

IN THE HIGH COURT OF SOUTH AFRICA**(WESTERN CAPE HIGH COURT, CAPE TOWN)****CASE NUMBER:**

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5 **DATE:**

11 NOVEMBER 2010

In the matter between:

THE STATE

and

10 **DINISIO DIAS ALFONSO**

S E N T E N C E**STEYN, J:**

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The accused, Dinisio Dias Alfonso, was found guilty of robbery with aggravating circumstances and of murder on 3 November 2010. Today the Court has to decide on an appropriate sentence. The accused elected not to testify and no witnesses
20 were called in mitigation of sentence, His counsel put certain facts to Court to consider with regard to sentence.

The task of sentencing someone who has been found guilty of offences as serious as those of which the accused has been
25 found guilty of, is a serious responsibility. Society and the
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legislature demand that those who transgressed its required norms are appropriately punished by those to whom that responsibility has been deputed. The purposes of sentencing have been identified as being deterrence, prevention, 5 rehabilitation and retribution. Those objects are sought to be achieved by applying the principal criteria that have been evolved by our courts over a number of decades, namely the personal circumstances of the accused, the seriousness of the offences of which an accused has been found guilty and the 10 interests of society. Courts are furthermore required, when applying those criteria in a balanced manner, to also introduce an element of mercy.

It is difficult to define the interests of society. Courts are 15 obliged to impose sentences that engender respect of the criminal justice system, failing which members of the public might be tempted to take the law into their own hands, as has already manifested itself on a number of occasions in areas of this Court's jurisdiction, but whilst the public cannot be seen to 20 dictate what sentences courts should impose, courts should be astute not to disregard the society's needs.

It is apparent from the trials that served before this Court, including criminal appeals and automatic reviews, that crimes 25 involving violence against those not always capable of

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protecting themselves, even in the sanctity of their homes, are assuming epidemic proportions in this Court's area of jurisdiction and for that reason requires the imposition of severe sentences in order to discourage a continuation of antisocial conduct of that kind.

The legislature has prescribed a minimum sentencing regime that takes into consideration the relevant elements relating to the imposition of sentences, to make provision for consistency in sentencing. The provision of section 51(1) of Act 105 of 1997 of the Criminal Law Amendment Act (the Act), relating to minimum sentence are applicable to both of the charges that the accused has been found guilty of. Section 51(1) provides that the Court shall sentence a person convicted of murder, to imprisonment for life when the death of the victim was caused by the accused in committing or attempting to commit robbery with aggravating circumstances as defined in the Criminal Procedure Act, or the offence was committed by a person acting in the execution or furtherance of a common purpose or conspiracy.

Section 51(2)(a) of the Act, Part II of Schedule 2, prescribes that the minimum sentence for a first offender is imprisonment for a period of not less than 15 years when robbery is committed where there are aggravating circumstances or

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involving the theft of a motor vehicle. The accused was informed at the commencement of the trial that in the event of conviction on the charges, the above minimum sentences are prescribed, unless substantial and compelling circumstances are found to be present. The Court is, therefore, faced with the question whether substantial and compelling circumstances justify a departure from the prescribed sentences laid down by the legislature.

10 The following factors considered cumulatively, have been submitted by counsel for the defence to constitute such substantial and compelling circumstances. I first deal with the accused's personal circumstances. The accused is a first offender. The accused was 25 years of age when the crimes
15 were committed. The accused has a dysfunctional background. He grew up without the presence of a father and left school while in Grade 6. The accused, who is unmarried, has three young children with one woman with whom they stay. The last child was born while he was in custody. He has
20 another young child with another woman in Pretoria. It is not clear if the child stays with the mother.

It was the testimony of the accused that he had a girlfriend at the time of the commission of the offences. He was not
25 staying with the pregnant mother of his young children and

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informed the Court that he was a "playboy". Counsel argued that accused was paying maintenance for his children prior to his arrest, but there is no persuasive evidence in this regard. Accused did not impress the Court as a family man. It seems highly unlikely that he paid maintenance to his children, at least not on a regular basis. It was argued that the accused either had gainful employment or has the potential to be gainfully employed. It appeared possible during the testimony of the accused, that he may have the potential of gainful employment, since he has received training that he could put to use to earn an income. However, it seems that he was not gainfully employed at the time when the crimes were committed, instead he was consorting with his good friend Gito, a wanted criminal.

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As regards further factors to be considered by the Court in weighing up the possible existence of substantial and compelling circumstances, it was submitted by the counsel of the accused that the Court should take into account that the accused had been influenced by the intoxicating effects of alcohol at the relevant time and that the accused was not found guilty of *dolus directus*, but the lesser form of intent, namely *dolus eventualis*. The Court should accept that the accused was not the main perpetrator and in effect that he was manipulated into committing the crimes by his friend Gito. The

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accused co-operated with the police after he was apprehended by making a statement and pointing out to the investigating officer, and making a further extensive statement to Colonel Ngesi, which contributed to the crime being solved. The facts
5 that the crimes were not premeditated should be considered as a mitigating factor. The accused had remorse for his deed, which was evident from his evidence during the trial. The accused has been in custody for three years and eight months.

10 The accused may have been 25 years of age at the time of the commission of the offence, but although he may have been relatively young, the manner in which he conducted himself in the court, left no room for any belief that he was immature. In addition he had already fathered three children and a fourth
15 child was expected. Youthfulness, which may serve as a mitigating factor in the assessment of moral culpability, is not at the forefront in this case.

There is nothing in the family or education background of the
20 accused that leads the Court to a particularly sympathetic view towards him. As regards his education, or lack thereof, it was the Court's view that the accused is very intelligent. He, himself, testified about his eagerness to learn. From his statement to Colonel Ngesi, it can be concluded that he has
25 mastered several languages. There is no indication that the

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accused suffered serious economic deprivation. His accommodation was adequate. He was able to travel around South African and possibly Mozambique. He afforded sophisticated electrical equipment and the use of a cell phone.

5 He socialised with Gito and his wealthy friends. It appears that the accused was not in formal employment, but he has been given the training and opportunity to explore a career in the arts. Considering his hitherto unblemished record, his age and training, there may be a possibility that the accused may

10 be rehabilitated, if he is able to avoid consorting with criminally inclined friends.

The accused pleaded not guilty to the charges of which he has been found guilty and as he was entitled to do, persisted with

15 his claim of innocence until the finalisation of the trial. By doing so, he deprived himself of the opportunity of expressing genuine remorse, a weighty factor in determination what an appropriate sentence should be. Instead of apologising for the death of the deceased, the accused complained at one stage

20 that everybody was concerned with the deceased and did not give enough regard to his feelings.

As regards the accused's involvement or role in the crimes he has been convicted of, it has been suggested that he played a

25 lesser role which, according to his counsel, could be

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concluded, *inter alia*, from the existence of several fingerprints of Gito's on the scene of the crime, compared to the one fingerprint of the accused. However, considering the extensive injuries of the deceased, the Court found that both the accused and Gito inflicted these injuries. It would be speculation to submit that one person played a more extensive part in the murder than the other. However, Gito is a known criminal, while the accused has an unblemished record. It was his statement to Colonel Ngesi that he tried to staunch the flow of blood of the deceased at one stage and although this testimony seems unlikely, it may be possible.

Although the Court is suspicious in this regard, the Court was not able to find conclusively that the crimes of which the accused has been convicted, were premeditated. The prosecution argued that there are no substantial and compelling circumstances that justify a departure from the minimum prescribed sentence. In a well reasoned and comprehensive argument, it was argued by the State that substantial aggravating factors exist. The seriousness of the offences of which the accused has been guilty of, are self-evident.

The deceased, a very security conscious person, allowed the accused and his friend, who apparently was friendly with the

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deceased, into his house, his haven, for an evening of socialising and possibly sexual intercourse. It appears from the evidence presented, that the deceased was led like a lamb to slaughter. He was put at ease and when he was undressed
5 and at his most vulnerable, he was attacked, tortured, battered, stabbed and death came gradually, caused by a ligature around his neck that stopped his flow of oxygen.

The killing was completely unnecessary, as the deceased, a
10 small person according to the *post-mortem* report, was no match for the two attackers and had been tied up to prevent escape. The only reason for killing him must have been to prevent identification of his attackers. The motive for the attack and killing was pure greed. The deceased was tortured,
15 probably for the PIN numbers to his cards and to find out the whereabouts of a safe that he did not have. He was left trussed up and extensively injured, with a substantial ligature around his neck, lying facedown and bleeding on the carpet of his bedroom. He was shown no mercy, despite evidence of the
20 accused that he pleaded and cried.

The final insult was that the accused and his friend then removed some valuable items from the home of the deceased. Accused took his cell phone and accompanied by Gito, drove
25 away in his car. The car was sold at the first possible

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opportunity with such speed, that the State argued that the prompt sale of the car indicates the overwhelming probability that the car had been pre-ordered and the crimes, therefore, premeditated. Although the Court is highly suspicious in this regard, I will be charitable to the accused by finding that there is no proof beyond reasonable doubt that this scenario is correct or that he was involved in the sale of the vehicle. According to the accused's statement to Colonel Ngesi, Gito boasted about selling the vehicle and had the money to show for his actions.

As regards the co-operation by the accused with the police as a factor to consider by the Court, it was argued by the State that the accused only co-operated with the police when he was informed that it had been established that he had used the cell phone of the deceased, which was overwhelming evidence of his guilt. The fact that he denied his co-operation with the police in court, leading to two long trials-within-a-trial, neutralises any advantage that he may have enjoyed as a result of his co-operation.

The accused's allegations to Colonel Ngesi that he was reluctantly persuaded to remove items from the house of the deceased were rejected, as were his allegations that he received the cell phone of the deceased from Gito. The

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actions of the accused, following the murder of the deceased, indicate that he was a co-perpetrator with Gito in every material respect in regard to the crimes of murder and of robbery.

5

I will now deal with some principles set out in decisions that are followed by this Court. The principles set out in S v Malgas 2001(1) SACR 469 (SCA) which have been followed in a long line of cases, have been described as a good example for a
10 breakdown of the leading principles that are enduring and not complicated, setting out how the sentencing regime should be approached and in particular how the inquiry into substantial and compelling circumstances is to be conducted by a Court. Malgas has emphasised that the enactment of the minimum
15 sentencing legislation is an indication that a Court has to approach the question of sentencing, conscious of the fact that the minimum sentence has been ordained as the sentence which ordinarily should be imposed unless substantial and compelling circumstances are found to be present. I quote
20 from paragraph 9 of the Malgas judgment:

“The specified sentences are not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypothesis favourable to the
25 offender, maudlin sympathy, aversion to imprisoning first

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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 that the legislature intended the Court to exclude from consideration, as it were, any or all of the many factors traditionally and rightly taken into account by courts when sentencing offenders."

In S v Vuyisile Matyityi, an as yet unreported decision, case number 695/09 of the Supreme Court of Appeal dated 30 September 2010, Ponnan, JA, found as follows in paragraph 23 of the judgment:

"Despite certain limited successes, there has been no real let up in the crime pandemic that engulfs our country. The situation continues to be alarming. It follows that, to borrow from Malgas, it still is "no longer business as usual", and yet one notices all too frequently a willingness on the part of sentencing courts to deviate from the minimum sentences prescribed by the

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legislature for the flimsiest of reasons - reasons as here that do not survive scrutiny. As Malgas makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to
5 implement those sentences. Our courts derive their power from the Constitution and like other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the
10 legitimate domains of power and the other arms of State. Here parliament has spoken, it has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are
15 not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable
20 outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."

The "determinative test", as framed in Malgas and endorsed in
25 later reported decisions, is that it is incumbent upon a Court in

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every case before imposing a prescribed sentence to assess upon a consideration of all the circumstances of a particular case, whether or not the prescribed sentence is indeed proportionate to the particular offence. Only if it is
5 disproportionate, is the Court free to impose a lesser sentence, otherwise not.

In the proportionality/disproportionality inquiry in the instant case, regard should be had to the facts that I have set out
10 above. In the favour of the accused is the fact that he was a first offender. He has spent more than three and half years in custody. He did partake of wine prior to the commission of the offence, although there is scant indication that his actions were infected by intoxication. It is correct that the Court was
15 not able to find conclusively that the murder was premeditated. It is true that some of the stolen items were retrieved after the accused had pointed out these items. As far as the BMW of the deceased is concerned, the accused has consistently been vague and uncooperative, which does not count in his favour.
20 However, it is possible that Gito may have been the main perpetrator with regard to the theft of the vehicle and the subsequent sale thereof.

The Court, in fairness to the accused, based on a lack of
25 conclusive evidence, found him guilty of murder on the basis of

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dolus eventualis. However, the carelessness and the recklessness of the accused with regard to death ensuing, was apparent. The main aggravating factor in this matter is the remorseless, unscrupulous, brutal attack of a harmless older
5 person, in the sanctity of his own home, after he had befriended the accused and shared his food and wine with him.

The imposition of a life sentence is the ultimate penalty that the Court can impose. Despite the fact that under certain
10 circumstances it may be the prescribed minimum sentence which should not be avoided for flimsy reasons, it should also not be imposed lightly. In my view the cumulative factors enumerated above, that are in favour of the accused, marginally outweigh the aggravating factors and tip the scales
15 of justice in favour of the accused to the extent that I am able to find the existence of substantial and compelling circumstances that allow me to impose a lesser sentence than the prescribed minimum sentence in respect of the crimes committed.

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I find that the imposition of the prescribed minimum sentences in this matter is disproportionate to the sentence that I would have imposed had the minimum sentence legislation not been passed and that it would be unjust, should the prescribed
25 minimum sentences be imposed. I, therefore, impose the

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following sentences:

1. In respect of the first charge, robbery with aggravating
circumstances, **12 (TWELVE) YEARS IMPRISONMENT.**
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2. In respect of the second charge, murder, **27 (TWENTY
SEVEN) YEARS IMPRISONMENT.**
3. In terms of the provisions of section 282 of Act 51 of
10 1977, it is **ORDERED THAT THE SENTENCES ON
CHARGES 1 AND 2 WILL RUN CONCURRENTLY.**

The State has requested that the accused be declared unfit to
possess a firearm in terms of section 103 of Act 60 of 2000
15 and it is so ordered.

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STEYN, J