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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 40/07

DATE: 2007-09-12

In the matter between

THE STATE
and
RODERICK FRANCIS & OTHERS Accused

S E N T E N C E

BORUCHOWITZ, J: The three accused have been convicted of murder. Because the court has found that the offence was committed by the accused acting in execution or furtherance of a common purpose it is obliged by virtue of the provisions of Section 51(1)(a) of the Criminal Law Amendment Act 105 of 1997 (the Act) to sentence the accused to imprisonment for life. A lesser sentence may only be imposed if substantial and compelling circumstances within the meaning of that expression are found to exist justify the imposition of such lesser sentence (Section 51(3)(a)).

The approach to be followed in determining whether substantial

and compelling circumstances exist is to be found in *S v Malgas* 2001 (1) SACR 469 (SCA). It was there held that the sentencing court was required to be conscious that the legislature had ordained life imprisonment as the sentence which would ordinarily be imposed for the crime specified. The legislature aimed at ensuring a severe standardised and consistent response from the courts to the commission of such crimes and that there should be truly convincing reasons for a different response. The specified sentences were not to be parted from lightly and for flimsy reasons. The court had a duty to consider the circumstances of the case including the many factors traditionally taken into account by courts when sentencing offenders.

> For circumstances to qualify as substantial and compelling they do not have to be exceptional in the sense of seldom encountered. The ultimate approach is to consider all the circumstances and consider whether cumulatively they justify departure from the standard response that the legislature had ordained. If the sentencing court on consideration of these circumstances 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 done by imposing that sentence it is entitled to impose a lesser sentence.

The relevant proven facts are the following. In the evening of 21 January 2007 the accused proceeded to a flat situate at the intersection of Stilte and Vrede Streets, Vrede Park, Johannesburg. Their purpose was to visit certain ladies. They proceeded thereto in a gold Mercedes Benz motor vehicle which they parked outside the building. While socialising with the ladies concerned they were informed that the vehicle had been broken into and the radio, tape-deck removed there from. They immediately left the flat to inspect the vehicle. Upon inspection they found

that a brick had been thrown through the driver's window and that the radio cassette deck had been removed from the consol. This angered the accused.

The deceased was then still in the vicinity and was pointed out to the accused as being the person who had unlawfully broken into the vehicle. Angered by what they had seen the accused pursued the deceased, they eventually confronted him. One of their number struck the deceased who fell to the ground and struck his head on a concrete slab. The deceased lay there in a semi-conscious state, whereupon the accused acting in concert individually and jointly kicked, jumped and stepped upon the deceased's head, chest and abdomen. The deceased died at the scene as a result of multiple blunt force injuries inflicted by the accused as particularised in the post-mortem report.

The cumulative effect of the following factors constitute in my view substantial and compelling circumstances that would justify the imposition of a lesser sentence than life imprisonment, the minimum prescribed under the Act. The assault that gave rise to the death of the deceased was unpremeditated. The accused acted impulsively on the spur of the moment and without proper reflection. They were angered by what they had seen. The assault occurred soon after the accused had been informed that their vehicle had been broken into and the radio removed. Their anger was provoked by the alleged conduct of the deceased who they believed was responsible for the break in. They immediately pursued and confronted the deceased and gave vent to their anger and frustration. Unfortunately after a single blow was administered the deceased slipped and fell on a concrete slab. At that point the accused were then egged on by certain members of the crowd that had gathered at the scene and commenced to assault the deceased.

There was no direct intention on the part of the accused to kill the deceased. Their intention was to recover the radio and it seems to assault or to punish him. The court found having regard to the nature and severity and sustained nature of the attack that the accused foresaw that their actions could result in the death of the deceased and they proceeded

recklessly, as to whether death would in fact result. The intention in the form of *dolus eventualis* was found to exist.

The accused are of relatively advanced age. Accused 1 was born on 11 February 1958, accused 2 on 3 May 1957 and accused 3 on 31 October 1965. They are presently aged 49, 50 and 42 years respectively. Accused 2 and 3 are first offenders. Accused 1 has two previous convictions. He was convicted of assault and sentenced to a fine of R30 or 30 days on 2 November 1978 and on 2 October 1985 was convicted of a contravention under the then Road Traffic Act. His previous conviction of assault is nearly 30 years old. For all practical purposes he is also to be regarded as a first offender.

The accused has led evidence from a social worker in private practise who is also a registered probation officer. It emerges from her evidence that the accused do not have a propensity for violence and it is clear that they do not constitute a danger to society. Figeur conducted an in-depth investigation and introduced a psycho-social background report in respect of each of the accused, Exhibits J, K and L. Her considered view is that the accused are relatively stable individuals whose track record shows an absence of violence or violent pathology. What occurred in her view as an isolated incident brought about by the unfortunate circumstances that confronted the accused at the time. I am in agreement with her view that the accused are unlikely to repeat such an offence or to commit crimes involving serious bodily injury or violence.

The accused, who are friends, all live in the same neighbourhood and social environment. The areas where they live and have been

brought up namely Westbury and Newclare have a notoriously high criminal incidence of crime and it is in my view remarkable that the accused have until the present time not succumb to such pressures. Despite adversity and instability in their personal lives they appear to have made a success of their lives and a contribution to society. They each have impressive work records and they are or have been married with children and other family members who are dependent upon them for support. All these aspects have been fully canvassed in the reports compiled by the aforesaid social worker Annette Figeur Exhibits J, K and L and do not bear repeating.

The cumulative effect of the aforegoing factors are in my view truly convincing reasons for a departing from the prescribed minimum sentence of life imprisonment. A sentence of life imprisonment would be unjust in that it would be disproportionate having regard to the particular circumstances of the crime involved, the personal circumstances of the accused and societal needs.

Given that there exist substantial and compelling circumstances that justify a lesser sentence than the prescribed minimum the question that falls to be determined is what is the exact nature of the "lesser sentence" that the court may impose in terms of Section 51(3)(a). There is no express indication in the Act or limitation imposed as to the type of sentence that is envisaged. Section 51(5) of the Act stipulates that the operation of a sentence imposed in terms of the said section shall not be suspended as contemplated in Section 297(4) of the Criminal Procedure Act 51 of 1977, but that section of the Criminal Procedure Act is only applicable to minimum sentences. The "lesser sentence" referred to in Section 51(3)(a) of the Act is not a minimum sentence.

It would appear that the court has an unfettered discretion to impose any punishment referred to in Section 276 of the Criminal Procedure Act if appropriate. This would include the right to impose suspended or partially suspended terms of imprisonment. All of this however is subject to the general policy guidelines laid down in Act 105 of 1997. Examples where suspended terms of imprisonment have been imposed are *S v Ferreira and Others* 2004 (2) SACR 454, *S v Harker*

2004 (2) All SA 416C and *S v Morpolai* 2005 (1) SACR 580B. All of the aforegoing however is subject to the general policy considerations that underlie Act 105 of 1997. It was held in *S v Mahomotso* 2002 (2) SACR 435 (SCA) para 18

> "That if substantial and compelling circumstances are found to exist life imprisonment is not mandatory and nor is any other mandatory sentence applicable. The sentence to impose in such circumstances is within the sentencing discretion of the trial court, subject to the obligation cast upon it by the Act to take due cognisance of the legislature's desire for further punishment than that which may have been thought to be appropriate in the past."

Similar sentiments are expressed in *S v Abrahams* 2002 (1) SACR 116 (SCA) at 126 and *Malgas Supra* at 482F

> "The court is thus free to exercise a substantial measure of judicial discretion in imposing sentence. The individualisation of sentences remains an important consideration."

It was submitted on behalf of the accused that consideration should be given to a sentence involving correctional supervision such as for example Section 276(1)(i) of Act 51 of 1977. This would also include a sentence in terms of the counter part Section 276(1)(h) which has been given even in cases of murder. See *S v Potgieter* 1994 (1) SACR 61A, *S v Ingram* 1995 (1) SACR 1A, *S v Larsen* 1994 (2) SACR 149A, *S v Aspeling* 1981 SACR 561 (C) and *S v Malejane* 1999 (1) SACR 2790.

It was held in these and other cases that whether a sentence of correctional supervision or involving correctional supervision is appropriate would depend whether having regard to the personal circumstances, the nature of the accused, the nature of the crime and the interest of society the particular offender should be removed from the community. As is evident from the abovementioned cases the emphasis cannot only be laid on the personal circumstances of the accused. I am mindful in this regard of the remarks of *Nienaber, JA* in *S v Lister* 1993 (2) SACR 228 at 232G-H, where it was stated:

> "To focus on the wellbeing of the accused at the expense of the other aims of sentencing such as the interests of the community is to distort the process and to produce in all likelihood a warped sentence. See also *S v Maleka* 2001 (2) SACR 366 (SCA) para 5 and 6."

Of equal importance and particular importance in the present case is the objective gravity of the offence and the interest of society which require that those who take the law into their own hands as the accused did in the present case should be deterred from so doing. Instead of arresting the deceased and handing him over to the police the accused saw fit to interrogate him and to inflict punishment in the form of an assault that culminated in his death. The assault inflicted was of a savage and brutal nature. To fully appreciate the degree of savagery one need only look at the photographs contained in Exhibit C and the medico-legal autopsy report Exhibit B as amplified by the evidence of the pathologist.

The accused in this case exhibited a high degree of violence and callousness by jumping and kicking the deceased either individually or jointly in concert on his head, chest and abdomen. Not only was the deceased negatively affected by the accused's conduct but also those who witnessed the assault on him. Notwithstanding the clear mitigating factors to which I have referred the objective gravity of the offence and the need to deter the community at large from resorting to violence in such circumstances render it

necessary to impose a custodial sentence on the accused.

The following sentences are therefore imposed.

Accused 1, 2 and 3 are each sentenced to 10 years imprisonment of which five years are suspended for five years on condition that such accused is not convicted of any offence involving the infliction of serious bodily harm committed in the period of suspension and for which imprisonment without the option of a fine is imposed.