

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 05/2020

In the matter between:

THE STATE

and

LUKAS KASKAS NGHIFIKEPUNYE KASHONGA

ACCUSED

Neutral citation: *S v Kashonga* (CC 05/2020) [2020] NAHCMD 293 (16 July 2020)

Coram: SIBEYA, A.J

Heard: 30 June and 13 July 2020

Delivered: 16 July 2020

Flynote: Criminal Procedure – Sentence – Murder with *dolus directus* – Accused killed two people under different circumstances within 24 hours — Murder gruesomely perpetrated against one deceased while the other deceased was a helpless woman who attempted to flee the attack – Society calls for severe sentences – Accused deserved to be uprooted from society – Accused sentenced to double life sentences on 2 counts of murder - Housebreaking with intent to steal and theft – Accused broke a padlock, entered the house and stole matches and tobacco – Offence invading another’s privacy and calling for custodial sentence - Accused sentenced to 1 year’ imprisonment.

Summary: The accused was indicted in the High Court on 2 counts of murder and 1 count of housebreaking with intent to steal and theft. He pleaded guilty to all counts and was convicted on that basis. Evidence led in mitigation and aggravation established that the accused killed *Hendrik Beukes* on 24-25 May 2019 following an altercation. While the deceased was on the ground, the accused picked up a huge stone measuring 30cm in width and repeatedly, on more than 4 times, threw it to the head of the deceased. The head of the deceased was resultantly deformed, his skull was crushed and part of the brain was missing. He died as a result of severe head injuries.

On 25 May 2019, the accused met *Daniella Swartbooi* (the deceased in count 1) in Rehoboth. He demanded his money which was previously taken by her. She denied taking money from him and ran away. He chased her, caught up with her and stabbed her with a knife on the chest. She died as a result of the stabbing.

On the charge of housebreaking with intent to steal and theft, the accused broke a padlock and stole a box of matches and tobacco.

Held that, the triad principles of sentencing revisited: the crime, the offender and the interest of society as well as the fourth element of mercy, but mercy should not be misplaced pity.

Held further that, within 24 hours, the accused took away the life of 2 persons under different circumstances, thus depriving them of their right to life, and deserving of severe sentences.

Held further that, pleading guilty is a mitigating factor, but where such plea is made in the face of overwhelming evidence, it becomes a neutral factor which carries less weight.

Held further that, remorse, even though expressed at the end of the trial may be found to be genuine depending on the facts and circumstances of each case. The seriousness and brutality of the offences committed outweighed the personal circumstances of the offender inclusive of remorse.

Held further that, time spent in custody pending trial should be judicially considered in mitigation together with all other factors relevant to sentencing.

Held further that, the barbaric and gruesomeness of the murder committed against a friend and a defenceless woman is aggravating to the core.

Held further that, courts should not just be institutions which balances the scales of justice in sentencing, but should further protect the society from unscrupulous offenders and would be offenders by passing severe sentences on persons who commit serious crimes.

Held further that, in serious cases, retribution and deterrence purposes of punishment should carry a lot of weight while rehabilitation of the offender should play a limited role.

Held further that, the accused behaved like an animal when he savagely attacked *Hendrik Beukes* and chased after *Daniella Swartboo*i like a predator pursuing prey, which qualifies him to be worthy of being uprooted from society.

Held further that, the accused ruined the lives of the families of the deceased persons, his own life and the lives of his family for which severe sentences is the price to pay.

Held further that, the nature of the offences of murder justifies the imposition of the most severe form of sentence possible in this jurisdiction, namely, life imprisonment.

Held further that, as per s 99(2) of the Correctional Services Act 9 of 2012, any sentence imposed is to be served concurrently with the earlier sentence of life imprisonment.

ORDER

Count 1: Murder – Life imprisonment.

Count 2: Murder – Life imprisonment.

Count 3: Housebreaking with intent to steal and theft – 1 year' imprisonment.

SENTENCE

SIBEYA AJ:

[1] In a period of less than 24 hours, the accused deprived two people of their most valuable right, being the right to life. Life is a determinant factor of other human rights, for there should be life in order to enjoy other rights. States, Namibia, being no exception, have placed mechanisms in place to safeguard the universal right to life. Our Constitution guarantees the right to life and consistently prohibits killing another person.¹ The accused killed two people of opposite sex, at different premises, in unrelated circumstances and utilised dissimilar weapons to perpetrate his evil deeds. Life lost through criminal activities should be accorded the utmost attention by the courts. Actions of the offender should be condemned in the strongest words possible and be met with an appropriate sentence which will be indicative of the utter repugnance of such conduct by the court.

[2] On 13 July 2020, this court convicted the accused, based on his plea of guilty, on count 1: murder of *Daniella Swartbooi* with direct intent; count 2: murder of *Hendrik Beukes* with direct intent and count: 3 housebreaking with intent to steal and theft.

[3] At this juncture, the court is duty bound to impose appropriate sentences in accordance with the offences convicted of.

[4] *Mr M Olivier* appeared for the state while *Mr N Kauari* appeared for the accused.

[5] In considering punishment, courts should consider the celebrated triad factors of sentencing, being the crime, the offender and the interests of society.² Over the years, a fourth factor of mercy which is relevant to sentencing and worthy of consideration emerged, as set out in *S v Khumalo*.³ Important as it may be, mercy should not amount to misplaced pity. The said factors should be considered together with the purposes of punishment, namely: retributive, preventative, reformatory and deterrence.⁴

¹ Article 6.

² *S v Zinn* 1969 (2) SA 537 (A).

³ 1973 (3) SA 697 (A) 698.

⁴ *S v Tcoeib* 1991 NR 263.

[6] Sentencing requires that a fine balance be kept between the different factors of punishment. It is, however, established in our jurisdiction that, in endeavour to balance the sentencing factors, it may sometimes be unavoidable to emphasise one factor at the expense of the others.⁵

[7] Guided by the above-mentioned principles, I commence to consider the personal circumstances of the accused. The accused testified in mitigation of sentence. He stated that he was aged 31 years' old at the time of the commission of the offences and is presently 32 years' old. He is unmarried, and has 3 children aged 2, 4 and 7 years' old respectively. The eldest two of his children live with his mother, while the last-born child lives with her mother. Prior to arrest, he worked on a farm as a cattle herder where he earned N\$1 200 per month. He sent N\$700 to his mother and N\$400 to the mother of his last-born child for support on a monthly basis. His highest grade in school is grade 9.

[8] Notwithstanding the state placing on record that the accused was a first offender, the accused testified that he was previously convicted of theft and sentenced to 6 months' imprisonment in 2018. During court proceedings, the accused acknowledged the seriousness of the offences. He apologized to the families of the deceased persons, although such apologies were not accepted. He testified undisputedly that the crimes convicted of were not premeditated. He has been in police custody for a period of 1 year and 1 month awaiting trial. It is settled law that time spent in custody pending trial should be considered in mitigation of sentence. This court will therefore consider the time spent as a mitigating factor together with other relevant factors to sentencing.

[9] The crimes of murder are very serious offences which calls for severe sentences to be passed.

[10] The murder perpetrated on *Hendrik Beukes* (the deceased on count 2) between 24 and 25 May 2019 is aggravated by the fact that the deceased and the accused were friends who worked at neighbouring farms. The accused and *Hendrik Beukes* consumed alcoholic beverages on farm Nagubib in the district of Rehoboth. The deceased took money from the accused and purchased more alcoholic beverages but did not return the change to the accused. When the accused inquired about his change, an argument erupted. The argument culminated in a fight. The

⁵ *S v Van Wyk* 1993 NR 426 (SC).

accused pushed the deceased to the ground, picked up a round stone of about 30cm in width and repeatedly, on more than 4 occasions, threw it to the head of the deceased. By then the deceased was lying on the ground.

[11] When questioned by *Mr Olivier*, whether the murder of *Hendrik Beukes* was extremely brutal, he responded in the affirmative. The report compiled on the post-mortem examination of the deceased (*Hendrik Beukes*), reveal that the chief post-mortem findings were:

- Assault with a stone to the head;
- Crushing injuries to the head: deformed head and fractured both calvarium and skull base;
- Open head with brain mashed and some expelled from the skull cavity (some brain missing);

The cause of death was severe head injuries by blunt force object impact.

[12] The murder perpetrated on *Hedrik Beukes* was barbaric and gruesome to the core. Despite the prevalence of murder cases in our country, the manner in which *Hendrik Beukes* was killed is unusual, unimaginable and disturbing. The accused struck him with a huge stone repeatedly and totally disfigured his face. The skull of the deceased was crushed and his brain was spattered around the room.

[13] On 25 May 2019, the accused met with the deceased in count 1 *Daniella Swartboo*i in Rehoboth. She was aged 20 years old and was a mother of one child. She was his acquaintance. He inquired about the return of the money which she previously took from him. She disputed taking the money and they began to argue about it. She ran away from him, but he took chase like a predator pursuing prey. He caught up with her and stabbed her with a knife on the chest.

[14] The chief post-mortem examination finding on the deceased *Daniella Swartboo*i's body was a single penetrating stab wound to the centre of the upper chest made by a sharp pointed object and the cause of death was stabbing.

[15] The fact that this offence was committed against a defenceless and unarmed woman is aggravating.

[16] With regard to the interests of society, it should be stated boldly that society expects that convicted persons should be punished. Courts are no longer just institutions which should balance the scales of justice in sentencing when such scales are disturbed, but are duty bound to protect society. Courts should therefore shield members of society from unscrupulous offenders and would be offenders, by imposing severe sentences in total repugnance of the offences committed.

[17] This court in *S v Katanga*⁶ at para 12 quoted with approval the following passage from *S v Matolo en 'n Ander* 1998 (1) SACR 206 (O) at 211d-f:

'In cases like the present the interests of society is a factor which plays a material role and which requires serious consideration. Our country at present suffers an unprecedented, uncontrolled and unacceptable wave of violence, murder, homicide, robbery and rape. A blatant and flagrant want of respect for the life and property of fellow human beings has become prevalent. The vocabulary of our courts to describe the barbaric and repulsive conduct of such unscrupulous criminals is being exhausted. The community craves the assistance of the courts: its members threaten, *inter alia*, to take the law into their own hands. The courts impose severe sentences, but the momentum of violence continues unabated. A court must be thoroughly aware of its responsibility to the community, and by acting steadfastly, impartially and fearlessly, announce to the world in unambiguous terms its utter repugnance and contempt of such conduct.'

[18] Notwithstanding the fact that the above remarks were expressed in the South African context, same finds application to our country as adopted by our courts in *S v Alexander* and *S v Katanga (supra)*.

[19] This court considers the horrific loss suffered by the families and friends of the deceased persons together with the indignation of other members of society. In these types of serious cases, retribution and deterrence purposes of punishment carry more weight. In *S v Swart*⁷ the following was stated:

'In our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment does not require to be accorded equal weight but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.'

⁶ (CC 23/2018) [2019] NAHCMD 66 (27 February 2020). *S v Alexander* (Case No. SA 5/1995) delivered on 13 February 2003 at page 7.

⁷ 2004 (2) SACR 370 (SCA) at 378.

[20] *In casu*, this court is obliged to impose a sentence which will deter the accused and prospective offenders from committing similar offences in future.

[21] It is important to consider that the accused is middle aged and may be rehabilitated. One of the determining factors for possible rehabilitation is the plea of guilty and the expression of remorse.

[22] It was submitted by *Mr Olivier* that the evidence against the accused was overwhelming and that the accused had no opening to escape conviction. He further submitted that remorse expressed herein is a neural factor which should carry less weight. When one considers the pointing out, the photoplans, post-mortem examination reports (all received by consent of the accused) and the fact that the averment of the presence of overwhelming evidence against the accused was not disputed by *Mr. Kauari*, this court is inclined to accept that indeed the state had a strong case against him. It appears that the writing was on the wall that the accused is guilty of the offences convicted of. Where the accused pleads guilty after being caught between a rock and hard place due to an overwhelmingly strong case against him, such plea should carry less weight (if any).⁸

[23] *In casu*, the accused in mitigation of sentence apologised under oath to the families of the two deceased persons. Given the pain and suffering caused to the deceased person's families, it is not surprising that his apologies were not accepted. It is apparent that the apology was expressed at the tail end of the trial. This court in *S v Levi*⁹ quoted a passage with approval from *Hango v S*¹⁰ at para 13 -15 regarding expressing an apology belatedly, where the following was stated:

[13] Notwithstanding, the trial court proceeded to find that the appellant did not show remorse. The court reasoned that genuine remorse is expressed at the beginning of the trial and remorse expressed after a full trial when witnesses are excused cannot be genuine. This court however in *S v Shaningua*¹¹ to the contrary stated the following at para 10:

'The accused in this matter pleaded not guilty and required of the State to prove the allegations set out in the indictment. This the State did, and secured convictions on both counts. I do not believe that in all instances where an accused expresses remorse only after

⁸ *S v Landau* 2000 (2) SACR 673 (WLD) 678a-c.

⁹ (CC 22/2019) [2020] NAHCMD 257 (29 June 2020).

¹⁰ (HC-MD-CRI-APP-CAL-2019/00090) [2020] NAHCMD 201 (29 May 2020).

¹¹ (CC 09/2016) [2017] NAHCMD 247 (31 August 2017).

conviction, can it be said that it is not sincere. Much will depend on the circumstances of the case and I have no doubt that there could be circumstances in which the court would be able to find that remorse, albeit demonstrated only after conviction, is genuine and sincere.'

[14] In light of the above, the finding of the trial court can therefore not be correct.

[15] Where a convicted person testifies under oath and expresses remorse but same is left unchallenged, unless there are clear reasons to the contrary, such remorse can be said to be genuine. *In casu*, the appellant emphatically stated that he committed the offences, repeatedly apologised and said that he was wrong. He further said that he will not recommit the offences. This court therefore finds that the trial court misdirected itself when it decided that the appellant was not remorseful.'

[24] In the present matter, the non-acceptance of the apologies by the families, does not necessary mean that such apologies were not genuine. *Mr Kauari* implored on the court to consider that the accused is remorseful for his deeds. Save for the rejection of the apologies, there was no evidence led to gainsay same. This court ultimately finds no qualms to accept that the apologies were genuine. What remains to be determined is the effect of such apologies on the sentence to be passed. The seriousness and brutality of the offences committed is beyond comprehension and these factors far outweigh the personal circumstances of the accused, inclusive of remorse and time spent in custody pending trial. The accused committed the offences in a manner equated to a wild animal and not worthy of human behaviour. He is thus a danger to society deserving of being uprooted from society.

[25] The nature of the offences of murder convicted of, compels the court to impose sentences which are severe and satisfactory to the society. Passing lenient sentences on such offences has the calibre of inciting the community to take the law into their own hands. That is a situation which courts should avoid by all means necessary. Sadly, the accused through his barbaric actions ruined the lives of the families of the deceased persons and in the process, he further ruined his own life and that of his family. Considering the seriousness and brutal nature of offences of murder, the personal circumstances of the accused (*albeit* heavily outweighed) and the interest of society, it is inevitable that the accused deserves to be removed from society for a lengthy period of time possible.

[26] *Mr Olivier* and *Mr Kauari* were *ad idem* that, the offences of murder call upon the court to impose sentences of life imprisonment on each count.

[27] In *S v Nicodemus*,¹² the court discussed the effect of life imprisonment on an offender and stated as follows:

‘The court in *S v Bull and Another*¹³ provided some guidance as to the imposition of life imprisonment when stating:

“[21] Since the abolition of death penalty this court has consistently recognised that life imprisonment is the most severe and onerous sentence which can be imposed and that it is the appropriate sentence to impose in those cases where the accused must effectively be removed from society”

[28] In the Namibian context, the Supreme Court as per *Mohamed CJ* in *S v Tcoeb*¹⁴ found that the possibility of a parole being granted to an offender sentenced to life imprisonment, meant that such person is not left without hope of being incarcerated for the rest of his natural life and may be released in future as provided for in s 117 of the Correctional Service Act 9 of 2012.’

[28] After balancing the competing factors relevant to sentencing, this court is of the considered view that the accused deserves the most severe punishment within its sentencing jurisdiction. I am therefore in agreement with both counsels that, the sentence that meet the offences in question is one of life imprisonment on each count of murder.

[29] In respect of the offence of housebreaking with intent to steal and theft, the accused broke a padlock to a house and stole items of meagre value. Accused invaded another person’s privacy and deprived such person of his properties, consequently, a custodial sentence is warranted in the circumstances. Prevalent as the offence may be, the sentence to be imposed should still be individualised. The sentence should not be disproportionate to the offence committed. This court hold the view that the sentence on this charge should not be severe, but rather be commensurate to the offence convicted of.

[30] It was submitted for the accused that the sentences to be imposed should be ordered to run concurrently. This concern, can disposed of without breaking a sweat. Section 99(2) of Act 9 of 2012 provides that:

¹² (CC 15/2017) [2019] NAHCMD 296 (20 August 2019).

¹³ 2001 (2) SACR 681 (SCA) at para 21.

¹⁴ 1996 (1) SACR 390 (NM).

'Where a person sentenced to life imprisonment or who has been declared a habitual criminal is sentenced to any further term of imprisonment, such further term of imprisonment is served concurrently with the earlier sentence of life imprisonment or declaration as a habitual criminal, as the case may be.'

[31] Considering all the aforesaid factors, reasoning and conclusions, I hold the view that the sentences set out hereunder meets the justice of this case. In the result the accused is sentenced as follows:

Count 1: Murder – Life imprisonment.

Count 2: Murder – Life imprisonment.

Count 3: Housebreaking with intent to steal and theft – 1 year' imprisonment.

O S SIBEYA
ACTING JUDGE

APPEARANCES:

STATE: M Olivier
Of Office of the Prosecutor-General

Windhoek

ACCUSED:

N Kauari
Of Tjituri Law Chambers
Windhoek