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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PALM RIDGE)**

CASE NO: CC 59/2024

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED.

DATE: 2025/05/30

SIGNATURE:

In the matter between:

THE STATE

and

NKULULEKO MTSHALI

ACCUSED

SENTENCE

JOHNSON, AJ:

[1] This matter was delayed for various reasons during the allocated trial dates. Part of the delays were caused by the non-availability of both advocates during the allocated dates. It is well known that the justice system is under scrutiny and heavily criticized for the delays in the finalizing of cases. It is the responsibility of courts to see to it that any delays are restricted to the minimum.

[2] After conviction Adv Myamane for the accused requested a postponement to call a probation officer to testify. What was concerning, is that the request for the postponement was not based on the calling of a specific witness, but rather to go and look for a witness who could testify. I further gained the impression that she wanted to call a probation officer because of the age of the accused.

[3] Adv Myamane had not taken any steps yet to consult a probation officer. We all know that compiling reports and the investigations that accompany it, takes weeks and sometimes months to complete. This would cause a further delay in the completion of the matter.

[4] Legal representatives should be vigilant in taking on briefs where they foresee that they might want to call expert witnesses and plan and consult such witnesses long before the trial starts or during the proceedings. It is unacceptable to wait for the reasons of the judgement or sentence, and it is not an excuse to argue that it is unsure what the presiding officer might say.

[5] All parties were aware that this trial was set down for 2 weeks, and all preparations necessary should have been finalized as far as possible timeously. In this instance, a probation officer had not even been identified or consulted yet.

[6] A probation officer's primary purpose during the sentencing process, is to assist the court in determining an appropriate and effective sentence by providing comprehensive information and recommendations. This involves conducting a pre-sentence investigation, which includes gathering details about the accused, the offense, and his circumstances, to enable the judge to make an informed decision. I was not informed of any assistance I might get from a probation officer in this regard, and the request for a remand was unsubstantiated.

[7] A court has a discretion in deciding whether to grant or refuse a postponement, and to prevent any further unnecessary delays. To grant the postponement for the reasons requested by the defence, would in effect be to condone the dereliction of duty that occurred here.

[8] Adv Myamane had the right to address me in mitigation of sentence and had the right to place any mitigating factor before court without any reservation. Even if the application for a remand were to be denied, the accused would still get a fair trial, because if anything was said during argument that warranted a probation officer's evidence, I had the discretion to call for the assistance of a probation officer if it was needed. I subsequently denied the request for a postponement before I was addressed in mitigation of sentence.

[9] As far as sentencing is concerned, the provisions of the Criminal Law Amendment Act¹ is applicable in respect of both the charges of which you had been convicted. Section 51 (1) of the Act determines that a high court shall sentence a person who has been convicted of an offence referred to in part 1 of schedule 2 (like [i] murder when the death of the victim was caused by the accused in committing or attempting to commit rape, and [ii] rape where the victim was under the age of 16 years) to a minimum sentence of life imprisonment, unless you prove on a balance of probabilities that substantial and compelling circumstances exist.

[10] The Court in *S v Malgas*² discussed the question of substantial and compelling circumstances. The important part of the *Malgas*-judgment is the explanation, that the circumstances envisaged by the expression, need not be exceptional, but must provide 'truly convincing reasons' (Paras 8 and 25C) or 'weighty justification' <Paras 18 and 25B) for imposing less than life imprisonment, or they must induce the conclusion that the prescribed sentence would in the particular case be unjust or disproportionate to the crime, the offender and the legitimate needs of society.(Paras 22 and 25).

¹ Act 105 of 1997

² 2001 (3) SA 1222 (SCA)

[11] The general principle is that a Court is required to, in the exercise of its sentencing discretion, have regard to the seriousness of the crime committed, the interests of the community and the personal circumstances of the offender to reach an appropriate and just sentence. It is a well-established principle that the punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy. It is not lost out of sight that a sentence must always be individualised, considered, and passed dispassionately, objectively and upon a careful consideration of all relevant factors.

[12] In a search for substantial and compelling circumstances, the Court has regard to the offences of which you have been convicted, the motive for committing the crimes, the interests of society, your personal circumstances or any other matter of importance which have been brought to the court's attention. In your instance you did not truthfully disclose a motive and left us in the dark.

[13] A standardized and consistent response is required from our Courts, aware of the fact that life imprisonment is called for where there are no substantial and compelling circumstances.

[14] As far as your personal circumstances are concerned, you were born on 19 August 2004 and were 18 years of age when you committed the offences. You are single and have no children. You do not know your biological parents, who passed away when you were still young. You were raised by grandfather, the last defence witness. You left primary school because you were a slow learner. You were enrolled at a special school to learn skills like carpentry and making flowers, but you also dropped out. You started working in your grandfather's tavern. He did not pay you a salary, but only gave you pocket money. You did not use drugs until you met Phakiso. You are in good health. Your advocate requested the court to take the following facts into account as substantial and compelling circumstances: you have been in custody for 19 months, you are a first offender, you are still youthful, you are a candidate for rehabilitation, you did not know the deceased, and you were not the mastermind of the offences.

[15] Rape is on the increase, and there is unfortunately little more that we can do to safeguard our women, than what we are currently doing. It seems that our women have become fair game for ruthless criminals. In many cases like in this instance, ruthless rapists like you also kill their victims without any motive or reason. We will never know why you acted in this way, because you failed to take the court into your confidence. Rape is undeniably a despicable crime. In *N v T*³ rape was described as 'a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of [the] victim.' In *S v Chapman*⁴ the court said it is 'a humiliating, degrading and virtual invasion of the privacy, the dignity and the person of the victim.'

[16] The killing of victims, especially when they are as young and defenceless as the deceased, is also a serious and despicable crime. You had no regard for her life and killed her for an unknown reason. One can only but imagine the fear she experienced during her last moments of life.

[17] I stress that when an appropriate sentence is considered, the triad consisting of your personal circumstances, the interests of society and the offences of which you have been convicted, must be considered in a balanced way, and none must be over - or under emphasized in favour of the other. The sentence should further not be used as a kind of sledgehammer to destroy you. In meting out an appropriate sentence, the court must do it with a measure of mercy.

[18] I have taken cognisance of the fact that you have been in custody for approximately 19 months awaiting finalization of the trial. The Supreme Court of Appeal considered the role played by the period that a person spends in detention while awaiting finalisation of the case in *S v Livanje*⁵ It confirmed what it held in *S v Radebe*⁶ namely that: "the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the crime committed: whether the sentence in

³ 1994 (1) SA 862(C) at 864G

⁴ 1997 (2) SACR 3 (SCA).

⁵ 2020 (2) SACR 451 (SCA).

⁶ 2013 (2) SACR 165 (SCA) at para 14

all the circumstances, including the period spent in detention, prior to conviction and sentencing, is a just one."

[19] The period you spent in prison awaiting trial is longer than one would expect, but it is superseded by the ultimate sentence that I consider to be appropriate. It is however less than the norm, where accused persons sometimes wait for years to have their matters finalized.

[20] You committed heinous crimes against a young child who was in the prime of her life. She had no defence against your attack when you raped and killed her. One can only make but one finding as far as your actions are concerned - you are a danger to society.

[21] If one look at the photos of the body of the deceased, it is sad to see how broken the body of the 8-year-old deceased was after you were done with her. She had her whole life ahead of her, which was cut short by a ruthless criminal to satisfy his own sexual needs. In the absence of Phakiso, you very conveniently put the blame on him. Initially your defence was that he forced you to have sexual intercourse with her. You then got on top of her and only faked sex. Your evidence was so fraught with contradictions and improbabilities that it was rejected as false. You have only yourself to blame that you failed to play open cards with the court. Instead of taking responsibilities for your deeds, you cunningly tried to evade justice by putting all the blame on a person who had apparently died.

[22] You showed her no mercy, and you had no remorse for what you had done. Advocate Shivuri called P[...] N[...], who had already testified, to testify about impact of the death of the deceased on her family. Her death hurt the family, and her grandmother is bedridden after she saw what happened to the deceased. He is also emotionally affected by her death, and the community is supporting him.

[23] Advocate Shivuri argued that the deceased was eight years of age when she was raped and murdered. The offences are prevalent. The attack on her was brutal. There are no substantial and compelling circumstances which warrants the court to deviate from the minimum prescribed sentences.

[24] When assessing your personal circumstances, I considered what was said in *S v Vilakazi*⁷:

"In cases of serious crime, the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment, the questions whether the accused is married or single, whether he has two children or three, whether or not he is employed, are in themselves largely immaterial to what that period should be. And those seem to me to be the kind of flimsy grounds that *Malgas* said should be avoided."

[25] In *S v Ro and Another*⁸ the majority of the Supreme Court of Appeal held as follows:

"To elevate the personal circumstances of the accused above that of society in general and the victims, in particular, would not serve the well-established aim of sentencing, including deterrence and retribution."

[26] In *DPP, North Gauteng v Thabethe*⁹ 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."

[27] I have considered all the factors that were argued regarding sentence. I am not convinced that a probation officer's report would have been of any assistance in assessing what an appropriate sentence would be. It is further found that there are

⁷ 2009 (1) SACR 552 (SCA) at paragraph 58

⁸ 2010 (2) SACR 248 (SCA),

⁹ 2011 (2) SACR 567 (SCA) 577g-i

no substantial and compelling circumstances which entitles the court to deviate from the prescribed minimum sentences. The prescribed sentences are not unjust or disproportionate to the serious offences of which you had been convicted. Despite your youthfulness, you are a danger to society. A sentence which would protect the community against you, is called for.

[28] The State also requested that you should be declared unfit to possess a firearm. Your advocate had no response to the request.

[29] I find that the following sentences are appropriate:

Count 1: Life imprisonment;

Count 2: Life imprisonment.

As a matter of course the two sentences will run concurrently.

[30] The court makes no finding in terms of section 103 (1) of the Firearms Control Act 60/2000. You are therefore regarded as unfit to possess a firearm

JOHNSON AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PALM RIDGE