REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: CA 32/2017

In the matter between:

ALBETUS VAN WYK **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation*:* *Van Wyk v S* (CA 32/2017) [2017] NAHCMD 272 (26 September 2017)

Coram: SIBOLEKA, J and UNENGU, AJ
Heard: **22 August 2017**
Delivered: **26 September 2017**

Flynote: Criminal Procedure – Appeal – Appeal against sentence – Sentence imposed on appellant by the Regional Court following a conviction of murder with direct intent to kill – Appellant killing the deceased by stabbing him 13 times with a knife all over the body – Court declined to interfere with the sentence because it is appropriate in the circumstances of the matter. The appeal is dismissed on all the grounds.

Summary: The appellant who was convicted of murder with direct intent to kill and sentenced to 19 years imprisonment in the Regional Court, is appealing the sentence passed on him by the Regional Court on various grounds. The appellant

stabbed the deceased 13 times with a knife thereby causing his death on the spot. On appeal, the court declined to interfere with the sentence.

Held: that the magistrate did not commit any misdirection during the sentence proceedings:

Held: Further that the sentenced passed is appropriate in the circumstances of the matter and dismissed the appeal.

ORDER

The appeal fails and is dismissed.

JUDGMENT

Introduction

UNENGU AJ:

[1] The appellant was charged and convicted of murder with direct intent to kill the deceased. The conviction followed after the appellant changed his plea from one of not guilty to a plea of guilty and was sentenced to 19 years imprisonment. This happened on the 10 October 2014 in the Regional Court for the division of Keetmanshoop.

[2] Aggrieved by the sentence imposed on him, the appellant is now appealing the sentence on the amended grounds of appeal set out verbatim hereunder:

'AD THE SENTENCE

2.1. The effective term of imprisonment of 19 years is shockingly inappropriate in that it induces a sense of shock;

2.2. The court erred in over emphasizing the seriousness of the offence and the deterrent effect of the sentence and in so doing the court failed to individualize the sentencing of the applicant (sic) and in the process gave little to no weight to the mitigating factors of the appellant;

2.3. The court in making a negative inference against the appellant in attributing the delays, regarding the commencement of the trial, to attempts being made by the appellant to frustrate said trial, despite the record showing that the said delays were largely occasioned by the State;

2.4. The magistrate failed to put sufficient weight on the element of provocation, by the deceased, perpetrated against the appellant, in that the magistrate had failed to take into account the arsenal of weapons as well as the escalating degree and severity of said weapons used by the deceased in his repeated assault of the appellant's wife, which triggered the incident;

2.5. The magistrate failed to take into consideration that the appellant had consumed alcohol on the day in question, prior to the incident which lead to the death of the deceased and as such, had neglected to take into account that the appellant was intoxicated at material time prior to and during the incident which lead to the death of the deceased, therefore impairing his faculties of the judgment during the said incident, subsequently diminishing his capability in relation to the incident accordingly;

2.6. The magistrate misdirected himself in finding that the appellant had stabbed the deceased in full view of his children whilst the record reflects that the appellant's children in fact were sleeping at the time of the incident;

2.7. The court erred in finding that the accused had shown no remorse for the crime that he had committed as the appellant had been crying, in open court whilst his guilty plea was being read into the record and as such, that act is indicative of the accused's remorse in relation to his actions;

2.8. The court overemphasized one of the triad of sentencing interests at the expense of another in sentencing the applicant;

2.9. The court had failed to show the appellant mercy in sentencing him, on the basis of the guilty plea which he tendered to the court.

[3] The facts of the matter are briefly set out in the appellant's statement in terms of s 112(2) of the Criminal Procedure Act[1] handed in on behalf of the appellant at the trial and in the evidence of state witness, Quinton Van Wyk. On 15 September 2007, the deceased and the appellant's wife had a physical scuffle in a night club at Oranjemund. This happened in the absence of the appellant. The appellant was outside sitting in his vehicle. After the altercation in the club, so it appears, the deceased left the club and drove away therefrom. In the meantime, the appellant

[1] Act 51 of 1977 (The CPA)

heard about what happened between his wife and the deceased, and decided to pursue the deceased in his vehicle until they traced him.

[4] The appellant got out of the car and approached the deceased who was sitting in his car. After talking to the deceased, probably asking why the deceased assaulted his wife in the club, the appellant started stabbing the deceased with a knife. The screaming, deceased jumped out of the vehicle and started running away from the appellant. Regrettably, he stumbled over a rock and fell to the ground. The appellant reached the deceased while he was still on the ground. He stabbed him with a knife 13 times all over the body until he died. While the appellant was stabbing the deceased who was lying on the ground his wife joined him and she started beating the deceased.

[5] During the trial, the appellant and the wife were represented by Mr Cupido who also addressed the court and argued in mitigation for sentence on behalf of the appellant. He put all personal circumstances and other factors of the appellant before court. It was argued that, the appellant stabbed the deceased due to provocation which the trial court was asked to consider during sentencing. This counsel referred the court to unreported judgments of this court in the matters of the *State v Williams Beukes*[2]and the *State v Jacobus Coetze.*[3]

[6] Before us on appeal, the appellant was represented by Mr Isaacks while Ms Ndlovu acted on behalf of the respondent.

[7] It is apparent from the authorities and legal principles of sentencing referred to by both counsel, that it is trite law that punishment is primarily a matter for the discretion of the trial court.[4] An appeal court is entitled to interfere with the sentence if it finds that: the trial court misdirected itself on the facts or on the law; a material irregularity occurred during the sentencing proceedings; the trial court failed to take into account facts or over-emphasized the importance of other facts or the sentence imposed is startlingly in appropriate, induces a sense of shock and there is a striking

[2] Case No CC 5/1993
[3] Case No CC 29/2007
[4] S v Rabie 1975 (4) SA 855 at 857 d-D; S v Van Wyk 1992 (1) SACR 147 (Nam) and S v Ndikwetepo and others 1992 NR 319 (SC)

disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal[5] had it sat as a court of first instance.

I will now look at the grounds one of appeal

[8] The appellant makes a bare allegation that the effective term of imprisonment of 19 years is shocking inappropriate as it induces a sense of shock. This is vague, not clear as it does not specify why the sentence is shocking and inappropriate to create a sense of shock. It follows therefore, that it should fail because it does not meet the requirements[6] that the grounds of appeal must be specific and clearly set out in the notice of appeal in order to inform the other parties what the issues are all about.

Grounds two, four, eight and nine

[9] The averments in these four grounds are in fact mitigating factors placed before the trial court in favour of the appellant during sentencing. These factors could not be considered in isolation but cumulatively together with other personal circumstances of the appellant. The magistrate appropriately addressed them in his reasons for sentence.

[10] In his reasons for sentence the magistrate credibly considered the aggravating factors such as the seriousness of the crime and the brutal violent manner it was perpetrated. On page 385 of the record of proceedings the magistrate said the following:

'. . . murder is indeed one of the most serious crimes. Society is often left august and so shocked when a life is snuffed out in such cruel and wicked circumstances such as in the present case. The sanctity of human life can never be over-emphasized. The right to life is indubitably the most sacred and the most precious right and it must be jealously guarded –without respect to human life or respect for and without sufficient protection of same, judicially and otherwise social order would generate into anarchy and the rule of the jungle will prevail.' (Emphasis added)

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[5] S v Tjiho 1991 NR 366.
[6] Rule 67 of the Magistrate's Court Act 32 of 1944 as amended.

[11] It is my considered view, that the magistrate's reasonings on this matter are correct. The deceased died a violent, brutal and a painful death at the hands of the appellant for a trivial reason. I agree with the sentiments expressed by Tommassi, J in *S v Lukas Hangula Kamati*[7] which was referred to by respondent in regard to provocation that it should not lead to violent responses as a means of settling disagreements between parties in a civilized society. Society expects and demands people to bottle in and control their emotions so as to avoid over-reaction which may unnecessary cause loss of human lives as it happened in the present matter. And if they do fail to control their emotions and commit crimes as a result, they will be punished appropriately.

[12] The appellant in this matter can therefore not rely on provocation as a mitigating factor because – it is in fact an aggravating factor against him judging from the multiple stab wounds he had inflicted on the body of the deceased.

Grounds three and six

[13] These two grounds refer to the remarks made by the trial court regarding delays in the commencement of the hearing as attempts by the appellant to frustrate the trial and that the appellant stabbed the deceased in full view of his children. There is nothing wrong in these remarks by trial court.

Ground five

[14] I agree with the magistrate, that there was no evidence led or submissions made on behalf of the appellant about the degree of his intoxication prior and during the time of the incident. This is a valid reason for the magistrate not having considered it as mitigatory because, it was as not placed before him.

Ground seven

[15] As pointed out before, the personal circumstances and mitigating factors of the appellant, including whether or not he had shown remorse for his actions, were considered together with the aggravating circumstances. However the magistrate

[7] Case No. CC 29/2010 delivered on 29 September 2011.

found that the appellant's mitigating factors were outweighed by the aggravating factors.

[16] That being the case, and for the reasons stated above in the judgement, I come to the conclusion that the magistrate did not commit any misdirection during the sentence proceedings. The sentence passed in the matter is appropriate. It does not induce a sense of shock. It will therefore, not be interfered with. The appeal must fail on all the grounds.

[17] In the result the appeal fails and is dismissed.

E P UNENGU

Acting Judge

A SIBOLEKA

Judge

APPEARANCES

APPELLANT:	TM Carolus Kadhila Amoomo Legal Practitioners, Windhoek
RESPONDENT:	H Iipinge Office of the Prosecutor-General, Windhoek