

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A178/10

Case No.: 45/2009

In the appeal between:-

TSHOKOLO DAVID RADEBE

Appellant

and

THE STATE

Respondent

CORAM: MUSI, JP *et* JORDAAN, J *et* MURRAY, AJ

HEARD ON: 29 NOVEMBER 2010

JUDGMENT BY: MUSI, JP *et* MURRAY, AJ

DELIVERED ON: 28 JULY 2011

JUDGMENT

[1] This is an appeal to the full bench of this division against the sentences imposed on the appellant at the Bethlehem Circuit Court on 21 August 2009.

[2] The appellant was convicted on two counts:
2.1 count 1: housebreaking with intent to murder and

murder and

2.2 count 2: rape.

[3] On count 1 the appellant was sentenced to life imprisonment, and on count 2 to 20 years' imprisonment.

[4] On 21 August 2009 he was granted leave to appeal to the full bench of this court against the sentences only.

[5] The relevant background facts are the following: the 9-year old rape victim (the complainant) and her grandmother (the deceased) were asleep in the latter's home when, around 2 a.m. on 1 January 2009, the appellant kicked open the door with such force that the doorframe was cracked and the sliding bolt with a piece of wood still adhering to it, broke out of the frame. He burst into the room, threw a bottle at the deceased, pulled her from the bed and demanded money. When she could not pay, he pulled a plastic bag over her head and throttled and/or suffocated her. When she tried to escape through the window, he pulled her back into the room where she fought back so desperately that there was blood everywhere: on the floor, on the plastic bag, on the blankets, on the wall, on the curtain, on the window sill and even on the wall outside of the window, on the appellant's T-shirt, his

tackies, his jeans and his forehead, besides the scratches on his neck. She finally died on the floor from what the pathologist described as swollen, fluid-filled lungs and an immensely swollen brain due to asphyxiation and suffocation.

[6] From her grandmother's bed, the "*very small, petite, very thin*" 9-year old complainant had to watch and listen to her grandmother being killed. When she screamed, the appellant put his hand over her mouth and ordered her to undress. He removed her panties, held her down with such force that she suffered multiple abrasions on both legs and feet and raped her, both vaginally and anally. That she, too, struggled fiercely, was evident from the fact that some sections of her hairpiece were found on the floor next to the bed and that the appellant was found with a wound on his finger where she told the police she had bit him.

[7] She described the pain the rape caused her. The doctor testified that she was still so shocked and traumatised the next morning that it took a long while before she could even

be examined. When she was, the doctor found definite signs of vaginal penetration which left various lacerations, numerous abrasions, tearing, bleeding, and inflamed vaginal organs and an absent hymen. She also found obvious forceful anal penetration with ejaculation which left a 1 cm tear between the anus and the vagina, the significance of which the doctor described as follows:

“... it was lacerated because he had to tear it open to get in.”

- [8] It is clear, therefore, that both crimes were committed with extreme brutality. The court *a quo* accordingly imposed severe sentences.
- [9] On count 1 the trial court found the appellant guilty of *“housebreaking with intent to murder and murder”*. Yet it found the form of intent to have been “at least *dolus eventualis*” and, without making a finding of premeditation or preplanning, imposed a sentence of life imprisonment.
- [10] The question, then, is whether the sentence was competent in view of the findings above.

[11] In order to determine that, several issues need to be examined, namely:

11.1 whether the conviction of “housebreaking *with intent* to murder” is reconcilable with the finding of *dolus eventualis*;

11.2 whether such conviction necessarily implies premeditation or preplanning;

11.3 whether the trial court was correct in not explicitly finding that the murder was premeditated, and

11.4 whether it was competent for the trial court to impose life imprisonment in the absence of an explicit finding of direct intention or preplanning or premeditation.

[12] The first question, then, is whether a finding of “housebreaking **with intent to murder** and murder” is reconcilable with a finding of *dolus eventualis*. Both counsel argued that, in the circumstances of the case, it was not.

[13] Intent can occur in three forms: *dolus directus*, *dolus indirectus* and *dolus eventualis*. Intent in the form of *dolus eventualis* or ‘legal intention’, which is present when the perpetrator objectively foresees the possibility of his act causing death and persists regardless of the consequences,

suffices to find someone guilty of murder. See in this regard **S v SHAIK AND OTHERS** 1983 (4) SA 57 (A) at 62 A – B.

[14] *Dolus directus*, on the other hand, known as “*intention in its ordinary grammatical sense*”, is present when the accused’s aim and object is to bring about the unlawful consequence, even should the chance of its resulting be small. See Burchell: **Principles of Criminal Law**, 3rd ed, at 251.

[15] In **S v DE BRUYN EN 'N ANDER** 1968 (4) SA 498 (A) at 500, 502 – 503, 506 and 511 it was stressed that legal intention to murder does not *per se* connote a lesser degree of blameworthiness than actual intention. It is sufficient if the accused foresaw the possibility of the existence of the circumstance and was reckless as to whether it existed or not, that is, if he had legal intention or *dolus eventualis*.

[16] *In casu* the trial court found the appellant guilty of “at least” *dolus eventualis*, which leaves the door open for an

inference that the appellant could have acted with a more direct form of intent than *dolus eventualis*.

- [17] It is not always easy to pin-point where the one form of intent stops and the next begins. It has been found, however, that murder by strangulation or, as *in casu*, suffocation, involves a deliberate act “designed to be effective”, in other words, designed to cut off the airflow to the victim’s lungs and brain. And as aptly stated in **R v LEWIS** 1958 (3) SA 107 (A) at 109:

“... *in order to be effective it had of necessity to be severe, continuous and of some duration.*”

- [18] Though in **R v LEWIS**, *supra*, the court made no explicit finding as to *dolus directus* or *dolus eventualis* despite the reference to “*a deliberate act*”, it found that the assailant had to have realised or at least recklessly disregarded the probable consequences of his ‘deliberate’ act. It therefore also opened the way for an inference of “at least” *dolus eventualis*.

[19] In **S v OLIVIER** 2007 (2) SACR 596 (C) the court with reference to the strangulation of a 6-year old boy with a telephone cord, did expressly find that

“the only reasonable inference that the court can draw is that [the accused] had the direct intention [i.e. dolus directus] to kill him.”

[20] On the evidence *in casu* it would be difficult to find that the murder was not committed with direct intent. On the medical evidence the deceased died of suffocation due to a lack of oxygen resulting in the accumulation of fluid in lungs and brain, leading to a massively swollen brain and asphyxiation. On the complainant’s version the appellant pulled a white plastic bag over the deceased’s head and ‘strangled’ her. This is corroborated by a bloodstained white plastic bag found at the murder scene. As stated in **R v LEWIS**, *supra*, for this to lead to the deceased’s death the act must have been of some duration and must have been committed with determination.

[21] It is common cause that, when the deceased tried to escape through the window, the appellant pulled her back into the room. This was objectively confirmed by the blood on the curtains and the window sill as well as on the outside wall, whereas the deceased was found next to the bed. The conclusion seems inescapable that the appellant wanted the deceased dead: he did not stop until she was dead, even when he had the opportunity to do so. On that basis one could argue that he acted with the same direct intention that was found regarding the strangulation in **S v OLIVIER**, *supra*.

[22] Although the appellant was convicted of housebreaking **with intent to** murder, the trial court made no express or explicit finding of premeditation or preplanning, either. Mr. Hiemstra, for the State, argued, however, that, by imposing a sentence of life imprisonment, the trial court appeared nonetheless to have regarded the murder as preplanned or premeditated.

[23] *Dolus directus* and premeditation/preplanning are not

synonymous. While premeditation obviously results in *dolus directus*, the converse is not true. That is clear from the case law.

[24] What constitutes ‘premeditated or planned’ murder was described as follows in the full bench appeal, **S v RAATH** 2009 (2) SACR 46 (C) at p. 53 par. [16]:

“Clearly the concept suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and one which had been conceived and planned over months or even years before its execution... Only an examination of all the circumstances surrounding any particular murder, including not least the accused’s state of mind, will allow one to arrive at the conclusion as to whether a particular murder is ‘planned or premeditated’. In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was ‘planned or premeditated’.”

[25] *In casu* no such examination was explicitly done and no explicit finding of premeditation was made. It is left to this court then to examine the circumstances to see if the failure to make such finding is correct. To that end we examined applicable case law.

[26] In **S v RAATH**, *supra*, the appellant shot and killed his wife. Despite “*ample evidence of the appellant’s violent behaviour towards the deceased in the months preceding the shooting*” the court found at p. 53 par. [16] that:

“there was nothing to suggest that he conceived an intention or plan to shoot or kill the deceased before the night in question or, for that matter, before [his son] entered the house.”

[27] The court found, furthermore, that:

“the accused was angered by the fact that his wife and children were not at home and had not returned home by the early hours of the morning and when [his son] was sent home to find out whether everything was in order, his anger seems to have turned into rage... At worst for the appellant it was then that he conceived the idea of killing

the deceased, using his firearm. Thereafter... he retrieved his firearm from the safe, violently pushed [his son] aside and, storming out of the house, crossed the road and shot the deceased just *as she emerged from the neighbour's house.*"

[28] The court found, too, that:

"no more than a matter of a few minutes had passed between the appellant's eruption into rage and the shooting of the deceased. While it was correct that from the moment he appeared to conceive the idea of shooting his wife, the appellant brooked no opposition and almost immediately proceeded to carry out the murder, this did not, in the court's view, transform what appears to have been a deadly, but spur-of-the-moment act or acts of a man *in an emotional rage, into a planned and premeditated murder.*"

[29] Although he shot his wife point blank, with direct intent, therefore, the court did not regard the murder as premeditated or planned.

[30] In order to determine whether the sentence of life imprisonment *in casu* was proportional to the crime, one therefore needs to distinguish between premeditated or pre-

planned murder and *dolus directus* which relates to the manner in which the murder was perpetrated.

- [31] The clearest such distinction appears in **S v BALOYI** 1994 (1) SACR 430 (A) at 709, where the court listed five aggravating factors in considering the imposition of the death penalty.

The first was that the murder was premeditated, which finding was based on the fact that:

“the appellant [had] travelled a considerable distance to reach the hut in which the deceased lived and arrived there with petrol he had bought to enable him to carry out his plan.”

The second was that *“he [had] acted with dolus directus”* which finding was based on the fact that he deliberately set fire to the hut in which he knew the deceased to be.

- [32] In **S v ZONDI** 1992 (2) SACR 706 (A) at 709 the court based its finding that the murder was *“not only premeditated but carefully planned”* on the fact that:

“The appellant used his own car to drive to the bottle store of the deceased after having taken the precaution of removing its number plates in order, obviously, to make identification more difficult. The way in which he drove up to the bottle store and turned his car around so as to facilitate the quick ‘get-away’ after the commission of the crime is but another facet of his careful planning... He returned to the car, armed himself with a pistol, returned to the store and shot the deceased in the head.”

The court found his point blank shooting of the deceased to be *“clearly dolus directus”*.

[33] In **S v KHIBA** 1993 (2) SACR 1 (A) at p. 3 where the appellant shot the deceased in the chest, the Appeal Court found that the shot was fired with *dolus directus* and not with *dolus eventualis* as the trial court found. The Appeal Court found that:

“the inference that the appellant fired at the upper part of the deceased’s body at a range of a mere 5 metres with the direct intention of killing him, is irresistible.”

[34] In **S v KHIBA**, *supra*, the court found, in addition, a preconceived plan to attack the deceased. The Appeal Court found that:

“it seems clear from the evidence, and particularly from appellant’s confession that the three accused had planned this attack on the deceased and his wife carefully. The plan seems to have been to waylay the deceased outside his house while he was about his farming activities and to kill him so that they could plunder his home with comparative ease. To this end they approached the farmhouse on a Saturday evening. A suitable opportunity for a successful attack on the deceased, however, did not present itself. And so it came about that they returned to the scene early on the Sunday morning. While the deceased was waiting alone at the paddock gate one of his assailants must have come up quietly from behind and inflicted a wound on his back with a panga. As he swung around, to face his attacker another assailant stabbed him in the chest with a pitchfork. Appellant then shot him in the chest.”

The shooting was found to be with direct intent.

[35] In **S v OLIVIER**, *supra*, at 611 C – D, par. [41], too, a

distinction was made between premeditated murder and *dolus directus*. On the evidence the appellant saw the victim's family on the beach the previous day and greeted the victim, then followed them home. While his 6-year old victim was playing outside his own home, the appellant accosted and lured him away, sexually assaulted him, and on his own version murdered him to prevent identification and possible testifying against him. Based on that evidence, the court found the murder to have been premeditated. The court also made a separate finding regarding the strangulation with a telephone cord, namely that:

“from the manner in which it had been carried out, the only reasonable inference was that the accused had had direct intention to kill”.

[36] In **S v MBANYARU AND ANOTHER** 2009 (1) SACR 631 (C)

a distinction was also made between direct intention to kill and preplanning or premeditation. The court found that the close range at which the shots were fired at the deceased shows that direct intention to kill was present. From the fact that while the deceased was waiting for his workmen to

arrive, the appellant appeared and without saying a word, shot the deceased and then ran away and the fact that no motive was advanced for the murder the court found that:

“the only reasonable inference I can draw is that the murder was planned or premeditated as envisaged in section 51(1) of the Act.”

[37] Also in **S v FRANCIS** 1999 (1) SACR 650 (SCA) at p. 662 par. [29] the court in analysing the evidence to ascertain whether there was premeditation, found a clear and consistent pattern emerging. It found that towards the end of 1994 the appellant bought a pistol and made a practice of carrying it with him.

“There could be no mistake about his undisputed threats that he was going to find (the appellant) and (the deceased) dead in the room. On the night of the shooting he entered the home with the loaded pistol. In firing the fatal shot at the deceased he merely fulfilled ‘the whole design that he had been threatening for some time’.”

The murder was therefore found to be premeditated.

[38] As for the nature of the appellant's intent, the Appeal Court found at p. 662, par. [29] and [30] that the appellant should have been convicted on the basis of *dolus directus* because:

“when he fired the fatal shot, he held the pistol with two hands and the trajectory of the bullet was consistent with the typical execution shot.”

[39] In view of the cases cited above, it is apparent that in order for the murder to be found to be premeditated or planned, the court has to examine all circumstances, including the accused's state of mind. In doing so the court has to keep in mind that the concept of premeditation or planning suggests a deliberate weighing up of the proposed criminal conduct, as opposed to the commission of a crime on the spur of a moment. The period elapsing between the accused forming the intention to kill, and carrying out that intention, is of cardinal importance as stated in **S v RAATH** 2009 (2) SACR 46 (C).

[40] *In casu*, there is no evidence of premeditation or preplanning, however, whether direct or circumstantial, as Mr. Hiemstra correctly conceded.

[41] There is no evidence that the appellant came prepared to murder the deceased or brought along the murder weapon, a white plastic bag “*in which flour is kept*”, or any other weapon.

[42] There is no evidence of any special arrangements or special preparations or precautions or plans to enable the appellant to execute the murder.

[43] There is no evidence, either, that he had held a grudge against the deceased or had threatened her prior to the attack. The mere fact that he kicked open the door during the night certainly does not prove that at that stage he had already planned to kill the deceased. Which leads one to question the correctness of the finding of “housebreaking with intent to murder” rather than, for instance, “housebreaking with intent to commit robbery” although this would be purely academic in view of the fact that permission to appeal was granted regarding the sentences only.

[44] His motive to kill the deceased appears to have been money, the recovery of which forms a recurring theme in the complainant's evidence; the appellant's brother's evidence; the appellant's confession and the appellant's testimony. On his own version, corroborated by the complainant's evidence, the deceased's refusal to give him money triggered the fatal attack:

“toe word my hart seer en ek het vir haar geklap...”

[45] There appears to have elapsed no or minimal time between his getting angry and his murderous attack on the deceased. The murder *in casu* therefore seems to be one committed on the spur of the moment, like the one in **S v RAATH**, *supra*. The circumstances appear to preclude premeditation and preplanning and in our opinion the trial court acted correctly in not making an explicit finding of preplanned or premeditated murder.

[46] The next question, then, is whether it was competent to

impose the sentence of life imprisonment in the absence of premeditation or preplanning. Section 51(1) of the Criminal Law Amendment Act (“the Act”) 105 of 1997, as amended, as read with Part I of Schedule 2 thereto requires for the prescribed minimum sentence of life imprisonment to be applicable in a murder case, not merely *dolus directus*, but that the murder must have been “*planned*” or “*premeditated*”.

[47] Had the appellant been convicted of premeditated murder, the provisions of section 51(1) of the Act read with Part I of Schedule 2 thereto and therefore the prescribed minimum sentence of life imprisonment would have been applicable. Since premeditation was not proved, section 51(1) does not apply.

[48] The murder therefore falls under Part II of Schedule 2, and since the accused was a first offender, the trial court was obliged to impose a minimum sentence of 15 years’ imprisonment unless it found substantial and compelling circumstances to be present, which it did not.

[49] The second question, then, is whether it was competent for the trial court to impose life imprisonment despite the prescribed minimum of 15 years being applicable.

[50] One has to bear in mind that the provisions of Act 105 of 1997 prescribes a minimum and not a maximum sentence, and we agree with Bozalek J in **S v RAATH**, *supra*, at p. 54, par. [20] that:

“it is thus open to the court, in appropriate circumstances, to impose a heavier sentence, including life imprisonment, even though, prima facie, [the appellant] qualifies for a lesser minimum sentence.”

- [51] Clear authority for the approach adopted by the trial court in imposing the sentence of life imprisonment is found in **S v KHOZA AND OTHERS** 2010 (2) SACR 207 (SCA) at p. 88. In the latter case, the appellants had been convicted on counts of robbery with aggravating circumstances in a cash-in-transit robbery. As first offenders, since their conviction fell within the purview of Part II of Schedule 2 of the Act, 15 years imprisonment was the applicable prescribed minimum sentence. The trial court had found no substantial and compelling circumstances that would justify the imposition of a lesser sentence. It found, on the contrary, that such prescribed minimum sentence would be too lenient and imposed sentences ranging from 21 years to 23 years imprisonment. On appeal, the Supreme Court of Appeal confirmed the sentences on the basis that they were commensurate with the seriousness of the offences, the

circumstances of the appellants and the interests of society.

[52] It would seem to us that it would have made no sense for the trial court to have first engaged in the enquiry of whether there were substantial and compelling circumstances that would justify the imposition of a lesser sentence than the prescribed minimum sentence of 15 years imprisonment, when it was of the firm view that the imposition of the latter sentence would be too lenient. That would, in fact, serve no purpose and would be absurd. The cardinal question on appeal is whether the sentence of life imprisonment imposed on count 1 was shockingly inappropriate, thus entitling this court to interfere therewith. This calls for a consideration of both the mitigating and aggravating circumstances in the matter.

[53] The following mitigating factors were recorded:

53.1 that the appellant was 21 years of age at the time of commission of the crimes;

53.2 that he had only passed std. 6;

53.3 that he had no dependents;

53.4 that he was a contract worker;

53.5 that he was a first offender;

53.6 that he had spent nearly seven months in custody whilst awaiting trial;

53.7 that he had consumed alcohol before committing the crimes; and

53.8 that he was found to have committed the murder on the basis of at least *dolus eventualis*.

Of all these factors those that call for a full assessment are

the applicant's age and level of education, his status as a first offender, the fact that he had consumed alcohol and the finding that the murder was committed on the basis of *dolus eventualis*. We deal hereunder with each of these factors.

The appellant's age and level of education

[54] No evidence was presented that would have enabled the trial court to assess the effect of either the appellant's age or his level of education on his culpability or his moral blameworthiness.

[55] In **S v MABUZA AND OTHERS** 2009 (2) SACR 435 (SCA) at par. [23] Cachalia JA found that although youthfulness can in certain circumstances constitute substantial and compelling circumstances, the legislature:

“... in requiring a sentencing court to depart from the prescribed sentence in respect of offenders who have attained the age of 18 only if substantial and compelling circumstances justify this departure... has clearly intended that youthfulness no longer be regarded as per se a mitigating factor.”

[56] In **S v MATYITYI** 695/09 [2010] ZASCA 127 at par. [14] it

was said that:

“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 factor.”

[57] *In casu* no such evidence was presented and the appellant's age can at best for him only serve as a neutral factor.

Status as a first offender

[58] The appellant's status as a first offender has already been catered for in the prescribed minimum sentence of 15 years (instead of 20 for a second offender, etc) and therefore can be disregarded as a further mitigating factor regarding the murder.

[59] Only two of the other factors listed by the court *a quo in casu* could potentially be of any real significance in mitigation, namely, the finding of at least *dolus eventualis* and the appellant's alcohol consumption before committing the crimes.

Appellant's alcohol consumption

[60] *In casu* no reliable evidence was introduced as to the extent of the appellant's alcohol consumption or on how it affected his conduct. His brother testified that they had spent the day together and had "*had some drinks*" at a tavern. Then he averred that by the time he left, the *appellant* "*couldn't have been under the influence because he only had one beer at that stage*".

[61] The appellant himself offered various versions of his drinking: at first he alleged that he and some other people had bought and shared a case of beer and later that he had brought and drank four 750 ml beers. What is important, however, is that on his own version he "*was drunk*" "*but not that drunk*". His conduct and actions during the murder and the rape certainly show that his faculties were not substantially impaired.

[62] In the absence of any reliable evidence as to the amount of

alcohol consumed, or as to how it affected the appellant's actions and his culpability, therefore, no great weight could be attached to that factor.

The finding of at least *dolus eventualis*

[63] The only other potential mitigating factor of any real consequence as far as the murder is concerned, therefore, seems to be the form of intent found to have been at least *dolus eventualis*. In most instances, such as in the full bench decision in **S v BROPHY AND ANOTHER** 2007 (2) SACR 56 (W) at [13], a finding of *dolus eventualis* was explicitly identified as a mitigating factor on which to base, in combination with such ordinary factors as youthfulness and being a first offender, a finding that substantial and compelling circumstances existed to justify the imposition of a lesser sentence than the prescribed minimum of life imprisonment.

[64] Each case has to be decided on its own merits. However, as set out above, we are of the opinion that in the

circumstances of this case appellant acted with direct intent.

[65] There are therefore, in our view, no significant mitigating factors in this case. The aggravating factors, on the contrary, are significant and severe.

[66] In sentencing, the trial court considered the following aggravating factors:

[67] That the appellant had entered the deceased, a vulnerable middle-aged woman's house which was supposed to be her safe haven by violently kicking in the door;

[68] That the brutal attack happened in the middle of the night when the victim was asleep and at her most vulnerable;

[69] That the appellant demanded a negligible amount of money apparently to pay his liquor account and when the deceased could not provide the money, killed her;

[70] That the appellant never showed any remorse: See in that regard the discussion of the ‘chasm’ between regret and remorse in **S v MATYITYI**, *supra*, at par. [13]. *In casu*, the appellant showed neither one;

[71] That the murder left the deceased’s daughter and granddaughter motherless.

[72] We agree with Mr. Hiemstra that the following aggravating factors are extremely serious:

[73] That the appellant acted in the early hours of the night when his victims were at their most vulnerable. In **S v Khiba**, *supra*, at p. 4 Eksteen JA, as he then was, listed numerous cases, such as **S v Khundulu and Another** 1991 (1) SACR 470 (A); **S v Makie** 1991 (2) SACR 139 (A); **S v Ngcobo** 1992 (1) SACR 544 (A); **S v Jordaan** 1992 (2) SACR 498 (A) and **S v Mofokeng** 1992 (2) SACR 710 (A) in which death sentences were confirmed on appeal:

“reflecting the gravity with which [the Appeal Court] regards

murderous attacks on victims in their own homes”;

[74] That the deceased *in casu* was killed for a negligible amount of money: if the two brothers are to be believed, for a mere R50 to R150. For that, as Mr Hiemstra submitted, the appellant murdered the grandmother deliberately and determinedly in front of her grandchild in what was evidently a terrible struggle, which in itself must have been extremely traumatic for the child, and the appellant immediately followed up the murder with the rape of a tiny sexually immature 9-year old child who had just experienced the extreme agony and trauma of witnessing her grandmother’s murder;

[75] That the appellant chose to strangle and/or suffocate the deceased, which as Mr. Hiemstra submitted, is “*always a particularly ‘intimate’*” form of murder in which the murderer can literally feel the life being extinguished beneath his hands in a slow, deliberate process during which he needs to keep the deceased under continuous restraint, the result of which was said in **R v LEWIS** 1958 (3) SA 107 (A) at 109 E

must be clear to “*even the most dull-witted individual*”;

[76] That the appellant showed no remorse: in fact, he kept changing his version from a confession to at least having hit the deceased and slept with the child, to a total denial of having done anything at all. As found in **S v LANGA** 2010 (2) SACR 289 (KZP) at p. 310 there is no indication that the appellant *in casu* is a good candidate for rehabilitation.

[77] The enactment of the minimum sentence provisions certainly did not strip the superior courts of their inherent jurisdiction to impose life imprisonment in appropriate circumstances. In imposing the ultimate sentence for the murder the trial court started out from the prescribed minimum sentence of 15 years’ imprisonment, but found that the circumstances of this case called for the imposition of “*the heaviest sentence this Court is entitled to impose*”. The trial court described as an ‘anomaly’ in the Act ...

“dat die Wetgewer ‘n swaarder vonnis voorskryf in hierdie saak ten opsigte van die verkragting as in die geval van die moord.”

[78] The trial court further commented as follows:

“Hierdie Hof is egter van mening dat as dit kom by straftoemeting dit in verhouding moet wees met die erns van die misdryf en die heersende omstandighede wat ter sprake is. Om die lewe te neem van ‘n medemens ag ons in hierdie huidige saak baie ernstiger as die verkragting wat hier ter sprake is.”

[79] We are of the opinion that in the circumstances of this case life imprisonment for the murder is not excessive or disproportionately harsh.

[80] Now the appellant has also challenged the sentence of 20 years imprisonment on count 2 (rape). However, Mr. Reyneke, who argued the appeal on his behalf, did not seriously challenge it and was content to suggest that 18 years imprisonment would be more appropriate, which is not a sufficient ground to justify interference with the sentence. On the other hand, Mr. Hiemstra, for the State, submitted that the sentence was appropriate and supported it. Both legal representatives supported the finding of the trial court

that there were substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed minimum sentence of life imprisonment.

[81] We do not, with respect, agree with the finding of the court *a quo* that there were indeed substantial and compelling circumstances justifying a departure from the prescribed minimum sentence in this case, but it is unnecessary to elaborate, given that we are not at liberty to increase such sentence in view of the fact that there was no cross appeal and the appellant has not been warned that it may be increased. At any rate, a second life imprisonment would have run concurrently with the life imprisonment imposed on count 1 in much the same way that the 20 years imprisonment will run concurrently with the life imprisonment imposed on count 1.

[82] In the result, the appeal is dismissed and the sentences imposed by the trial court are confirmed.

H.M. MUSI, JP

H. MURRAY, AJ

I concur.

A.F. JORDAAN, J

On behalf of appellant:

Mr. J.D. Reyneke
Instructed by:
Legal Aid SA
BLOEMFONTEIN

On behalf of respondent:

Adv. J.H.S. Hiemstra SC
Instructed by:
Director Public Prosecutions
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