Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: A 562/07

In the matter of

1.	**SIPHO MONGEZI MFAZWE**	**First Appellant**
2.	**MONGEZI BOBOTYANE**	**Second Appellant**
3.	**DINA MANUELA RODRIGUES**	**Third Appellant**
4.	**ZANETHEMBA GWADA**	**Fourth Appellant**
5.	**BONGINKOSI SIGENU**	**Fifth Appellant**

and

THE STATE	**Respondent**

DISSENTING JUDGMENT DELIVERED : 29 OCTOBER 2009

MOOSA J:

The Issue

[1] The crisp legal issue that has to be determined in this appeal on sentence, aside from the factual issues, is: Can the trial court, after having found that substantial and compelling circumstances exist as envisaged in subsection 51(3)(a) read with subsection

(1) of the Criminal Law Amendment Act No, 105 of 1997 ("the Act"), exercise its sentencing discretion to impose life imprisonment? This question impacts on Appellants 1, 2 and 3 who were sentenced to life imprisonment on the charge of murder. A useful point of departure is to ascertain the intention of the legislature as reflected in subsection 51(3)(a) and as it obtained at the time sentences were handed down in this matter.

The Law

[2] The relevant sections of the Act are set out hereunder for the sake of convenience.

(a) Section 51(3)(a) reads as follows:

"If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence."

(b) Subsection (1) reads as follows:

"Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall –

(a) if it has convicted a person of an offence referred to in Part 1 of Schedule 2; or

(b) if the matter has been referred to it under section 52(1) for sentence after the person concerned has been convicted of an offence referred to in Part 1 of Schedule 2,

sentence the person to imprisonment for life."

Substantial and Compelling Circumstances

[3] The Act does not define what constitutes substantial and compelling circumstances. Our courts have over time explained what is understood by the term

"substantial and compelling circumstances" as envisaged in the Act. The *locus classicus* in that regard is the case of **S v Malgas** 2001 (1) SACR 469 (SCA) as confirmed in the case of **S v Dodo** 2001 (1) SACR 594 (CC) and reinforced in the recent case of **S v Vilakazi** 2009 (1) SACR 552 (SCA).

[4] In **S v Malgas** *(supra)* at para 25, **Marais JA**, writing for the court, said, *inter alia*,

(i) that section 51 has limited, but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in subsections (1) and (2);

(ii) that courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment or prescribed term of minimum imprisonment as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances;

(iii) that all factors traditionally taken into consideration continue to play a role in the sentencing process;

(iv) that the ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick, that is, "substantial and compelling circumstances" and must be such as to cumulatively justify a departure from the prescribed minimum sentences that the Legislature has ordained; and

(v) if the sentencing court, on consideration of the circumstances of the particular case, is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

The Enquiries

[5] Section 51 postulates two enquiries. The first is to determine whether there are substantial and compelling circumstances to warrant a departure from life imprisonment or a prescribed minimum sentence. If the court finds that there are no substantial and compelling circumstances to impose a lesser sentence, the court is then obliged to impose the prescribed sentence. If the court should find that there are substantial and compelling circumstances to impose a lesser sentence, the second enquiry kicks in and that is to determine an appropriate sentence.

[6] In the first enquiry, the court puts all the aggravating and mitigating circumstances, which would include the seriousness of the crime, the interest of society and the personal circumstances of the accused, into the scale. The object is to determine whether there are substantial and compelling circumstances to warrant the imposition of a lesser sentence than that prescribed. In that process the court makes a value judgment. Once the court finds that there are substantial and compelling circumstances, the court is relieved from imposing life imprisonment or a prescribed sentence for the specified offences.

[7] If a court, despite such finding in the second enquiry, proceeds to impose life imprisonment or a prescribed sentence or one exceeding that, such sentence would amount to a miscarriage of justice because in the words of **Marais JA** in **Malgas** *(supra)* at para 25I the *"prescribed sentence would be unjust in that it would be disproportionate to the crime, the criminal and the needs of society".* If a court is of the view that the seriousness of the offence calls for the imposition of life imprisonment or a prescribed sentence as provided for in section 51, then it flies in the face of logic to find that there are substantial and compelling circumstance to impose a lesser sentence. If such were the case, the court in the first place should have found that there were no substantial and compelling circumstances to impose a lesser sentence.

[8] I disagree with the state's submission that the trial court has its normal discretionary sentencing power, as if the minimum sentencing legislation has not been passed, once it has found that substantial and compelling circumstances exist. In my view the discretion of the sentencing court has been circumscribed by the Act, the extent thereof is dependent on whether in a particular case substantial and compelling circumstances are found to exist or not. The authorities quoted by the state, do not support its contention.

[9] In the case of subsection 51(3)(a) read with subsection (1) of the Act, if no substantial and compelling circumstances are found to exist, the court has no discretion but to impose life imprisonment. However, should the court in such case find that substantial and compelling circumstances exist to impose a lesser sentence, then the residual discretion of the court is circumscribed in that the court is obliged to impose a sentence other than life imprisonment in accordance with the doctrine of proportionality by taking into consideration that the Legislature has ordained life imprisonment for such scheduled offence in the absence of substantial and compelling circumstances.

[10] In the case of subsection 51(3)(a) read with subsection (2), if no substantial and compelling circumstances are found to exist, in my view, the discretion of the court is circumscribed to the extent that it is free to impose any sentence depending on the circumstances of the case, but not less that those prescribed. However, should the court find substantial and compelling circumstances exist to impose a lesser sentence, the residual discretion of the court to impose sentence is circumscribed to the extent that it is obliged to impose a sentence other than those prescribed but in accordance with the doctrine of proportionality by taking into consideration that the legislature has ordained a

prescribed sentence for such scheduled offence in the absence of substantial and compelling circumstances.

[11] Marais JA in **S v Malgas** *(supra)* at 477g-i makes the following observation:

> *"It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that. There is no indication in the language it has employed that it intended the enquiry into possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically different way, namely, by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration."*

Marais JA continues at 481f-g to discuss the nature of the residual discretion and the question of proportionality as follows:

> *"What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect and not merely pay lip service to, in the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."*

The Interpretation of the Impugned Provision

[12] I now turn to the interpretation of section 51. It appears that there is some ambiguity in the provisions of the section. On the one hand, the court is required to make a value judgment whether or not to impose a lesser sentence than life imprisonment or a prescribed sentence. On the other hand, once the court has made such value judgment, it appears that the court is given a discretion by virtue of the use of the word "may", either to impose or not to impose a lesser sentence. They are contradictions in terms and mutually destructive. The Legislature could never have intended such an anomaly.

[13] The use of the word "may" in section 51(3)(a), which reads *"…and **may** thereupon proceed to impose a lesser sentence"* is an unfortunate choice of word. Insofar as the section is not clear, a purposive approach to the interpretation of the impugned section should be adopted. In such approach consideration should be given to the language in which it is couched, the context in which it appears and the tenor, scope and object of the particular legislation. It is trite that where the wording of a statute is open to more than one interpretation, the one which is fair, equitable and to the advantage of the accused, should be adopted. (**S v Kimberley** 2005 (2) SACR 663 (SCA) at 670).

[14] During the course of argument, reference was made to the discretion of the court to impose the death penalty despite the presence of extenuating circumstances before the death penalty was declared unconstitutional. In **R v Von Zell** 1953 (4) All SA 376 (A) the court had to decide whether the trial court had a discretion to impose the death penalty despite the fact that extenuating circumstances were found to exist. In interpreting section 338 (1) of Act 31 of 1917, as amended by section 61 of Act No 61 of 1935, (which obtained then), the court held that the word "may" ought to be given its ordinary meaning as giving

the court a discretion to impose the death penalty despite the presence of extenuating circumstances. (See: **S v Eiman** 1989 (2) SA 863 (A).) The distinguishing feature in the interpretation of that clause and the impugned clause under consideration is that, in the case dealing with the death penalty, there was no ambiguity, whilst in the case of the impugned clause under consideration there is an ambiguity. Because of such ambiguity, it calls for a different approach and a different interpretation. In my view, the two cases are clearly distinguishable.

[15] This becomes apparent from the fact that the Legislature has seen fit to amend the impugned section to remove the ambiguity. The legislature has substituted the word "must" for the word "may". This now obliges the court, in the event of finding that circumstantial and compelling circumstances exist, to impose a sentence lesser than the one prescribed. This amendment came into effect on 31 December 2007. The accused were sentenced on 28 June 2007, that is, six months earlier. Had those accused that were sentenced to life imprisonment, by the twist of fate, been sentenced six months later, they would have escaped the ultimate penalty.

The Misdirection on a Question of Law

[16] The trial court was alive to the provision of the Act. At the outset of its judgment on sentence, the trial court states:

> *"In terms of the provisions of the Criminal Law Amendment Act, this court is enjoined to sentence accused 1,2 and 3 to imprisonment for life unless they **(sic)** are able to satisfy me that there are substantial and compelling circumstances which justify a lesser sentence."*

After evaluating the evidence in respect of sentence, the trial court concludes:

> *"I am satisfied that, in respect of each of the accused facing the minimum*

> *sentences, there are substantial and compelling circumstances that entitles me to impose a sentence other than that prescribed by the Act. However, I am not obliged to impose a lesser sentence simply because the accused have established substantial and compelling circumstances. This finding allows me to determine a sentence that is fair in all the circumstances."*

The trial court then continues and states:

> *"As for the charge of murder, the harshest of punishment is the only one this court can justify imposing upon the accused numbers 1, 2 and 3. No substantial and compelling circumstances can, in this case, justify a lesser sentence than that prescribed by the Act."*

[17] Counsel for the state submitted that the trial court correctly found that it is not obliged to impose a lesser sentence simply because the Appellants have established factors that could be regarded as substantial and compelling circumstances. I disagree. The submission in my view, amounts to no more than semantics. The trial court concludes that in respect of each of the accused facing the minimum sentence, there are substantial and compelling circumstances that entitle it to impose a sentence other than that prescribed by the Act. Therein lies the crux of the issue. What other sentence is it entitled to impose for life imprisonment in respect of Accused 1, 2 and 3, but a term of imprisonment other than life?

[18] In my view the trial court misdirected itself on the question of law by finding that it was not obliged to impose a lesser sentence simply because the accused had established substantial and compelling circumstances. I am strengthened in that conclusion firstly, by the fact that the Legislature has sought to amend the impugned clause in order to remove

the ambiguity; secondly, the Act and the authorities unequivocally speak of the "substantial and compelling circumstances to impose a lesser sentence" and where reference is made to "substantial and compelling circumstances", it is understood to be "to impose a lesser sentence" and thirdly, I have not found a single reported authority in my research, where the court, after finding substantial and compelling circumstances to impose a lesser sentence, went on to impose life imprisonment or a prescribed sentence.

[19] I am furthermore supported in that conclusion by **Marais JA** in **S v Malgas** *(supra)* at p 479c-d, when he deals with the application of section 51 and by **Nugent JA** in **S v Vilakazi** *(supra)* at p 561a-c when he endorses the approach as follows:

> *"If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence. That is also made clear in* ***Malgas****, which said that the relevant provision in the Act: 'vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which 'justify' … it'."*

[20] In my view, the trial court, after having found that substantial and compelling circumstances exist to impose a lesser sentence as envisaged in subsection 51(3)(a) read with subsection (1) of the Act, is precluded from imposing life imprisonment. The question at the start of the judgment must accordingly be answered in the negative. This court is accordingly at large to sentence Appellants 1, 2 and 3 afresh on the murder charge. There does not, in my opinion, appear to be any misdirection, on matters of law in respect of the

other counts for which they have been sentenced, or in respect of the sentences imposed by the trial court on accused 3 and 5. The trial court imposed sentences on accused 1 and 2 in respect of the other counts less than those prescribed by the Act consistent with having found substantial and compelling circumstances. Insofar as accused 4 and 5 are concerned, it appears that the trial court did not make the Act applicable to them but, if I am wrong in that regard, it did find that *"in respect of each of the accused facing the minimum sentences, there are substantial and compelling circumstances that entitle me to impose a sentence other than that prescribed by the Act".*

The Factual Issues concerning the Appeal

[21] I now turn to deal with the factual issues concerning the appeal. It is a trite principle of our law that the imposition of sentence is a matter which falls pre-eminently within the discretion of the trial court. The power of a court of appeal to interfere with such sentence is limited. It will only interfere with such sentence if the trial court has misdirected itself in any material respects or failed to exercise its discretion judicially or imposed a sentence that no court could reasonably have imposed or that it was shockingly inappropriate. (See: **S v Malgas** *(supra)*; **S v Salzwedel & Others** 2000 (1) SA 786 (SCA); **S v Petkar** 1988 (3) SA 571 (A) at 574C and **S v Blank** 1995 (1) SACR 62 (A) at 65).)

[22] I accordingly proceed to consider, in the first place, a suitable sentence for Appellants 1, 2 and 3 in respect of the murder charge. In that regard **Marais JA** in **Malgas** *(supra)* at para 25 has pointed out that in considering a lesser sentence, due regard must be had to the fact that the Legislature has singled out the offences in question for severe punishment and the court, in imposing a sentence in lieu of the prescribed sentence, has to

pay due regard to the benchmark that the Legislature has set. This entails a degree of proportionality between the lesser sentence the court intends imposing in the light of all the circumstances of the particular case and the benchmark the Legislature has set. It is no longer "business as usual". In the past there was no such benchmark. As precedents and guidelines, sentences imposed in the past and prior to the coming into operation of the Act for such scheduled offences, must be considered with circumspection. It would be inevitable that the sentences for such crimes would be consistently heavier than before.

Evaluation

[23] In order to arrive at appropriate sentences for Appellants 1, 2 and 3 in respect of the murder count, I will evaluate the evidence in respect of sentence. The contract murder of six months old Jordan Leigh Norton ("baby Jordan") was pre-meditated, thoughtfully planned, well orchestrated and carefully executed. The principal perpetrator was Appellant 3, who sought the killing of her lover's child, baby Jordan, for the reward of R10 000,00. Appellants 1, 2, 4 and 5 gained entry to the home of the Nortons by false pretenses. Dylan Norton and Thobeka Buso, the child-minder of baby Jordan, were threatened with knives, bound and ushered into the bedroom and later into the toilet, while the home was ransacked. Appellant 2 brutally and callously plunged a knife three times into the defenceless body of baby Jordan. She died as a result of the wounds sustained.

[24] The killing of baby Jordan was cold, calculated and callous. Counsel for Appellant 3, addressing the trial court in mitigation of sentence said that *"this court will be aware that a murder is a victim based crime, that there is a family, the murder was, with respect, an unspeakable one, and the anguish of the family is unimaginable".* The murder was variously described as *"barbaric and gruesome"*, *"calculated, callous and cold-blooded"*, *"cruel and gruesome"*, *"heinous crime"* and *"most horrendous crime"*. These epithets

appropriately describe the nature of the crime of murder. What aggravates the crime was the fact that baby Jordan was killed in the sanctity and security of her home.

[25] The interest of society demands that an offender be suitably punished as an act of retribution. The penalty must be such as to serve as a means firstly, to prevent and combat crime by deterring the accused or other potential criminals in society from committing such crimes; secondly, to restore the peace and tranquillity in society which has been disturbed by the commission of the crime, by satisfying members of society that justice has indeed been done; thirdly, to protect society against the ravages of crime and fourthly, to rehabilitate and reform the offender. It is not the function of the court to exact revenge. Members of society react with natural indignation to crime, particularly those that are accompanied by violence and committed against women and children. In this case, counsel described the reaction of members of the community to this horrific crime. Amongst other things, they conducted campaigns against the Appellants, but more particularly against Appellant 3. They protested outside court with posters demanding that the severest punishment be meted out to the Appellants. Counsel also pointed out the relentless campaign conducted by the media against Appellant 3. The trial court was singularly aware of such campaigns and stated in its judgment: *"The trial has spanned over a period of nearly 18 months, it has gripped the community who have displayed their outrage in a number of ways. They demand that the maximum sentence that the law permits be invoked".* While it is true that a sentencing court ought to take into consideration the public interest, it must guard against being swayed by public opinion. Such opinion could, at times, be highly emotive and influenced by hysterical media coverage. The sentencing court must disabuse its mind of such public opinion and media coverage, in arriving at an appropriate sentence, after taking into consideration all the competing interests including the element of mercy.

[26] The innocent victim that paid the ultimate price was baby Jordan. She had no say in the trial and tribulations of the role players. She could not fend for herself. She had a right to life which the Constitution guaranteed. Her life was prematurely terminated. The motive for the killing of baby Jordan was ascribed to a *"love-hate"* relationship between certain role players. Others who became victims of the conduct of the Appellants were the mother, grandparents, uncle and child-minder of baby Jordan. They were all subjected to trauma, pain and suffering.

[27] Appellant 1 was second in command. He recruited Appellants 2, 4 and 5. He was 33 years old and the eldest of the Appellants. He was a first offender and was HIV positive. He pleaded not guilty, did not testify and showed no remorse. He protested his innocence throughout. He had a life partner and was the father of two minor children. He worked as a taxi-driver. He was in custody as an awaiting-trial prisoner for approximately two years.

[28] Appellant 2 was the foot-soldier who plunged the knife three times into the defenceless baby Jordan and inflicted the fatal wound in the neck of the child. He was 22 years old at the time of the commission of the offence. He is an orphan. He was a first offender. He is the father of a minor child. He left school in grade 7 because of poverty. He assisted a friend in a barber shop for which he received food and pocket money. He was lured into the commission of the offence because of the money. He had never earned such a lot of money at one time in his entire life. He did not show genuine remorse. He gave a watered down plea on the murder charge to exonerate himself. He did not take the court into his confidence. He disputed his confession.

[29] Appellant 3 was the commander-in-chief and the principal actor who sought the elimination of baby Jordan. She took advantage of the other Appellants' poor socio-economic circumstances to lure them with the offer of R10 000,00 to kill baby Jordan. She meticulously and obsessively planned the murder. She pleaded not guilty and maintained her innocence throughout. She did not take the court into her confidence to show what motivated her to commit such a senseless crime. There was evidence that she was passionately in love with the father of baby Jordan. The only reasonable inference the court can draw from the facts and circumstances is that she was obsessively jealous of the mother of baby Jordan and in order to cut the ties between the mother and her lover she had to eliminate baby Jordan. In that sense, it appears to have been a crime of passion. What rational explanation can there be other than the fact that emotional conflict drove her to commit this senseless and hapless crime. This, no doubt, reflects on her immaturity both emotionally and intellectually. She was 23 years old at the time the crime was committed. Mr Neill Wilson, her erstwhile lover, described her as a caring and decent human being. She is a first offender. She lived with her parents and worked in the family business. She was studying part-time for a B.Com degree. The trial court in its judgment said: *"She has no previous convictions and has been held in prison for over 14 months, awaiting the finalisation of this trial. Her counsel rightly argued that she should have remained out on bail as her bail was withdrawn based on evidence which was suspect. This is an important factor which I shall take into consideration when considering an appropriate sentence for her. However, it is not always possible to compensate for a period of pre-trial detention."*

The Findings

[30] I now turn to consider an appropriate sentence for Appellants 1, 2 and 3 in respect of the murder count. In my view, there were substantial and compelling circumstances not to impose life imprisonment. I cannot say with any degree of conviction that they killed out

of inherent wickedness. The imposition of life imprisonment on the three Appellants would, in my opinion, be unjust as it would be "disproportionate to the crime, the criminal and the needs of society". The nature and seriousness of the murder count warrants a lengthy period of imprisonment for the three Appellants, but does not warrant them to be removed permanently from society. The question that I have to decide is what would be the term of imprisonment in respect of each of them. Each of the Appellants played an equally leading role in the execution of the crime. Appellant 3 carefully planned and orchestrated the crime. Appellant 2 recruited the other perpetrators and participated in the commission of the offence. Appellant 1 inflicted the fatal wound. Although they played different roles in that process, in my opinion, they were bound by the thread of common purpose and were equally culpable for the commission of the crime. Each of them is a first offender. Each of them has been in custody, as an awaiting trial prisoner, for approximately two years. Appellant 3 had her bail withdrawn on evidence that was suspect. Each of the Appellants was relatively young at the time of the commission of the offence. In my view each of the Appellants can be rehabilitated and returned to society as useful citizens.

[31] In **S v Malgas** *(supra)* a 22 year old woman was convicted of murder and sentenced to life imprisonment. The trial court found that there were no substantial and compelling circumstances to impose a lesser sentence. The accused committed the crime at the instigation of the wife of the deceased. On appeal, the court found substantial and compelling circumstances to impose a lesser sentence, set aside the sentence of life imprisonment and imposed a sentence of 25 years. In **S v Ferreira and Others** [2004] 4 All SA 373 (SCA) the appellants were sentenced to life imprisonment for a contract murder in the absence of substantial and compelling circumstances. On appeal the court found substantial and compelling circumstances in respect of the first appellant and sentenced her to six years imprisonment and suspended the unexpired period of her sentence. The

court found no substantial and compelling circumstances in respect of the other appellants and confirmed their sentences of life imprisonment.

[32] In **S v B** 2006 (1) SACR 311 the accused was convicted of murder and robbery with aggravating circumstances. He was sentenced to life imprisonment for the murdcer and 15 years for the two robbery counts. He was 17 years and 7 months at the time of the commission of the offences. On appeal the life imprisonment was substituted by 18 years imprisonment. The 15 years for the two robbery counts was confirmed, but the court ordered that it should run concurrently with the sentence imposed on the murder count. The Appeal Court remarked that the murder was particularly heinous. A defenceless elderly lady had been murdered in the sanctity of her home.

[33] In **S v Lehnberg and Another** 1975 (4) SA 553 (A) – Lehnberg who sought the services of an accomplice to kill the wife of her lover, was sentenced to death in the absence of extenuating circumstances. On appeal, the court found extenuating circumstances and converted the death sentence to one of 20 years imprisonment. It is trite that each case must be considered on its own merits.

[34] Taking all the mitigating and aggravating circumstances into consideration and tempering the sentence with mercy, I am of the view that a term of imprisonment of 26 years would be an appropriate sentence for the murder count in respect of each of the Appellants.

[35] I now turn to deal with the charge of robbery with aggravating circumstances against Appellants 1, 2, 4 and 5. Appellants 1 and 2 were each sentenced to 10 years imprisonment whilst Appellants 3 and 4 were each sentenced to seven years imprisonment.

The difference in sentence was due to the fact that Appellants 4 and 5 were juveniles at the time they committed the offence. I agree with the trial court that the principal objective of the accused was to kill baby Jordan. I also agree with the trial court that the robbery was committed to mask the killing of baby Jordan and was incidental to the murder. What makes the robbery aggravating was the fact that knives were used as weapons to execute robbery. Both Dylan Norton and Thobeka Buso were threatened with knives and forced to point out the safe. They were tied up, confined to the bedroom initially and thereafter to the toilet while the robbery was carried out. The prescribed minimum sentence in terms of the Act is 15 years imprisonment for the robbery charge. The trial court, having found substantial and compelling circumstances to impose a lesser sentence, sentenced Appellant 1 and 2 each to 10 years imprisonment in respect of the robbery charge. Although Appellant 5 had a previous conviction for robbery, he was treated in the same manner as Appellant 4, as he refused to stab baby Jordan with the knife. I cannot find any misdirection on the part of the trial court to justify this court interfering with such sentences.

[36] Appellant 1 was also convicted of the unlawful possession of a fire-arm and sentenced to six months imprisonment. It does not appear that the fire-arm was used in the commission of the crime. The sentence cannot be described as shockingly inappropriate or one that no reasonable court would impose or that the court has misdirected itself or not exercised its discretion judiciously. In my view, there are no grounds to interfere with the sentence imposed by the trial court in respect of such charge.

The Order

[37] In the result the following order should be made:

(i) The appeal of Appellants 1, 2 and 3 against the sentence in respect of the

murder count succeeds. The sentences of life imprisonment are set aside and substituted with a sentence of 26 (twenty six) years imprisonment. Such sentences are antedated to 28 June 2007.

(ii) The appeal of Appellants 1 and 2 in respect of the other counts fails and the sentences imposed in respect of those counts are confirmed, but such sentences shall run concurrently with the sentences imposed in respect of the murder count.

(iii) The appeal of Appellants 4 and 5 fails and the sentences are confirmed.

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