IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case Number: A149/2019

THEKISO BETHUEL MALI AND ANOTHER Appellant

and

THE STATE Respondent

CORAM: **MBHELE, J *et* MOLITSOANE, J**

JUDGEMENT BY: **MBHELE**, J

HEARD ON: **03 FEBRUARY 2020**

DELIVERED ON: **30 APRIL 2020**

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[1] The appellants were convicted by the Regional Magistrate, Welkom, of 2 counts: viz, murder and defeating the administration of justice. They were both sentenced to 20 years imprisonment and 10 years imprisonment on 20 October 2017. Aggrieved by the sentences, the appellants approached this court on appeal with leave of this court.

[2] In their notice of appeal the appellants contended that the sentences imposed induce a sense of shock and are inappropriate. They, further, contended that the court erred in not taking into consideration the fact that they were first offenders and further that the court over emphasized the seriousness of the offence and the interest of society at their expense.

[3] The two appellants were sharing premises with the deceased on the farm, Wonderkop, near Welkom. On 23 December 2015 the deceased arrived at the 3rd state witness' house and found the appellants drinking in company of the first, second and third state witnesses (state witnesses). He came to report that he found windows at his house broken. He left soon thereafter and the appellants followed him after about 20 minutes. The state witnesses went to the deceased's house after they heard noise and found the appellants assaulting the deceased. The first appellant was throttling the deceased while the second appellant was sitting on top of him pinning his lower body down to the ground. The second state witness, Lehlohonolo tried to intervene and the second appellant who was brandishing a knife threatened to stab him and gave a chase after him. The appellants were later seen by the witnesses carrying the deceased and walking towards

the bushes. The deceased was last seen carried by the appellants and his body was discovered 5 days later in a shallow grave in the bushes, decomposed. According to the post mortem report he died as a result of strangulation.

[4] The issue in this appeal is whether the trial court erred in not ordering sentences in count 1 and 2 to run concurrently.

[5] Before us, Mr Straus, counsel for the respondent, conceded that the appellants' age, circumstances around which the offences were committed and the fact that they were first offenders who spent two years in prison render the 10 years imprisonment imposed by the court a quo in count 2 shockingly inappropriate. In his view the sentence of 5 years imprisonment would be appropriate in count 2 and it should run concurrently with the sentence in count 1. He, further, submitted that section 51 (2) of the General Law Amendment Act fits the circumstances of this matter.

[6] The sentencing powers are pre-eminently within the judicial discretion of the trial court, the court of appeal should be careful not to erode such discretion. The court sitting on appeal will interfere if the sentencing court exercised its discretion unreasonably or in circumstances where the sentence is adversely disproportionate. See **S v Rabie 1975 (4) SA 855 (A) AT 857 D-E also S v De Jager and Another 1965 (2) SA 616 (A)**

[7] When sentencing, the court must consider the main objectives of punishment, being the prevention of crime, retribution, the deterrence of criminals, and the reformation of the offender. Simultaneously, the court must strike a balance between the crime, the offender and the interest of society. The court should also take into consideration the provisions of Section 51 of The Criminal Law Amendment Act 105 of 1997 (The Act) where applicable. In the end, the appellant as an individual must be sentenced.

[8] In **S v Mudau 2013 JDR 0938 (SCA)** para 13. Madjiet JA, as he then was, remarked as follows:

> "I hasten to add that it is trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualized, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity. . ."

[9] It is so that sentence must be tailored to suit the offender, the crime and the circumstances surrounding the case. In sentencing, a 'one size fits all approach' does not translate into fairness and justice. Every case presents its own considerations, ranging from the facts and circumstances of the offence to the personal circumstances of the offender and the sentencing court must give due regard to all these factors.

[10] The trial court found that there are substantial and compelling circumstances warranting deviation from the prescribed sentence in count 1 of murder. It is, however, not clear from both the charge sheet and the trial record which prescribed sentence the trial court deviated from. The charge sheet reads as follows:

> 'That the accused are guilty of the crime of murder (read with the provisions of Section 51 of the Criminal Law Amendment Act 105 of 1997)' (The Act)….'

[11] The record does not show that the appellants were warned of the applicability of the provisions of the Act. Upon perusal of the record, it is not clear which subsection of section 51 of the Act was invoked. The trial record, charge sheet, judgment and sentence are silent on this issue. The imposition of 20 years after the trial court deviated from the prescribed minimum sentence brings one to an assumption that section 51 (1) of the Act was invoked.

[12] The appellants did not specifically raise the non- applicability of s51(1) as a ground of appeal. I am, however, enjoined to consider that aspect in adjudicating whether the sentence imposed is shockingly appropriate. Having considered the facts of this matter I am not of the view that section 51 (1) finds application in this matter. There is no evidence that the murder was pre-meditated. There is no evidence that this murder was committed by a group of persons pursuing a common purpose. None of the other jurisdictional facts applicable to s51(1) were present in this case. In my view the facts of this case rather establish the applicability of s51(2) of the Act which prescribes a minimum sentence of 15 years imprisonment. The magistrate misdirected himself when he

assumed the harshest sentence without explaining it to the appellants and providing reasons for arriving at such sentence.

[13] The offences committed by the appellants are undoubtedly very serious ones. The deceased was murdered in his house, his sanctuary, by people he was familiar with and he trusted. He was murdered by people who knew him better and were supposed to be his protectors.

[14] The appellants brutally battered a defenseless man even after he slumped to the ground in defeat. The attack continued long after he lied on the ground with no strength to fight back. The appellants had an opportunity to stop the attack but they unleashed violence even on the person who tried to lend a helping hand to the deceased. He was strangled to death and his body was taken to a secluded place where they buried it in a shallow grave to avoid detection. The deceased would have become part of the statistics of missing persons had the witnesses not kept a vigilant eye on the appellants.

[15] In ***S* v Malgas 2001 (1) SACR 469 SCA** it was held that courts are required to regard the prescribed sentences as "being *generally appropriate'* for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so.

[16] Mandatory sentences are not intended to strip judicial officers of their ability to devise punishments that fit specific crimes and offenders and to temper such sentences with mercy if

circumstances warrant. As stated *supra*, punishment must be proportionate to the offence.

[17] I turn to deal with personal circumstances of the appellants. The first appellant was a first offender who was 23 years of age at the time of sentencing, single, employed at Wonderkop farm with grade 5 as his highest school qualification and he was staying with his mother. The second appellant was a first offender, 27 years old, single father of a 5 year old daughter, employed at Wonderkop farm with grade 7 as his highest qualification.

[18] The trial court found the existence of substantial and compelling circumstances and we find no reason to disturb such conclusion. When weighing up the mitigating factors against the aggravating circumstances, this matter as well as the interest of community, I am persuaded that justice will be served if the sentence imposed by the trial court is overturned. Upholding it would be to deny the appellants a fair trial while turning a blind eye to all the other objectives of punishment and the provisions of the Act. They committed the offence while under the influence of alcohol. Owing to the misdirection committed, we are obliged to interfere with the sentences.

[19] The peculiar circumstances of this matter and the fact that the appellants after they had committed the murder went further to hide the body, still calls for the imposition of long imprisonment terms. Had the appellants succeeded to hide the deceased's remains forever this would have denied the family of the deceased a right to bury their own. The act would have denied them some

form of closure. We are accordingly of the view that it would not be appropriate to order the sentences we intend to impose to run concurrently. The appeal ought to succeed.

ORDER

[20] The following order is made:

1. The appeal is upheld;
2. The sentences in count 1 and 2 are set aside and replaced with the following sentences:

   The appellants are sentenced to 13 years imprisonment in count 1 and 5 years imprisonment in count 2.
3. The sentences are antedated to 20 October 2017.

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N.M. MBHELE, J

I concur.

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P.E. MOLITSOANE, J

On behalf of the appellant: Adv. V. Abrahams
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of the respondent: Adv. Strauss
Instructed by:

Director: Public Prosecution
BLOEMFONTEIN