REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 19/2013

In the matter between:

THE STATE

and

MARCUS THOMAS **FIRST ACCUSED**

KEVAN DONEL TOWNSEND **SECOND ACCUSED**

Neutral citation: *S v Thomas* (CC 19/2013) [2023] NAHCMD 680 (26 October 2023)

Coram: LIEBENBERG J

Heard: **10 – 11 October 2023**

Delivered: **26 October 2023**

Flynote: Criminal Procedure – Charges – Murder – Robbery – Possession of a firearm and ammunition – Importing of firearms into Namibia – Attempting to defeat or obstruct the course of justice.
Criminal Procedure – Sentencing – Triad factors, objectives of punishment considered and restated.

Criminal Procedure – Personal Circumstances – Custodial sentence – Medical condition of an accused at sentence a factor, provided evidence as to the nature and health status is provided – The extent of hardship to be suffered from incarceration also a factor – Evidence to be provided.

Criminal Procedure – Lengthy pre-trial incarceration – A factor to be taken into account at sentence – Discounting or deducting from the time spent in pre-trial incarceration, role accused played in delaying the finalisation of matter a determining factor – Such period not arithmetically discounted and subtracted.

Criminal Procedure – Circumstances pertaining to the deceased and his family – A factor for consideration when established – Moral blameworthiness – Planned criminality morally more reprehensible – Remorse – Must be sincere and accused must take court fully into his confidence.

Criminal Procedure – Approach followed in *S v Ningisa* endorsed – Foreigners committing serious crimes and abusing hospitality of the country – Severe punishment meted out.

Summary: The accused persons were, on 6 September 2023, found guilty on charges of murder, robbery and the possession of a firearm and ammunition. Accused 1 was further convicted of the offence of importing of firearms (barrels) into Namibia and attempting to defeat or obstruct the course of justice. Accused 2 further stands convicted of a second count of possession of firearms, relating to the imported barrels. Proceedings have now reached the stage where this court must decide what punishment should be meted out to each accused. The approach to sentence and the court's attitude towards sentencing is that punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.

In search of what would be an appropriate sentence, the court stands guided by what is generally known as the triad of factors, comprising the personal circumstances of the offender, the seriousness of the crime committed and the interests of society. Coupled with this, regard must be had to the main purposes or objectives of punishment namely, deterrence, prevention, reformation and retribution.

Held: In the absence of information pertaining to the current nature and health status as well as the further hardship the accused will suffer as a result of a custodial sentence, the court may assume that his medical condition is treatable and under control whilst in detention. To this end, the court is satisfied that the accused's medical needs would be attended to as far as it is reasonably possible.

Held further that: Pre-trial incarceration 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.

Held that: Where an accused has made him/herself guilty of the deliberate and wilful disruption of or delay in court proceedings which, essentially, amounts to the malicious abuse of court process, then that person should not in the end stand to gain or benefit from such behaviour through discounting the entire wasted period of time.

Held further that: In the present instance, the period the accused persons have been in detention is indeed substantial and should lead to a discount in sentence. However, where the prolonged delay in finalisation of the trial attributed to the accused persons, in total, consumed almost half the time it took to finalise the trial, the period deducted from their sentence should be limited, in this instance, to nine years.

Held that: Approach in *S v Nikanor* applied, namely, that when determining the sentence to be meted out for the accused, the circumstances pertaining to the deceased and his family must be given sufficient weight.

Held further that: Keeping accused persons away from their families for an even longer period is an inevitable consequence of crime considering that there is a high level of moral blameworthiness attributed to both the accused. Further, planned criminality is morally more reprehensible than unplanned.

Held that: Although not considered an aggravating factor, remorse, reflects on the character of the persons before court, who, in the present instance appear unfazed by the crimes they committed as well as the consequences to others. Further, that when the deterrent effect of a sentence is adjudged, remorse, as an indication that the offence will not be committed again, is considered a mitigating factor.

Held further that: The fact that the accused persons remain unwilling to accept legal and moral responsibility for what they have done, renders accused 1's alleged feelings for the family insincere and carriers no weight.

Held further that: The fact that the motive behind the accused person's criminal activities remain a mystery, increases the degree of moral blameworthiness of both the accused.

Held that: It is aggravating where a foreigner enters Namibia with the intention to commit crimes. Where crimes convicted of serious, severe punishment must be meted out.

ORDER

Count 1: Murder – Accused 1 & 2 each: 27 years' imprisonment.

Count 2: Robbery (with aggravating circumstances) – Accused 1 & 2 each: 4 years' imprisonment.

Count 3: Importing of firearms without a permit (c/s 22(1) of Act 7 of 1996) – Accused 1: N$4000 or 1 year imprisonment.

Possession of firearms without a permit (c/s 2 of Act 7 of 1996) – Accused 2: N$1000 or 6 months' imprisonment.

Count 4 and count 5 taken together for sentence: Possession of a firearm without a licence (c/s 2 of Act 7 of 1996) and Possession of ammunition (c/s 33 of Act 7 of 1996) – Accused 1 & 2 each: N$1000 or 6 months' imprisonment.

Count 6: Attempting to defeat or obstruct the course of justice – Accused 1: 1 year imprisonment.

In terms of s 280(2) of Act 51 of 1977 it is ordered that 2 years of the sentence imposed on count 2 to be served concurrently with the sentence imposed on count 1.

It is further ordered: In terms of s 10(6) of Act 7 of 1996 accused 1 and 2 are declared unfit to possess an arm for a period of five years. This order takes effect upon the date of release of an accused after serving his sentence.

SENTENCE

LIEBENBERG J:

[1] On 6 September 2023 this court found both the accused guilty on charges of murder, robbery and the possession of a firearm and ammunition. Accused 1 was further convicted of the offence of importing of firearms (barrels) into Namibia and attempting to defeat or obstruct the course of justice. Accused 2 further stands convicted of a second count of possession of firearms, relating to the imported barrels. Proceedings have now reached the stage where this court must decide what punishment should be meted out to each accused which, in the circumstances of this case, would be appropriate. The approach to sentence and the court's attitude towards sentencing is succinctly captured in the oft-quoted passage in *S v Rabie*[1] at 862G-H where it is stated:

---

[1] *S v Rabie* 1975 (4) SA 855 (A).

'Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.'

[2] The approach of this court would be to apply the applicable principles to the present circumstances as far as it is humanly possible and, regarding the requirement of mercy, not to shy away from imposing a heavy sentence where it is justified in the circumstances. In search of what would be an appropriate sentence, the court stands guided by what is generally known as the triad of factors, comprising the personal circumstances of the offender, the seriousness of the crime committed and the interests of society. At the same time regard must be had to the main purposes or objectives of punishment namely, deterrence, prevention, reformation and retribution. Although the court is required to harmonise and balance these principles and to apply them to the facts, it does not imply that equal weight or value must be given to the different factors, as situations may arise where it becomes necessary and unavoidable to emphasise one or more of the factors at the expense of the others.[2]

[3] The state in aggravation of sentence led the evidence of Mrs Birgit Heckmaier, the mother of the deceased, André Heckmaier and outlined the personal circumstances of the deceased at the time of his death. He was 25 years of age and five months away from completing his studies at a hotel school in Switzerland, whereafter he and his girlfriend intended getting married and pursue a career in the hospitality profession. He had come home to be with his family during the festive season and was due to return to Switzerland the day after he was murdered. She remembered her son as being friendly with an outgoing personality.

[4] With regards to the psychological suffering endured by the family as a result of the loss of their son, Mrs Heckmaier explained that the last time she, her husband Peter, and their daughter Bianca greeted the deceased, was before he left for the lunch appointment. Their next meeting was in the mortuary where he lay with a gunshot wound in his right cheek. She explained that their family received psychological therapy but that Bianca, in particular,

[2] *S v Van Wyk* 1993 NR 426 (HC) at 448B-E.

can still not cope with the death of her brother and the manner in which he was killed. As for her husband, he became depressive and fell ill for not only losing his only son, but also his best friend. During her testimony she expressed the desire of the family wanting to know why their son was so brutally murdered and what the motive behind it was.

[5] Ms Verhoef, representing the state, led no further evidence.

[6] Mr Kanyemba still appears for accused 1 and Mr Siyomunji for accused 2.

[7] Both the accused elected not to testify or call witnesses in mitigation of sentence. Their personal circumstances only came before court through their counsel, addressing the court from the bar. This caused some problems for Mr Kanyemba who found himself in the unenviable position where his client (accused 1) initially refused to brief him on his personal circumstances but, at the proverbial eleventh hour, handed counsel a note from which he was able to make submissions. I will revert to this development later in the judgment.

[8] The personal circumstances of accused 1: At the time of his arrest in January 2011, he was just short from turning 25 years.[3] is single and a student in the United States of America (USA) where he studied in capital financial markets. He has been in custody since his arrest, a period of 12 years and nine (9) months. He experienced anguish being separated from his family during this period and, being detained in a foreign country, was left without their support. He recognises the seriousness of the offences and the grief and loss suffered by the family of the deceased, hoping they would get through this. He further acknowledges this court's findings.

[9] With regards to sentence, Mr Kanyemba proposed the appropriate sentence for murder would be 20 years' imprisonment, of which 12 years suspended, bearing in mind the period of pre-trial incarceration. Furthermore, the sentences on the remaining counts to be served concurrently.

[3] Currently 37 years and 8 months.

[10] The personal circumstances of accused 2: He is currently 37 years of age, single and has one child aged 14, whom he last saw in 2012. Before his arrest, he was a student at a Community College in Manhattan, USA, studying psychology. He has equally been in custody for 12 years and 9 months pending finalisation of the trial. With regards to his medical condition, it was submitted that he was diagnosed with hypothyroidism (a condition where the thyroid gland does not produce enough hormones), hypertension and chronic kidney disease which has caused liver damage. In support thereof, the accused's health passport and an unidentified document attached thereto, bearing notes of 'liver damage/disease' and 'kidney failure', was handed up. Regarding the unidentified document, neither the author nor the purpose for which it was issued was disclosed. This, as pointed out by the state, questions the reliability of information contained in the document. As for the laboratory results issued on 16 June 2020, these are of no assistance to the court without interpretation by a medically qualified person; such person not being called to give evidence in this regard.

[11] It seems necessary at this juncture to remark that '…the medical condition of an accused at the stage of sentencing obviously deserves consideration as it forms part of the accused's personal circumstances and the availability of medical treatment when serving a sentence must be considered with the totality of the convicted person's circumstances (*S v Magida* 2005 (2) SACR 591 (SCA); *S v Asser Haungeya* (unreported) case No 05/2010 delivered 9 June 2010)'.[4] In the present instance no evidence was presented to show what the current nature and health status of the accused is, and to what extent he would suffer additional hardship as a result of a custodial sentence. In the absence of such information, the court may assume that his medical condition is treatable and under control whilst in detention. To this end, the court is satisfied that the accused's medical needs would be attended to as far as it is reasonably possible.

[12] Mr Siyomunji submitted that the accused was still youthful at the age of 23 and that the court should be lenient on him. In light of the period of almost 13 years the accused had been in custody, it was said that a sentence

[4] *S v Mushishi* 2010 (2) NR 559 (HC) at 564A-B.

of seven (7) years' imprisonment of which five (5) years suspended, was deemed to be appropriate. Direct imprisonment of four (4) years on count 2 (robbery) was proposed while the imposition of fines on the remaining counts could be imposed as the accused had the necessary funds to pay. Lastly, the sentences of imprisonment were to be served concurrently.

[13] Both the accused are first time offenders, which, in itself, is a mitigating factor.

[14] Ms Verhoef, on the contrary, argued that in light of the gravity of the offences of murder and robbery and the circumstances under which they were committed, that a sentence of life imprisonment was called for. Alternatively, lengthy custodial sentences on the murder and robbery counts. Though acknowledging the period spent in pre-trial incarceration being lengthy, it was submitted that, notwithstanding, regard must also be had to whether the accused persons contributed to the delay in finalising the matter. Pre-trial incarceration is merely a factor the court must take into consideration at sentencing.

[15] Turning to the crimes the accused persons stand convicted of, the following factors are for consideration: Crimes such as murder and robbery are considered by the courts as very serious and are normally visited with heavy sentences. Argument was advanced, based on the cases cited by the defence, that the present case falls in the same category of cases where the benchmark sentence is one of 20 years' imprisonment for murder. It was further submitted that, given the circumstances of this case, it should have been tried in the Regional Court where the court's jurisdiction is limited to 20 years' imprisonment. Counsel's bold assertion is undoubtedly inconsistent with other cases of similar nature and circumstances tried in this court in the past, where sentences ranging between life imprisonment and direct imprisonment well in excess of 20 years' imprisonment have been imposed. There is accordingly no merit in the argument advanced in this regard.

[16] As much as this court has to adhere to the principle of uniformity and equality in imposing sentence, equal consideration must be given to the principle of individualisation, where the relevant facts and personal

circumstances of the offender may distinguish the crime and the criminal from other cases.

[17] This court found that the accused persons acted with common purpose when setting in motion a series of pre-planning and preparation to obtain the murder weapon and to set up a meeting with the deceased, clearly for purposes of executing their plan. This resulted in luring him to a dead-end street where he was executed with a single gunshot in the head whilst seated in the driver's seat of the vehicle, all happening in broad daylight in a residential area. The same persons with whom he had a lunch appointment, became his murderers. The brazen and merciless killing of the deceased came unexpectedly, not only shocking his family, but also broader society. Moreover, in circumstances where the motive to this day remains unanswered and something that will haunt the family forever. This much is evident from the testimony of Mrs Heckmaier, speaking for her family. A similar situation comes to mind.

[18] In *S v Nikanor*[5] the sister to the deceased testified before sentence about the person the deceased was and gave the court a peek of what they as sisters had to endure after one sister was murdered. She affectionately described what the deceased had meant to them as a family and sadly, the last time they as siblings were together was when they went to the mortuary to identify the deceased. The same traumatic and harrowing experience the Heckmaier family had to endure after their son and brother was brutally murdered. In light of the present facts, it seems appropriate to repeat what the court said in *Nikanor* at par 7:

'The procedure on sentence, and as part of the triad of factors for consideration, *inter alia* focusses on the personal circumstances of the offender where evidence is generally received pertaining to the character of the offender before court. Contrary thereto, it is seldom that evidence is led about the person who the victim was prior to the incident, and the effect on the family due to the loss of a loved one in murder cases; or the effect on the victim in a rape case, and what happens to such person after the trial. Sadly they often just become another statistic, and that is wrong. I believe it should not just be accepted that these persons will be

[5] *The State v Nikanor* (CC 15/2015) [2016] NAHCMD 248 (06 September 2016).

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. There is no reason in my view why these circumstances, once duly established, should not be considered and relied upon in aggravation of sentence. I am accordingly enjoined to take into account, when determining the sentence to be meted out for the accused, the circumstances pertaining to the deceased and her family as narrated by Ms Wilson and give sufficient weight thereto.'

[19] This court will follow the same approach at sentencing the accused persons now before court.

[20] Regarding the anguish experienced by the accused persons of being separated from their family who live in the USA, I accept that there would likely be some degree of distress and hardship suffered by both sides if lengthy custodial sentences are imposed, keeping the accused persons away from their family and friends for an even longer period of time. However, this is an inevitable consequence of crime and one cannot allow one's sympathy for them to deter one from imposing the kind of sentence dictated by the interests of justice and society.

[21] It is an established principle of law that the state of mind and thus his moral blameworthiness at the time of committing the crimes, becomes a crucial factor at sentencing. It is trite that the degree of moral blameworthiness should be reflected in the sentence imposed on the offender. In *Terblanche:* Guide to Sentencing in South Africa, (Second Ed.) at 150 para 7.2.2 the following is said:

'The modern view of the seriousness of crime generally also refers to the blameworthiness of the offender. According to this view, the seriousness of the offence is affected by the extent to which the offender can be blamed or held accountable for the harm caused or risked by the crime. This is a partly objective assessment. It should also include those subjective factors which lessen (mitigate) or increase (aggravate) the blame that can be attributed to the offender.'

[22] In the present instance, the fact that the murder and accompanying robbery were committed only after careful planning, is well recognised as an

aggravating factor, for reason that planned criminality is morally more reprehensible than unplanned. See *Terblanche* at 187 fn. 26. The acquiring of a suitable arm and accessories to use in the commission of the murder was planned by accused 1 in fine detail and well in advance. This included the dispatching of a pistol silencer from a foreign country to Namibia and the importation of pistol barrels. In addition, plans were made and successfully executed to buy an arm and ammunition off the street and ultimately used in the commission of the murder. In these circumstances there is a high level of moral blameworthiness, attributed to both the accused, considered an aggravating factor in sentencing.

[23] Neither of the accused persons expressed any remorse for the crimes they committed and the accompanying pain and suffering brought upon the family of the deceased. Though not considered an aggravating factor, it reflects on the character of the persons before court, who appear unfazed by the crimes they committed and the consequences to others. The half-hearted attempt by accused 1 to recognise the grief and loss of the deceased's family and hoping they would get through it, falls significantly short of contrition. It is settled law that when the deterrent effect of a sentence is adjudged, remorse, as an indication that the offence will not be committed again, is considered a mitigating factor. Provided, to be a valid consideration, penitence must be sincere and the accused must take the court fully into his confidence.[6] When the opportunity presented itself in this court to express their remorse to the mother of the deceased during her testimony, albeit through their counsel, they were silent. The fact that the accused persons remain unwilling to accept legal and moral responsibility for what they have done, renders accused 1's alleged feelings for the family insincere and carriers no weight. It would appear that the accused persons rather see themselves as unfortunate victims of circumstances that landed them in the present disaster.

[24] The position the accused persons find themselves in is no different to that of the accused in the matter of *S v Ningisa*[7] where the court remarked that where a foreigner enters Namibia with the intention to commit robbery, is

[6] *S v Seegers* 1970 (2) SA 506 (A) at 511G-H.
[7] *S v Ningisa and Others* 2013 (2) NR 504 (SC).

aggravating and ‘a stranger who abuses the hospitality of the people of this country by committing crimes after being granted entry to stay would, depending on the seriousness of the crime he or she has been convicted of, be punished severely’. I respectfully endorse these sentiments.

[25] As borne out by the evidence presented, the accused travelled from the USA with one thing in mind and that was to murder the deceased; this they accomplished and in the process robbed him of his properties. The fact that the motive behind their criminal activities remains a mystery, renders the ending of a young person’s life, standing at the beginning of what appears to have been a prosperous career and vibrant future, even more senseless. In the absence of evidence showing otherwise, this would increase the degree of moral blameworthiness of both the accused.

[26] Turning next to the interests of society, the court, with great concern, notes that offences such as murder and robbery are prevalent throughout our country and every law abiding citizen is shocked to the core at the rate at which these crimes are perpetrated, coupled with the brutality and callousness that accompany them. These horrendous crimes are more prevalent than ever and there is undoubtedly wide spread outrage in our society against the senseless killing of fellow human beings. The respect for life as such and the right to life has become non-existent to criminals who, as the accused in this instance, only serve their own interests. When these people become a threat to society, the natural indignation of interested parties and the community at large, should receive some recognition in the sentences the courts impose, lest the administration of justice may fall into disrepute.[8] In cases as the present, society’s outrage and the need to deter the accused before court and other potential offenders, deserve considerable weight. The court cannot simply turn a blind eye to the accused persons’ blatant and flagrant want of respect for the life and dignity of a fellow human being. Hence, the punishment meted out by this court today should reflect the court’s utter repugnance and contempt for the accused persons’ disrespect to these values.

[8] *R v Karg* 1961(1) SA 231 (AD), cited with approval in decisions of this jurisdiction.

[27] Turning to the period of pre-trial incarceration, it is true that this is usually a factor taken into consideration at sentencing, especially when the period an accused spends in custody is lengthy. This would normally lead to a deduction in sentence.[9] It is on this basis that arguments were advanced on behalf of the accused that the period the accused spent in custody pending the finalisation of the trial, is to be deducted from a sentence of 20 years' imprisonment for murder, which counsel considered appropriate in the circumstances. Though acknowledging that the period of pre-trial incarceration is a factor to be taken into consideration in sentencing, state counsel relied on the *dictum* enunciated in *Raphael Lyazwila Lifumbela and Others*[10] at para 347 where it is stated:

'Relying on *Karirao v S*[11] and *S v Radebe and another*[12] he [the trial judge] also observed that the period spent in pre-trial detention must be considered together with other factors in arriving at an appropriate sentence. The reasons for the prolonged trial also come into the equation. The trial judge did not, unfortunately, demonstrate how exactly he took that period into account. The appellants were in pre-trial detention from 1999 until conviction and sentence in 2016. Some of the delay was attributable to the appellants. There is evidence of their refusal to cooperate and disruption of the proceedings in one way or another. We are of the view that the court *a quo* should have demonstrably discounted the sentence by the period spent in custody before sentence. That discounting must take into account the appellants' contribution to the prolonged delay in completing the trial. Instead of deducting the whole period of 16 years we think that a lesser period of between 11 and 14 years should be deducted from the period of imprisonment.' (Emphasis provided)

[28] The court in *Karirao* (supra), as per Strydom AJA, referred to the period of four years the appellant spent as an awaiting trial prisoner and stated:

'However, such period is not arithmetically discounted 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

[9] *S v Kauzuu* 2006(1) NR 225 (HC).
[10] *Raphael Lyazwila Lifumbela and Others* SA 25/2016 delivered on 22 December 2021.
[11] *Karirao v S* (SA 70-2011) [2013] NASC 7 (15 July 2013) para 23, p 14.
[12] *S v Radebe and another* 2013 (2) SACR 165 (SCA).

moral blameworthiness, to arrive at an appropriate sentence in all the circumstances of a particular case.'

[29] When applying the principles stated above to the present circumstances, there is no justification for the proposals made by the defence. I accordingly decline to follow that approach. In paragraphs 1 and 2 of this court's earlier judgment, the background was briefly sketched, explaining why the trial covered a period in excess of nine years to reach the present stage of sentencing. As demonstrated below, it would not be wrong to say that the delay in bringing this matter to finalisation, could primarily be attributed to accused 1. Though acknowledging this conclusion, Mr Siyomunji argued that accused 2 at all times wanted the matter to be finalized and played no part in prolonging the trial. This, he said, is borne out by the fact that they even sought a separation of trials.

[30] As pointed out by the court during oral argument, the submissions made on behalf of accused 2 is not wrong, but must be considered in context. Firstly, at no stage while accused 1 brought a number of interlocutory applications did accused 2 oppose these. In the words of his counsel, he opted to 'remain neutral' in circumstances where he could have aired his dissatisfaction with the continuous disruption of the trial by accused 1. Although it probably would have made little difference to his position as a co-accused, it would at least have given credence to him belatedly crying foul at the stage of sentencing. Secondly, when the application for a separation of trial was made, this was after the trial had commenced and there was no legal basis for this court to order a separation of trial. Neither would it have been in the interest of justice to do so in circumstances where the indictment read that the accused acted with common purpose when committing the offences charged.

[31] As for accused 1, it is evident from the record of proceedings that lengthy delays in the trial, some stretching over years, came about due to multiple attempts by accused 1 to derail the trial. It started off at the onset of trial proceedings when accused 1, subsequent to a botched escape from custody, claimed to have sustained a head injury which prompted his referral

for psychiatric evaluation. For reasons stated in the court's earlier rulings, the accused was referred for a second evaluation by two independent psychiatrists who concluded that the accused was malingering (feigned illness) and found him fit to stand trial. After conducting two separate inquiries during which several witnesses testified, stretching over three years, the court in the end ruled that accused 1 was indeed fit to stand trial. This was followed by multiple (three) applications for the recusal of the presiding judge and applications for leave to appeal, and one petition to the Chief Justice; none having been met with success.

[32] In between, there was the constant change of legal counsel who, in the majority of instances withdrew due to either being conflicted or receiving untenable instructions from the accused. In some instances newly instructed counsel were only available during the following year which the court found unacceptable, prompting their withdrawal. With each new appointment, counsel was afforded time to study the record of proceedings in order to prepare for the trial which, in total, spanned over years. One such counsel, Mr Ipumbu, was given time to prepare himself for the trial and intimated that he was ready to proceed. However, instead he was instructed to bring a recusal application which was unsuccessful. Accused 1 thereafter went so far as to draft a letter addressed to the Directorate Legal Aid, giving out that it came from his counsel, Mr Ipumbu, according to which notice is given to Legal Aid that counsel could no longer represent the accused due to a conflict of interest, not attributable to the accused. When asked by the accused on the day the trial had to continue to append his signature to the letter drafted by the accused, Mr Ipumbu refused. After bringing the accused's conduct to the attention of the court, counsel decided to withdraw from the case. The significance of this incident is to show to what lengths accused 1 was willing to either delay or disrupt the trial.

[33] There were also two instances where accused 1 simply refused to come to court, prompting the issuing of orders to have the accused brought before court to inquire into his refusal. In one instance it was hinted that he contracted Covid which turned out not to be the case.

[34] This indecorous behaviour by the accused unfortunately continued right up to the end when both accused, on the day pre-sentence proceedings were to commence, instructed their counsel (only that morning) to bring an application in terms of s 317 of the Criminal Procedure Act 51 of 1977, dealing with a special entry of an irregularity or illegality to be made on the record. Not only was no notice given, either during the trial or after the delivery of the judgment, but leave sought for a postponement to allow time to file the necessary papers. When the application was refused it became evident that counsel by then – more than one month after judgment was delivered – had not yet consulted with the accused on sentence and was therefore not ready to make submissions. Proceedings had to be postponed until the next day to afford accused 1 time to note his personal circumstances and gather medical records. However, when proceedings resumed the next day, counsel for accused 1 informed the court that the accused, during consultation, withheld his personal information and persisted with the s 317 application. The moment this information was placed on record, accused 1 unexpectedly handed over a note to his counsel, enabling him to make submissions from.

[35] In addition to the delays caused by the accused, intermittent delays were occasioned as a result of the State of Emergency due to the Covid pandemic when the court was closed.

[36] It is against this background that the court must now decide how much of the sentence should be discounted, bearing in mind the period of almost 13 years the accused have been in pre-trial incarceration, and their respective contributions in finalising the trial. It is this court's considered view that where an accused has made him/herself guilty of the deliberate and wilful disruption of or delay in court proceedings which, essentially, amounts to the malicious abuse of court process, then that person should not in the end stand to gain or benefit from such behaviour through discounting the entire wasted period of time.

[37] In the present instance, the period the accused persons have been in detention is indeed substantial and should lead to a discount in sentence. However, where the prolonged delay in finalisation of the trial attributed to the

accused persons, in total, consumed almost half the time it took to finalise the trial, the period deducted from their sentence should be limited to between eight and nine years.

[38] The state argued that the circumstances of the case justify the imposition of life imprisonment, alternatively, a lengthy custodial sentence. Given the gravity of the crimes involved and the aggravating circumstances overshadowing the mitigating circumstances presented, there can be little doubt that this is an instance where life imprisonment would have been the appropriate sentence to impose on the accused. However, the total period of pre-trial incarceration of the accused may render life imprisonment too severe a sentence. Any doubt as to whether this would be appropriate punishment, should favour the accused persons. The imposition of lengthy custodial sentences then seems inevitable on the murder and robbery counts.

[39] Argument advanced on behalf of the accused that the counts should be taken together for purpose of sentence, and that sentences should be partly suspended, is contradictory to the approach followed in this court where the practice of taking counts together for purpose of sentence was found undesirable.[13] While the Supreme Court found it inappropriate to suspend part of the sentence where a long term of imprisonment is imposed (20 years) for reason that the suspension of sentence 'must yield to the sentencing objective of rehabilitation and the principle that there should be finality and certainty in regard to the punishment meted out'.[14]

[40] Where the court is faced with a premeditated, callous murder and robbery such as the present, it is a well-recognized principle of our law that retribution and deterrence are proper purposes of punishment and must be accorded due weight in any sentence that is imposed. Serious crimes will usually require that these two objectives of punishment come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.[15] Given the circumstances of this case and the current levels of violence

[13] *S v Tjikotoke* (CR 86/2012) [2012] NAHCMD 41 (29 October 2012).
[14] *Karirao v S* (supra).
[15] *S v Swart* 2004 (2) SACR 370 (SCA) at 378c-e.

and serious crimes in this country, is seems proper that the emphasis should be on retribution and deterrence.

[41] In this instance where the accused persons are convicted of murder and robbery, deriving from one incident and thus overlapping, the court must avoid a duplication of punishment when sentencing the crimes individually. To this end, the court will endeavour to incorporate the approach followed in *S v S.*[16] When applying the stated principles to the present facts, the evidence clearly established that murder was the primary intention and the robbery secondary. Though both crimes were premeditated and clearly overlap, it is my considered view that the crimes must be punished individually, bearing in mind the moral blameworthiness of the accused persons as regards each offence.

[42] It is a recognised principle of our law that where an accused is sentenced in respect of two or more related offences, the accepted practice is that the sentencing court should have regard to the cumulative effect of the individual sentences imposed, in order to ensure that the total sentence is not disproportionate to the accused's blameworthiness in relation to the offences, in this instance murder and robbery, for which the accused persons have to be sentenced.[17] To this end, the appropriate order could be made in terms of s 280(2) of the Criminal Procedure Act.

[43] In order to give effect to the provisions of s 10(6) of the Arms and Ammunition Act 7 of 1996 (Arms and Ammunition Act), by virtue of which the accused are deemed to be declared unfit to possess an arm, no argument was advanced by counsel for the defence opposing such declaration.

[44] Mr Siyomunji further proposed the imposition of a fine(s) on those charges under the Arms and Ammunition Act of which accused 2 was convicted. It was submitted that the accused has the financial means to pay the fine(s). Though Mr Kanyemba did not advance a similar proposition, it would appear that accused 1 shares the same view and prayer.

---

[16] *S v S* 1991 (2) SA 93 (A) at 103H-106C.
[17] *S v Sevenster* 2002 (2) SACR 400 (CPD) at 405a-b.

[45] Taking all the relevant factors and circumstances into consideration, it is this court's considered view that the following sentences are appropriate:

Count 1: Murder – Accused 1 & 2 each: 27 years' imprisonment.

Count 2: Robbery (with aggravating circumstances) – Accused 1 & 2 each: 4 years' imprisonment.

Count 3: Importing of firearms without a permit (c/s 22(1) of Act 7 of 1996) – Accused 1: N$4000 or 1 year imprisonment.

Possession of firearms without a permit (c/s 2 of Act 7 of 1996) – Accused 2: N$1000 or 6 months' imprisonment.

Count 4 and count 5 taken together for sentence: Possession of a firearm without a licence (c/s 2 of Act 7 of 1996) and Possession of ammunition (c/s 33 of Act 7 of 1996) – Accused 1 & 2 each: N$1000 or 6 months' imprisonment.

Count 6: Attempting to defeat or obstruct the course of justice – Accused 1: 1 year imprisonment.

In terms of s 280(2) of Act 51 of 1977 it is ordered that 2 years of the sentence imposed on count 2 to be served concurrently with the sentence imposed on count 1.

It is further ordered: In terms of s 10(6) of Act 7 of 1996 accused 1 and 2 are declared unfit to possess an arm for a period of five years. This order takes effect upon the date of release of an accused after serving his sentence.

_____

JC LIEBENBERG

JUDGE

APPEARANCES

STATE:	A Verhoef Of the Office of the Prosecutor-General, Windhoek.
ACCUSED 1:	S Kanyemba Of Salomon Kanyemba Incorporated, Instructed by Directorate: Legal Aid, Windhoek.
ACCUSED 2:	M Siyomunji Of Siyomunji Law Chambers, Windhoek.