REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 32/2012

In the matter between:

JACOBUS QUIDO APPOLUS **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Appolus v The State* (CA 32/2012) [2013] NAHCMD 37 (12 February 2013)

Coram: SMUTS J *et* GEIER J
Heard: **19 November 2012**
Delivered: **12 February 2013**

Flynote: Appeal against conviction and sentence – Ad the conviction - Court concluding that findings of magistrate not wrong – Appeal against conviction dismissed - Ad sentence – Court finding that the aspect of deterrence was over-emphasised, whereas the strong personal mitigating factors in favour of the appellant were under – Emphasized - That the learned magistrate therefore got the complicated task of trying to harmonise and balance the principles applicable to sentencing and to apply them to the facts wrong in these respects – In any event the sentence imposed by the court a quo also inducing a sense of shock in the sense

that there was a startling disparity between the sentence imposed by the trial court and the sentence deemed appropriate by the appeal court – Sentence set aside -

Summary: Appellant – aged 71 - Was arraigned on the charge of murdering his own son Patricio David Apollus in the Regional Court held at Keetmanshoop. He pleaded not guilty and in his defence only submitted a statement in terms of section 115 of the Criminal Procedure Act 51 of 1977, in which he claimed that he had acted in self-defence and that the shot which had been fired, which had admittedly killed his son, had meant to be a warning shot, intended to go over the deceased. The deceased, who had bent down, allegedly rose unexpectedly and got into the path of the shot and was thus killed almost instantly - He was subsequently found guilty and convicted of murder and sentenced to 15 years imprisonment, of which 5 years were suspended. The appellant subsequently noted an appeal against this conviction and sentence - Ad the conviction - Court concluding that findings of magistrate not wrong – Appeal against conviction dismissed - Ad sentence – Court finding that the aspect of deterrence was over-emphasised, whereas the strong personal mitigating factors in favour of the appellant were under – Emphasized - That the learned magistrate therefore got the complicated task of trying to harmonise and balance the principles applicable to sentencing and to apply them to the facts wrong in these respects – In any event the sentence imposed by the court a quo also inducing a sense of shock in the sense that there was a startling disparity between the sentence imposed by the trial court and the sentence deemed appropriate by the appeal court – Sentence set aside – And replaced.

ORDER

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a) The appeal against the appellant's conviction is dismissed;

b) The appeal against sentence succeeds and is replaced with the following sentence:

> TEN (10) YEARS IMPRISONMENT of which FIVE (5) YEARS ARE SUSPENDED FOR FIVE (5) YEARS on condition that Appellant is not convicted of murder or attempted murder committed during the period of suspension.

JUDGMENT

GEIER J (SMUTS J concurring):

[1] The appellant was arraigned on the charge of murdering his own son Patricio David Apollus in the Regional Court held at Keetmanshoop. He pleaded not guilty and in his defence submitted a statement in terms of section 115 of the Criminal Procedure Act 51 of 1977, in which he claimed that he had acted in self-defence and that the shot which had been fired, which had admittedly killed his son, had meant to be a warning shot, intended to go over the deceased. The deceased, who had bent down, allegedly rose unexpectedly and got into the path of the shot and was thus killed almost instantly.

[2] In support of its case, the State called three witnesses, the first being the investigating officer in the case whose evidence was mainly of a formal nature. The second witness was present at the scene but did not witness the actual shooting. The third witness, although also having been in the vicinity of the incident, could also not shed any greater light onto what had exactly transpired at the material time.

[3] The appellant closed his case without giving evidence.

[4] He was subsequently found guilty and convicted of murder on 8 April 2010 and sentenced to 15 years imprisonment, of which 5 years were suspended. The appellant subsequently noted an appeal against this conviction and sentence.

The background facts

[5] On the 2nd of February 2008 the deceased and the appellant had an altercation at the appellant's house. There was an initial altercation and a subsequent stand-off between the two after the deceased and appellant had been separated and the deceased had left the yard, to which he later returned. After the appellant attempted to evict the deceased from the yard with the aid of a *kierie* the deceased went to pick up some stones. In response the appellant apparently stated 'if you are going to pick up stones, I am going to get my gun'. The appellant then went into his house and indeed armed himself with a rifle. The deceased went and stood some four metres from the kitchen door – a stable door, with the lower part closed and the upper part open. The appellant remained inside the house the deceased being on the outside in the yard. While in these respective positions they then challenged each other – the deceased inciting the appellant to shoot him, and the appellant telling the deceased to throw his stones. The appellant then shot the deceased.

The state's evidence

Sergeant Dierstaan

[6] He informed the court that he received information on the 3rd of February 2008 that there had been a shooting incident at Tses. He was instructed to investigate the case, he thus drove to Tses. On arrival he learnt that the appellant had already been arrested. He subsequently charged the appellant and returned on the 5th for further investigation. A photo plan was compiled and the firearm in question was already booked in as an exhibit as well as five live rounds and one

discharged round - these were taken to the forensic laboratory for tests. The results were positive and corroborated that the confiscated firearm that had been used in the crime. In court Sgt Dierstaan identified the exhibits being a Musgrave rifle, one empty cartridge and a box containing 9 live rounds of ammunition. The appellant's firearm licence was handed in as an exhibit together with the results of the forensic test and a copy of the post-mortem report and the said photo plan. All these exhibits were handed in without objection from the defence.

Ms Laurentia Kangootui

[7] Ms L Kangootui, a retired teacher by profession, firstly identified the appellant as she knew him well. She confirmed further that she was at the appellant's residence on the day in question. She told the court that she was sitting in front of the buildings which were close to the appellant's home. She noticed 2 persons emerging from the appellant's house who were followed by the deceased who then picked up stones, the two other persons walked in the direction of a police van which happened to stand in the vicinity and when the deceased saw this he dropped the stones and followed them. After a while she noticed that the two persons came back but passed the yard and that the deceased also came back but went into the yard. At this stage the appellant told him not to enter but this warning was not heeded by the deceased, who then went to sit at the corner of the garage. The appellant apparently went back into the house and when he emerged he had *kierie* with which he pushed the deceased around his shoulders and chest in order to persuade him to leave the yard. The deceased apparently then stood up in order to pick up the stones in response to which the appellant apparently said '… if you are picking stones I am going to get my gun.' He then went into the house. Ms Kangootui apparently tried to persuade the deceased to rather leave and go to his friends but the deceased refused to listen. Importantly she then testified that the deceased then went with the stones and stood in front of the kitchen door. The appellant who had entered the house stayed in it for some time and remained inside. She then heard the two challenging each other. As she had been sitting in an awkward position and was only able to observe all this by turning her head, and

as she got tired of turning neck, she turned away at a certain stage. It was during this time that she heard a shot. She also noticed that the residents of the town immediately came to the scene. In response to certain additional questions from the prosecutor she clarified that while the deceased was still sitting and the appellant came to push him with a *kierie* that the deceased had not object in his hands. She also could not recall how many stones the deceased picked up later when he walked armed with such stones and stood in front of the kitchen door. She was probed on the distance that the deceased stood from the kitchen door. She confirmed that it was some distance away. She also described that it was a split door ie the type of door where one could open and close the top part as well as the bottom part and that the lower part could remain closed while the top part could remain open. She testified that at the time that the deceased stood in front of the door the upper part of the door was open and that the lower part was closed and that the deceased while looking into the kitchen made no movements or did anything else apart from was standing in front of the door. She also confirmed that the deceased remained in the house throughout. When questioned as to whether there was any communication between the deceased and the appellant at the time, she stated that

'… all I heard was like both parties were saying words to each other as to say you shoot and throw you can throw or you can shoot those were the words exchanged by the two parties

Court: Repeat that again

Answer: All I heard was that the one party told the accused person saying to the deceased person one saying shoot the other one saying throw.

Prosecutor Who was saying shoot or which of the two were saying shoot?

Answer: The deceased person was the one who was saying shoot.

Prosecutor: And which of the one was saying throw?

Answer: That is the accused person'

[8] She reiterated that she then turned and did not observe what happened next, but she explained this regard that this was only for a very short time until she heard the shot when she turned again and saw the deceased falling while the appellant

was still in the house. She repeated that she did not see the deceased throwing any stones or bricks at the appellant.

[9] The initial part of cross-examination of this witness focused on the preceding altercation in which also the two other men were involved during which the deceased was then aggravated to such extent that he wanted to fight with the appellant. She also confirmed under cross-examination that the appellant had pushed the deceased with a *kierie* and that the deceased did not leave the yard. That it was from there that he went to pick up the stones for a second time that the appellant at that stage said he would fetch his gun and went into said house. She denied that the deceased went to pick up any bricks which he threw at the appellant, when this was put to her. She also denied, as put by defence counsel, that she noticed the deceased throwing stones at the appellant when the appellant ran towards the back of the house into the kitchen and that there were two women who as a result ran into the garage and that he picked up another stone, one already being in the other hand, and chased the appellant. It was then put to her that the appellant grabbed the rifle after he got into the house and that he closed the lower part of the door of the kitchen. The witness confirmed that she noticed that only the lower part was closed and that she did not see the appellant physically come back. It was then put to her that the appellant closed the lower part of the door and put his firearm on the lower part of the door pointing to the outside and that the deceased then dropping the stones or half- bricks and grabbed the gun which rested on the lower part of the door. Ms Kangootui denied that she saw any of this. Mrs Kangootui also denied that she had seen the appellant come back and that she noticed again when they were challenging each other, exchanging the words ‘throw’ and ‘shoot’. Mr Tjombe, who appeared on behalf of the appellant at the trial, then put it to the witness that the deceased then let go of the ‘gun’ and went to pick up the stones that he had dropped earlier. Also this was not noticed by her. He then put it to the witness that as the deceased bent to pick up the stones that had been dropped there, the appellant intended to fire a warning shot above the deceased, that the deceased then lifted his head or his body, who had bent down in order to pick up stones and that it was then that the deceased lifted his

head or his body, with stones, that the shot then went off. The witness again stated that all she knows is that a shot was fired that killed the deceased and that she did not see the deceased picking up stones. She was then confronted with a statement which she made in which she had stated that she had seen the barrel of the gun on the lower part of the door and the witness explained that this was something that she had stated heard and that she did not actually see. She was then finally quizzed as to whether she could not remember the incident fully or that she did not really see some of the things that transpired to which she responded by stating that she just knew what she had seen and stated that in respect of those things that she did not see she did not know what to say. Mr Tjombe's parting shot was to then to put to her that if the appellant would come and say that after the deceased had stopped pulling the appellants 'gun' he went to pick up stones that she would not be able to dispute his version. To this Mrs Kandootui replied: 'That is correct. I have not seen that, so how can I argue about that … '.

[10] In re-examination, she was asked to clarify whether it was possible - in the limited time in which she turned her head away from the scene - for the deceased to have dropped the stones, move closer towards the kitchen door, get hold of the barrel of the gun, turn back, bend, pick up stones which he had earlier thrown on the ground and then stand upright? The witness responded that she did not think so, intimating thereby that she thought that this was not possible.

[11] When questioned by the court she also clarified that at the time that the appellant went into the house (to fetch the rifle) she stood with the deceased and talked to him. When questioned on the distance that the deceased stood from the door (when he was shot), she replied that: '… I did not measure it … It was not that far and also not that close, but it was not much a long distance or a big distance …'. She then also confirmed that when she heard the shot and turned again she just saw the deceased falling.

Johannes Gabriel Koper

[12] This state witness confirmed that he knew the appellant. He confirmed further that he and one Kahuure went to the appellant's home that day in order to borrow some money. He explained how a quarrel arose in respect of the money in respect of which the deceased was dissatisfied with his share. The deceased demanded more and when appellant could not give him more the quarrel ensued, that both he and Kahuure talked to the deceased and after the deceased had run out of the house and picked up stones they urged him not to go back. They also told him that they would report the incident to the police and that they indeed went to a police van which stood in the vicinity and reported the incident to one Tsamareb who did however not intervene. Mr Koper and Kahuure then left.

[13] When they returned later they found the deceased person standing outside the appellant's house gesticulating into the appellant's home. They could however not hear what was being said. As they proceeded they heard the discharge of the rifle.

[14] The initial part of Mr Tjombe's cross-examination focused on the initial quarrel relating to the dissatisfaction of the deceased relating to the payment he had received. Mr Koper confirmed that the deceased was very angry at the time and that he even left the house in order to get some stones. They then managed to shield the appellant and take the deceased away from him and push him out of the house. Mr Koper confirmed that if this had not been done that the deceased would have used the stones to harm the appellant and that the deceased even picked up more stones as they were leaving the yard. By that time that they reached the police van the deceased was still threatening him with the stones. The deceased then stopped while Koper spoke to the police reservist Tsamareb. Although Koper was of the view that the deceased should have been locked up Tsamareb did not do this. He and Kahuure then left for the location. When they came back they observed the deceased making movements with his arm and hands and from which they deduced that the deceased was busy quarrelling with the appellant. When questioned whether or not this looked dangerous Koper said that he was looking all the time – and thus could not say – and that he then commented '… there he is

busy again …' after which they just proceeded further .

[15] He also confirmed that he knew the appellant very well as they worked together for many years and that he also had seen the deceased grow up in front of him. He confirmed that there had been quarrels between the deceased and his parents but that the deceased had quarrelled mostly with appellant in the past. He also stated that in his opinion the appellant was not a violent person.

[16] Finally it should be mentioned that in re-examination, Mr Alexander, who ran the prosecution in the court a quo, had Mr Koper's witness statement confirmed for the purposes of having him declared a hostile witness in order not to disclose certain inconsistent parts of his statement. These parts related mainly to the first quarrel and did not throw any new light on the material time that the deceased was shot. The State then closed its case.

[17] The defence also closed its case.

[18] As the appellant thus gave no evidence in his defence the contents of his plea explanation thus came to the fore.

The appellant's plea explanation

[19] 'Explanation of plea of not guilty in terms of Section 115 of the Criminal Procedure Act, Act 51 of 1977:

1. The Accused plead not guilty to the charge of murder, and provides the following explanation to the plea:

2. The Accused deny that on 2 February 2008 and at Tses in the regional division of Keetmanshoop, Namibia, he unlawfully and intentionally killed **PATRICIO DAVID APOLLUS** ("the deceased").

3. The Accused admit that on 2 February 2008, and at Tses in the regional division of Keetmanshoop, Namibia he discharged a firearm of which bullet struck the deceased

and which caused his death.

4. The Accused discharged the firearm in the self-defence against the continuous and a further imminent attack by the deceased, who was throwing stones or bricks at the Accused and intended to throw stones or bricks at the Accused.

5. When the deceased bent downwards to pick up the bricks or stones, the Accused intended to fire one shot above the deceased to ward off the continuous and further imminent attacks. The bricks or stones that the deceased intended to throw at the Accused were large and had the potential to cause serious harm or death.

6. As the Accused fired the one shot, the deceased unexpectedly moved upwards and into the path of the bullet, which struck him in the head causing his death. The Accused did not foresee that the deceased will be struck by the bullet. Had the deceased not moved unexpectedly upwards, the bullet would have not struck the deceased, but would have harmlessly and safely passed the deceased. The intention was to scare him so that would cease his attacks on the Accused, which attacks were imminent and caused the Accused to fear for his life and safety.

7. Accordingly, the Accused did not intend to strike the deceased, and therefore did not intend to kill the deceased, but fired the one shot with the intention to ward off the attack by the deceased.

8. The deceased was a violent person throughout his life, which violence was mostly directed at the Accused (who is his father), his mother and other family members. At the relevant time of the incident referred in the charge sheet, the deceased was particularly violent and was attacking the Accused with stones or bricks, and the escalated the attack by intending to throw at least further two bricks or stones at the accused.

9. The Accused's striking the deceased was not intentional nor was it negligent, but the Accused's actions were reasonable and necessary in the circumstances.

10. The Accused therefore plead not guilty to the charge of murder, and this is therefore his explanation of his plea of not guilty.

11. Any admissions made herein above may be recorded as formal admissions in terms of section 220 of the Criminal Procedure Act, Act 51 of 1977.'

Judgment of the court a quo

[20] After summing up the evidence and considering counsels' submissions the learned magistrate took some time out to differentiate some of the case law which had been cited to him. He set out the applicable case law and the applicable principles regarding private defence including that it was clear that the appellant facing a prima face case had an evidential burden to discharge or to refute such prima face case. He remarked that although the appellant's section 115 statement was quite elaborate it left many questions unanswered and without the appellant testifying it was impossible for the court to find what the appellant's state of mind was when he fired the shot. He analysed the requirements of self-defence and concluded that the state had made out a prima facie case which had cast an evidential burden on the appellant. He proceeded to analyse the Section 115 plea explanation of the appellant with reference to the evidence on record which importantly also showed that the deceased 'did not remain attacking his father because he was afraid of the police' – and that by reason of the fact that the appellant and the deceased were challenging each other immediately prior to the shooting and because 'the impression given by both witnesses, (that) they are seeing the appellant in front of the house or the kitchen door and the hearing of the shot was such that it was not possible to accommodate the defence's averments …'. He also concluded that the situation in which the parties were challenging each other rather 'bordered on provocation and annoyance' rather 'than a real self-defence situation'. By firing a lethal weapon at the deceased's head or body the appellant should have foreseen that he could kill the deceased or at risking that. If it was intended as a warning shot it should have been aimed in the air. He ultimately concluded that the appellant was not under attack and even if he was that he exceeded the bounds of self-defence. In the result he found the appellant guilty as charged.

Argument

[21] During argument presented at the appeal hearing the court raised a number

of aspects pertinent to the issue of private-defence with the appellant's counsel, Mr McNally, who was alive to the constraints placed on his task by the little probative value, if any, that attaches to plea explanations made in terms of section 115 of the Criminal Procedure Act 1977.[1]

Ad the alleged use of large bricks or stones

[22] The first aspect so raised concerned the bricks or stones with which the deceased was alleged to have had mounted the 'continuous and further imminent attack' against appellant.

[23] In this regard it should not be forgotten that the appellant had described the attack he was facing in his statement made in terms of Section 115 as follows:

'4. The Accused discharged the firearm in the self-defence against the continuous and a further imminent attack by the deceased, who was throwing stones or bricks at the Accused and intended to throw stones or bricks at the Accused.

5. When the deceased bend downwards to pick up the bricks or stones, the Accused intended to fire one shot above the deceased to ward off the continuous and further imminent attacks. The bricks or stones that the. Deceased intended to throw at the accused were large and had the potential to cause serious harm or death.'

[24] Mr McNally readily conceded that there was absolutely no evidence of any bricks or the use thereof nor was there any indication as to the size of the stones that had been handled at any time and which therefore could have had 'the potential to cause serious harm or death.'

[25] This concession was correctly made given the evidence tendered by the state witnesses in this regard which must be accepted.

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[1]See for instance : *S v Tjiho (2)* 1990 NR 266 (HC) at 270 - 271, *S v Maans* 1991 NR 119 (HC) at p 120, *S v Teek* 2009 (1) NR 127 (SC) at 133 para [15].

Ad the alleged grabbing of the rifle

[26] On this score it will be recalled that defence counsel had put it to Mrs Kangootui that:

'And then the Deceased who had the stones in his hand dropped the stones. Can you confirm that? —- I, no I cannot tell as to how he dropped the stones. I do not know whether he just dropped them voluntarily or it was when he was shot. That I cannot tell.

And after dropping the stones or these half bricks he grabbed the gun which was on the, the lower part of the door. I did not see that.

You did not see. That is correct I did not see

My instructions are further that, to you, that the Deceased then pulled the gun that was being hold on the other side of the door in the kitchen by the Accused. What is your comment on that? I have not see, I did not see that.

You did not see that? No.

At the time when he was pulling, when he grabbed he gun and pulling it towards him he was shouting to the accused using all sorts of vulgar words in between that the Accused should shoot him or he will throw the Accused with the stones. And using vulgar language. — I did not see and hear that.

The instructions of the Accused are further that he then left the, the gun, let go of the gun and went to pick up the stones that he dropped earlier or went to bend to pick them up. … I did not see that.'

[27] Here Mr McNally had to agree that the appellant's version, as put, was not consonant with the plea explanation in which 'a continuous and further imminent attack by the deceased, who was allegedly throwing stones or bricks' had been sketched and were the deceased saw fit to drop his stones, wrestle for the rifle and were the appellant and the deceased actually took time out to threaten each other

and where the deceased had actually taken up a position some distance away from the kitchen door, as was also corroborated by Point E indicated on the photo plan, Exhibit ‘G’.

[28] There was also in such circumstances no continuous and further imminent attack by the deceased who was throwing stones of bricks or intended to throw stones or bricks.

[29] It therefore emerged that also in this regard the appellant’s version was not quite borne out by the evidence.

Ad the warning shot

[30] Here the plea explanation read:

‘5. When the deceased bend*(t)* downwards to pick up the bricks or stones, the Accused intended to fire one shot above the deceased to ward off the continuous and further imminent attacks. The bricks or stones that the deceased intended to throw at the accused were large and had the potential to cause serious harm or death.

6. As the Accused fired the one shot, the deceased unexpectedly moved upwards and into the path of the bullet, which struck him in the head causing his death. The Accused did not foresee that the deceased will be struck by the bullet. Had the deceased not moved unexpectedly upwards, the bullet would not have struck the deceased, but would have harmlessly and safely passed the deceased. The intention was to scare him so that *(he)* would cease his attacks on the Accused, which attacks were imminent and caused the Accused to fear for his life and safety.

7. Accordingly, the Accused did not intent*(d)* to strike the deceased, and therefore did not intent*(d)* to kill the deceased, but fired the one shot with the intention to ward off the attack by the deceased.'

[31] The immediate and obvious problem posed by the alleged scenario is that it was common cause between the prosecution and the defence that the lower part of the kitchen door - which did also have a top part – and which parts could independently be opened and closed – was shut at the time that the appellant intended- and fired his 'warning shot 'above the deceased'. The deceased was however at the time bending down 'to pick up bricks or stones' when the deceased 'moved unexpectedly upwards'. According to the photo plan the kitchen and thus the spot from which the appellant fired his shot, was elevated. In addition the lower part of the door would have impeded the aiming of the shot to an area situated 'lower down' and were the deceased was bending down, making the hitting of the target in a lower area even more difficult. In order to hit a target lower down the appellant would have had to move forward in order to overcome the barrier posed by the lower part of the kitchen door in order to aim his rifle at the deceased and thus to hit him. These objective facts do not gel with the appellant's version that he only hit the deceased by chance because he was in the process of coming up again. If the appellant had really intended not to strike the deceased and had really aimed to fire his rifle above the deceased - so that the shot would pass him by 'harmlessly and safely', it remains inexplicable why he was not able to achieve this objective – after all it would have been an easy matter to have fired a warning shot 'safely' into the air well above the deceased's head, as the top part of the kitchen door was admittedly open and would not have impeded such manoevre.

[32] The objective facts are thus rather indicative of a shot aimed at the deceased and the intention to execute the verbal threats made immediately before the shooting - at the very least the appellant's actions amount to a reckless disregard as to the consequences of his actions by the aiming and firing of a shot, fairly low

down, into the direction of the deceased – who was admittedly bending down but who would thus, foreseeably, come up again, with lethal consequences.

[33] It did therefore not altogether come as a surprise that the learned magistrate, in the court a quo, ultimately concluded his findings as follows:

> 'By aiming a lethal weapon such as a gun at the Deceased or by firing a lethal weapon such as a gun at the Deceased's head or body Accused clearly foresaw that a bullet to that part of the head or of the body would kill the Deceased or have, or would have fatal consequences and thereby took the risking game. If it was intended to be a warning shot it could and would have been made in the air. It is clear that the requirements of the defence of self-defence do not cover the Accused at all. Evidence before this Court does not suggest that Accused person was under attack and even if he was under attack the means he took to defend himself clearly exceeded the bounds of self-defence. In the result this Court finds Accused guilty as charged.'

[34] We cannot say that such finding was wrong. On the contrary it would appear that such finding is correct. Accordingly we do not uphold the appeal against the appellant's conviction.

Ad sentence

[35] During argument, Mr Alexander for the prosecution, in the court a quo, submitted that a five year term of imprisonment would be an appropriate sentence for the appellant in the circumstances. He also requested the court to order the forfeiture of the rifle, which had been used and its silencer.

[36] Mr Tjombe on the other hand urged the court to impose a wholly suspended sentence coupled with community service.

[37] The court a quo however imposed a sentence of fifteen years of which five years were suspended on the usual conditions. In addition the rifle and silencer were declared forfeit to the State and the appellant declared unfit to possess a firearm.

[38] Given this divergence it does not take much that the resultant sentence imposed for murder became the central focus of this appeal.

Mitigation

[39] From the evidence on record it emerges that he appellant is presently seventy-three years old. He is married with children. He was involved in farming through which he provided for his wife and family. He had no previous convictions. He has been a law abiding citizen for most his life and has even occupied a board position on the board of directors of the National Development Corporation. He is still a respected leader in the ‘Blouwes’ traditional community, which community he also served by being on the traditional authority in Tses and beyond.

[40] Both the appellant and his wife are no longer in perfect health.

[41] The appellant has to continue to live for the rest of his life with the fact that he has killed his own son a deed that obviously hurt him deeply and for which he has expressed regret according to the evidence of family members, the Reverend Bever and a social worker who testified in mitigation.

[42] Extensive evidence was offered in regard to the provocation that the appellant would have to endure on many occasions from the deceased over the years.

[43] In the course of the testimonials given by a number of witnesses in favour of the appellant they all agreed that the appellant should not be sent to prison.

[44] It was submitted further that the killing was not pre-meditated and that there was no necessity to remove the appellant from society and that imprisonment, given the appellant's age would not serve its rehabilitative purpose and that it was rather a suspended sentence that would effectively serve as a deterrent. It was pointed out in this regard that the likelihood that the appellant would become a repeat-offender was virtually nil.

[45] The court was urged to consider the option of community service as a realistic alternative to imprisonment.

[46] The prosecution reminded the court that the offence of which the appellant was convicted called for a long custodial sentence. It was conceded that the circumstances which prevailed at the time, the appellant's age, the role which he still played in the community justified a substantial reduction in the sentence which would otherwise be appropriate – the prosecutions point of departure having been a sentence of between fifteen to twenty years imprisonment. It was suggested that a totally suspended sentence would only have been fitting in the event of a conviction of culpable homicide of murder on the basis of *dolus eventualis*.

[47] Mr Alexander submitted further that the degree of provocation was not such as could be regarded by a reasonable person as an excusable reaction. He conceded that the past acrimonious relationship between father and son must have got the appellant to the point where he lost control and a young life was lost.

[48] He also pointed out that adequate medical and hospital facilities were also available in prisons and that it was rather the exception than the rule that medical grounds constituted a good reason for not sending a convicted person to jail for a serious offence.

[49] It was also argued that there was authority for not sending first offenders to prison but that it also went without saying that were a serious crime was committed this principle would not apply.

[50] He conceded also that the appellant's conduct was less reprehensible as it was committed under circumstances of diminished responsibility but that on the other hand perpetrators of domestic violence should be severely punished and that the sentences imposed should send out a strong deterrent message.

[51] He nevertheless considered a sentence of eight years imprisonment as unjust and submitted that a term of five years would appropriately do justice to all applicable factors.

Reason's for sentence

[52] The learned magistrate initially considered the various competing factors relevant to sentencing with reference to the applicable authorities.

[53] He acknowledged the compelling personal circumstances of the appellant and even was prepared to accept the appellant's medical condition in the absence of 'proof'.

[54] The court also accepted that the appellant was remorseful and that he regretted the death of his son. He was mindful that the social worker who had testified had called for a non-custodial sentence and that the appellant was a useful member of the community who was mindful of his responsibilities towards his wife.

[55] The focus then shifted as follows:

'… It is always in the interest of the community and society at large that the right to life is jealously protected. The upsurge of crimes of violence and the rise of the tendency to take the law into one's own hands and exact extraditial resolution is very harmful to society as a whole. People in society can only have respect for the rule of law and the criminal justice delivery system if crimes are seen to be adequately and generally as far as possible uniformly punished …

… Generally Accused appears to have more sympathisers sympathizing with him that with the Deceased. Perhaps it is because of the Accused person's position in the community, maybe it is because of his reputation and the fact that the Deceased was probably a nuisance or simply because the Deceased has already been lost anyway. … One must point out that from the nature in which the investigations were carried out by the social worker and the time she says she had with the Accused person and the areas she covered her report is clearly inadequate. She concentrated only on the current state of the Accused person, …It must be noted that society or the community's definition goes beyond and is not limited to the Accused person's immediate family, peers and his immediate locality or community. A sentence must only make sense to a particular section of society or a particular community…

… A clear message must be sent that crime. especially murder cannot be condoned, no matter how popular (indistinct) the offender is or how harmful and unpopular the victim is in a particular community. In other words life is life and it is important no matter who carries it Likewise the interest of the community are not necessarily synonymous with the immediate benefits the particular section of the community stands to derive from a particular Accused person. Thus the Courts must be careful to apply the (indistinct) of the community or focus of interest. If that were to be the order of the day then some well-placed people in society, especially in small remote communities will be tempted to execute social outcasts and rely on the support of their communities which communities (indistinct) their beneficiary to escape due punishment (indistinct) …

… Although the Court is under a duty to serve the public interest it must be mindful that public expectation is not synonymous with public interest and the Courts must, the Courts should not give in to expectations of society and impose sentences which society deems just. The Courts must safeguard their independence and have to consider sentences in accordance with the well-established principles applicable to sentencing and of which public interest is but one factor to be taken into account." The same Court in the Nakapawa Johannes case quoted above on page 6, paragraph 14 remarked as follows and I quote: 'The Court on the other hand is mindful of the fact that people in society on a daily basis encounter situations in which they are angered, humiliated or provoked, but have to control their emotions without yielding to the urge of taking the law into their own hands and punish (indistinct). Having said that the question is what sentence is applicable in this specific case. I have already alluded to the Defence suggested a wholly suspended sentence. The State on the other raised diminished responsibility into Accused person's actions and urged the

Court to follow the case of The State versus Munisi cited above and sentence the Accused person to an effective prison term of five years…

… however the Munisi case is distinguishable …It is not clear at what stage Accused person was (indistinct) with that anger. Was it when he went into the house to get the key or he went to collect his gun or at the point of pulling the trigger. ... One obviously sympathises with the plight of the Accused person's wife and children, but especially the wife. They will definitely suffer with the Accused person incarcerated. Unfortunately such is the natural consequence of crime. An adequate sentence is called for in this particular case. While there may be some mitigatory features present in this case they are not as adequately strong as to justify complete departure from the norm of sentencing in murder cases. Both the State and the Defence could not refer this Court to any Namibian authority in support of their respective suggestions for sentence. A totally suspended sentence as suggest by the I Defence is totally out of the question. The State as mentioned above also suggested five years imprisonment, but this Court was not provided with any binding authority in support obviously as demonstrated above not on all fours with the present case. While the cases of S v Steenkamp …(35 years) … S v Ronnie Noabeb … (35 years) … S v Samotwane CC29/06 … (30 years) … S v Gerald Kashamba … (20years) … may not be on all fours with the present case in that the 'victims were either spouses or girlfriends of the Accused persons. There can be no denying that by these cases a clear highway has been graded by the Higher Courts for the lower courts to follow in the case of sentencing in murder cases. This Court has already mentioned and agrees with the Defence and the Accused that the Deceased had provoked the Accused person and that we heard the Deceased was generally a nuisance. The Deceased may have been a spoilt brat as his sister testified, but it is only the law of the jungle which calls for such people to be exterminated. ..

…From the cases cited and the circumstances favourable to the Accused one not a find a (indistinct) to depart from general trends in sentencing murder cases. As already mentioned having taken that into account and the nature of the offence tied together with the real interest of society and weighing them against the interest of the Accused person this Court unfortunately finds itself unable to agree with both the State and the Defence on the sentence, sentences proposed. While the Court may sympathise with the Accused person impartial and apply the law as it is. In fact our criminal justice delivery system remains both respectable, reliable. (indistinct) predictable, because Courts of law must and do operate on sound principles and above personal feelings In my view that is the golden rule that cannot be lightly departed from. In the result the Court taking into account Accused person's interest and (indistinct) set by the superior courts, especially in the cases cited above and also the

Nakapawa Johannes case supra which by all standards is far less serious than this one in that the Accused was a female offender and who was committed of murder with legal intent this Court is of the belief that the maximum of twenty years will still be just and equitable, however given Accused person's advanced age and perhaps that there are strong and mitigatory features which both the State and the Defence find to be present, but which still remain a bit elusive the Accused person will be sentenced as follows:…. FIFTEEN (15) YEARS IMPRISONMENT of which FIVE (5) YEARS IS SUSPENDED FOR FIVE (5) YEARS on condition Accused is not convicted of murder or attempted murder committed during the period of suspension. Secondly the gun and the silencer produced as Exhibits are forfeited to the State (indistinct) in terms of Section 10(6) of Act 7 of 1996, the Accused person is declared unfit to possess a firearm for a period of ten years which period shall run from the time Accused person completes his sentence. … '

[56] Interestingly enough the learned magistrate chose to add that: '… This sentence and conviction are very much appealable … '

The applicable principles

[57] Mr McNally referred the court to the Supreme Court decision of S v van Wyk[2] where Ackerman AJA formulated the applicable approach on appeal as follows:

'Punishment being pre-eminently a matter for the discretion of the trial Court, the powers of a Court on appeal to interfere with sentence are limited. Such interference is only permissible where the trial Court has not exercised its discretion judicially or properly. This occurs when it has misdirected itself on facts material to sentencing or on legal principles relevant to sentencing. It will also be inferred that the trial Court acted unreasonably if (t)here exists such a striking disparity between the sentences passed by the learned trial Judge and the sentences which this Court would have passed (Berliner's case supra at 200) - or, to pose the enquiry in the phraseology employed in other cases, whether the sentences appealed against appear to this Court to be so startlingly (*S v Ivanisevic and Another* (supra at 575)) or disturbingly (*S v Letsolo* I 1970 (3) SA 476 (A) at 477) inappropriate - as to warrant interference with the exercise of the learned Judge's discretion regarding sentence'.

[2]1993 NR 426 (SC)

S v Whitehead 1970 (4) SA 424 (A) at 436D-E. Compare also *S v Anderson* 1964 (3) SA 494 (A); *S v Letsoko* and Others 1964 (4) SA 768 (A) at 777D-H; *S v Ivanisevic and Another* 1967 (4) SA 572 (A) at 575G-H and *S v Rabie* 1975 (4) SA 855 (A) at 857D-F.

A Court of appeal will not readily differ from a trial Court in its assessment either of the factors to be had regard to or as to the value to be attached to them; *S v Fazzie* and Others 1964 (4) SA 673 (A) at 684; *S v Berliner* 1967 (2) SA 193 (A) at 200D.'[3]

[58] Counsel also referred the court to *S v Tjiho*[4] where Levy J stated:

'In terms of the guidelines to which I referred above, the appeal Court is entitled to interfere with a sentence if:

(i) the trial court misdirected itself on the facts or on the law;

(ii) an irregularity which was material occurred during the sentence proceedings;

(iii) the trial court failed to take into account material facts or over-emphasised the importance of other facts;

(iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal.

(Straf in Suid-Afrika Du Toit; cases cited by him.)'[5]

[59] It appears from the judgment of the Court a quo that it correctly considered the main principles applicable to sentencing as expounded in *S v Zinn* 1969 (2) SA 537 (A) and the triad of factors which had to be considered, consisting of the crime, the offender and the interests of society. The court also did not omit to consider the main purposes of punishment as referred to in *S v Khumalo and Others* 1984 (3) SA 327 (A), namely, deterrence, prevention, reformation and retribution.

[60] In our view the same cardinal question, as posed by the learned judge of appeal, in *S v van Wyk*[6], also arises in this instance:

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[3] at ps 447 - 448
[4] 1991 NR 361 (HC)
[5] at p 366
[6] Op cit

'As in many cases of sentencing, the difficulty arises, not so much from the general principles applicable, but from the complicated task of trying to harmonise and balance these principles and to apply them to the facts. The duty to harmonise and balance does not imply that equal weight or value must be given to the different factors. Situations can arise where it is necessary (indeed it is often unavoidable) to emphasise one at the expense of the other. It is more, although not exclusively, in this context that it was submitted that the Court a quo had wrongly overemphasised the retributive and deterrent aspects of punishment at the expense of the accused's personal circumstances, his psychological background, and his mental state (in broad sense) at the time of the murder… '.[7]

[61] If one then considers the submissions on sentence made by Mr McNally on appeal:

'… In casu, the Learned Judge ignored the principle of individualisation in sentencing, in his quest to keep up with the trend of sentencing in murder cases. In so doing, it is respectfully submitted, he erred. …

… In casu, it would be submitted the chances of Appellant re offending is nil. To send a 71 year old man who has led a blameless life all his life, serves no purpose other than to break him. …

… It is respectfully submitted that the circumstances of the case does not require for Appellant to be broken.

The Appellant, has learnt his lesson.

One is tempted to ask rhetorically what purpose would be served to sent a 71 year old man to prison for 10 years. To deter him?; To reform him?; Because he is a danger to society? Because an example need to be made of him? …

The undisputed evidence adduced before the Learned Magistrate was that the Appellant was not violent. He was not a danger to the Namibian Society in general, and the society of Tses in particular. …

He has shown genuine remorse.

… In casu, the Learned Magistrate went out of his way to emphasize the seriousness of the offence, and in his view this took an overriding importance over the other factors to be considered in imposing an appropriate sentence. In so doing, it is respectfully submitted the Learned Magistrate erred. …

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[7] At 448

… General deterrence should not take overriding importance over and above specific deterrence. …

… The public interest is not served by sending 71 year old exemplary member of society to prison. …

… The Learned Magistrate lost sight of the unique facts of the matter before him. There was no need to send out a general message, within the context of the facts of the particular case. …

… The Learned Magistrate, payed lip service to the strong mitigatory factors advanced on behalf of Appellant. It will be submitted that the strong mitigatory factors, by far exceeded the need to remove Appellant from society, and especially for such a lengthy period of time.'

It does indeed appear that the learned magistrate in the court a quo could not quite divorce himself from the severe sentences imposed in the *S v Steenkamp* …(35 years) … *S v Ronnie Noabeb* … (35 years) … *S v Samotwane* CC29/06 … (30 years) … *S v Gerald Kashamba* … (20years) … matters. These sentences obviously also contain - as a predominant element - the element of general deterrence. Mr McNally is correct in his submissions that this element cannot and should not have played a prominent role in the sentencing equation of the appellant, given the circumstances of this case, as *' … there was no need to send out a general message, within the context of the facts of the particular case* ' … were the appellant - now a 73 year old man – who was a first offender at the age of 71 and otherwise had also led a blameless life - had learnt his lesson - had shown genuine remorse - was not violent – and was no danger to the Namibian society in general – and were the questions could legitimately be posed : what purpose would be served to send such a person to prison for 10 years. – and where the related questions: 'to deter him?; to reform him?; because he is a danger to society? or because an example needs to be made of him? – all should be answered in the negative.

[62] We accordingly find that the aspect of deterrence was over-emphasised, whereas the strong personal mitigating factors in favour of the appellant were under - emphasised.

[63] In our view the learned magistrate got the complicated task - of trying to harmonise and balance the principles applicable to sentencing and to apply them to the facts - wrong in these respects.

[64] Even if we are wrong on this, and in any event, the sentence imposed by the court a quo also induces a sense of shock in the sense that there is a startling disparity between the sentence imposed by the trial court and the sentence which we deem appropriate, as will appear below.

[65] Having considered all the facts relevant to sentence in this case we are persuaded that the imposed sentence is so severe that it warrants interference from this court.

[66] In the result:

a) The appeal against the appellant's conviction is dismissed.

b) The appeal against sentence succeeds and is replaced with the following sentence:

> TEN (10) YEARS IMPRISONMENT of which FIVE (5) YEARS ARE SUSPENDED FOR FIVE (5) YEARS on condition that Appellant is not convicted of murder or attempted murder committed during the period of suspension.

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H GEIER

Judge

I agree

DF SMUTS

Judge

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APPEARANCES

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RESPONDENT:	EN Ndlovu Office of the Prosecutor General, Windhoek