CASE NO.: CC 10/2011

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

IGNATIUS PETU MURUTI

CORAM: LIEBENBERG, J.

Heard on: 27 January 2012
Delivered on: 31 January 2012

SENTENCE

LIEBENBERG, J.: [1] After hearing evidence the Court convicted the accused of murder (having acted with direct intent) and assault with intent to do grievous bodily harm. Mwengere Muwara, the deceased in respect of the murder charge, was seventeen (17) years of age when she died, whilst the

victim of the assault is her younger brother, aged fifteen (15) at the time; both being pupils of Divundu Combined School near Rundu.

[2] In considering what sentence in the circumstances of this case would be an appropriate sentence, this Court must have regard to certain factors generally referred to as the *"triad"* [1] consisting of the crime, the offender, and the interests of society.[2] In addition, the element of mercy also comes into play and in this regard the following is said in *S v Rabie*[3] at 866B-C:

> *"While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."*

[3] The Court simultaneously must consider the objectives of punishment namely, prevention, deterrence, rehabilitation and retribution; and in the particular circumstances of the case, decide what punishment would best serve both the interests of the accused, and that of society. It has been said, that although all factors relevant to sentencing must be given proper consideration, these somewhat competing factors need not be given equal weight as the circumstances of the case may be such – and often is, when it involves serious crime – that one or more factors deserve emphasis and

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[1] *S v Zinn*, 1969 (2) SA 537 (A) at 540G
[2] *S v Tjiho*, 1991 NR 361 (HC)
[3] 1975 (4) SA 855 (A)

should be given more weight at the expense of other factors.[4] What is required from the Court in sentencing is that a balance should be struck between the factors without undue over- or under emphasis of any of these factors.

[4] The accused testified in mitigation and from his testimony the following became apparent; facts not in dispute: Accused turns twenty (20) years of age in August this year and progressed up to grade 10, but had failed. He intends to continue furthering his studies through Namcol, and would have registered during 2010 had it not been for his arrest on 23 March 2010 and subsequent incarceration to date. He was four months short of eighteen years when he committed the crimes and had no prior brush with the law before this case under consideration. His parents are communal farmers and he assists them with ploughing and other household chores. Accused said he was remorseful for what he has done and that he has learnt his lesson. Because of his young age, he said, that he should be given a second chance in life.

[5] It is against this background that Ms *Mainga* submitted that the accused is a strong candidate for rehabilitation and as a lengthy custodial sentence would break him, the Court, in the present circumstances, should impose a wholly suspended sentence. When asked whether she had any authority supporting her contention, counsel was unable to provide any case law which might assist the Court on this point. Mr *Lisulo,* on the contrary, submitted that

[4] *S v Van Wyk*,1993 NR 426 (HC)

the circumstances of this case do not warrant a wholly suspended sentence and that a custodial sentence of direct imprisonment, is inevitable; the only question being for how long must the accused be sent to prison?

[6] The youthfulness of the accused and the fact that he is a first offender, are indeed compelling factors weighing in his favour when considering sentence. The weight to be given thereto, however, must not be considered in isolation but can only be determined once proper consideration has been given to other equally compelling circumstances, such as the nature of the crime and the circumstances under which it was committed; considered together with the interests of society. Only when all these factors have been weighed up, the one against the other, would the Court be able to determine the weight to be afforded to each and what sentence, in the circumstances of this case, would constitute an “appropriate sentence”.

[7] The crimes committed by the accused are indeed serious – more so, because it involves the use of a knife against his victims who were unarmed and who unexpectedly came under attack in circumstances where they were unable to defend themselves. They were both pupils who should not have either fallen victim to a brutal attack or have been exposed to such violence at such young age; and to me, it seems quite possible that Titus might experience psychological problems in future trying to cope with the murder of his sister taking place in his presence, as well as the attack on him and his stabbing with a knife. The incident took place on the hostel grounds which form part of the school premises, where the carrying of weapons were

specifically forbidden; a fact the accused, being a former pupil of the said school, well knew, but chose to ignore. He came there with dangerous weapons which he used against vulnerable pupils. Although the accused only stabbed the deceased once, the force behind it was severe, resulting in the blade of the knife penetrating the deceased's upper body, causing injuries to the left lung and the heart, resulting in death. The deceased was a young girl who had her whole life lying ahead of her but of which she was robbed for no apparent reason. Whereas the accused did not take the Court fully into his confidence and explained why he had stabbed the deceased – the Court having rejected the explanation he proffered in the trial – the motive behind the killing remains a mystery. I consider all these to be aggravating factors.

[8] Regarding the injuries inflicted on the person of Titus, I shall find in the absence of evidence showing otherwise, in favour of the accused that it does not appear that Titus has suffered any permanent damage to his right arm and that he fully recovered physically. Neither was the injury to his arm, as testified to by Dr Ncomanzi, considered to be life threatening.

[9] Youthfulness of the offender is a well-recognised mitigating factor and when sentencing young offenders, the courts have always given effect to the principle that juvenile offenders should only in exceptional circumstances be detained, and then only for the shortest possible period. It must however be emphasised that the incarceration of juvenile offenders are neither forbidden by the Namibian Constitution nor international conventions, and that youthfulness *per se* does not guarantee non-custodial sentences. The same

applies to first offenders. Each case must thus be considered on its own merits.

[10] The approach to be followed by the sentencing court when dealing with youthful offenders, which I respectfully endorse, has been stated as follows in *S v Erickson*[5] at 166:

> *"[5] It is trite that youthfulness of an offender is, as a matter of course, a mitigating factor. See, eg* ***S v Mazibuko and Others*** *1997 (1) SACR 255 (W) ([1996] 4 All SA 720) at 259f-g. ……*
>
> *[6] In general, young offenders should not fall victim to an indiscriminate (that is, a sweeping) exercise of the court's discretion in regard to punishment. The reason for this is that a teenager, such as the accused in the present case, should, prima facie, be regarded as immature. See* ***S v Ngoma*** *1984 (3) SA 666 (A) at 674F. Indeed, irresponsibility is more often a characteristic of the youth than it is of adults. This is so because a youthful person often lacks maturity, insight, discernment and experience and, therefore, acts in a foolish manner more readily than a mature person. See* ***S v Willemse en Andere*** *1988 (3) SA 836 (A) at 838D; and* ***S v Solani en Andere*** *1987 (4) SA 203 (NC) at 206H"*

[11] When looking at the accused in the present case, and with particular regard to his behaviour earlier in the day when he was boasting about himself and what he was capable of doing, even to a teacher, it seems to me to be nothing more than a sign of immaturity and that he thereby tried to impress his peers. This manifested itself in his response to a question as to what he was up to when threatening to stab the deceased, followed by his irrational and

[5] 2007 (1) NR 164 (HC)

irresponsible conduct by producing a knife and stabbing the deceased. From these facts I am unable to exclude the possibility that the accused's immaturity was a contributing factor for him to commit the offences he now stands convicted of. In *S v Peterson*[6] it is said that courts simply have to consider the lack of good judgment characteristic of young immature people. In the present circumstances it seems to me fair to say that the accused's actions on that fateful night lacked good judgment on his part due to immaturity; hence he acted with diminished moral blameworthiness. I accordingly find this to be a mitigating factor.

[12] Turning to the interests of society, I am convinced that although society might have some understanding for the accused's youthful age for committing the crimes, it certainly would not want to see the accused going out scot-free. That undoubtedly would send out the wrong message to young offenders who just might labour under the misconception that their youthfulness would keep them out of prison. More and more serious cases are brought before our courts involving juveniles making themselves guilty of the most heinous crimes like rape and murder; and the only way in which the courts could bring an end to this unacceptable situation, is by imposing deterrent sentences and where necessary, to remove these persons – despite their young age – from society. The latter course, obviously, should be employed only as last resort.

[13] In the present circumstances there appears to be good prospects of rehabilitation, however, there is also the need to punish the accused for the

[6] 2001 (1) SACR 16 (SCA) at para 19

crimes committed and to impose a sentence that would not only serve as a deterrent to the accused, but also to other would-be offenders in general. To impose a wholly suspended sentence, in my view, would not satisfy these requirements and would only serve the interests of the accused. I have not been able to find any persuasive authority based on similar facts that would justify such course; and this Court has always found a custodial sentence, partly suspended, to be an appropriate sentence in cases of this nature. The extent of the sentence is usually determined by the circumstances of the particular case.

[14] The period the accused has spent in custody awaiting the finalisation of his case, as a matter of principle, is a factor to be taken into consideration.[7] In this instance the accused has been in custody two months shy of two years.

[15] Despite the accused being a first and youthful offender, I have come to the conclusion that the mitigating circumstances are outweighed by more compelling aggravating factors, making the imposition of a lengthy custodial sentence inescapable. The length of the sentence, however, needs to be tailored to reflect that the well-being and the needs of the accused were duly taken into consideration in sentencing. The sentences to be imposed herein are considered by the Court to be appropriate sentences.

[16] In the result, Ignatius Petu Muruti, you are sentenced as follows:

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[7] *S v Engelbrecht.* 2005 (2) SACR 163 (WLD) at 172C; *S v Goldman,* 1990 (1) SACR 1 (A)

1. Count 1: Murder – Eighteen (18) years' imprisonment of which five (5) years' imprisonment is suspended for five (5) years on condition that the accused is not convicted of murder, committed during the period of suspension.
2. Count 2: Assault with intent to do grievous bodily harm – One (1) year imprisonment.

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LIEBENBERG, J

ON BEHALF OF THE ACCUSED	**Ms I Mainga**
Instructed by:	**Inonge Mainga Attorneys**
ON BEHALF OF THE STATE	**Mr D Lisulo**
Instructed by:	**Office of the Prosecutor-General**