**REPORTABLE**

# *THE SUPREME COURT OF APPEAL OF SOUTH AFRICA*

Case No: 117/2000

In the matter between

**HENNA MALGAS** **Appellant**

and

**THE STATE** **Respondent**

**<u>CORAM</u>:** HARMS, MARAIS, CAMERON JJA CHETTY *et* MTHIYANE AJJA

**<u>DATE HEARD</u>:** 16 February 2001

**<u>DATE DELIVERED</u>:** 19 March 2001

**Minimum sentences for certain serious offences - murder - life imprisonment - s 51(3)(a) Act 51 of 1977 - substantial and compelling circumstances justifying lesser sentence - interpretation of provision.**

**JUDGMENT**

**MARAIS JA**

**MARAIS JA:** [1] Judicial hostility to legislative prescriptions which strip courts of their sentencing discretion is hardly surprising. Given the infinite variety of circumstances which attend the commission of crimes, who are better placed than the courts, which experience daily the complexities of imposing sentences which are as just as human fallibility can make them, to understand the arbitrariness and potential unjustness of such edicts? Sentencing has rightly been described as "a lonely and onerous task"[1]. For those who must shoulder that responsibility in society's name, to have to impose a statutorily decreed sentence which is manifestly unjust in the particular circumstances of the case is a monstrous thing.

[2] That said, there is a significant distinction between, on the one hand, a legislative provision which does in truth deprive a court of any sentencing discretion at all, or so attenuates it that its existence is illusory, and, on the other, one which fetters only partially the exercise of the discretion and leaves it otherwise largely intact. Ritualistic incantations of the doctrine of the separation of powers to justify resistance to *any* form of legislative intervention in this regard seem to me to lack plausibility. Subject of course to constraints going to substance imposed by the Constitution, Parliament is obviously empowered to create new offences and abolish old ones (whether they were statutorily created or originated in the common law) and to provide for the penalties courts may impose. It may, and does, limit the sentencing powers of courts in a variety of ways. The types of sentence which may be imposed may

[1] Hogarth, *Sentencing as a Human Process* (1971) U. of Toronto P., p.5. (Cited in *Stockdale and Devlin on Sentencing*, 1987, p 8).

be laid down, for example, those listed in s 276 of the Criminal Procedure Act 51 of 1977. A maximum penalty of one kind or another may be specified. Even in those countries where the doctrine of the separation of powers is an article of faith, legislatures have been doing such things for generations without protest from the judiciary or the citizenry. No court exercising criminal jurisdiction in South Africa could convincingly claim to be the sole constitutional repository of power to do such things. Indeed, the courts have no inherent power to do any such thing. They cannot create new crimes. Nor can they invent a new kind of penalty such as, for example, physical detention under lock and key at some place other than a prison.

[3] What *is* rightly regarded as an unjustifiable intrusion by the legislature upon the legitimate domain of the courts, is legislation which is so prescriptive in its terms that it leaves a court effectively with no sentencing discretion whatsoever and obliges it to pass a specific sentence which, judged by all normal and well-established sentencing criteria, could be manifestly unjust in the circumstances of a particular case. Such a sentencing provision can accurately be described as a mandatory provision in the pejorative sense intended by opponents of legislative incursions into this area.[2] A provision which leaves the courts free to exercise a substantial measure of judicial discretion is not, in my opinion, properly described as a mandatory provision in that sense. As I see it, this case is concerned with such a provision.

[4] Sections 51 and 53 of the Criminal Law Amendment Act 105 of 1997 provide:

"**51. Minimum sentences for certain serious offences. -** (1) Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall, if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.

---

[2] *S v Toms; S v Bruce* 1990 (2) SA 802 (A) at 806H - 807D.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall -

(a) if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person in the case of -

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(b) if it has convicted a person of an offence referred to in Part III of Schedule 2, sentence the person, in the case of -

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

(c) if it has convicted a person of an offence referred to in Part IV of Schedule 2, sentence the person, in the case of -

(i) a first offender, to imprisonment for a period not less than 5 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years:

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection;

(3)(a) 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) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older; but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.

(4) Any sentence contemplated in this section shall be calculated from the date of sentence.

(5) The operation of a sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

(6) The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.

(7) If in the application of this section the age of a child is placed in issue, the onus shall be on the State to prove the age of the child beyond reasonable doubt.

(8) (Omitted because immaterial.)"

"**53. Saving. -** (1) Sections 51 and 52 shall, subject to subsections (2) and (3), cease to have effect after the expiry of two years from the commencement of this Act.

(2) The period referred to in subsection (1) may be extended by the President, with the concurrence of Parliament, by proclamation in the *Gazette* for one year at a time.

(3) Any appeal against -

(a) a conviction of an offence referred to in Schedule 2 of this Act and a resultant sentence imposed in terms of section 51; or

(b) a sentence imposed in terms of section 51, shall be continued and concluded as if section 51 had at all relevant times been in

operation.”



[5] Schedule 2 is as follows:

“PART I

Murder, when -

(a) it was planned or premeditated;

(b) the victim was -

(i) a law enforcement officer performing his or her functions as such, whether on duty or not; or

(ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act 51 of 1977), at criminal proceedings in any court;

(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:

(i) Rape; or

(ii) robbery with aggravating circumstances; or

(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

Rape -

(a) when committed -

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution of furtherance or a common purpose or conspiracy;

(iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions; or

(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

(b) where the victim -

(i) is a girl under the age of 16 years;

(ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or

(iii) is a mentally ill woman as contemplated in section 1 of the Mental

Health Act, 1973 (Act 18 of 1973); or

(c) involving the infliction of grievous bodily harm.

PART II

Murder in circumstances other than those referred to in Part 1.

Robbery -

(a) when there are aggravating circumstances; or

(b) involving the taking of a motor vehicle.

Any offence referred to in section 13 (f) of the Drugs and Drug Trafficking Act, 1993 (Act 140 of 1992). If it is proved that -

(a) the value of the dependence producing substance in question is more than R50 000,00;

(b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution of furtherance of a common purpose or conspiracy; or

(c) the offence was committed by any law enforcement officer.

Any offence relating to -

(a) the dealing in or smuggling of ammunition, firearms, explosives or armament; or

(b) the possession of an automatic or semi-automatic firearm, explosives or armament.

Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft -

(a) involving amounts of more than R500 000,00
(b) involving amounts of more than R100 000,00, if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or

(c) if it is proved that the offence was committed by any law enforcement officer -

(i) involving amounts of more than R10 000,00; or

(ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

PART III

Rape in circumstances other than those referred to in Part I.

Indecent assault on a child under the age of 16 years, involving the infliction of

bodily harm.



Assault with intent to do grievous bodily harm on a child under the age of 16 years.

Any offence in contravention of section 36 of the Arms and Ammunition Act, 1969 (Act 75 of 1969), on account of being in possession of more than 1000 rounds of ammunition intended for firing in an arm contemplated in section 39 (2)(a)(i) of that Act.

PART IV

Any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act 51 of 1977), other than an offence referred to in Part I, II. or III of this Schedule, if the accused had with him or her at the time a firearm, which was intended for use as such, in the commission of such offence."

[6] There have been a number of decisions[3] in which the High Courts have considered the import of the injunction to impose imprisonment for life upon a person convicted of an offence referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2) unless satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence. The interpretations placed upon the provisions have been discordant and that necessitates this Court

---

[3] *S v Mofokeng and Another* 1999 (1) SACR 502 (W); *S v Segole and Another* 1999 (2) SACR 115 (W); *S v Zitha and Others* 1999 (2) SACR 404 (W); *S v Jansen* 1999 (2) SACR 368 (C); *S v Swartz and Another* 1999 (2) SACR 380 (C); *S v Blaauw* 1999 (2) SACR 295 (W); *S v Shongwe* 1999 (2) SACR 220 (O); *S v Dithotze* 1999 (2) SACR 314 (W); *S v Homareda* 1999 (2) SACR 319 (W); *S v Van Wyk* 2000 (1) SACR 45 (C); *S v N* 2000 (1) SACR 209 (W); *S v Boer en Andere* 2000 (2) SACR 114 (NC); *S v Kanjwayo; S v Mihlali* 1999 (2) SACR 651 (O); *S v Montgomery* 2000 (2) SACR 318 (N). Unreported cases: *S v Mthembu and Another*, 365/98 WLD (Leveson J) 22.10.1998; *S v Madondo*, cc 22/99 NPD (Squires J) 30.3.1999; *S v Ngubane*, cc 31/99 NPD (Squires J) 30.3.1999; *S v Cimani*, cc 11/99 ECD (Jones J) 28.4.1999; *S v Oliphant*, cc 27/99 SECLD (Erasmus J); *S v Van Rooyen en Andere,* cc 18/00 SECLD (Kroon J) 7.6.2000.

considering the question afresh in deciding the outcome of the appeal against sentence in this matter. In doing so, I have found much of great help in those judgments for which I am grateful. Valuable as they are, a dissection and discussion of each of them would result in an indigestible judgment. Instead, I shall approach the problem as if the matter was *res nova* but with the advantage of the insights which the reading of those judgments has given.

[7] First, some preliminary observations. The provisions are to be read in the light of the values enshrined in the Constitution and, unless it does not prove possible to do so, interpreted in a manner which respects those values.[4] Due weight must be given to the fact that these provisions were not intended to be permanent fixtures on the legislative scene and were to lapse after two years unless extended annually. (They were put into operation on 1 May 1998 and were extended for 12 months with effect from 1 May 2000.) That shows that when conceived they were intended to be relatively short-term responses to a situation which it was hoped would not persist indefinitely. That situation was and remains notorious: an alarming burgeoning in the commission of crimes of the kind specified resulting in the government, the police, prosecutors and the courts constantly being exhorted to use their best efforts to stem the tide of criminality which threatened and continues to threaten to engulf society. It was of course open to the High Courts even prior to the enactment of the amending legislation to impose life imprisonment in the free exercise of their discretion. The very fact that this amending legislation has been enacted indicates that parliament was not content with that and that it was no longer to be "business as usual" when sentencing for the commission of the specified crimes.

[8] In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular

---

4 *S v Dzukuda and Others; S v Tshilo* 2000 (4) SA 1078 (CC) at 1100I - 1102B.

prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.

[9] Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence. As was observed in *Flannery v Halifax Estate Agencies Ltd* [5] by the Court of Appeal, "a requirement to give reasons concentrates the mind, if it is fulfilled the resulting decision is much more likely to be soundly based --- than if it is not". Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances. Nor were marginal differences in the personal circumstances or degrees of participation of co-offenders which, but for the provisions, might have justified differentiating between them. But for the rest I can see no warrant for deducing

[5] [2000] 1 WLR 377 at 381H

that the legislature intended a court to exclude from consideration, *ante omnia* as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders. The use of the epithets "substantial" and "compelling" cannot be interpreted as excluding *even from consideration* any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative *impact* of those circumstances must be such as to *justify* a departure. 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 the 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.

[10] To the extent therefore that there are *dicta* in the previously decided cases that suggest that there are such factors which fall to be eliminated entirely either at the outset of the enquiry or at any subsequent stage (eg age or the absence of previous convictions), I consider them to be erroneous. Equally erroneous, so it seems to me, are *dicta* which suggest that for circumstances to qualify as substantial and compelling they must be "exceptional" in the sense of seldom encountered or rare. The frequency or infrequency of the existence of a set of circumstances is logically irrelevant to the question of whether or not they are substantial and compelling.

[11] Some of the courts which have had to deal with the problem have resorted to the processes of thought employed and the concepts developed by the courts in considering appeals against sentence. In my view such an

approach is problematical and likely to lead to error in giving effect to the intention of the legislature.

[12] The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject of course to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.

[13] Some of the courts which have wrestled with the problems which

sections s 51 raises have sought to draw parallels between the latter process and the approach to be followed when applying its provisions. With respect, I consider the attempt to be misguided. The tests for interference with sentences on appeal were evolved in order to avoid subverting basic principles that are fundamental in our law of criminal procedure, namely, that the imposition of sentence is the prerogative of the trial court for good reason and that it is not for appellate courts to interfere with that exercise of discretion unless it is convincingly shown that it has not been properly exercised. The epithets ("shocking", "startling", "disturbingly inappropriate" and the like) that have been employed to drive that point home should not simply be appropriated indiscriminately for use in a situation which is very different.

[14] When applying the provisions of s 51 a trial court is not in appellate mode. It is not confronted by a prior exercise of judicial discretion attuned to the particular circumstances of the case and which is *prima facie* to be respected. Instead, it is faced with a generalised statutory injunction to impose a particular sentence which injunction rests, not upon all the circumstances of the case including the personal circumstances of the offender, but simply upon whether or not the crime falls within the specific categories spelt out in Schedule 2. Concomitantly, there is a provision which 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*" (my emphasis) it. In considering that question the trial court is doing so for the first time. There has been no prior consideration of the particular circumstances of the case by either the legislature or another court. There is thus no justification for arbitrarily importing into the exercise a test which was evolved in a very different context and which was designed to serve a very different purpose.

[15] I consider the *dicta* in the cases which advocate such an approach to

the application of s 51 to be conducive to error. In my view, they constrict unjustifiably the power given to a trial court by s 51 (3) to conclude that a lesser sentence is justified. Any limitations upon that power must be derived from a proper interpretation of the provisions of the Act and not from the assumption *a priori* that only a process akin to that which a court follows when in appellate mode is intended.

[16] It is of course so that satisfaction of the test which that process postulates would also justify the conclusion that a departure from the prescribed sentence is justified. The problem is that it by no means follows that simply because that test is not satisfied, a departure is *ipso facto* unjustified. In other words, while satisfaction of that test is certainly a *sufficient* justification for departure, satisfaction of it is not *necessary* to justify departure. The use of the test tends to obscure that. Hence its potential to lead one into error.

[17] On the other hand, it seems clear that those who have decried the suggestion that the exercise required involves no more than assessing what, but for the legislation, would have been an appropriate sentence and, if that should be anything less than the prescribed sentence, regarding that as sufficient justification for departure, are right. As they have pointed out, that approach would obviously represent a return to what I have called "business as usual" and no effect whatsoever would be given to the intention of the legislature.

[18] Here lies the rub. Somewhere between these two extremes the intention of the legislature is located and must be found. The absence of any pertinent guidance from the legislature by way of definition or otherwise as to what circumstances should rank as substantial and compelling or what should not, does not make the task any easier. That it has refrained from giving such guidance as was done in Minnesota from whence the concept of "substantial and compelling circumstances" was derived[6] is significant. It signals that it has deliberately and advisedly left it to the courts to decide in the final analysis

6 Van Zyl Smit, 1999 (15) SAJHR 270 at 271-273.

whether the circumstances of any particular case call for a departure from the prescribed sentence. In doing so, they are required to regard the prescribed sentences as being *generally appropriate* for crimes of the kind specified and enjoined not to depart from them unless they are satisfied that there is weighty justification for doing so. A departure must be justified by reference to circumstances which can be seen to be substantial and compelling as contrasted with circumstances of little significance or of debatable validity or which reflect a purely personal preference unlikely to be shared by many.

[19] There has been some uncertainty as to whether the words "substantial and compelling" are to be examined separately or conjointly in attempting to arrive at Parliament's intention and in applying them to the particular circumstances of a case. In my opinion it is a barren exercise to subject each to intense scrutiny on its own devoid of the influence of its neighbour. The legislature refrained from using the word "or" in favour of the word "and" and has thus provided a composite description of the circumstances which can justify a departure from the prescribed sentences. What Parliament requires is that the circumstances should meet the test of the composite description.

[20] It would be an impossible task to attempt to catalogue exhaustively either those circumstances or combinations of circumstances which could rank as substantial and compelling or those which could not. The best one can do is to acknowledge that one is obliged to keep in the forefront of one's mind that the specified sentence has been prescribed by law as the sentence which must be regarded as ordinarily appropriate and that personal distaste for such legislative generalisation cannot justify an indulgent approach to the characterisation of circumstances as substantial and compelling. When justifying a departure a court is to guard against lapses, conscious or unconscious, into sophistry or spurious rationalisations or the drawing of distinctions so subtle that they can hardly be seen to exist.

[21] It would be foolish of course, to refuse to acknowledge that there is

an abiding reality which cannot be wished away, namely, an understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust. To attempt to deny a court the right to have any regard whatsoever to past sentencing patterns when deciding whether a prescribed sentence is in the circumstances of a particular case manifestly unjust is tantamount to expecting someone who has not been allowed to see the colour blue to appreciate and gauge the extent to which the colour dark blue differs from it. As long as it is appreciated that the mere existence of *some* discrepancy between them cannot be the sole criterion and that something more than that is needed to justify departure, no great harm will be done.

[22] What that something more must be it is not possible to express in precise, accurate and all-embracing language. The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence.

[23] While speaking of injustice, it is necessary to add that the imposition of the prescribed sentence need not amount to a shocking injustice ("'n skokkende onreg" as it has been put in some of the cases in the High Court) before a departure is justified. That it would be an injustice is enough. One does not calibrate injustices in a court of law and take note only of those which are shocking.

[24] It has been suggested that the kind of circumstances which might

qualify as substantial and compelling are those which reduce the moral guilt of the offender (analogously to the circumstances considered in earlier times to be capable of constituting "extenuating circumstances" in crimes which attracted the sentence of death). That will no doubt often be so but it would not be right to suppose that it is only factors diminishing moral guilt which may rank as substantial and compelling circumstances.

[25] 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 that 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, 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. In summary -

A Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the

policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.

H In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I 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.

J In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided.

[26] I turn to the merits of the present appeal against sentence. Appellant, a 22 year old woman, was convicted by Liebenberg J in the South Eastern Cape Local Division of the High Court of murder and sentenced to imprisonment for life. Leave to appeal to this Court against her sentence was granted by the court *a quo*. At the instigation of his wife, appellant shot the deceased in the head while he lay asleep at his home. The circumstances which led up to that were these. Appellant had been living for about a month in the deceased's house together with him, his wife Carol and their children. Precisely what the nature of appellant's relationship with the deceased was is unclear. However, she testified that the night before the deceased was shot he had struck her because he believed that she had been sexually involved with another man. The relationship between the deceased and his wife was stormy and many quarrels had taken place. The deceased's wife had allegedly been unfaithful to him with various other men. On the night that appellant was struck by the deceased Carol told her that she intended to shoot the deceased. Carol had been upset by the incident.

[27] On the day of the shooting a quarrel between the deceased and Carol took place. Later the deceased told appellant that he loved her. She replied that she wished to have nothing to do with him. He produced a firearm and locked himself in the bathroom where he fired a shot causing Carol and appellant to think he had committed suicide. When told by appellant that she and Carol were going to "drink pills" he emerged from the bathroom unscathed. Friends of the deceased arrived and whisky was consumed until approximately 1.30 am when the friends left. Thereafter appellant, Carol and the deceased all lay upon the same bed. The deceased fell asleep and Carol roused him and gave him two pills to drink. The deceased fell asleep again and snored so loudly that appellant went to lie down in another room.

[28] Shortly after 3.00 am Carol woke appellant and handed her a pair of gloves, a jersey and a firearm which she had loaded and cocked. Appellant was

told to don the gloves so that her fingerprints would not appear on the firearm and also to prevent any traces of gunpowder from being deposited upon her hands. She was told to wear the jersey so that any gunpowder marks and traces of blood would not be deposited upon her night attire. Carol told her to repair to their bedroom and to shoot the deceased. She referred to her life with the deceased as "'n hond se lewe". Appellant knelt alongside the deceased and levelled the firearm at his head. She could not bring herself to fire the shot and stood up again. After further persuasion by Carol she knelt alongside the bed again and once again trained the weapon upon the deceased. Again she could not bring herself to fire the shot. When she rose to her feet Carol told her that she had to shoot the deceased or she would burn the house down with petrol. She also said that if appellant shot the deceased she, Carol, and Carol's children would thereafter be able to lead "'n baie lekker lewe". Carol also reminded her that the deceased had struck her the previous evening and that that should serve as an incentive to her to shoot him. The appellant once again knelt alongside the deceased and pointed the firearm at his head. Carol said that she would indicate when the shot should be fired. When Carol said to her "Henna nou!" she fired a shot and the deceased was struck in the head. He died soon thereafter.

[29] With the co-operation of appellant Carol thereafter attempted to pass off what had occurred as an act of suicide committed by the deceased. Some time thereafter appellant confessed first to a friend and thereafter to a member of the South African Police who was also a friend that she had shot the deceased. That led to her arrest and trial.

[30] Liebenberg J gave anxious consideration to the question of sentence and concluded that the circumstances of the case could not be regarded as substantial and compelling in their mitigatory effect and therefore such as to justify the imposition of a lesser sentence than imprisonment for life. He reached that conclusion with regret and said that if it had not been for the fact

that a sentence of life imprisonment was prescribed by the relevant statute, he would not have considered sentencing appellant to imprisonment for life. He referred to the lack of unanimity in the provincial divisions of the High Court as to the correct interpretation of the legislation and regarded himself as bound by the approach indicated by Stegmann J in *S v Mofokeng* which approach had been approved by Jones J in an unreported decision in the Eastern Cape Division. He indicated that he was, in any event, in agreement with that approach. One of the findings made by Stegmann J in *Mofokeng's* case was that "for substantial and compelling reasons to be found, the facts of the particular case must present some circumstance that is so exceptional in its nature and that so obviously exposes the injustice of the statutory prescribed sentence in the particular case, that it can rightly be described as 'compelling' the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified".

[31] As I have indicated earlier in this judgment the requirement that the circumstances be "exceptional" does not appear from the legislation and, in so far as Liebenberg J approached the question of sentence from that perspective, he erred. In all other respects Liebenberg J approached the question of sentence in a manner consistent with the approach set forth in this judgment. He made reference to the very serious nature of the crime. He pointed to the element of premeditation present and the defenselessness of the deceased. He considered that the motive for the killing was greed. There were apparently some life insurance policies from which Carol would benefit and the appellant stood to gain from the "lekker lewe" of which Carol had spoken. He adverted to the prevalence of crimes of violence in the country and the community's interest in having the courts deal severely with offenders.

[32] As against those considerations he took into account the absence of any previous convictions, and accepted evidence that Carol was a domineering personality. He accepted too that Carol had been the instigator and that she had

brought influence to bear upon the appellant but did not consider it to have been a weighty factor when measured against the appellant's deed. The learned Judge regarded appellant's remorse induced voluntary admission of her guilt to her friends as possibly the strongest point in appellant's favour but then tended to minimise its importance by observing that subsequent remorse was not something exceptional. Having balanced all these considerations he concluded that they did not amount to substantial and compelling circumstances within the meaning of the legislation.

[33] It is not possible to say to what extent the learned Judge's evaluation of the circumstances of the case as not being substantial and compelling was influenced by his adoption of the proposition that they would have to be classifiable as exceptional before they would qualify as substantial and compelling circumstances. That it must have played some role seems clear for he found it necessary to state expressly that he approved of Stegmann J's view that the circumstances would have to be exceptional. Given that misdirection this Court is at large to reconsider the matter afresh and it is unnecessary to decide whether or not it would have been free to do so absent such misdirection.[7]

[34] The circumstances in which the crime was committed are undoubtedly such as to render it necessary to impose a sentence of imprisonment for life unless substantial and compelling circumstances justify a lesser sentence. The shooting was premeditated and planned. The fact that the planning and premeditation occurred not long before the deed was accomplished cannot alter that. It was also carried out in the execution of a common purpose to kill the deceased. Giving all due weight to the enormity of the crime and the public interest in an appropriately severe punishment being imposed for it, I consider that the personal circumstances of the accused (her relative youth, her clean record and her vulnerability to Carol's influence by

---

[7] Cf *S v Homareda* 1999 (2) SACR 319 (W) at 326c-d.

reason of her status as a resident in the latter's home at the latter's pleasure) and the fact that she was dragooned into the commission of the offence by a domineering personality are strongly mitigating factors. As a fact she gained nothing from the commission of the crime. Her remorse cannot be doubted and her spontaneous confession which brought to light the commission of a crime which would otherwise have gone undetected is deserving of recognition in a tangible sense. She is young enough to make rehabilitation of her a real prospect even after a long period of imprisonment. These circumstances, cumulatively regarded, satisfy me that a sentence of life imprisonment would be unjust. They qualify therefore as substantial and compelling circumstances within the meaning of the provision. None the less, it remains a particularly heinous crime of the kind which the legislature has singled out for severe punishment and the sentence to be imposed in lieu of life imprisonment should be assessed paying due regard to the bench mark which the legislature has provided. In my judgment, imprisonment for twenty-five (25) years is appropriate.

[35] The appeal succeeds. The sentence of life imprisonment is set aside and there is substituted for it a sentence of imprisonment for twenty-five (25) years. In so far as it may be necessary to do so, the sentence so imposed is antedated to 3 November 1999 being the date upon which the sentence of life imprisonment was imposed.

**R M MARAIS**
**JUDGE OF APPEAL**

**HARMS JA)**
**CAMERON JA)**
**CHETTY AJA)**
**MTHIYANE AJA) CONCUR**