REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 08/2022

In the matter between:

THE STATE

and

AZAAN SHANYANGE MADISIA **ACCUSED 1**

STEVEN MULUNDU **ACCUSED 2**

Neutral citation: *S v Madisia* (CC 08/2022) [2023] NAHCMD 312 (13 June 2023)

Coram: **LIEBENBERG J**

Heard: **17 May 2023**

Delivered: **13 June 2023**

Flynote: Criminal procedure – Sentence – Defeating or obstructing the course of justice and fraud – Sentencing principles confirmed and applied –

Remorse as mitigating factor – Weight to be accorded – Sincerity lacking – Youthfulness of accused 2 – Lack of immaturity, insight, discernment and experience of accused decided on facts – A weighty factor when considering sentence – Merely one of several factors – Aggravating factors – Seriousness of the crime – Accused destroyed evidence – Cause of death as a result not established – Probably led to acquittal on murder charge – Custodial sentences on all counts inescapable – Distinction between public expectation and public interest emphasised.

Summary: The accused persons were acquitted on charges of murder and robbery, but convicted on one count of defeating or obstructing the course of justice. Accused 1 was convicted on two further counts of fraud emanating from false insurance claims. The deceased died after a physical altercation with accused 1 whereafter the latter called on accused 2 to assist her in removing the body from her flat and having it buried on the outskirts of town. When the skeletal remains of the deceased were discovered after six months, the cause of death could not be determined. Through their actions the accused effectively destroyed evidence which likely contributed to the acquittal of accused 1 on a charge of murder. The court considered mitigating factors such as remorse, youthfulness of accused 2 and them being first offenders. In light of the seriousness of the offence and the aggravating circumstances, the imposition of custodial sentences are inevitable. In sentencing, public expectation is not synonymous with public interest.

ORDER

Count 3 – Defeating or obstructing the course of justice:

Accused 1: 8 years' imprisonment of which two years' imprisonment is suspended for a period of five years, on condition that the accused is not convicted of defeating or obstructing the course of justice, committed during the period of suspension.

Accused 2: 6 years' imprisonment of which two years' imprisonment is suspended for a period of five years, on condition that the accused is not convicted of defeating or obstructing the course of justice, committed during the period of suspension.

Count 4 – Fraud:

Accused 1: 1 year imprisonment

Count 5 – Fraud:

Accused 1: 1 year imprisonment

In terms of s 280(2) of Act 51 of 1977, it is ordered that the sentences imposed on counts 4 and 5 are to be served concurrently with the sentence imposed on count 3.

SENTENCE

LIEBENBERG J:

[1] On 16 May 2023 the accused persons were jointly convicted on one count of defeating or obstructing the course of justice, while accused 1 was convicted on two further counts of fraud. Proceedings have now reached the stage where the court needs to consider what appropriate sentence should be passed on the accused persons.

[2] It is settled law that, at sentencing, a triad of factors must be considered namely the crime, the offender and the interests of society. Further consideration must be given to the objectives of punishment ie what the court aspires to achieve with regards to punishment, namely, deterrence, prevention, reformation and retribution. As stated in *S v Van Wyk*[1] the difficulty often arises from the challenging task of trying to harmonise and

[1] *S v Van Wyk* 1993 NR 426 (SC).

balance these principles and to apply them to the present facts. Equal weight or value need not be given to the different factors and, depending on the particular facts of the case, situations may arise where certain factors are emphasised at the expense of others. This is called the principle of individualisation where punishment is determined in relation to the individual before court, the facts and circumstances under which the crime was committed. At the same time the court must consider the interest of society. In the end the court endeavours to find and impose a well-balanced sentence.

[3] The accused persons elected not to give evidence in mitigation of sentence and their personal particulars were placed on record by their respective counsel. In addition, Mr Titus read into the record a letter written by accused 1. The accused are siblings.

[4] Accused 1 is 31 years of age, not married and without dependants. Her academic achievements are that she completed grade 12 and holds a diploma in para-legal studies. At the time of her arrest, she was employed as an administrative officer with Konica Minolta in Walvis Bay. The accused to date is in pre-trial incarceration since her arrest in October 2020, a period of two years and seven months. She is a first offender.

[5] Accused 2 is 25 years old and is the father of one child aged four years. His highest academic qualification is grade 12 and although he had no fixed employment at the time of his arrest, he intends pursuing tertiary studies. He remained in pre-trial incarceration for the past two years and six months and is a first offender. Ms Klazen, representing accused 2, submitted that the accused is a youthful offender and should be treated as such at sentencing.

[6] It is not in dispute that both accused tendered pleas of guilty on the charges they stand convicted of. It was submitted that, when considered together with their expression of remorse during their earlier testimonies, this is indicative of sincere contrition on their part. Mr Muhongo, appearing for the state, argued to the contrary saying that, in light of their earlier admissions, they simply had no other option but to tender pleas of guilty. Although it has been found that these statements contained elements of dishonesty, it did lay

the basis for their respective pleas of guilty as regards the charge of defeating or obstructing the course of justice.

[7] When considering the passionate expression of remorse by the accused persons whilst fully comprehending the consequences of their wrongdoing towards the deceased and her family, it begs the question what weight should the court attach thereto? In deciding this vexed question, sight should not be lost of the fact that neither of the accused persons initially intended to come clean and admit their wrongdoing. This only came about when accused 1 was linked to the anonymous text messages during the police investigation and which led to her arrest. Although she desired the deceased's body to be found where buried, she never wished to implicate herself in the commission of the crime. She and accused 2 kept it a secret until their arrest, about six months later. This was further aggravated by the number of statements made by the accused to the police in which misleading information was tendered. With regards to what weight should be attached to the tendering of a plea of guilty, the court in *S v Landau*[2] said at 678a-c:

> 'However, where it is clear to an accused that the "writing is on the wall' and that he has no viable defence, the mere fact that he then pleads guilty in the hope of being able to gain some advantage from that conduct should not receive much weight in mitigation of sentence unless accompanied by genuine and demonstrable expression of remorse …'

[8] Though it would appear, either from their own testimonies or what has been stated on their behalf about contrition on their part for what they have done, it is my considered view that, given the circumstances which led to their arrest and them ultimately being tried, the element of sincerity in their proclaimed contrition seems doubtful. While I do not doubt that the accused persons do have feelings of remorse, this factor unfortunately loses some of its weight due to the fact that it is clear from the evidence that they would never have come to the fore, had they not been caught out. Therefore, in my view, limited weight should be accorded to their expressions of remorse, either in person or through their counsel.

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[2] *S v Landau* 2000 (2) SACR 673 (WLD).

[9] With regards to the reference made of the young age of accused 2, it is trite, as was stated in *S v Erickson*[3] and the cases cited therein, that youthfulness of an offender is, as a matter of course, a mitigating factor – the reason being that youthful persons, *prima facie,* should be considered immature for they often lack maturity, insight, discernment and experience.[4] Although the youthful age of an accused is a weighty factor when considering sentence, it is merely one of several factors that need to be taken into consideration in the particular circumstances of the case. In the present circumstances there is nothing before court from which it could be inferred that accused 2 lacked 'maturity, insight, discernment and experience'. On the contrary, he is the one who displayed responsibility by proposing that the incident which led to the death of the deceased, be reported to the authorities. He is furthermore the father of a four year old boy which, in itself, comes with some responsibility, irrespective of age. I am accordingly not convinced that the relatively young age of accused 2, *per se,* constitutes a mitigating factor.

[10] However, as borne out by the evidence, accused 2 was unexpectedly drawn into an unenviable situation by accused 1 who persuaded him not to involve the authorities but rather to assist her in disposing the body. He caved in and whilst realising that he would be committing a crime, agreed to help her as he felt pity on her. In these circumstances it appears to me that the blameworthiness or culpability of accused 2 is, to a certain degree, less than that of accused 1. This is a mitigating factor which should be reflected in the punishment meted out for reason that, the less blameworthy an offender is, the less severe should the sentence be.

[11] Regarding the crimes the accused persons stand convicted of, counsel for the defence are *ad idem* that they are serious and each deserving of a custodial sentence. Moreover, with regards to the charge of defeating the ends of justice, where their criminal conduct resulted in the destroying of evidence which made it impossible to determine the cause of death. In turn, this probably contributed in the acquittal of accused 1. In addition, they remained silent about the death of the deceased in circumstances where the

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[3] *S v Erickson* 2007 (1) NR 164 (HC) at 166E-H.
[4] *S v Ngoma,* 1984 (3) SA 666 (A) at 674F.

family was emotionally tormented by the disappearance of their child, not knowing what had happened to her. The impact this had on the family is evident from the testimony of Mr Mathews, the deceased's father, who narrated what the family went through with the disappearance of the deceased and how horrific it was to learn of her untimely death, particularly when considering the undignified manner in which she was buried. He said the deceased at the young age of 21 years was robbed of a life he had hoped for her and even though the trial will now come to an end they, as parents, will remain without a daughter.

[12] Though expressive and emotional, the testimony of Mr Mathews gives some perspective as to what the family of the victim had to endure subsequent to her disappearance and death. It was therefore apposite to bring these dimensions to the court's attention at the stage of sentencing, when regard is had to all circumstances either of mitigating or aggravating nature, assisting the court in determining what punishment would be just and suitable in the circumstances of the case.

[13] As part of the triad of factors for consideration, the court would primarily focus on the personal circumstances of the offender where evidence is received pertaining to the character of the person before court. Contrary thereto, it is seldom that evidence is led about the victim as a person or the impact of the loss of a loved one on the family who, more often than not, suffer in silence and must simply accept what had happened. I believe it should not just be accepted that these persons will be able to cope afterwards and continue with their lives without taking into account the agony and suffering they and others must endure as a result of 'collateral damage' caused by the offender. In my view, there is no reason why these circumstances, once established, should not be considered and relied upon in aggravation of sentence. In sentencing, I am accordingly enjoined to take into account the circumstances pertaining to the deceased and her family, testified to by the deceased's father, and give it appropriate weight.

[14] When considering the circumstances that led to the decision to dispose of the body, it obviously involved some degree of decision making as

to where it should be buried without the accused being detected or being linked to the deceased's personal belongings. These decisions were clearly prompted by unforseen circumstances and taken on the spur of the moment when accused 2 arrived at the flat. This is not an instance where the commission of the crime was planned in advance but was more in the form of a cover-up. However, with regards to the fraud charges committed by accused 1, these crimes required careful planning when preparing and submitting claims against her insurer, based on false information made up by the accused. It is a well-established principle of our law that the deliberate planning of a crime is considered an aggravating factor at sentencing and, in this instance, finds application as far as it concerns the fraud charges.

[15] When considering the interests of society, this court is alive to its duty to uphold and promote the rule of law in society through its judgments and to reflect society's indignation and antipathy towards those making themselves guilty of serious crimes. In the present instance, statements allegedly made by the family of the deceased and members of public were reported in the media following the judgment, undoubtedly for purposes of influencing the court at sentencing. It should be made clear to all that, what is required of this court today is to punish the accused persons for the crimes they stand convicted of, based on the facts and law as set out in this court's earlier judgment, and not for crimes society expected them to be guilty of. For the court to give in to public expectation, as opposed to considering how public interest could best be served, would result in a travesty of justice.

[16] Though one might have empathy with those in society who harbour strong feelings of resentment towards the accused persons and want to see the court mete out severe punishment on them, it need equally be recognised that public expectation is not synonymous with public interest (*S v Makwanyane and Another*).[5] The court has the duty to serve the interests of society and though it should not be insensitive towards or ignorant of public feelings and expectations, it may not blindly adhere thereto. The court does not sentence in a vacuum but punishes the offender with full regard to his or her own personal circumstances, considered against the nature and

[5] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at 431C-D.

seriousness of the crime committed and the interests of society. This is the approach to sentencing the court will follow in this instance.

[17] Counsel on both sides agree that the imposition of custodial sentences on all the counts are inevitable. I agree. Sentences ranging between three and five years were proposed by the defence for defeating or obstructing the course of justice while the state, guided by the sentence imposed in *S v Du Preez*[6] for a similar offence, proposed a sentence of eight years' imprisonment. Contrary to the circumstances in *Du Preez* where the accused were also convicted of murder and the sentences on both counts ordered to partly run concurrently, that is not the case in the present matter. Though to this end the cases are distinguishable, it does not detract from the seriousness of the offence committed by the accused where they deliberately and for a protracted period of six months made several false statements to the police as cover-up for their crime, well-knowing the anguish and suffering the deceased's family had to endure during that time.

[18] In circumstances where the interests of the accused persons do not measure up against the gravity of the crime and, when considered with the legitimate interests and expectations of society, the imposition of direct imprisonment seems inescapable.

[19] Defence counsel further submitted that sentences of direct imprisonment would also impact on the family of the accused. Though it could be expected that their absence would necessarily bring distress and hardship to the family of the accused persons, this is an inevitable consequence of crime and is not something which the court can consider as a mitigating circumstance.

[20] With regards to the period of pre-trial incarceration, it is trite that the period the accused has spent in custody pending the finalisation of the matter will be taken into account and usually leads to a reduction in sentence.[7] The approach to be followed by the court is succinctly set out in *S v Karirao*[8] where it is stated that: 'However, such period is not arithmetically discounted

[6] *S v Du Preez* (CC 02/2016) [2019] NAHCMD 426 (22 October 2019).
[7] *S v Kauzuu* 2006 (1) NR 225 (HC) at 232F-H.
[8] *S v Karirao* SA 70/2011 NASC 7 (15 July 2013).

and subtracted from the overall sum of imprisonment imposed. This is a factor which is considered together with other factors, such as the culpability of the accused and his or her moral blameworthiness, to arrive at an appropriate sentence in all the circumstances of a particular case'.

[21] In this instance, the accused persons remained in custody for a considerable period of more than two years, in circumstances where the state must have realised that the only evidence it had against the accused persons on the murder charge was their own self-incriminating statements, nothing more. Having in the end been convicted of a lesser offence, the accused persons in the circumstances deserve some recognition for the period spent in custody awaiting trial.

[22] In respect of accused 1, the court further needs to consider the cumulative effect of the sentences imposed in order to ensure that the total sentence is not disproportionate to the accused's blameworthiness in relation to the offences for which she has to be sentenced. In the present instance, this could be achieved by issuing an order in terms of s 280(2) of the Criminal Procedure Act 51 of 1977.

[23] In the result, the following sentences are considered to be just and appropriate:

Count 3 – Defeating or obstructing the course of justice:

Accused 1: 8 years' imprisonment of which two years' imprisonment is suspended for a period of five years, on condition that the accused is not convicted of defeating or obstructing the course of justice, committed during the period of suspension.

Accused 2: 6 years' imprisonment of which two years' imprisonment is suspended for a period of five years, on condition that the accused is not convicted of defeating or obstructing the course of justice, committed during the period of suspension.

Count 4 – Fraud:

Accused 1: 1 year imprisonment

Count 5 – Fraud:

Accused 1: 1 year imprisonment

In terms of s 280(2) of Act 51 of 1977 it is ordered that the sentences imposed on counts 4 and 5 are to be served concurrently with the sentence imposed on count 3.

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JC LIEBENBERG

JUDGE

APPEARANCE

STATE:	M H Muhongo Of the Office of the Prosecutor-General, Windhoek.

ACCUSED 1:	A Titus Of the Directorate Legal Aid, Windhoek.
ACCUSED 2:	T Klazen Of the Directorate Legal Aid, Windhoek.