

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

CASE NO: CC49/2019

24/1/2020

In the matter between

THE STATE

and.

MXOLISI MDLETSHE

Accused

JUDGMENT ON SENTENCE

VAN VEENENDAAL AJ

- [1.] The Accused has been convicted on one count of murder, one count of kidnapping and one count of rape, with the possible consequences of section 51(1) of the Criminal Procedure Amendment Act 1997 being applicable. His victim, T[....] F[...] Z[...], was 14 years old.
- [2.] The court now has the task to sentence the accused, taking into account the minimum sentences applicable: the community's sense of outrage and the personal circumstances of the Accused. This is not an easy task .

The nature of the offence :

- [3.] The court has to take into account the offences and the effect on the family of the deceased. The Deceased had been kidnapped, held in a house close to her own home, raped and murdered.
- [4.] The murder and rape are heinous deeds, mercilessly committed not far from the Deceased's home. The Deceased was brutally raped and cut so many times in the neck, that the doctor who performed the post mortem could not determine the number of cuts. The scene photographs reflect the particular violence with which the Deceased was murdered.
- [5.] Rape is a violent offence and is an expression of the violent nature of the perpetrator. Rape is one of the most serious offences against women. Rape is a humiliating, degrading, brutal invasion of the right to dignity of the person, which right is guaranteed in the Constitution. The right to freedom is also guaranteed in the Constitution. Women should have the right to walk the streets in safety, without having to look over their shoulders or expect an attack at any moment, especially when they are at home and should be able to relax in the safety of their homes. The Accused has infringed on these basic rights of his victim. I can only refer to the following dictum from **S v AM** 2014 1 SACR 48 (FB) at par 16: *"[16] In this case the e1ppellant conducted himself with total disregard for this young girl's right not to be abused and to individual physical integrity"*.
- [6.] It is the duty of the courts to condemn this conduct as unacceptable in any civilized society, particularly in South Africa, where the society ought to be committed to the protection of the rights of all persons, including women and children.

The victim and the effect on her family:

- [7.] No parent should be made to bury a child, especially not when the child's death was brought on by an unprovoked attack on her. The Deceased was a 14 year old girl. Her life was snuffed out before it had time to blossom.

- [8.] She is described by her brother as a girl who was innocent, she loved dancing, she was creative, she loved writing stories, she was talkative, she was full of ideas, she wanted to be a designer one day.
- [9.] The Deceased had a close relationship with her mother. Her mother described her as happy, carefree, not a stubborn teenager, she was well-adjusted, she did well at school.
- [10.] Another brother is 28 years old, he is the father of two children. The manner in which the Deceased died, has an influence on how he will be raising his own children.
- [11.] The Deceased was the adopted child of her mother, but had an open relationship with her adoptive mother. She also had an adopted sister - to this sister, she was everything, not just a sister or just a friend. They did everything together.
- [12.] The picture painted by the prosecutrix, is that the Deceased's family was close-knit and happy, with an open-door policy to friends, including the accused.
- [13.] The community broke down the Accused's house after the police investigation was done. This illustrates the disgust and anger at the Accused because of this offence.

The criminal:

- [14.] The Accused's personal circumstances were put before the court through address from the Bar and a presentencing report.
- [15.] The Accused lived alone in the house where the Deceased came to her sad and violent death. He had two tenants on the property. He is a first offender and he is 24 years old.
- [16.] The Accused was viewed like a son in the Deceased's household, he was friend to her brother. After the disappearance of the Deceased, the Accused held out to the community that he knew nothing of the whereabouts or condition of the deceased. He had discussions with the Deceased's family as though nothing was amiss.
- [17.] Interestingly, the Accused puts before court that he is a very sick man

However, he does not play open cards with the court regarding the nature of his illness. He suffers from shortness of breath. He had been hospitalised for seven months in 2015 because of this ailment. He qualified for, and receives, a disability grant because of this shortness of breath. What the shortness of breath is a symptom of, he does not share with the court. What the longterm prognosis is, he does not share with the court.

[18.] Medicinenet.com says that "Causes of shortness of breath include asthma, bronchitis, pneumonia, pneumothorax, anemia, lung cancer, inhalation injury, pulmonary embolism, anxiety, COPD, high altitude with lower oxygen levels, congestive heart failure, arrhythmia, allergic reaction, anaphylaxis, subglottic stenosis, interstitial lung disease, obesity, tuberculosis, epiglottitis, emphysema, pulmonary fibrosis, pulmonary artery hypertension, pleurisy, croup, polymyositis, Guillain-Barre syndrome, sarcoidosis, rib fracture, carbon monoxide poisoning, and aerobic exercise." Each of these may have different consequences on longevity and different ways of being treated, depending on whether the illness is related to the heart, the chestwall, lung tissue, obstructions to airflow or other causes. The State did submit documentation in which the Accused listed that he suffers from asthma.

[19.] The State submits that the Accused *is* tormenting the deceased's family even while at court. He told the court that he was involved with an elder daughter and how he waited for the deceased to grow up. This was rejected in judgment on conviction.

[20.] The Defence counsel submitted that the Accused had used crystal meth for the first time the night before the deceased disappeared. He also submitted that the Accused had used alcohol and that it should be mitigating circumstances.

[21.] The Accused dropped out of school after grade 11 due to his ill-health. He later attempted to attend a college but dropped out due to lack of funds. He became an assistant driver in Lenasia but left that job after 4 months

because the salary was too small. At the time of the commission of the offence the accused held a job in Booysens at a Tavern.

[22.] It is also submitted that he has an older and a younger sibling. He has been incarcerated for less than a year.

[23.] It is submitted to court that all these circumstances together should mitigate and constitute substantial and compelling reasons to deviate from the minimum sentence.

The interests of society

[24.] The interests of society are reflected in the minimum sentencing regime. The minimum sentencing legislation provide for the gradation of first offenders, **second** offenders and so on. Counsel for the State calls for the minimum sentence to be applied, counsel for the defence calls for mercy and submits that the cumulative effect of the mitigating circumstances should constitute substantial and compelling circumstances.

[25.] As a consequence of the Accused's conduct, the family members of the deceased are all grappling with self-blame, sleeplessness, children who no longer perform well at school, trauma, nightmares. The larger community demolished the house of the Accused.

[26.] The issue of remorse was also before court through argument. The State referred to the fact that the Accused displayed no regret or remorse. The Accused's presentencing report referred to the issue of regret and remorse, in the sense that it pointed out the absence thereof.

[27.] Accused can undergo programmes in prison. However, the success of following programmes and continuing studies in prison is dependent on the personal commitment of each Accused. The court has no oversight role in that regard.

Substantial and compelling circumstances:

[28.] The court has to apply the minimum sentences and should not depart from it for flimsy reasons. The case law is very clear on that. See S v Malgas

2001 (1) SACR 409 SCA Although there were Instances where there was deviation from this principle, the Supreme Court of Appeal has never deviated from its warning that there should be truly convincing reasons for deviating from the prescribed minimum sentence.

[29.] In *S v Malgas* (supra) the court, at paragraph 22 says the following regarding finding something that convinces the court to deviate from the prescribed minimum: "What that something more must be it is not possible to express in precise, accurate and all-embracing language. The greater the sense of unease a court feels about the imposition of a prescribed sentence, the greater its anxiety will be that it may be perpetrating an injustice. Once a court reaches the point where unease has hardened into a conviction that an injustice will be done, that can only be because it is satisfied that the circumstances of the particular case render the prescribed sentence unjust or, as some might prefer to put it, disproportionate to the crime, the criminal and the legitimate needs of society. If that is the result of a consideration of the circumstances the court is entitled to characterise them as substantial and compelling and such as to justify the imposition of a lesser sentence."

[30.] The court has tried to find substantial and compelling circumstances to individualize sentence for Accused, balancing it against the interests of the community and also trying to serve as deterrent example to others who consider embarking on a life of crime.

[31.] The Accused is not a good candidate for rehabilitation. He fabricated his version before conviction, and at sentencing stage persisted in fabricating a health situation without playing open cards with the court, again.

[32.] I consider that these circumstances together do not justify a finding of substantial and compelling reasons to deviate from the minimum sentences. There is no sense of unease as described in *Ma/gas* (supra).

[33.] The court wishes to instruct the Accused to follow the programmes offered in the prisons for his personal benefit, including the so-called victim-offender programmes in order to realize the impact of his conduct on the society.

[34.] The court requests the family of the deceased to find and attend the so-called victim-offender programmes run by the Department of Correctional Services, in order to make sense of the death of the deceased and to have the questions and anger they still have, answered. The Deceased's family need to obtain the assistance of trauma counsellors and psychologists for debriefing and counselling and wishes to request the State Prosecutor to assist as far as possible in this regard.

[35.] I also advise the family of the deceased to keep *in* contact with the Department of Correctional Services in order to be contacted and to give input when the Accused would be considered for release.

[36.] The sentences I impose for the Accused are as follows:

Count 1	Murder life imprisonment
Count 2	Kidnapping 5 years imprisonment
Count 3	Rape Life imprisonment

[37.] The Accused is declared unfit to possess a firearm.

[38.] Name to be entered on Register of Sexual Offenders.

C. VAN VEENENDAAL AJ
THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 28 OCTOBER 2019

DATE OF JUDGMENT: 24 JANUARY 2020

APPEARNCES:

FOR THE STATE: ADV C.P HARMZEN

FOR THE DEFENCE: MR M.B KGAGARA