

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **CA&R67/2015**
DATE HEARD: **06/06/2016**
DATE DELIVERED: **01/07/2016**

In the matter between:

RUDI AFRIKA

Appellant

and

THE STATE

Respondent

Coram : Olivier J *et* Murray AJ

JUDGMENT

Murray AJ

- [1] The Appellant (Accused 2) and his co-accused, Xolani Besana, (Accused 1) were indicted in the Colesberg Regional Court on a count of murder, read with the provisions of Section 51(1) of the Criminal Procedure Amendment Act, Act 105 of 1997 ("the Minimum Sentence Act").
- [2] On **25 June 2015** they were convicted as charged and sentenced as follows:
- 2.1 Accused 1 to 20 years' imprisonment;
- 2.2 The Appellant to life imprisonment in terms of s 51(1) read with Schedule 2, Part 1 of Act 105 of 1997, based on the court's finding that :

"The offence was committed by a person, group of persons or a syndicate acting in the execution or furtherance of a common purpose or conspiracy."

- [3] The Appellant exercised his automatic right of appeal in terms of s 309(1)(a) of the Criminal Procedure Act, Act 51 of 1977, ("the CPA") to appeal against his sentence of life imprisonment only. His appeal is based on the disparity between the two sentences. He avers that his sentence is shockingly inappropriate compared to the 20 years' imprisonment imposed on Accused1 and that interference therein is therefore justified.
- [4] Both accused were legally represented throughout the trial and were duly warned of the implications of s 51(1) of Act 105 of 1997. In the appeal Mr Nel of Legal-Aid South Africa appeared for the Appellant and Ms Ilanga for the State. The State supported his sentence.
- [5] Accused 1 pleaded guilty *ab initio* and not only described his involvement in and the circumstances of the murder in detail in a written confession, in his 112(2) statement, and in court, but also directly implicated the Appellant as his co-perpetrator in all material respects.
- [6] The Appellant, on the other hand, pleaded not guilty. His defence was one of total denial, although he did make certain formal s 220 admissions which placed him on the scene of the murder. He admitted his presence up to the moment the Deceased was pulled into the cemetery, but averred that he then left and only saw Accused 1 again early the next morning when the latter woke him up to borrow some shoes.
- [7] The relevant facts appearing from Accused 1's evidence are that on the night of the

murder, he and the Appellant had some drinks. On their way home, they met the Deceased who allegedly owed Accused 1 R10. They started arguing with the Deceased and the two of them dragged him to the cemetery where they pulled his hat over his face, slapped and punched him, before forcing him through an opening in the fence. Once inside the cemetery, Accused 1 held the Deceased's feet while the Appellant fetched a rock of about 30cm x 30 cm and hit the Deceased over the head with it. The Appellant, in turn, held the Deceased's feet while Accused 1 tied his hands with a belt and wired him to a pole. With a similar sized rock Accused 1 then hit the Deceased twice on the left side of his head, while the Appellant threw another rock at his head and kicked him in the chest with his boots.

[8] After every blow they checked to see if the Deceased was still moving. At some stage a car approached and they hid themselves and the Deceased among the headstones till it passed, then resumed the attack. In his statement Accused 1 averred that the Appellant also stabbed the Deceased in the neck several times with a broken bottle. When the Deceased stopped moving, they covered him with some branches and left him there. His body was found there the next day.

[9] Although there are some discrepancies between Accused 1's versions in the documents and his testimony in court, and between his version and that of Ms Julia Abraham who witnessed a large part of the incident, as to the exact sequence of events in the cemetery, the material aspects of his version were corroborated by her evidence, as well as by that of Dr Mogoje, the forensic pathologist who did the autopsy on the Deceased, and by that of Sgt Visagie of the SAPS who was called to the murder scene the next morning.

[10] Ms Abraham's testimony, in a nutshell, was that she knew both accused and the Deceased well. On the night of the murder she saw the two accused grab, slap and

hit the Deceased before forcing him through the cemetery fence. From nearby, in the light of an Apollo lamp and some security and shop lights, she witnessed the Deceased struggling in vain to free himself from his assailants, saw and heard the blows when the Appellant and Accused 1 took turns to hold him down and hit him in the head with the rocks. She saw them hide themselves and the Deceased among the graves when she called out to them. Later on she saw the two accused leave the cemetery alone.

[11] Dr Mogoje found the great amount of damage and destruction to the Deceased's skull to be commensurate with injuries inflicted by a heavy object like the two 30x30cm rocks which Sgt Visagie found next to the Deceased's body, of which one had blood on it. The Deceased's chest injuries and ruptured liver according to the doctor would have been caused by massive force, such as being hit by a solid object, or a rock thrown from a distance, or a kick with a booted foot, and the six stab wounds and the cut through his penile shaft by a sharp object, like a broken bottle.

[12] Sgt Visagie confirmed that the Deceased's body was found in the cemetery under some branches, that his hands had been bound with a belt and his feet tied with his shoelaces, and that Accused 1's tackies, which were found on the Appellant's roof, had the Deceased's blood on them (as confirmed by a DNA test).

[13] Despite the Appellant's denial of any involvement in the incident within the cemetery, therefore, the evidence against him was overwhelming. I agree with Mr Nel that it is clear that one person acting alone could not have inflicted such a great amount of damage and destruction to the deceased's skull and body and that Accused 1 and the Appellant must have acted together, irrespective of who committed which acts.

[14] From the evidence it is clear, therefore, that the murder was gruesome and

protracted and, although not proved to have been pre-planned, was indeed committed with direct intent as the trial court found. It is clear, furthermore, that, despite his averments to the contrary, the Appellant had been as involved in perpetrating the offence as Accused 1 on his own evidence was. In my view, therefore, the trial court correctly found Accused 1 and the Appellant to have committed the brutal murder with a common purpose.

[15] S 51(1) of the Act 105 of 1997 determines that a sentence of life imprisonment *shall* be imposed on someone convicted of an offence referred to in Part 1 of Schedule 2. And a murder which is committed by a person or group of persons acting in execution or furtherance of a common purpose, as *in casu*, does indeed fall under Schedule 2, Part 1. Life imprisonment therefore was the starting point in sentencing both accused.

[16] With reference to Accused 1 the trial court found substantial and compelling circumstances to justify the imposition of a lesser sentence of 20 years' imprisonment. In regard to the Appellant, however, the trial court found no such circumstances to justify a deviation from the prescribed sentence of life imprisonment.

[17] This disparity resulted in the appeal. It is an indispensable requirement of justice that sentences be consistent and that they be perceived as such. The Appellant relies on the passage in *S v Mathebula*¹ which determined that:

"it is trite that, unless there are exceptional circumstances, accused persons convicted of the same offences must receive the same sentence. The principle accords with the fundamental principles of uniformity of sentence, equality and fairness. Fairness in particular is a foundational value which

¹ 2012(1) SACR 374 (SCA) at [14] at 379c-d.

should suffuse the entire criminal proceedings.”

- [18] Disparity does not guarantee interference, however. Although it is true that equal punishment for equal offences is to be achieved as a general principle unless different personal factors make differentiation necessary,² a court of appeal's discretion to interfere in a sentence is not unfettered. In *S v Marx*³, for instance, the court cautioned that even a striking difference between two sentences does not in all instances justify interference. And in *S v Vermeulen*⁴ it was held that a court is not obliged to impose on an appellant the same sentence as that imposed on a lighter-sentenced co-accused, notwithstanding the disparity in their sentences.
- [19] Despite a disparity in sentences of co-accused, the accepted principles governing an appeal court's right to interfere in sentencing must still be observed. In *S v Matoewa*⁵, for example, the court emphasised that in evaluating the contended disparity in the sentences imposed on two co-accused, the essential enquiry is not whether the sentences were right or wrong, but whether the trial court, in imposing them, had exercised its discretion properly and judicially. *In casu*, therefore, in order to justify interference in his sentence, the Appellant needs to show that his sentence is disturbingly inappropriate in comparison to Accused 1's 20 years' imprisonment and that the trial court had misdirected itself or had acted unreasonably or arbitrarily in sentencing him to life imprisonment.⁶
- [20] The court in *S v Marx* made it clear, furthermore, that, where interference is indeed justified because the sentence is disturbingly inappropriate, it needs to be done in

² Du Toit, Commentary on the Criminal Procedure Act, Volume 2, Service 53, 2014 at 28-18Y.

³ 1989(1) SA 222 (A) at 22B-D

⁴ 2004(2) SACR 174 (SCA) at [14]

⁵ 2009(2) SACR 303 (ECG) at 308 c – d.

⁶ *S v Matoewa, supra*, at 309d.

accordance with the guidelines set out in *S v Giannoulis*⁷:

1. In general, sentence is a matter for the discretion of the trial court. Disparity in the sentences imposed on participants in an offence ... will not necessarily warrant interference on appeal. Uniformity should not be elevated to a principle, at variance both with a flexible discretion in the trial court and with the accepted limitation of appellate interference therewith.
2. Where, however, there is a disturbing disparity in such sentences, and the degrees of participation are more or less equal, and there are no personal factors warranting such disparity, appellate interference with the sentence may, depending on the circumstances, be warranted. The ground for interference would be that the sentence is disturbingly inappropriate.
3. In ameliorating the offending sentence on appeal, the Court does not necessarily equate the sentences: it does what it considers appropriate in the circumstances.”

[21] Justice demands that appropriate sentences be imposed. In determining whether the Appellant’s sentence is appropriate or so disturbingly disproportionate as to cause a disparity which amounts to “unreasonableness and unfairness which would reduce the credibility of criminal justice in the eyes of the man in the street⁸, the court cannot merely consider the facts and circumstances of the particular offence. It also needs to compare the sentence appealed against with the lesser one imposed on a convicted co-perpetrator who participated equally in the same offence, whose personal circumstances are the same, and whose sentence is a reasonable or acceptable one in the circumstances of the case.

[22] That the Appellant participated equally in the murder *in casu* is clear. The next issue

⁷ 1975(4) SA 867 (A)

⁸ Du Toit: Commentary on the Criminal Procedure Act, Service 53, 2014 at 28-18Y.

to determine, therefore, is whether the personal circumstances of the two co-perpetrators differ to the extent that they in themselves justify the disparity in the sentences.

[23] Accused 1's personal circumstances as listed by the trial court were that he was 20 years old when the offence was committed; that he had only completed Grade 5; that he had no dependents; that he had been raised by an aunt since both his parents had passed away; and that before his arrest he had worked at Shoprite and earned R3000.00 per month.

[24] The Appellant's, on the other hand, were that he was 31 years old at the time of the murder; that he had only completed Grade 4; that although he was unmarried, he had a 13-year old child who lived with the biological mother; that he had worked as a mason and with his income of R 5600 per month had supported his child and his mother.

[25] The only potentially significant differences in the two accuseds' personal circumstances, therefore, are their ages and the Appellant's dependents. Although Accused 1 was hardly more than a teen-ager when they committed the murder, there is no evidence that his youth in any way affected his reasoning or conduct. As Ponnar JA stated in *S v Matyityi*⁹, while someone under the age of 18 is to be regarded as naturally immature, the same does not apply to adults, and a person of 20 years or more must show by acceptable evidence that he was immature to such an extent that his immaturity can operate as a mitigating circumstance. In the absence of any such evidence, Accused 1's youthfulness in itself could therefore not have been a sufficiently weighty mitigating factor to justify the substantial disparity

⁹ 2011(1) SACR 40 (SCA) at para [14]

between his reduced sentence of 20 years and the Appellant's sentence of life imprisonment.

- [26] The Appellant was 31 years old when the offence was committed. The 10 year age difference between the two accused in itself in my view cannot be regarded as significant enough to cause the substantial disparity in their sentences, especially in the absence of any evidence as to how 'youthfulness' affected their conduct. According to *S v Matyityi*¹⁰, the Appellant's age had to be regarded as, at most, a neutral factor. But age in *Matyityi* was discussed with reference to its potential effect on diminished moral blameworthiness. In that sense the Appellant's age would indeed not be a mitigating circumstance. Age in the context of life imprisonment, however, affects the proportionality of the sentence and the Appellant's age of 31 years rather than, for instance, 60 years would indeed be of importance. In *S v Martin*¹¹, for instance, the court warned that discrepancies between the imposition of life imprisonment on young as opposed to old offenders cannot be ignored and held that:

"... an approach that life imprisonment is what is appropriate for a bad man committing a bad crime disregards that such a norm tends to create disparity. A life sentence imposed upon a lively man of 30 imposes a much longer and harsher sentence than the nominally identical sentence when imposed on a man of 65 who has lost interest in everything around him."

- [27] The trial court did not take the Appellant's age into consideration regarding the proportionality of imposing on him a sentence of life imprisonment when it decided that there were no substantial and compelling circumstances to justify a lesser sentence in his case as it did with Accused 1. In my view it should have.

¹⁰ 2011(1) SACR 40 (SCA) at para [14]

¹¹ 1996(2) SACR 378 (W) at 385E - G

[28] The only remaining difference in the two co-perpetrators' personal circumstances, therefore, is the fact that the Appellant had a trade and had applied his meagre income to support his dependents, a factor which could or should not have contributed to the disparity. If anything, it should have contributed to tipping the scale in his favour as it did in *S v Sikhapha*¹² where the Supreme Court of Appeal considered the appellant's age (31 at the time of the trial), his trade from which he makes a living and his supporting his dependent family members, to be three of the factors contributing to a finding of substantial and compelling circumstances to justify setting aside the appellant's sentence of life imprisonment.

[29] As held in *S v Malgas*¹³ the specified minimum sentences are not to be departed from lightly or for flimsy reasons, which entails that "marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded" as substantial and compelling circumstances justifying a deviation. The two co-accused's participation in the murder *in casu* and their personal circumstances having been more or less equal, one would therefore have to look further for more significant differences to see if the disparity in their sentences was justified or not.

[30] The next factor which clearly played a significant role in their unequal sentences is the difference in the nature and number of their previous convictions. Accused 1 had only one prior conviction, namely for housebreaking with intent to steal and theft. The offence involved no violence against the body of another person and he was merely placed under correctional supervision. This conviction clearly did not play a heavily aggravating role in the sentence selected for him. The Appellant, on the other hand, by the age of 33 had already perpetrated several offences. In 1998 he was convicted of two counts of assault with intent to cause grievous bodily harm and

¹² 2006(2) SACR 439 (SCA) at [18] at 445

¹³ 2001(1) SACR 469 (SCA)

of malicious damage to property, and since then was convicted of several counts of housebreaking with intent to steal and theft, but none involving violence against the body of another person.

[31] Mr Nel urged this court to take into consideration that the Appellant's only convictions for offences involving violence were those in 1998, when he was still a teen-ager, and that they all stemmed from a single incident 16 years before his conviction *in casu*, and should therefore not have been a factor in deciding on an appropriate sentence for this murder. He pointed out that although the trial court stated that it took into consideration that the Appellant's further crimes contained no element of violence against the body, it still expressed its '*shock*' at the Appellant's '*criminal career*' which '*started in 1998 already*', which might indicate that the non-violent nature of his later crimes was not accorded enough weight when the court decided to impose on him the harshest sentence possible.

[32] Mr Nel argued that the trial court should have lent proper weight to the nature of the Appellant's offences and should have drawn the inference that the Appellant is not a repetitive violent offender who is beyond reform and who could not be deterred from such conduct through a lesser but still severe term of imprisonment, and should certainly not have deemed him to be an offender who needed to be removed from society permanently with a sentence of life imprisonment.

[33] Apposite in the present case would be Howie JA's remark in *S v Jibiliza*¹⁴ when he replaced the death sentence with an effective sentence of 30 years imprisonment in an instance where, although the appellant's record read "*badly*" an analysis showed that all his violent crimes had been committed between 15 and 20 years earlier when he was still a minor and that in the 12 years before the present events his only

¹⁴ 1995 (2) SACR 677 (A) at p. 681 A - C

offences were housebreaking with intent to steal and theft, that:

"... had he been convicted in that 12 year period of a crime of serious violence or had his record in that time showed an undeterred tendency to repetitive violence, the argument for life imprisonment would have been more compelling".

[34] A further submission was that the effect of alcohol on the Appellant's moral blameworthiness had not been accorded enough weight in the court's sentencing decision. Terblanche¹⁵ stated that:

"generally, once a court is satisfied that the offender was intoxicated, his intoxication will be a mitigating factor. The reason therefore is that liquor can arouse senses and inhibit sensibilities, which may diminish responsibility of the offender."

[35] The court in *S v Cele*¹⁶, furthermore, made it clear that:

"full effect had to be given to 'intoxication as a mitigating factor and, in particular, to the fact that accuseds' moral blameworthiness was thereby diminished '... [since it] 'impaired or affected their mental faculties or judgment and thereby influenced them in regard to the crime'".

[36] I agree that, even though the court in the present case mentioned alcohol consumption as a potential mitigating factor in considering the absence or presence of substantial and compelling circumstances regarding both accused, it failed to indicate what weight it did attach to its effect on the moral blameworthiness of the two accused in each instance and failed to explain why in the case of Accused 1 it was held to be one of the factors weighty enough to constitute substantial and compelling circumstances, but not in the Appellant's case.

¹⁵ Terblanche S S: The Guide to Sentencing in South Africa, 2nd Ed, at para 7.3.9 at 200.

¹⁶ 1990 (1) SACR 251 (A) at 255 B-D

[37] The most significant remaining distinction between the two co-perpetrators, then, is the fact that Accused 1 demonstrated his potential for rehabilitation, apart from his age, by pleading guilty *ab initio*, thereby showing his willingness to acknowledge his wrong-doing and demonstrating what the trial court called 'real remorse' of the kind of sincere penitence 'translated into action' which in *S v Brand*¹⁷ was said to result in 'accommodating punishment'. Thence Accused 1's 20-year sentence.

[38] The State submitted that the Appellant, on the other hand, demonstrated his lack of repentance by denying his role in the murder, even in the face of the overwhelming credible and reliable evidence against him and that such lack of remorse should be regarded as an aggravating factor. While Mabuse J in *S v Au*¹⁸ on which the State relied, did call this type of conduct "a quintessential example of a lack of remorse" which is indicative of the appellant's not being prepared to rehabilitate and indicated that it would serve as "an aggravating factor that increased the chances of the imposition of a heavy sentence", however, one has to keep in mind that the right to remain silent and to require the State to prove the case against one is a right that is constitutionally protected. In *S v Mbatha*¹⁹ Wallis J, as he then was, held that:

"there seem to me to be substantial dangers in inferring an absence of remorse from the exercise of a constitutional right, and treating that as an aggravating factor. Equally, the Constitution protects the right of an accused person to advance his or her defence. To infer from the fact that the accused has advanced a defence found to be dishonest, that this reflects a lack of remorse and therefore justifies the imposition of a more substantial sentence, comes perilously close to holding that the accused is being sentenced not only for the crime that he has committed, but also for his failure to confess that crime. All this seems to me inconsistent with the constitutional protection afforded to the accused person to remain silent or put forward a defence to a charge. No doubt it is for that reason that remorse usually comes into the scale in mitigation of sentence, rather than in aggravation of

¹⁷ 1998(1) SACR 296 (C) at 304a-d.

¹⁸ 2014(2) SACR 91 (GP) at [15]. Compare 2008(2) SACR 135 (SCA) at [26] & 2015 JDR 2610 (GP) at [20].

¹⁹ 2009(2) SACR 623 (KZP) at [31]

it, and where its absence is treated as aggravating, that is inferred from factors other than the accused's conduct of his or her defence."

- [39] The trial court in the present instance did state that the Appellant had a constitutional right to plead not guilty, for which it could not punish him, but also remarked that it could not record in his favour that he had shown even a sprinkle of remorse. While the Appellant therefore did not demonstrate his prospects for rehabilitation by confessing to the murder as Accused 1 did, his plea of not guilty could not have served to infer that he had no remorse and therefore had no prospect of rehabilitation, and that life imprisonment would therefore be justified and proportionate. It could, at most, have led to the absence of the mitigating effect of demonstrated remorse.
- [40] For Accused 1 the court found the following factors to be substantial and compelling: his age during the commission of the offence, his alcohol consumption, and his true remorse for committing the offence. It accordingly considered a sentence of life imprisonment to be disproportionate for him and reduced the indicated sentence of life imprisonment to one of 20 years' imprisonment.
- [41] For the Appellant, though, the court listed and rejected only two factors as potential substantial and compelling circumstances, namely his alcohol consumption and his having been in custody since 14 October 2014, i.e. for a period of about 8 months. It did so without any reasoning regarding the potential weight to be attached to each of those factors and without considering them in conjunction with the Appellant's personal circumstances such as his age during the commission of the murder (with reference to the proportionality of the sentence), his having a trade from which he made a living, his maintaining his dependents on his meagre salary (which Accused 1 did not have to do) and the absence of violence in any of his convictions as an

adult. The cumulative effect of all of these factors would in my view have resulted in substantial and compelling circumstances being found to be present in the Appellant's case as well.

[41] I agree with Mr Nel that in determining the proportionality of life imprisonment it is essential to factor into the equation that it is the ultimate penalty and that it should be reserved for those instances in which an offender ought to remain incarcerated for the remainder of his natural life. I agree, furthermore, that there are circumstances which render life imprisonment disproportionate in the Appellant's case.

[42] In my view, then, the Appellant's sentence of life imprisonment is, in comparison to Accused 1's 20-year sentence and bearing in mind the co-accused's equal participation and comparable personal circumstances, disturbingly inappropriate and disproportionate enough to warrant interference. But, even though equal sentences for equal crimes is indeed the general principle to strive for, in view of the Appellant's lack of remorse and greater number of previous convictions, exact parity would be neither feasible, nor fair.

[43] The horrendous nature of the murder justifies a lengthy term of imprisonment. A sentence of twenty-five years' imprisonment would be long enough to deter both the Appellant and others from committing such brutal offences, while serving the community's need to see justice being done and to see their safety being protected by the courts' punishing severe crimes with severe sentences. It would, furthermore, allow for a measure of mercy and afford the Appellant an opportunity to reform. As such it would comply with the principles encompassed in the Zinn-triad and with the objectives of sentencing.

[44] It would, furthermore, reduce the substantial disparity between the two sentences to an acceptable level in accordance with the guidelines set out in *S v Giannoulis*, i.e. without elevating uniformity "to a principle, at variance both with a flexible discretion in the trial court and with the accepted limitation of appellate interference therewith", and would allow fairness to "suffuse" the proceedings as propounded in *S v Mathebula*. In the last instance, it would allow for justice to be seen to be done.

WHEREFORE THE FOLLOWING ORDER IS MADE:

1. The appeal against sentence succeeds and the sentence of life imprisonment is replaced with one of twenty-five years' imprisonment.


H MURRAY
ACTING JUDGE
NORTHERN CAPE DIVISION

I concur.


C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Appellant:

Adv V Z Nel
(Legal-Aid, Kimberley, Northern Cape)

For the Respondent:

Adv K F Ilanga
(Office of the Director of Public Prosecutions,
Northern Cape)