



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 01/2012

THE STATE

versus

OTNIEL SOMSEB

Neutral citation: *S v Somseb* (CC 1/2012) [2013] NAHCMD 174 (21 June 2013)

Coram: SHIVUTE, J

Heard: 29 April, 15 May 2013

Delivered: 21 June 2013

Fly note: Criminal procedure - Sentence – Murder – Accused first offender who pleaded guilty – Youth of 22 years – Killed the deceased by assaulting him with an arrow – Set alight his body – Crushed his bones and hid them in a cave – Although accused youthful offender – His actions – not consistent with actions of a person of his age – His actions more consistent with those of a calculating mature criminal mind – Accordingly accused sentenced to 30 years' imprisonment.

Summary: Criminal procedure – Sentence - The accused a youthful first offender of 22 years, who pleaded guilty, was convicted of murder

with direct intent - He killed the deceased by assaulting him with an arrow - He set his body alight, crushed his bones and hid them in a cave - Although the accused was undoubtedly a youthful offender, who pleaded guilty, his actions were evidently not consistent with actions of a person of his age - On the contrary his actions were more consistent with those of a calculating mature criminal mind- The accused is accordingly sentenced to 32 years' imprisonment.

SENTENCE

- 1st Count: Murder with direct intent – 30 years' imprisonment.
- 2nd Count: Defeating or obstructing the course of justice – 12 months' imprisonment.
- 3rd Count: Housebreaking with intent to steal and theft – 18 months' imprisonment, suspended in *toto* for 5 years on condition that the accused is not convicted of housebreaking with intent to steal and theft, or theft committed during the period of suspension.
- 4th Count: Theft read with the provision of the Stock Theft Act 12 of 1990 as amended – 2 years' imprisonment, of which 1 year is suspended for 5 years on condition that the accused is not convicted of theft of stock or theft under the common law committed during the period of suspension.

SENTENCE

SHIVUTE J:

[1] The accused person was convicted on four counts, namely:

1st Count : Murder with direct intent.

2nd Count : Defeating or obstructing the course of justice.

3rd Count : Housebreaking with intent to steal and theft.

4th Count : Theft of one goat read with the provisions of ss 1, 11 (1) (a) 14 and 17 of the Stock Theft Act 12 of 1990 as amended.

[2] The accused was jointly charged with another person. The accused pleaded guilty to all the charges and was convicted accordingly. A separation of trial was ordered and his co-accused stood down. The accused is represented by Mr Isaacks on the instructions of Legal Aid Directorate. The State is represented by Ms Ndlovu.

[3] Mr Isaacks prepared a plea statement in terms of s 112 (2) of the Criminal Procedure Act 51 of 1977.

[4] I now proceed to summarise the accused's plea to all the charges as follows:

During February 2007, the accused and his then co-accused went to Farm De Rest situated in Khorixas district. They were instructed to clean the house of the grandmother of his co-accused that was situated on the farm. When they reached the house, the accused became thirsty and he went with his co-accused to the water point on the farm. Whilst there, the accused saw goats belonging to the deceased Mr August Soreb Thaniseb. The accused, assisted by his co-accused, caught one of the goats and slaughtered it in order to eat it. The accused carried the carcass and his co-accused carried the intestines and they both went to the house of the grandmother of his co-accused. The accused knew that at the time he slaughtered the goat his actions were wrong and against the law and if caught he could be punished.

[5] At the house he made fire and cooked liver which he shared with his co-accused both of them ate their shares. The deceased arrived looking for his goats. He found the accused and his co-accused busy cutting the meat. The deceased got into an argument with the accused. The accused threw stones at the deceased; the deceased threw them back to him and accused fought the deceased. When he realised that the deceased was stronger than him, he sent his co-accused to bring the arrow. When his co-accused brought an arrow the accused assaulted the deceased on the head with the arrow until he died. The accused was aware that by assaulting the deceased with an arrow he could cause his death. He admitted that it was wrong to assault the deceased. The accused had no legal justification to kill the deceased. He knew that what he was doing was wrong and that he could be punished if caught.

[6] After the accused killed the deceased, he and his co-accused dragged the deceased's body into the veld and left it there. They proceeded to the deceased's house. The accused broke the glass of a window of the deceased's house and gained entry to the house. His intention for entering the house was to steal and he indeed, stole two tyre tubes, a pair of boots, a saw, pump, radio, solar panel, a pot, some clothing and a mattress. All the items belonged to the deceased and the accused had no right to take them. The items were removed through the window, through which the accused had gained entry into the house. The stolen goods were taken to the house of the grandmother of his co-accused. Later on the items were confiscated by the police.

[7] The following day the accused and his co-accused went back to the place where they had left the deceased's body. They put grass on the deceased's body, set it alight and crushed the bones of the deceased and the accused hid the crushed bones in a cave. The reason why he crushed the deceased's bones and hid them was to make sure that the police did not discover the death of the deceased and he was not connected to the deceased's death. The accused was aware that by setting the deceased's body alight, crushing his bones and hiding them in a cave his actions were wrong and against the law. The accused stated that he was sorry for what he did and begged for the court to be merciful to him.

[8] The accused testified in mitigation of sentence and called no witnesses. He was born on a farm in the district of Outjo on 6 June 1985. His father is now deceased. His mother is residing in Outjo district. He has six siblings three sisters and three brothers. He grew up with his grandfather looking after the livestock. His level of education is Grade 2. He is illiterate. The accused moved from one place to another. He had no fixed job but he used to sell sculptures which he made himself from which he earned an income. At the time of the commission of the offence, the accused was staying at Farm De Rest. Although the accused stated that he had been incarcerated for four years before he was released on bail. This is not correct because the record from the District Court shows that the accused was arrested on 15 March 2007 and when he appeared before court on 29 July 2008 he was on bail. He stated that the reason he broke into the deceased's house and took the goods was because he wanted them to become his property. He felt sorry for committing the offence of murder and he would not repeat it. He knew the deceased personally and he regretted killing him; and he is sad for what he did and asked for forgiveness. He asked for mercy and stated that he is willing to testify against his co-accused if called upon to do so. As mentioned before, the goods he stole from the deceased's house were recovered by the police.

[9] The accused was aware that the offences he committed were very serious. It was obvious to him that the Court would impose a lengthy custodial sentence and he asked the Court to exercise leniency on him. It was further his testimony that he did not enjoy his mother's love since he only came to know her when he was already grown up. He again wished to be re-united with his mother. The accused is a father of a minor boy. He promised to behave himself in future. At the time the accused committed these offences he was 22 years old. The accused was crying at the time he was giving his testimony.

[10] Counsel for the State called two witnesses in respect of sentence. The first one was Mr Isaskar Thourob, a nephew of the deceased. He testified that the deceased had goats which he used to sell to a lodge owner and at auctions. Each goat was sold for between N\$400 and N\$500. He sold a breed of goats known as "Boer Bokke". If a goat was small he could sell it for between N\$350 and N\$400.

[11] The second witness was Ms Julia Huses, a young sister of the deceased. She testified that the deceased left four children. He was the one who was maintaining them before he died. He also maintained some of his siblings, including the witness. Since the deceased's death the farm had not been attended to. Some of his livestock got lost. The fact that the deceased's remains were not buried had an adverse effect on the family. The deceased's death had also made their life difficult since they depended on him. They searched for the deceased from February 2007 and his remains were only discovered during March 2007. The witness further stated that since the Almighty God said we should forgive and forget, she has forgiven the accused.

[12] Counsel for the accused argued that the accused is a first offender who pleaded guilty; therefore the Court should exercise mercy on him. Counsel further referred the Court to well-known principles of sentencing and cited several authorities which I have read and considered when deciding on the appropriate sentence to impose. It was counsel for the accused's argument that the murder committed by the accused was not premeditated. Counsel contended that it was committed in the heat of the moment. Concerning the housebreaking with intent to steal and theft, he submitted that all the goods were recovered. With regard to the crime of defeating or obstructing the course of justice, counsel argued that the deceased's remains were recovered because of the assistance of the accused. It was counsel's further argument that as far as the crime of stock theft was concerned the accused stole because he was hungry. He again argued that there were substantial and compelling circumstances, namely that the accused is a first offender who was relatively youthful at the time of the commission of the offences, the motive of theft was hunger and not greed; the lack of maturity at the time of the commission of the offences, the theft was not pre-planned and the fact that part of the meat has been recovered. Taking these factors cumulatively, so counsel argued, this would amount to substantial and compelling circumstances.

[13] Counsel further submitted that the accused expressed a genuine remorse when he took the Court into its confidence and testified under oath to express his remorse. Concerning the time the accused spent in custody, it appears from the

record that the accused was released on bail and thereafter bail was withdrawn because the depositor wanted to get his money back. Thereafter the accused stayed in custody for about three to four years before he was granted bail again. I deem it necessary to mention at the outset that although the accused has been in custody for a relatively lengthy period awaiting trial, this was partly due to the fact that after he was released on bail, the accused absconded and a warrant of arrest was issued against him. This prompted the depositor to withdraw the bail money.

[14] Counsel for the accused submitted further that the Court should consider imposing a concurrent sentence. He urged that the sentence on the housebreaking count should run concurrently with the sentence imposed on the counts of stock theft and defeating the course of justice because these offences were closely connected in terms of the time and space.

[15] On the other hand, counsel for the State argued that at the time the accused committed the offences, he was 22 years old and a father of a child. He was earning an income from the sculptures he was making. Therefore, so counsel contended, he was not really a person that could be said to be youthful. The issue of youthfulness does not really become relevant in situations where a person is already self-supportive. The behaviour of the accused when he committed these offences showed maturity. The State submitted further that the offences committed are prevalent and the Court should impose deterrent sentences. The deceased was a person who was providing for his family's upkeep. Because the accused burned the deceased's body and crushed his bones, the deceased's body could not be recognised and as a result the deceased's remains were taken to the National Forensic Institute for identification purposes. This also led to the delay of the deceased's burial. Therefore the Court should consider it as an aggravating factor.

[16] Concerning theft of the goat; counsel for the State argued that the fact that the accused was hungry should not be considered as a mitigating factor as this would lead to lawlessness: anyone who is hungry will take upon themselves to steal other people's stock wherever they are available because they say they are hungry. With

regard to whether there are substantial and compelling circumstances, counsel argued that what has been advanced before this Court were the usual mitigation factors. The fact that the accused was hungry should not be used to condone theft. Therefore there was nothing substantial and compelling about the case. The accused had time to reflect on what he was doing. He first stole the goat, killed the deceased, went to burn his remains and thereafter proceeded to break into the deceased's house and take the goods. These offences were committed at different times. Therefore, they should be treated as separate and distinct offences. Counsel again referred the Court to several well-known authorities in support of her argument. Needless to say, I have perused and considered those authorities in arriving at the appropriate sentences imposed herein.

[17] Having heard all the arguments placed before me by both counsel and the testimonies of the accused and witnesses for the State in respect of sentence, I will now proceed to consider the appropriate sentences in the circumstances and on the facts of the case.

[18] That the accused is a first offender who pleaded guilty to the crimes preferred against him is a factor in his favour. The accused had showed remorse. This is reflected by him when he gave his testimony that he was sorry and saddened by what he did. He has asked for forgiveness from the deceased's family. The accused also showed apparently genuine physical emotion in respect of his remorse during his testimony.

[19] That notwithstanding, the Court should not lose sight of the fact that the offences committed by the accused are serious and prevalent. The accused killed the deceased by assaulting him with an arrow on his head several times until he died. This was undoubtedly a ferocious attack on the deceased. After the accused had killed the deceased he burned his remains, crushed the bones and hid them away to ensure that they are not discovered so as to link him to the commission of the crimes.

[20] Although the accused was undoubtedly a youthful offender, his actions were evidently not consistent with the actions of a person of his age. On the contrary, the actions were more consistent with those of a calculating mature criminal mind.

[21] The accused claimed that he was hungry when he slaughtered the deceased's goat. The fact that the accused was hungry in the circumstances that he had relatively steady income should not be condoned because this would lead to an untenable situation of lawlessness. There is evidence before me that the accused had a source of income as he was making sculptures and selling them. Although the accused may not have had everything at his disposal, the evidence shows that he was not a destitute and his claim that he slaughtered the goat because of hunger cannot be accepted.

[22] Concerning the issue whether there are substantial and compelling circumstances, as already stated, counsel for the accused argued that the accused, a youthful first offender, committed the offence of stock theft because he was hungry; that the offence was not pre-planned and that part of the meat has been recovered. And for Counsel, these factors taken cumulatively amount to substantial and compelling circumstances. Clearly, there can be no merit in this argument. What was placed before me in this connection was nothing but the ordinary and usual mitigatory factors. I, therefore, find no substantial and compelling circumstances in respect of this offence and I am bound to impose the mandatory sentence.

[23] The Court has considered the period the accused has spent in custody and the fact that these offences were not premeditated. The peculiar circumstances in which they were committed have also been taken into account. I have also considered the sequence in which these offences were committed. The accused stole the goat the value of which was not more than N\$500. After he had slaughtered it and ate some of the meat, he was confronted by the deceased whose only sin was to ask why the accused had stolen his goat. The accused's response was to brutally kill the deceased. He took his body from the scene to a place where he set it on fire. As if that was not enough, he proceeded to the deceased's house

and broke into it. The following day he returned to the deceased's remains and crushed the bones and hid them. As Counsel for the State rightly pointed out, the accused had time to reflect on his actions and form separate intentions for his separate acts.

[24] I have considered the personal circumstances of the accused as set out above. I am of the view, however, that these have been by far outweighed by the interest of society and the seriousness of the crimes. To argue, as counsel for the defence did, that the mortal remains of the deceased were recovered with the assistance of the accused should surely come as a cold comfort to the deceased's family. They were not only robbed of its dear bread winner, but after he had cruelly and callously been taken away from them, the family was also deprived of the opportunity to give the deceased a decent and dignified funeral. No human being deserves such cruel and inhumane treatment. Doubtless, persons convicted of crimes of violence in this country that seem to be a daily occurrence need to be visited with robust sentences to curb the high tide of this type of crime.

[25] In the result the accused is sentenced as follows.

1st Count: Murder with direct intent – 30 years' imprisonment.

2nd Count: Defeating or obstructing the course of justice – 12 months' imprisonment.

3rd Count: Housebreaking with intent to steal and theft – 18 months' imprisonment, suspended *in toto* for 5 years on condition that the accused is not convicted of housebreaking with intent to steal and theft, or theft committed during the period of suspension.

4th Count: Theft read with the provision of the Stock Theft Act 12 of 1990 as amended – 2 years' imprisonment, of which 1 year is suspended for 5 years on condition that the accused is not convicted of theft of stock or

theft under the common law committed during the period of suspension.

N N Shivute
Judge

APPEARANCES

STATE : Ms Ndlovu
Office of the Prosecutor-General

ACCUSED: Mr Isaacks
Instructed by Directorate of Legal Aid