IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: SS32/2010

DATE: 19 JULY 2011

In the matter between:

THE STATE

and

MAWANDA MABENU Accused 1

THEMBALETHU KHAMENI Accused 2

VUYISANI MFUNDENI Accused 3

S E N T E N C E

MOSES, AJ:

Introduction:

All three the accused had been convicted on Thursday, 7 July 2011, following a long and protracted criminal trial which commenced on 7 March this year and which was initially set down for one month only. All three of them had been convicted on counts 1 and 2, namely murder and robbery with aggravating circumstances. Accused 2 had also been convicted on counts 3 and 4 which relate to the unlawful possession of an unlicensed firearm and ammunition.

The evidence regarding sentence:

Accused 1 testified in mitigation of his sentence. He also called a witness to testify on his behalf in mitigation of sentence. He is 23 years old. At the time of his arrest he was 21 years old. He lives in Hermanus in the same house as accused 3. He has a minor child of three years old. He was employed at the time of his arrest and was earning R1 400,00 per month. Part of his earnings was used to maintain his child and his family. He dropped out of school after completing Standard 6. The state has proved that accused 1 has one previous conviction of robbery and he received a five year suspended sentence on that count. He is remorseful for what had happened to Mr Kleynhans and admitted his role in the commission of the crime.

Tobeka Mfundeni was the witness called for and on behalf of accused 1. She is accused 1's cousin. She and accused 3 are siblings. Accused 1's father is the brother of Tobeka's mother. Accused 1 was raised by her mum. She has never known accused 1's biological mother. Accused 1's biological father suffers from mental illness. She and accused 1 were very close to each other. She has known accused 1 as a humble boy, who is not violent. He was never a naughty child. He did not even smoke or drink any alcohol. She testified that accused 1 and 3 were very responsible children, that is why

Tobeka's mother left them in charge of the spaza shop. She pleaded with the court to be lenient when sentencing accused 1 and that he should be given an opportunity to rehabilitate himself.

Accused 2 also testified in mitigation of his sentence. He also called a witness to testify on his behalf in mitigation of sentence. He is 32 years old and lives in Tsepetsepe, Hermanus. At the time of these offences he was apparently living alone. He is unmarried and has one minor child, a boy aged 9. The child is in the care of his parents who are pensioners and are living in Mqanduli in the Eastern Cape. At the time of his arrest, he was self-employed, a diver for *perlemoen*. He used to make about, at times, R15 000,00 a month. He used to maintain his child and his parents. This has stopped ever since he has been in custody. He suffers from head injuries. He has had an operation and is under medical treatment at Pollsmoor Prison. He requested the court to give him a suspended sentence, alternatively a death sentence. He insists that he has been convicted for something he has not done, thereby insisting on his innocence.

Valiswa Khameni was the witness who testified on behalf of accused 2. She is related to accused 2, they are cousins. They both come from the Eastern Cape. She moved to

Hermanus in 2005 and stayed with accused 2 at his place. When she found employment, she then moved to her own place. Accused 2 used to come to her house every day and eat there. She used to buy food and accused 2 occasionally bought groceries when he had money. Accused 2 only went as far as Standard 2 and left to herd cattle. She has known accused 2 as a good person.

Accused 3 elected not to, and did not, testify in mitigation of his sentence as was his right.

The witness for the state was Warrant Officer David Paine, who testified that he had had a consultation with Mr Marius Kleynhans, the son of the deceased, Mr Kleynhans and Ms Kleynhans. He confirmed that on 5 July this year, Marius Kleynhans flew from Namibia to consult with the state and flew back on 7 July 2011, because he had to attend to matters connected with his late father's estate. Warrant Officer Paine then obtained a sworn statement from Mr Marius Kleynhans, which was admitted as an Exhibit marked M. In this affidavit Mr Kleynhans junior said that his father was murdered cold-bloodedly. His parents were helpless and never posed any danger to any of the accused, the intruders, on the day of these offences.

His father was a hard working businessman and employed many people. Now that he is deceased, these people are unemployed. In his affidavit, which was in Afrikaans, Mr Marius Kleynhans also said the follows:

> "Niks sal ooit weer my pa terugbring of kan vergoed vir sy dood nie, maar dit is vir ons familie van kardinale belang dat hierdie mense nooit toegelaat sal word om dieselfde leed aan iemand anders te doen nie. Hierdie wete sal ons help om 'n mate van afsluiting te vind, die stukke van ons lewens weer op te tel en voort te gaan."

The statement was commissioned by Warrant Officer Paine.

These then constituted the evidence regarding sentence before this court. I now deal with the submissions by counsel. Ms Arnot, who appears on behalf of accused 1, did not dispute that the minimum sentence is applicable to accused 1. She submitted that the following facts and circumstances should be taken into account by this court as constituting compelling and substantial circumstances regarding accused 1:

1. His age, he was 21 years at the time of the commission of this offence.

2. He was in custody for approximately two years after his arrest on these offences.

3. He is remorseful for what he has done and for his role in these offences.

4. He is the father of a young child, who is dependent on him and for whom he should be there to fulfil is parental role as a father.

5. The court found that his role was that of an accomplice and as such that he played a lesser role in the commission of these offences.

6. The background of accused 1, namely that he was not raised by his biological parents, but primarily by his aunt, who became his adopted mother.

7. Given his age, that he is more susceptible to the influences of older people and particularly peer pressure.

8. Accused 1 does not display a disposition, to violence.

Ms Mahlasela, who appears on behalf of accused 2, made the following submissions on behalf of accused 2 in mitigation of

sentence and as constituted compelling and substantial circumstances regarding him. She similarly did not dispute that the minimum sentence is applicable to accused 2:

1. That he is a first offender.

2. That he comes from a very poor socio-economic background.

3. That he is not sophisticated.

4. That he also spent a long time in prison awaiting trial for approximately one year.

5. He also suffers from ill health relating to the wound he sustained to his head and for which he still requires medical treatment.

6. On the basis of this, that the court should not impose the minimum sentence of life incarceration.

Mr Colenso, who appears on behalf of accused 3, also did not dispute that the minimum sentence is applicable to accused 3. He made the following submissions on behalf of accused 3 in mitigation of sentence and as constituting compelling and

substantial circumstances regarding accused 3:

1. That accused 3 should not be given a sentence of more than 25 years.

2. That counts 1 and 2 should be taken together for purposes of sentence, alternatively, that the sentences in respect of these two counts should be ordered to run concurrently.

3. That he has a five year old minor child.

4. That he comes from a family of hardworking people.

5. That the shooting was not intentional. That at most it was a matter of *dolus eventualis* with which this offence of murder was committed.

6. That accused 3 did not benefit from these crimes.

7. That he has been in custody for two years.

8. That he was a victim of prejudice in Hermanus where he stayed and worked.

Mr Sebelebele, who appears on behalf of the state, made the

following submissions:

1. That both counts 1 and 2 contained the element of violence, which is very prevalent in our society.

2. That the court has a duty to discourage criminals from continuing to commit these violent crimes.

3. That the victims, and particularly Mr and Ms Kleynhans, were attacked in their own home where they were expected to be safe.

4. The victims were helpless. There was no indication of any resistance from them, which on its own should be regarded as an aggravating circumstance.

5. The two rifles that were robbed by these accused were still not recovered. These are liable to be used for committing further crimes which should also count as an aggravating factor.

6. All three accused should be treated as adults and that their respected ages should not and could not be regarded as a mitigating or compelling and substantial circumstance.

7. In respect of accused 1 that a previous conviction is relevant.

8. That the murder of Mr Kleynhans had a devastating effect on the Kleynhans family.

9. In the circumstances that the minimum sentence should be imposed in respect of all three accused on count 1, that is the murder of Mr Kleynhans, in other words that life sentences should be imposed.

10. That the two counts should not be taken together for purposes of sentence, that's count 1 and count 2.

11. That in respect of accused 2, that the maximum sentence of 15 years be imposed in respect of both count 3 and count 4.

In summary, the state's submissions are, therefore, that on count 1 life sentences should be imposed in respect of all three accused, on count 2, 15 years in respect of all three accused; on count 3, 15 years in respect of accused 2; and on count 4, 15 years in respect of accused 2. This court then adjourned to consider these submissions made by counsel, as well as the evidence which was tendered in respect of

sentence, which we have done.

I now deal with the applicable legal principles relating to sentencing. In considering and deciding an appropriate sentence, this court is guided by the under-mentioned principles which had crystallised over the years and had been applied by our courts, from the lowest to the highest courts in our land. It is trite that the sentencing court must maintain a delicate balance when imposing a sentence between:

(a) The nature and seriousness of the crimes.

(b) The interest of the community or society.

(c) The interest of the criminal or the accused without overemphasising the one element, that is of the triad, at the expense of the others. (See in this regard S v Zinn 1969 (2) SA 537 (A).

In addition the sentence so imposed by the court must also be tempered with the element of mercy, which is an independent and important element of justice. See S v Khumalo 1973 (3) SA 697 AD at 698, S v Sparks 1972 (3) SA 396 AD at 410A, S v Rabie 1975 (4) SA 855 AD at 862D. Direct imprisonment of an offender, especially a first offender, should not be imposed

lightly and must be avoided as far as possible where the same objectives could be achieved via other forms of punishment. See S v Holder 1979 (2) SA 70 (A).

These principles, which are the traditional guide for sentencing courts, must, however, be understood and considered, firstly, in the context of this case with its particular facts and circumstances. Secondly, it must be considered and applied in the context of our constitutional democracy post 1994, based on the rule of law and our criminal justice system, which is located within that constitutional democracy. Thirdly, it must be considered and applied in the context of the jurisprudence regarding sentencing that has developed within that context post 1994, and more particularly within the context of the minimum sentences prescribed by law, with specific reference to section 51 of the Criminal Law Amendment Act, Act 105 of 1997 as amended. See in this regard S v Malgas 2001 (1) SACR 469 (SCA) at paragraphs 7, 8 and 9. S v Jaipal 2005 (4) SA 581 (CC) at paragraph 29. S v Matyityi 2011 (1) SACR 40 (SCA) at paragraphs 11, 16, 18, 21 and 23.

Section 51 of Act 105 of 1997, the relevant parts thereof reads as follows:

"51. **Minimum sentences for certain serious**

offences. – 1. Notwithstanding any other law, but subject to subsections (3) and (6), a High Court shall –

(a) if it has convicted a person of an offence referred to in Part I of Schedule 2;

....

sentence the person to imprisonment for life."

Part I of Schedule 2 refers to 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

....

(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 offices:

(i) Rape or compelled rape as contemplated in section (3) or (4) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 respectively, or

(ii) Robbery with aggravating circumstances

as defined in section 1 of the Criminal Procedure Act, Act 51 of 1977."

Subsection 3 of section 51, which is relevant for purposes of this case reads as follows:

"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 must thereupon impose such lesser sentence..."

That this section ushered in a new era in our Criminal Justice System generally and our Criminal Law in particular, is highlighted and amplified in the decision of the Supreme Court of Appeal case of S v Malgas, to which we have referred earlier, more particularly at paragraphs 8 to 9 thereof, wherein the following was said:

[8] "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

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....

[9] .... 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 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...."

This court is guided by, and bound, to follow these principles. I now turn to the evaluation of the evidence and facts and circumstances with regards to the accused.

With regards to accused 1, this court has listened very carefully to his evidence and that of his cousin, Ms Tobeka Mfundeni, who is also the older sister of accused 3. Despite the absence of his natural parents, that is his mother and father, accused 1 had a stable upbringing. His aunt, Tobeka Mfundeni's mother, was for all practical purposes also his mother who took care of him. He attended school until Standard 6. Thereafter he helped his aunt in his aunt's spaza shop where he earned a weekly salary of plus/minus R350,00. He used some of this money towards the care and upbringing of his minor child, a daughter, Bhoko, currently three years old. He also sent some of this money to his adopted mother, his aunt, in the Eastern Cape, to assist them there.

He is not of an inherently violent disposition and has worked and assisted diligently in the running of the spaza shop business of his aunt. He ran this business together with accused 3, who is the brother of Tobeka Mfundeni. He has one previous criminal conviction for robbery committed on 28 June 2008, where he was convicted as an accomplice and sentenced by the Strand Regional Court on 22 November 2010 to five years imprisonment, which was conditionally suspended for five years. He admitted his role in this violent crime, but confined it only to helping to secure a vehicle and/or driver for these other people who committed the actual crimes. To that extent he is remorseful for his actions. He and his cousin, Tobeka, pleaded for mercy from this court to give him a second chance. When considering his role in these crimes, the following emerged:

(a) Accused 1 initially denied that he was involved in the commission of these offences, however, as this court has already found and as the evidence demonstrates, primarily the evidence of Mr Deon Methu, he was involved in the planning of these crimes, it was premeditated.

(b) He organised the getaway car, that is the vehicle of Mr

Deon Methu, to be used in the commission of these crimes.

(c) He knew, was aware of and saw the firearms that accused 2 fetched and returned with to the car of Mr Deon Methu before they left for the house of Mr and Ms Kleynhans.

(d) He saw and was aware that accused 2 handed over one firearm to accused 3 and that accused 2 kept the other firearm.

(e) He was, therefore, aware of the fact that these perpetrators were armed, prepared and ready for the crime that they had planned to commit on the day of 24 April 2009.

(f) He travelled with all the other accused, including the driver, Deon Methu.

(g) He was present when accused 2, 3 and Xolani Ndumo were dropped at the house of Mr and Ms Kleynhans.

(h) He stayed with Deon Methu thereafter for approximately eight hours, awaiting further instructions from the

perpetrators. He had a cell phone with him for that purpose.

(i) Upon receiving the call from these perpetrators, he and Deon Methu went to fetch them. The other accused, accused 2 and 3, as well as Xolani Ndumo were covered in blood and had black bags and long rifles with them at the time. They drove back to the house of Deon Methu and parked inside the latter's garage.

(j) Accused 1 took the bloodstained clothes of the other three perpetrators, which were put in a black bag and got rid of these clothes.

(k) He thereafter took the car of Deon Methu and drove off with accused 3 and 2 and the stolen and robbed goods.

(l) He returned the vehicle of Deon Methu shortly thereafter.

With regards to accused 2, we have already referred to his evidence as well as that of his witness. We have also referred to the submissions made by his counsel on his behalf in mitigation of sentence. We have taken these into consideration. With reference to his role in these offences, according to Deon Methu, he was the one who fetched the

"stuff" and returned with two firearms, a 9 mm pistol and a revolver, that was on the morning of 24 April 2009. He gave the one firearm to accused 3 and kept the other one for himself. What these men did in the house of Mr and Ms Kleynhans and to the occupants of this house at the time, Mr and Ms Kleynhans, the gardener, Elias Ndaliso and the domestic worker, Ms Luleka Mpalwani, also known as Precious, were described in detail by these three witnesses during their respective testimonies. It is not necessary to repeat it here, but the following picture emerged:

(a) These three witnesses were held, ordered and subjected at gun point.

(b) Ms Kleynhans was hit on the head and face with a gun.

(c) Mr Kleynhans was shot with a firearm by these intruders, as a result whereof he subsequently died on the scene.

(d) A gun was held to the head of Mr Kleynhans with a pillow in order to extract information from Ms Kleynhans in relation to the safes in the house, how to open it, where it was located, as well as its contents.

(e) The man with the silver gun hit Mr Kleynhans on the head

with the gun. According to Deon Methu, accused 2 had a silver gun.

(f) One of these firearms, the 9 mm pistol, was the subject of another reported criminal offence, the illegal pointing thereof, ostensibly committed by accused 2, which eventually led to the discovery of that firearm at the house of Nokothula Mxhonywa on or about 17 May 2009.

(g) Accused 2 misled the police several times with regards to the location of this firearm and on another occasion with regards to the location of the rifles which were robbed from the Kleynhans' residence on 24 April 2009, when he took the police for a ride to the Eastern Cape, ostensibly to point out where these firearms were allegedly buried. It turned out that accused 2 had lied to the police in this regard.

With regards to accused 3, we have already referred to the submissions made on his behalf by his counsel, as well as the evidence of his sister, insofar as it referred to him, all of which we have duly taken into consideration. With regards to his role in these offences, according to Deon Methu, accused 2 handed to accused 3 the 9 mm pistol, black and silver in colour, on this day of 24 April 2009 before these crimes were

committed at the Kleynhans' residence. Accused 3 had blue overalls on according to Deon Methu. Mr Ndaliso and Ms Mpalwani testified that at the time that they heard a gunshot upstairs, they were guarded by another man with a firearm. This man was wearing a red tracksuit pants and a brown raincoat top. According to Mr Ndaliso, when they heard this gunshot, it was a man in blue overalls and a man with a knife who were upstairs. According to Deon Methu, accused 3 was given a pistol by accused 2, which he accused 3, kept. Accused 3 was the man in the blue overalls.

Mr Kleynhans, the deceased, was shot by a 9 mm pistol according to the ballistic evidence. According to the *post-mortem* report, the cause of death was this gunshot wound to the groin of Mr Kleynhans. The perpetrator, according to the evidence of Dr Sindisa Potelwa, the forensic pathologist, would have stood in front of the victim, that is the deceased, when the shot was fired and this gunshot wound was inflicted. The only inescapable inference to be drawn from the totality of the evidence, is that accused 3 was the person who inflicted the gunshot wound in respect of Mr Kleynhans, which also caused the latter's death.

I now turn to the crimes. These crimes committed by the accused are undoubtedly extremely serious. It was

premeditated, well planned and executed with no trace left of the intruders, no fingerprints, all of them well masked and disguised. Deon Methu testified that the three perpetrators had two sets of clothing on that specific day. They subsequently discarded the clothing which they wore during the execution of these crimes and which were bloodstained. Had it not been for the evidence of Deon Methu, coupled with the information and the evidenced of Nokothula and Mr Mathengwa and as corroborated by the ballistic evidence, these accused would still have roamed the streets of our communities with impunity.

It was a heinous crime, driven, not by human need, but by greed. On the evidence as a whole, all three of them had a steady job. Accused 1 as an employee and cashier. Accused 3 as a *de facto* spaza shop owner and a taxi driver. He possessed approximately three vehicles, including a Quantum minibus, which he utilised as a taxi, a mini coach and another vehicle. He was running a profitable, successful entrepreneurial enterprise. Accused 2 was a *perlemoen* diver, which is a very sought after commodity. According to him, he could earn as much as R15 000,00 for 50 kilograms of *perlemoen*. He was living alone at the time in his own house. So it is not as if these three accused were suffering in extreme poverty. They were driven by greed and wanted to get their

hands on the property of their victims at all cost, even if it means killing people. They did not hesitate to shoot Mr Kleynhans in an effort to get their hands on his money, diamonds and jewellery, which they thought were being kept on the premises.

I now turn to the victims of these offences. Mr Ndaliso, Ms Mpalwani and Ms Kleynhans were all unharmed and harmless. Mr Ndaliso, who was employed by the Kleynhans' as a gardener, was traumatised, not only by the sight of these unexpected intruders, but also by the weapons that these intruders had in their possession and were yielding at the time. He testified that he screamed upon noticing these intruders and fell to the ground. Ms Mpalwani and Ms Kleynhans were equally traumatised by these events. Ms Kleynhans was attacked, hit with a firearm on the head, in the face. She was forced to hand over her rings, to watch on while these intruders mercilessly tried to extract information from her wounded and bleeding husband. She witnessed how her husband was bleeding, losing blood all the time, how he got weaker and weaker.

She pleaded with these attackers, in vain. She was threatened and witnessed how they held a gun to her husband's head, with the perpetrators mercilessly demanding information about

the safes, its location, its contents, about money, about diamonds. It was an ordeal which eventually resulted in her husband's death. She was not a young person at the time, neither was her husband. The two of them were living together, enjoying peacefully and lovingly the fruits of years of hard, dedicated work. All these victims had, and still do have, a constitutionally guaranteed right to life, to dignity, to the security of their person, their privacy. All these rights were violently violated by these intruders, including the accused before court. Mr Kleynhans suffered the ultimate violation, his right to life.

The Constitution of our land is not only a tool, a shield to be used by criminals in the event of any violation of their constitutional rights, which is extremely important in our constitutional democracy in general and our criminal justice system in particular. Our Constitution, including our Bill of Rights, also protect all the citizens of this country, including the victims of crimes. These victims also have, and are entitled to, the protection of their constitutional rights. These rights were violently and unlawfully violated by these accused. The only things that were recovered were the rings of Ms Kleynhans and the Mercedes Benz motor vehicle, which was also damaged by these intruders.

I now deal with the interests of the society and our communities. Our communities are terrorised by violent criminal activities committed by people who simply do not care or respect other people's basic human rights. Violent robberies, murders, housebreaking are the order of the day. Peace loving and law abiding citizens are entitled to the peace and security of the sanctity and safety of their homes, their families, their possessions. They are entitled to the protection of their rights to life, to dignity, to the security of their person and those of their families. The violence in our communities is part of what has aptly been described on occasion as a serious social injury being inflicted on our communities, especially the poor and marginalised communities. These communities must be protected against this violence, against this violent greed resulting in people's lives not being respected. Life itself has become cheap, almost worthless.

Law biding citizens must be protected against this lawlessness, against this utter and extreme disrespect for the law. In this regard we refer to S v Matyityi,(supra) more particularly paragraph 23 thereof, where this prevalence of crime was also referred to as follows:

"Despite certain limited successes, there has been no real let up on 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"."

I now turn to the argument and submissions with regards to the existence or otherwise of compelling and substantial circumstances. In this regard, this court is guided by, and wants to refer to, the dictum of Ponnan, JA, in S v Matyityi (supra) in paragraph 23, where the following was said:

"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. (Referring to the minimum sentences – our insertion). 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."

This is the context within which we must determine whether or not any of the accused had established compelling and substantial circumstances before this court. The facts and circumstances relating to accused 1 that are relevant in this regard, are the following. Firstly, his youthfulness, which in this case clearly played a role in the sense that he was in the company of his cousin, accused 3, who provided him with a form of employment and, therefore, an income which he, accused 1, could use to take care of himself and his family. He was also staying with accused 3 at the time of committing these offences. The influence which these older perpetrators, more particularly accused 3, coupled with peer pressure being exerted on him, cannot be discounted. It is an important factor.

Secondly, his lesser role which he played in the commission of these offences, more importantly his physical absence at the place and time when the deceased was shot and killed by the intruders, was the most decisive factor and circumstances which this court considers to tilt the balance in favour of accused 1. This court finds that that lesser role to be the most important compelling and substantial circumstance, in conjunction with his indication of remorse for what he has done. This court accordingly finds that accused 1 has established, and has satisfied this court, that compelling and substantial circumstances exist that enables this court to impose a lesser sentence.

When it come to accused 2, this court is not satisfied, on the evidence before us, that compelling and substantial circumstances have been established that justify a deviation from the prescribed minimum sentence. Despite the evidence of accused 2 and that of the witness called to testify on his behalf, as well as the submission made by his counsel, which were all duly considered by this court, there is nothing substantial and compelling to justify a lesser sentence than the prescribed minimum sentence.

With regards to accused 3, as already pointed out, he elected not to, and did not, testify in mitigation of sentence. This court

has, however, listened carefully to the submissions made by his counsel on his behalf, as well as the evidence of his sister, but what this court has not been told by accused 3 is why was it necessary for the deceased to have been killed and assaulted in the way that it happened. Whether he, accused 3, was remorseful for any of his actions. Whether he has the potential to be rehabilitated. These were the things that accused 1 had elected to share with this court.

As was said in S v Matyityi supra at paragraph 21, the one person who could have furnished this court with those important evidence, facts and circumstances to enable us to determine whether or not compelling and substantial circumstances exist, was accused 3. As that court said, in regard to a convicted accused's election not to testify (in paragraph 21 of that judgement):

> "[21] .... The one person who could have filled those gaps was the respondent. He chose not to. That was his right. But it is not without its consequences, for, as the Constitutional Court has endeavoured to stress (with reference to S v Jaipal 2005 (1) SACR 215 (CC) para 29):
>
> 'The right of an accused to a fair trial,

requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.'

His silence thus leads irresistibly to the conclusion that there was nothing to be said in his favour."

This approach is clearly applicable in this case in respect of accused 3. In the circumstances, it is the finding of this court that no substantial and compelling circumstances have been established or exist in respect of accused 3 that justify this court to deviate from the prescribed minimum sentence.

To conclude, the accused before this court are relatively young, especially accused 1. They all have their whole lives ahead of them. They have dependants. They have families and in their own way, their careers. The court is mindful of their respective personal circumstances and have taken that into serious consideration in deciding on an appropriate sentence, in particular the roles played by the respective accused persons in the commission of these offences. The

court has taken into consideration the seriousness of these offences, the interests of society, including the interests of the victims of these crimes, all in accordance with the principles referred to before. This court is not inclined to deal with the suspended sentence imposed in respect of accused 1 as reflected in his previous conviction. That is the subject for another and proper application in the appropriate forum.

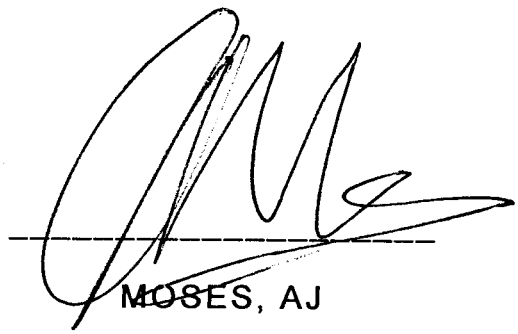
In the circumstances and on the facts of this case, this court considers the following sentences to be appropriate:

1. Accused 1 in respect of count 1, **IS SENTENCED TO 20 (TWENTY) YEARS IMPRISONMENT**. In respect of count 2, **HE IS SENTENCED TO 15 YEARS IMPRISONMENT**. It is directed in terms of section 280(2) of the Criminal Procedure Act 51 of 1977 as amended, that the 15 years in respect of count 2 are to run concurrently with the 20 years imprisonment imposed in respect of count 1. It is further directed that accused 1 will not be considered for parole until he has served two-thirds of his cumulative sentences, all in terms of section 276B(2) of the Criminal Procedure Act 51 of 1977 as amended. He has already been declared unfit to possess a firearm.

2. Accused 2 is sentenced in respect of count 1, **LIFE**

INCARCERATION, and in respect of Count 2, **15 (FIFTEEN) YEARS IMPRISONMENT**. Counts 3 and 4 are taken together for purposes of sentence and in respect hereof, he is sentenced to **10 (TEN) YEARS IMPRISONMENT**. Accused 2 is declared unfit to possess a firearm.

3. Accused 3 is sentenced in respect of count 1 to **LIFE INCARCERATION** and on Count 2 to **15 (FIFTEEN) YEARS IMPRISONMENT**. Accused 3 is declared unfit to possess a firearm.



MOSES, AJ