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IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION. PRETORIA)

CASE NO: A898/2013

DATE: 21/10/2015

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

IN THE MATTER BETWEEN

1. A. K. 1ST APPELLANT (Accused I in court *a quo)*

2. ELLIOT KOMANI 2ND APPELLANT (Accused 2 in court *a quo)*

3. EDDIE BALOYI 4TH APPELLANT (Accused 3 in court *a quo)*

4. HERMANDO SIBIYA AND 3RD APPELLANT (Accused 4 in court *a quo)*

AND

THE STATE RESPONDENT

JUDGMENT

MSIMEKI, J

[I] The appellants appeared before the High Court, Transvaal Provincial Division as it then was, charged with murder, robbery with aggravating circumstances, housebreaking with the

intention to rob and robbery with aggravating circumstances, attempted murder, unlawful possession of firearms and unlawful possession of ammunition.

[2] They all were duly represented.

[3] They all pleaded not guilty and exercised their rights to remain silent in terms of section 115 of the Criminal Procedure Act no 51 of 1977 ("the CPA").

[4] Various admissions in terms of section 220 of the CPA were made. Some of the admissions were that:

1. the deceased referred to in the indictment, Beulah Phyllis Botha, had died on 7 April 1995 as a result of injuries she had sustained on the same day;

2. the body of the deceased, from the time the injuries were sustained until a post mortem examination was conducted on the body by Dr S F Richards on 10 April 1995, had sustained no further injuries and that the body was correctly identified;

3. the doctor, during the post mortem examination, noted his findings on form GW7/15 and that the facts and the findings had been correctly noted and that the cause of death was correctly noted as "breinskeuring en breinbloeding" and that the report, by agreement, was handed in as exhibit "B";

4. the correctness of the contents of the various documents handed in as exhibits was not disputed.

[5] For the purposes of this judgment, I shall only refer to those admissions which I deem necessary as most of them are not relevant in the sense that they do not relate to all the appellants.

[6] To avoid confusion, I shall refer to the appellants as "the accused" in the respective order that they appeared in the trial court.

[7] Mr Makama, for accused I, filed his heads of argument late and accordingly applied for condonation. Condonation was not opposed and the appeal then was proceeded with. Should it appear that nothing was said about the application such application is granted.

[8] It is noteworthy that the trial court sat with two assessors. Accused 5 neither appealed against his conviction nor sentence.

[9] Accused I and 2 were convicted on counts I , 3, 4, 5 and 6 and acquitted on count 2.

Accused 3 and 4 were convicted on counts 1, 3 and 4 and acquitted on counts 2, 5 and 6.

[10] Accused 1 to 4, on count 1, were each sentenced to fifty (50) years imprisonment. On count 3, accused 1 to 4, were each sentenced to twenty (20) years imprisonment. On count 4, accused I to 4, were each sentenced to twenty (20) years imprisonment. On count 5, accused 1, 2 and 5, were each sentenced to two (2) years imprisonment. On count 6, accused I , 2 and 5, were each sentenced to one (1) year imprisonment. I need to point out that accused 5 was convicted on counts 5 and 6 and acquitted on counts I, 2, 3 and 4.

In the case of accused 1, the court ordered that the sentences on counts 3, 4, 5 and 6 should run concurrently with the sentence on count 1. This, effectively, means that accused I's effective sentence is fifty (50) years imprisonment.

In the case of accused 2, the court ordered that 10 years of the sentence on count 3 and the sentences on counts 4, 5 and 6 should run concurrently with the sentence on count 1. His effective sentence is therefore sixty (60) years imprisonment.

In the case of accused 3 and 4 the court ordered that 10 years of the sentence on counts 3 and 4 should run concurrently with the sentence on count 1. Their effective sentence is therefore sixty (60) years imprisonment.

[11] On 15 March 2010 Van der Merwe DJP (as he then was) granted accused 3 leave to

appeal to the Full Court of this division only against sentence.

On 18 July 2014 the Supreme Court of Appeal granted accused 3 leave to appeal in respect of both his conviction and sentence.

[12] On 15 July 2013 the Supreme Court of Appeal granted accused 1 leave to appeal to the Full Court of this court against sentence imposed by a single judge.

[13] On 1 November 2012 the Judge-President granted accused 2 leave to appeal against sentence to the Full Court of this court.

[14] On 22 October 2013 the Supreme Court of Appeal granted accused 4 leave to appeal against sentence to the Full Court of this court.

[15] In this appeal, accused 3 is appealing against conviction and sentence while accused **1,** 2 and 4 are appealing against sentence only.

[16] Advocate L Augustyn (Ms Augustyn), for accused 3, in her heads, indicated that the court record was incomplete in certain respects. She, however, submitted that notwithstanding the shortcomings in the record, the record was sufficient for the adjudication of accused 3's appeal. This was, indeed, confirmed and the appeal proceeded.

BRIEF FACTS

[17] The case emanates from the murder of the deceased, Beulah Phyllis Botha, and the attempted murder of Dr Antonie Botha on their farm De Rust, Skeerpoort, in the district of Brits on 7 April 1995. Deceased was married to Dr Antonie Botha with whom she lived on the farm. Accused 3 and 4, their employees, lived with them on the farm. Various statements and confessions were made by the accused after their arrest. Of significance is exhibit "K" which is a statement which accused 3 made to Magistrate D Janse vari Rensburg on 11 April 1995, four days after the murder of the deceased. Paragraph 8 of the admissions relates to

accused 3 and it reads:

> "8. Dat 3, Eddie Baloyi, op 11 April 1995 'n verklaring vry en bereidwillig en sonder dat hy onbehoorlik belnvloed is afgele het aan mnr D Janse van Rensburg, 'n landdros."

There was a trial within a trial relating to the admissibility of exhibit "K". Before the trial within a trial was concluded, the admissibility of exhibit "K" was admitted and was no longer in dispute. Counsel for accused 3 informed the court that he had received specific instructions to admit exhibit "K" as well as the correctness of its contents in terms of section 220 of the CPA. Accused 3 confirmed this and the statement was read into the record. The statements and the confessions refer to the other accused. I am well aware of the rule that a confession is only admissible against the author or maker. The deceased and the husband, the doctor, were attacked. The deceased was murdered while the doctor was severely injured. He, in the process, lost his consciousness, had to be admitted to hospital and operated on. His skull was badly injured to a point where it has not been possible for him to heal completely. He still experiences serious problems as he no longer can use his body like before.

THE ISSUES

[18] First, what has to be established is as to who the assailants were on the day in question. Put differently has the state proved the guilt of accused 3 beyond reasonable doubt for the conviction to ensue?

Second, the issue is whether the effective sentences imposed on the accused were in accordance with justice.

LEGAL PRINCIPLES AND DOCTRINE OF COMMON PURPOSE

[19] I shall refer to the legal principles which are paramount regarding the issues to be resolved in the current matter.

1. Common purpose

The doctrine of common purpose is applicable where one has to deal with more than one accused. The doctrine allows the court to impute the conduct of one accused to the other accused if one or two of the following requirements are met namely:

(1) where the parties agree to do the act in question which falls within their agreement;

(2) where, in the absence of a prior agreement, it can be shown that there was active association with the conduct of the accused who actually committed the crime by committing some act of association.

The essence of the special doctrine is that if two or more people having a common purpose to commit a crime act together in order to achieve that purpose then the conduct of each of them in the execution of that purpose is imputed to the other. See C R Snyman *Criminal Law,* 5th ed at page 265; *S v Shaik and others* 1983 4 SA 57 (A) at 65A; *S v Safatsa and others* 1988 1 SA 868 (A) at 894, 896 and 901; *S v Mgedezi and others* 1989 1 SA 687 (A) and *S v Thebus and another* 2003 2 SACR 319 (CC) at 341e.

It is clear from the legal writers and the case law that the doctrine of common purpose dispenses with the causation requirement. Provided the accused actually associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequence, the accused would be guilty of the offence. (S *v Thebus, supra,* at 341e.)

Active association in common purpose presupposes that:

(1) one must have been present at the scene where the violence was being committed;

(2) one must have been aware of the assault on the victim by somebody else;

(3) one must have intended to make common cause with the person or persons committing the assault;

(4) one must have manifested his sharing of a common purpose by himself performing some act of association with the conduct of the others; and

(5) one must have intended to kill the victim.

It is conceivable that one can procure another to commit the crime in his absence. (S v *Yelani* 1989 2 SA 43 (A).)

2. General principles

(1) The principles which should guide an appeal court in an appeal purely upon fact were summarised by Davis AJA in *R v Dhlumayo and another* 1948 2 SA 677 (A) at 705-706. I do not intend to enumerate all these principles. I shall, however, bring out those that I regard relevant to the current appeal.

Appeal courts, according to the judge, are "very reluctant to upset the findings of the trial judge". This, because the "trial judge has advantages - which the appellate court cannot have - in seeing and hearing the witnesses and being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality." This, according to the judge, "should never be overlooked". Further, a trial judge "may be in a better position than the appellate court, in that he may be more able to estimate what is probable or improbable in relation to the particular people whom he has observed at the trial".

In the absence of misdirection on fact by the trial court "the presumption is that his conclusion is correct; the appellate court will only reverse it where it is convinced that

it is wrong". *(Rex v Dhlumayo and another, supra).*

(2) The appeal court's powers to interfere with the findings of fact of a trial court are limited. To succeed on appeal an appellant has to convince the court on adequate grounds that "the trial court was wrong" in accepting a witness's evidence. In the absence of misdirection, the trial court's conclusion including its acceptance of a witness's evidence, is presumed to be correct. A reasonable doubt is not enough to justify interference with the trial court's findings. This, because of the advantage which the trial court has "of seeing and appraising a witness". The court, however, in exceptional cases, is entitled to "interfere with a trial court's evaluation of oral testimony". *(Taljaard v Sentrale Raad vir Kotiperatiewe Assuransie Bpk* 1974 2 SA 450 (A) at 452A-B; *S v Robinson and others* 1968 I SA 666 (A) at 675G-H and *R v Dhlumayo and another, supra.)*

(3) In *S v Hadebe and others* 1997 2 SACR 641 at 645e-f the court held that "in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong".

[20] The attack on the Bothas has been explained by Dr Botha himself in his evidence. Two males attacked them, tied them, murdered the wife, the deceased, and severely injured the doctor. The cause of the deceased's death was found to be "breinskeuring en breinbloeding". Evidence disclosed that accused 3 was not one of the assailants who physically killed the deceased and injured Dr Botha. The question which immediately springs to mind is whether accused 3, in any way, formed part of those who were to carry out the dastard act and, if so, the role that he played to be said to have actively associated himself in the common purpose.

COMMON CAUSE OR ADMITTED FACTS

[21] These are that:

(1) exhibit "K" is the statement that accused 3 made to the magistrate;

(2) accused 3 initially disputed the admissibility of the statement;

(3) during the trial within a trial accused 3 changed his mind and instructed his counsel to tell the court that he was admitting the admissibility of the statement as well as the correctness of its contents;

(4) accused 3 did not physically participate in the actual assault on the deceased and her husband;

(5) accused 3 drew the sketch-plan of the scene of crime for accused 1 and accused 2 to use in the commission of the crime;

(6) accused 3 knew why the sketch-plan was needed. It was to him clear that housebreaking was to take place;

(7) accused 3 knew the people who were to break into the Botha's house;

(8) accused 3 knew the movement of the Botha's on the day of the incident;

(9) accused 3 knew that the two assailants were waiting in the victim's house;

(10) he knew that the deceased was dead when Dr Botha eventually arrived at the scene of crime;

(11) Elizabeth Segone told accused 3 that the deceased, during the attack, called accused 3 who conveniently ignored that;

(12) accused I under cross-examination testified that he had been sent to go and commit the robbery by accused 3. This aspect was never disputed in cross

examination by accused 3's counsel;

13. accused 3, on two occasions, failed to warn the Botha's of the impending attack in which the sketch-plan that he had drawn would be used.

[22] The court *a quo* found that the state had proved the case against accused 3 and the co-accused beyond reasonable doubt. The court *a quo,* based on admitted and proved facts, evidence as a whole as well as the credibility findings, found that:

(1) accused I to 4 on 7 April 1995 were involved in the unlawful and intentional killing of Beulah Phyllis Botha, the deceased in count I;

(2) accused I to 4, on the same date and place, were involved in the unlawful and intentional housebreaking at the house of the deceased with the intention to rob where the deceased was assaulted and her articles mentioned in the indictment which were in her lawful possession were forcefully removed from her possess10n;

(3) accused I to 4 on the same date and place were involved in the unlawful and intentional attack on Antonie Botha with the intention to kill him.

[23] Accused 3 contends that the court *a quo* erred when it arrived at such findings. The contention seems to be based on the fact that accused 3 had nothing to do with the commission of the offences he has been convicted of. It is his further contention that he was forced to draw the sketch-plan by the other accused. This contention as correctly shown and proved by the state holds no water. Indeed, if accused 3 had been forced to draw the sketch-plan, and if he knew nothing of the commission of the offences, he immediately would have told the Botha's about the incident. This he did not do.

[24] Evidence at the court's disposal has shown that the four accused agreed that the Botha's were to be robbed. Accused 1 and 2 were brought into the picture while accused 4

would provide them with the muti which would help them succeed in their plan. Evidence again demonstrates that accused 1 and 2 were to commit the offence. This eventuated. Accused 3 and 4 as I have already alluded to worked and lived on the farm. Evidence relating to how things unfolded on the day of the incident is also corroborated by accused 3 himself. This evidence is confirmed by the testimony of Rosina Baloyi, accused 3's daughter and Elizabeth Segone. These witnesses testified about the attack on the deceased by two people who had balaclava hats on. The deceased screamed asking for help of accused 3. Accused 3 was duly told about this by Elizabeth Segone but he conveniently elected not to go and rescue the deceased. This piece of evidence is not disputed. A question which again immediately comes to mind is: why, if he had nothing to do with the attack on the deceased, did he not immediately go and assist the deceased or at least call for help and finally notify the police. Simple logic informs one that he could not do so because he knew what was happening.

[25] The coercion to draw the sketch-plan, according to accused 3, is very intriguing. Asked to explain how he had been forced to draw the sketch-plan accused 3 could proffer no plausible answer. In fact he failed very badly in trying to do so.

[26] Accused 3 while he could have helped resolve the issue relating to the assailants failed to give the police vital information at the scene of crime. Again simple logic will confirm that this is an action of someone who is heavily involved in the commission of the crime itself. Evidence further discloses that accused's relative's child happened to be on the farm and the deceased is said to have set dogs on her and this, according to further evidence, did not please accused 3 who appears to have told accused 1 and 2 to do whatever they wanted to do with the deceased. Accused 3's behaviour seems to lend credence to this and he did not seriously deny it. Clearly accused 3 who also seems to have been unhappy with his salary

knew all about the murder, the housebreaking and the attempted murder of Dr Antonie Botha.

[27] Accused 3 heard that the deceased was being attacked and he did nothing about it. What is worse he was asked by the deceased to go and help. He refused to offer such assistance because he conveniently did not go there. It did not matter to him if the deceased was killed. This conduct is more than foreseeing that the furnishing of the sketch-plan would lead to easy robbery where violence would be employed to overcome any resistance and that a person might die in the process. Accused 3 did not foresee but heard that the deceased was in distress and needed urgent help. That in fact told him that he immediately had to abandon whatever he was doing in order to go and offer the help that was needed. He said he would first attend to the tractor and thereafter go and help. He never went there. He never helped the deceased. Exhibit "K" explains in detail what transpired on the day of the incident. *Inter alia,* it states:

> "Na 'n paar minute het die ou man teruggekom en hulle het horn vasgehou. Hulle het die ou man vasgebind en op daardie stadium was die ou vrou klaar dood. Hulle het toe by my woning gekom en by my 'n sleutel gevra Ek het hulle meegedeel ek dra geen kennis in verband met die sleutel nie en toe het hulle gese hulle het die werk gedoen."

Accused 3 admitted exhibit "K" and its contents. Having said this, exhibit "K" can only be telling us about what the author of the statement knows about the murder and the attempted murder and the robbery. Besides, accused 3's daughter and Elizabeth Segone, upon hearing and seeing what was taking place immediately realised that that was a case which demanded to be attended to by the police. They acted promptly and properly because there was a high degree of urgency.

[28] The court *a quo* carefully and properly analysed the evidence of each witness.

Coming to accused 3 the court said:

> "Beskuldigde 3 was, om dit sagkens te stel, 'n absolute patetiese getuie gewees. Hy het voortdurend in gebreke gebly om op eenvoudige en reguit vrae te antwoord met die gevolg dat sekere vrae aanhoudend herhaal moes word. Hierdie optrede het veral treffend vorendag gekom wanneer hy oor kern aspekte van die saak ondervra is. Dit was opvallend dat hy sy getuienis aangepas het wanneer dit horn geval het en dat sy getuienis in wesenlike opsigte botsend was."

Referring to accused 3's answers regarding how he was forced to draw the sketch-plan the court *a quo* said: "Sy antwoorde oor hierdie wesenlike aspek was vaag, onseker en deursigtig."

Finally, the court *a quo* correctly rejected the version of accused 3 as not reasonably possibly true. Having gone through the court record, I cannot but agree with the court *a quo.* The court *a quo* said: "Myns insiens het die staat bo redelike twyfel bewys dat sy getuienis vals is." Again I agree.

[29] I have found no demonstrable and material misdirection by the trial court whose finding of fact I regard as correct. I have no reason to find them wrong. Accused 3's appeal in respect of conviction should fail.

SENTENCE

[30] All four accused were granted !eve to appeal to the Full Court of this division against sentence imposed by a single judge.

The appellants' legal representatives were duly warned that the court was contemplating imposing life imprisonment and that they needed to address it accordingly on the day of the hearing of the appeal.

PRINCIPLES

[31] Holmes JA in *S v Rabie* 1975 4 SA 855 (A) at 857E-F said:

> "1. In every appeal against sentence, whether imposed by a magistrate or a judge, the court hearing the appeal -
>
> (a) should be guided by the principle that punishment 1s 'pre-eminently a matter for the discretion of the trial court';
>
> (b) and should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised'.
>
> 2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate."

At 862G the court said:

> "Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to circumstances."

[32] In determining whether sentence imposed on an accused person is in accordance with justice one is always guided by the main purposes of punishment which are: "deterrent, preventive, reformative and retributive". *S v Rabie (supra)* at 862A.

[33] The court in *S v Salzwedel and others* 1999 2 SACR 586 (SCA) at 591g said:

> "An appeal court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is 'disturbingly inappropriate', or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate or vitiated by misdirections of a nature which shows that the trial court did not exercise its discretion

reasonably."

(See also S *v Pillay* 1977 4 SA 531 (A) at 5350-G; S *v Mothibe* 1977 3 SA 823 (A) and S *v Narker and another* 1975 1 SA 583 (A) at 588H.)

Lastly in S *v Pieters* 1987 3 SA 717 (A) at 727G Botha JA said:

> "Met betrekking tot appelle teen vonnis in die algemeen is daar herhaaldelik in talle uitsprake van hierdie hof beklemtoon dat vonnisoplegging berus by die diskresie van die Verhoorregter. Juis omdat dit so is, kan en sal hierdie hof nie ingryp en die vonnis van 'n Verhoorregter verander nie, tensy dit blyk dat hy die diskresie wat aan horn toevertrou is nie op 'n behoorlike of redelike wyse uitgeoefen het nie. Om dit andersom te stel: daar is ruimte vir hierdie hof om **'n** Verhoorregter se vonnis te verander alleenlik as dit blyk dat hy sy diskresie op **'n** onbehoorlike of onredelike wyse uitgeoefen het. Dit is die grondbeginsel wat alle appelle teen vonnis beheers."

PROCEEDINGS IN THE COURT *A QUO*

[34] When determining the appropriate sentences, the court *a quo* had regard to the Zinn's triad referred to in S *v Zinn* 1969 2 SA 537 (A) at 5400 which consists of the crime, the offender and the interests of society.

THE PERSONAL CIRCUMSTANCES OF THE ACCUSED

[35] **Accused 1**

Accused 1 was 17 years old when the offence was committed. He has a clean record. He is the eldest of the three children in the family. He grew up at his aunt's place. He worked as a gardener in the Reef where he earned R70,00 per week. He is not married but has a minor child. At school he only proceeded up to standard 6.The court *a quo* found that accused 1 showed remorse. His evidence filled the gaps that the state's case had. He never

disputed the statements that he made and testified advancing the state's case. The court, because of accused's age, found that he might have been influenced by the others.

Accused 2

Accused was 26 years old with a previous conviction of robbery where he was sentenced to two years' imprisonment on 10 November 1993. He is married with two minor children. He worked as a clerk and earned RI 400,00 per month. He is the oldest of five children whose father passed on when he was still young. He is a member of Zionist church. The court *a quo* found no remorse in respect of accused 2.

Accused 3

He was 62 years old. He never went to school. The court *a quo* wondered how far the witch-doctor, accused 4, could have influenced accused 3. He earned R250,00 per month. He too has a clean record.

Accused 4

He was 46 years old. He came from Mozambique with no scholastic background. His mother died while he was 10 years old. He grew up under very difficult conditions. He is a witch-doctor who was to ensure that the plans were carried out without any impediment. He has a previous conviction of stock-theft of 28 September 1992 where he was fined R300,00 or six months imprisonment.

[36] The court *a quo* considered the fact that all four had been in custody from the time of their arrest. The court had regard to the fact that serious crimes ought to attract heavy punishment. This, according to the court *a quo,* would ensure that the administration of justice did not fall into disrepute with society taking the law into its own hands. The court referred to *S v Karg* 1961 1 SA 231 (A) at 236A-B.

It was the court *a quo's* view that the public was not happy with the sentences that the courts meted out. The court *a quo* indicated it would take the cumulative effect of the sentences which would be imposed. The individualisation of the sentences the court *a quo* promised to adhere to. The court *a quo* specified that the offences that the accused were convicted of were very serious. Life was taken which was highly valued by the deceased and the family. The court *a quo* considered the prevalence of murder in our country. The court *a quo* considered the fact that the deceased and the husband had done nothing wrong as all they did was to assist accused 3 and 4. The deceased, according to the court, died a painful death. Evidence demonstrates this. Dr Botha was utterly surprised to see accused 3 and 4 as part of the perpetrators. Accused **1** was 17 when the offences were committed. The offences were not committed on the spur of the moment. They were carefully planned over a period of days when the accused could have decided to desist. The court nevertheless explained that it was not going to kill the accused or avenge their dastard acts on behalf of the deceased and the family. (S *v Du Toit* 1979 3 SA 846 (A).)

THE ISSUE

[37] The issue to be determined is whether the sentence is harsh, shocking and disturbingly inappropriate. Put differently, whether the sentence meted out is in accordance with justice.

[38] Mr Makama, for accused 1, implored the court to find that the sentence was such that it could hardly be said that the discretion of the court was reasonably, properly and judicially exercised. There is merit in the submission especially if regard is had to the fact that accused 1 was 17 years old when the offences were committed. The court *a quo* also found that accused 1 had been very co-operative to a point where he even bolstered the state's case. The court, here, misdirected itself when it found that the appropriate sentence, cumulatively, in respect of accused 1 was 50 years imprisonment. The court, even after observing that

accused 1 being the youngest of them all, must have been influenced by the others, did not deem it fit to impose a sentence on accused 1 which would have been proportionate to his circumstances. Accused 1 was still immature and his judgment was also limited.

[39] Accused 2 effectively was sentenced to 60 years imprisonment. Considering that he was 26 years old when he was sentenced, he would be 86 years old if he were to serve the whole sentence.

[40] Accused 3 who was 62 years old when he was sentenced, would be 112 years old if he were to serve the full sentence. Not many people live up to this age.

[41] Accused 4 was 46 years old when the sentence was passed. If he were to serve the whole sentence he would be I 06 years old at the time of his release. Very few people indeed reach this age and accused 4 is no exception.

[42] Having regard to their ages, the period they spent awaiting trial as well as their other personal circumstances, I regard the sentences imposed on them as inordinately long. The court *a quo,* in this regard, misdirected itself when it ultimately imposed the sentences it imposed on the accused.

[43] Farlam JA in *S v Nkosi and Others* 2003 I SACR 91 (SCA) at 95c-d [9] said:

> "[9] Thus, under the law as it presently stands, when what one may call a Methuselah sentence is imposed (ie a sentence in respect of which the prisoner would require something approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment which is prescribed by section 12(I)(e) of the Constitution of the Republic of South Africa Act

108 of 1996."

The possibility of parole saves a sentence of life imprisonment from being cruel, inhuman and degrading punishment (S *v Bull and another; S v Chavulla and Others* 2001 2 SACR 681 (SCA) at 693j-694a).

[44] Mr Coetzer, for the respondent, conceded that the sentences imposed by the court *a quo* qualified as such sentence referred to in the cases in paragraph 42 above. It is his further concession that the court *a quo* misdirected itself in imposing sentences of 50 years and 60 years effective imprisonment. I agree. This court is therefore at large to interfere with the sentences imposed.

[45] It remains to determine the appropriate sentences to be imposed on the accused. Mr Coetzer submitted that everything considered, an appropriate cumulative sentence would be one of between 30 and 35 years direct imprisonment if the court did not impose life imprisonment in respect of accused 2, 3 and 4. Ms Van Wyk, for accused 4, submitted that an effective period of 30 years imprisonment would be an appropriate sentence while Mr Makama for accused I felt that an effective sentence of 20 years imprisonment for his client would be an appropriate effective sentence.

[46] Accused 3 was, in my view, correctly convicted. The court *a quo's* findings on fact and the evaluation of evidence cannot be faulted. Accused 3's appeal in respect of his conviction should fail.

[47] The court *a quo's* misdirection on sentence means that the appeal against sentence should succeed.

[48] Having had regard to the triad referred to in S *v Zinn, supra,* and all the factors relevant to sentence I make the following order:

1. Accused 3's appeal against conviction is dismissed.

2. The appeal against the sentences imposed on the four accused is upheld.

3. The sentences imposed on the four accused by the court *a quo* are set aside and replaced with the following sentences:

ACCUSED 1

1. COUNT 1 : MURDER

You are sentenced to 25 years imprisonment.

2. COUNT 3: HOUSEBREAKING WITH THE INTENTION TO ROB AND ROBBERY WITH AGGRAVATING CIRCUMSTANCES

You are sentenced to I 0 years imprisonment.

3. COUNT 4: ATTEMPTED MURDER

You are sentenced to 10 years imprisonment.

Effectively you are sentenced to 25 years imprisonment.

ACCUSED 2

COUNT 1

You are sentenced to 35 years imprisonment.

COUNT 3

You are sentenced to 15 years imprisonment.

COUNT 4

You are sentenced to 15 years imprisonment.

Effectively you are sentenced to 35 years imprisonment.

ACCUSED 3

COUNT 1

You are sentenced to 35 years imprisonment.

COUNT 3

You are sentenced to 15 years imprisonment.

COUNT 4

You are sentenced to 15 years imprisonment.

Effectively you are sentenced to 35 years imprisonment.

ACCUSED 4

COUNT 1

You are sentenced to 35 years imprisonment.

COUNT 3

You are sentenced to 15 years imprisonment.

COUNT 4

You are sentenced to 15 years imprisonment.

You are effectively sentenced to 35 years imprisonment.

4. It is ordered that the sentences on counts 3 and 4 in respect of all the accused shall run concurrently with the sentence on count 1.

5. The sentences are antedated to 19 March 1997 being the date of sentence.

M W MSIMEKI

JUDGE OF THE GAUTENG DIVISION, PRETORIA

A898/2013

I agree

S POTTERIL

JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

N TUCHTEN

JUDGE OF THE GAUTENG DIVISION. PRETORIA

HEARD ON:

FOR THE APPELLANTS:

INSTRUCTED BY:

FOR THE RESPONDENT:

INSTRUCTED BY: