



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT ON SENTENCE

Case No.: CC 03/2011

In the matter between:

THE STATE

versus

JACKIE JACKSON**FIRST ACCUSED****KAVETU PONTIANUS KWANDU****SECOND ACCUSED****ISASKAR NAU-GAWASEB****THIRD ACCUSED**

Neutral citation: *S v Jackson* (CC 03/2011) [2013] NAHCMD 288 (17 October 2013)

Coram: SHIVUTE J

Heard: 1 October 2013

Delivered: 17 October 2013

Fly note: Criminal Procedure – Sentence – previous conviction of murder – 10 years old or more – Common law does not postulate that the such previous conviction should be ignored – Court has a discretion to disregard or take into account such previous conviction – An aggravating factor in appropriate case.

Criminal Procedure – Sentence – Accused convicted of murder – robbery with aggravating circumstances – both crimes resulting from a single act– one crime cannot be completely ignored by taking both counts together for purpose of sentence –principle of double jeopardy – accused person should not be punished twice for same offence – solution lying in ordering part of

sentence on robbery count to run concurrently with the sentence on murder count.

Summary: Criminal Procedure – Sentence – all accused persons convicted of murder - Accused No. 3 has a previous conviction of murder of more than 10 years old – Common law does not postulate that the court should disregard a previous conviction of 10 years old or more. A court has a discretion to disregard a previous conviction of 10 years or more and treat the accused as a first offender or to take into account the previous conviction. Accordingly, in this case the court taking into account the previous conviction of murder in respect of accused No. 3 as an aggravating factor.

Criminal Procedure – Sentence - Accused persons convicted of murder and robbery with aggravating circumstances – both crimes resulting from a single incident. The court cannot completely ignore one count by taking both counts together for purpose of sentence – Principle of double jeopardy – Accused persons should not be punished twice for the same offence – Solution to this dilemma lies in the court ordering part of the sentence on robbery with aggravating circumstances count to run concurrently with sentence on the murder count.

SENTENCE

1st Count: Murder: Accused Nos. 1 and 2 sentenced to twenty-eight (28) years' imprisonment each.

Accused No. 3 is sentenced to thirty (30) years' imprisonment.

2nd Count: Robbery with aggravating circumstances: Accused Nos. 1, 2 and 3 sentenced to fifteen (15) years' imprisonment each, five (5) years of which is to be served concurrently with the sentence imposed on the murder count.

4th Count: Attempting to defeat or obstruct the course of justice: Accused Nos.1, 2 and 3 sentenced to two (2) years' imprisonment each.

Order:

(a) Short gun with serial No. 05013505 is to be returned to its lawful owner, Mr Augustinus Jackson.

(b) The Nokia cell phone produced in this matter is to be given to the deceased's next of kin.

(c) In terms of s 10(6)(a) of Act 7 of 1996 each accused is declared unfit to possess a firearm for a period of five (5) years effective from the date of each accused's release from prison.

SENTENCE

SHIVUTE J:

[1] The accused persons were convicted of murder, robbery with aggravating circumstances and attempting to defeat or obstruct the course of justice preferred as count 1, count 2 and count 4 respectively.

[2] Ms Ndlovu appeared on behalf of the State whilst Mr Brockerhoff appeared on behalf of the first accused. Mr Tjituri appeared for the second accused while Mr Uirab appeared for the third accused. All counsel for the defence appeared on the instructions of the Directorate of Legal Aid.

[3] None of the accused persons testified in mitigation. Instead, submissions were made on their behalf by their respective counsel and it is to these that I now turn.

[4] It was argued on behalf of accused No. 1 that he is now 24 years old. At the time of the incidents he was 20 years old. He is a father of two minor children a boy

aged 5 years and a girl who is 5 months old. Accused No. 1 was working as a mechanic prior to his incarceration in connection with this matter and was earning about N\$4000 per month. He also doubled as a security guard. He was maintaining his minor children with the income he was earning. His level of education is Grade 8. He is a first offender. Although he was released on bail he was incarcerated for about 8 months before he was admitted to bail. Therefore, the court was urged to consider the time he had spent in custody when sentencing him. It was further argued on accused No.1's behalf that he was relatively immature and youthful at the time this incident took place. Counsel argued that the Court should not impose a sentence that would break accused No. 1 as there is some room for rehabilitation. It was further argued that accused No.1 cooperated with the police. He assisted the police in recovering the deceased's body and facilitated the arrest of the co-accused persons.

[5] As for the crimes, it was argued that accused No. 1 was convicted of a serious crime of murder. When the Court is sentencing him it should treat this matter on its own merits and should not sentence the accused in order to send a message to deter would be offenders.

[6] With regard to the interests of society, it was argued that society looks up to the Courts to protect it, but the Court should not lose sight that the accused forms part of this very society the Court is mandated to protect. His children also form part of the society. For the Court to punish accused No.1 who is a productive citizen for a lengthy period would only punish the society that the Court seeks to protect and tax payers would suffer for contributing to the maintenance of accused No.1 if sentenced for a lengthy period. In counsel's submission, no value or advantage would be served by such prospect. Counsel further urged the Court to exercise a degree of mercy on accused No. 1. The Court should consider suspending a portion of the sentence. He further argued that the sentence to be imposed on the count of robbery with aggravating circumstances should run concurrently with the sentence to be imposed on the count of murder as the two counts are intertwined. With regard to the fourth count of attempting to defeat or obstruct the course of justice, the Court should

consider imposing a fine. Counsel referred me to authorities concerning sentencing to which I have had regard.

[7] Accused No. 2's personal circumstances were placed before the Court by his counsel as follows: He is 30 years old. He was born at Simson Goro Village in Kavango East Region. His father is now deceased and his mother is 60 years old. Accused No. 2 is single and has a minor child aged 7. The child lives with his unemployed mother. Accused No. 2 attended school at Alpho Moumombamba Junior Secondary School up to Grade 10. He is a first offender. Accused No. 2 did not accept any responsibility for the commission of these offences as he felt that he was not the one who pulled the trigger and he never killed the deceased. He also did not accept responsibility for the crime of robbery with aggravating circumstances as he did not benefit in any manner from the commission of this offence. His counsel argued that the level of blameworthiness must be accordingly put to each and every accused as in his submission accused No. 2 was less blame worthy. Counsel argued that it would be unfair if all accused had to serve a similar sentence. Counsel therefore proposed that 15 years imprisonment on the count of murder be imposed on accused No. 2 and 5 years imprisonment be imposed in respect of robbery with aggravating circumstances which should run concurrently with the sentence to be imposed on the murder count. In the alternative, the whole of the latter sentence should be suspended. The sentence on the fourth count should also be wholly suspended.

[8] Personal circumstances of accused No.3 as placed on record by his counsel are that he was born on 26 May 1972 in Windhoek. Currently he is 41 years old. At the time these crimes were committed he was 37 years old. He attended school up to Grade 8. During 1992 accused No.3 was convicted of murder. Whilst he was in prison he completed his Grades 10 and 12 through Namibian College of Open Learning (NAMCOL). He also completed a diploma in Business Management. He is also a qualified plumber. The accused is an unmarried father of two boys. The first born is 21 years old and is employed. The last born is an 11 year old Grade 5 learner. The youngest son lives with his mother who is unemployed. At the time of the commission of these offences accused No. 3 was employed as a plumber. He

earned between N\$3000 and N\$4000 per month. At the time the accused was employed, he had maintained both his sons. Both his parents are now deceased. Prior to the father's death, his father was assisting him to maintain his youngest son. Now that he is no more, his child is suffering financially.

[9] Counsel for accused No. 3 continued to say that once the accused is released from prison, he intends to seek employment and continue to maintain his son. The fact that accused No. 3 has a dependant should be considered as a mitigating factor. He also has a reasonable prospect of getting a job once he is released from prison because of the qualifications he holds, so counsel argued. Concerning accused No.3's health, he was diagnosed with some chronic diseases. Counsel produced a copy of laboratory results as well as an extract from accused No. 3's health passport in this regard. Counsel further argued that accused No. 3 was arrested during April 2010 and he remained in custody since. He had roughly spent 3 years and 5 months in custody waiting for his trial. The Court should therefore consider the period spent in custody when determining the sentence.

[10] As far as accused No.3's previous convictions are concerned all of them are older than 10 years. Therefore the court should not attach much weight to the previous convictions. Counsel argued that when the accused was convicted of murder in 1992, he was a youthful offender who had some level of immaturity as he was only 18 years at the time. The accused was released from prison during February 2001. The current offences were committed 9 years after accused No. 3 was released from prison.

[11] Concerning the crimes committed, counsel for accused No. 3 argued that they are all serious. In respect of the count of robbery with aggravating circumstances all the property had been recovered except the SIM card. The owner did not suffer severe financial loss. Accused No. 3 felt sorry for the deceased's loss of life. Accused No. 3 was only remorseful for committing the offence of defeating or obstructing the course of justice but not remorseful for the crime of murder and robbery with aggravating circumstances because he believes that he is not guilty and

it was counsel's instructions that after accused No. 3's sentencing, he would lodge an appeal on counts 1 and 2.

[12] With regard to sentence to be imposed Counsel argued that an appropriate sentence would be a custodial one if one had to have regard to the seriousness of the offences committed. However, he suggested that all offences be taken together for purpose of sentencing as all offences primarily resulted from the same incident and are closely related. Counsel further argued that should the court decide to impose a separate sentence on each count, the court should consider suspending the whole or a portion of it or in the alternative it should be ordered to run concurrently to avoid the cumulative effect of a lengthy custodial sentence. He suggested that a term of imprisonment ranging from 15 to 20 years in respect of the murder count would be appropriate. In respect of count 2, the sentence should not exceed 10 years and that it should be ordered to run concurrently with the sentence to be imposed on the first count. Counsel referred me to several authorities regarding principles of sentencing which I have considered in coming to appropriate sentences in this case.

[13] On the other hand, counsel for the State argued that the offences of murder and robbery with aggravating circumstances are serious and are two distinctive offences although they arose from the same course of action. Counsel further argued that although accused No. 1 was youthful at the time he committed these offences, in this subject matter youthfulness should not play an important role as a mitigating factor because at the age of 20 accused No. 1 was already leading his life as a matured person. He was employed as a security guard by the company that was guarding the place where some of the crimes were committed. The first accused was already a father. Apart from his job as a security guard, he doubled as a mechanic. Therefore, he should be treated as a mature person in the manner these offences were committed because accused No. 1 took a leading role. Counsel argued that although youthfulness is normally a mitigating factor, in the circumstances of this case it should not be considered as such. Furthermore, accused No. 1 did not show any remorse for killing the deceased.

[14] Counsel argued that the offences of murder committed in the course of robbery with aggravating circumstances are prevalent. Counsel further argued that the cases quoted by counsel for accused No. 3 whereby accused persons were sentenced to 15 – 20 years imprisonment were imposed during 1999 and 2001 but this did not deter the offenders to commit these offences. The State argued that for the court to put a stop to these crimes the sentences meted out to the offenders should now be a lengthy period of imprisonment, to stay in line with the present sentencing pattern. She urged the court to impose separate sentences on counts of murder and robbery with aggravating circumstances and part of the sentence on the robbery count to run concurrently with the sentence to be imposed on the murder count rather than have the two counts treated as one for the purpose of sentencing.

[15] Concerning accused No. 3's previous convictions that are more than 10 years old, counsel for the State urged the court to consider the fact that accused No. 3 was convicted of murder where a firearm was involved like in the present case. Even if he was youthful when he committed the first murder, one expected him to be deterred. Instead, he took another life using a similar instrument. With regard to accused No. 3's state of health counsel argued that the accused is receiving medical attention whilst he is in custody. He had access to a major hospital in Windhoek. Counsel argued that when the court imposes a sentence, it should strive to meet the expectations of society and the three accused persons should be given a uniform sentence. It was again counsel for the State's submission that they should not be sentenced to less than 30 years imprisonment on the count of murder and not less than 20 years on the count of robbery with aggravating circumstances. It was a point of criticism by counsel for the State that for counsel of accused No. 2 to suggest a sentence of 15 years imprisonment on the count of murder and 5 years imprisonment on the count of robbery with aggravating circumstances counsel was trivialising these two offences which were premeditated.

[16] Counsel for the State further applied for the firearm used in the commission of the offence to be returned to its lawful owner, Mr Augustinus Jackson, and the cell phone to be returned to the deceased's relatives in terms of s 34(1)(a) and 34(1)(b) of the Criminal Procedure Act 51 of 1977. Furthermore, counsel applied for the court

to invoke the provisions of s 10(6A) of the Arms and ammunition Act 7 of 1996 for the three accused persons to be declared to be deemed unfit to possess a firearm after they served their sentences.

[17] The court has considered the personal circumstances of each accused as placed before it. It has also considered the offences committed and the interest of society. The court has also taken into account the period each accused spent in custody awaiting trial.

[18] When accused No. 1 committed the crimes he has been convicted of he was 20 years old. He was a youthful offender. Although accused No. 1 was the youngest, according to the evidence before court, he played a leading role than the two accused persons who were much older than him. He was the one who approached accused No. 3 to go with him to the stadium. He and accused No. 3 lured the deceased to the stadium where he met his death. There is no evidence that he was influenced by someone older and the type of offences committed as well as the circumstances in which they were committed are normally not the type of offences committed by immature persons. The first accused acted like a mature person. His way of life also fits that of a mature person because he was employed and he was a father already at the time of the commission of these offences. Accused No. 1 was the one who asked what they were going to do with the deceased after they had killed him. He drove the motor vehicle; he took the deceased's cell phone and he together with accused No. 3 sold the CD player that was removed from the motor vehicle. He also threw away the ignition key of the motor vehicle that they robbed from the deceased. I am therefore of the opinion that his youthfulness should not play a major role when imposing sentence on him.

[19] As far as accused No. 3 is concerned he has three previous convictions, although these were more than 10 years old. One of them is a previous conviction of murder. He was sentenced to 15 years imprisonment part of which was suspended. He has had the benefit of the suspended sentence for murder. His previous convictions are an indication that accused No. 3 is a person of bad character who has no respect for human life. It is evident that from accused No. 3's previous

convictions he has not taken any advantage of the lenience which the sentencing court on previous occasions had shown towards him.

[20] At common law the Court has unfettered but judicial discretion to disregard previous convictions which are ten years or older. In *S v Mqwathi* 1985 (4) SA 22 (T) the following appears in the English head note at 23E-F as quoted with approval by Damaseb JP in *S v Bezuidenhout* 2006 (2) NR 613 (HC) at 614 with which observations I agree:

'(T)he court now exercises an unfettered but judicial discretion, (to) decide, having regard to the nature, number and extent of similar previous offences and the passage of time between them and the present offence, to leave out of account the previous convictions, even where the last previous conviction is less than ten years old, and treat the accused as a first offender. The court can also, taking into account the aforementioned factors, nevertheless decide to take the previous convictions into account as an aggravating circumstance even where the last previous conviction is more than ten years old.'

[21] In essence the common law deals with the situation as to what weight a Court should attach to previous convictions, including the ones which are ten years or older. In that respect the Court is entitled, because of the age of a previous conviction to disregard and to treat the accused as a first offender. The common law does not suggest that a previous conviction of ten years or older must in all circumstances be disregarded. In an appropriate case like this one it may be regarded as an aggravating factor. The common law does not therefore postulate that a previous conviction which is ten years or older, should always not count as a previous conviction. (*S v Bezuidenhout*).

[22] All accused persons have committed heinous crimes whereby the deceased lost his precious life. This was not only a loss to the deceased's family but to the society as a whole. Accused persons No. 1 and No. 2 were supposed to maintain law and order at their place of work but instead they turned the place into a slaughter house. Accused No. 2 even went to the extent of falsifying the attendance register in order to cover their tracks.

[23] Although the crime of murder and robbery arose from the same incident no crime should be completely ignored when sentencing by taking both counts together for purpose of sentencing. (*S v Alexander* 2006(1) NR 1 (SC).The Court is also alive to the principle of double jeopardy that the accused should not be punished twice for the same offence. As was stated in *S v Alexander*, the solution is to order part of the sentence to run concurrently.

[24] The accused persons did not accept responsibility that they are the ones who caused the deceased's death and robbed him the motor vehicle while they were armed with a deadly weapon. The three accused persons are dangerous elements who need to be removed from society for a long time. Their personal interests are by far outweighed by the interest of society.

[25] Having considered the principles relating to sentencing, the submissions of counsel as well as the accused persons' personal circumstances, the following sentences are imposed:

1st count: Murder: Accused Nos. 1 and 2 sentenced to twenty-eight (28) years' imprisonment each.

Accused No. 3 is sentenced to thirty (30) years' imprisonment.

2nd count: Robbery with aggravating circumstances: Accused Nos. 1, 2 and 3 sentenced to fifteen (15) years' imprisonment each, five (5) years of which is to be served concurrently with the sentence imposed on the murder count.

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(a) Short gun with serial No. 05013505 is to be returned to its lawful owner, Mr Augustinus Jackson.

(b) The Nokia cell phone produced in this matter is to be given to the deceased's next of kin.

(c) In terms of s 10(6)(a) of Act 7 of 1996 each accused is declared unfit to possess a firearm for a period of five (5) years effective from the date of each accused's release from prison.

N N Shivute
Judge

APPEARANCES

STATE: Ms Ndlovu
Instructed by Office of the Prosecutor General

ACCUSED NO. 1: Mr Brockerhoff
Instructed by Directorate of Legal Aid

ACCUSED NO. 2: Mr Tjituri
Instructed by Directorate of Legal Aid

ACCUSED NO. 3: Mr Uirab
Instructed by Directorate of Legal Aid