

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-SLA-2021/00092

In the matter between:

THE STATE

APPELLANT

and

WALTER HAUSEB

RESPONDENT

Neutral citation: *S v Haoseb* (HC-MD-CRI-APP-SLA-2021/00036) [2023] NAHCMD 229 (12 May 2023)

Coram: D USIKU J and LIEBENBERG J

Heard: 13 March 2023

Delivered: 12 May 2023

Flynote: Criminal Procedure – Appeal against sentence – Appellate court slow to interfere on appeal – Sentence inappropriate under the circumstances – Deterrence and retribution as objectives of punishment – Misdirection committed by the court *a quo* on sentence – Sentence imposed too lenient.

Summary: The respondent was sentenced in the Regional Court sitting at Windhoek after a full-fledged trial on a charge of murder with direct intent to 10 years' imprisonment, wholly suspended for a period of five years on the usual conditions. Disgruntled by the sentence imposed by the Regional Court

the appellant sought leave to appeal which was granted by this court. The appeal lies against sentence only.

Held, an appellate court should be slow to interfere merely because it would have imposed a different sentence.

Held further, that the escalating number of violent crimes can only be condemned effectively by the courts through the imposition of deterrent and retributive sentences.

Held further, the imposition of a wholly suspended sentence induces a sense of shock, thus the court needs to interfere in the sentence imposed by the court *a quo*.

ORDER

1. The appeal against sentence is upheld.
2. The sentence imposed by the court *a quo* is set aside and substituted with the following sentence:
The accused is sentenced to 18 years' imprisonment of which 3 years' imprisonment is suspended for 5 years on condition that the accused is not convicted of murder, committed during the period of suspension.
3. The respondent is ordered to report to the Registrar of the High Court Main Division within 7 days from the date of this order for committal.

APPEAL JUDGMENT

USIKU J (LIEBENBERG J concurring):

Introduction

[1] The respondent was arraigned in the Windhoek Regional Court, on a charge of murder. After a full-fledged trial, the respondent was convicted of murder with direct intent whereafter he was sentenced to 10 years' imprisonment, wholly suspended for a period of five years on the usual conditions.

[2] Disgruntled by the sentence imposed by the court *a quo*, the appellant sought leave to appeal against the sentence imposed which was granted by this court. The appeal lies against sentence only.

[3] In terms of the provisions of s 310(1) of the Criminal Procedure Act 51 of 1977 as amended (CPA), the Prosecutor-General or other prosecutor may appeal against any decision given in favour of an accused in a criminal case, in a lower court, including an order made or a sentence imposed by such lower court.

[4] Further s 310(2) (a) of the CPA provides as follows:

'A written notice of an application referred to in subsection (1) shall be lodged with the Registrar of the High Court by the Prosecutor General or other prosecutor, within a period of 30 days of the decision, sentence or order of the lower court, as the case may be, or within such extended period as may on application on good cause be allowed.'

[5] The appellant herein applied for leave to appeal within the prescribed time limit, appealing against sentence only. The application for leave to appeal, decided by a judge in chambers as provided for in s 310 (1) (b) of the (CPA), was granted. Mr Muhongo appeared on behalf of the appellant whilst Mr Andreas appeared on behalf of the respondent.

[6] On the hearing date, counsel for the respondent failed to appear before court although he had filed heads of arguments on behalf of the respondent. The court shortly stood the matter down and on resumption counsel for the

respondent still did not turn up at court. It was decided that the matter proceed in the absence of counsel for the respondent. Mr Muhongo addressed the court briefly.

[7] On a next appearance, Mr Andreas explained his absence from court and extended an apology. When invited to make oral submissions on the merits, he intimated that he abides by the heads of argument filed and had nothing to add.

[8] The grounds of appeal are contained in the heads of arguments filed on behalf of the appellant which the respondent had opposed through their heads of arguments filed of record.

[9] The grounds of appeal are listed as hereunder:-

That the learned magistrate misdirected himself alternatively erred in law and/or in fact in the following respects:

- (a) By imposing a sentence of ten years imprisonment that is so lenient that it induces a sense of shock.
- (b) Suspending the operation of the whole sentence.
- (c) Overemphasizing the respondent's personal circumstances.
- (d) Underemphasizing the aggravating factors; and
- (e) Failing to consider sentences imposed for similar crimes.

The law relating to appeal against sentence

[10] It is settled law that the powers of the court of appeal is of a limited nature. The approach of a court of appeal concerning sentences imposed in the lower court was stated in *S v Kapuire*,¹ that sentencing is pre-eminently a matter within the discretion of the court. The court of appeal will only interfere

¹ *S v Kapuire*, 2015 2 NR 394 (HC) at page 400 para 17.

where the lower court (a) misdirected itself on the facts or on the law; (b) if an irregularity, which was material, occurred during the sentencing proceedings (c) where the trial court failed to take into account material facts or over-emphasized the importance of the other factors (d) if the sentence imposed is startlingly inappropriate, induces a sense of shock and where there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal.² (e) Also where the sentence is totally out of proportion to the gravity or magnitude of the offence; or that it is in the interest of justice to alter it.³ 'A trial court's sentence would only be set aside on appeal if it appears that the trial court exercised its discretion in an improper or unreasonable manner'.⁴

[11] It is in the context of the aforesaid, that the sentence imposed by the court *a quo* must be considered.

[12] In cases of murder, this court had imposed custodial sentences even where the accused was a first time offender.

[13] It is trite that the appellate court will not interfere with the sentence imposed by the lower court if the court exercised its discretion judiciously when sentencing.

[14] The first ground of appeal concerns the leniency of the sentence imposed. In order to determine whether the sentence imposed is in accordance with justice, the appellate court should be guided mainly by sentences imposed by the appellate court in more or less similar cases without losing sight of factual differences.

[15] The respondent in the present case was convicted and sentenced to 10 years' imprisonment on a charge of murder with direct intent. The sentence imposed was wholly suspended for the period of 5 years on the usual conditions.

² *S v Tjiho* 1991 1 NR 361 (HC) 1992 SACR 639 at 366 A-B.

³ *Director of Public Prosecutions, Kwazulu Natal v P* 2006 (1) SACT 243 SCA 254 C-F.

⁴ *S v Pieters* 1987 3 SA 717(a) at 727 F – H.

[16] The facts briefly summarised, are as follows: On 12 August 2015 there was a small commotion between the respondent and deceased. The next morning the respondent stormed towards the deceased who, at the time, was not doing anything but standing holding his blankets. The respondent stabbed the deceased under his left arm once with a knife. After the deceased was stabbed, he ran out and fell whilst pleading for the people present to call the ambulance.

[17] In the meantime, the respondent also came out of the room asking for assistance claiming to have caused the death of the deceased. The respondent was charged and convicted of murder with direct intent, for which the court imposed a sentence of 10 years' imprisonment wholly suspended on the usual conditions.

[18] In sentencing, the court *a quo* considered the respondent's personal circumstances and the interest of society. It further went on to consider that the deceased was the aggressor who provoked the respondent not only once, but continuously. It was the court *a quo*'s finding that the deceased had inflicted injuries on the respondent on a previous day, but the respondent did not retaliate then. This notwithstanding, the court *a quo* found that when the respondent killed the deceased, he acted with direct intent. This was a material factor that had to be taken into consideration in sentencing.

[19] Though it is trite that sentences should be individualised, our courts generally strive for uniformity of sentences in cases where there has been more or less an equal degree of participation in the same offence or offences by participants with roughly comparable personal circumstances.⁵ Furthermore, it is acknowledged that the principle of consistency in sentencing has gained wide acceptance. Its significance lies in the fact that it strives to avert any wide divergence in sentences imposed in similar cases and should thus appeal to any reasonable person's sense of fairness and justice. One advantage of consistency in sentencing is that it promotes legal

⁵ *S v Munyama* CC 27/2006 [2019] NHMD 60 (20 March 2019).

certainty and consequently improves respect for the judicial system. We associate ourselves with the above sentiments.⁶ The sentence of 10 years' imprisonment is not only too lenient under the circumstances of this case, but it is also not consistent with sentences imposed for similar crimes.

[20] In *Shifeta v The State*,⁷ the appellant was convicted and charged of murder with direct intent. On appeal, the court interfered with the sentence of 15 years' imprisonment of which 5 years' was suspended by the regional court and substituted it with a sentence of 20 years' imprisonment.

[21] In our view the court *a quo*, in the circumstances, misdirected itself by imposing a wholly suspended sentence of 10 years, the reason being that murder with direct intent generally is a crime that attracts a custodial sentence of direct imprisonment with the emphasis on the specific and general deterrence factor.

[22] Article 6 of the Namibian Constitution, guarantees the right to life which must be protected and respected. It is for that reason that murder is viewed in a very serious light.

[23] The second ground of appeal attacks the court *a quo* for suspending the operation of the whole sentence. As alluded to, the crime of murder with direct intent is an extremely serious offence. The victim in this case was stabbed to death once with a knife, which is a dangerous weapon. Given the current levels of violence and serious crimes in this country, it seems proper that in sentencing especially for such crimes, the emphasis should be placed on retribution and deterrence as objectives of punishment. This court is therefore of the view that the court *a quo* misdirected itself when it imposed a wholly suspended sentence for a crime of murder with direct intent.

[24] Ground three and four will be dealt with together. At the time of sentencing, the respondent was 26 years old and had dependants to look after. It was the appellant's contention that the court *a quo* overemphasized

⁶ S S Terblanche *A Guide to Sentencing in South Africa* (2007) p 139.

⁷ *Shifeta v The State* (CA 9/2014) [2014] NAHCMD 228 (28 July 2014).

the respondent's personal circumstances at the expense of the seriousness of the offence.

[25] From the court *a quo*'s judgment on sentence, it is evident that it over-emphasised the personal circumstances of the respondent by imposing a sentence inconsistent with the courts' earlier finding that the respondent caused the death of the deceased acting with direct intent. In the circumstances, a very severe sentence was called for. A sentence which also reflects the interest of society and not only that of the respondent.

[26] When sentencing, the court must carefully determine what sentence in the circumstances of the case would do justice to society as well as to the offender. An exercise which requires that the profile and interests of the respondent be considered together with the interest of society, whilst at the same time taking into account the seriousness of the crime committed. When regard is had to the seriousness of the offence committed, we are of the view that the court *a quo* did not properly consider the seriousness of the crime and therefore misdirected itself by overemphasizing the personal circumstances of the respondent at the expense of the gravity of the crime itself.

[27] With regard to the court *a quo*'s reasoning for sentence, namely, that the respondent killed the deceased due to provocation: Provocation might be a mitigating factor which may be considered when sentencing. However, a criminal act that resulted from it (provocation) is usually committed immediately after the provocative act. In *S v Kamati*,⁸ the court held the following:

'The value of our society demands that there must be a balance between the nature of provocation and the response thereto before one's conduct can be seen as less blameworthy or to mitigate the offence that had been committed.'

[28] Society yearns for peace and craves for perpetrators of violent crimes to be dealt with sternly by our courts. Courts are entrusted with an important function to administer justice and apply the law. Thus, the duty is upon this

⁸ *S v Kamati* (CC 29/2010) [2011] NAHND (29 September 2011).

court to protect society from crimes in general and violent crimes in particular. Courts are required to apply severe standardized and consistent response to those crimes unless convincing reasons justify otherwise.

[29] It has been a long standing position in our law that anger, jealousy or other akin emotions do not form a complete defence to criminal conduct, but stand as a factor which may mitigate sentence if the anger caused as a result of provocation was justified.⁹

[30] Moreover even if this court was to find that the respondent was provoked, which was not the case, and that it is human nature to respond to provocation and every person has a threshold to be reached, it does not mean that violent responses to provocation can be tolerated in a civilised society. The respondent had the opportunity to report the assault on him by the deceased, the previous evening to the police. He did not do so.

[31] The respondent demonstrated a total disregard for human life. In our assessment, the respondent must be removed from society for a long period of time as he possess a real danger to the wellbeing and security of other persons.

[32] In the result the following orders are made:

1. The appeal against sentence is upheld.
2. The sentence imposed by the court *a quo* is set aside and substituted with the following sentence:
The accused is sentenced to 18 years' imprisonment of which 3 years' imprisonment is suspended for a period of 5 years' on condition that the accused is not convicted of murder, committed during the period of suspension.
3. The respondent is ordered to report to the Registrar of the High Court Main Division within 7 days from the date of this order for committal.

⁹ J M Burchell et al South African Criminal Law and Procedure vol 1 (2011) 4 ed at 53.

D N USIKU

Judge

J C LIEBENBERG

Judge

APPEARANCES:

APPELLANT:

M. H. Muhongo

Of Office of the Prosecutor General, Windhoek

RESPONDENT: J. Andreas
Of Andreas-Hamunyela Legal Practitioners