

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, EASTERN CIRCUIT, ERMELO)**

CASE NUMBER: CC 94/14

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

06/08/2015

DATE

A handwritten signature in black ink, appearing to read "Lamprecht".

SIGNATURE

In the matter between:

THE STATE

versus

BHEKIBUTHO VINCENT NXUMALO

SENTENCE

LAMPRECHT, AJ (06 August 2015)

Introduction

[1] Mr Nxumalo, after having convicted you of the various crimes mentioned in my judgment on the merits, I now have to determine an appropriate punishment. In formulating a suitable sentence I must bear in mind the main objectives of punishment in South African criminal law,¹ namely retribution to those wronged, prevention of crime and the deterrence of criminals. In cases such as the current, where the crimes are very serious in nature, the penal objective of reformation or rehabilitation of the offender can be regarded as only a secondary objective of punishment. In formulating an appropriate sentence, I am required to have a dispassionate and proportional regard for the nature of the offence, the interests of society and your personal circumstances as an offender.² On the one hand, I am required to demonstrate the outrage of society at the commission of heinous crimes by imposing an appropriate and, if necessary, a severe sentence. On the other hand, a civil outlook on the concept of *Ubuntu* requires of me to try and show an understanding of and compassion for the weaknesses of human beings and the reasons why they commit serious crimes, by avoiding an overly harsh sentence if at all possible. In the end, the sentence imposed must be a balanced one, which is sensible and motivated by sound reasons and which will therefore meet with the approval of the majority of law-abiding citizens of the state.³ If I do not, the administration of justice will fall into disrepute and society will lose trust in the judicial system, with the possibility of engendering vigilante action and society taking the law into its own hands, although “righteous anger” should never “becloud [the] judgment [of the sentencing court]”.⁴ There is already an outcry for the re-introduction of the death penalty in some circumstances, and there have been recent incidents where society had taken the law into its own hands where suspected offenders were severely beaten up, sometimes even put to death in the most horrendous fashion, without even having appeared before a court of law and having had a

¹ *S v Rabie* 1975 (4) SA 855 (A) at 862A-B; *S v Mbonambi and Another* 1991 (1) SACR 123 (A) at 126i-j.

² *S v Zinn* 1969 (2) SA 537 (A); *S v Roux* 1975 (3) SA 190 (A) at 197; *S v Dlamini* 1992 (1) SA 18 (A).

³ *S v Khumalo* 1973 (3) SA 697 (A) at 698: “Punishment must fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.”

⁴ In *R v Karg* 1961 (1) SA 236 (AD) Streicher JA remarked: “It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice will fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment.”

fair trial. This is something that I cannot lose sight of and I must endeavour to restore the trust of society in the criminal justice system.

The crimes

[2] Murder, rape, robbery with aggravating circumstances and housebreaking with intention to rape and rob are some of the most serious crimes in South African criminal law, with only perhaps treason, genocide, the crime against humanity and war crimes have the propensity to be regarded as more serious in some circumstances. All of these crimes have in the pre-Constitutional era been regarded as capital crimes, which held the possibility of the death penalty being imposed in case of conviction. Fortunately, the death penalty is no longer a viable sentencing option, but that 'ultimate' penalty has now been replaced with life imprisonment as the heaviest sentencing option open to a competent court.

[3] The murder (count 1)⁵ and the two rape charges (counts 2 and 4)⁶ that you have been convicted of, in law carries a minimum sentence of life imprisonment that the court is obliged to impose, except if it is able to find that substantial and compelling reasons exist for the imposition of a lesser sentence.⁷ In the case of the robbery with aggravating circumstances (count 3) the minimum prescribed sentence is 15 years imprisonment, save where substantial and compelling circumstances justify a lesser sentence.⁸ However, following the

⁵ "Murder, when— ... (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit ... (i) Rape; or (ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act No 51 of 1977)" is a crime listed in Part I of Schedule 2 of the Criminal Law Amendment Act, 1997 (Act No 105 of 1997) as amended (the CLAA).

⁶ "Rape— ... (b) where the victim— (i) is a girl under the age of 16 years; ... (c) involving the infliction of grievous bodily harm" are crimes listed in Part I of Schedule 2 of the CLAA.

⁷ Section 51 (1) of the CLAA reads: "Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life." The relevant part of subsection (3)(a) reads: "If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsection, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: ..."

⁸ See section 51(2) read with Part II of Schedule 2 of the CLAA.

guidelines provided by the Supreme Court of Appeal in *S v Malgas*,⁹ all factors relevant to sentencing before the minimum sentencing legislation saw the light of day still need to be taken into account in determining and appropriate sentence, whilst bearing in mind that legislature has decreed a pertinent benchmark for punishment in those cases for good reason and that the specified sentences are not to be departed from lightly and for flimsy reasons. In other words, punishment must in each case be individualised to fit the specific crime in the particular circumstances of each case, and a generalised approach should be avoided.

[4] In considering the seriousness of the crimes that you have been convicted of, I must bear in mind that both the incidents you committed heinous crimes that induces shock in the mind of every right-minded person. To break into ones house, where one is supposed to feel safe and protected, with the intention to rape and rob; and, then to rape a small [...] year old girl; and, to brutally rape and rob an adult lady with such violence that she is actually brutally murdered cannot be regarded otherwise than in a serious light. The young child victim, who was only [...] years old at the time, has been emotionally disturbed by the incident to the extent that she has lost all trust in the male part of society – she even views her own father with suspicion and does not want to enter into normal relationships with boyfriends, even now, seven years after the incident in 2008 while she is already [...] years old. The murder, rape and robbery of the victim in counts 1 to 3, can only be described as a brutal and cruel torture of a lady. She was throttled until her hyoid bone fractured; causing a difficulty to breathe and her head was injured by brunt force trauma administered by you, which could even mean that you banged her head against the wall while throttling her, while she was no match for your strength. She was seriously injured and died an excruciatingly cruel death a few days later. All your victims were helpless against your thuggery. As the crimes were committed at dead of night with unsuspecting victims and neighbours who did not know you, while you masked yourself, made

⁹ 2001 (1) SACR 469 (SCA), especially at paras [20]-[25] of the judgment.

that the crimes were difficult to solve. For the 2008 incident, you were only arrested and charged a number of years after the incident. What apparently happened, according to the information provided by the prosecutor, is that, for some eight months after the 2013 incident, you remained untraceable. It was only since the father of the deceased kept on pestering the police to solve the matter that the police, through technical tracing methods, managed to trace the cellular phone of the deceased in your possession. Even then, for reasons that I do not comprehend, you were not immediately arrested. A sample of your DNA was collected, typed and circulated on the SAPS data base, after which you were linked to both incidents of rape, arrested and charged. In your case the wheels of justice surely turned slowly for society and the victims and, had it not been for advanced detective measures, these incidents might have gone unpunished for ever and become part of the statistics of unsolved crimes in this country, which society so protests against. For the first time during sentencing did you disclose that you are HIV positive. It is not known whether you were HIV positive before the young child who survives to this day was raped and, if so whether she contracted the HI virus or whether the dreaded ARV medication saved her from contracting this dreaded disease which is a killer of generations. I do not know what the reasons are for you to have committed such heinous deeds, and you have not disclosed any motive or reason that may have a mitigating effect on the seriousness of the crimes.

Interests of society

[5] Crimes such as these clearly engender outrage in society. Many people have left this country in fear of crimes such as these and it would appear as if serious violent crimes against women and children have increased tenfold or more during the past two decades of democracy. Nobody feels safe even in their own homes. Almost daily, one reads in the newspapers and sees on TV and hears over the radio of the most heinous crimes that have been committed against helpless members of society and everybody lives in fear. Tourists become scared to visit South Africa.

[6] The Constitution of the Republic of South Africa and many major international instruments to which South Africa is a signatory state regard the rights of women and children very highly. As regards to rape, the late Chief Justice of this country, Mahomed CJ, in *S v Chapman*¹⁰ remarked as follows:

“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.”

[7] In *S v Zitha and Others*,¹¹ it was similarly remarked that the courts should send out a message to everyone in society, including the townships, that crimes of violence and, especially sexual violence against women and children will not be tolerated by the courts and that they will not shy away from their duty to protect society even if it means that severe sentences like life imprisonment be imposed however painful it might be for the courts to do so.

[8] In fact, it would appear as if quite a large portion of the male community regards women and children as mere objects that can be sexually and violently abused at their whim and that they have no rights whatsoever. Again, you have supplied no motive or reason as to why you committed these crimes that may have the effect that I can be made to understand the reasons why you have committed them to determine whether you are entitled to any compassion and mercy.

Personal circumstances (interests) of the accused

¹⁰ 1997 (2) SACR (3) SCA at 5d.

¹¹ 1999 (2) SACR (W).

[9] I have carefully scrutinised your personal circumstances as were sketched by your Counsel in his address on mitigation. You were born on [.....], which makes you [...] years old. You are [...] positive which means that, without the right treatment and without following the strict prescripts of a medical doctor, you are prone to contract fully blown AIDS in which case you will not have a long life expectancy. Whether this is a mitigating feature, an aggravating feature or, at best, a neutral feature for purposes of determining a suitable punishment, I will leave undecided. Suffice it to say that the surviving victim will live in fear for a number of years to come for having contracted the HI virus. Your father passed away in 2009 and your mother is very sick. You have four kids and you are the last of four kids. These personal circumstances can, at best, be described as fairly average when compared to those of other criminals convicted of similarly heinous crimes.

[10] Your personal circumstances evidence an aggravating feature, to wit, that you have been sentenced for housebreaking with intent to steal and theft to a period of imprisonment for 5 years in 2001. You have not been long after you have served your sentence before, at two occasions a few years apart you again broke into the homes of unsuspecting and helpless victims. This time you did not only steal as you did with the property of Ms [...], but you also raped two people, robbed and severely injured and killed one of them. This leaves one with serious suspicions that you might have committed other similar crimes in the time that you remained undetected and at large, but that they have not yet been solved and might never be.

Sentence and final order

[11] Tried as I could, I could not find any substantial and compelling circumstances that would justify any preferent treatment in your case to receive a lesser sentence than that prescribed by the minimum sentencing law. To the contrary, even had it not been for that law, I would have considered at least one

term of life imprisonment as an appropriate sentence in your case. You have proven that you are a menace to society and that society has to be protected against you. The deterrent effect of punishment will also be underscored by such a sentence and it will send out the required message to society, the law-abiding part and the criminal part thereof, namely that rapists, robbers and murderers of this kind have no place in society and need to be removed for protection and deterrence. I take into account that the purpose of life imprisonment is to remove a criminal from society for the rest of his natural life; or, at least for as long as it requires to make the particular criminal harmless before he returns to society, and that the possibility of rehabilitation is next to impossible. By being a repeat offender for housebreaking with intent to steal and theft you have already indicated that you are not easily rehabilitated by punishment and, as indicated in my judgment on the merits and above, you have now escalated to the commission of even more heinous crimes. Taking all of this into account, I do not think that any other form of punishment is suitable than your removal for the rest of your natural life.

[12] You are hereby sentenced as follows:

Count 1 (murder): Imprisonment for life in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997;

Count 2 (rape): Imprisonment for life in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997;

Count 3 (robbery with aggravating circumstances): 15 years imprisonment imposed in terms of section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997;

Count 4 (rape): Imprisonment for life in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997;

Count 5 (housebreaking with intent to rape and rob): 8 years imprisonment;

Count 6 (housebreaking with intent to rape and rob): 8 years imprisonment;

Count 7 (theft): 2 years imprisonment.

Naturally all sentences will run concurrently as a sentence of longer than life imprisonment is not possible in law.



**A A LAMPRECHT
ACTING JUDGE GAUTENG
DIVISION OF THE HIGH COURT**

Representation for the state:

Counsel

Adv JJ Jacobs

Representation for the accused

Counsel

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Instructed by

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