



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

Case No: CC 02/2015

**THE STATE**

Versus

**RIAAN KHAXAB**

**1<sup>ST</sup> ACCUSED**

**HANS GERHARD KAMPERIPA**

**2<sup>ND</sup> ACCUSED**

**Neutral citation:** *S v Khaxab* (CC 02/2015) [2017] NAHCMD 182 (7 July 2017)

**Coram:** USIKU, J

**Heard:** 4 July 2017

**Delivered:** 7 July 2017

**Flynote:** Sentence – Murder and robbery with aggravating circumstances – Previous convictions – Long time lapse between convictions not necessarily meaning that accused will be treated as first offenders – Such an aggravating factor – however account must be had of other factors – Nature of previous convictions as well as seriousness of present crime – Circumstances of each particular case is important – Period in custody awaiting trial – Weight in favour of accused – All crimes resulting from a single incident – One cannot “think away” murder when sentencing accused persons on the other crimes – Solution lying in ordering sentences to run concurrently – Court having the duty to punish offenders appropriately for their crimes.

**Summary:** The two accused persons were charged with several crimes. Accused one making spontaneous statements, such admissions admissible against him. After considering the evidence in totality both accused convicted on all charges.

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### ORDER

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- Count one : Murder with dolus eventualis – 24 years imprisonment.
- Count two : Robbery with aggravating circumstances – 12 years  
Imprisonment.
- Count three : Defeating or obstructing the course of justice – three years  
Imprisonment.
- Count four : Possession of a firearm without a license – three years  
Imprisonment.
- Count five : Possession of ammunition – three years imprisonment.

It is ordered that the three years imprisonment on the third count must run together with the sentence on the second count and the sentence on the fifth count to run together with the sentence on the fourth count.

It is further ordered that Exhibit one a 2.70 Sako rifle with serial no 553150 is returned to the lawful owner, Mr. Jacobus Albertus Cloete.

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### SENTENCE

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**USIKU, J:**

**Introduction**

[1] On the 11 May 2017 the two accused persons were each convicted in this court on the following counts.

Count one : Murder dolus eventualis.

Count two : Robbery with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act 51 of 1977 as amended.

Count three : Defeating or obstructing or attempt to defeat or obstruct the Course of justice.

Count four : Contravening section 2 of Act 5 of 1996 – Possession of a firearm

Without a license.

Count five : Contravening section 33 of Act 7 of 1996 – Unlawful possession Of ammunition.

### **Mitigation**

[2] None of the accused persons testified in mitigation of sentence.

[3] Mr. Lutibezi called one witness to testify in aggravation of sentence. Mr. Jacobus Albertus Cloete testified that the deceased was his biological father. He is the youngest son of the deceased. At the time of his father's death his father was a pensioner and was responsible for taking care of this household. Their father's death affected them a lot and they were left traumatized. Their mother passed away because she could no longer cope after her husband's death, due to ill health.

[4] His sister and her child could no longer sleep well after they had received threatening text messages from the deceased's cellphone which was part of the stolen items. He has since moved out of his father's home and is currently living on his own with his family.

### **Submissions**

[5] Mr. Uirab who appeared for accused one placed the following on record: Accused one was born on the 21 March 1978 at Rehoboth. At the time of the offence he was aged 33 years. He attended school up to grade one which was Sub A at the time. He did not progress in school due to hardship. His mother raised him as a single parent. She has never had a permanent job. He is the third born of the four siblings.

[6] Accused one is single and has fathered two children. His first child is aged 13 years whilst the second child is a girl aged 10 years. His first child is currently attending school and is in grade three whilst the daughter has never attended school because she is residing on a farm.

[7] Before his arrest accused one has been self-employed and used to sell a local brew from which he was earning an income of plus minus N\$3000 per month. He also sold other items. He assisted his children from his monthly income. He used to take care of his late brother and later sister's children, as well as his own mother.

[8] Accused one is the owner of a house made of corrugated iron sheets as well as some stock which consists of few goats and six donkeys at a farm. These livestock is being looked after by his relatives and he no longer has control over them. Accused one desires to continue his farming activities once he has completed his sentence. He suffers from ill health, though his medical records were not available before the court. He allegedly suffers from kidney stone and is due for an operation on the 17 July 2017. He also suffers from High blood pressure as well as from a skin condition.

[9] Accused one has been in custody since the 2 December 2011 and has never been granted bail to-date, which makes him to have been incarcerated for about five and a half years. He conceded that at some point in time he was serving a sentence of escaping from lawful custody after his arrest on this case. He also conceded to his previous conviction on a charge of robbery during 2010, which is similar to the

offence he has been convicted of on the second count. He further confirmed that such previous conviction is relevant to the present case.

[10] Mr. Uirab submitted that some of the accused's previous convictions were older than 10 years and that those relate to other types of offences and as such not much weight should be attached to them. It was further submitted on behalf of accused one that he is remorseful and sad for what he has done to the deceased and the suffering he has consequently caused the family of the deceased. Also that because the offences committed are closely connected in time, the court should consider imposing concurrent sentences.

[11] On behalf of accused two it was submitted that, when the court is imposing sentences it must consider, the crime, the offender as well as the interest of society. Mr. Tjituri further submitted that accused two was invited by accused one and should not be treated like the latter because he was not factually liable for the death of the deceased. His only sin being that he had associated himself with the crime when he failed to report it to the police. Accused two persisted denied to have killed the deceased, placing the blame on accused one.

[12] It was further submitted on behalf of accused two that all the items belonging to the deceased were recovered from accused one and not from accused two. Accused two's personal circumstances are the following: He was born in 1981 at Rehoboth where he grew up. He was raised by a single mother and never saw his father. Accused two attended school up to grade four in 1992. He has two minor children who are aged six and seven respectively. One of the children is being taken care of by his mother whilst the other one is under the care of his biological mother.

[13] Accused two has been incarcerated for the past five years and eight months after he was refused bail. Mr. Tjituri conceded that the crime was committed in a gruesome manner and that society expects that those who commit serious crimes be dealt with appropriately. He however pleaded with the court to consider imposing a different sentence from the one to be imposed on accused one. He pleaded to the court to suspend part of the sentences.

[14] Counsel for the State on the other hand argued that it is an aggravating factor that each accused has a record of previous convictions. Accused one admitted to at least five previous convictions of which two are relevant to the present crime. Counsel for accused one tried to play down these previous convictions arguing that a long time has lapsed between the convictions and the present crimes.

[15] In my view this court cannot merely ignore them, neither could the accused persons be treated as first offenders. Their previous convictions each goes to prove that they have a tendency to engage in criminal activities. Indeed the court appreciates accused's' ones offer of a guilty plea to the charges on counts four and five which has saved the court's valuable time. It is trite that a plea of guilty has been considered under certain circumstances to be a sign of remorse and as such a mitigating factor<sup>1</sup>.

### **The Crime**

[16] The assault on the deceased was very brutal. The victim was an elderly man and therefore a vulnerable member of society. It leaves one with a sense of shock. As it was held in *S v Kaanyuka*<sup>2</sup>, "Brutality against the vulnerable in our society especially women and children has reached a crisis point. These crimes against the vulnerable in our society evoke a sense of helplessness in the national character. Those who commits despicable and serious crimes that we have shamefully now become accustomed to as a community, should expect harsh sentences from courts of this land".

[17] The accused persons were each convicted with murder without direct intent. That however does not make this crimes less serious. The deceased was overpowered and his properties were stolen from him. Though the accused persons have persisted in their innocence, one must consider the deceased's body mass at the time of his death. It could not have been possible for accused one alone to overpower the deceased without assistance from accused two who in fact confirmed to have been present on the crime scene. All indications are that accused persons

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<sup>1</sup> S v Kadhila CC 14 NAHCNLD 12/03/14.

<sup>2</sup> S v Kaanyuka 2005 NR 206 F-I.

acted in concert in the attack and killing of the deceased, where after they tied him up and left he covered with bushes in order to conceal his body.

### **Period spend in custody awaiting trial**

[18] It is trite that the period accused person each had spent in custody awaiting the finalization of his trial has to be taken into account and will lead to a reduction in sentence. The period the accused persons have spent in custody is indeed a substantial one and this will be considered when sentences are imposed. At the same time the court is well aware that the Namibian society is at present plagued by violent crimes. The spilling of blood and the taking of lives through violent means has become a common place.

[19] Our courts are therefore tasked with a duty to protect the most vulnerable groups such as the elderly and children so as to ensure that their right to life and dignity are protected and respected. No one would want a situation whereby the community become helpless and then decide to take the laws into their own hands due to lenient sentences imposed by the courts.

[20] It is therefore important for the courts to punish those who commit serious crimes so as to prevent them from committing similar crimes and also to warn others about the consequences of committing such crimes. It appears to this court that the sentences that were imposed on the accused persons previously have had no impact on their rehabilitation as they have continued to commit even more serious crimes. This court is mindful of the fact that the accused persons each face several counts and in order to avoid too long sentences, the solution lies in ordering some of the sentences to run concurrently with sentences on other counts. However, the court still have the duty to pass sentences which will sent out a clear and unequivocal message to society that such behavior cannot be tolerated or condoned.

[21] Having carefully considered all factors relevant to sentencing. I have come to conclude that the crimes the accused persons have been convicted of, the interest of society by far outweigh the accused person's personal interests.

[22] As a result each accused person is sentenced as follows:

Count one : Murder with dolus eventualis – 24 years imprisonment.

Count two : Robbery with aggravating circumstances – 12 years  
Imprisonment.

Count three : Defeating or obstructing the course of justice – three years  
Imprisonment.

Count four : Possession of a firearm without a license – three years  
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D N USIKU

Judge



## APPEARANCES

STATE : Mr Lutibezi  
Office of the Prosecutor-General

ACCUSED ONE : Mr Uirab  
Directorate of Legal Aid

ACCUSED TWO : Mr Tjituri  
Tjituri Law Chambers  
Instructed by Directorate of Legal Aid