

SOUTH AFRICA / JUDGMENT

S v Amerika (CC22/2016) [2016] ZAWCHC 204; 2017 (1) SACR 532 (WCC) (13 December 2016) [2016] ZAWCHC 204

COURT

Western Cape High Court, Cape Town

BEFORE

RCA Henney

CASE / FILE NUMBER

CC22/2016

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Policy

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE

NUMBER: CC22/2016

In

the matter between:

THE

STATE

versus

JEROME

AMERIKA ACCUSED

JUDGMENT

ON SENTENCE DELIVERED ON 13 DECEMBER 2016

Henney, J:

Introduction

[1] The court in considering an appropriate sentence must have regard, and take into consideration the aims of punishment, which are deterrence, retribution, rehabilitation and prevention. During the sentencing process the court should never lose sight of the element of mercy. In *S v Rabie*[1] 1975 (4) SA 855 A.D. at 862 D-F Holmes JA said the following in this regard:

“[...] with particular reference to the concept of mercy-

- (i) It is a balanced and humane state of thought.
 - (ii) It tempers one’s approach to the factors to be considered in arriving at an appropriate sentence.
 - (iii) It has nothing in common with maudlin sympathy for the accused.
 - (iv) It recognises that fair punishment may sometimes have to be robust.
 - (v) It eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger.
 - (vi) The measure of the scope of mercy depends upon the circumstances of each case.”
- [2] The court further has to strive to balance, which means it has to consider all the facts, factors and circumstances evenly for the attainment of the aims of punishment as set out above. These facts, factors and circumstances should furthermore include the personal circumstances of the accused; the offence, taking into account all the things which had been committed (which includes the circumstances under which it had been committed); as well as the interest of society. In considering the aforementioned factors, the court, should at all times strive to impose a proportionate sentence without over or under emphasising any of these circumstances at the expense of the other.

The personal circumstances of the Accused

[3] The accused is 23 years of age. He was born and grew up in Riebeeck West, with his mother. At a later stage, he moved to Paarl and came to live with his father. He is the youngest of 4 children and has no contact with his mother. During his evidence in court, he testified that he did not go to school, but when his cousin Charlotte Adams came to testify on his behalf, she said that he attended the same primary school as her. According to her when he came to Paarl, he was in grade 7, or standard 5 and she was in grade 9, or standard 7. Further,

according to her, if he says that he did not go to school he is not telling the truth.

- [4] During the sentencing proceedings, the court took this up with his legal representative Advocate Theunissen who conveyed to this court that he took instructions from the accused regarding this issue. He informed the court that the accused told him that although he was enrolled at school, he did not attend school.
- [5] The accused is the father of a child that was born out of a relationship with H. Claassen, the complainant on count 1, 2 and 3, who is also the stepsister of the deceased. It seems that this child is well cared for by H. and the other members of her family.

According to the evidence which is uncontested, the accused also did not pay any maintenance or supported this child. He has two previous convictions, one for possession of dagga and one for housebreaking with the intent to steal and theft. These offences were committed respectively on 31 December 2012 and 18 June 2013. In both instances he was sentenced to a non-custodial sentence as reflected on his SAP 69's.

The offences in respect of H. C.

- [6] In my view, a distinction should be drawn between the offences committed against H., and those which were committed by the accused

against the deceased, S., especially with regards to the circumstances under which these respective offences were committed. These offences, in respect of both incidents and in respect of both persons, are very serious. All of the offences, except that of kidnapping, attract a prescribed sentence in terms of the Criminal Law Amendment Act 105 of 1997. I will deal with the offences committed against the deceased, S., at a later stage.

- [7] It is common cause that in or during 2012 the accused and H. became involved in a romantic relationship out of which a child was born. According to H.'s evidence, after the birth of the child, the accused started to physically abuse her on a regular basis. This consisted of slapping, kicking her, and physically assaulting her by other means, as described in her evidence. As a result of this, during 2013, she went to the Magistrate's court to obtain a protection order to prevent the accused from further abusing her.
- [8] At that stage, she only went so far as to obtain an interim protection order and did not seek to have the order made final. She said that she did this because the accused promised not to engage in any act of assault or abuse against her. Notwithstanding these promises, according to her evidence, such incidents recurred again. There were times when she ended the relationship, but each time thereafter he would come back and promise that he would not abuse her again. She testified in court that she was afraid of him, at the times this happened.
- [9] At the time when the accused kidnapped and raped H. during April 2015, he first came to her house, on the evening of 6 April 2015, and threatened her with an axe that he had in his possession. He wanted to resume the relationship that he previously had with her. Thereafter he left and the following day, 7 April 2015, while she was on her way to work, he

once again approached her and told her that she must shut up or otherwise, he is going to assault her with the axe. Then he assaulted her with a stick, before forcing her to walk with him, where after he proceeded to rape her, twice.

- [10] The following day, 8 April 2015, she went to the Magistrate's court to obtain a protection order that was granted to her. Thereafter she did not have any contact with him until they resumed their relationship in November 2015. Shortly after that, the accused moved in at [...] I. Street, Groenheuwel, Paarl East. In her evidence in court, she said that after he asked her to take him back and made promises to her, she once again had forgiven him for what he had done to her.
- [11] The rape, assault and kidnapping of H. were a gross violation of her freedom of movement, physical integrity, dignity and privacy. The accused showed no regard for her rights. He thought, even in court, with the attitude he displayed when testifying, that he could do with her as he pleases. This was evident when he was asked what he thought after he had assaulted and forced her to accompany him and there after he had sexual intercourse with her.
- [12] He thought there was nothing wrong in demanding that she have sexual intercourse with him. This was the type of attitude the accused displayed towards H.. This treatment of her was inhumane and callous. I agree with the prosecutor that the accused is a serial abuser and that little regard should be given to the feeble apologies he had made to H. every time he had abused her. By displaying this attitude, he clearly regarded H. as his property. When H. testified what became evident was the fact that she was humiliated by this incident and felt a sense of betrayal, through the actions of the accused.
- [13] This is clearly a case that is akin to what is known as spousal abuse, even though the accused and H. were in an extramarital

relationship. Many studies and research has been conducted on this kind of abuse, such as has been evident in this case, between spouses as well as people involved in dating relationships. In a paper entitled Spousal Abuse dated May 2011[2] the following has been said: "Spousal abuse often occurs in relationships that are romantic in nature and where when one partner seeks to dominate and exert power over the other. In doing so, the relationship often deteriorates and may become violent. Emotional, verbal, psychological, financial, physical and sexual abuse is common in such relationships. Spousal abuse can occur in husband-wife relationships, dating relationships, with common-law spouses and also in same-sex relationships." [3]

And further: "Many men have come to believe that violence against a women, child or another man is an acceptable way to control another person.

Historically, women were considered the property of men. It was only decades ago that a husband was legally able to beat his wife with a stick as long as it was not thicker than his thumb. It has only been 20 years that it has been a crime for a man to rape his wife" [4]

As to why men behave in this manner, in the same study, it has been concluded that: “Many theories have been developed to explain why some men use violence against their partners. These theories include: family dysfunction,

inadequate communication skills, stress, chemical dependency, lack of spirituality and economic hardship. These issues may be associated

with battering of woman, but they are not the causes. The batterer begins and continues his behaviour because violence is an effective

method for gaining and keeping control over another person and he usually does not suffer adverse consequences as a result of his

behaviour. In other words, it gets him what he wants. It ensures his partner will not leave him.” [5]

[14] In this study, they also reflect on some of the reasons why women are unable to leave violent relationships. These include fear, shame, lack of resources, lack of finances/economic reality, lack of housing, children, feelings of guilt, promises of reforms, sex-role conditioning, societal acceptance/reinforcement of violence to women/wives, and love for the spouse.[6] In this particular case, H. indicated these were some of the reasons as to why she went back to the accused, more particularly, where he promised that he would change and she also said that one of the reasons why she went back to the accused was that she loved him, at one stage.

[15] I also agree with the notion as pointed out in the study that it is a myth that women stay in violent relationships because they are masochistic and that such a theory is insulting to victims of abuse because no one wants to be beaten by someone who is supposed to love and support them.[7] In in this particular case, the accused exhibits some, if not most, of the characteristics of a batterer or abuser, while H. on the other hand, exhibits some characteristics of a person that is a victim of abuse.

[16] The consequences and effects of spousal abuse or partner abuse, albeit in another context, had been given judicial recognition in this country in *Ferreira and others v S*[8] as a consideration to determine whether there are substantial and compelling circumstances to deviate from a prescribed sentence, in the case where a victim who had been found guilty of murder had been subject to spousal abuse over a prolonged period of time, and who murdered her partner.

[17] In *Ferreira*, the Supreme Court of Appeal in recognising the plight of abused women said the following at para 40: “It is something which has to be judicially evaluated not from a male perspective or an objective perspective but by the court’s

placing itself as far as it can in the position of the woman concerned, with a fully detailed account of the abusive relationship

and the assistance of expert evidence [...]”. And further goes on to say that “Sexual violence and the threat of sexual violence goes to the core of women’s subordination in society.”[9] It also, therefore, means having regard to an abused woman’s [...] constitutional rights to dignity, freedom from violence

and bodily integrity that the abuser has infringed.”[10]

In this particular case, and in contrast to the Ferreira case, the perpetrator is the abuser and not the victim of abuse.

[18] This is not an ordinary rape case, where the rapist would usually not be as intimately involved with his victim; where the victim did lay a charge with the police; where the victim had not forgiven the rapist; where the rape victim immediately wanted the rapist to be prosecuted and pay for his deeds. Instead, this is a case where the victim did not desire that a prosecution be instituted against the perpetrator. It is a case that seldom or ever lands before the court and the very first of the numerous rape matters, I as a judicial officer, had dealt with, due to the relationship between the perpetrator and victim. The complainant in this matter rather sought to deal with this matter in a different manner by acquiring a protection order against the accused.

[19] This is a situation in which many woman in this country find themselves in, and that is why spousal rape or rape between partners

are seldom, if ever, reported to the police. In this particular case the crime of rape was committed by the accused, and the mere fact that it had not been reported by the complainant to the police does not normalise or decriminalise the conduct of the accused or other perpetrators like him. It also does not decriminalise or normalise the act of rape, where he or other perpetrators like him in similar situations where women in an abusive relationship did not report the incident after it had been perpetrated on them. Where they had forgiven the perpetrator and continued to live with him as if nothing had happened.

[20] This is indeed a rare case which would not ordinarily have found its way into a criminal court in which the rapist would be prosecuted. In *Holtzhauzen v Roodt*, [11] Satchwell J says the following in the context of an “ordinary rape” and the unique characteristics and nuances underlying the crime of rape:

“Rape has frequently been described as a crime which seldom sees the light of day, let alone comes before the scrutiny of our courts. Rape victims or rape survivors have usually endured their experience in silence, and the particular and somewhat unique character and features of rape have long gone unstudied. They have certainly gone unappreciated by our courts.

In the United States of America new legislation pertaining to the admissibility of evidence of previous rape allegations has

recently been passed by the US congress. In an interesting article entitled 'Once a Rapist, Motivational Evidence and Relevancy in Rape Law' in the 1997 (110) No 3 Harvard Law Review, Professor Baker of Chicago Kent College of Law commented as follows. What she says is not new, is obvious and yet it deserves repeating:

'All rapes are not alike. They are not alike in the eyes of the men who commit them, and they are not alike in the eyes of the jurors and the public who judge them. The degree to which different kinds of rape adversely affect victims is still an open enquiry, but it is all too obvious that the perpetrators of rape and the public at large view rape along a complex spectrum of permissibility. All rapes are in part about sex and masculinity and domination. But some rapes are predominantly about sex. Some rapes are predominantly about masculinity, and some rapes are predominantly about domination.'

This article argues that we cannot adequately address either the evidentiary problems in rape cases or the issues central to rape reform unless we begin to recognise and incorporate the rather obvious insight that not all rapes are the same.

Indeed it is probably trite to say that the capacity for human experience is so infinite and unpredictable that no crime is quite the same as another. Each case must be assessed and an attempt must be made to understand it on its own particular and unique

facts.

However, rape is an experience of the utmost intimacy. The victims or survivors thereof are largely confined to the female sex. I have heard the response of such survivors generically described as 'a scream from silence'. The result has been a paucity of South African legal and judicial understanding and commentary on the full parameters and implications of this phenomenon. Rape is an experience so devastating in its consequences that it is rightly perceived as striking at the very fundament of human, particularly female, privacy, dignity and personhood. Yet, I acknowledge that the ability of a judicial officer such as myself to fully comprehend the kaleidoscope of emotion and experience, of both rapist and rape survivor, is extremely limited."

I agree with the above sentiments expressed by the learned judge. In my view the remarks are very pertinent and applicable to this case.

[21] Given the unique and somewhat unusual circumstances of this case an argument may therefore be made out that, due to the situation in which the victim found herself, in firstly deciding not to lay a criminal complaint against the perpetrator, secondly by having

forgiven the perpetrator, and by subsequently having resumed the relationship with the perpetrator, that such conduct may serve as a mitigating factor or a consideration to conclude whether there are substantial and compelling circumstances to deviate from the prescribed sentence. Would it be in the interests of justice for a court do so, where the victim acted in such a manner due to the abuse that she had been subjected to?

[22] In my view, I do not think it can be regarded as a mitigating factor or as a consideration to conclude whether there are substantive and compelling circumstances to deviate from the prescribed sentence. This would clearly send out the wrong message and would be contrary to the values of the Constitution. It would furthermore undermine the dignity and humanity of abused women in this country. It would send out the message that men who make themselves guilty of spousal abuse or partner abuse by raping their partners will escape the full might of the law. In my view, rape committed in the context of an abusive relationship, should be regarded as an aggravating factor in the consideration of an appropriate sentence.

The offences perpetrated against the deceased

[23] It is difficult to find words to describe the conduct of the accused, when he perpetrated the murder and rape of this young and innocent child. It is only a coward and someone with no conscience who can act in such an inhumane manner. It borders on predatory behaviour. The only inference that one can draw from the facts and circumstances of this case is that the accused waited like an opportunistic predator for the deceased, a young defenceless girl to be left on her own, so that he can pounce upon her, after which he committed these abhorrent, callous and horrendous deeds.

[24] I have referred to the medical evidence during my earlier judgment in respect of the serious and gruesome injuries the deceased has sustained especially to her private parts. The accused clearly smothered the deceased and there after strangled her so that she could not scream for help or assistance. He perpetrated the offences in the most conniving and underhand manner so that he could not be detected. He kept the lifeless body of this young child, under his control and hid it away in such a manner, that no other person after having searched the premises could find her body. It was only after the body started to decompose and there was a strong smell that it was found. This he did full well knowing that the family of the deceased were agonisingly trying to find her. This is nothing but inhumane and barbaric conduct on the part of the accused and shows the utter disregard he had for the sanctity of human life.

Interests of society

[25] It has almost become a daily occurrence in this country of ours that young children are brutally murdered, after they had been sexually abused in a violent manner, as happened in this case. It is something that has to come to a stop sooner rather than later. No self-respecting society can allow children to be killed and maimed in such a brutal manner. The accused has not only murdered, this young child, but the soul and being of her parents and relatives. The court could feel the emotion and felt deep empathy for the hurt and sorrow they have suffered, and that where they are still trying to come to terms with this awful tragedy which was caused at the hands of the accused. Whatever punishment this court should impose will not and cannot make up for the deep loss they have suffered and are still suffering.

- [26] Society demands that wanton criminal acts as displayed by the accused should not be left unpunished. It demands of the courts to send out a clear and strong message that such acts of criminality will not be countenanced and further demands that the strictest and severest punishment should be meted out to individuals such as the accused. It is also for these reasons that the law has prescribed certain sentences that the court should impose in cases like these.
- [27] In respect of the rape committed against H., which is “rape” in terms of section 3 of SORMA, [12] where the victim was raped more than once by the accused and which also included the infliction of grievous bodily harm a sentence of life imprisonment is prescribed. If the court finds that there are no substantial and compelling circumstances to deviate from such a sentence.
- [28] In respect of 2 counts of rape of the deceased, S., as contemplated in section 3 of SORMA, where the rape was committed where the victim is a person under the age of 16 years and also involving the infliction of grievous bodily harm, a sentence of life imprisonment is also prescribed in terms of Act 105 of 1997. This is also the case where the victim was raped more than once by the accused.
- [29] In respect of the murder charge, it seems according to the evidence that the murder of the victim was caused after the accused had committed the offence of rape as contemplated in section 3 of SORMA. In such a case, just as in the rape of the deceased, a sentence of life imprisonment should also be imposed.
- [30] In terms of section 51 (3) of the Criminal Law Amendment Act, the court must impose the prescribed sentence unless there is substantial and compelling circumstances to deviate from such prescribed

sentence. The approach a court should follow in determining whether there are substantial and compelling circumstances present, had been laid down in the oft quoted *S v Malgas*: [13]

“B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The Legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislative has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided."

[31] The accused has not taken the court into his confidence. He tried to mislead the court, and the court had difficulty in accepting what the true circumstances and facts of this case was which led to the rape and murder of the deceased. The accused has shown no remorse for his actions, in respect of all the offences he has committed. In *S v Matyityi*, Ponnann JA had the following to say on this aspect:[14]

"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions."

[32] None of these circumstances and facts are applicable because the accused has steadfastly refused to take responsibility for his actions especially in regard to the deceased. In both instances, the violence was perpetrated towards a woman and a girl child. And in considering an appropriate sentence, the court takes into consideration what Wallis JA said in *Director of Public Prosecutions, Western Cape v Prins and Others*:^[15]

“No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children, the right to be children; to grow up in innocence and, as they grow older, to awaken to the maturity and joy of full humanity. The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone. It is a sad reflection on our world, and societies such as our own, that women and children have been abused and that such abuse continues, so that their rights

require legal protection by way of international conventions and domestic laws, as South Africa has done in various provisions of our Constitution and in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act).”

[34] This court is not convinced that there are substantial and compelling circumstances to deviate from the prescribed sentence of life imprisonment in respect of all the offences for which such a sentence prescribed. Given the totality of the circumstances of this case which includes his personal circumstances as well as the circumstances relating to the offence and the interests of society, the only appropriate sentence, the court can impose is one of long-term imprisonment which would have the effect to permanently

remove the accused from society. In fact in cases like this, retribution and deterrence to comes to the fore, whilst rehabilitation, will play a relatively smaller role.

[35] I, therefore, impose the following sentence on the accused:

Count 1: kidnapping of H.: The accused is sentenced to Three (3) years’ imprisonment;

Count 2: the first Rape of H.: life imprisonment;

Count 3: the second Rape of H.: life imprisonment;

It is ordered that the sentences imposed on counts 1 to 3 run concurrently.

Count 4: the kidnapping of the deceased, S.: Three (3) years’ imprisonment;

Count 5: the first Rape of the deceased, S.: life imprisonment;

Count 6: the second Rape of the deceased, S.: life imprisonment;

Count 7: the Murder of the deceased, S.: life imprisonment.

It is ordered that the sentences imposed on counts 4 to 7 run concurrently.

In terms of section 103 of the Firearms Control Act 60 of 2000 the accused is declared unfit to possess a firearm.

In terms of the provisions of section 50 (2) (a) (i) of the SORMA, I make an order that the particulars of the accused be included in the register of sexual offenders.

JUDGE OF THE HIGH COURT

RCA HENNEY

[1] 1975 (4) SA 855 (A) at 862D-F.

[2] Issued by the Canadian Resource Centre for Victims of Crime: May 2011 at 2.

[3] Spousal Abuse n 2 at 2.

[4] Spousal Abuse n 3 at 2, which refers to the position in Canada. For the South African perspective, see G Hancox 'Marital Rape in South

Africa: Enough is Enough' (25 October 2012) BUWA! A Journal on African Women's Experiences 70-74 at 72, where it states: "It was not until 1993 that South Africa passed the Prevention of Family Violence Act, which, among other things, criminalised martial rape. The law stated that 'Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.'"

[4] Spousal Abuse n 3 at 2, which refers to the position in Canada. For the South African perspective, see G Hancox 'Marital Rape in South

Africa: Enough is Enough' (25 October 2012) BUWA! A Journal on African Women's Experiences 70-74 at 72, where it states:

"It was not until 1993 that South Africa passed the Prevention of Family Violence Act, which, among other things, criminalised martial rape. The law stated that 'Notwithstanding anything to the contrary contained in any law or in the common law, a husband may be convicted of the rape of his wife.'"

[5] Spousal Abuse n 3 at 3.

[6] Spousal Abuse n 3 at 6-8.

[7] Spousal Abuse n 3 at 9.

[8]

[2004] 4 All SA 373 (SCA) para 43.

[9] Ferreira n 8 para 40 quoting Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) [2001] ZACC 22; 2001

(4) SA 938 (CC) para 45.

[10] See Ferreira n 8 para 40 footnote 13.

[11] 1997 (4) SA 766 (W) at 778A-H.

[12] Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 (“SORMA”).

[13] 2011 (1) SACR 469 (SCA) para 25.

[14] 2011 (1) SACR 40 (SCA) para 13.

[15] 2012 (2) SACR 183 (SCA) para 1.

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Prepared on 10 October 2026 · Esheria