.
Count 4 – Attempted Murder: 15 years' imprisonment.
Count 5 – Housebreaking with intent to steal and theft: 6 months' imprisonment.
Count 6 – Arson: 6 years' imprisonment.
Count 7 – Attempting to defeat or obstruct the course of justice: 4 years' imprisonment.

In terms of s. 280 (2) of Act 51 of 1977 it is ordered that half the sentence imposed on counts 2 and 3, respectively, to be served concurrently. Furthermore, the sentence imposed on count 5 to be served concurrently with the sentence imposed on count 6; and half the sentence imposed on counts 6 and 7, respectively, to be served concurrently. Accused is sentenced to effective imprisonment of 87 years.

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LIEBENBERG, J

ON BEHALF OF THE ACCUSED **Mr. G.F. Bondai**

Instructed by: **Directorate: Legal Aid**

ON BEHALF OF THE STATE **Mr. N.M. Wamambo**

Instructed by: **Office of the Prosecutor-**

General