REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: JPV 2010/0046

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

21 MAY 2013 **FHD VAN OOSTEN**

In the matter between

THE STATE

and

NOMSHADO JODI MDLULI **ACCUSED**

J U D G M E N T
(SENTENCE)

VAN OOSTEN J

[1] The accused has been convicted on 12 counts, of which are 3 counts of murder. In respect of the conviction on the murder counts, and having found that the attack on the Sekoati household was pre-planned and executed with *dolus directus*, the provisions of the Criminal Law Amendment Act 105 of

1997, prescribing a sentence of life imprisonment, apply. It is at the outset necessary to refer to the approach that should be adopted by this court concerning imposing statutory mandatory minimum sentences. In *S v Matyityi* 2011 (1) SACR 40 (SCA), Ponnan JA, set it out as follows:

'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 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 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 legitimate domains of power of 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 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 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.'

(See also: *S v Malgas* 2001 (1) SACR 469 (SCA); and *S v Dodo* 2001 (1) SACR 594 (CC), endorsing the approach in *Malgas*).

[2] In the consideration of an appropriate sentence to be imposed it is incumbent upon this court "to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence" (*per* Nugent JA in *S v Vilakazi* 2009 (1) SACR 552 (SCA)). Adopting this approach I turn to deal with and consider the accused's personal circumstances, the severity of the offences she has been convicted of against the background of the interests of society. In this process, the element of mercy, which forms the cornerstone of a civilised society, must never be overlooked.

[3] The mother of the accused, Ms Simelane, testified in mitigation of sentence. She is a widowed pensioner who lives in Lichtenburg. The accused is her only child. Her husband died when the accused was 4 years old. She has taken over the care of the accused's children since the date of the accused's arrest in March 2010. The father of the children, Ndumiso, not surprisingly, does not contribute to their maintenance and has for all practical purposes deserted them. The result is that Ms Simelane is reliant on a meagre income derived from a state social grant. The children, apart from having to cope with the constant reality of an absent mother, are all school-going and well-cared for.

[4] The accused is presently 31 years old. She holds a BCom degree from UNISA as well as a diploma in Finance, obtained at Damelin College. Of great concern is that the accused has had a brush with the law before: on 1 November 2011, while she was awaiting this trial in prison, she was convicted on 8 counts of fraud, which were committed in September and October 2007, for which she was sentenced to an effective period of 10 year's imprisonment, which she is presently serving. She has accordingly been in custody for just more than 3 years since the date of her arrest in this matter. In view of the sentence imposed, I am unable to accede to her counsel's request to consider the whole of this period as an awaiting trial period. I do however, take into account, as one of the factors that should be taken into account in determining an appropriate sentence, the period of detention from the date of her arrest until 1 November 2011, which is some 20 months (see *Radebe v S* (726/12) [2013] ZASCA 31 (27 March 2013). Lastly, it is regrettable that the accused has not shown any sign of remorse. She raised a false alibi and maintains her innocence.

[5] The gravity of the offences the accused has been convicted of cannot be over-emphasised. It is hardly possible to properly describe the horrific incident that was caused by the careful pre-planning and supportive involvement of the accused. The callousness, cruelty and brutality of the attack on the innocent and defenceless occupants of the house at Mapetla, the terrible consequences of three people, including two young children, having burnt to death and the house destroyed, heave this matter into the category of the

most serious cases this court has ever dealt with. The attack was primarily aimed against a child, L, on whose behalf M's last desperate plea was unscrupulously turned down. This conduct, I should add, surpasses all human understanding.

[6] Right thinking members of our society, with ample justification, demand that heavy punishment should be meted out to persons who commit such hideous and cruel crimes. Against this background the personal circumstances of the accused, when weighed against the seriousness of the crimes, pale into insignificance. The accused's children will no doubt suffer if she is permanently removed from society but, as against this, they are well-cared for and will, in any event, for ever have to live and cope with the knowledge and disgrace of their mother having been convicted and sentenced for these abhorrent crimes. Having taken into account and balanced all the aggravating and mitigating factors I have come to the conclusion that there are no substantial and compelling circumstances justifying the imposition of a lesser sentence than life imprisonment, which in my view, is proportionate to the crimes the accused has been convicted of. I should add that I, even in the absence of the minimum sentence legislation, in the exercise of my discretion, would still have imposed the ultimate sentence.

[7] Lastly, I do not think it will serve any useful purpose to impose separate sentences in respect of each count. I therefore propose to impose one composite sentence in respect of all 12 counts.

[8] Taking all the factors mentioned above into account the accused is sentenced as follows:

1. On counts 1 to 12, taken together for the purpose of sentence, the accused is sentenced to life imprisonment.

2. It is ordered that the sentence be served concurrently with the sentence the accused is serving presently.

[9] The immediate relatives of the deceased persons are hereby informed, in terms of section 299A of the Criminal Procedure Act 51 of 1977, that they have the right, subject to the directives of the Commissioner of Correctional

Services, to make representations when placement of the accused on parole, on day parole or under correctional supervision is considered, or to attend any relevant meeting of the parole board.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE STATE	***ADV P NEL***
COUNSEL FOR THE ACCUSED	***ADV R MUFAMADI***
DATE OF JUDGMENT	***21 MAY 2013***