

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No: CC 25/2018

Date heard: 2 August 2019

Date delivered: 7 August 2019

In the matter between:

THE STATE

And

XOLANI NYANGWA

Accused

JUDGMENT

Goosen J:

[1] The accused is a 26 year old man. He has no previous convictions. At the time of the commission of the offence for which he has been convicted he was unemployed. He did, however perform the odd casual job to earn some income. He

was living in a backyard shack at his parents' home. He is unmarried although he is the father of a young child.

[2] The offence for which he has been convicted is a grave and serious offence. The prevalence of the crime of murder is such that cognisance is sometimes lost of the extreme consequences that flow from it. A life is ended. And with it the enjoyment of all of the rights vested in that person: dignity, equality and freedom, and the right to life itself. Not only is a life ended, but the lives of family and friends are irreparably altered. It is for this reason that the rule of law requires that the perpetrator should, generally, be visited with harsh punishment. The act of punishment serves as retribution. It serves also to signify that such crimes will not be tolerated, that there is a significant and serious consequence to be suffered by the perpetrator. It is this which our theory of criminal justice posits as the basis for deterrence. But, as a society founded upon the respect for and protection of human dignity, our criminal justice system also acknowledges that, wherever possible, the consequences should be ameliorated where there is a prospect that the perpetrator may be rehabilitated and reintegrated into society upon the completion of the sentence imposed.

[3] This is the task that a sentencing court is called upon to carry out. It is required to take proper cognisance of the nature of the crime and to determine a sentence which balances the competing interests of the society and the individual perpetrator while meeting the objectives of punishment. It does so in the context of the fundamental values that underpin our legal system. It is a task rightly considered to be very difficult. Guidance is to be derived from policy determined by the

legislature. It is also to be derived from the principles encapsulated in judicial precedent, while taking into account the particular facts in the matter before the sentencing court.

[4] In this instance s 51(2) read with the Schedules to Act 105 of 1997 prescribes a minimum sentence of 15 years for the murder. Such prescribed sentence ought to be imposed unless the court finds that there are substantial and compelling circumstances present which warrant the imposition of a lesser sentence. It is a well-established principle that a court will not for flimsy reasons depart from the prescribed sentence. The court must in its judgment record the circumstances which it finds to be substantial and compelling. It is this finding which serves to justify its departure.

[5] It should be emphasized that the legislatively prescribed sentences, while serving as a benchmark, do not preclude the imposition of more severe sentences. The legislative provisions serve merely as a guide. Such guidance is to be considered in the light of all relevant factors, both mitigating and aggravating. Once these are evaluated the court must ask itself whether the prescribed sentence or that which it considers ought to be imposed is proportionate and appropriate.

[6] Mitigating factors are those which tend to reduce the moral blameworthiness of the accused. They are factors which tend to offer some plausible explanation for the conduct. Traditionally these include the "*personal circumstances*" i.e. the age, social circumstances, education and character of the accused. They include also factors such as the sobriety of the accused at the time of the commission of the offence; the circumstances giving rise to the offence, the conduct of the accused in

relation thereto and, importantly his or her attitude to the offence. It is in regard to this latter factor that consideration may be given to the possible acceptance of responsibility and expressions of remorse.

[7] In the present matter only the personal circumstances of the accused have been proffered as mitigating factors. These have been set out above. Consideration of these factors, however, in their cumulative effect provides, in my view, no substantial mitigation. They do not allow for acceptance that the accused's moral blameworthiness is diminished. I can find no substantial and compelling reasons to depart from the prescribed sentence by imposing a lesser sentence.

[8] The "*mitigating*" factors put up by the accused, on the contrary, pale into insignificance when consideration is given to the nature of the crime. I did not set out in graphic detail the true nature of the crime in the main judgment. It was not necessary to do so then. However, it is necessary to do so now to a greater extent.

[9] The deceased was 14 years old. She would have turned 15 three weeks after the day of the crime. She was subjected to horrific violence. During the course of the struggle two braids were torn from her scalp. The assault upon her commenced in one part of the building and continued through other parts. Her blood, in the form of spatter marks, was found in all three rooms. In the room where the main attack occurred the scene evidence suggests a sustained and vicious attack. She was bludgeoned with a piece/ pieces of rubble. The post mortem report records a significant number of wounds suggesting that she was bludgeoned repeatedly. Whilst prone on the ground the accused delivered a blow to her head which caused a large depressed fracture of the skull. To do so he used a cinder/cement block. She

was then dragged to another room. Here the assault continued. She was then set alight. The fire destroyed her body from mid-torso down.

[10] The evidence suggests an extraordinary degree of violence. It also establishes direct physical contact between the victim and the accused as the deadly assault was carried out.

[11] Mr *Stander*, for the state, submitted that the process of killing the deceased was such as to place the crime in the category of the most serious. I agree. It is difficult to conceive of the degree of violence that was meted out by the accused and what the victim experienced in her last moments.

[12] The accused's conduct after the event points to a callousness that is striking. After bludgeoning the deceased to death and setting her body alight he returned home. There he proceeded to have sexual intercourse with a woman whom he had left there earlier in the night. This is chilling conduct.

[13] When the aggravating nature of the crime is weighed against the mitigating circumstances present there is, in my view, no doubt that there is no basis to impose a sentence less than that prescribed. The only question that arises is whether a more severe sentence ought to be imposed.

[14] Mr *Stander* argued that this was a matter in which the court should impose a sentence of life imprisonment notwithstanding that it is not prescribed. In developing the argument he submitted that, having regard to the moral blameworthiness, it is anomalous that a sentence of life imprisonment can be imposed on an accused who premeditates a murder and then carries it out by firing a single fatal shot whereas in

the present case such sentence is not prescribed notwithstanding the abhorrent and cruel nature of the crime.

[15] Nugent JA drew attention to anomalies of this nature in the context of sentences for rape, in **S v Vilikazi**¹ where he commented as follows:

"[13] What is striking about that regime is the absence of any gradation between ten years' imprisonment and life imprisonment. The minimum sentence of ten years' imprisonment progresses immediately to the maximum sentence that our law allows once any of the aggravating features is present, irrespective of how many of those features are present, irrespective of the degree in which the feature is present, and irrespective of whether the convicted person is a first or repeat offender. On the face of it a first-offending 18-year-old boy who rapes his 15-year-old girlfriend on one occasion must receive the same sentence as a recidivist serial rapist who repeatedly gang-rapes and beats senseless a disabled victim whom he consciously infects with HIV. The 18-year-old boy who rapes his 15-year-old girlfriend must also receive the same sentence as the adult recidivist who rapes an infant. The offender who imprisons and rapes his victim repeatedly every day for a week is considered to be no more culpable than one who rapes his victim twice within ten minutes. It requires only a cursory reading of the Act to reveal other startling incongruities. And when the sentences that are prescribed for rape in various circumstances are related to sentences prescribed for other crimes even more incongruities emerge. It is not surprising that the leading writer on the subject of sentencing in this country, Prof Terblanche, advanced the following acerbic observation on the Act ten years after it took effect:

¹ 2012 (6) SA 353 (SCA)

'I have criticised the Act elsewhere and, if anything, have become more critical with time. There is hardly a provision in sections 51 to 53 that is without problems. The number of absurdities that have been identified and which will no doubt be identified in future is simply astounding. The Act's lack of sophistication disappoints from beginning to end. There are too many examples of disproportionality between the various offences and the prescribed sentences.'

[16] The learned judge addressed the anomalies by pointing out that what is required in determining whether to impose a prescribed sentence, is an assessment of the proportionality of that sentence. At paragraph [18] of the judgment the learned judge said the following:

"[18] It is plain from the determinative test laid down by Malgas, consistent with what was said throughout the judgment, and consistent with what was said by the Constitutional Court in Dodo, that a prescribed sentence cannot be assumed a priori to be proportionate in a particular case. It cannot even be assumed a priori that the sentence is constitutionally permitted. Whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case. It ought to be apparent that when the matter is approached in that way it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs it will be because the prescribed sentence is seldom proportionate to the offence. For the essence of Malgas and of Dodo is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice."

[17] Mr *Bodlo*, for the accused, sought to persuade me on the basis of proportionality, and in the exercise of mercy, that I should not impose the prescribed sentence. For reasons I have already indicated I am not so persuaded. In my view, a sentence of 15 years' imprisonment would not be proportionate in that it would be unduly lenient. It would not adequately reflect the outrage that must rightly be felt by the society when faced with such egregious violence visited upon a child. It would also not address the fact, to be inferred from the nature of the crime and the accused's conduct, that he poses a serious threat to society.

[18] Mr *Bodlo* also relied on considerations of proportionality in countering the sentence sought by Mr *Stander*. Such a sentence it was submitted would unduly emphasize the nature of the crime. I disagree. This was a dreadful crime carried out with shocking violence. To treat it as anything less would bring about an injustice. He argued also that the court should show mercy to the accused. The plea for mercy, however, rings hollow. He has remained silent throughout. We are left without any explanation for what occurred and have no understanding of his view of the crime. He is of course not to be punished for silence. But he cannot obtain the benefit of sympathy without taking the court into his confidence and without a measure of acceptance of responsibility for his conduct.

[19] This court cannot be motivated by maudlin sympathy for the accused. It is required to deliver justice. It does so by weighing all of the factors relevant to sentence when it strikes a balance between the interests of the criminal and the society. It is required to impose punishment which speaks to the crime, the criminal and the interests of society. When I take all these factors into account I find that the

only appropriate and proportionate sentence is the maximum sentence that this court can impose.

[20] In the result the accused is sentenced to life imprisonment.

G.G GOOSEN
JUDGE OF THE HIGH COURT

Obo the State:

Adv M. Stander

NDPP, Uitenhage Road, North End, Port Elizabeth

Tel (012) 842 1400

Obo the Defence:

Mr X. Bodlo

Legal-Aid South Africa (Port Elizabeth)

Uitenhage Road, North End, Port Elizabeth

Tel (041) 408 2800