

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: CC 3/2018

In the matter between:

**THE STATE**

and

**JAN MOSES UAMUNIKA**

**ACCUSED**

**Neutral citation:** *S v Uamunika* (CC 3/2018) [2020] NAHCMD 289 (15 July 2020)

**Coram:** RAKOW, AJ

**Heard on:** 10 July 2020

**Delivered on:** 15 July 2020

**Flynote:** Criminal Procedure – Sentence – Murder – Accused first offender  
Convicted of murder in the form of *dolus eventualis* – for killing a 69 year old

male – and using of property without the owner’s consent; contravening section 8 of the General Law Amendment Ordinance 12 of 1956 – Accused accordingly sentenced to 25 years imprisonment of which 5 years imprisonment is suspended for 5 years on condition that the accused is not found guilty of murder committed during the period of suspension in respect of murder – 12 months’ imprisonment in respect of using property without the owner’s consent;– Sentence ordered to run concurrently.

**Summary:** The accused person was indicted on three counts to which he pleaded not guilty. The first count is one of murder, second count of robbery with aggravating circumstances as defined in s 1 of the Criminal Procedure Act, 51 of 1977 and count three related to the theft of a cellphone belonging to the deceased. The Accused was convicted on a count of murder and the use of the vehicle of the deceased without owner’s consent, contravening section 8 of the General Law Amendment Ordinance 12 of 1956 on 1 July 2020. All the charges relates to the death of one Joseph Adriaan Barth during the period of 30-31 August 2017. The accused was an employee of the deceased at the time of the incident. The accused testified that a struggle started between him and the deceased after he did not receive his salary and he questioned the deceased about that fact. The deceased then hit him first where-after a struggle started between him and the deceased, ending with him tying up the deceased and shooting him in the legs. He further testified that he and the deceased further had a good relationship, up until the day of the incident. It was also never his intention to kill the deceased, it happened when he defended himself. This court now has the task to hand down sentences for these offences committed by the accused.

*Held that* punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances. These factors should be considered together with the main purposes of punishment in mind.

*Held further that* this was not a pre-meditated offence and the accused was found guilty of the crime of murder without direct intent, but with intent in the form of *dolus eventualis*. In the current instance, this is seen as a mitigating circumstance and is therefore taken into account when determining an appropriate sentence.

*Held furthermore that* society will be best served in the accused receiving an appropriate sentence that will deter him and other members from committing the offence of murder, in giving him the opportunity to rehabilitate and becoming a useful member of society after his release and a sentence that expresses the abhorrence of society with the specific crime of murder sufficiently. Society look at courts for their protection against perpetrators of crime and murder, especially murder of farmers, are frowned upon.

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### **ORDER**

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Count 1 – Murder (*dolus eventualis*): 25 years imprisonment of which 5 years imprisonment is suspended for 5 years on condition that the accused is not found guilty of murder committed during the period of suspension;

Count 2: Use of property without the owner's consent; contravening section 8 of the General Law Amendment Ordinance 12 of 1956: 12 months imprisonment to run concurrent with the sentence given under count 1.

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### **JUDGMENT**

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**RAKOW, AJ**

Introduction

[1] The accused person was indicted on three counts to which he pleaded not guilty. The first count is one of murder in that during the period of 30 – 31 August 2017, at or near Rehoboth, the accused unlawfully and intentionally killed Joseph Adriaan Barth, a 69 year-old male person.

[2] He was further charged with a count of robbery with aggravating circumstances as defined in s 1 of the Criminal Procedure Act, 51 of 1977 in that during the same period as in count one and at or near Rehoboth, the accused unlawfully and with the intention of forcing him into submission, assaulted Joseph Adriaan Barth by firing shots at him with a firearm, and/or tying his leg(s) and arm(s) with ropes, and/or hitting, cutting and stabbing with a stick(s) and/or other unknown objects on his body and head and fracturing his ribs, and did unlawfully with the intent to steal, take a small solar panel, a brown leather wallet, a white Volkswagen Golf motor vehicle with registration number N4486R as well as the keys to this motor vehicle, all which was in the lawful possession of Joseph Adriaan Barth. Count three related to the theft of one STK black cell phone with a SIM card at or near Rehoboth in the district of Rehoboth or at or near Mariental in the district of Mariental, which was the property or in the lawful possession of Joseph Adriaan Barth.

[3] The Accused was convicted on a count of murder and the use of the vehicle of the deceased without owner's consent, contravening section 8 of the General Law Amendment Ordinance 12 of 1956 on 1 July 2020. This court now has the task to hand down sentences for these offences committed by the accused.

[4] The accused testified on his own behalf. He is a first offender. He is 49 years old currently and was 46 years old when the offences were committed. He attended school up to grade 7 and his mother is still alive, she is 70 years old. He has never been married and has 8 children. The eldest was born in 1991 and is currently 29 years old. The youngest are twins who was born in April this year

(2020). He was employed by the deceased for 4 – 6 months before the incident and earned N\$1500 per month. The incident happened because the deceased did not pay him N\$2500 that was due to him. He was in custody for about 8 – 9 months before the matter was withdrawn against him. The accused and the deceased further had a good relationship, up until the day of the incident. It was also never his intention to kill the deceased, it happened when he defended himself. He testified that he is very remorseful as it was not a good thing that happened. He also apologized in court to the daughter and family of the accused and the bigger Rehoboth community.

[5] Mr Engelbrecht on behalf of the accused then submitted that in determining a sentence, the court has to look at the nature of the crime, the circumstances of the accused and the interest of society. He stressed that none of these may be over-emphasized and argued that the accused has been a good citizen until the incident. He has no previous convictions. He was however found guilty of a serious crime and therefore it is in the interest of society that serious cases like these need to be visited with an appropriate sentence but it is also expected from our courts not to destroy the offender, the interest of society should therefore not be over-emphasized (see *S v Windstaan*).<sup>1</sup> The court is also urged not to only look at the crime that was committed, but the circumstances in which it was committed and to take cognizance of the fact that the accused was convicted of murder not committed with *dolus directus* but *dolus eventualis*.

[6] Mr Lilungwe for the state referred to the triad as described in *S v Zinn*<sup>2</sup> as the three factors that should be balanced during the process of sentencing, being the crime, the personal circumstances of the accused and the interest of society. Murder is without a doubt a serious crime and should be met with a heavy hand by this court. The accused and deceased were no strangers to one another as the accused was working for the deceased at a farm, which in itself should be

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<sup>1</sup> (CC 19/2010) [2017] NAHCMD 97 (24 March 2017).

<sup>2</sup> 1969 (2) SA 537 (AD).

seen as aggravating. Farming contributes to the economy of this country.<sup>3</sup> The deceased was also 69 years old at the time of the murder. The gruesome nature of the murder should also be taken into account as well as the fact that the deceased was left out exposed to the natural elements. The remorse expressed by the accused should also be seen as too little too late and is not necessarily sincere because it comes after he was already convicted.

### The sentencing process.

[7] In our law there are a number of principles crystalized through various decisions of our courts which play a role or influence the sentencing process. One of the cases that today is still as applicable as it was in 1975 is the case of *S v Rabie*<sup>4</sup> where James JA stated seven general guidelines for consideration during sentencing:

' (a) *Let the punishment fit the crime - the punishment fit the crime*", sang the Mikado in 1885, echoing the British judicial sentiment of those days. (W.S. Gilbert was a barrister, who retained his interest, though not his practice, in the Courts). The couplet is still quoted in Britain, at any rate in relation to the retributive aspect of punishment; see *Criminal Law of Scotland*, by G.H. Gordon (1967), p. 50, line 3.

(b) That used to be the approach in this country, too; see, e.g., *R. v Motsepe*, 1923 T.P.D. 380 in fin.:

*"The punishment must be made to fit the crime."*

However, in 1959 this Court pointed out that the punishment should fit *"the criminal as well as the crime"*; see *R. v Zonele and Others*, 1959 (3) SA 319 (AD) at p. 330E.

(c) The interests of society in punishment were noted in *R. v Karg*, 1961 (1) SA 231 (AD) at p. 236A - B, and *S. v Zinn*, 1969 (2) SA 537 (AD) at p. 540G.

(d) Then there is the approach of mercy or compassion or plain humanity. It has

<sup>3</sup> *The State v Katanga* (CC 23/2018) [2020] NAHCMD 66 (27 February 2020).

<sup>4</sup> 1975 4 SA 855.

nothing in common with maudlin sympathy for the accused. While recognising that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society; see *S. v Narker and Another*, 1975 (1) SA 583 (AD) at p. 586D. That decision also pointed out that it would be wrong first to arrive at an appropriate sentence by reference to the relevant factors, and then to seek to reduce it for mercy's sake. This was also recognised in *S. v Roux*, 1975 (3) SA 190 (AD).

(e) This quality of mercy or compassion is not something that has judicially cropped up recently. It was first mentioned in this Court some 40 years ago, by BEYERS, J.A., in *Ex parte Minister of Justice: In re R. v Berger and Another*, 1936 AD 334 at p. 341:

*"Tereg word gesê dat na skuldigbevinding die Regter in 'n ander sfeer verkeer waar die oplê van die straf gepaard moet gaan met oordeelkundige genade en menslikheid ooreenkomstig die feite en omstandighede van die geval."*

(In passing, BEYERS, J.A., pioneered the use of Afrikaans in the judgments of this Court; see *Souter v Norris*, 1933 AD 41 at p. 48 (dated 27 October 1932); followed by WESSELS, C.J., in *R. v Gertenbach*, 1933 AD 119 (8 March 1933). For an early judgment in Afrikaans by VAN DEN HEEVER, J. (subsequently a pillar of this Court), see *Ex parte Pieterse*, N.O., 1933 S.W.A. 4 (6 March 1933)).

Since then, the approach of mercy has been recognised in several decisions in this Court, with a number of Judges, in all, concurring; see *S. v Harrison*, 1970 (3) SA 684 (AD) at p. 686A:

*"Justice must be done, but mercy, not a sledgehammer is its concomitant";* *S. v Sparks and Another*, 1972 (3) SA 396 (AD) at p. 410G; *S. v V.*, 1972 (3) SA 611 (AD) at p. 614H; *S. v Kumalo*, 1973 (3) SA 697 (AD) at p. 698A; *S. v De Maura*, 1974 (4) SA 204 (AD) at p. 208H; *S. v Narker and Another*, 1975 (1) SA 583 (AD) at p. 586. And does not Portia refer to the unstrained quality of mercy "*which seasons justice*", in a memorable passage worthy of judicial study? (The Merchant of Venice, Act IV, Scene 1 - a court of justice).

(f) The main purposes of punishment are deterrent, preventive, reformatory and retributive; see *R v Swanepoel*, 1945 AD 444 at p. 455. As pointed out in Gordon, *Criminal Law of Scotland*, (1967) at p. 50:

*"The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation... The other theories, reformatory, preventive and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment."*

It is therefore not surprising that in *R. v Karg*, 1961 (1) SA 231 (AD) at p. 236A, SCHREINER, J.A., observed that, while the deterrent effect of punishment has remained as important as ever,

*"the retributive aspect has tended to yield ground to the aspects of prevention and correction"*.

(g) It remains only to add that, while fair punishment may sometimes have to be robust, an insensitively censorious attitude is to be avoided in sentencing a fellow mortal, lest the weighing in the scales be tilted by incompleteness. Judge Jeffreys ended his days in the tower of London.

(h) To sum up, with particular reference to the concept of mercy -

- (i) It is a balanced and humane state of thought.
- (ii) It tempers one's approach to the factors to be considered in arriving at an appropriate sentence.
- (iii) It has nothing in common with maudlin sympathy for the accused.
- (iv) It recognises that fair punishment may sometimes have to be robust.
- (v) It eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger.
- (vi) The measure of the scope of mercy depends upon the circumstances of each case. '

[8] In *S v Sparks and Another*,<sup>5</sup> the principles of punishment was summarized that punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances. These factors should be considered together with the main purposes of punishment in mind as reiterated in *S v Tcoelib*,<sup>6</sup> being deterrent, preventative, reformatory and

<sup>5</sup> 1972 (3) SA 396 (A) B at 410H.

<sup>6</sup> 1991 NR 263.



retributive. These four themes of sentencing is the cornerstones of a solid criminal justice sentencing system and should therefore be given weight in any sentencing procedure before arriving at a suitable sentence.

[9] It is further true that in sentencing, courts are called upon to strike a balance between the competing factors of sentencing in order to deliver sentences commensurate to the offences on which the accused is convicted. In so doing, it may sometimes be unavoidable to emphasize one factor at the expense of the others.<sup>7</sup>

#### Determining a suitable sentence

[10] The first leg of the Zinn triad – the crime: the court finds that murder is a serious crime, in general and in this instance, the injuries that were inflicted to the deceased were quite brutal. The deceased, although in good health, was 69 years old. He was severely beaten, he suffered from a skull fracture which ultimately caused his death, broken ribs, various defensive wounds on his hands, contusions on his chest, arms and back, and two gunshot wounds on his legs. He was further tied up and left exposed to the elements. He managed to loosen himself from the ties and crawled to the side of the house where he passed away and was found the next day. It is further true that there was a relationship of employer – employee between the deceased and the accused and that they knew each other. The existence of this relationship of trust is seen as an aggravating circumstance. Two of the deceased children also testified in the trial. The daughter of the deceased, Soria Barth specifically testified that she has not been back to her father's farm due to the impact that his death had on her.

[11] The accused testified that a struggle started between him and the deceased after he did not receive his salary and he questioned the deceased about that fact. The deceased then hit him first where-after a struggle started

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<sup>7</sup> *S v Van Wyk* 1993 NR 426 (SC).

between him and the deceased, ending with him tying up the deceased and shooting him in the legs. The court found that this was not a pre-meditated offence and the accused was found guilty of the crime of murder without direct intent, but with intent in the form of *dolus eventualis*. In the current instance, this is seen as a mitigating circumstance and is therefore taken into account when determining an appropriate sentence.

[12] The second leg of the triad - the criminal: The accused is a first offender and has not had a brush with the law before. This counts in favour of the accused. He further has 8 children, of which the youngest two are but a few months old. From his evidence it seems however that he struggles to keep employment due to the current case pending against him as he is every time questioned about the said case and then released from his employment, seemingly because of the fact that he was facing a murder charge.

[13] The accused further expressed remorse during his evidence although he indicated that it was never his intention to kill the deceased. When considering the question of remorse it is important to be reminded of comments made by the court in *S v Matyityi*<sup>8</sup> at para 13 when the learned judge examined the question of remorse by stating the following:

‘...There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a knowing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful, and not simply feeling sorry himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be

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<sup>8</sup> (695/09) [2010] ZASCA 127 (30 September 2010).

determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia, what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions...’

[14] The third leg – the interest of society: Undoubtedly this leg is the most difficult one to describe as the interest of society is not just the reaction of members of the society who express their abhorrence with a specific crime or type of crime but a broader sense of a sentence that serves the society. Society is served when crime is prevented but also when criminals are rehabilitated to eventually become productive members of society. Society needs crime to be deterred and is protected when criminals are removed from it. Society’s interest is best served when the advantage that is derived from a sentence is the biggest. This result is only achieved when everything that adds up to the interest of society is added into the mix in weights that is just the right amounts. This is clearly different from revisiting the crime component.<sup>9</sup>

[15] In the current matter before court society will be best served in the accused receiving an appropriate sentence that will deter him and other members from committing the offence of murder, in giving him the opportunity to rehabilitate and becoming a useful member of society after his release and a sentence that expresses the abhorrence of society with the specific crime of murder sufficiently. Society look at courts for their protection against perpetrators of crime and murder, especially murder of farmers are frowned upon. It was admitted during submissions by the accused that the Rehoboth community lost a valuable member and he apologized to the community for his part in their loss.

[16] After considering the evidence given by the accused in mitigation, the submissions made on his behalf by Mr. Engelbrecht and the submissions made on behalf of the state, as well as being mindful of the guidelines as set out in *S v*

<sup>9</sup> SS Terblance, *The guide to sentencing in South Africa*; 1991; Butterworths page 174 – 177.

*Rabie (supra)* and the Zinn-triad as discussed above, I came to the conclusion that a period of imprisonment would be an appropriate sentence with regard to the first count. It also seems that the accused does not necessarily have the means to pay a fine on the second count and should therefore also receive a period of imprisonment on this count.

[17] Taking all the relevant factors and circumstances into account, I consider the following sentences to be appropriate:

Count 1 – Murder (*dolus eventualis*): 25 years imprisonment of which 5 years imprisonment is suspended for 5 years on condition that the accused is not found guilty of murder committed during the period of suspension;

Count 2: Use of property without the owner's consent; contravening section 8 of the General Law Amendment Ordinance 12 of 1956: 12 months imprisonment to run concurrent with the sentence given under count 1.

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E RAKOW  
Acting Judge

APPEARANCES:

THE STATE:

Mr Lilungwe  
Of Office of the Prosecutor-General  
Windhoek

THE ACCUSED:

Mr Engelbrecht  
Instructed by the Directorate of Legal Aid  
Windhoek