REPUBLIC OF NAMIBIA

CASE NO. CC5/2003

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOSEPH GERSON GARISEB **Applicant**

and

THE STATE **Respondent**

CORAM: **VAN NIEKERK, J**

Heard: 15 June 2009
Delivered: 22 June 2009

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK, J: [1] This is an application for leave to appeal against sentence. I convicted the applicant and his co-accused on 16 October 2006 after a trial on a count of murder, three counts of housebreaking with intent to rob and robbery with aggravating circumstances and one count of robbery with aggravating circumstances. On the count of murder I sentenced applicant to a prison sentence of 40 years. On count 2 the Court sentenced him to 16 years imprisonment and ordered that 11 years run together with the sentence on count 1. All the other sentences of 14, 8 and 3 years respectively were

ordered to run concurrently with the sentence imposed on count 1. The effect is that the applicant must serve 45 years in total.

[2] Applicant obtained the assistance from another inmate to draw his application for leave to appeal. Some of the seventeen or so grounds of appeal are impossible to understand. When I asked applicant, who appeared in person, whether he could explain their meaning or intention, he was also at a loss to shed any light on them. I shall therefore confine myself to those grounds of appeal that are comprehensible. Applicant further stated during oral argument that his complaint is against the 40 year sentence on count 1 and not against the other sentences imposed. The result is that the grounds of appeal may be conveniently combined and summarized to the following:

1. The Court erred in not finding that the applicant committed the offence of murder with the absence of *dolus directus*.
2. The Court erred in its assessment that there were aggravating circumstances present. More particularly, the Court erred in its findings that applicant wielded a dangerous weapon before, during or after the commission of the crimes, and/or inflicted grievous bodily harm and/or threatened to inflict grievous bodily harm.
3. The Court erred in under-emphasising the mitigating factors and over-emphasising the aggravating factors, particularly the seriousness of the offence.
4. The Court erred in under-emphasising the reformative purpose of punishment.

5. The sentence of 40 years on the murder count is shockingly inappropriate.

[3] The first ground of appeal is clearly erroneous. The finding of the Court was indeed that the murder was committed with absence of *dolus directus*.

[4] The second ground of appeal is strictly speaking only relevant in relation to counts 2-5 where the indictment alleged (and the Court found) that aggravating circumstances as meant in section 1 of the Criminal Procedure Act, 51 of 1977, were present. I deal with this aspect because it receives a great deal of attention in the application for leave to appeal. Furthermore during oral argument is appeared that applicant felt aggrieved because he allegedly did not inflict the fatal blows with any of the instruments used to assault the deceased.

[5] Applicant overlooks an important aspect of the Court's finding on the merits of this matter. This is that he and the co-accused committed the murder and the other offences with common purpose. It therefore does not matter who dealt the fatal blows. I did find in their favour that the State did not prove that they planned to murder the deceased. However, they did plan to attack and overpower the deceased and they both participated to about equal degree in carrying out this plan. They each assaulted the deceased in various ways in the presence and to the knowledge of the other in the execution of their common purpose, which was to obtain the keys to the safes and shop and to lay their hands on money and other valuables. In the process they repeatedly assaulted and tortured the deceased in a cruel manner and tied him up so that he could not

defend himself or escape. Even if the home made braai fork used during the assaults was not intended to be used as a weapon when it was made by applicant's co-accused, it was used very effectively to cause pain and injury on several places on the deceased's body. The co-accused carried a large knife to the knowledge of applicant when they left Kransneus that day. This knife was also used in the attack upon deceased. Other items like a knobkierie, a wooden dropper and a vehicle exhaust pipe were also found close by the deceased's body of which at least the latter was indeed used to hit the deceased on the head. The main cause of death was the head injuries. There is also evidence that applicant kicked the deceased with a shod foot in the ribs. What is clear is that all the items involved were used as weapons and clearly were used in a dangerous manner. In my view there is no merit in this ground of appeal.

[6] Regarding the third ground of appeal applicant submitted that the mitigatory factors were ignored or under-emphasised. The mitigatory factors were certainly not ignored as the judgment on sentence clearly shows. However, the problem for applicant is that the mitigatory factors are so few. The Court had regard to his personal circumstances, upbringing and education, but found that the aggravating factors far outweigh the few mitigating factors. I specifically dealt with the reasons why I considered his youthfulness not to be a factor which should incline me towards a much lighter sentence. It is permissible to accord different weights to the different relevant factors when considering what sentence to impose, (*S v De Kock* 1997 (2) SACR 171 (T) 197*g*-*h*), even to the extent that mitigating factors have no actual effect on the sentence, especially if the crime is really serious. For example, in *S v Skenjana* 1985 (3) SA 51 (A)

54A, the Appellate division agreed with the Court *a quo* that the personal circumstances of the appellant did not have a great deal of weight when viewed against the enormity of the crime committed. In this case the same approach was taken. The Namibian Supreme Court in the case of *S v Paulus Alexander* (Case No SA 5/1995 unreported judgment delivered 13/2/03) followed the same approach having referred with approval to the case of *S v Matolo* 1998 (1) SACR 206 (O) at 211D-F, where the following was said (the quote is from the English headnote at 208G-I):

> "*Held*, that in cases like the present the interests of society is a factor which plays a material role and which requires serious consideration. Our country at present suffers an unprecedented, uncontrolled and unacceptable wave of violence, murder, homicide, robbery and rape. A blatant and flagrant want of respect for the life and property of fellow human beings has become prevalent. The vocabulary of our courts to describe the barbaric and repulsive conduct of such unscrupulous criminals is being exhausted. The community craves the assistance of the courts: its members threaten, *inter alia*, to take the law into their own hands. The courts impose severe sentences, but the momentum of violence continues unabated. A court must be thoroughly aware of its responsibility to the community, and by acting steadfastly, impartially and fearlessly, announce to the world in unambiguous terms its utter repugnance and contempt of such conduct."

[7] I do not think that there is any reasonable prospect that the Supreme Court will disagree with the approach I followed or the manner in which I applied it to the facts of this case.

[8] As far as the fourth ground of appeal is concerned, there is no merit in it. Although I agree with applicant's submission that the long period of effective imprisonment imposed in this case would not tend to his rehabilitation, the aim of the

punishment was to remove the applicant from society for a very long time because of the danger he poses to it. That this is a permissible approach in appropriate cases is clear (see e.g. *S v Nkambule* 1993 (1) SACR 136 (A) 147*f; S v Mhlakaza* 1997 (1) SACR 515 (SCA) 519*h-i*). The applicant's record of previous convictions does not fill me with much hope that he will reform. He committed the offences in this case while on the run from the police after having committed a serious offence of housebreaking with intent to steal and theft for which he served two years imprisonment and indicates a severe lack of respect for society and the law. The violent and cruel nature of the assaults upon the deceased showed the applicant to be a merciless person who did not shirk from torturing the deceased in various ways to extract information from him about the whereabouts of the keys in order to lay his hands on deceased's money and other valuables.

[9] The approach that rehabilitation must take a backseat in the face of the overwhelming seriousness of the crime committed has been followed also in this jurisdiction, e.g. in *S v Gerson Tjivela* (Supreme Court Case No. SA 14/2003 unreported judgment delivered 16/12/2004 at p5).

[10] I now turn to the last ground of appeal. Ms *Verhoef* for the State submitted that the sentence imposed in this matter is well within the usual limits for serious cases comparable with the case under consideration and does not create a sense of shock. This is indeed so. In the light of what I have already stated about this particular case, both in the main judgments as well as in this judgment above, I have no doubt that the sentence is appropriate. Even if the Supreme Court might consider imposing a lesser sentence, I am

confident that there is no reasonable prospect that that Court will be inclined to reduce that sentence to such an extent that it is likely come to the conclusion that I failed to properly exercise my discretion in determining the length of imprisonment on count 1.

[11] The result is therefore that the application for leave to appeal against sentence is dismissed.

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VAN NIEKERK, J

Appearance for the parties:

For applicant:	In person
For respondent:	Ms A Verhoef Office of the Prosecutor-General