

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
21/06/2022	
DATE	
SIGNATURE	

CASE NO: CC 70/2020
DPP REF: M23/2020

In the matter between:

THE STATE

v

NICHOLAS HENDRIK JANSE VAN RENSBURG

ACCUSED

JUDGMENT ON SENTENCE

MOOSA J:

[1] MR NICHOLAS HENDRIK JANSE VAN RENSBURG ('accused') has been found guilty on Friday, 01 April 2022, on the following charges:

[a] COUNT 1:

MURDER READ WITH THE PROVISIONS OF SECTION
51(1)(a) AND PART 1 OF SCHEDULE 2 OF ACT 105 OF 1997

IN THAT on or about 13 October 2019 and at or near Mjejane RDP next to Walala Wasala Tuck-shop in the district of Komatipoort the accused did unlawfully and intentionally assault **ZITHA ANDISWA NANCY**, an adult female by beating her causing serious injuries as a result whereof the said **ZITHA ANDISWA NANCY** died on 15 October 2019 in the Tonga Hospital.

[b] **COUNT 2:**

RAPE READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997

IN THAT on or about the date and at or near the place mentioned in count 1, the accused did unlawfully commit an act of sexual penetration with **ZITHA ANDISWA NANCY**, a female person, by inserting a wooden spoon into her vagina, more than once, without her consent.

[2] The court in imposing sentence, must have due regard to the facts of the case, and in addition thereto, must apply certain well-established legal principles relating to the extent and magnitude of punishment. An awesome responsibility is thereby vested in the Court.

[3] The acknowledged objects and purpose of criminal punishment are deterrent, preventive, reformative and retributive.

[4] What must also be considered is the triad consisting of the crime, the offender and the interests of society.¹ I am in respectful agreement with what has been stated in these cases. The elements of the triad contain an equilibrium and a tension. A court should when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements.

¹ S v Zinn 1969 (2) SA 537 (A) at 540G; S v Scheepers 1977 (2) SA 154 (A)

What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern. This conception as expounded by the courts is sound and is incompatible with anything less. Therefore all the elements of the triad, although not identical are in dissociable.

[5] The nature of the crime is of considerable importance. It may be of such significance or so far reaching that a lengthy period of imprisonment is the only adequate punishment. In passing sentence the trial court must take into account the moral and ethical nature of the crime, and the gravity of the offence. It is accepted and is indeed logical that a more serious crime will carry with it a greater moral blameworthiness than a minor or less serious offence. This involves a moral and value judgment. A process of arid intellectualism is insufficient. Mere theorising is insufficient. What matters finally is how the court views the crime on its own merits, and all the relevant proven facts and circumstances must be carefully considered and assessed.

[6] Merely to find that a crime by itself is serious without regard to its setting and its factual context, and thereby concluding that the crime committed by the offender is therefore also serious, is not appropriate, and may result in a serious misdirection. The court does not and cannot rely on a catalogue of crimes. To do so would result in a purely mechanistic approach, whereby the court, in its judicial discretion, would fail to pay due regard to the facts and circumstances of the particular crime.

The sentence therefore must be commensurate with the gravity or otherwise of the crime, and is a necessary concomitant of punishment.²

[7] In considering the offender, due regard must be had, inter alia, to the following: his/her age and background; level of education, attainment, and position in society; family circumstances, whether married or not, and the

² S v Haasbroek 1969 (1) SA 356 (E)

question of dependants; motive in committing the offence, whether for personal gain or for reasons of avarice, or being actuated by some moral or laudable objective; whether the offender stood to gain by the offence; the question of the accused being a first offender; the effect of punishment on the offender, and more particularly if a sentence of imprisonment is imposed; the prospects of reformation and correction, and becoming a useful member of society; the presence or absence of remorse or contrition; whether instead of imprisonment an alternative method of punishment would not be appropriate in the circumstances; a perceptive understanding of the accused's human frailties as effected by the circumstances surrounding the commission of the offence in question and a balancing of those frailties against the evil of the offender's deed³; influence or encouragement of another⁴.

[8] Due weight must be given to the personal circumstances of the accused. As a general principle equal punishment for equal offences is to be imposed unless the personal characteristics of the respective accused make such differentiation necessary.

[9] The feelings and requirements of the community, the protection of society against the accused and other potential offenders must be considered, as well as the maintenance of peace and tranquility in the land needs to be taken into account. Whilst considering the interests of society as a factor in determining sentence, the interests of society should not be over-stressed to the detriment of the personal factors of the accused.

I pause to mention that a balance should be maintained between the different elements of the triad.

[10] It is noteworthy to mention that this triad has been criticised as inadequate, as the role of the victim is not emphasised. This anomaly has caused the courts to now give serious consideration to the victim during

³ S v Sigwahla 1967 (4) SA 566 (A) at 571 E-F

⁴ S v Lehnberg en 'n Ander 1975 (4) SA 533 (A)

sentencing proceedings. This phenomenon has been termed as the squaring of the triad.

[11] An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before court.⁵ To that should be added, it also needs to be victim-centred. Internationally the concerns of victims have been recognised and sought to be addressed through a number of declarations, the most important of which is the UN Declaration of the Basic Principles of Justice for Crime and Abuse of Power.⁶

The Declaration is based on the philosophy that adequate recognition should be given to victims and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the state – it is an injury or wrong done to another person.⁷

The underlying philosophy of the Service Charter for Victims of Crime in South Africa⁸ (also referred to as Victim's Charter) is to give meaningful content to the rights of all citizens, by reaffirming one of our founding democratic values namely human dignity.⁹

[12] By accommodating the victim and/or their representative during the sentencing process the court will be better informed before sentencing about the after effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim and/or their families, the court will only have half of the information necessary to properly exercise its sentencing discretion. It is

⁵ Samuels v The State [2010] ZASCA 113

⁶ Resolution 40/34 Adopted by the General Assembly on 29 November 1985

⁷ SA Law Commission Discussion Paper 7 Sentencing Restorative Justice (1997)

⁸ Approved by Cabinet on 2 December 2004

⁹ S 7(1) of the Constitution 108 of 1996

thus important that information pertaining not just to the objective gravity of the offence, but also the impact of the crime on the victim and/or their families be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality rather than harshness.¹⁰

[13] The convictions in this case relate to the cold blooded, callous, heinous, egregious, systematic, predatory, opportunistic, wretched, despicable and contemptible conduct on the part of the accused. His conduct further clearly displays an absolute flagrant disregard for the sanctity of human life.

[14] The Accused has been found guilty of one count of Murder and Rape read with Section 51(1) of the Criminal Law Amendment Act 105 of 1997, which prescribes the imposition of life imprisonment, on each count.

[15] It is clear from the evidence before this court, that the conduct of the accused involved a wanton disregard for his victim; an element of planning and premeditation, and a single-minded resolve on his part to commit the crimes, for which he has been convicted off. His behaviour and conduct can be described, and may be likened to a Slubberdegullion. This conclusion is fortified by the fact that he set upon the deceased in a vicious, brutal and unrelenting manner, like a hyena.

[16] I have duly taken note of the fact that the accused does not have any previous convictions, and accordingly stands as a first offender before this Court.

¹⁰ S v Matyityi 2011 (1) SACR 40 (SCA) paragraph 17

[17] The accused testified, *inter alia*, in mitigation of sentence, as follows:

[a] He was born on 19 August 1981 and is currently 40 (forty) years old. His highest standard of education is Standard 8 (eight), which he completed in 1999.

[b] He is married and has one son who is 18 years old, and three daughters who are 13, 12 and 6 years old respectively. His son resides with the accused's friends in Mbombela, whilst his daughters are with his wife in Swaziland.

[c] He was employed at Jodie and Sons, Malelane as a boiler maker, fitter and turner and mechanic, earning a salary of R 15 000,00 (fifteen thousand rand) per month just prior to his arrest. Thereafter, his step-father has been sending money to his wife, and who has been residing with her brother in Swaziland.

[d] He was responsible for the maintenance and support of his family prior to his arrest, as he was the sole breadwinner. His wife is unemployed, as she has been diagnosed with leukemia.

[e] He has been in custody since October 2020, pending the finalisation of his trial.

[f] He requested that this Court deviates in the imposition of the prescribed minimum sentence, as he needs to raise and support his children.

That in essence concluded the evidence of the accused in mitigation of sentence.

[18] Mr Manzini made the following submissions, *inter alia*, on behalf of the accused in mitigation of sentence:

[a] Submitting that the personal circumstances of the accused together with the mitigating factors can be cumulatively regarded as substantial and compelling circumstances, and which would cause this court to deviate from the imposition of the prescribed minimum sentence.

[b] Further, that the Court take into account the time spent by the accused, whilst awaiting the finalisation of his trial.

That in essence concluded the submissions on behalf of the accused.

[19] **Anton Zitha** ('Zitha'), the deceased's uncle testified, *inter alia*, in aggravation of sentence as follows:

[a] The deceased is his late brother's daughter, and he took the deceased in when her father passed on. He resided with her from the time when she was 13 (thirteen) years old, until she turned 15 (fifteen). The deceased thereafter went to live with his aunt. However, he was responsible for the deceased's maintenance.

[b] The deceased was unemployed and she took care of her aunt who was 80 (eighty) years old.

[c] He is very heartbroken at the death of the deceased, and her untimely death has really affected him.

That in essence concluded the evidence of this witness, in aggravation of sentence.

[20] Ms Bekwa submitted that this Court take into account the following factors in aggravation of sentence:

[a] The accused have been convicted of very serious crimes, and the nature thereof is nothing but heinous.

[b] The accused has not shown any remorse for his conduct.

[c] The Court take into account that this is a gender based violence case, and that during 2020 the President of the Republic of South Africa declared that gender based violence is now becoming a pandemic in South Africa.

[d] Further, that the court take into account that there are no substantial and compelling circumstances that could cause this court to deviate in the imposition of the prescribed minimum sentence, where applicable.

That in essence concluded the submissions of the State in aggravation of sentence.

[21] The crime of rape, which the accused has been convicted off, is extremely serious, and in addition thereto it is settled that these crimes are extremely prevalent and are becoming a rampant scourge and the order of the day.

Majiedt JA in S v SMM 2013 (2) SACR (292) (SCA) at 297 f – 298 B (paragraph 14) stated as follows:

"Our country is plainly facing a crisis of epidemic proportions in respect of rape, particularly of young children. The rape statistics induce a sense of shock and disbelief. The concomitant violence in many rape incidents engenders resentment, anger and outrage. Government has introduced various programmes to stem the tide, but the sexual abuse of particularly women and children continues unabated. In *S v RO and another* 2010 (2) SACR 248 SCA, I referred to this extremely worrying social malaise, to the latest statistics at that time in respect of sexual abuse of children and also to the disturbingly increasing phenomenon of sexual abuse within the family context. If anything, the picture looks even gloomier now, three years

down the line. The public is rightly outraged by this rampant scourge. There is consequently increasing pressure on our courts to impose harsher sentences primarily, as far as the public is concerned, to exact retribution and to deter further criminal conduct. It is trite that retribution is but one of the objectives of sentencing. It is also trite that in certain cases retribution will play a more prominent role than the other sentencing objectives. But one cannot only sentence to satisfy public demand for revenge - the other sentencing objectives, including rehabilitation, can never be discarded altogether, in order to attain a balanced, effective sentence."

[22] Our courts have repeatedly pronounced on the devastating effects of the abuse of woman and children and the approach to be adopted by the courts. In **S v Chapman 1997 (3) SA 341 (SCA); [1997] 3 All SA 277 (A)**, a decision preceding the enactment of Act 105 of 1997, Mohamed CJ said:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy, and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity, which constantly diminishes the quality and enjoyment of their lives. The appellant showed no respect for their rights. He prowled the street and shopping malls and in a short period of one week he raped three young women, who were unknown to him. He deceptively pretended to care for them by giving them lifts and then proceeded to rape them callously and brutally, after threatening them with a knife. At no stage, did he show the slightest remorse. The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.'

[23] In **DPP, North Gauteng v Thabethe 2011 (2) SACR 567 (SCA) 577g-i** the court stated:

'Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our recent democracy which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right thinking and self-respecting members of society. Our courts have an obligation in imposing sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, to impose the kind of sentences which reflect the

natural outrage and revulsion felt by the law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system.'

[24] In **Mashigo and another v The State (20108/2014) [2015] ZASCA 65 (14 May 2015)** Bosielo JA remarked at para 31:

"It is sad and a bad reflection on our society that 21 years into our nascent democracy underpinned by a Bill of Rights, which places a premium on the right to equality (s 9) and the right to human dignity (s 10), we are still grappling with what has now morphed into a scourge to our nation...Needless to state that courts across the country are dealing with instances of...abuse of women and children on a daily basis. Our media in general is replete with gruesome stories of ...women and child abuse on a daily basis."

[25] On 15 June 2017, the Constitutional Court in **Ndlovu v S (CCT174/16) [2017] ZACC 19 (15 June 2017)** in relation to the responsibilities of prosecutors and courts said at para 53:

"Mr Ndlovu's crime is just one instance of one of the most harrowing and malignant crimes confronting South Africa today – rape. Rape is perhaps the most horrific and dehumanising violation that a person can live through and is a crime that not only violates the mind and body of a complainant, but also one that vexes the soul. This crime is an inescapable and seemingly ever-present reality and scourge on the nation and the collective conscience of the people of South Africa."

[26] In **N v T 1994 (1) SA 862 C at 864G** rape was described as "a horrifying crime and... a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of the victim". In **S v Nesche 2005 (2) SACR 386 (WLD) at 395 g – j** the court stated as follows: "Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable. In our country, it occurs far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman's body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expect our courts to punish rapists very severely."

[27] In **Kearns v The State 2009 (2) SACR 684 GSJ** [also reported at [2009] JOL 24205 (GSJ) at 690 Jajbhay J, *inter alia*, remarked that: "A rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault it

is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim. The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. It is violation with violence of the private person of a woman. This constitutes an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order."

[28] In the case of **AM v S [2017] JOL 39064 (GP) 11** the following was said: "Rape is a repulsive crime. It is an invasion of the privacy, the dignity and the person of a woman/child; truly a violation of any woman and/or child's privacy and dignity and is bound to have adverse psychological impact on any rape victim. Whilst this court may not presume that the appellant's conduct inclines towards a strong prospect against rehabilitation the appropriate sentence in this case should bring home to the appellant and likeminded people that:

- (i) Rape is a serious offence that will not be tolerated in our society;
- (ii) Women have the right to bodily integrity and the law will bear heavily on those who violate their rights;
- (iii) The molestation and abuse of children likewise, will never be tolerated."

[29] In the seminal judgment of **S v Malgas**¹¹ at paragraphs 7 and 8, the following was said per Marais JA regarding the provisions of the Minimum Sentence legislation: "The very fact that this amending legislation has been enacted indicates that parliament was not content with that and that it was no longer to be "business as usual" when sentencing for the commission of the specified crimes".

"In what respects was it no longer to be business as usual? 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

¹¹ 2001 (1) SACR 469 SCA

the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may".

"Secondly, a court was required to spell out and enter on the record the circumstances which it considered justified a refusal to impose the specified sentence....Moreover, those circumstances had to be substantial and compelling. Whatever nuances of meaning may lurk in those words, their central thrust seems obvious. 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. The use of the epithets "substantial" and "compelling" cannot be interpreted as excluding even from consideration any of those factors. They are neither notionally nor linguistically appropriate to achieve that. What they are apt to convey, is that the ultimate cumulative impact of those circumstances must be such as to justify a departure.

It is axiomatic in the normal process of sentencing that, while each of a number of mitigating factors when viewed in isolation may have little persuasive force, their combined impact may be considerable. Parliament cannot have been ignorant of that. There is no indication in the language it has employed that it intended the enquiry into the possible existence of substantial and compelling circumstances justifying a departure, to proceed in a radically different way, namely, by eliminating at the very threshold of the enquiry one or more factors traditionally and rightly taken into consideration when assessing sentence. None of those factors have been singled out either expressly or impliedly for exclusion from consideration".

[30] In **S v Malgas** *supra*, **S v Dodo**¹² and **S v Vilakazi**¹³ regarding the imposition of an appropriate and proportional sentence in the context of the prescribed minimum sentence of life imprisonment and the "determination" for

¹² 2001 (1) SACR 594 (CC)

¹³ 2009 (1) SACR 552 (SCA)

when the prescribed sentence may be departed from. The following extract from **Vilakazi**, paragraph 3 is apposite: "... the Constitutional Court reminded us in *S v Dodo* that punishment must always be proportionate to the deserts of the particular offender – no less but also no more – for all human beings ought to be treated as ends in themselves, never merely as means to an end".

[31] Mercy is regarded as a concomitant of justice. In **S v Rabie** ¹⁴ at 861 D et seq, Holmes JA stated: "Then there is the approach of mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused. While recognising that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal, as well as the crime, and being fair to society".

[32] It is trite that sentencing is generally a matter of discretion left in the hands of the court-passing sentence. The discretion, however, may not be exercised arbitrarily, but reasonably and judicially within the parameters of legislative prescription. Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence.¹⁵ Retribution may even be decisive.¹⁶

[33] What appears from the aforementioned cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role¹⁷.

¹⁴ 1975 (4) SA (A)

¹⁵ *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 519 d - e

¹⁶ *S v Nkwanyana and Others* 1990 (4) SA 735 (A) at 749 C - D

¹⁷ *S v Swart* 2004 (2) SACR 370 (SCA)

[34] Accordingly, the need for a strong emphasis to deter violent crime in our society is an absolute necessity that should not be compromised or subjected to any further scrutiny. The State is therefore enjoined, and indeed compelled, to be resolute in protecting human life against violation by others who are found wayward. The level of crime in our society has reached dangerously alarming proportions. It is the duty of this Court in as much as it is the duty of the courts of the land elsewhere to deal with violent crime firmly as far as the letter of the law can stretch¹⁸.

[35] We are no closer now than we were in 1998 when the Criminal Law Amendment Act 105 of 1997 was enacted as a short term measure to deal with the rampant crime wave which engulfed our country. The minimum sentences mandated by the Legislature have become a permanent feature on our statute books with no deterrent effect.

The remarks by Ponnann JA in *S v Matyityi* are apposite:

'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.'

¹⁸ S v Mashao [2016] JOL 34327 (GJ)

[36] In *S v Dodo* 2001 (1) SACR 594 (CC) the Court reiterated at para 8 that: "A sentence of imprisonment for life, irrespective of the policies and procedures to which such sentence may be subjected by the Department of Correctional Services, must be regarded by the Court imposing it as having the potential consequence, at the very least, that the accused so sentenced will indeed be incarcerated until his death. It is an extreme sentence. It is the most severe sentence, which may lawfully be imposed on an accused such as the one now before Court. It is a sentence which, in the ordinary course, requires a meticulous weighing of all relevant factors before a decision to impose it can be justified."

[37] It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that is involved at arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence, which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society.

[38] Sentencing involves a very high degree of responsibility, which should be carried out with equanimity. I am reminded of the comments of Corbett JA in *S v Rabie* ¹⁹ "a judicial officer should not approach punishment in a spirit of anger, because, being human, that will make it difficult for him to achieve that delicate balance between the crime, criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender himself to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality".

[39] It is necessary to reiterate a self-evident reality. Rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space.²⁰ The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be

¹⁹ 1975 (4) SA 855 (A) at 866 A-C

²⁰ *S v Chapman* 1997 (3) SA 341 (SCA) at 344 J-345A is apposite

treated in a cruel, inhumane or degrading way.²¹ I pause to mention that it is clear from the evidence, that the accused violently penetrated the deceased with a large wooden spoon several times, and which caused her to ultimately succumb to the horrific injuries suffered, as a direct result of his barbaric conduct.

[40] In **S v Vilakazi**,²² Nugent JA referred to the study done by Rachel Jewkes and Naeema Abrahams on the epidemiology of rape²³ which concluded on the available evidence that "women's right to give or withhold consent to sexual intercourse is one of the most commonly violated of all, human rights in South Africa".

[41] I have duly taken cognisance of the rampant scourge of crimes of violence against women and children that are being perpetrated daily. The prevalence of these offences in South Africa is seriously concerning. According to research conducted by Ullman (2010) sexual violation has deep and long lasting effects including physical, psychological and emotional harm on its victims as a result of being stripped off their dignity and being violated.

In my view it surely would be a sad indictment upon this court if it does not heed the call of government, the cry from civil society and the victims of this heinous crime. I am of the view that this systemic disease needs to be quashed, and the courts have been enjoined to view such matters in a very serious light.

[42] It is noteworthy to mention that this court is duly enjoined to look at the aggravating and mitigating circumstances and once these are carefully considered, to determine as to whether there are substantial and compelling circumstances that will cause it to deviate from the imposition of the prescribed minimum sentence of life imprisonment.

²¹ Section 12(1)(c) and (e) of the Constitution 108 of 1996

²² *supra*

²³ Rachel Jewkes and Naeema Abrahams 'The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview, Social Science and Medicine Journal 55 (2002) 1231 - 1244

[43] The court will bear in mind that there is no onus placed on the accused to prove the presence of substantial and compelling circumstances, or on the State to prove the absence of such substantial and compelling circumstances. However, there rests a clear duty on an accused to produce evidence to convince the court that circumstances exist, which justify the imposition of a lesser sentence. It stands to reason that such substantial and compelling circumstances may also be inferred to be present in the State's case or in evidence presented by State witnesses or by the prosecution itself. If no factual basis is laid for a finding that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence, it follows that a court will be obliged under the statutory provisions to impose the prescribed sentence.

[44] This court is also aware of the various authorities where it was settled that substantial and compelling circumstances should not be found, based on flimsy reasons. **S v Malgas** supra.

[45] In **S v M 2007 (2) SACR 60 (W)** – Satchwell J remarked as follows: “I take into account that the accused has no previous convictions and he is a man in his sixties. However, I must take into account that there is no authority for the proposition that the previous clean record of an accused convicted of offences in Part 1 of Schedule 2 constitutes in and of itself, a ‘substantial and compelling circumstance’. At most, it would be one of the considerations taken into account for exploring the possibility that, in conjunction with other factors, it may persuade the sentencing court to make such a finding.”

Consequently, I have duly applied my mind to this aspect in respect of the accused.

[46] I have duly given due cognisance to the principles that need to be applied when imposing a suitable punishment upon the accused. I have carefully looked at the aggravating as opposed to the mitigating factors, and have taken all other circumstances and factors relevant to sentencing and measured it against the composite yardstick (“substantial and compelling”), in order to properly determine whether the aforementioned cumulatively justify a departure from the standardised response that the legislature has ordained.

[47] After careful consideration of all the evidence before me, and taking into account all the aggravating and mitigating and other factors that I am required to take into account, I am of the view that as far as the accused is concerned, no substantially compelling circumstances exist to deviate from the imposition of the prescribed minimum sentence, where appropriate.

[48] Further, I believe that there can simply be no other suitable sentence to be imposed in these circumstances having due regard to the heinous, wanton and reckless conduct of the accused. To this end, I have duly taken into consideration the following facts, and which have impelled me to conclude that there should not be any deviation in the imposition of the prescribed minimum sentence upon the accused:

- [a] The repeated penetration of the deceased's vagina with a large wooden spoon is but nothing short of barbaric and heinous.
- [b] The magnitude of the injuries suffered by the deceased, and which ultimately led to her demise.
- [c] The seriousness of the crimes.
- [d] The callousness of the accused's conduct, and to the extent that it is simply senseless, cold-blooded and merciless.
- [e] The lack of genuine remorse on the part of the accused.
- [f] The degree of planning and premeditation involved in the commission of the crime.
- [g] The level of violent crime in our society has reached dangerously alarming proportions, and more especially the sexual violence towards women and children.

[49] I have duly taken into account and given credence to the evidence that has been presented, having due regard to the triad as espoused in **S v Zinn** supra, together with the overall impact on the victim's family, when considering a suitable sentence to be imposed. I have carefully considered the mitigating and aggravating factors present in this case, whilst carefully weighing and balancing them against each other. I have taken all the factors that are necessary, and as I am required to do, in the determination of a suitable sentence to be imposed upon the accused.

[50] In my view the time has come to send out a clear, crisp and unambiguous message to society that this court will simply not lay supine, when faced with offenders who make themselves guilty of serious and violent crimes. On the contrary, the need has duly arisen to impose robust sentences upon offenders who conduct themselves in the manner that the accused has, and to make it clear that lawlessness, and abuse of women will simply not be tolerated. Nothing more! Nothing less!

[51] Sekwanele!
Enough is Enough!
Genoeg is Genoeg!

[52] In the result the accused is sentenced as follows:

- [a] **COUNT 1 - MURDER READ WITH THE PROVISIONS
OF SECTION 51(1) OF ACT 105 OF 1997
LIFE IMPRISONMENT**
- [b] **COUNT 2 - RAPE READ WITH THE PROVISIONS OF
SECTION 51(1) OF ACT 105 OF 1997
LIFE IMPRISONMENT**

[53] Considering that the prescribed minimum sentence for the murder on count 1 and the rape on count 2 is life imprisonment, it is ordered that the sentence on count 2 will run concurrently with count 1.

[54] The accused is effectively sentenced to life imprisonment.

[55] The accused is ordered to participate in long term psychotherapy, with a focus on behaviour, anger management, and insight-orientated interventions offered by the Department of Correctional Services; and that he further participates in other appropriate programmes/courses offered by the Department of Correctional Services.

[56] In terms of Section 103(1)(g) of the Firearms Control Act 60 of 2000, the Court makes no order. The accused is hereby deemed unfit to possess a firearm.

[a] In terms of Section 103(4) of Act 60 of 2000, the court issues a search and seizure order for competency certificates, licences, authorisations and permits, firearms and ammunition.

[b] The Assistant Registrar is ordered to inform the Registrar: Central Firearms Control Register in writing of this order.

[57] In terms of Section 299A of the Criminal Procedure Act²⁴ the family of the deceased be informed that they have the right, subject to the directives issued by the Commissioner of Correctional Services under subsection (4), to make representations when placement of the prisoner on parole, on day parole or under correctional supervision is considered or to attend any relevant meeting of the parole board.

[58] A copy of the judgment and sentence be forwarded to the Department of Correctional Services and be reviewed when considering parole and/or psychological treatment for the accused.

[59] The particulars of the accused as completed on Form 5 (J736) together with a set of fingerprints be forwarded to the Registrar of the National Register

²⁴ 51 of 1977

for Sex Offenders, to be registered in terms of Section 50(2)(a) of the Criminal Law Amendment Act²⁵



C. L. MOOSA

JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION, MBOMBELA

TUESDAY, 21 JUNE 2022

Counsel for State:

Adv TSJ Bekwa

Instructed by:

Director of Public Prosecutions

Mbombela

Mpumalanga

Counsel for Accused

Adv K W Manzini

Instructed by:

Legal Aid South Africa

Mbombela

Mpumalanga

Date of hearing:

01 April 2022

Date of judgment:

21 June 2022

²⁵ 32 of 2007