

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT ON SENTENCE

Case No: CC 12/2015

In the matter between:

THE STATE

and

RUBEN FRITZ

ACCUSED

Neutral citation: *S v Fritz* (CC 12/2015) [2020] NAHCMD 244 (20 May 2021)

Coram: USIKU, J

Heard: 19 March 2021 and 29 April 2021

Delivered: 20 May 2021

Flynote: Criminal Procedure – Sentence – Factors to be taken into account at sentencing – Accused convicted of murder, rape, robbery with aggravating circumstances, and defeating or obstructing the course of justice – Combating of Rape Act No. 8 of 2000 – Absence of substantial and compelling circumstances.

Summary: Accused person convicted of murder, rape, robbery with aggravating circumstances and defeating or obstructing the course of justice – Absence of substantial and compelling circumstances – To ameliorate the cumulative effect of the

sentences, certain sentences ordered to run concurrently – The accused sentenced to a total of 31 years imprisonment.

SENTENCE

- (a) Count 1 – Murder: (acting with direct intent):
30 years imprisonment, four (4) years of which are suspended for a period of five (5) years on condition that the accused is not convicted of murder or attempted murder committed during the period of suspension
- (b) Count 3 – Rape (contravening s2 (1) (a) of the Combating of Rape Act No. 8 of 2000):
15 years imprisonment
- (c) Count 4 – Robbery with aggravating circumstances:
10 years imprisonment
- (d) Count 5 – Defeating or obstructing the course of justice:
1 year imprisonment.

(e) It is recorded that ten (10) years of the sentence of count 3 and the sentences in respect of count 4 and 5 shall run concurrently with the sentence imposed in count 1. Therefore, accused is sentenced to a total of 31 years imprisonment.

JUDGMENT

USIKU, J

Introduction

[1] The accused person, Ruben Fritz, stands convicted of:

- (a) one count of murder (acting with direct intent),
- (b) one count of rape, in contravention of s2 (1)(a) of the Combating of Rape Act No. 8 of 2000 ,
- (c) one count of robbery with aggravating circumstances ,
- (e) one count of defeating or obstructing the course of justice.

[2] The circumstances in which the aforesaid offences were committed are set out in the judgment on conviction delivered on 16 November 2020. The accused must now be sentenced in respect of the abovementioned counts.

[3] The brief background against which the aforesaid offences were committed, in so far as is relevant to the present proceedings, is as follows. During the evening of Thursday 28 March 2013, the deceased, the accused person and a couple of their friends were socializing at different shebeens in Shandumbala, Katutura. During the late evening hours of 28 March 2013 and early morning hours of Friday, 29 March 2013, the accused person and the deceased somehow found themselves at a bushy area between Shandumbala and the Western Bypass road. At this scene the accused person raped and murdered the deceased by strangling her and smashing her head with a 21.035 kg stone, causing multiple severe skull fractures. Having killed the deceased person, the accused took the deceased's cellphone. The cellphone was recovered. Other items which were in the possession of the deceased at the time, such as shoes, a pair of trousers, among other things, were not recovered. Later, the accused disposed of the cellphone's SIM card and requested his mother to give false information to the police, should the police enquire about his whereabouts during that evening.

[4] The following Monday, the 1st of April 2013, the accused person led Superintendent Kolokwe to the scene where a naked body of the deceased lay, in a state of decomposition. The accused was then arrested, charged, tried and on 16 November 2020 convicted of the above-mentioned offences.

The legal principles

[5] In deciding the proper sentence, the court has to consider the traditional triad of factors normally considered by the courts at sentencing, namely: the personal circumstances of the accused, the nature and gravity of the crime(s) committed and the interests of the society.

[6] At the same time the court must also have regard to the objectives of punishment, namely: prevention, deterrence, rehabilitation and retribution, to strike a balance among them. Having considered the objectives of punishment, the court will then have to decide which purpose or any combination of them is best served by the sentence to be imposed.

Personal circumstances of the accused

[7] The accused testified in mitigation of sentence that he is now 26 years old. He was 18 years old when he committed the offences. He is a father of a daughter who was born on 25 August 2012. Before his arrest he was employed at FP Du Toit Transport and his salary was about N\$ 2 600 per month.

[8] The accused attended school up to grade 9, but dropped out before he completed grade 9. He has been in custody since 1 April 2013 and has been awaiting trial for about 8 years now. I hasten to add that, it is trite law that if an accused has been in custody awaiting trial for a lengthy period, that would normally be considered when sentence is being imposed¹.

[9] On the 3rd of April 2013, after his arrest for the present offences, the accused was found guilty of having been found in possession of cannabis valued at N\$ 15 and was fined N\$ 100 or 30 days imprisonment. This conviction occurred after the offences for which the accused is now to be sentenced were committed. In other word, the offence in respect of which the accused was so convicted and sentenced was committed subsequently to the ones for which he has now to be sentenced. I am therefore of the

¹ *S v Mushishi* Case No. CC 07/2010 delivered on 25 June 2010 para 4 and *S v Limbare* 2006 (2) NR 505 at 512 B-C.

view that no weight is to be attached to the 'previous conviction' for the present purposes. The accused will therefore be considered as a first time offender.

[10] The accused testified that he is sorry for what he has done and asked for forgiveness from the family of the deceased and from the court. Furthermore, the accused related that he has now joined a bible study group in prison and his life has changed for the better since he discovered the word of God.

[11] Ms Hester Sisamu, the mother of the accused also testified on behalf of the accused, in mitigation. She related to the court that when the accused was about 15 years he started hanging out with wrong friends, who were older than him. She realized that the accused was using and selling drugs. She tried her best to help the accused but without much success. She requested forgiveness from the family of the deceased and from the court.

[12] Mr Kavejandja, counsel for the accused, submitted that the court must take into account the youthfulness of the accused when he committed the offences. In addition, the court should take into consideration that the accused has been in custody for 8 years as trial awaiting prisoner. The accused has expressed remorse for what he has done and he is already on the way towards reformation.

The State: aggravation of sentence

[13] The State led evidence from Ms Anelise Urikhos, the mother of the deceased. She testified that the deceased was born on 27 November 1994. She was still 18 years old when she was murdered. She would have turned 19 years in November 2013. At the time of her death, the deceased had dropped out of grade 10 and was in the process to register herself for other classes.

[14] The deceased's mother also testified that after the deceased went missing, she was later asked to go to the mortuary to identify the deceased. She further testified that she has forgiven the accused.

[15] Ms Ndlovu, counsel for the State, submitted that the fact that the accused was convicted of murder with direct intent, aggravates the offence. As regards the offence of rape, Ms Ndlovu contended that the Combating of Rape Act requires imposition of a minimum sentence of 15 years imprisonment and that there are no substantial and compelling circumstances justifying departure from the minimum prescribed penalty.

Analysis

Murder

[16] It appears common cause to me that the deceased suffered a violent and brutal death at the hands of the accused. The circumstances in which she died justifiably arouse the indignation and horror of the society. The accused had no justifiable reason for murdering the deceased. These considerations aggravate the offence. However, the foregoing considerations should be balanced with the fact that the accused is a first time offender and was relatively young at the time of the commission of the offence. Another factor that should be considered in meting out the appropriate penalty is the fact that the accused has been in custody for 8 years awaiting trial. Because of the seriousness of the offence, a custodial sentence is unavoidable. The court shall therefore impose an appropriate sentence having the foregoing considerations in mind.

Rape

[17] Insofar as rape is concerned, the provisions of the Combating of Rape Act, come into play. The rape was committed under coercive circumstances and the accused has used a stone weighing 21.035 kg for the purpose of on in connection with the rape. A minimum sentence of 15 years imprisonment is prescribed², unless the court finds that

² Section 3(1) (a) (ff) of the Combating of Rape Act No. 8 of 2000.

there are substantial and compelling circumstances justifying the imposition of a lesser sentence.

[18] I have taken into account all the personal circumstances of the accused. I am of the view that there are no substantial and compelling circumstances warranting deviation from the minimum sentence prescribed by the Act.

Robbery with aggravating circumstances

[19] With regard to robbery with aggravating circumstances, the general principles of sentencing are applicable.

Defeating or obstructing the course of justice

[20] Furthermore, when it comes to the count of defeating or obstructing the course of justice, the general principles of sentencing are applicable, regard being had to all the factors outlined above.

Conclusion

[21] I am of the view that the personal circumstances of the accused are far outweighed by the seriousness of the crimes committed, particularly the offences of rape and murder. There are no words to express the horror that the deceased found herself in, when confronted with the accused, after the rape, determined to kill her.

[22] Having taken all the factors discussed above into account, I am satisfied that direct imprisonment is the only appropriate sentence in respect of the offences of which the accused is convicted.

[23] As a general rule, the court is obliged to consider the cumulative effect of the sentences to be served. Where the cumulative effect is likely to be disproportionate to the blameworthiness of the accused, individual sentences may be ordered to run

concurrently in order to ameliorate the cumulative effect of the sentences to be served. For the foregoing reasons, I will order that some sentences should run concurrently.

[24] In the result, the accused is sentenced as follows:

- (a) Count 1 – Murder: (acting with direct intent):
30 years imprisonment, four (4) years of which are suspended for a period of five (5) years on condition that the accused is not convicted of murder or attempted murder committed during the period of suspension;
 - (b) Count 3 – Rape (contravening s2 (1) (a) of the Combating of Rape Act No. 8 of 2000):
15 years imprisonment;
 - (c) Count 4 – Robbery with aggravating circumstances:
10 years imprisonment;
 - (d) Count 5 – Defeating or obstructing the course of justice:
1 year imprisonment.
- (e) It is recorded that ten (10) years of the sentence of count 3 and the sentences in respect of count 4 and 5 shall run concurrently with the sentence imposed in count 1. Therefore, accused is sentenced to a total of 31 years imprisonment.

B Usiku
Judge

APPEARANCES:

THE STATE:

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ACCUSED:

J Kavejandja

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