

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No: CC 5/2018

Date heard: 11 December 2019

Date delivered: 13 December 2019

REPORTABLE

In the matter between:

THE STATE

And

DAMIAN KAMMIES

Accused 1

WARREN STEYN

Accused 6

JUDGMENT

Goosen J:

[1] Accused 1 has been convicted of housebreaking; kidnapping; possession of a firearm and murder. Accused 6 has been convicted of housebreaking; kidnapping and murder. As was noted in the main judgment, the evidence establishes that at the time the deceased was removed from his home the accused were acting in concert exhibiting a common purpose in relation to the commission of the offences. The conviction for murder was founded upon the drawing of an inference of unlawful and intentional conduct premised upon the proven facts.

[2] In terms of s 51(1) of Act 105 of 1997 (as read with Schedule 2) a court shall sentence a person it has convicted of murder committed by a person or group of persons acting in the execution or furtherance of a common purpose, to life imprisonment.

[3] Section 51(1)(c) of the Act prescribes a sentence of not less than 5 years for a first offender¹ for crimes set out in Part IV of Schedule 2. Of relevance for present purposes are the crimes of kidnapping and breaking and entering premises with the intent to commit a crime. The qualification which applies in that the accused “*had with him or her at the time a firearm, which was intended for use as such, in the commission of such offence.*” It follows from this qualification, on the basis of the finding set out in the main judgment, that in respect of accused 6, these prescribed sentence provisions do not apply.

[4] It is trite that the sentencing court retains discretion in regard to the imposition of prescribed sentences. If the court is satisfied that there are substantial and

¹ The prescribed sentence escalates to 7 years for a second offence and 10 years for a third or subsequent offence.

compelling circumstances which justify a departure from such sentence then it is at large to determine an appropriate sentence. The court is obliged to depart from the prescribed sentence if that sentence would be disproportionate and bring about an injustice².

[5] When deciding on an appropriate sentence it is necessary to consider the nature of the crime, the interests of society and the individualized interests of the criminal to be sentenced. These interests must be balanced carefully to ensure that the object and purpose for which punishment is imposed can be achieved.

[6] Consideration of the triad of factors usually commences with reflection upon the nature of the crime and the circumstances in which it is committed. There are sound reasons for doing so. It is usually essential to understand what aberrant behaviour is being brought to account in the scales of justice before the weight of the counterbalance can be determined.

[7] In this case, the known facts point to the commission of a spate of crimes driven by a desire to correct an “*outrage*” perpetrated against a comrade and a desire to recover a firearm. The narrative of an underlying motive did not, in my view, add probative value in the discharge of the burden of proof for purposes of conviction. But, in the context of sentence proceedings, different considerations apply.

[8] Despite denials of association with street-gang activities, and in particular the Spotbouer gang, the weight of the evidence establishes beyond doubt that accused

² See *S v Malgas* 2001 (1) SACR 469 (SCA); *S v Vilakazi* 2009 (1) SACR 552 (SCA) at par [14] and [15]

1 and 6 are indeed active members of the Spotbouer gang. In the case of accused 1, the evidence points to his leadership of that gang. The evidence also establishes that the gang operates from a complex of apartments on Glendenning Road, Schauderville (the Glendenning flats).

[9] The events at 67 Gideon Street arose because of an earlier incident in which the witness, Neville Bruintjies, had dispossessed accused 6 of a firearm. It is clear from the evidence of Luciano Kiddo that the accused were in pursuit of Neville Bruintjies and that they were prepared to target anyone associated with him. Hence the attack on 67 Gideon Street, the kidnapping of the deceased and, ultimately the murder of the deceased.

[10] It is, in this light, that the offences must be seen. Each of the offences, on its own, is a very serious offence. The forceful and violent invasion of a home by armed thugs is a terrifying reality for far too many. The abduction of the deceased must have induced in him sheer terror and helplessness. The post-mortem report records severe blunt force trauma to the chest. We do not know how this was inflicted but it seems probable that he was violently beaten before he was executed with two gunshots to the head. The object of this abduction, assault and murder was to establish the whereabouts of Neville Bruintjies with whom the deceased was associated.

[11] This conduct speaks of quite extraordinary callousness on the part of the accused. It speaks also of a chilling sense of moral and legal impunity, where an

affront to the integrity of the gang order is met with deadly, fatal punishment. Many parts of this city exist under a siege of violence perpetrated by gangs. Killings by shooting are an almost daily occurrence. The gangs, of which there are many, operate brazenly outside of the framework of the law and the codes of civilized conduct.

[12] The consequences of this lawlessness are invariably deeply destructive of the values upon which we found our Constitutional order. In aggravation of sentence the state tendered a victim impact statement prepared by the father of the deceased. The deceased's sister also testified to the impact that the death of the deceased has had upon the family. Both testify to the profound loss suffered by the family and the fact that it is the living parents, siblings and children who must bear the loss. The deceased has four children. As a result of the trauma experienced by his death their mother broke down and descended into a life of alcohol abuse, resulting in further trauma to the children.

[13] Mrs Brooks, the deceased's sister, described how it was necessary to engage in a protracted battle to secure custody and care of the children so that they could be protected. That has now occurred and the children are being cared for by one of the deceased's sisters. The family, however, is struggling financially. The children are cared for with the assistance of child support grants, although this is insufficient to meet their needs as they progress into their teenage years.

[14] These are the practical and often dire consequences that families suffer when a father or mother dies as a result of criminal conduct. But it is the psychological and emotional trauma that is more devastating. Mrs Brooks gave insight into this trauma

when she explained that it has been left to the siblings to attempt to answer the children when they want to know why this happened to their father. No answer is satisfactory. The deceased's father, Sulayman Abdullah stated that his son grew up under a strict religious upbringing. His son assisted him in his religious work in the community. As a result the deceased was well-loved and respected in his community. His children regarded him as a hero. Following Mohammed Abdullah's murder his youngest son, then aged 11 years, did not attend school for a year. The impact on the family was devastating. Mr Abdullah said in his statement that he had not been able to attend the trial because he could not face the accused. He suffers from depression and insomnia and is currently on medication. He said his son did not deserve to die in the manner in which he did and to be discarded on the roadside like a dead animal.

[15] It is to correct such injustices that the courts impose punishments. Our system of criminal justice recognizes that societal retribution by way of incarceration serves to vindicate the rule of law and it serves to affirm individual accountability for wrongs against the society. It seeks to foster the rule of law in the face of both individual and collective violations. It does so by enforcing individual accountability for criminal conduct. It is for this reason that harsh punishments are prescribed as a point of departure for certain categories of crime. But, no less significant is the recognition by our system of justice that human beings are fallible; that transgressions may be driven by circumstances and, equally that rehabilitation is possible.

[16] For this reason, courts take into consideration the individual's circumstances; his or her attitude to the crime and they attempt, so far as is reasonably possible, to

fashion a sentence which takes into account all of the relevant factors. It is this that constitutes an appropriate sentence.

[17] Neither of the accused testified in mitigation of sentence. Their personal circumstances were placed on record from the bar.

[18] Accused 1 is 36 years old. He is unmarried but is the father of four children from three mothers. The children live with and are cared for by their respective mothers. The youngest are 7-year-old twins. His other children are 10 years and 15 years old respectively. The accused provided for their maintenance from his income earned providing school transport in his vehicle.

[19] Accused 1 has a matric pass. After completing school he was employed by the Coca Cola Company as a marketer for 10 years. He lost his employment as a result of being held in custody for an offence. He was acquitted of that offence. He thereafter was unable to obtain formal employment. Accused 1 has one previous conviction. He was convicted on 5 August 2015, in terms of s 37 of the **General Law Amendment Act**³, being in possession of suspected stolen property. He was sentenced to 12 months imprisonment.

[20] Mr Nel argued that regard should be had to the social milieu in which the accused found themselves. He pointed to the prevalence of gang activities; the very high incidence of gun-related violence and the fear that grips the community. He argued that it is against this background that the conduct of the accused should be

³ Act No. 62 of 1955

assessed. The incident in which the firearm was taken from accused 6 would have generated significant fear. This, he suggested, coupled with the consumption of alcohol at the braai would account for the desire to recover the firearm and, therefore, the conduct of the accused.

[21] All of these factors, namely a productive member of the community, a father of four young children for whom he provides, the social milieu and consumption of alcohol ought to persuade the court, it was argued, that there are substantial and compelling reasons to not impose life imprisonment.

[22] The obvious difficulty with the argument is that the accused himself provided no such explanation for his conduct. His motivation and what might have induced an otherwise law-abiding and responsible person to engage in such extraordinarily callous and calculated violence cannot be inferred from facts that he at no stage admitted. He denied any involvement and maintains such denial. It is difficult to understand therefore on what basis this court might come to the conclusion that his moral blameworthiness was reduced by reason of the interplay of the factors raised by Mr Nel.

[23] I shall accept that accused 1 has been able to maintain his children and, in this, that he has functioned as a responsible parent. I shall also accept, in his favour, that his previous conviction is not relevant for present purposes. I am, however, unable to find that his personal circumstances are such as would compel me not to impose the prescribed sentence. I cannot accept the argument premised upon the social milieu and the prevalence of gang and gun-related violence as being a

mitigating factor. The evidence established that accused 1 is a key member, if not leader of, the Spotbouer gang. It operates out of the Glendenning flats.

[24] It seems to me ironic that a key participant in the perpetration of gang-related criminal conduct, one who chooses to live by its codes and dictates, should plead for mercy on the basis of the destroyed social fabric that arises from precisely such choices.

[25] I am satisfied that in the case of accused 1 there are no substantial and compelling circumstances present. I will deal hereunder with the broader questions regarding proportionality of the prescribed sentence.

[26] Accused 6 is 26 years old. He has no previous convictions. He has a brother. He has no children. He was born in Cape Town. His father abandoned him when he was still very young. As a result his mother relocated to Port Elizabeth where they lived with his grandmother. His mother passed away when he was 7 years old. He lived with his grandmother until she passed away in 2016. At that stage he was living there with two younger cousins. After his grandmother's death, he cared for his cousins.

[27] After leaving school in Grade 10, accused 6 was employed as a casual labourer at the Coca Cola Company. Thereafter he assisted a friend of his who was involved in the installation of satellite TV systems.

[28] He had been in custody on another matter until his release on bail on 18 November 2016. A party was held to celebrate his release and he had consumed alcohol, it was suggested until he had “*passed out*”.

[29] Mr Crompton also sought to frame an argument based upon the social milieu of gang-related violence, centred as he put it on the “*incubator*” that was Glendenning flats. The argument does not succeed for reasons similar to those relating to accused 1.

[30] It is indeed so that accused 6 is a young man with no previous convictions. These are weighty considerations when considering what would be an appropriate sentence. It is trite that the length of the period of imprisonment imposed upon a young offender should not, generally, be such as would destroy the person. The period should, so far as reasonably possible, be for the shortest possible period. However, this general starting point when dealing with youthful offenders does not preclude the imposition of even the most severe penalty. That is so because even young offenders perpetrate horrendous crimes. When they do so the nature of those crimes will generally outweigh the plea based on youthful immaturity.

[31] In this instance we are dealing with a crime which invokes abhorrence. An innocent man was brutally and callously murdered because of his association with another man with whom the accused were aggrieved. While there is no evidence to point to a specific role played by accused 6 in the commission of these offences, it is clear that he joined in and continued to associate himself with his co-accused throughout.

[32] It cannot be ignored that he had only just been released on bail in relation to another matter. On the evidence he was in possession of a firearm earlier that evening. The firearm was taken from him after a violent scuffle with Bruintjies. What followed is the sequence of actions which, some hours thereafter, saw the deceased brutally murdered. These are not the actions of a callow youth driven by immaturity. They are instead actions of a hardened man.

[33] In my view the gravity of the offences committed by the accused outweigh the mitigating factors of accused 6's youthfulness and his personal circumstances.

[34] An aspect which is necessary to consider is the period that the accused have spent in custody awaiting finalization of the case. Both were arrested on 19 December 2016. They were denied bail and have been in custody on this matter since that date, a period of three years.

[35] Our courts have on several occasions called attention to the need for legislation to be enacted to enable a trial court to ante-date a sentence so that account may be taken of the time that an accused has spent in custody awaiting trial.⁴

[36] In ***Director of Public Prosecutions, North Gauteng: Pretoria v Gcwala and Others***⁵ Lewis JA reiterated what was held in ***S v Radebe and Another***⁶, that *"the sentencing court should consider in all cases whether the period of*

⁴ See *S v Nkomonde* 1993 (2) SACR 597 (W) at 598b-e; *S v Vilikazi and Others* 2000 (1) SACR 140 (W) at 142h-i

⁵ 2014 (2) SACR 337 (SCA) at par [18]

⁶ 2013 (2) SACR 165 (SCA) at par [14]

imprisonment proposed is proportionate to the crime committed, taking into account, for that purpose, the period spent in custody awaiting trial.” This reflects the principle set out by Cachalia JA in ***S v Dlamini***⁷ that:

“[41] . . . It is trite that the period an accused is held in custody while awaiting completion of his trial should be taken into account when deciding on the appropriate sentence. This is done by making the period of imprisonment actually imposed shorter than it would otherwise have been. However, the courts have not spoken clearly on how to calculate this period. One approach has been to do an inexact subtraction; another is to deduct the period actually spent; yet another is to treat the time spent in custody, at the very least, as equivalent to the time served without remission; and a fourth, more adventurous method is to treat the period as equivalent to about twice the length, because of the harsher conditions that awaiting-trial prisoners are subjected to in comparison with the conditions of sentenced prisoners.”

[37] There is, of course, no rule of thumb by which this calculus is to occur. The idea that the awaiting trial period is to be treated as double that period at the stage of sentencing has been rejected.⁸ What the authorities require is that the period of imprisonment imposed should be reduced or ameliorated in some degree in the light of the time spent in custody awaiting trial.

⁷ 2012 (2) SACR 1 (SCA) at par [41]

⁸ See *S v Vilikazi* (*supra*) and *S v Radebe and Another* (*supra*) at par [13] and [14].

[38] In my view, a conceptual difficulty arises when the sentence under consideration is one of life imprisonment rather than a determinate sentence. The reason is not hard to discern. A sentence of life imprisonment means precisely what it states. It is a sentence which extends for so long as the prisoner is alive. It has no determinate maximum period. It cannot be “*reduced*” by the period spent in custody awaiting trial. It can only be ameliorated on that basis if it is not imposed.

[39] A sentencing court determines the maximum period of imprisonment to be served by the convicted person. It makes that determination upon consideration of all relevant factors before it. It does not have any regard to possible parole (save in respect of sentences where s 276B may be relevant).⁹ It is indeed improper to take into account the possibility of parole when determining a suitable sentence.¹⁰

[40] It is this that gives rise to the sentencing conundrum. If the time spent awaiting trial is not in itself a substantial and compelling circumstance¹¹ how then is the period so spent to be brought to account in reducing an indeterminate sentence? The only basis upon which such calculus can occur is with reference to the “*parole exclusion*” period¹² which applies to a sentence of life imprisonment. But to do so involves the sentencing court in consideration of the possibility of parole in the determination of what is a suitable sentence. There is also an anomaly in logic. A sentence of life imprisonment is the most severe sentence that a court may impose precisely because it is indeterminate in length. It is saved from being a cruel and inhuman punishment because of the possibility of parole. The possibility of parole is

⁹ See *S v Matlala* 2003 (1) SACR 80 (SCA) at par [7]

¹⁰ See *S v Mvubu* [2016] ZASCA 184 (29 November 2016) at par [25]

¹¹ See *S v Radebe and Others* (*supra*)

¹² This, in the case of life imprisonment, is the period of 25 years which must be served before the convicted prisoner may be considered for parole.

a function of future conduct on the part of a prisoner and the policy determinations made by the executive to which expression is given by the legislature. Life imprisonment is, both at the level of the type of sentence and at the level of policy, wholly different to a determinate sentence. It has as its object the removal of the convicted person from society.

[41] In the case of a determinate sentence the possibility of parole is determined by policy with reference to the maximum period of the sentence. Thus, a person sentenced to 10 years imprisonment may be released on parole after serving half that sentence i.e. after 5 years. A reduction in the determinate sentence by reason of time spent awaiting trial (to say 8 years) has the effect of reducing the maximum period until parole may be granted (to say 4 years).

[42] It is not difficult to see that this calculus may give rise to significant sentencing difficulties. As Goldstein J remarked in *S v Vilikazi*¹³:

"A difficulty which arises is that the official sentence of this Court is then approximately two years lighter than it should have been in each case. This lighter sentence then becomes part of the particular accused's official record of previous convictions, thereby possibly misleading any court which may subsequently convict him, and also the prison authorities on the seriousness of his crime. Then, too, the lighter sentence misleads the news media and more importantly the public which has an important interest in sentence, and especially in its deterrent function."

¹³ *Supra* at 142a-b

[43] Although our courts have held¹⁴ that the period of awaiting trial in prison is to be taken into account it is all but impossible to do so in the context of considering life imprisonment, without elevating the pre-trial incarceration period to a substantial and compelling circumstance, which it plainly is not.

[44] In this instance, the accused have spent 3 years in custody awaiting trial. The other circumstances discussed above point to the absence of substantial and compelling circumstances which would warrant a departure.

[45] Imposing life imprisonment would mean that they will only qualify for consideration of parole in 25 years. That means in effect that they will have been incarcerated for 28 years before being considered for parole. Does that fact render the sentence of life imprisonment disproportionate? The answer must be no, since the proportionality of the sentence (as a maximum period) has nothing to do with whether or when they may be released on parole.

[46] If the period spent awaiting trial were to tip the scales in such proportionality assessment it would give rise to absurd results since the sentencing court would necessarily be involved in equating life imprisonment with the parole exclusion period (of 25 years) and then be evaluating whether the total period spent in custody was the appropriate sentence.

[47] How then does the prisoner get the “*benefit*” or credit for time already served before sentencing? The answer, it seems to me, is not by reduction of the

¹⁴ S v Radebe (supra); DPP v Gcwala (supra)

indeterminate sentence but rather at the stage of parole consideration. It is at that stage that the authorities responsible for deciding whether or not to place the prisoner on parole must take into account the period that the prisoner was incarcerated whilst awaiting trial. In this way the prisoner may yet receive “*credit*” for such period. Such “*credit*” is not in any manner illusory since it is likely to conduce to a decision favouring parole rather than not.

[48] The better course, however, would be to provide, by way of legislation, for the court to ante-date a sentence to an appropriate date in order to take into account lengthy periods of pre-trial incarceration. Our courts have on several occasions called upon the legislature to effect an appropriate amendment to the legislation which would allow the sentencing court to ante-date its sentence to a date which would take cognisance of the effect of a long period of incarceration. In my view, such an amendment will address the obvious difficulties which arise in relation to the imposition of life imprisonment and ought to enjoy the urgent attention of the legislature.

[49] For the reasons set out above I am not persuaded that there is a rational basis upon which the time spent awaiting trial can be brought to account in the context of an indeterminate period of imprisonment such as life imprisonment. I have already dealt with the fact that such mitigation as is present is outweighed by the objective gravity of the offences. There are, in my view, no substantial and compelling circumstances present. I do not consider that a sentence of life imprisonment for the murder of Mohammed Gamaldien Abdullah is disproportionate. On the contrary, in the circumstances of this case, it is a just sentence. In so far as

the other prescribed sentences are concerned there are, in relation to accused 1, no compelling reasons to depart from them. As indicated no prescribed sentences apply to these offences in the case of accused 6.

[50] The prescribed sentences are not, in my view, unduly harsh even in relation to accused 6. I shall, however, impose lesser periods of imprisonment given that he was not personally in possession of a firearm at the time of commission of the offences.

[51] It follows as a matter of law that the sentences imposed in respect of counts 1, 2 and 3 will run concurrently with the sentence on count 5.

[52] I therefore impose the following sentences:

Accused 1:

Count 1 (Housebreaking)	-	5 years imprisonment;
Count 2 (Kidnapping)	-	5 years imprisonment;
Count 3 (Unlawful possession of Firearm)	-	5 years imprisonment;
Count 5 (Murder)	-	Life imprisonment.

Accused 6:

Count 1 (Housebreaking)	-	3 years imprisonment;
Count 2 (Kidnapping)	-	3 years imprisonment;
Count 5 (Murder)	-	Life imprisonment.

G.G. GOOSEN

JUDGE OF THE HIGH COURT