



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
SENTENCE

Case no: CC 13/2017

In the matter between:

**THE STATE**

and

**IVAN HOEBEB**

**ACCUSED**

**Neutral citation:** *S v Hoebeb* (CC 13-2017) [2017] NAHCMD 227 (16 August 2017)

**Coram:** LIEBENBERG J

**Heard:** 09 August 2017

**Delivered:** 16 August 2017

**Flynote:** Criminal procedure – Sentence – Factors considered – Remorse – Must be sincere – Accused expressed remorse only after conviction – Not genuine.

**Summary:** The accused was convicted on counts of murder, theft and attempting to defeat or obstruct the course of justice. Whereas the accused's version as to the circumstances under which the murder was committed having

been rejected, the court in sentencing has to rely on inferences drawn from the proven facts. Had the accused told the truth, the court would have had a clearer picture as to what happened. In the absence of a motive to commit murder, it can be seen as a senseless killing, which then makes the accused a danger to society. Moreover when regard is had to his subsequent behaviour when trying to destroy the body by setting it alight. The seriousness of the offences and the circumstances under which it was committed justify severe punishment. Deterrence and retribution as sentencing objectives emphasised.

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### ORDER

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Count 1: Murder – 34 years' imprisonment.

Count 3: Theft – 1 year imprisonment.

Count 4: Attempting to defeat or obstruct the course of justice – 6 years' imprisonment.

In terms of s 280 (2) of Act 51 of 1977 it is ordered that the sentence imposed in count 3, as well as 3 years' imprisonment of the sentence imposed in count 4, be served concurrently with the sentence imposed in count 1.

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### SENTENCE

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LIEBENBERG J:

[1] At the end of a trial the accused was convicted on counts of murder, theft, and attempting to obstruct the course of justice, all of which arising from the

same incident which happened during the early hours of 31 October 2015 in Otjiwarongo.

[2] In sentencing, the court is required to consider the personal circumstances of the accused, the seriousness and circumstances under which the crimes were committed, and the interests of society. After having considered each factor the court must decide the objective or purpose of punishment to impose, and what sentence, in the circumstances of the case, would be fair and just to the accused. During this exercise equal weight need not be given to the often competing factors and the court may emphasise one factor at the expense of others: Provided that the sentence ultimately imposed is a well-balanced one with due regard to the interests of the accused and that of society.

[3] The accused testified in mitigation of sentence and is currently 31 years of age and not married, but has four children who reside with their respective mothers. The ages of these children range between 11 and 2 years, all of whom he financially supported until his arrest on 09 November 2015. The accused is a bricklayer by profession and earned approximately N\$2 800 per month.

[4] In January 2016 and whilst in custody, he asked an aunt of his to approach the deceased's family with the request for them to visit him in prison so that he could beg their forgiveness. This however never materialised as his aunt became afraid and bailed out. During his testimony in mitigation of sentence, the accused said that he abides by the court's finding and that he is sorry for what he has done.

[5] Mr *Muhongo* for the State, however submitted that the accused's professed contrition was not genuine as he at no stage prior to his conviction apologised to anyone. It is trite that before remorse could be considered a mitigating factor,

there must be some indication that it is genuine. This usually manifests itself by the accused expressing remorse for any wrongdoing done to the family of the deceased, or where the accused accepts guilt and pleads guilty without putting the family through the ordeal of a trial in which gruesome facts are often testified on in detail and the pain and suffering a loved one was subjected to, is relived. When coupled with an accused's sincere expression of remorse under oath, the courts are inclined to take it into account as a mitigating factor and which normally reflects in the sentence imposed.

[6] In this case the accused at no stage prior to his conviction spoke about his remorse, neither can it in my view be inferred from the fact that he, from the onset, placed himself at the scene of the crime as submitted by his counsel, Mr *Engelbrecht*. The argument significantly loses weight if regard is had to the fact that the accused's involvement only became known after a report had been made to the police, and not of his own doing. On the contrary, even after he was rounded up as a suspect the first time around, he did not admit his involvement. This only came about one week later when there was concrete evidence on which he was linked to the deceased's cell phone. This led to his arrest and subsequent admissions made to the police and a magistrate. But at no stage did he take these persons or the court into his confidence and came clean as to his wrongdoing.

[7] Crucial evidence and the truth of his version was thus deliberately withheld from the court. Consequently, the court was obliged to draw inferences from established facts in order to determine the accused's actions and state of mind at the time of committing the said crimes. Had the accused taken the court into his confidence and not fabricate evidence favourable to him, but told the truth, the court in sentencing the accused, would have had a much clearer picture of what actually transpired on that fateful day. During the trial he relied on his constitutional right to be deemed innocent until proven guilty, whereby the State was obliged to prove the allegations against the accused beyond reasonable

doubt. Though the accused cannot be faulted for the course he has chosen, it does not reflect favourably on his proclaimed remorse, even when he says that he accepts the court's verdict.

[8] Though the accused may have feelings of remorse as stated under oath and his willingness to accept legal and moral responsibility for his misdeeds, it unfortunately loses some weight due to the fact that he, right up to the end, tried to mislead the court and only exhibited his professed change of heart after conviction. It would appear that the accused sees himself as the unfortunate victim of circumstances which landed him in the present disaster of being convicted. This much is evident from Deputy Commissioner Khairabeb's evidence that during their interview the accused remarked that maybe he was cursed.

[9] In view of the above, I am unpersuaded that the accused's professed remorse is sincere, hence it should be accorded little weight and is not deemed a mitigating factor.

[10] The crimes committed are not only serious, but also prevalent throughout Namibia. The unlawful attack on innocent and vulnerable persons in society continues unabated. These assaults are often executed in the most horrifying and brutal manner imaginable during which fundamental rights are simply swept aside as if unimportant and non-existent. Those are the circumstances present where the accused, for reasons unknown to the court, overwhelmed his much weaker and defenceless victim and thereafter made himself guilty of an offence that can only be described as senseless. An aggravating feature is that a knife was used in the attack during which injuries were inflicted on both hands of the deceased, probably when defending herself against her attacker. Although these injuries did not *per se* contribute to the cause of death, it does reflect on the viciousness of the assault. This is equally manifested in the

manual strangulation of the deceased. Whether the accused in the process made use of a belt to strangle the deceased with or used his bare hands, in my view, does not detract from the cruelty exhibited by the accused during the commission of the offence.

[11] A further disquieting feature of the case is the accused's subsequent conduct when a sharp object was inserted into the vagina and the setting alight of the body. To me this is an indication that the person before court has no respect for the life or limb of another, and reflects the extent he is willing to go to in order to evade justice. That clearly makes him a danger to society.

[12] The prevalence of a specific type of crime in a particular community is another factor that may and ought to be taken into account in sentencing. The view taken by the courts when considering sentence in relation to the prevalence of specific offences, is to impose heavier sentences, the *ratio* being deterrence and aimed at deterring other potential offenders. An increase in sentence in respect of those offences that have become more prevalent, should serve as general deterrence to others in society.<sup>1</sup> The Court must however guard against making an accused the scapegoat of all offenders who make themselves guilty of committing similar or relevant crimes, for the accused should not be sacrificed on the proverbial altar of deterrence for crimes he did not commit. Though the objective of punishment in the present instance *inter alia* would be to impose a deterrent sentence, this factor should not be overemphasised at the expense of the accused person's own interests.

[13] At present there is undoubtedly wide spread outrage against the prevalence of murders in our society and lest the courts step in and impose severe punishment in an attempt to root out this evil, society may decide to take the law into their own hands. It has therefore been said that the natural indignation of interested persons and the community at large, should receive some recognition in the sentences courts impose. Where sentences for serious

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<sup>1</sup> *S v Gaus*, 1980 (3) SA 770 (SWA); *S v Maseko*, 1982 (1) SA 99 (A).

crimes are too lenient, the administration of justice may fall into disrepute and those injured may resort to taking the law into their own hands.<sup>2</sup> There is accordingly the need to emphasise retribution and deterrence as the main objectives of punishment.

[14] Though the offence of theft is deemed serious, I do not consider theft of the deceased's cell phone in the present circumstances particularly serious. The phone was subsequently recovered and would likely be handed over to her family.

[15] As for the conviction on a count of attempting to defeat or obstruct the course of justice, the fact that the accused had set alight the deceased's body and clothing after placing it on the face in order to mutilate the body thereby attempting to destroy the identity of the person and potential evidence; and the insertion of a sharp object into the genitalia of the deceased, is indicative of the extremes which the accused was willing to go in order to evade justice. This offence is equally considered to be very serious, moreover when regard is had to the abhorrent circumstances under which it was committed.

[16] Generally, the commission of serious crimes would attract severe punishment, where retribution and deterrence, as objectives of punishment, require specific emphasis; opposed to rehabilitation, being a lesser consideration. This is an unfortunate situation, particularly when dealing with a first offender, when rehabilitation of the prisoner can only take place whilst serving sentence in a correctional facility; a situation not conducive for the first offender. The severity of the sentence will largely be determined by an assessment of the accused's personal circumstances and interests, weighed up against the gravity of the offence and circumstances under which it was committed, including the interests of society.

[17] An inescapable consequence of the crimes committed by the accused is that, not only is the deceased's children left without the love and care of their

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<sup>2</sup> *R v Karg*, 1961 (1) SA 231 (A) at 236B.

mother, but also the accused's own children will experience some hardship during the period of his incarceration. This is one of the consequences of crime and usually brings about more hardship to innocent persons than what is hoped for. Unfortunately, one cannot allow one's sympathy for the accused's family deter one from imposing the kind of sentence dictated by the interests of justice and society.

[18] It is trite that the period an accused spends in custody awaiting trial, especially if it is lengthy, is a factor favourable to the accused and which normally leads to a reduction in sentence.<sup>3</sup> In this case the accused was in custody awaiting trial for 21 months.

[19] Whereas the accused stands to be sentenced on multiple serious charges and each likely to attract severe punishment, the Court is mindful of the cumulative effect of the sentences to be imposed. In order to ensure that the total of sentences imposed is not disproportionate to the accused's blameworthiness in relation to the offences – for these offences are related to one another – the Court will, also as a sign of mercy, make an appropriate order, ameliorating the totality of the sentences to be imposed.

[20] After taking everything into consideration, I deem appropriate the following sentences:

Count 1: Murder – 34 years' imprisonment.

Count 3: Theft – 1 year imprisonment.

Count 4: Attempting to defeat or obstruct the course of justice – 6 years' imprisonment.

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<sup>3</sup> *S v Kauzuu*, 2006 (1) NR 225 (HC) at 232F-H.



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