IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No.: A562/07

In the matter between: **- REPORTABLE -**

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	**Firth Appellant**

and

THE STATE

JUDGMENT DELIVERED: 29 OCTOBER 2009

LE GRANGE, J:

Introduction:

[1] I had the opportunity of reading the judgment of my learned Brother, Moosa J. (The dissenting judgment). It is correct as articulated in his judgment, that the main legal issue for determination, aside from the factual issues, in this appeal is

whether the trail court, pursuant to its finding that substantial and compelling circumstances exists, as envisaged in subsection 51(3)(a) read with subsection (1) of the Criminal Law Amendment Act No, 105 of 1997 ("the Act"), was entitled to impose life imprisonment. This issue is important as it impacts on Appellants 1, 2 and 3 who were sentenced to life imprisonment on the charge of murder.

[2] Regrettably, I am constrained for the reasons stated herein, to disagree with Moosa J's reasoning that a trial court is precluded from imposing life imprisonment. I am also in profound disagreement with the result in respect of Appellants 1, 2 and 3 in the judgment.

The Law:

[3] It is now well accepted that the General Law Amendment Act, 105 of 1997, as amended on 31 December 2007, has dramatically changed the sentencing regime for certain categories of offences in our law. The seminal judgment in S v Malgas 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA), and endorsed by the Constitutional Court in S v Dodo 2001 (1) SACR 594 (CC), clearly sets out the criteria that should be used by our courts in determining substantial and compelling circumstances.

[4] There can be little doubt that the minimum sentencing legislation has two operative effects. Firstly, the statutorily prescribed minimum sentences must ordinarily be imposed. Moreover, the scheduled offences, absent "*truly convincing reasons"* for departure, are "*required to elicit a severe, standardised and consistent response*

from the courts" through imposition of the ordained sentences. Secondly, even where those sentences do not have to be imposed because substantial and compelling circumstances are found, justifying the imposition of a lesser sentence, the legislation has a balancing effect leading to the imposition of consistently heavier sentences. See Malgas at paragraphs [8-9] and [25].

[5] Moosa J, expresses the view in paragraph [7] of his judgment that *"If a court, despite such findings 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 25 I the "prescribed sentence would be unjust in that it would be disproportionate to the crime 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 circumstances 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"*.

[6] I cannot subscribe to this view of Moosa J, as it fails to properly distinguish between the two enquiries including the proportionality test as envisaged by the subsection. It also militates against well established principles on sentencing in our law. The wording of the subsection *"If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exits* ***which justify*** (my underlining) *the imposition of a lesser sentence than the prescribed sentence in those subsections, it shall*

enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence", is clear and cannot be subjected to any ambiguity.

[7] I will now return to the issue under consideration in this appeal and the reasons why I fundamentally differ from Moosa, J's approach and interpretation of the subsection.

[8] Section 51(3)(a) of the Act which was applicable, before its amendment on 31 December 2007, read as follows:

(a) "*(3) (a) If any court referred to in subsection(1) or (2) is satisfied that substantial and compelling circumstances exits which justify the imposition of a lesser sentence than the prescribed sentence 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 subsection(3) and (6), a High Court shall-

(a) if it has convicted a person of an offence referred to in Part 1 of schedule2; or

(b) if the matter has been referred to it under section 52(1) for sentence after the person concerned has been convicted of any

offence referred to I Part 1 of Schedule 2, sentence the person to imprisonment for life"

[9] The new amended subsection reads as follows:

"*If any court referred to in subsection(1) or (2) is satisfied that substantial and compelling circumstances exits which justify the imposition of a lesser sentence than the prescribe sentence in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such lesser sentence in respect of an offence referred to Part 1 of schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years"*

[10] There can be no debate that section 51(3)(a) postulates two enquiries. The first is for a trial court to determine whether there are substantial and compelling circumstances present. This in my view is a pure subjective test. A trial court should, as far as possible, place itself in the shoes of the accused person and have regard to the various factors as enunciated in para [25] of the Malgas case to establish whether substantial and compelling circumstances are absent or not. It is during this test where for instance an accused's age, previous convictions if any and all other personal circumstances will properly be investigated. The other traditional factors such as motive, lack of remorse, aggravating and or mitigating circumstances, also play a role during this stage. The impact of these subjective factors will ultimately help determine whether substantial and compelling circumstances do in fact exist. It

is also during this enquiry that a trial court must guard against "*the lapses, conscious or unconscious, into sophistry or spurious rationalisations or the drawings of distinctions so subtle that they can hardly be seen to exist* ", in the determining what substantial and compelling circumstances are. See Malgas at para [20].

[11] In my view subjective factors alone cannot be indicative if the imposition of a lesser sentence is justified or not. The second enquiry is as important as the first. It is during this enquiry that the proportionality test is applicable whether substantial and compelling circumstances exist or not.

[12] In my view the approach during the second inquiry is to objectively weigh up and balanced the substantial and compelling circumstances, if found to exist, against the interest of the society and the seriousness of the offence. A court in considering whether the imposition of a lesser sentence is ***justified*** (my underlining) should during this stage have regard to the aims and principles of sentencing. The guidelines as enunciated in S v Thonga 1993 (1) SACR 365 (V) at 370 *d-i,* is perhaps apposite at this stage.

> *"In my view the punishment must firstly be reasonable, i.e. it should reflect the degree of moral blameworthiness attaching to the offender, as well as the degree of reprehensibleness or seriousness of the offense. Punishment therefore should ideally be in keeping with the particular offence and the specific offender. It is necessary, secondly, for the punishment to clearly reflect the balanced process of careful and objective consideration of all relevant facts, mitigating and*

aggravating. The sentence should, thirdly, reflect consistency, as far as is humanly, possible, with previous sentences imposed on similar offenders committing similar offences, lest society should believe that justice was not seen to be done. Lastly, the penal discretion is to be exercised afresh in each case, taking the facts of each case and the personality of each offender into account. To all this I would add that the trial Court does not impose sentence in vacuo. It, to the contrary, certainly does so within a certain frame and at a certain stage in the development of the people(s) of a district, or a country, or even a continent. The criminal court is also an instrument in the hands of society, applying its laws, reflecting its value and its moral indignation at unlawful conduct, as well as the negative or harmful effect thereof on third parties or society itself. But in a civilised society punishment reflects also the interest of the offender himself. The trial Court, in a criminal matter then functions not in a technical laboratory, but as a living instrument, a vital component of the fabric of society, serving the interest of society and all of its law- abiding members. The criminal court primarily seeks to establish and maintain peaceful co- existence among members of society within a territory to life and property by dispensing criminal justice. Furthermore, during the imposition of punishment, the trial court jealously guards the fine line between raw revenge or emotional punishment and the judicial, reasonable and objectively balanced (effective) exercise of its penal discretion."

[13] Lastly, a very important consideration during this enquiry is the proportionality test. A court is obliged, even in the absence of substantial and compelling circumstances, to consider this test during the second inquiry. The dictum of

Nugent JA in S v Vilakazi 2009 (1) SACR 552 SCA at paragraph [15] is pertinent in this regard *"It is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to asses, upon a consideration of all circumstances of a particular case, whether the prescribed sentence is indeed proportionate to the particular offence.*". See further Malgas at para [25 I].

[14] It is only when a court has properly applied these enquiries that it can determine if substantial and compelling circumstances justify the imposition of a lesser sentence or not to the particular offence.

[15] Moosa J, it appears, also had great difficulty with the word *'may'* in the applicable subsection. He expressed the view that the word *'may'* creates a contradiction in terms, is mutually destructive and the Legislature could not have intended such an anomaly. In dealing with this apparent ambiguity he goes further and concludes that the trial court, *in casu* misdirected itself on the question of law by not imposing a lesser sentence, pursuant to the finding of substantial and compelling circumstances. He also sought to rely on the amended word from '*may'* to '*must'* by the Legislature and lack of decided case law where, pursuant to a finding that substantial and compelling circumstances exists, a heavier sentence was imposed, to support his view.

[16] First, the amendment of the subsection to include the word *must*, cannot in my view impact on the unambiguous and very important part of the subsection that

clearly deals with the two different enquiries as stated in paragraphs [10-13] above. Secondly, on a proper reading, the authority Moosa, J is relying on in his paragraph [19] does not support his view that pursuant to the finding of substantial and compelling circumstances a trial court's discretion is limited and *automatically* obliged to impose a lesser sentence. It is evident that what Nugent JA, in Vilakazi, *supra* at 561 *(b)* articulated and alluded to is where a court is indeed satisfied that a lesser sentence is called for in a particular case that justifies (my underlining), the imposition of a lesser sentence then it hardly needs saying that a court is bound to impose that lesser sentence. See also Malgas paragraph [14]. The word *'may'* in the context of the decided authority was therefore superfluous. The amendment of the word *'may'* to '*must'* does not in my view eliminate an ambiguity and limit a courts' sentencing discretion as suggested by Moosa, J. It merely reflects the *ratio decidendi* of our Higher Courts that a court is bound to impose a lesser sentence where it indeed found that substantial and compelling circumstances justify it and is proportionate to the offence.

[17] I am therefore satisfied that the relevant subsection did not create an ambiguity nor did it limit a court's discretion to impose a heavier sentence pursuant to a finding that substantial and compelling circumstances exists. Moreover, the lack of decided cases to impose a heavier sentence can hardly be a justifiable reason that the subsection limits a court's sentence discretion in that regard.

Evaluation:

[18] The facts on which the convictions are premised have been adequately set out in the judgment of Moosa J, and will I only refer to it where necessary.

[19] It is trite in our law that the imposition of sentence is pre-eminently a matter falling within the discretion of the court *a quo* and a court of appeal will only interfere where such discretion was not properly or judiciously exercised.

[20] In *casu*, the trial court considered the personal circumstances of the Appellant's and in a well reasoned and balanced judgment came to the conclusion that substantial and compelling circumstances exists with regard to each individual appellant. The approach by the trial court, in objectively weighing up and balancing the substantial and compelling circumstances against the well established principles on sentencing to determine if a lesser sentence was justified or not, can also not be criticised.

[21] In S v Ferreira 2004 (2) SACR 454 SCA at paragraph [70], Marais, JA held the following:

> *"It is the course so that the motives which prompt the hiring of contract killers may vary from those which are undeserving of any sympathy whatsoever to those which evoke a great deal of sympathy. And these variations in motive are equally obviously highly relevant to the sentence imposed. But after all is said and done, a contract killing for reward is involved. That is, I believe, in the eyes of most reasonable people, an abomination which is corrosive of the very*

foundations of justice and its administration. While there is clearly room for differentiation of sentences in even contract killings because the degree of repugnancy of the motive in one case may be less than that in another, a court must face the fact that, whatever the motive, a remedy which society rightly regards as an abomination has been unlawfully resorted to by the accused. If no greater sanction for that than a non-custodial sentence is said by this Court to be an appropriate response to a contract killing, I believe it will undermine public confidence in the courts, encourage a belief that those who instigate contract killings will not necessary be visited with incarceration, foster a perception that, provided one's motives are subjectively pure and no matter how unreasonable and culpable one's failure to explore or , make use of other or less drastic options may be, society will not be greatly offended by one's engagement of killers to do away with another human being. It is similar to the kind of reasoning to which vigilante lynch mobs resort to excuse their actions: A noble motive and a genuine lack of faith in the ability of the law to deal effectively with the victim and protect the public from his or her violence."

[22] The trial court in considering all the relevant factors and circumstances pertaining to sentence stated the following on page 3868 of record:

"Having considered all of the factors as contained in the pre-sentencing reports; as presented from the bar; and taking into account the fact of the accused incarceration, 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.

In so far as their conviction for robbery is concerned, I am of the view that imposing the minimum sentence of 15 years imprisonment will be disproportionate to the offence. The robbery while extremely serious was a secondary offence, committed in an attempt to hide the real objectives of their action. As to the charge of murder the harshest of punishment is the only one this Court can justify imposing upon 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. With regard to accused numbers 4 and 5 they are juveniles when they committed the crimes. Although I do not consider correctional supervision in any form appropriate because I believe both of them to be perpetrators as well as victims I have no hesitation in imposing a substantially lesser sentence upon them."

[23] It is evident from the abovementioned that the trial court did apply the two-stage enquiry, but did not find that the substantial and compelling circumstances in respect of Appellants 1, 2 and 3, justified a lesser sentence. This is made clear from the wording that 'no substantial and compelling circumstances can, in this case, justify a lesser sentence than that prescribed by the Act'. On a conspectus of the totality of circumstances of all the Appellants, I am in agreement with this finding of the trial court.

[24] The evidence *in casu,* established overwhelmingly that the principal perpetrator was Appellant 3, who sought the killing of six months old Jordan Leigh

Norton, her lover's child, for the reward of R 10 000.00. The Appellants 1, 2, 4 and 5 gained entry to the home of the Norton's by false pretences. The motive for this callous killing of a six month old baby in the sanctity and security of her home can evoke very little mercy or sympathy, if any.

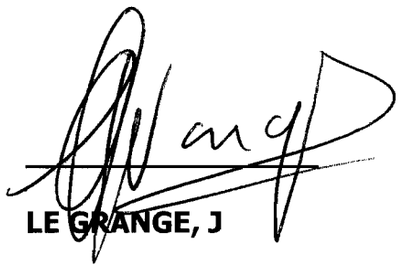
[25] There was also ample time and opportunity for all the Appellants a day before the killing to come to their senses and desist from committing these offences when an attempt by Appellants 1, 2, 4 and 5 to enter the Norton's house was thwarted by the uncle of the deceased. The Appellants however persisted with their plans and by false pretences of delivering a parcel, the following day, entered the Norton's house. The deceased was forcefully taken away from the nanny, who at the time was feeding her, and was butchered to death like an animal.

[26] The contract murder of the deceased was pre-meditated, well orchestrated, carefully planned and executed. The substantial and compelling circumstances that exist in respect of Appellants 1, 2 and 3 do not in my view justify the imposition of a lesser sentence other than life imprisonment, and is the imposed sentence not disproportionate to the offence.

[27] I am satisfied that the trial court did not misdirect itself on the law or the facts in sentencing the Appellants in this matter. It follows that the appeal by the Appellants cannot succeed.

[28] In the result I will propose the following order.

The appeal against sentence by the Appellants is dismissed.



LE GRANGE, J

I agree. It is so ordered.

TRAVERSO, DJP