



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT)**

Case No: CC 35/2021

In the matter between:

THE STATE

and

ZUKILE GQOGQO

Accused 1

WANDISA WANDA TIMOTHY

Accused 2

SENTENCE

MALUSI J:

[1] It is my onerous task to impose an appropriate sentence after the two accused have been convicted of murder that was planned and in furtherance of a common purpose, unlawful possession of a firearm and unlawful possession of ammunition.

[2] Due to the nature of the offences the provisions of *sec 51(1)*, relating to murder, and *sec 51(2)*, relating to possession of ammunition, of the *Criminal*

Law Amendment Act 105 of 1997 (the Act) provides for a minimum sentence of life imprisonment and five (5) years' imprisonment respectively.

[3] The legal position when considering a sentence for an offence within the ambit of the minimum sentence legislation was correctly described in the seminal judgment of *S v Malgas* as '*no longer business as usual.*'¹ The court is no longer given a clean slate to impose whatever sentence it deems appropriate. The court is required to identify and tabulate substantial and compelling circumstances before it may depart from the ordained sentence. These need not be exceptional but must be '*truly convincing reasons 'or' weighty justification.*'²

[4] Accused 1 is currently 43 years old. He was 38 old at the time of the commission of the offences. His highest education qualification is standard 5. He was raised by a sister to his grandmother. He reportedly had a good upbringing. He is in good health. He is single with two (2) minor children: a seven (7) year old and five (5) year old. Both minor children are in the primary care of their paternal grandmother. They both are currently recipients of a State social grant. At the time of his arrest, he was self-employed as a hawker. He was arrested on 1 December 2019.

[5] Accused 1 had seven (7) previous convictions at the time he committed the offences in this case. He started his criminal career as a fifteen (15) year old committing petty offences. He was sentenced to fines or terms of imprisonment that were wholly suspended. When the sentences did not have the desired effect relatively more heavier sentences were imposed. On 24 February 2014 he was convicted for the serious charge of attempted murder and sentenced to seven (7)

¹ 2001 (2) SA 1222 (SCA) at para 8.

² *Malgas* at 25 and 18.

years' imprisonment. He committed the offences in this case whilst he was out on parole. He is currently serving a sentence for possession unlicensed firearm and ammunition that was committed after he committed the offences in this case. The character painted by his previous convictions is that of a committed criminal who is progressively committing more serious offences.

[6] *Mr Erasmus*, who appeared on behalf of accused 1, submitted, correctly in my view that the personal circumstances of accused 1 do not disclose any substantial and compelling circumstances. He further conceded that discretionary minimum sentences are not disproportionate in the circumstances. He urged the court in the exercise of mercy to consider ordering that all the sentences run concurrently.

[7] Accused 2 is currently 56 years old. She was formerly an employee of the *Department of Education* as an *administrative officer*. She was promoted to be an *assistant manager*. She resigned her employment during the year 2014. In 2015 she started a farming enterprise. She has also been involved in community farming projects. She played a leadership role in such projects providing guidance to other members of the projects. She has two offspring who are now both independent adults. The eldest, *Sinakho Timothy* is currently married and staying with her family in *King William's Town*. The youngest, *Amthanda Mgudlwa* is working in Johannesburg where she resides.

[8] Accused 2 currently suffers from post-traumatic stress disorder and depression. It was submitted that these conditions arise from the events on 7 June 2018. She has no previous convictions. It was submitted she had a good relationship with the deceased which had intermittent challenges like any other relationship.

[9] *Mr Kilani*, who appeared on behalf of accused 2, argued that her personal circumstances considered cumulatively qualify as substantial and compelling circumstances to deviate from the discretionary minimum sentences.

[10] *Mr Mtsila*, who appeared on behalf of the State, submitted that the murder of the deceased was a gruesome and a horrific crime as depicted in the photo-album. The use of the hammer and the stones together with the blows exclusively to the deceased's head indicate a singular and direct intention to kill. It was not hard to imagine the pain and trauma suffered by the deceased.

[11] *Mr Mtsila* argued that the accused has shown a disregard for the privacy and dignity of the deceased whom they treated like an object. The two (2) accused had not come to terms with the inherent wrongfulness of their actions. They showed no sense of remorse. He submitted that their personal circumstances were not extra-ordinary and in fact were more aggravating. In particular the involvement of accused 2 in the murder after what she herself said was a cordial and a long-standing relationship was even more aggravating. He submitted that the interest of society required that violent crime be treated harshly with severe sentences lest the populace is tempted to take the law into their own hands. He argued that there were no substantial and compelling circumstances in this case, and neither was the discretionary minimum sentence disproportionate. He conceded, correctly in my view, that the sentences ought to run concurrently.

[12] The murder in this case was heinous and cruel. An elderly and sickly man was callously murdered in the sanctity of his own home. An aggravating feature is that the murder was arranged by the wife of the deceased. She not only let the killers into their home but was present and actively associated as such in the gruesome murder of her own husband. A contract killing has always

been regarded in our law as a heinous atrocity to be severely punished. It is an irreversible violation of the *Constitutional* right to life of the deceased.

[13] *Howie P* has stated the following:

*“As to the contract killing aspect, this is unquestionably a feature that in reported cases has been regarded as a severely aggravating circumstance. The moral blameworthiness of the procurer, however, must depend on the motive, and subjective state of mind with which a contract killer is engaged.”*³

This court has been deprived of the knowledge of the motive and the subjective state of mind of accused 2 due to the fact that she has elected not to take the court into her confidence.

[14] The protection of society and the deterrence of others are important determinants of the interests of society. Society expects the courts to mete out sufficiently robust sentences in cases of violent and serious crimes. The horrific murder was committed brazenly in the sanctity of the deceased home. The appellate court has stated clearly:

*“The requirements of society demand that a premeditated, callous murder such as the present should not be punished too leniently lest the administration of justice be brought into disrepute. The punishment should not only reflect the shock and indignation of interested persons and of the community at large and so serve as a just retribution for the crime but should also deter others from similar conduct.”*⁴

[15] *Mr Kilani* has submitted that the personal circumstances of accused 2 constitute substantial and compelling circumstances for the court to depart from the discretionary minimum sentences. He particularly highlighted her age, lack of previous conviction and ill-health.

³ *S v Ferreira* 2004 (2) SACR 454 (SCA) at para 33.

⁴ *S v Di Blasi* 1996 (1) SACR 1 (A) at 10F-G.

[16] I do not agree. Accused 2 breached the trust of the deceased in committing the murder. In my view the conduct of both accused in killing the deceased amounted to abuse of an older person as provided in *sec 30 of Older Person Act 13 of 2006*. This is an aggravating factor as envisaged in *sec 30(4) of the aforementioned Act*. The chronological age of accused 2 is a neutral factor. The injuries exclusively to the head and face of the deceased clearly indicate a direct intention to kill on the part of the accused. Once it was determined the accused were the perpetrators then the assault determined the intention and not necessarily each blow or injury.⁵ In my view both accused are morally blameworthy regardless of the roles they played. They were all acting in the furtherance of a common purpose.

[17] I have also considered the time accused 1 spent awaiting trial. It has been held that factor does not, in and of itself, constitute substantial and compelling circumstances but is only one factor among many to be considered.⁶

[18] Furthermore, I have considered whether the discretionary sentences would be unjust or disproportionate. I have found no basis for such a conclusion. In my view, the murder in this case falls into the category of the worst murders one can imagine.

[19] I, therefore, find the following sentences to be appropriate.

19.1 Murder:

Both accused are sentenced to undergo life imprisonment.

⁵ *S v van Aard* 2009 (1) SACR 648 (SCA) at para 39.

⁶ *S v Radebe* 2013 (2) SACR 165 (SCA) at para 13.

19.2 Unlawful possession of a firearm:

Both accused are sentenced to undergo five (5) years' imprisonment.

19.3 Unlawful possession of ammunition:

Both accused are sentenced to undergo three (3) years' imprisonment.

All the sentences are ordered to run concurrently.

T MALUSI

JUDGE OF THE HIGH COURT

Heard: 6-20 March 2023, 18 July-04 August 2023, 16-27 October 2023 and 5, 6, 7, 12, 13 & 14 February 2024.

Delivered: 15 February 2024

Appearances:

For the State: Advocate Mtsila *instructed by*
Director of Public Prosecutions
MAKHANDA

For Accused 1: Advocate Erasmus *instructed by*
Legal Aid South Africa
KING WILLIAM'S TOWN

For Accused 2: Adv Nabela, Mr Manyisane & Advocate Kilani *instructed by*
Legal Aid South Africa

KING WILLIAM'S TOWN