IN THE SUPREME COURT OF BELIZE, A.D 2023

(CRIMINAL JURISDICTION)

CENTRAL DIVISION

INDICTMENT C30/2022

THE KING

v.

EFRAIN MARTINEZ

-

MANSLAUGHTER

Appearances:

Mr. Riis Cattouse, Crown Counsel for the Crown

Mr. Leeroy Banner, Defence Counsel for the Accused

Hearing Date: 2023: June 15th;

Delivery Date: 2023: December 20th.

Indictment read to Accused Person

Accused plead guilty to Manslaughter

SENTENCE JUDGMENT

[1] **SANDCROFT, J**.: The accused was presented with the indictment and entered a plea of "Guilty to Manslaughter."

[2] On Monday 28th January 2019, around 4:00 p.m. Mr. Harry Beni Nava Diaz finished his work. After he finished he went towards his pick up that was parked outside about twenty feet from the main gate of Mr. George Orellana's house. Upon reaching where his pick up was parked he started to change off his clothes. After he change his clothes he walk into the small area of the yard which is in front of the residence. While he was in the yard he looked to the left hand side of the house and he saw a man he only know as Efrain was seated on a board chair and a young person who he only knew as Michael was seated beside him. He only know both Michael and Efrain for about two weeks from since he started to work with Mr. George Orellano. Efrain was wearing a white shirt with purple and blue stripes with a long pants but he can't recall the color. Upon seeing Efrain and Michael seated there he went to where they were and he offered them a piece of bread that he was eating. They both took the piece of bread and started eating it. About five minutes speaking to Michael and Efrain he saw a man who he did not know, it was the first time he was seeing him in his life who came through the main gate and came to where they were. The person was wearing a shirt the color of the shirt he can't recall, a blue in color jeans short pants, and had a kit bag on his back but he can't recall the color of the bag. When he was walking towards them he noticed that the man was talking to Michael in English Language. He was unable to understand what they were talking because he do not understand English but he know that he was talking in a loud tone of voice and he appeared to be intoxicated. When he get closer about five feet away where Michael Efrain and he were, he (the man) continued arguing with Michael but at this time in the Spanish

language. When Efrain heard that he asked the man to calm down and to leave. When the man heard that he told Efrain why he don't take him out from the place himself. He then saw that Efrain stood up and went closer to the man about one foot away and asked him "Tell me what you really want? The man answered him "I want my work back but I am not begging, I went two times to your house looking for you but you were not there", "You are the one with the balls here". Efrain answered him "Yes that me", he heard the man answered "You take me out then". Upon hearing that he saw that Efrain walked away from him about ten feet away from where they were arguing, went towards a table, picked up machete measuring about three feet in length with black handle. When Efrain took the machete he returned where the man was, the man didn't move and stared at him without saying anything. Everybody remained silent. Suddenly he saw that Efrain who had the machete in his right hand, lift up the machete and chopped the man on his neck. When Efrain chop the man he saw he fell to the ground and started to bleed. When Efrain chopped the man with the machete on his neck he (the witness) was standing about five feet away from Efrain and nothing obstructed his view. The day was clear because the sun was still shining. When he saw that he (the defendant) chopped the man with the machete, he (the witness) was frightened, he got up and walked towards the main gate. When he reached to the main gate he came out of the yard and went to his pick-up. While I was following Jorge I saw that Efrain was walking towards the main gate where I met him and he said to me "Buddy do me a favor, take me out of here, take me to Salvapan." Upon hearing that I answered him "Brother I can't do that. … and you will complicate my life". Efrain then asked me "You can't do it then?" The witness told him that he could not do it, he (the defendant) then walked towards a green in color pick up that was parked on the left side of the house. He reached to the pick-up, boarded it, started it and drove

towards the main gate. Took a right and drove towards the direction of Belize City. That was the last time he saw Efrain. After Efrain left I went under the house. He was able to see from far that the man that Efrain had chopped was lying down but he didn't go closer. Minutes after the Police arrived and thereafter the ambulance arrived and took away the man. I do not know if he was still alive or dead. I need to mention that Efrain is of clear complexion, about sixty years old, his built is between slim and stout, measuring about 5 feet 6 inches in height and have grey hair. If he saw Efrain again he will be able to identify him.

[3] Dr. Loyden Ken who performed the autopsy on deceased, Elmer Yobany Salazar on the 30th day of January 2019 stated that the cause of death was due to acute cervico-spinal cord, traumatic injuries as a consequence of multiple chop wounds to the neck. Dr. Loyden Ken observed multiple sharp force injuries to the neck of the deceased. He further observed a cluster of 5 (five) chops wound to the posterior aspect of the neck and occipital region and left lateral side of the neck. On the posterior the largest measuring 19 cm x 6 cm, gaping wound, continuous with the left lateral chop wound measuring 10 x 4 cm gaping .Direction from back to front, on the posterior aspect, right to left, up-downwards and on the left lateral, direction from back to front, left to right, up-downwards. Sharp end of wounds to the left of the body, wounds horizontally oriented cuts 2nd and 3rd cervical vertebral cutting the spinal cord and the right vertebral artery on the occipital region. Dr. Loyden Ken observed a total of 6 (six) chop wounds; there was also chop wound to the right knee measuring 3 cm with adjacent edge contusion, with the right knee cap of the deceased.

The Law

[4] In approaching this sentence I will consider:

(i) previous decided cases,

(ii) the sentencing guidelines that where passed on the day of 2018,

(iii) legislation that provides for discounts to be awarded by the court under certain circumstances.

[5] In the case of **R v Lorde** (2006) 73 WIR 28 (Bds CA) the accused was charged for the offence of murder but he pleaded guilty to the offence of manslaughter. The plea was accepted due to the live issue of provocation. The trial judge sentenced Mr Lorde to 20 years imprisonment. The Court of Appeal in that case reduced the sentence to 12 years and found that the trial judge did not properly balance the aggravating and mitigating matters.

[6] The Court went on to give general guidance on sentencing for manslaughter which was later approved by the CCJ in **Burton v R, Nurse v R - (2014) 84 WIR 84, CCJ.**

Per Simmons, CJ: at paragraph 13 of his judgement stated:-

AGGRAVATING AND MITGATING FACTORS RELEVANT TO MANSLAUGHTER

The offence of manslaughter may be committed in a wide variety of circumstances. We shall eschew the temptation to set out a list of the variety of such circumstances in this judgment but nothing that we say applies to 'motor manslaughter'. Our observations relate to cases where original charges of murder result in convictions for manslaughter. For example, three types of cases are commonplace.

(1) On a charge of murder, the accused pleads not guilty but is found guilty of manslaughter by the jury.

(2) On a charge of murder, the accused pleads not guilty of murder and the prosecution accepts a plea of guilty of manslaughter.

(3) On a conviction for murder, the Court of Appeal substitutes a conviction for manslaughter because of judicial error in the summation.

In deference to the submissions of both counsel and their generous citation of authority we now identify some of the aggravating and mitigating factors that ought to be considered by the court where they are relevant. They relate both to the offence and the offender.

Aggravating factors relating to the OFFENCE may include—

(a) planning or premeditation;

(b) use of a firearm or dangerous weapon;

(c) being armed with a weapon in advance;

(d) excessive force in self-defence even though the issue of self-defence is rejected by the jury;

(e) in cases of domestic violence, the fact that the killing was the culmination of a history of violence by the offender.

Aggravating factors relating to the OFFENDER may include—

(a) previous convictions;

(b) indifference to the offence.

Mitigating factors relating to the OFFENCE may include—

(a) spontaneous action rather than premeditation;

(b) provocation (in the technical and non-technical sense);

(c) some evidence of self-defence even if rejected by a jury.

Mitigating factors relating to the OFFENDER may include—

(a) age;

(b) clear evidence of remorse or contrition;

(c) a timely plea of guilty.

The court will always be required to balance the competing factors in deciding what is the appropriate length of a sentence.

1. In a contested trial where death was caused by a firearm and the facts are on the borderline of murder with no mitigating features, the range of sentence should be 25 years and upwards, including, in a proper case, life imprisonment.

2. In a contested trial where death was caused by a firearm and the facts are grave but mitigating factors such as provocation exist, the range of sentence should be 18 to 22 years. However, an early plea of guilty in a non-contested case on similar facts will attract a lower sentence in the range of 14 to 18 years.

3. In a contested trial where no firearm was used and there are no mitigating circumstances, the range of sentence should be 16 to 20 years. An early plea of guilty in this type of case will reduce the range of sentence to 10 to 14 years.

4. In a contested trial where no intrinsically dangerous weapon was used and there are mitigating features, the range of sentence should be 8 to 12 years. An early plea of guilty in this type of case may attract a sentence of less than 8 years."

Sentencing Guidelines

[7] The court has informal sentencing guidelines that were published in case law emanating from this jurisdiction and other jurisdictions in the Caribbean and the wider Commonwealth. These sentencing guidelines seek to promote among other things some unity in the sentences that were handed down by Judges. In the sentencing guidelines the following terms are established:-

- The statutory maximum is life
- The usual starting point for manslaughter is five (5) years.
- The range of sentences for manslaughter is between three (3) to ten (10) years.

[8] In utilising the sentencing guidelines I have regard that the purpose of the guidelines is to give some uniformity to sentences but it is not a fetter to the discretion of the court. This was advocated in the cases of **Burton v R, Nurse v R - (2014) 84 WIR 84, CCJ (from BdsCA)**.

[9] Burton, 15 years old, and Nurse, 17 years old, were schoolboys who had been engaged in a fight with another schoolboy, Wright. Burton stabbed Wright in his chest which caused Wright's death. On arraignment both offered pleas of not guilty to murder but guilty of manslaughter. The prosecution accepted the plea.

[10] There were some mitigating factors to include their age, unblemished records, remorse and their assistance to the police. They also had favourable pre-sentencing reports.

[11] It was argued, inter alia that judicial sentencing guidelines had not been followed. The Court of Appeal ruled that guidelines were not intended to take away from the discretion of a judge.

Per Anderson, JA:

> **"[13] We agree that the exercise of judicial discretion is and must remain at the heart of the sentencing process. The guidelines cannot place the sentencing judge into a strait-jacket or in any way fetter that judicial discretion. …**
>
> **[14] As has been said repeatedly, the guidelines are only guidelines and not meant to be applied slavishly to every case. They provide assistance to the sentencing judge not rules from which departure is prohibited. No guidelines can ever cover the totality of circumstances in which criminal ingenuity and recklessness may be expressed. We accept the essence of the opinion offered by Sir David Simmons CJ in Bend and Murray v R when he said:**
>
> **'We have issued these guidelines on sentences for manslaughter merely to indicate the range or scale of sentences. Judges will still be free to tailor sentences according to the facts of a particular case. It must be remembered that, in our system, judicial discretion is at the heart of the sentencing process. That discretion will invite flexibility and, from time to time it will produce inconsistency. These guidelines are intended merely to assist judges and the legal profession, not to bind judges and fetter their discretion. At the end of the day sentencing is very much an art and not a science.'**
>
> **[15] But this is much different from saying that the guidelines lack legal significance or may be disregarded without reason. The guidelines distil important aspects of sentencing principles. When pronounced by the Court of Appeal they constitute rules of practice. Lower courts must have regard to the guidelines. The sacrosanct nature of the discretion of the sentencing judge is preserved in two ways. Firstly, the guidelines indicate a range of sentences that may be appropriate for particular categories of offences and it is for the sentencing judge to decide where on the continuum of the tariff the specific sentence ought to be placed having regard to the peculiarities of the circumstances of the offence and the offender. Secondly, it is perfectly appropriate for the sentencing judge to not follow the guidelines in a particular case if he or she concludes that their application would not result in the appropriate sentence. Public confidence in the criminal justice system must be maintained by the imposition of suitable penalties taking into consideration the penological objectives of protection of the public, deterrence, and rehabilitation of the offender, and it is for the sentencing judge in his discretion to make the call as to the sentence that will come closest to achieving those objectives. However, if the sentencing judge decides to depart from the guidelines established by the**

superior court then he or she should explain his or her reasons for doing so.

General Guidance

[12] Common law gives some guidance to the court as to the discount that may be awarded in the event that an accused person pled guilty to an offence.

[13] Where a defendant pleads guilty to an offence with which he has been charged, the Court may, in accordance with common law, reduce the sentence that it would otherwise have imposed on the defendant, had the defendant been tried and convicted of the offence.

[14] The Court may reduce the sentence that it would otherwise have imposed on the defendant in the following manner-

a) Where the defendant indicates to the Court on the first opportune that he wishes to plead guilty to the offence, the sentence may be reduced by up to 1/2,

b) Where the defendant indicates to the Court after the first opportune date but before the trial commences, that he wished to plead guilty to the offence, the sentence may be reduced by up to 1/3;

c) Where the defendant pleads guilty to the offence, after the trial has commenced but before the verdict is given, the sentence may be reduced by up to 1/4.

[15] Notwithstanding the provisions of any law to the contrary, where the offence to which the defendant pleads guilty is punishable by a prescribed minimum penalty the Court may –

a) Reduce the sentence pursuant to the provisions of this section without regard to the prescribed minimum penalty; and

b) Specify the period, not being less than two-thirds of the sentence imposed, which the defendant shall serve before becoming eligible for parole.

[16] In determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made by a defendant within an opportune period alluded to at common law, the Court shall have regard to the following factors namely-

a) Whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;

b) The circumstances of the offence, including its impact in the victims;

c) Any factors that are relevant to the defendant.;

d) The circumstances surrounding the plea;

e) Where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;

f) Whether the defendant has any previous convictions;

[17] When it comes to sentencing, the court is required to consider the triad of factors comprising the crime, the offender and the interests of society. In addition, the court is enjoined to consider the element of mercy in the appropriate circumstances. In the court's determination of what would be appropriate punishment, regard must equally be had to the objectives of punishment namely, deterrence, prevention, reformation and retribution. In **S v Van Wyk**[1] it was said that some difficulty often arises when trying to harmonise and balance these principles and to apply them to the facts of the particular case. It is trite that equal weight or value need not be given to the different factors and, obviously, depending on the facts before the court, the situation may arise where the one requires more emphasis at the expense of the others. This is called the principle of individualisation where punishment is meted out with regards to the particular circumstances of the accused, the facts and circumstances under which the crime was committed, and what sentence would best serve the interests of society. The purpose is thus to find a just and fair sentence that would not only serve the interests of the offender, but also that of society.

[18] It is not wrong for a court to place more weight on one factor than it places on another. What is called for is that the court consider all the factors and strives to strike a balance. In this regard the court in **Schiefer v. S** (SA 29-2015) [2017] NASC (12 September 2017), stated at para 31 and 32:

> **'Since it is an acceptable principle, when considering the *Zinn* triad, that a court may, depending on the circumstances, afford more weight to a specific factor, similarly in giving effect to the aims of punishment a court may be justified to emphasise one aim at the expense of others.**

[1] 1993 NR 426 (HC).

In this regard in S v Vekueminina & others 1993 (1) SACR 561 (Nm) a full bench decision of the High Court, Levy AJP at 564b stated:
"Where the nature of the offence arouses moral indignation and the purpose of the penalty is clearly retributive, the interests of the accused are then secondary to those factors."'

[19] At the current age of 61 years, the accused was 57 when he committed the crime under consideration and in a common law relationship with Ms. Maria, the mother of his daughter and son. He completed some form of schooling and entered the construction business where he had some success with the awarding of informal contract tenders until his arrest in 2019.

[20] It is trite that a sentencing court would usually consider provocation to be a mitigating factor, weighing in favour of the accused. Depending on the circumstances of the case and provided the court finds that it is reasonable in the circumstances, such provocation could be relevant to mitigation of sentence.[2] The accused's narrative of events leading up to the shooting incident, which forms the basis of his guilty plea as accepted by the state, is aimed at showing that provocation actually resulted in the killing of the deceased. According to him, he was driven by anger and in a fit of rage, completely losing perspective and control of his emotions when provoked by the deceased.

[21] It has been a long standing position in our law that anger, jealousy or other akin emotions do not form a complete defence to criminal conduct, but stand as a factor which may mitigate sentence if the anger caused as a result of provocation was justified.[3] If properly founded and reasonable in the circumstances it would constitute diminished criminal responsibility. This

[2] S v Mokonto 1971 (2) SA 319 (AD).
[3] J M Burchell et al South African Criminal Law and Procedure vol 1 (2011) 4 ed at 53.

diminished responsibility in turn becomes a factor during sentencing as it affects an accused person's reprehensibility or moral blameworthiness.

[22] The only complete defence, which includes a multitude of emotional factors, i.e. Non-Pathological Criminal Incapacity does not form part of the fact of this case.[4] In **S v Mnisi**,[5] at para 5 and 6 **Boruchowitz** AJA held the following:

> **'Whether an accused acted with diminished responsibility must be determined in the light of all the evidence, expert or otherwise. There is no obligation upon an accused to adduce expert evidence. His ipse dixit may suffice provided that a proper factual foundation is laid which gives rise to the reasonable possibility that he so acted. Such evidence must be carefully scrutinised and considered in the light of all the circumstances and the alleged criminal conduct viewed objectively. The fact that an accused acted in a fit of rage or temper is in itself not mitigatory. Loss of temper is a common occurrence and society expects its members to keep their emotions sufficiently in check to avoid harming others. What matters for the purposes of sentence are the circumstances that give rise to the lack of restraint and self – control…**

[23] On the question of remorse, the accused said he was truly sorry for having killed the deceased which, it was said, manifested in his admission of guilt from the outset and having pleaded guilty to the charge. He broke down in tears during his plea and sought forgiveness from the court and society in general. It was further submitted on the convict's behalf that he was generally a calm person.

[4] C R Snyman Criminal Law (2014) 6 ed at 234.
[5] S v Mnisi, 2009 (2) SACR 227 at paragraphs 5 and 6.

[24] The state's view on the accused's remorse is that he was left with no other option but to plead guilty as the evidence against him was condemning. This is consistent with the view taken in **S v Landau**[6] where the following appears at 678b-c:

> **'In certain instances a plea of guilty may indeed be a factor which can and should be taken into account in favour of an accused in mitigation of sentence. However, where it is clear to an accused that the "writing is on the wall" and that he has no viable defence, the mere fact that he then pleads guilty in the hope of being able to gain some advantage from that conduct should not receive much weight in mitigation of sentence unless accompanied by genuine and demonstrable expression of remorse, …'**

[25] In similar vein the court in **S v Strauss**[7] stated at 79E-H:

> **'He says he has remorse and this must be taken into account, but it cannot carry much weight, in a case such as the present, where he was caught in possession of diamonds and where there was clearly no opportunity for him to deny his deed, since there was overwhelming evidence against him. If this had been a complicated case in which the accused and his legal representative had gone out of their way to come out with the truth, especially if the truth would otherwise not have been revealed, it would have been an additional factor to a plea of guilty and the remorse of the accused. Even though he pleaded guilty in this case and said he had remorse, the Court cannot attach too much weight to this fact.'**

[26] When applying these principles to the present facts where the accused, on his own account, admitted guilt from the outset and against overwhelming evidence, I am convinced that this is

[6] 2000 (2) SACR 673 (WLD).
[7] 1990 NR 71 (HC).

an additional mitigating factor to his plea of guilty and proclaimed remorse. This conclusion is consistent with the view taken in **S v Kadhila**[8] where the summary reads:

> 'Considerable weight ought to be accorded to a plea of guilty to serve as incentive to others: Provided the case against the accused is not such that he was left with no other option.'(Emphasis provided)

[27] Notwithstanding, the accused did express remorse during his testimony in mitigation of sentence and sought forgiveness from the deceased's family shortly after the incident, which is indicative of apology and, to that extent, will be accorded the necessary weight.

[28] There can be no doubt that the courts view the offence of manslaughter as extremely serious, moreover when, as in this case, committed in a domestic setting. This court already expressed its disapproval and shock in several judgments on sentence about the prevalence of domestic or gender based violence in this jurisdiction and that the courts, when it comes to punishment, should fully take into account the important need of society 'to root out the evil of domestic violence and violence against anyone'.[9] It was further said that the message from the courts must be that crimes involving domestic violence in Belize will not be tolerated and that sentences imposed in these cases will be appropriately severe.

[29] Moreover the escalating number of violent crimes can only be effectively condemned by courts of law through the imposition of effectively deterrent and retributive sentences. The court *a quo* indicated that it cannot turn a blind eye to the prevalence of violent offences committed in its

[8] (Unreported) (CC 14/2013) [2014] NAHCNLD 17 (12 March 2014).

[9] S v Bohitile, 2007 (1) NR 137 (HC) at 141E.

jurisdiction and country wide.[10]The reasoning of the learned magistrate cannot be faulted as the prevalence of violent crimes indeed do go unabated. Fittingly stated in **S v Mhlakaza & another**[11] at 519d Harms JA stated the following in regards to the effect of violent crimes and the objectives of punishment:

> **'Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence (cf Windlesham "*Life Sentences: The Paradox of Indeterminancy*" [1989] *Crim LR* at 244, 251). Retribution may even be decisive (*S v Nkwanyama and others* 1990 (4) SA 735 (A) at 749C-D).'**

[30] Notwithstanding, a sentencing court should be careful not to make the accused the scapegoat for all those making themselves guilty of similar conduct but, based on the crime and the degree of the accused's moral reprehensibility, the court must decide what punishment would be just and fair in the circumstances that brought the accused before court.

[31] The crime of manslaughter is lately more prevalent than ever and there is undoubtedly wide spread outrage in our society against the senseless killing of the most vulnerable in its midst. The respect for life as such and the rights of fellow human beings has become non-existent to those criminals who, as the accused in this instance, only serve their own interests or need. These criminals are as much as anyone else part of society and when they transgress and become a threat to society, the natural indignation of interested parties and the community at

[10] Record 489.
[11] S v Mhlakaza & another 1997 (1) SACR 515 (SCA).

large should receive some recognition in sentences the courts impose, lest the administration of justice may fall into disrepute.[12]

The offence and Interests of society

[32] The accused has been convicted of a very serious and prevalent offence of manslaughter that calls for severe punishment. The evidence indicates that the deceased was killed out of provocation on the part of the accused by using a machete. At the time of chopping the deceased the confrontation on him (Convict) had already ended. In cases like this society expects courts to protect their interests by imposing stringent sentences.

[33] It is common cause that the deceased was the initial aggressor when he provoked the accused. It is also not disputed that the accused is not a violent person and the killing was not pre-meditated. However, the accused unlawfully took away the life of a member of society.

[34] Counsel for the accused submitted that accused having been employed, was able to make contribution to his family and society financially. In referring to several cases counsel proposed a sentence of 10 years' imprisonment. On the other hand counsel for the Crown argued that an appropriate sentence should be benchmarked against other cases while taking into account the nature and the manner in which the deceased was killed.

[35] The court is mindful of the fact that people in any society encounter situations in which they are angered, humiliated or provoked but have to control their emotions without yielding to the urge of taking the law into their own hands. Even if one might feel for the accused in the

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

circumstances, in my view a sentence suggested by the defence to some extent adequately reflect the gravity of the offence committed. It is trite and sensible that a person who is provoked in the circumstances is entitled to defend himself provided he does that within the limits of the law which the accused *in casu* failed to do.

[36] There can be no doubt that the courts view the offence of manslaughter as extremely serious, moreover when, as in this case, committed in a domestic work setting. The use of a machete causing five (5) chop wounds to the neck and vertebral artery of the deceased, killing him instantly, was done in cold blood and with complete disregard for the sanctity of human life. The deceased was a helpless, unarmed victim who did nothing except dare his attacker to remove him from the compound, but was chopped several times. The killing was brutal, cruel though not calculated. Though the court is mindful that the convict was prompted by the deceased's conduct, the fact that the convict walked away and went for a machete and chopped defenceless man several times, is indeed an aggravating factor weighing heavily against the convict. Moreover when the fatal chop wounds were inflicted on the deceased who was said to be intoxicated. The use of a machete under these circumstances was unwarranted, excessive and callous.

[37] Notwithstanding the aforesaid, I am persuaded by Liebenberg AJ as he then was when he stated that: '…for purposes of sentence, provocation is regarded as a mitigating factor because the crime was committed impulsively and not premediated and therefore regarded to be morally less blameworthy than one committed with premeditation ….[13] In this particular case the accused was provoked by the deceased, the deceased being the initial aggressor.

[13] The State v Ndafapawa Johannes Case No CC 11/2009 delivered on 13.11 2009, at 6

[38] I concur with what Holmes JA had stated in **S v Kumalo** 1973 (3) SA 697 (A) that 'Punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances. The last of these four elements are sometimes overlooked.' This is such case where the circumstances provides for an extension of a measure of mercy to the accused while at the same time holding him accountable for his unlawful conduct.

[39] Holmes JA in **S v Rabie**[14] stated that even when the crime is horrendously serious, the heinousness of the crime should not be allowed to exclude all other factors. I associated myself and endorse the sentiments expressed.

[40] The Convict accepted the averments and facts set out in the Prosecution's stated facts which accompanied his plea of guilty to the offence of manslaughter offered to him. These undisputed facts raise the reasonable possibility that the convict when he acted in the way did, was not acting completely rationally when he killed the deceased and that his actions were not premeditated and were the product of emotional stress brought about by the conduct of the deceased. In my view the agreed factual pattern lays a sufficient factual foundation to support a finding that his actions showed there was diminished responsibility present when he committed the offence when he chopped the deceased five times in the neck region of his body. Manslaughter is undoubtedly a serious crime but the Defendant's conduct is morally less reprehensible by reason of the fact that the offence was committed under circumstances of diminished criminal responsibility. Also in his favour was the fact that he acted with *dolus indirectus* when killing the deceased.

[14] 1975 (4) SA 855 (A)

[41] Moreover, the concept of provocation as a mitigatory factor has been further explained by **Plasket J in S v Ndzima**,[15] at para 30:

> **'While it is a feature of provocation as a mitigatory factor that the criminal act that resulted from it is usually committed immediately after the provocative act, the extent to which it is mitigatory depends, essentially, on whether the accused's loss of control as a result of his or her anger would be regarded by an ordinary reasonable person – ''n gewone redelike mens' – as an excusable human reaction in the circumstances. In this matter, a reasonable person would baulk at the suggestion that the appellant's acts of executing his incapacitated victims were understandable in the circumstances, even though he was justifiably and understandably angry at having been assaulted and, no doubt, fearful when he fired the first shots. That he was provoked, and that the provocation was severe, is not in dispute. That the anger evoked by the provocation led him to shoot the deceased who was running away is also understandable. But then to execute both of the deceased, when he ought to have been able to reflect on what he had done and to realise that he was no longer in any danger, cannot be regarded as an excusable human reaction to the provocation.'**

[42] Applying the principles as set out above, the fact that the convict alleges that he acted out of provocation, with it being founded on reasonable grounds or whether a reasonable person in the same circumstances would act the same in similar circumstances, would constitute a mitigating factor.

Conclusion

[43] Having considered the circumstances surrounding the commission of the offence, the nature of the crime, the interests of society and the objectives of sentencing and when regard is had that the offence was not pre-meditated, it is my considered view that some leniency on the

[15] S v Ndzima 2010 (2) SACR 501 (ECG), para 30.

accused has to be exercised than otherwise would have been by imposing a custodial sentence.

[44] The accused is currently 61 years old and against this background, the defence proposed a sentence of 25 years' imprisonment on the manslaughter count whilst the case law may seem to point in the direction of a sentence of life imprisonment. An offender sentenced to life imprisonment becomes eligible for parole after 25 years, whereas another offender becomes eligible after serving two-thirds of a fixed term sentence.[16] The Supreme Court of Namibia in **S v Gaingob and Others**[17] reaffirmed that the conditions of life imprisonment do not *per se* amount to cruel, inhuman or degrading treatment or punishment as there is a realistic hope of release after 25 years. Hence, it would not infringe an offender's right to dignity protected under the Constitution of Belize, as held in **S v Tcoeib**.[18] The court took into consideration the age of the offenders in deciding whether or not the sentences imposed amounted to an informal life sentence and whether they had any realistic prospect of release in the sense of fully engaging in society again during their lifetime.

[45] In the present matter the court, in my view, should guard against imposing a sentence that takes away any realistic hope of release and which, in effect, amounts to an informal life sentence. To impose a sentence of life on the accused in this instance means that the accused only becomes eligible for parole at the age of 86, provided he has met all the other requirements. In my view there are no realistic prospects of release, giving the accused's

[16] Sections 115 and 117 of the Correctional Services Act 9 of 2012.
[17] 2018 (1) NR 211 (SC).
[18] 1999 NR 24 (SC).

advanced age. I therefore do not consider life imprisonment to be suitable punishment in the present circumstances.

[46] Unfortunately the distress and vicissitudes that the accused's misdeed has brought upon his dependents and love ones is an unfortunate consequence of crime and not something the court can regard as an aggravating circumstance. Neither can the court allow its sympathy for them to deter it from imposing the kind of sentence dictated by the interests of justice and society.

[47] In light of the gravity of the crime committed and the court having come to the conclusion that the accused is considered a dangerous person, the emphasis, as regards the objectives of punishment, must fall on prevention, deterrence and retribution. To this end, the accused cannot escape a lengthy custodial sentence. In this instance the mitigating factors in favour of the accused are far insufficient to be regarded as retribution for the manslaughter he committed. Against this background and bearing in mind that manslaughter usually attracts a lengthy custodial sentence, the question is what period of imprisonment would be just and fair in the circumstances? It is settled law that the period of imprisonment must be reasonable in relation to the seriousness of the crime and care should be taken not to overemphasise the interests of society at the expense of the interests of justice and that of the offender.

[48] With regard to the period of pre-trial incarceration, it is trite law that the period the accused has spent in custody pending the finalisation of the matter will be taken into account and usually leads to a reduction in sentence.[19]

[19] S v Kauzuu 2006 (1) NR 225 (HC) at 232F-H.

[49] The message going out from this court today must be clear, namely, the courts will not shirk its duty to uphold the rule of law in society and to protect and defend the rights of others, in particular, that of the innocent and vulnerable, against unscrupulous criminals. In view thereof it is inevitable to come to the conclusion that the accused's personal circumstances simply do not measure up to the gravity of the crimes committed and the circumstances under which it took place, considered together with the legitimate interests and expectations of society. Moreover where society, as in this instance, needs protection against the convict.

[50] In this case there is the presence of a number of aggravating circumstances that I have taken into consideration. These include:-

a. The number of chop wounds inflicted on the deceased. The post mortem report indicated the deceased was chopped six (6) times. Five (5) times in the region of the neck; the area of the right vertebral artery to be more specific.

b. The fact that the evidence against the accused was quite inundating.

c. I have considered that this could not be considered an early guilty plea as the matter was mentioned on several occasions after there had been full disclosure.

[51] The mitigating circumstances are that:

a. The accused did plead guilty and will be awarded a discount. The law allows for up to a 1/2 discount, however due to the time in which the plea was given and the circumstances of this case then only a 1/3 discount will be granted.

b. This is the accused man's first conviction and as such he will be granted a discount. This offence involved the taking of a life and as such that amount of discount awarded will reflect this position.

c. He was provoked by the deceased.

d. This a reasonably young man so I will give consideration to his age when handing down the sentence.

e. The length of time that he has been in custody.

f. He has a good social enquiry report and I will grant a discount due to this. I have especially taken into account his good community report.

[52] The maximum allowed under the law for manslaughter is life. I would not be considering the maximum in this case. In light of the aggravating circumstances detailed above along with the provocation element, the starting point for the accused is 20 years.

[53] He will be granted a 1/3 discount due to his guilty plea which reduces the 20 years to 14 years.

[54] He has been in custody for 4 years; 11 months and the sentence will be reduced for this period of time.

[55] He is an older man with has a good social enquiry report and such the term of imprisonment will be reduced by a further 2 years, one year for the age and one year for the good social enquiry report.

[56] Mr. Efrain Martinez is sentenced to nine (9) years for the manslaughter. Three (3) years of which are suspended for three (3) years.

[57]	Manslaughter	9 years. To serve 6 years imprisonment.

Dated the 20th day of December 2023

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RICARDO O'N. SANDCROFT

Justice of the High Court