

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A109/11

In the appeal between:-

DANIël MATLOKO

First Appellant

GERALD ATTER GATRI

Second Appellant

AMOS MKHABA

Third Appellant

and

THE STATE

Respondent

CORAM: HANCKE, AJP *et* VAN DER MERWE, J *et* MOLEMELA, J

HEARD ON: 14 MAY 2012

JUDGMENT BY: VAN DER MERWE, J

DELIVERED ON: 31 MAY 2012

[1] This appeal concerns the sentences imposed by the trial court and is before us with its leave.

[2] Each appellant was convicted of the following crimes:

Count 2: Housebreaking with the intent to murder and attempted murder.

Count 3: Murder.

Count 5: Murder.

Count 7: Housebreaking with the intent to assault and assault.

Count 8: Attempted murder.

Count 9: Housebreaking with the intent to steal and theft.

In addition the first appellant was on count 4 convicted of sexual assault and the third appellant was convicted on count 10 of housebreaking with the intent to steal and theft.

[3] Each appellant was sentenced as follows:

Count 2: Seven (7) years imprisonment.

Count 3: Twenty five (25) years imprisonment.

Count 5: Twenty five (25) years imprisonment.

Count 7: Five (5) years imprisonment.

Count 8: Seven (7) years imprisonment.

Count 9: Ten (10) years imprisonment.

On count 4 the first appellant was sentenced to five (5) years imprisonment. On count 10 the third appellant was sentenced to three (3) years imprisonment. In respect of each of the appellants the trial court ordered that all other

sentences be served concurrently with the sentence of twenty five (25) years imprisonment imposed in respect of count 5. Each appellant was therefore sentenced to an effective term of twenty five (25) years imprisonment.

- [4] The respondent duly gave notice of its intention to apply at the hearing of the appeal for the increase of each of the sentences imposed in respect of counts 3 and 5 to life imprisonment. Section 316B of the Criminal Procedure Act 51 of 1977 provides that the Director of Public Prosecutions may with the necessary leave appeal against a sentence imposed in the High Court. This section was introduced by an amendment during 1990, as was section 310A, which provides for an appeal by the Director of Public Prosecutions against a sentence imposed in a lower court. In **S v KELLERMAN** 1997 (1) SACR 1 (AD) at 5 it was held that section 310A did not affect the existing long-standing practice that the court may after notice to that effect by the court or the state, increase a sentence appealed against by an accused person. It was held that section 310A was intended to cater for the case where the accused does not appeal against a sentence that is regarded as too lenient.

Clearly the same must apply to section 316B. The sentences imposed in respect of counts 3 and 5 must therefore firstly be considered.

[5] The trial court found that both murders were committed by the appellants acting in execution or furtherance of a common purpose. This finding was rightly not contested before us. In the result a sentence of life imprisonment was prescribed in terms of the Criminal Law Amendment Act 105 of 1997 for each count of murder.

[6] These prescribed sentences can of course be departed from if that is justified by substantial and compelling circumstances. Such substantial and compelling circumstances are present when in all the circumstances of a particular case the imposition of the prescribed sentence would be disproportionate to the crime, the criminal and the needs of society and therefore unjust. But substantial and compelling circumstances must be considered with real recognition thereof that the legislature has ordained a particular prescribed sentence that should ordinarily and in the absence of weighty justification be imposed. Therefore,

as was said in **S v MALGAS** 2001 (1) SACR 469 (SCA) at 477 e – f:

“Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them.”

See also **S v VILAKAZI** 2009 (1) SACR 552 (SCA) at 560 – 562 and **S v MATYITYI** 2011 (1) SACR 40 (SCA).

- [7] It is necessary therefore to consider the circumstances of the crimes in question. The three appellants at night kicked open the door of the house of Mr. Nkhoeli, burst into the house and attempted to murder him by stabbing him several times with a knife (count 2). They ransacked the house and in the process killed the frail wife of Mr. Nkhoeli (count 3) as well as their 12 year old son (count 5). Several stab wounds and two deep lacerations of the skull were inflicted on Mr.

Nkhoeli's wife. She was killed by a stab wound in the neck. The boy was killed by a stab wound through the heart.

[8] The first appellant was 27 years of age at the time. He attended school up to standard 7. At the time of his arrest he was employed on a farm as a general labourer, where he earned R1 800,00 per month. He is not married but has a four year old daughter. This daughter is cared for by his mother with the help of a government grant. The first appellant is not a first offender. On 30 March 2000 he was convicted of possession of a firearm without a licence and theft and on these two counts, taken together for purposes of sentence, he was sentenced to six (6) months imprisonment, wholly conditionally suspended. On 16 October 2003 he was sentenced to three (3) years imprisonment on a charge of negligent discharge of a firearm and on 20 January 2004 he was sentenced to four (4) years imprisonment for robbery.

[9] The second appellant was also 27 years old and progressed to standard 8 at school. He is not married and has no children and was unemployed at the time of his arrest. On 16 April 2004 he was convicted of housebreaking with the

intention to steal and theft and sentenced to eighteen (18) months imprisonment of which twelve (12) months imprisonment were conditionally suspended for three (3) years.

[10] The third appellant was 33 years of age at the time, not married but living with a partner. At school he reached standard 6. The couple has three children ranging between the ages of 11 and 2 years old. He worked as a farm worker. On 11 September 2002 he was sentenced to twelve (12) months imprisonment, wholly conditionally suspended for three (3) years on a charge of theft.

[11] Each appellant was in custody in respect of this matter before sentence for a period of approximately of fifteen (15) months.

[12] The trial court said the following in respect of substantial and compelling circumstances in respect of count 3 and 5:

“In my view I am satisfied that all the accused’s personal circumstances taken cumulatively with other mitigating factors

such as having stayed in custody for over one year and three months, amount to compelling and substantial which justify this court to depart from the prescribed life imprisonment in respect of the two counts of murder in counts 3 and 5, but I am also satisfied that, as submitted by Adv Liebenberg, that the aggravating circumstances far outweigh the mitigatory circumstances which justify long terms of imprisonment.

I must stress and state clearly that the fact, as I did not mention, that the accused drank alcohol and smoked dagga in my view is an afterthought and a ploy to avoid getting punishment that the accused deserve. It will be regarded and taken as such with the disdain that it deserves.”

- [13] I am unable to agree. The crimes in question are extremely serious. The appellants attacked a family whilst they were in what should have been the safety of their home. The interest of the society requires that violent intrusions into dwellings be severely punished. The appellants brutally and senselessly killed two innocent and defenceless persons. The murder of the child in these circumstances especially fills one with horror. There is no legitimate ground on which the roles played by the appellants in the commission of these crimes can be differentiated. Against this background I find nothing in the personal circumstances of the appellants that

would render the prescribed sentence disproportionate and unjust. The appellants are not youths, they are not first offenders and they take no real responsibility for their crimes.

[14] I also find no other mitigatory factors. I am prepared to accept in favour of the appellants that the appellants were to some extent under the influence of intoxicating liquor and/or dagga. But there is no evidence on record as to the extent of the influence thereof on the first and third appellants and the second appellant testified that the drinking and smoking of dagga had no real effect on him. To find substantial and compelling circumstances on this ground in these circumstances would amount to the speculation in favour of the accused person warned against above.

[15] A prescribed sentence of life imprisonment should not be departed from on the ground that the accused person had already been in custody before sentence in respect of the particular crime. To the sentencing court imprisonment for life means exactly that. See section 73(1)(b) of the Correctional Services Act 111 of 1998. It is not then concerned with parole. See section 73(6)(b)(iv) read with

section 73(5)(a)(ii). A prescribed sentence of imprisonment for life for a crime is therefore not rendered disproportionate by the fact that the accused person had already spent some period in prison in respect of that crime. Of course, once substantial and compelling circumstances are found on legitimate grounds, the time spent in custody awaiting sentence is an important consideration when imposing sentence. It also goes without saying that the period spent in custody before sentence may be taken into account when considering whether substantial and compelling circumstances justify departure from a prescribed sentence other than life imprisonment.

- [16] In the result I am convinced that the trial court erred in finding that substantial and compelling circumstances justify departure from the prescribed sentences of life imprisonment in respect of counts 3 and 5. The trial court should have imposed life imprisonment in respect of each of the appellants on each of counts 3 and 5 and that is what this court should order. There is no merit in the appeals against any of the other sentences imposed. In view of the provisions of section 39(2)(a)(i) of the Correctional Services

Act, an order of concurrent serving of sentences is inappropriate.

[17] In the result the following orders are issued:

1. The sentences of each of the appellants on each of counts 3 and 5 and the orders in respect of concurrent serving of sentences, are set aside.
2. A sentence of life imprisonment is imposed in respect of each appellant on each of counts 3 and 5.
3. The sentences imposed on the other counts are confirmed.

C.H.G. VAN DER MERWE, J

I concur.

S.P.B. HANCHE, AJP

I concur.

M.B. MOLEMELA, J

On behalf of first appellant:	Mr. J.D. Reyneke Instructed by: Bloemfontein Justice Centre BLOEMFONTEIN
On behalf of second appellant:	Me L. Smit Instructed by: Bloemfontein Justice Centre BLOEMFONTEIN
On behalf of third appellant:	Me S. Kruger Instructed by: Bloemfontein Justice Centre BLOEMFONTEIN
On behalf of respondent:	Adv. E. Liebenberg Instructed by: Office of the Director of Public Prosecutions BLOEMFONTEIN

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