



REPORTABLE

CASE NO: SA 29/2015

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ROMEO MANELLITTO SCHIEFER

Appellant

and

THE STATE

Respondent

Coram: DAMASEB DCJ, SMUTS JA and HOFF JA

Heard: 20 June 2016

Delivered: 12 September 2017

Summary: The approach to appeals against sentence on the ground of excessive severity or excessive leniency where there has been no misdirection on the part of the trial court. The imposition of sentence is the prerogative of the trial court and the exercise of its discretion is not to be interfered with merely because an appellate court would have imposed a heavier or lighter sentence.

An appeal court may only interfere if the sentence imposed by the trial court is so inappropriate, that if the appeal court had sat as a court of first instance, it would have

imposed a sentence which would markedly have differed from that imposed by the trial court.

In such situations it would be said that the sentence imposed by the trial court was shockingly or startlingly or disturbingly inappropriate or that the trial court has unreasonably exercised its discretion.

Held on appeal – the cumulative effect of mitigating factors may be considerable.

Held further on appeal that had this court sat as a court of first instance it would have ordered a longer period of imprisonment imposed in respect of second count to run concurrently with sentence imposed in first count and that the proposed sentence differs markedly from the sentence imposed by the trial court so that the sentence imposed by the trial court attracts the epithet of strikingly, startlingly or patently inappropriate which justifies interference on appeal.

APPEAL JUDGMENT

HOFF JA (DAMASEB DCJ and SMUTS JA concurring):

[1] This is an appeal against the sentence imposed by the High Court after convicting the appellant on two counts of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003 and one count of theft.

[2] The appellant was sentenced to 28 years imprisonment on each of the murder counts. Eight years imprisonment in respect of the second count was ordered to run concurrently with the sentence imposed in the first count. The appellant was warned and cautioned in respect of the count of theft. The appellant therefore had to serve 48 years imprisonment effectively.

[3] The appellant thereafter unsuccessfully applied for leave to appeal against his convictions and sentences by the court *a quo* and petitioned the Chief Justice. Leave to appeal was granted against the sentences only.

Condonation applications

[4] The appellant's petition for leave to appeal was filed late and the heads of argument were also filed late. The respondent's heads of argument were also filed late. The appellant and respondent applied for condonation of their respective non-compliances with the rules of this court. The applications were unopposed. This court having been satisfied in respect of the reasons for the respective non-compliances, granted condonation.

The grounds of appeal

[5] The grounds of appeal were stated as follows in the appellant's application for leave to appeal:

'That the learned Judge erred and/or misdirected herself by:

1. imposing a sentence of 48 (forty eight) yrs direct imprisonment on a juvenile who was 18 yrs old at the time of the commission of the offences which sentence is startlingly inappropriate and induces a sense of shock.
2. overemphasising the interest of society and ignoring the important personal circumstances of the Appellant by only paying (lip?) service to these factors and not reflecting these in the sentence.
3. overemphasising the circumstances of the murders and totally disregarding the evidence given by the sister and brother as well as the son of the two deceased persons with regard to the murders.
4. overemphasising the retributive and preventative elements in the absence of direct evidence that it should form the main focus of the sentence instead of accepting the reformatory and rehabilitative aspect as the main guideline for this youthful Appellant.
5. finding that Appellant showed no remorse while there is in fact no evidence to support such finding but rather evidence and submissions from the bench that the appellant is indeed extremely remorseful and loved his parents very much and were very close to them as the baby of the family.'

[6] It is not clear what is meant in ground 5, unless the word 'bench' is substituted with 'defence'.

The facts found to be proved by the court *a quo* in respect of the convictions

[7] It is important in determining the appeal against sentence to consider the circumstances in which the offences had been committed. A confession admitted as evidence during the trial portrayed the circumstances as follows:

'I failed my Grade 10 exam during 2006 and repeated it in 2007 at Namcol. I failed to hand in my last projects of four subjects. This made my mother angry as she said that I wasted her money. I went with my brother to Namcol who said that they will send out our results on the coming Monday 2008/01/21. My mother was very upset she swears at me and pulls me around on Tuesday 2008/01/17. On Friday 2008/01/18 I assisted my mother in the kitchen and watched TV with my father. I left home at about 21:00 and went to the shop. The bar is next to the shop. I purchased a cigarette at the bar and I went home. When I reached at home my friend Lee-Roy arrived. We sat in the car and discussed our plans to go out for the evening. I told him to come back later so that I can prepare myself first. I went into the yard and went to the back where I smoked. The lady in the outside room saw me. I finished and went into the house and asked my mother money. She asked me to purchase Tango credit. My mother swore at me and accused me that I do not want to learn, waste her money and just walk around doing nothing. That triggered me and I decided that this is enough. I went to the drawer where the knives were kept and I took one. I stabbed my mother. Do not know where I stabbed her and I went to my father's room where he was asleep. I closed the door, went to the cupboard and took his pistol. I was crying and a teardrop fell on him and he turned. I first shot him through the pillow which I hold in front of the pistol. I went out of the sleeping room and found my mother still in the kitchen. I went out of the kitchen and my mother closed the door. I shot three or four shots through the door. I forced the door open and went in. I found that my mother was inside their sleeping room and the door was locked. I kicked the door open and went inside. I fired one shot in the air and my mother stormed at me. And I shot at her several shots. I went out of the room and my friend Lee-Roy arrived. I asked him to purchase the Tango Credit. While he was away I put on a jean, T-shirt and takkies. My trousers were blood smeared. Lee-Roy arrived and I took the credit and pretended as if I gave the credit to my mother. While inside I start to stab my mother again but I cannot recall where I stabbed her. I left the pistol on a table in the kitchen. I throw the knife between the two cars and closed the garage doors. I went with Lee-Roy. I did not say anything and Lee-Roy asked me what is wrong but I not tell him anything and we went to Vaalhoek. We went to Lee-Roy's house. Arriving there he had to wait for other girls and we start to drink wine. At about 01:00 my brother Mario phone me and he said that there are problems at home. I went home and met them all there. We went to police station. Answered some questions and I went to my aunt's house where I slept

the night. I think there is something wrong with me since I was a small boy. I also consulted a psychologist several times.'

[8] The biological father of the appellant died as a result of a gunshot injury to the head and his mother died as a result of multiple projectile injuries to the head, neck, chest, legs and abdomen. There were 9 entrance wounds and 6 exit wounds on the body of the mother of the appellant. Three projectiles were retrieved from her body. In addition there were incision wounds on the mother's right cheek and in the neck with the blade of the knife still *in situ* in the left lateral neck. The stab wounds did not cause the death of the mother.

The sentencing in the court *a quo*

[9] The appellant did not testify in mitigation of sentence but called three family members to testify on his behalf. The testimonies of these family members were to the effect that the appellant is a person of good character, was disciplined and obedient to his parents and all three family members testified that they did not believe that the appellant was responsible for the murders of his parents. It also appeared from the evidence that the appellant was never ill-treated by his parents, that he led a privileged and sheltered life, that he never had to work for an income, had no bank account or money of his own, that his parents maintained him, that he was trusted with the finances of the meat business, that in order to assist him with his studies his parents enrolled him in a private school after he had failed Grade 10, and was his parents' 'favourite' child.

[10] The judge *a quo* prior to pronouncing the sentences imposed stated that the murders were committed in a vicious manner, that the deceased were killed in cold blood 'execution style', and that the case was arguably the most horrific case' she had ever presided over. The judge *a quo* continued as follows:

'The accused did not show any remorse. The only mitigating factors in his favour are that he is a first offender; he spent a long time in custody awaiting his trial to be finalised and at the time the accused committed these offences he was a youthful offender who was about two months from attaining his 19th birthday. Although the accused person was a youthful offender at the time he committed these offences, I cannot ignore the fact that two innocent lives were taken away for no apparent reason. The terror and anguish they had endured at the hands of their own son is unimaginable. In imposing an appropriate sentence I must consider the interest of the accused, the seriousness of the offence committed and the interest of society. Society expects that people who commit heinous crimes such as the murders in this case should be dealt with accordingly and lengthy sentences should be imposed on them. A failure to do that will put the administration of justice in disrepute. I have weighed the three interests as stated above and in attempt to achieve a delicate balance that must be struck, I have arrived at the following sentences.'

Submissions on appeal

[11] Mr Christians on behalf of the appellant submitted that the basis of the appeal lies against the severity of the cumulative effect of the sentences imposed. It was submitted that this court may interfere where the sentence induces a sense of shock and it was submitted that there is a striking disparity between the sentence imposed by the trial court and that which, as urged by counsel, this court ought to impose. This submission was mainly based on the youthfulness of the appellant, since the conduct

of the appellant, so it was submitted, manifested a lack of judgment, a lack of experience, a lack of forethought and impulsive conduct.

[12] It was submitted that a sentence of 54 years (48 years direct imprisonment and a period of 6 years which was spent in custody awaiting trial) would break the appellant and may cause the appellant, on his release, return to society a severely distorted person.

[13] It was submitted that there was no evidence to suggest that the murders were pre-meditated and no evidence which suggested that these murders were committed as a result of a violent history by the appellant with his parents or in general.

[14] Mr Christians finally submitted that although the appellant did not testify in mitigation of sentence, the contents of the confession should serve as a guideline regarding the appellant's state of mind at the time of the commission of the crimes.

[15] Ms Verhoef on behalf of the respondent submitted that the triad consisting of the crime, the offender and the interests of society¹ does not imply that equal weight must be given to the different factors, and that it is often unavoidable to emphasise one at the expense of the other. Counsel submitted that the prevalence of domestic violence and the compelling interest of society to combat it requires that domestic violence should be regarded as an aggravating factor when it comes to imposing punishment.

¹ See *S v Zinn* 1969 (2) SA 537 (A).

[16] The respondent submitted that an analysis of the extra-curial statements and his evidence in the bail enquiry indicates that the appellant murdered his mother because she did not want to give the appellant more money and he wanted *more* money. It was submitted that to kill your biological mother for money and to execute your sleeping father to eliminate a possible witness shows that appellant indeed has very high moral blameworthiness.

[17] It was submitted that during the commission of the murders and thereafter, the appellant showed a remarkable presence of mind coupled with determined and calculated conduct which is inconsistent with immaturity based on youthfulness. It was submitted that there is no evidence that the appellant, despite his age, acted anything else but as an ordinary criminal and should be treated as such.

[18] Respondent submitted that Part XIII of the Correctional Service Act 9 of 2012 provides for the remission of sentences and release on parole or probation of offenders serving imprisonment of twenty years or more for scheduled crimes (which includes murder) after serving two thirds of his or her term of imprisonment. In the appellant's case he may qualify after serving 32 years of his sentence.

[19] It was finally submitted on behalf of the respondent that taking into consideration the savagery and callousness of the murders, the motives involved, the domestic setting in which the crimes were committed, the fact that the youthfulness of the appellant did not play a role in the commission of the crimes and that the

appellant does not have remorse, that the effective term of imprisonment imposed by the court *a quo* is an appropriate sentence.

The approach on appeal

[20] This court in *S v Shikunga & another* 1997 (2) SACR 470 (NmSC) stated the approach at 486b-f as follows:

'It is trite law that the issue of sentencing is one which vests a discretion in the trial court. An appeal Court will only interfere with the exercise of this discretion where it is felt that the sentence imposed is not a reasonable one, or where the discretion imposed has not been judiciously exercised. The circumstances in which a Court of appeal will interfere with the sentence imposed by the trial court are where the trial court has misdirected itself on the facts or the law (*S v Rabie* 1975 (4) SA 855 (A)); or where the sentence that is imposed is one which is manifestly inappropriate and, induces a sense of shock (*S v Snyders* 1982 (2) SA 694 (A)); or is such that a patent disparity exists between the sentence that was imposed and the sentence that the court of appeal would have imposed (*S v ABT* 1975 (3) SA 214 (A)); *S v Hlapezula and Others* 1965 (4) SA 439 (A); *S v Van Wyk* 1992 (1) SACR 147 (Nm) at 165d-g; *S v De Jager and Another* 1965 (2) SA 616 (A) at 629A-B; *R v Zulu and Others* 1951 (1) SA 489 (N) at 497C-D; *S v Bolus and Another* 1966 (4) SA 575 (A) at 581E-H; *S v Petkar* 1988 (3) SA 571 (A) at 574C); or where there is an overemphasis of the gravity of the particular crime and an under-emphasis of the accused's personal circumstances (*S v Maseko* 1982 (1) SA 99 (A) at 102; *S v Collett* 1990 (1) SACR 465 (A)).'

[21] The reference to the words 'where it is felt' was explained in *S v Pieters* 1987 (3) SA 717 (A) at 728B-C as to be understood that since a court of appeal does not have an own discretion to exercise, that a court of appeal must be convinced² that the exercise of its discretion by the trial court was not a reasonable one.

² By the appellant.

[22] In *S v Sadler* 2000 (1) SACR 331 (SCA) at 335a-f the point is made that where there is a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed, interference is justified but that practical content must be given to these notions and the dilemma was stated as follows:

'9 The comparison involved in the exercise may sometimes be purely quantitative, say three years' versus six years' imprisonment or a fine of R50 000 versus a fine of R100 000, or it may be qualitative, say a custodial versus a non-custodial sentence. Where quantitative comparisons are involved there is the problem of deciding how great the disparity must be before it attracts the epithet 'striking' or 'startling' or 'disturbing'. Where qualitative comparisons are involved one faces a similar problem. When compared with a sentence of wholly suspended imprisonment which an appellate Court considers would have been appropriate, a trial court's decision to impose a substantial fine with an alternative of imprisonment may not be regarded as giving rise to a disparity of that character. As against that, the distinction which exists between a non-custodial and a custodial sentence, as those terms are commonly understood, is so generally recognised to be profound and fundamental that, save possibly in rare instances, the conclusion that a custodial sentence was called for where a non-custodial sentence has been imposed (or vice versa) will justify interference with the sentence imposed.

10 However, even in the latter class of case, it is important to emphasise that for interference to be justified, it is not enough to conclude that one's own choice of penalty would have been *an* appropriate penalty. Something more is required; one must conclude that one's own choice of penalty is *the* appropriate penalty and that the penalty chosen by the trial court is not. Sentencing appropriately is one of the more difficult tasks which faces courts and it is not surprising that honest differences of opinion will frequently exist. However, the hierarchical structure of our courts is such that where such differences exist it is the view of the appellate Court which must prevail.'

[23] Mr Christian readily recognised that the imposition of a long custodial sentence is an appropriate sentence in the circumstances of this case and also suggested terms of imprisonment this court ought to impose. The dilemma, however, is should this court be amenable to his submissions, as stated supra, to decide how great the disparity, must be before it attracts the epithet of 'striking', or 'startling' or 'disturbing'.

The grounds of appeal

[24] I shall deal with the grounds of appeal in reverse order starting with the fifth ground.

[25] I do not agree that the trial judge erred or misdirected herself when she found that the appellant did not show any remorse.

[26] This court in the matter of *Harry de Klerk v The State* Case no. SA 18/2003 delivered on 8 December 2006 at para 15 referred with approval to what Flemming DJP had to say regarding remorse in *S v Martin* 1996 (2) SACR 378 (W) at 383:

'For the purpose of sentence, there is a chasm between regret and remorse. The former has no necessary implication of anything more than simply being sorry that you have committed the deed, perhaps with no deeper roots than the current adverse consequences to yourself. Remorse connotes repentance, an inner sorrow inspired by another's plight or by a feeling of guilt, eg because of breaking the commands of the higher authority. There is often no factual basis for a finding that there is true remorse if the accused does not step out to say what is going on in his inner self.'

[27] It was held in *S v Matyityi* 2011 (1) SACR 40 (SCA) para 13 that:

'Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error.'

[28] The appellant chose not to testify in mitigation of sentence himself, denying the trial court the opportunity to gauge his remorse, if any. In the absence of any testimony by the appellant to say what was going on 'in his inner self' the trial court in my view was perfectly justified to conclude that the appellant showed no remorse for his conduct.

[29] In respect of the fourth ground of appeal the trial court did not refer specifically to the retributive and preventative objects of sentencing and why those objectives were preferred to the reformative and rehabilitative objects of sentencing. As I understand this ground – it is an inference or conclusion drawn by the drafter of the grounds of appeal premised on the eventual sentence imposed by the trial court.

[30] Retribution has been referred to as the 'natural indignation of interested persons and of the community at large',³ should be seen in connection with 'denunciation' (ie the condemnation of an offender's deeds),⁴ and comes to the fore in cases of serious crime.⁵

³ *R v Karg* 1961 (1) SA 231 (A).

⁴ *S v Nkambule* 1993 (1) SACR 136 (A) at 147c-e.

⁵ *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 519d.

[31] Since it is an acceptable principle, when considering the *Zinn* triad, that a court may, depending on the circumstances, afford more weight to a specific factor, similarly in giving effect to the aims of punishment a court may be justified to emphasise one aim at the expense of others.

[32] In this regard in *S v Vekueminina & others* 1993 (1) SACR 561 (Nm) a full bench decision of the High Court, Levy AJP at 564b stated:

‘Where the nature of the offence arouses moral indignation and the purpose of the penalty is clearly retributive, the interests of the accused are then secondary to those factors.’

[33] Although the court in *Vekueminina* considered the ability to pay a fine, the principle expressed remains applicable.

[34] In a similar vein Harms JA in *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA) at 519d stated the following:

‘Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence (cf Windlesham “*Life Sentences: The Paradox of Indeterminacy*” [1989] *Crim LR* at 244, 251). Retribution may even be decisive (*S v Nkwanyama and others* 1990 (4) SA 735 (A) at 749C-D).’

[35] If one has to conclude in the present instance that the retributive and preventative (deterrent) aims of punishment had been emphasised by the trial judge

at the expense of the reformatory and rehabilitative aims, the trial judge in my view was justified to do so.

[36] On the aspect of rehabilitation, in *Mhlakaza* the court referred to the scepticism expressed whether long-term imprisonment has any rehabilitative effect, and remarked as follows on p 519h-i:

‘Whether or not this scepticism is fully justified, the point is that the object of a lengthy sentence of imprisonment is the removal of a serious offender from society. Should he become rehabilitated in prison, he might qualify for a reduction in sentence, but it remains an unenviable, if not impossible, burden upon a court to have to divine what effect a long sentence will have on the individual before it. Such predictions cannot be made with any degree of accuracy.’

[37] In respect of the third ground of appeal it is not clear in which way the circumstances of the murders were over-emphasised. It is also not clear what relevance the evidence of the sister and brother as well as the son of the deceased persons has if one has regard to the fact that there were no eye witnesses to these murders. These witnesses testified regarding the personality of the appellant and the relationships the appellant had with the deceased persons and their disbelief that the appellant could have been responsible for the murder of his parents. This ground of appeal is without any merit.

[38] In respect of the second ground of appeal as stated hereinbefore, the trial judge was entitled to put more emphasis on the aspect of the interests of society and less on the personal circumstances of the appellant. I do not find any support in the

reasons for sentence for the contention that the trial judge ignored the personal circumstances of the appellant or only paid lip service thereto.

[39] It must be emphasised that though a court may emphasise one factor of the *Zinn* triad or one aim of punishment at the expense of others, a trial court may not totally ignore or disregard such factor or aim of punishment.

[40] In respect of the first ground of appeal Mr Christians emphasised the severity of the cumulative effect of the sentence namely an effective 54 years imprisonment, if the period of approximately 6 years in detention as a trial awaiting prisoner is added. It was submitted that the difference in sentence this court sitting as a court of appeal would have imposed is 'quite remarkable' and justified interference with the sentence. Counsel further laments the fact that the trial judge summarised her reasons for sentence in only one paragraph.

[41] Ms Verhoef on behalf of the respondent submitted that the sentence imposed was not shockingly severe and that the sentence fits the crime and the appellant.

[42] In *Sadler* the following was said⁶ in respect of the approach where an appeal lies against the severity of the sentence imposed:⁷

'The traditional formulation of the approach to appeals against sentence on the ground of excessive severity or excessive lenience where there has been no

⁶ P 334 para 8.

⁷ See also *The State v LK* an unreported judgment of this court in case no. P 1/2014 delivered on 13 November 2015.

misdirection on the part of the court which imposed the sentence is easy enough to state. It is less easy to apply. Account must be taken of the admonition that the imposition of sentence is the prerogative of the trial court and that the exercise of its discretion in that regard is not to be interfered with merely because an appellate Court would have imposed a heavier or lighter sentence. At the same time it has to be recognised that the admonition cannot be taken too literally and requires substantial qualification. If it were taken too literally, it would deprive an appeal against sentence of much of the social utility it is intended to have. So it is said that where there exists, a 'striking', or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate Court would have imposed, interference is justified. In such situations the trial court's discretion is regarded (fictionally, some might cynically say) as having been unreasonably exercised.'

[43] Before I continue to consider the first ground of appeal, I need to remark on the submission on behalf of the respondent that the appellant may qualify for release on parole after serving 32 years of his sentence.

[44] In *S v Mhlakaza* Harms JA referred with approval to a passage in *S v S* 1987 (2) SA 307 (AA) where the following appears at 313H⁸:

'Although a judicial officer, in the determination of an appropriate sentence for a crime, does not necessarily have to close his eyes to the fact that a prisoner might possibly be released on parole, it remains an uncertain factor whether a prisoner in a particular case will be released on parole and, if so, to what extent his sentence will be reduced, and such eventualities cannot, in the determination of an appropriate sentence, be taken into account as a probability.'

[45] This appeal must therefore be approached on the basis that court *a quo* considered a 56 years term of imprisonment as an appropriate sentence after having

⁸ A translation from Afrikaans as it appears in the headnote.

taken into account the approximately 6 years appellant spent in custody awaiting the finalisation of his trial. The court *a quo* then, in order to ameliorate the cumulative effect of the sentences imposed, ordered that 8 years of the sentence imposed in count 2 to run concurrently with the sentence imposed in count 1.

[46] It is trite law that the youth of an offender is invariably considered as a mitigating factor because in general a court of law would not normally judge the deeds of a youthful offender in the same manner as that of an adult person. Youthfulness has been described⁹ as ‘immaturity, a lack of life experience, rash and notably a state of mind susceptible to influencing principally by adults’ and that it is ‘incorrect to proceed from the premise that youthfulness could only be regarded as an extenuating circumstance if the commission of the particular offence could be ascribed solely to the youthfulness of the offender but not otherwise: the reality as regards youthful offenders was that in the vast majority of cases other factors influence the immature mind in such a way that it could not effectively withstand that influence and lost control with the result that the youthful offender then proceeded with the commission of the offence. In most of such cases the accused’s youthfulness was regarded as an extenuating circumstance even though his actions were not solely attributable to his youthfulness’.¹⁰

[47] The court *a quo* found three mitigating factors favouring the appellant namely the fact the he is a first offender, the time he had spent in custody as a trial awaiting prisoner, and that he was a youthful offender. The court *a quo* did not make the

⁹ In *S v Lehnberg & another* 1975 (4) SA 553 (A) at 561A by Rumff CJ (My own translation).

¹⁰ *S v Lengane* 1990 (1) SACR 214 (A) at 220b-d.

finding that the viciousness of his deeds ruled out immaturity as submitted by Ms Verhoef. Nevertheless there are in my view additional factors to be considered (which were not disputed), namely the fact that the murders had been committed on the spur of the moment ie with a lack of any planning, and there is no evidence that the appellant was an individual who had a history of aggressive or violent behaviour in the past or that he is an inherently wicked person and neither can this in these circumstances be inferred.

[48] It was submitted on behalf of the respondent that the motive for killing his mother was that the appellant wanted *more* money. I do not agree. What is certainly clear from the evidence was that that was the motive for stealing his mother's bank card and PIN code. The state as part of its evidence against the appellant relied on a confession. In that confession appellant explained that he failed his Grade 10 examination in 2006 and repeated it the next year at Namcol; that his mother accused him of wasting her money; that on the fateful day his mother swore at him; accused him of not wanting to learn; and accused him of doing nothing. These accusations 'triggered', according the appellant, his subsequent conduct. It was an instantaneous reaction.

[49] It was also submitted on behalf of the respondent that the only reasonable conclusion to arrive at as to why the appellant murdered his father was to eliminate a possible witness as his father would have awoken from the commotion and the shooting of his mother. I do not agree that this is the only reasonable conclusion to arrive at. It amounts to speculation. In the absence of any testimony in mitigation of

sentence and cross-examination regarding the motive for killing his father, his unexpressed reason for doing so remains an enigma.

[50] The appellant in his confession alluded to the fact that there is something 'wrong' with him since as a small boy he had consulted a psychologist several times. The trial court did not receive in evidence any report by a psychologist which could possibly have explained the mental health or otherwise of the appellant and what could have triggered his unexpected behaviour on the fateful day. Though psychiatric reports were handed in as evidence those reports dealt with the question whether the appellant was fit to stand trial in a court of law.

[51] If one has regard to his unusual behaviour on the day of the murders one is tempted to conclude that there must have been something 'wrong' with appellant, but in the absence of any psychiatric report this remains conjecture.

[52] Had I sat as a court of first instance I would have considered the cumulative impact of the mitigating factors, namely the fact that the appellant is a first offender, and in particular that he is a youthful offender, the period he was detained awaiting trial, that the commission of the offences were committed without any premeditation, and that the appellant had no history of aggressive or violent behaviour. As was stated in *The State v LK* at para 44 their 'cumulative effect may be considerable'.

[53] I agree that a long term of imprisonment is an appropriate sentence in the circumstances, however had I sat as a court of first instance I would have ordered a longer period of imprisonment to run concurrently with the sentence imposed in count 1. This proposed sentence in my view differs so markedly from the sentence imposed by the trial court that the sentence imposed by the trial court attracts the epithet of strikingly or startlingly or patently inappropriate and would justify an interference by this court.

[54] In the result the following orders are made:

1. The appeal against sentence succeeds to the extent as set out under point 4.
2. The sentence imposed in respect of count 1 is confirmed.
3. The sentence imposed in respect of count 2 is confirmed.
4. It is ordered that 14 years of the sentence imposed in count 2 should run concurrently with the sentence imposed in count 1.

5. This sentence is antedated to 24 October 2013.

HOFF JA

DAMASEB DCJ

SMUTS JA

APPEARANCES

APPELLANT:

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RESPONDENT:

A T Verhoef

Of Office of the Prosecutor-General