REPORTABLE

CASE NO.: SA 70/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between

MUUAMUHONA KARIRAO **Appellant**

and

THE STATE **Respondent**

Coram: MARITZ JA, MAINGA JA AND STRYDOM AJA

Heard : **26 October 2012**

Delivered: **15 July 2013**

APPEAL JUDGMENT

STRYDOM AJA (MARITZ JA and MAINGA JA concurring):

[1] The deceased, Jan HendrikJoubert,was a tour guide operator who was mapping out the route taken through southern Africaby a group of people who migrated from the ZAR and later settled in southern Angola during the late 1800's.

Their epic trek took them through some of the most desolated and arid parts of southern Africa and hence the name 'Dorsland' (Thirstland)trek. He told Ms. Tjozongoro, one of the witnesses at the trial of the appellant, that he was mapping out this route at a chance meeting on a road, running in an eastern direction beyond the town of Gobabis. On the morning of the 21st June 2006 he was first seen by hercamping in a river bed. She later gave a description of his Toyota Raider pick-up. The witness was part of a campaign to distribute polio vaccines to all Namibians.When she noticed him, she wason her way to a cattle post in the Springboklaagte area where the appellant and one Steve Kaseraera (Steve) were employed as cattle herders by the witness Edward Kaseraera. She did not find the appellant and Steve at the cattle post but met them on her return journey close to a place where there were some gates in the road on which she was travelling. Whilst driving further along the same road, she encountered the deceased who was then travelling in the opposite direction, i.e the direction where she had earlier met the appellant and Steve. Shealso stopped and vaccinated him.

[2] Early on the morning of the next day a Toyota Raider pick-up was found abandoned in the bush some 800metresfrom Epako, a Township of Gobabis. On investigation, the police found blood in the loading box of the vehicle as well as some blood smudges on the side of the vehicle.Further investigation by Warrant Officer Jantjies revealed that the vehicle belonged to one Jan HendrikJoubert. Jantjies also discovered that the vehicle was equipped with a GPS map data route finder, satellite modems as well as laptops capable of tracking and transmitting a vehicle's

geographical position on any route. With the assistance of the company marketing Garmin route finders, it was determined that the deceased had earlier been in the vicinity of a place called Tallismanus and that he had driven from there towards the Steenboklaagte area.From that point onwards, no further tracking data was available which, according to the witness, meant that the route finder hadeither been out of order or had been switched off. As a result of this information the police decided to start their search for the deceased at Tallismanus.From there the police went in the direction of Springboklaagtewhere, through some excellent detective work, they picked up the tracks of a vehicle which were similar to that of the Toyota Raider's tracks. They followed these tracks and, some two kilometres from where MsTjozongorohad encountered the appellant and Steve earlier, they found the body of the deceased lying in the veldt amongst some bushes. The body had a bullet entrance wound in its chest with an exit wound at the right shoulder.

[3] The police also followed the tracks left by the Toyota Raider up to the cattle post where the appellant and Steve resided. They found no one there.The next morning the police returned and on their way to the cattle post they saw two men walking. One, the appellant, was wearing a khaki jacket with blue stripes.It was later established that the deceased had a similar jacket. At the cattle post the police searched the shack and found a .308 Parker Hale rifle hidden underneath a mattress. It still had an empty cartridge in the firing chamber of the rifle. Later that morning the police found the appellant and Steve at the shack and on questioning them they initially denied having had anything to do with the murder. After further questioning

they each blamed the other for committing the crimes. They were both arrested and taken to Gobabis for further investigation.

[4] At a later stage Steve was willing to point out to the police the place where the deceased had been shot. This was at a gate in the road where the police also found blood on the sand. He also pointed out where they had dumped the body of the deceased and, some distance from the shackat the Springboklaagte cattle post, he showed the police where some of the stolen property of the deceased had been buried. The State also presented the evidence of two women who were staying at the cattle post on the night of 21st June. They were Ms. Blondie Kaseraera and Ms. Maria Nduvatie. They testified that on the night of the 21st the appellant and Steve arrived at the cattle post in a vehicle. They were called by Steve to carry a lot of items to the shack. When they asked the appellant and Steve where they had found the goods they were told not to ask questions.The next morning they also helped to bury some of the items where they were later pointed out by Steve.

[5] A brother of the deceased, MrAlbertus Erasmus Joubert, came to Gobabis and identified all the recovered items as the property of the deceased. Amongst these were a laptop, a satellite telephone, a GPS route finder and various items of camping equipment and clothes. The total value of which, together with the pickup, was N$161,000-00.

[6] The rifle belonged to Mr Edward Kaseraera who testified that he had earlier been at the cattle post where appellant and Steve were employed by him. On his return to Gobabis he discovered that the rifle had been stolen from the vehicle.

[7] The appellant made two statements, both styled as confessions, to Deputy Commissioner Swarts. I agree with the learned Judge *a quo* that these statements do not qualify as confessions as they do not contain unequivocal admissions of the appellant's guilt. In the first statement, made on the 26th June, the appellant stated that he had been threatened by Steve that he would kill him if he did not accompany him, presumably to where they later met up with the deceased. He said that they had waited some distance from the gate in the road. The deceased arrived and got out of his vehicle to open the gate. When he returned to the car he was stabbed by Steve with an assegai in the breast. He stated that he had been so shocked that he ran away. On the following day the appellant said that he had lied on one aspect and would like to correct his previous statement. He was again brought to Deputy Commissioner Swart where he stated that he had been threatened by Steve and that he then shot the deceased when the latter returned to the vehicle after he had opened the gate. They then loaded the deceased onto the pick-up and dumped him in the field some distance away from where the shooting had occurred. They off-loaded the stolen articles at the cattle post and it was then decided between them that the appellant would take the pick-up to Gobabis and abandon it there. He returned the next day to Tallismanuswhere he again joined up with Steve. Only on the 27th June did the appellant, in a warning statement, state that Steve had shot the deceased.

[8] The appellant and Steve werearraigned before the High Court on the following charges:

1. Murder;
2. Robbery with aggravating circumstances;
3. Defeating or obstructing or attempting to defeat or obstruct the course of justice;
4. Theft;
5. Possession of a firearm without a licence; and
6. Possession of ammunition.

[9] Steve pleaded guilty to all the charges whereas the appellant pleaded not guilty. The trials were separated and Steve was found guilty and sentenced according to his pleas.

[10] After the close of the State's case in the appellant's trial, he was discharged in respect of counts 4, 5 and 6.The appellant then closed his case without giving evidence or calling any witnesses. The learned Judge *a quo* rejected the defence of compulsion raised by the appellant and convicted him on counts 1, 2 and 3.

[11] Appellant was sentenced as follows:

1. Murder: 30 years imprisonment;

2. Robbery with aggravating circumstances: 20 years imprisonment of which 6 years were suspended on the usual conditions; and

3. Defeating or obstructing the course of justice: 1 year imprisonment to run concurrently with the sentence on count 1.

[12] An application made in the High Court for leave to appeal against his conviction and sentence was unsuccessful. On petition to the Chief Justice, the appellant was granted leave to appeal against the sentences imposed by the learned Judge *a quo.*

[13] The notice of appeal stated the following grounds:

‘1. The Honourable Judge failed to take into account adequately that:

1.1.1 the appellant was a first offender;

1.1.2 the appellant was only 21 years old at the relevant time;

1.3 the appellant was not the main perpetrator;

1.4 the goods were discovered and returned to the deceased estate;

1.5 the appellant had spent more than (4) four years in custody awaiting trial;

1.6 the appellant was illiterate.

2. An effective term of imprisonment of 44 years is shockingly inappropriate in that:

2.1 it is out of proportion with the totality of the accepted facts in mitigation;

2.2 the offences were committed in a single transaction or act and/orsimultaneously

3. The Honourable Judge erred in not ordering that the sentences should run concurrently in terms of section 280(2) of Act 51 of 1977.

4. The Honourable Judge erred in over-emphasising the deterrent effect of the sentence and in doing so the Honourable Judge ignored the effect of mercy, rehabilitation and reformation as form of punishment.'

[14] MrMuluti, who also represented the appellant at the trial, accepted that sentencing is a matter for the discretion of the trial Court and that the Court of Appeal could only interfere therewith on limited grounds. (See *S v Ndikwetepo.* 1993 NR 319 (SC).) Counsel further submitted that the Court *a quo* did not sufficiently take into consideration that the appellant, at the age of 21, was not a mature adult and that, combined with the fact that he was a first offender with limited education, the sentences imposed by the learned Judge was devoid of mercy and would destroy the appellant. Furthermore it was submitted that the appellant was not the main perpetrator as Steve was the person who initiated the commission of the crime and also fired the fatal shot which killed the deceased. Counsel referred the Court to

various cases in support of these submissions such as *S v Erickson,* 2007 (1) NR 164 (HC), *S v IgnatiiusPetuMuruti,* (unreported judgment by Liebenberg J, delivered on 31 January 2012), *S v Ngunovandu,* 1996 NR 306 (HC) and *S v Nxumalo,* 1982 (2) SA 856(A) at 861H.)

[15] MrMuluti further pointed out that all the stolen property had been recovered and that the appellant and Steve did not reap any benefit from their criminal actions. Counsel also pointed out that the appellant had been in custody for a period of more than 4 years prior to conviction and that the learned Judge had not adequately considered this fact when sentencing the appellant. For this submission Counsel found support in the case of *S v Kauzuu,* 2006 (1) NR 225 (HC) and the cases there referred to.

[16] Lastly,MrMuluti submitted that, bearing in mind the mitigating factors and personal circumstances of the appellant, the sentence of an effective period of 44 years imprisonment induced a sense of shock and that it was therefore competent for this Court to interfere with the sentences imposed by the learned Judge *a quo.* To this extent Counsel was able to refer the Court to various cases where sentences imposed on similar charges were less than the sentences imposed on the appellant. (See in this regard*S v Alexander,* 2006 (1) NR 1 (SC); *S v Gurirab and Others*, (1) NR 316 (SC) and*S v ShidudeShihepo,* (unreported judgment of the Supreme Court of Namibia) Case No: SA 23/2003, delivered on 25 November 2004. Counsel further argued that because both crimes were committed at the same time and the murder

and subsequent robbery were, as to motive, directly connected, the learned Judge *a quo* committed a misdirection in not ordering that the sentences for murder and robbery run concurrently in terms of s 280 of Act 51 of 1977.

[17] MrKuutondokwa, on behalf of the State, extracted various principles applicable to sentencing from court cases and literature on the subject. Counsel denied that the learned trial Judge committed any misdirection and pointed out excerpts from her judgment on sentencing that she was fully aware of the personal circumstances of the appellant and that these circumstances were properly considered in the Court's finding of what appropriate sentences would be in those circumstances.Counsel further pointed out that, according to the Court's findings, the appellant's criminal liability was based on the doctrine of common purpose and that moral blameworthiness, in the circumstances of this case, equally attached to the person who pulled the trigger and his co-perpetrator.Counsel also denied that the sentences induced a sense of shock and was able to refer to various cases where sentences for murder in order to facilitate robbery with aggravated circumstances were as lengthy or even lengthier than those imposed by the trial Court in this instance.

[18] In my opinion the Court correctly found that the appellant acted in common purpose with Steve and that his defence of duress was a fabrication. Firstly, he never gave evidence so that the Court could determine to what extent, if at all, he was threatened and if so, what the effect thereof was on his mind. (See *S v Haikele,* 1992 NR 54 (HC) at p 63E-F.)The appellant made various extra-curial statements which

differed in material respects from each other and detracted from the veracity of the defence he was seeking to advance. He also had various opportunities to extract himself from the so-called threats by Steve but he failed to do so.In my opinion the appellant was a willing and participating partyto the commission of the crimesfrom the beginning to the end. They armed themselves with the rifle andtogether they waited at the gate knowing that the deceased would come their way and would have had to get out of his vehicle to open the gate; after the deceased was shot and killed, the appellant went through his pockets and found the keys of the vehicle. They loaded the body onto the vehicle and dumped it amongst some bushes, obviously in an attempt to cover their tracks and hide discovery of the killing of the deceased. They off-loaded the stolen property at their shack and when they were questioned by one of the witnesses, the appellant also told her not to ask questions. Thereafter appellant drove the vehicle to Gobabis and abandoned it there in another attempt to escape discovery of their complicity in the crimes. He thereafter returned to Tallismanus where he joined Steve and, when confronted by the police, denied any knowledge of the crimes.

[19] I am not persuaded that the learned Judge committed any misdirection or that she did not give due weight to the personal circumstances of the appellant and other mitigating circumstances. The Court referred to these issues, sometimes more than once, and it is clear that the learned Judge considered these factors and properly weighed them against the aggravating circumstances in deciding what an appropriate sentence would be in all the circumstances. It was conceded by MrMuluti that the

crimes committed by the appellant and Steve were of the most serious nature. In this regard the Court *a quo* found that the appellant and Steve had acted with the direct intent to kill the deceased. The crimes were premeditated. Edward Kaseraera's rifle was stolen and they waited for the deceased to come to the gate in the road where they knew he was going to pass through. After the deceased got out of the car in order to open the gate, and when he was at his most vulnerable, they launched their attack and killedthe deceased. The deceased was unarmed and he posed no threat to them. He was not given any choice whether to give up his property without any resistance.He wassimplyshot and killed. The inference is inescapable that the killing was not only to overcome any possible resistance from the deceased but also to ensure that there would be no witness to the commission of the crimes. The appellant and Steve acted solely from personal greed. The killing was cold blooded and callous.

[20] The actions of the appellant after the killing of the deceased show that he had fully associated himself with the crimes committed and that the role that he played had beensignificant. On his own say so he was the person who went through the pockets of the deceased and discovered the keys of thevehicle. This is hardly what one would expect from a person who subsequently claimed that he had not committed the crimes and had only been acting under duress from Steve. Also, according to his plea explanation, he stated that he and Steve had agreed that he should drive the pick-up to Gobabis and abandon it there. This was an astute move by appellant and Steve because it would not have been easy to hide the pick-up and, if they had kept it, it would have clearly shownthat they were the perpetrators of the

crimes. By abandoning it in Gobabis they obviously wanted to draw attention away from Springboklaagte. Unfortunately for them, and unbeknown to them, the police could follow the route taken by the deceasedthrough its GPS route finder. It, however, shows planning by the two perpetrators of the crimes and shows that they were not as‘unsophisticated’ and ‘immature’ as was submitted by MrMuluti.

[21] In the light of what has been set out above the aggravating circumstances by far exceeded the mitigating factors. The learned Judge *a quo* accepted the personal circumstances of the appellant and the other mitigating circumstances put before the Court. Against that the appellant, together with Steve, planned the crime and only acted when they were sure that they could successfully execute their plans. Thereafter they did everything possible to lead the police off the track. They hid articles such as the laptop and the GPS route finder, objects which one would not expect to find at a place such as Springboklaagte, and which could easily be traced as the property of the deceased, and buried them some distance away from where they resided. They abandoned the car in Gobabis, again far from the place where the crime was committed. The fact that the property of the deceased was returned to his estate could, in the circumstances, not count for much, bearing in mind the extent to which the appellant and Steve went to ensure that their tracks were covered and that they would be able to enjoy the spoils of their criminal conduct.

[22] Apart from what is set out above the appellant was leading an adult life and was already the father of two children. To say that, because he was younger than

Steve, he was influenced by the latter to take part in the crimes is to elevate such circumstance to a rule of evidence. It does not follow that, because one of the perpetrators is younger than the other,it should be a mitigating circumstance without more. In this instance we do not even know what the age difference between Steve and the appellant was. But, more importantly, there is again no evidence that the appellant was so influenced and that he did not act willingly out of his own greed to acquire the property of the deceased. The facts set out above show, in my opinion, and that is also the finding of the Court *a quo,* that he willingly made common cause with Steve.

[23] The learned Judge *a quo* was well aware of the fact that the appellant spent some 4 years as an awaiting trial prisoner and this was in my opinion considered by her. 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 moral blameworthiness, to arrive at an appropriate sentence in all the circumstances of a particular case.

[24] With reference to the case of *S v Skrywer,* 2005 NR 288(HC),MrMuluti submitted that the learned trial Judge did not heed the principle that sentences should, where circumstances were more or less the same, be consistent and he referred the Court to various cases where the sentences imposed were lighter than that imposed in this instance. As to the principles applicable, see *S v Giannoulis,*

1975 (4) SA 867(A) and *S v Marx,* 1998 (1) SA 222(A). In the present instance it is not counsel's complaint that the appellant received a heavier sentence than Steve and that the learned Judge had discriminated between two co-accused. MrMuluti attempted to show that, because the circumstances between the two accused differed, the appellant should have received a lesser sentence for the crimes he committed with Steve. For the reasons set out herein before I do not agree with counsel's submission. In my opinion the culpability or moral blameworthiness of the appellant and Steveis the same. Although Steve took the blame during his trial for firing the fatal shot,it is evident that he had done so with the approval and connivance of the appellant.The learned Judge therefore correctly did not distinguish between them as far as these sentences were concerned. According to counsel, Steve was also on the murder charge sentenced to 30 years imprisonment. Not surprisingly,MrKuutondokwa could refer the Court to various cases where the sentences imposed in regard to convictions for murder together with robbery with aggravating circumstances were in the same range than those imposed in this particular instance.

[25] Bearing in mind the prevalence of serious crimes involving violence in Namibia, and the circumstances in which this particular murder and robbery were committed, the sentences imposed do not leave one with a sense of shock and neither were the sentences imposed out of range with more or less similar crimes committed by others.

[26] The Court *a quo* imposed a sentence of 20 years in regard to the conviction of the appellant of robbery with aggravating circumstances. Probably to ameliorate the cumulative effect of two long terms of imprisonment, and taking into consideration the mitigating circumstances of the appellant, the Court suspended 6 years of the sentence of 20 years on the usual conditions. However, where a long term of imprisonment is imposed it is not appropriate to impose a further suspended sentence. The reason why part of a sentence is sometimes suspended where shorter terms of imprisonment are imposed is, generally speaking, to shorten the periods accused personswould have to spend in prison and, simultaneously, to suspend part of their sentences as a continuing deterrent to commit the same or similar crimes and encourage themtomend their ways.If not, they must know that a breach of the conditions of suspension is likely to bring into operation the suspended part of the sentence on top of any other sentence which a court may impose as punishment for the later crime committed. In the instance of long terms imprisonment that consideration must yield to the sentencing objective of rehabilitation and the principle that there should also be finality and certainty in regard to the punishment meted out. It follows therefore that the suspension must be set aside.

[27] In instances like the present, where the crimes of murder and robbery are committed by the same act of violence, in this instance, the shooting and killing of the deceased, an accused may be in jeopardy of being punished twice for crimes based on a single act, seeing that the violence perpetrated on the victim constitutes an element of both these crimes. This was the dilemma addressed by Maritz, AJA, (as

he then was) in the matter of *S v Alexander,* reported in 2006 (1) NR 1 (SC). The learned Judge discussed the case of *S v Maraisana and Another,* 1992 (2) SACR 507(A) where the majority of the South African Supreme Court of Appeal concluded that, where in an instance the crime of murder was committed in order to facilitate a robbery, it may be that in considering an appropriate sentence for the robbery, and to avoid the jeopardy that the accused may be punished twice for the same result, the violence applied during the robbery should also be thought away to a greater or lesser extent (see p.508a). Judge Maritz pointed out that previously the South African Appeal Court, and Courts within its jurisdiction, avoided the risk of double jeopardy by 'thinking away' the result of the violence which ended in the death of the victim. It followed from this that the degree of violence used in such an instance was still relevant to sentencing for the crime of robbery. (See the cases referred to by the learned Judge.)

[28] The learned Judge also referred to the minority judgment by Van den Heever, JA, in the *Maraisana*matter which took the view that the violence with which the robbery was committed was relevant to sentencing for robbery and that the seriousness thereof must be taken into account but as if the accused had not been, and would not be, charged with murder. The learned Judge discussed these conflicting views, and stated as follows:

> 'The approach adopted by the majority of that Court may conceivably not only lead to the imposition of sentences which do not adequately reflect the seriousness with which the crime should be regarded, but may conceivably also have untenable results

> in practice. If both the violence perpetrated on the victim and he or her resultant death are ignored in sentencing the accused on the charge of robbery, and the conviction on the charge of murder is subsequently set aside on appeal, then what will remain is a hopelessly inadequate sentence on the conviction of robbery – a sentence which punishes only the element of dishonesty and takes no or inadequate cognizance of the element of violence in robbery. The latter, in most instances, also constitutes the "aggravating circumstances" of the crime of which the accused has been convicted in the first instance.'

[29] I share the misgivings of the learned Judge. Generally speaking robbery, and more particularly robbery with aggravating circumstances, is a more serious crime than theft because of the potential risk it carries in regard to the life and limb of the victim. It therefore demands heavier sentences where an accused is convicted of robbery with aggravated circumstances. (As was pointed out by the learned Judge, in all those circumstances where murder was committed to facilitate a robbery, aggravating circumstances are present). Although not an element of the crime, aggravating circumstances is a factor which targets the issue of violence or threat of violence carried out at the time of the commission of the crime. As such it has a direct bearing on the sentencing of an accused and cannot be ignored or 'thought away'. To do so would not only be flouting the provisions of the Criminal Procedure Act but would also tend to ignore the Legislators' attempt to punish such crime more heavily, where the circumstances call for it. It also serves as a deterrent and a penal measure to protect the public. By thinking away the violence when punishing an accused for robbery the element which distinguishes robbery from theft is eliminated and thereby the reason for imposing stiffer sentences than would generally have been the case.

[30] The learned Judge in the *Alexander*-case concluded as follows:

> 'I agree with the approach favoured by Van den Heever JA: the accused must be sentenced on the count of robbery as if he has not been convicted on the count of murder and is not in jeopardy of such a conviction in future. In many instances the result may well be the same as that of the earlier approach applied by that Court, i.e. to think the death of the victim away when sentencing the accused on the count of murder, (*the reference to "murder" is a slip of the pen and should read "robbery"*) but its substratum is different and founded on the principle that the sentence should always be designed to fit the crime (and it is not to say that it should not also incorporate the other elements of Zinn's triad). While this approach may well be criticized for not removing the risk of double jeopardy altogether, it remains, for the reasons I have already referred to, the preferred option. To the extent that an element thereof remains, this can be addressed adequately by directing that the sentences (or portions thereof) will be served concurrently.'(theitalicized remark in parenthesis is mine.)

I respectfully agree with the approach and principles set out in the case of *Alexander, supra.*

[31] The sentencing process for the conviction of robbery with aggravating circumstances must clearly demonstrate the application of these principles and bearing this in mind, I am of the opinion that had I sat in first instance on this matter, I would have ordered that 10 years of the sentence of 20 years imprisonment imposed on the count of robbery with aggravating circumstances be served concurrently with the sentence imposed on the count of murder.

[32] In the result the following order is made:

1. The sentence of 30 years imprisonment on count 1, murder, is confirmed.

2. The sentence of 20 years imprisonment on count 2, i.e. robbery with aggravating circumstances, is confirmed but it is ordered that 10years of the sentence of 20 years be served concurrently with the sentence imposed on count 1.

3. The sentence of 1 year imprisonment on count 3, i.e. defeating or obstructing or attempting to defeat or obstruct the course of justice, which was ordered to run concurrently with the sentence imposed on count 1, is confirmed.

4. The sentences are antedated to 8 December 2010.

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STRYDOM AJA

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MARITZ JA

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MAINGA JA

APPEARANCES

APPELLANT:	P S Muluti Instructed by Muluti& Partners
RESPONDENT:	J T Kuutondokwa For the State