THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 391/08

DOCTOR MNISI (THEMBA) Appellant

and

THE STATE Respondent

Neutral citation: *D Mnisi v The State* (391/2008) [2009] ZASCA 17 (19 March 2009)
Coram: CLOETE JA, MAYA JA and BORUCHOWITZ AJA
Heard: 19 NOVEMBER 2008
Delivered: 19 MARCH 2009
Summary: Criminal Law ─ Sentence ─ Diminished responsibility ─ deterrence.

ORDER

On appeal from: High Court, Pretoria (Brunette and Van Zyl AJJ sitting as a court of appeal).

1. The appeal is upheld. The order of the court a quo is substituted with the following order:

'The appeal against the sentence is upheld. The sentence imposed by the magistrate is set aside and replaced with a sentence of five years' imprisonment.'

JUDGMENT

BORUCHOWITZ AJA (Cloete JA concurring in separate judgment.):

[1] This is an appeal against sentence only. The appellant was convicted, upon a plea of guilty, by the Regional Court (Benoni) of one count of murder. As the appellant was a first offender and the offence was committed in circumstances other than those referred to in part 1 of schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Act) the provisions of s 51(2)(a) of the Act found application. This section requires the imposition of a minimum sentence of 15 years imprisonment in the absence of 'substantial and compelling circumstances' justifying a lesser sentence. The regional court found such circumstances to be present and sentenced the appellant to a term of eight years' imprisonment. An appeal to the High Court Pretoria proved unsuccessful and the further appeal to this court is with its leave.

[2] The appellant was convicted on the strength of a written statement made in terms of s 112(2) of the Criminal Procedure Act 51 of 1977. The factual basis upon which the plea of guilty was tendered can be summarised as follows: The appellant, who was a prison warder, admits that on 11 August 2001 at Rambuda Street in the district of Benoni he

unlawfully and intentionally shot and killed the deceased Joshua Hlatswayo with his licenced service firearm. Prior to the incident the appellant's wife and the deceased were involved in an adulterous relationship. The appellant resented this and found her actions to be extremely humiliating and degrading. He eventually confronted her about the relationship with the deceased and their respective families discussed the matter. The appellant was relieved when his wife promised that she would no longer see the deceased and felt hopeful that he would be able to reconcile with her. Unfortunately matters did not turn out as promised. On the day of the incident the appellant found his wife and the deceased embracing each other in a car. The appellant immediately drew his service firearm and shot the deceased where he was sitting in the vehicle. The appellant states that when he found his wife in the embrace of the deceased all the hurt and pain he had suffered through the adulterous affair flooded his mind and provoked him to the extent that he momentarily lost control of his 'inhibitions' and shot the deceased. The appellant claims that he did not intend to kill the deceased but discharged the firearm recklessly appreciating that his actions could kill the deceased.

[3] The argument of the appellant is that the trial court had not given sufficient consideration to the fact that the appellant acted at the relevant

time with diminished criminal responsibility as a result of the provocation and emotional stress which preceded the shooting. The shooting had occurred when the appellant's powers of restraint and self control were diminished. It was also contended that the trial court over-emphasized the objective gravity of the offence and the need to impose a deterrent sentence. Consequently, although the trial court had correctly found the existence of substantial and compelling circumstances justifying the imposition of a lesser sentence than the minimum prescribed, the sentence imposed is vitiated by misdirection as to entitle this court to interfere therewith.

[4] The appellant does not seek to rely upon the defence of temporary non-pathological criminal incapacity[1] but rather upon diminished responsibility which is not a defence but is relevant to the question of sentence. The former relates to a lack of criminal capacity arising from a non-pathological cause which is of a temporary nature whereas the latter pre-supposes criminal capacity but reduces culpability. The following cases are examples in this court where the fact that the accused was found to have acted with diminished responsibility warranted the imposition of

[1] See *S v Laubscher* 1988 (1) SA 163 (A); *S v Calitz* 1990 (1) SACR 119 (A); *S v Wiide* 1990 (1) SACR 561 (A); *S v Kalogoropoulos* 1993 (1) SACR 12 (A); *S v Potgieter* 1994 (1) SACR 61 (A); *S v Kensley* 1995 (1) SACR 646 (A); *S v Di Blasi* 1996 (1) SACR 1 (A); *S v Cunningham* 1996 (1) SACR 631 (A); *S v Henry* 1999 (1) SACR 13 (SCA); *S v Francis* 1999 (1) SACR 650 (SCA); *S v Kok* 2001 (2) SACR 106 (SCA).

a less severe punishment: *S v Campher,* [2] *S v Laubscher*;[3] *S v Smith*;[4] *S v Shapiro*;[5] and *S v Ingram*.[6]

[5] Whether an accused acted with diminished responsibility must be determined in the light of all the evidence, expert or otherwise. There is no obligation upon an accused to adduce expert evidence. His *ipse dixit* may suffice provided that a proper factual foundation is laid which gives rise to the reasonable possibility that he so acted. Such evidence must be carefully scrutinised and considered in the light of all the circumstances and the alleged criminal conduct viewed objectively. The fact that an accused acted in a fit of rage or temper is in itself not mitigatory. Loss of temper is a common occurrence and society expects its members to keep their emotions sufficiently in check to avoid harming others. What matters for the purposes of sentence are the circumstances that give rise to the lack of restraint and self control.

[6] The State accepted the averments and facts set out in the appellant's written statement which accompanied his plea of guilty. These undisputed facts raise the reasonable possibility that the appellant was not

[2] 1987 (1) SA 940 (A) at 964 C-H and 976 D-E.
[3] 1988 (1) SA 163 (A) at 173 F-G.
[4] 1990 (1) SACR 130 (A) at 135 B-E.
[5] 1994 (1) SACR 112 (A) at 123C-F.
[6] 1995 (1) SACR 1 (A) at 8D-I.

acting completely rationally when he shot the deceased and that his actions were the product of emotional stress brought about by the conduct of the deceased and the appellant's wife. In my view the appellant's statement lays a sufficient factual foundation to support a finding that he acted with diminished responsibility when he committed the offence. Murder is undoubtedly a serious crime but the appellant's conduct is morally less reprehensible by reason of the fact that the offence was committed under circumstances of diminished criminal responsibility. This factor was not afforded sufficient recognition and weight by the trial court in imposing sentence on the appellant. Also in the appellant's favour, and not taken into account by the trial court, was the fact that the appellant acted with *dolus indirectus* when shooting the deceased.

[7] The trial court also placed undue emphasis on the element of deterrence as an object of punishment. This is evident from the following passage in the judgment where the magistrate states the following:

'. . . the Court cannot give the impression that the Court condones people executing people being involved in adulterous affairs. As such deterrence plays a heavy role in the sentence of this Court should impose. Society will have to find other means to deal with this problem in our society.'

[8] So far as individual deterrence is concerned, the evidence does not suggest that the appellant has a propensity for violence or is a danger to

society. He is a first offender and given the unusual circumstances of the case is unlikely again to commit such an offence.

[9] The element of general deterrence must be placed in its proper perspective. Domestic violence is rife and those who seek solutions to domestic and other problems through violence must be severely punished. Sentences imposed must send a deterrent message. On the other hand sight cannot be lost of the fact that the appellant committed murder whilst acting with diminished responsibility. In such circumstances the element of deterrence is of lesser importance when imposing sentence. This is consistent with the approach followed by this court in the *Campher*, *Smith*, *Ingram* and *Shapiro* cases.

[10] In the light of these misdirections this Court is free to impose the sentence it considers appropriate, subject to the provisions of the Act and the sentencing guidelines laid down in *S v Malgas*.[7]

[11] Taking these factors into account I am satisfied that although direct imprisonment is warranted, a sentence of eight years would be unjust. The circumstances do not call for an exemplary sentence. In my view,

[7] 2001 (2) SA 1222 (SCA).

imprisonment for a period of five years would be an appropriate sentence.

[12] The appeal is upheld. The order of the court a quo is substituted with the following order:

'The appeal against the sentence is upheld. The sentence imposed by the magistrate is set aside and replaced with a sentence of five years' imprisonment.

_____

P BORUCHOWITZ
ACTING JUDGE OF APPEAL

MAYA JA (dissenting):

[13] I have had the benefit of reading the judgment of my colleague Boruchowitz AJA. Regrettably, I am unable to agree with both his reasoning and conclusion regarding the sentence he proposes should be imposed.

[14] The background facts and the factors relevant for determination in the sentencing enquiry are set out in the main judgment and I need not repeat them. Suffice to mention that there is, regrettably, a paucity of detail on record as to how the incident actually occurred; no post mortem report seems to have been filed and the matter was decided solely on the appellant's rather sketchy statement tendered in terms of s 112 of the

Criminal Procedure Act 51 of 1977 seemingly tailored[8] to explain his mental state.

[15] The statement reads as follows:

'…

2. I plead guilty to a count of murder, freely, voluntarily and without undue influence having been brought to bear on me.

3. I admit that on 11/08/2001 and at Rambuda Str.Daveyton which is within this Honourable Court's jurisdiction area, I shot Joshua Hlatswayo (hereinafter referred to as the deceased) with my licensed 9mm Norenco arm as a result of which the deceased died.

4. I admit that I had no legal excuse for shooting the deceased and my actions were unlawful.

5. I found my wife in a car in *flagrante delicto* with the deceased whereupon I immediately drew my arm and shot the deceased.

6. The shooting was not planned nor premeditated and I had no time to reflect before I pulled my arm and shot the deceased.

7. The deceased and my wife were involved in an adulterous relationship and after it became known and after the families discussed the matter, my wife had agreed to no longer see the deceased. At the time I suffered the actions of my wife extremely humiliating, degrading and I resented her activities. I was very relieved when she indicated that she would no longer see the deceased and hopeful that we could salvage our marriage.

8. On the day of the shooting when I found my wife and the deceased in the car, I was provoked to such an extent that I momentarily lost control of my inhibitions and shot at the deceased to injure him as he had injured me.

9. All the hurt and pain I suffered before through their adulterous affair, flooded my mind when I found them inside the car.

10. I did not want to kill deceased but recklessly fired with my arm at him. I appreciated that the instrument I used, the arm, was a dangerous weapon that could kill a person. I admit, as same had been explained to me by my legal representative, that legally it is viewed that I had the intent to murder the deceased.

11. I knew my actions on the day were unlawful although I was severely provoked and lost control of my inhibitions but nevertheless did at the time foresee that I could kill the deceased.'

[8] I use these words fully mindful of the fact that it was the State's duty to prove its case against the appellant.

[16] All that can be gleaned from this statement is that the appellant's wife was having an adulterous affair with the faceless deceased, which she failed to terminate despite her undertaking to do so to the appellant and their families until the appellant found them together in a motor vehicle – in the magistrate's judgment it is said that they were kissing, a detail which must have been mentioned during legal argument as it does not appear in the body of evidence – and, during a momentary lapse of self-control, shot and killed the deceased with the intent to 'injure' him and the foresight that he might die from his action.

[17] The main contentions raised against the magistrate's decision are that she did not accord due weight to the mitigating factors in the appellant's favour particularly that he was a first offender and his plea of guilt, which indicated his remorse, as these factors are not reflected in her judgment. It was also submitted that the magistrate overemphasized the element of deterrence which has no role in a case of this nature where it is not likely that the accused will repeat the offence.

[18] Regarding the first criticism, it is so that the judgment makes no reference to the appellant's clean record and plea of guilty. But this hardly seems to me to justify a conclusion that the magistrate did not consider these factors in determining the sentence. As Davis AJA said some sixty years ago '[n]o judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has

not been mentioned, therefore it has not been considered.'[9] To my mind, it is inconceivable that an experienced judicial officer such as a regional magistrate, who daily adjudicates criminal cases, would have overlooked such elementary aspects of the sentencing enquiry. I have no doubt that these factors would have weighed on the magistrate's mind when she determined the appellant's sentence.

[19] As regards the second challenge, I do not agree that the magistrate misdirected herself by overemphasising the element of deterrence. This court has made it quite clear in recent cases not so dissimilar to the present one that the element of deterrence in the sentencing process is a material factor in the community's perception of justice and legal convictions.

[20] In *S v Makatu*[10] the appellant murdered his estranged wife with whom he raised four minor children – one born of their marriage, two from his previous relationship and one from the deceased's previous relationship. The root of the strife was the deceased's deceitful conduct as she, apparently, surreptiously maintained contact with the father of her child, engaged in extramarital affairs whilst refusing sexual intercourse

[9] *R v Dhlumayo* 1948 (2) AD 677 at 706.
[10] 2006 (2) SACR 582 (SCA).

with the appellant and misused money he gave her. During the appellant's visit to her place of work in a bid to make peace, following an unsuccessful attempt by their families to effect their reconciliation, she rebuffed his efforts and ordered him to vacate the family home which he was renovating for them. According to the appellant the deceased's reaction triggered all the past, hurtful memories of her conduct and, as he put it, 'at that spur of the moment [he] felt hurt and started shooting at her' and then shot himself in the head sustaining serious injuries which he miraculously survived.

[21] The court accepted that the offence was not premeditated and that the appellant, a first offender and soldier of good standing of 18 years in the South African National Defence Force who pleaded guilty and expressed remorse, merely wished to save his marriage for the sake of their children whom he maintained and was further in a state of great anguish when he, on the spur of the moment, shot the deceased. Notwithstanding these weighty mitigating factors Lewis JA held:

'Domestic violence is rife and should not only be deplored but also severely punished. Family murders are all too common. Society, the vulnerable in particular, requires protection from those who use firearms to resolve their problems. The sentence imposed must send a deterrent message to those who seek solutions to domestic and other problems in violence … A sentence of 12 years' imprisonment would send a

strong deterrent message to the community, but would take account of the very difficult personal circumstances of the appellant.'[11]

[22] In a more recent judgment in *Director of Public Prosecutions, Transvaal v Venter*[12] Mlambo JA, writing for the majority, evaluated various past cases of this court,[13] including some of those referred to in paragraph [4] above, which involved family murders committed in emotionally stressful circumstances in which the accused were found to have acted with diminished criminal responsibility. The learned judge described the sentences imposed in these cases, which ranged between three and eight years' imprisonment, as 'very lenient' and cautioned that it must be borne in mind when the cases are invoked that they were 'decided at a time when it was "business as usual" and the sentencing discretion of the courts was as yet unfettered by the minimum sentencing legislation'.

[23] In Mlambo JA's view, an effective sentence of ten years' imprisonment – eight years' imprisonment for the attempted murder of the appellant's wife, ten years' imprisonment for the murder of his five year old daughter and 15 years' imprisonment of which five years were

[11] *S v Makatu* (supra) at paras 17 and 18.
[12] 2009 (1) SACR 165 (SCA) at para 25.
[13] *S v Laubscher* 1988 (1) SA 163 (A); *S v Smith* 1990 (1) SACR 130 (A); *S v Kalogoropoulos* 1993 (1) SACR 12 (A); *S v Shapiro* 1994 (1) SACR 112 (A) and *S v Di Blasi* 1996 (1) SACR 1 (A).

conditionally suspended for the murder of his four year old son, ordered to run concurrently – which he promptly replaced with an effective prison term of 18 years, was 'shockingly light' and did not reflect the interests of society which viewed the conduct in a very serious light and the need for deterrent sentences. The learned judge continued at para 31:

'In my view this matter calls for a sentence cognisant of [the respondent's] personal circumstances, but which takes account of the seriousness of the offences and the need for appropriate severity and deterrence. *This latter element is at the core of the community interest in how courts should deal with violent crime*.

This is a matter in which the respondent's personal circumstances are outweighed by society's need for a retributive and *deterrent* sentence.'

(My emphasis.)

[24] In my view, the magistrate properly considered the appellant's favourable personal circumstances, namely that he was a 31 year-old first offender, was still married to the subject of his woes, had young children and a grandmother dependent on him for support and was remorseful. Included in that enquiry was the effect on the appellant of his wife's adulterous conduct, which the magistrate severely disparaged commending the appellant's attempts to salvage his marriage. The

magistrate expressly acknowledged that the experience must have caused him frustration, humiliation, anger and pain.

[25] It is clear from the magistrate's judgment that she, as did the court below, fully accepted that the appellant's capacity for sound judgment and rational thought were impaired by these emotions and that he was in a state of distress when he committed the murder. This, after all, is one of the key factors that led to the substantial reduction of the mandatory minimum sentence of 15 years' imprisonment to eight years' imprisonment.

[26] Having said that, mitigating factors must nevertheless be weighed against the aggravating circumstances of the relevant offence and the expectations of society. As properly acknowledged in the main judgment, murder is unquestionably an offence of the gravest nature. In this matter, the deceased posed no physical threat to the appellant and apparently had no interaction with him at all. All too often in this country, male partners lose self-control and react violently to marital and relational strife, a common fact of life, mostly with fatal results facilitated by the use of a firearm.

[27] I cannot agree more with the comments of Naidu AJ in *S v McDonald*[14] where he said:

'It is indeed unfortunate that, in recent times, crimes of violence committed by the use of firearms as a result of anger and frustration, appear to be on the increase. Persons possessing firearms have a specific responsibility to ensure that they exercise self control even in extreme cases, and that the use of a firearm must be resorted to only when there is no other alternative.'

In that case the court imposed, inter alia, eight years' imprisonment on the appellant for the murder of his ex-wife committed spontaneously in a highly charged child custody tug-of-war.

[28] It is critical to send out a clear message to society at large that resort to violence cannot be tolerated. The courts can convey that message effectively only in the sentences that they impose in cases of this nature. The possibility of rehabilitation of the appellant as a first offender and the improbability of a repeat offence, strenuously argued on his behalf, certainly do not mean that a short term of imprisonment or correctional supervision are the only appropriate sentences even when other relevant factors indicate a substantial term of imprisonment.[15] Just as the interests of society are not properly served by too harsh a sentence, neither are they served by one that is too lenient such as the one proposed

[14] 2000 (2) SACR 493 (N) at 510 e-f.
[15] *S v Khumalo* 1984 (3) SA 327 (A) at 333F.

by my learned colleague which, in my view, fails to adequately reflect the gravity of the offence.

[29] In determining the precise weight to be attached to the appellant's defence of diminished criminal responsibility it seems to me instructive to consider the remarks of Nugent JA in his concurrence in the *Venter* decision.[16] There, the learned judge reminds us that diminished criminal responsibility is not a pathological condition but 'a state of mind varying in degree that might be brought about by a variety of circumstances … [such as] the effects of alcohol, jealousy, distress, provocation … [which] have always been matters to be taken account of in mitigation' and concludes that nothing is altered when these circumstances are brought together under a label.[17]

[30] As stated above, it is undisputed that the appellant acted with diminished criminal responsibility when he committed the murder. But, on a fair assessment of all the evidence, I hardly find a prison term of eight years for the offence – which, incidentally, the legislature has ordained to be ordinarily punishable by 15 years' imprisonment in the

[16] 2009 (1) SACR 165.
[17] Para 65.

absence of substantial and compelling circumstances[18] – startling, shocking or disturbing. I would, accordingly, dismiss the appeal.

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MML MAYA
JUDGE OF APPEAL

CLOETE JA:

[31] I have had the advantage of reading the judgments of my colleagues Boruchowitz and Maya. I respectfully agree with the former and find myself, with equal respect, fundamentally in disagreement with the latter.

[32] The most significant fact in the present appeal so far as sentence is concerned, is that when he shot the deceased, the appellant was acting with diminished responsibility. That appears quite clearly from both paragraphs 8 and 9 of the appellant's plea explanation,[19] accepted by the State, where the appellant says that he was provoked and 'lost control of [his] inhibitions'. My colleague Boruchowitz gives in my view proper emphasis to this fact and refers to previous decisions of this court in support of his view; whereas my colleague Maya underplays its significance and refers to authority in support of her view which, for reasons I shall give, I consider inapposite or contrary to established authority in this court.

[18] In terms of s 51(3)(a) of the Criminal Law Amendment Act 105 of 1997.
[19] Quoted by my colleague Maya in paragraph 15 of her judgment.

[33] It must be underlined that diminished responsibility consists in loss of restraint and self-control (which does not have to amount to sane automatism to amount to mitigation). That is what happened here. The appellant killed the deceased but when he had 'lost control of [his] inhibitions' ie when his ability to exercise normal self-restraint was impaired. My colleague Maya quotes (in para 29 above) from the judgment of Nugent JA in *DPP Transvaal v Venter*.[20] I understand my colleague Nugent in the passage quoted to be saying that various factors can contribute to produce the state of mind labelled by lawyers as diminished responsibility, and that that state of mind may vary in degree. In the present matter, the degree to which the appellant's responsibility for his actions was diminished, and the reasons therefor, were established by the appellant's plea explanation. My colleague Maya comments that there is 'regrettably a paucity of detail on record as to how the incident actually occurred', categorises the appellant's plea explanation as 'rather sketchy' and concludes on this point that the plea explanation was 'seemingly tailored to explain his mental state'. I, on the other hand, would have expected the plea explanation to be tailored to emphasise the appellant's mental state and not to amount to a regurgitation of conclusions of fact to be found in some precedent from the law reports. And if the State considered that the plea explanation could be controverted by evidence at its disposal or by cross-examination of the appellant, it was free not to accept it. But the prosecutor did accept it, with the consequence that the facts it contains must be taken as correct.

[34] The appellant was not acting with diminished responsibility in either of the two decisions in this court relied upon by my colleague

[20] 2009 (1) SACR 165 (SCA).

Maya. In the first, namely *S v Makatu*,[21] it was found that the appellant 'at the spur of the moment . . . felt *hurt* and started shooting' (my emphasis) ─ and for that reason, the decision is of no relevance in the present context. The other judgment of this court on which my colleague relies, that of Mlambo JA in *DPP Transvaal v Venter*,[22] in my respectful view and for reasons which I gave in a dissenting judgment at the time, both constitutes a radical departure from sentences previously considered appropriate by the courts, including this court, for murder committed with diminished responsibility, and also emphasises aspects of sentence which this court has ─ repeatedly ─ held do not require emphasis in such cases. One of those aspects is deterrence. My colleague Maya relies upon the judgment of Mlambo JA to justify the emphasis of this aspect in the present case and in particular places in italics[23] his statement that 'This latter element [viz deterrence] is at the core of the community interest in how courts should deal with violent crime'. I am unable to reconcile this approach with established case law in matters such as the present. I shall give four examples.

[35] In *S v Campher*[24] this court said:

'Die misdaad waaraan appellante haar skuldig gemaak het is ongetwyfeld 'n ernstige een. In ons huidige samelewing waar rusies tussen getroude pare dikwels uitloop op die dood van een (of soms albei) van hulle behoort die element van afskrikking in straf normaalweg sterk na vore te tree. Die huidige is egter, na my mening, nie 'n geval waar daardie element belangrik is nie. Appellante was 'n eerste oortreder en daar is geen suggestie hoegenaamd dat sy 'n neiging tot geweld het nie. Die teenoorgestelde blyk eerder uit die getuienis.'

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[21] Referred to in paras 20 and 21 above.
[22] Above, n 20.
[23] In para 23 above.
[24] 1987 (1) SA 940 (A) at 964C-H per Jacobs JA, Boshoff AJA concurring at 967D-E.

In *S v Smith*[25] this court said:

'The appellant is a first offender and on all the evidence has never, apart from on this occasion, acted violently. One can safely conclude that there is no need for a sentence to be imposed to serve as a personal deterrent. There is little or no likelihood of this experience repeating itself.'

In *S v Ingram*,[26] which deals with the same point as my colleague Maya JA does in regard to the interests of society (in para 28 of her judgment), this court said:

'It is trite law that the determination of an appropriate sentence requires that proper regard be had to the triad of the crime, the criminal and the interests of society. A sentence must also, in fitting cases, be tempered with mercy. Murder, in any form, remains a serious crime which usually calls for severe punishment. Circumstances, however, vary and the punishment must ultimately fit the true nature and seriousness of the crime. The interests of society are not best served by too harsh a sentence; but equally so they are not properly served by one that is too lenient. One must always strive for a proper balance. In doing so due regard must be had to the objects of punishment. In this respect the trial Judge held, in my view correctly, that the deterrent aspect of punishment does not play a major role in the present instance. The appellant is not every likely to repeat what he did. Deterrence is therefore only relevant in the context of the effect any sentence may have on prospective offenders.'

Lastly, I would refer to *S v Shapiro*[27] where the court said:

'[T]here can be no doubt that the community must view this crime with abhorrence. I do not believe, however, that right-thinking men would demand condign punishment in a case where the accused acted with substantially diminished criminal responsibility. Nor do I think that there is substance in the point made in para 2.1.4 that the trial Judge ignored or underemphasised the increase in cases of this nature, or overemphasised emotional instability as a justification for or in mitigation of unacceptable conduct. Each case must be judged on its own facts, and it would, I think, be wrong in principle to impose a heavier sentence in this case in an attempt to stem the flow of cases in which emotional instability is relied on by the defence.

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[25] 1990 (1) SACR 130 (A) at 136b per Kumleben JA, Hefer and Friedman JJA concurring.
[26] 1995 (1) SACR 1 (A) at 8i-9b per Smalberger JA, Hefer and Nienaber JJA concurring.
[27] 1994 (1) SACR 112 (A) at 123i-124d per Nicholas AJA, Van Heerden and Smalberger JJA concurring.

. . .

I do not agree that the learned trial Judge ignored or minimised the importance of retribution and deterrence as objects of punishment. I do not think that in the light of the finding of diminished responsibility this case is one which is clamant for retribution. It does not appear from the evidence that Shapiro is likely to again commit a violent crime. He has no previous convictions relevant to show propensity for violence. It does not seem that he is a danger to society which would call for his separation from the community for a long time. In regard to the deterrence of others, it does not seem to me that in the present case a long prison sentence is called for. The concatenation of circumstances was highly unusual and is unlikely to occur again.'

I would only add, as I did in *DPP Transvaal v Venter*,[28] that to my mind there would seem to be little purpose in attempting to deter a person not in full control of his or her faculties.

[36] For these reasons, I am unable to support the approach of my colleague Maya and I am of the view that the magistrate committed a misdirection in finding that:

'[D]eterrence plays a heavy role in the sentence that this court should impose.'

[37] There is a further misdirection in the judgment of the magistrate to which my colleague Boruchowitz refers,[29] namely, that the magistrate did not afford sufficient recognition and weight to the fact that the appellant had acted with diminished responsibility. The concept is nowhere mentioned by name by the magistrate. The high water mark of her judgment in this regard is contained in the following passages:

'So the court has to accept that this incident occurred as a result of you acting on the spur of the moment and that it was then to a great extent surely as the result of you being put under stress.

. . .

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[28] Above n 20, para 61.
[29] Para 6 above.

However, the court accepts from the factual circumstances that you must have been frustrated and probably angered. That these feelings of mixed emotions must have been made worse by means of the inevitable pain and heartache that you must have felt. And that all this then led to you acting on the spur of the moment.'

The High Court on appeal simply paraphrased these findings. I am therefore, with respect, also unable to support the following finding by my colleague Maya:[30]

'It is clear from the magistrate's judgment that she, as did the court below, fully accepted that the appellant's capacity for sound judgment and rational thought were impaired by these emotions . . . when he committed the murder . . . .'

[38] Because of the misdirections by the magistrate, I agree with my colleague Boruchowitz that this court is at large to impose the sentence it considers appropriate. Giving due weight to the fact that the appellant acted with diminished responsibility, and bearing in mind the guidelines in *S v Malgas*,[31] I respectfully agree with my colleague Boruchowitz for the reasons he gives that imprisonment for a period of five years would be an appropriate sentence. I accordingly concur in the order made by him.

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T D CLOETE
JUDGE OF APPEAL

[30] In para 25 above.
[31] 2001 (2) SA 1222 (SCA).

APPEARANCES:

For Appellant:	M Wyngaard Instructed by A S Steijn; Benoni Rosendorff Reitz Barry; Bloemfontein
For Respondent:	S Masilela Instructed by Director of Public Prosecutions; Pretoria Director of Public Prosecutions; Bloemfontein