



CASE NO.: CC 02/2009

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

FANUEL FESTUS SHIPANGA

ACCUSED NO. 1

PAULUS KAMATI

ACCUSED NO. 2

CORAM: USIKU, AJ

Heard on: 21 April 2011

Delivered on: 26 May 2011

SENTENCE

USIKU, AJ: [1] The two accused persons have been convicted of murder with direct intent on the first count each, robbery with aggravating circumstances on the second count, kidnapping on the third count, possession of fire-arms without a licence on the fourth count, and possession of ammunition on the fifth count.

[2] None of the accused person testified in mitigation of sentence. Instead both counsel for the accused persons made submissions on behalf of the accused persons in mitigation of sentence and cited relevant authorities in support of their respective submissions. In aggravation of sentence, Ms Ndlovu also referred this Court to recent judgments of this Court.

[3] In assessing the appropriate sentences to pass on the accused persons, I will be guided by the decisions that have been made in this Court which emphasises the need for the courts to deter crimes of violence. One such case is that of *The State against Brandt and various other cases 1991 NR 356* where the court enunciated the following principles at 357 A and 358 C:

“The reason for punishing convicted persons is to deter them and others from committing similar crimes, and if they are capable of being reformed, of reforming them.

Society also expects that people who have done wrong will be punished, that is the retributive purpose in punishment is important.

This is particularly so in cases which involve violence for housebreaking where the indignation of the community has been aroused. Sentences which are too low do not achieve any of those purposes.

The accused and the community laugh and scoff at such sentences and sentences lead eventually to the community taking the law into their own hands and meeting out the punishment they consider the accused deserves.”

And

“Violence is becoming more and more prevalent, and depending on the circumstances, where the accused used any type of weapon, it is one of those crimes where a first offender could and even should be sent to prison.”

[4] In fairness, both Mr Namandje and Mr Kwala has conceded that the accused persons cannot escape a prison sentence but at the same time also asked the Court to be guided by the well known principles enunciated in *S v Sparks and Another 1972 (3) SA 396, at 410*, stated as follows:

“... and, in addition to the matter of punishment, the deterrent aspect calls for a measure of emphasis, lest others think the game is worth the candle. Nevertheless, the appellants must not be visited with punishment to the point of being broken. Punishment should fit the criminal as well as the crimes be fair to the State and to the accused, and be blended with a measure of mercy.”

Or as Parker J, put it in the case of *Naftali Kondja CC 04 of 2006*:

“Consequently, in my opinion, the court must not behave as if it is perched on an ivory tower, far removed from the general populace and its genuine fears and concerns about horrendous and depraved crimes and from the people’s desires to live in peace.”

[5] Thus the community expects that the court will punish perpetrators of serious crimes severely, but at the same time the community also expects that mitigating circumstances, including the accused’s personal circumstances will be given due consideration. That to my mind, is fairness in sentencing.

[6] Both accused persons stand convicted of murder with direct intent, committed with common purpose. Without exception, these crimes were a joint enterprise and in my view it would be unjust to differentiate between the two accused on the ground of either age, or the fact that accused no. 1 was proven to have a previous conviction which is now more than ten years. The normal tariff of sentences for murder is high for the reasons set out in various judgments of this Court. Particularly for brutal

murder, as occurred in this present case, and the aim of sentencing is primarily to deter all forms of the unlawful taking of human life.

[7] It has been submitted that both accused persons are fathers of some children who are still depended on them for their livelihood. However, my view is that shooting an unarmed visitor who had just arrived in a foreign country is so horrendous. I find that the accused persons' personal circumstances are the usual ones, and are not out of the ordinary, and as such no great weight need to be attached to them, except that the accused since their arrest in 2007, have been kept in custody to date.

Indeed, severe sentences within the tariff for murder, with direct intent will fit the accused persons as well as their crimes, be fair to the State and to the accused persons.

[8] I have also not ignored the seriousness of the other crimes of which the accused persons had also been convicted.

[9] Taking into account the mitigatory as well as the aggravating factors of the case, it is desirable that any sentence to be imposed must have a meaning and must also take into account the interests of society at large.

[10] The outcome is as follows:

Count 1: Murder: 30 years imprisonment each.

Count 2: Robbery with aggravating circumstances: 12 years imprisonment each.

Count 3: Kidnapping: 6 years imprisonment each.

Count 4: Possession of a fire-arm without a licence: 1 year imprisonment each.

Count 5: Possession of ammunition: 1 year imprisonment each.

2 years of the 12 years imprisonment on Count 2 and the 2 years of the 6 years imprisonment on Count 3 are ordered to run concurrently with the sentence on Count 1.

The following orders are also made:

- (1) That the fire-arms produced as Exhibits be and is declared forfeited to the State.
- (2) That the Digital camera, be returned to the complainant, Elke M G Fellingner.

ON BEHALF OF THE STATE:

MS NDLOVU

Instructed by:

OFFICE OF THE PROSECUTOR-GENERAL

ON BEHALF OF ACCUSED NO. 1:

MR NAMANDJE

NO. 2

MR KWALA

Instructed by:

DIRECTORATE OF LEGAL AID