

SOUTH AFRICA / JUDGMENT

S v C.D (CC36/2018) [2019] ZAWCHC 79 (25 June 2019) [2019] ZAWCHC 79

COURT

Western Cape High Court, Cape Town

BEFORE

Salie-Hlophe

CASE / FILE NUMBER

CC36/2018

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OFFICE OF THE CHIEF JUSTICE

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: CC36/2018

In the matter between:

THE STATE

and

MR C D

Accused

JUDGMENT ON SENTENCE DELIVERED ON 25 JUNE 2019

SALIE-HLOPHE, J:

- [1] Mr. De Kock, on the 20th of March 2019, this Court found you guilty and convicted you as charged, namely, the kidnapping, rape, murder of your niece, 10 year old C M. You were also convicted of the offence of defeating the ends of justice in that you disposed of the victim's body by dumping it at a nearby field and that you cleaned up the blood from your dwelling where you had committed the aforementioned offences.

- [2] Now is the time for me to meet out an appropriate sentence to you for the crimes of which you had been convicted. The determination of a suitable sentence does not entail a mechanical process in which predetermined sentences are imposed for specific crimes. In each case the sentencing Court has to take into account all relevant factors, afford the appropriate weight thereto and strike a balance between the various interests to consider. In determining a sentence which is just and fair, I have regard to the triad of factors that have to be considered as set out in the case of *S v Zinn* 1969 (2) SA 537 (A). The Court must therefore take into account your personal circumstances as the accused and being the person convicted of the crimes, the nature of the crime including the gravity and extent thereof and the interests of the community.
- [3] In deciding on such a sentence the Court must tinge it with a measure of mercy and strive to meet the objectives of punishment being retribution, prevention, deterrence and rehabilitation.
- [4] In mitigation of sentence, your counsel called your aunt Ms. A and also addressed the Court *ex parte* apropos factors which I should take into account in order to impose a lesser sentence to you in respect of the crimes of which you had been convicted. Counsel for the State on the other hand led evidence in the form of two (2) witnesses, namely, the late C's class teacher at the time of her death, Ms. B C and Dr. Mandy Date-Chong, the state pathologist, whom performed the post-mortem examination on the body of the deceased. Furthermore submissions were addressed *ex parte* which in the view of the State are so aggravating the only appropriate punishment would be the prescribed sentences and that no justification exist for departing therefrom. A petition by the Manenberg Community Members were also handed in at the inception of sentencing proceedings, with no objection by the defence, marked as exhibit N.
- [5] The legislature otherwise known as the lawmakers have recognized that certain serious crimes must be met with a minimum sentence. In this regard the Criminal Law Amendment Act 105 of 1997, commonly referred to as the minimum sentence legislation is of application and is the 'Act' which will be referred to herein.
- [6] The prescribed minimum sentence in respect of the conviction of rape of a minor child is that of life imprisonment. Section 51(1) of the Act sets out that a sentence of life imprisonment is prescribed in respect of circumstances where the victim had been under the age of 16 years and apart from that, in circumstances where grievous bodily harm was inflicted in the course of the act of rape.
- [7] The murder which you had committed and convicted of also attracts a sentence of life imprisonment. The provisions of Section 51(1) read with schedule 2, Part 1 of the Act are applicable in these circumstances in that the victim was a person who was likely to give material evidence in criminal proceedings against you in respect of the act of rape. In addition thereto, imprisonment of life is also prescribed because the death of the victim was caused by you after having raped the victim.

- [8] In a nutshell, the convictions of rape and murder together with the circumstances in which you had committed it attracts the imprisonment of life any number of ways.
- [9] The law, as laid down in a number of leading cases on that aspect, (See: *S v Malgas* 2001 (2) SA 1222 (SCA)) is trite and settled that a prescribed minimum sentence cannot be deviated or departed from for flimsy reasons unless the sentencing Court is satisfied that there exists substantial and compelling circumstances which justifies the imposition of a sentence other than prescribed by the law. Differently put, this Court retains a discretion in the imposition of sentence, however, can only impose a sentence lesser than the life sentences which you face if it is persuaded that the circumstances are of such an extent that it would be woefully inappropriate to punish you accordingly.
- [10] I will now turn to the triad factors which need be considered herein, starting with your personal circumstances as had been set out by your counsel and certain factors relating to your childhood which had been attested to by your aunt, Ms. A.

PERSONAL CIRCUMSTANCES:

- [11] You are 34 years old, married and you have 3 children, aged 16, 11 and 8 years old. Your children are in the primary care of their mother. You completed Grade 9, had previously worked as a general worker in the construction industry, however, you were unemployed at the time of the commission of the offences.
- [12] Your parents passed away during your youth in an environment where you had no example to guide you. Mrs. A testified, where possible she offered you a form of stability during your childhood, however, she had lost contact with you over the past 13 years, having last been in your life up until the age of 19. Drug use by you since your early twenties had caused you and your family an unstable life. You have been incarcerated for just over 20 months, whilst awaiting the finalisation of this matter, having been arrested the day after the incident in October 2017.
- [13] Although you are no stranger to breaking the law, having previous convictions, your counsel correctly argued that you stand before this Court as a first offender for these type of offences, which he sought of this Court to take into account with the aforesaid other personal factors in mitigation of sentence. In conclusion of his submissions, he argued that the factors so highlighted by him on your behalf forms part of the cumulative weight which justifies departing from the imposition of the sentence of life imprisonment. I will deal with that aspect later in this judgment.
- [14] I turn now to the second factor to be considered, that being the crimes of which you had been convicted, the manner of execution

thereof as well as the nature, seriousness and impact thereof.

THE OFFENCES:

- [15] The victim of these offences was non other than your niece. You were her uncle and in a position of trust. You lived in the same home environment and in fact on the day when you raped and murdered her, she came to you looking for your children, her cousins, to walk to school together as had been their routine. They had left earlier that morning, you grabbed her around the neck in a deathhold position, pulled her into your home and pushed her to the ground. She fell onto the ground but without any care for your victim and careful not to be detected or disturbed, you closed the door of your home and proceeded with your attack unhindered by any conscience.
- [16] Dr. Date-Chong testified as to the contents of her crime scene and post mortem reports that the deceased victim was discovered at 08h30 on Friday, 20 October 2017, alongside a dam at or nearby Primrose Park off Vygieskraal Road. The body had flies present on it and was covered in a bloodstained curtain with the corner of the fabric tied around the neck which had been used to strangle her. The victim's vagina was forcefully sexually penetrated, injured and lacerated causing her to bleed profusely from the wound. The injuries were extensive , including a severe skull fracture, a large vaginal laceration, the lungs contained aspirated blood and gastric content indicative that the victim had vomited and coughed up blood during the attack which in turn was inhaled after sustaining the injuries. It goes without saying that all the while, C was alive. The cause of death was determined to be as a result of multiple blunt force injuries to the head, neck and genitalia. In the opinion of the pathologist the skull fracture was caused by severe blows inflicted to the head of the victim, consistent with a brick or concrete block hit repeatedly over her head and to the face a number of times. She concluded that this rape and murder was an extremely traumatic event and that the child clearly suffered physically and psychologically in the last moments of her life. The doctor further testified that she had performed in excess of 4000 autopsies, however, the extent of the victim's vaginal laceration was the worst form of injury sustained to this area compared to any other autopsy which she had performed in similar cases. Death was not instant as her findings are that some
- time would have passed between infliction of the injuries until the moment of death.
- [17] The evidence is clear that you did not spare your victim nor her loved ones any pain and suffering. After raping and murdering C, you went about your business in a matter of fact way devoid of emotion or conscience, to escape any wrongdoing and prosecution for the rape and murder of your niece. With methodical planning you placed the black wheelie bin right in front of the door of your home and you placed the child's body in the bin, carefully assessed the bustle of the morning passers-by to carry on with execution of your plan at an appropriate time. When the traffic had subsided some 2 or 3 hours later, enhancing your chances of being undetected, you pushed this bin to a secluded bush area about 10 minutes' walk away, an area known to you as a popular spot for discovering of dead bodies. You dumped your young victim's body, returned the wheelie bin to your home, proceeded to clean the victim's blood from both the bin and the house as well as the concrete brick you used to bash her skull in.

- [18] The day had turned into night, leaving your family to worry about had happened to their loved one. When the inevitable search and panic erupted for the family and together with members of the community and the police a frantic search for C pursued, you too pretended like a concerned uncle to search for her, knowing full well what you had done to her, that you violated her, murdered her and where you had dumped her remains. In the end, you were linked to the offences by way of evidence, which included your DNA in the form your semen on the victim's school pants worn at the time of her discovery. Her blood was found inside your home and the curtain wrapped around the deceased belonged in your home, the place where you had murdered her.
- [19] When this Court follows the unfolding of events as well as the exhibits of record, which include the crime scene photos, post mortem photos, reports setting out the impact on the family of the victim as well as the pre-sentence report, the idiom 'Like a wolf in sheep's clothing', springs to mind. You sat by Mr. D, pretending to be a trusted family member. However, you were anything but that. You are a sexual predator that violated a child of your family and inflicted horrifying violence on her until you not only sexually violated her but also murdered her in the most brutal way. She was vulnerable and defenceless and stood no chance against you. You are the evil that lurks amongst our communities. You are the monster that parents warn their children of.
- [20] The record before this Court through testimony as well as the report setting out the sentiments of various family members indicate that C was a beautiful child. She was a respectful and sweet child, she loved dancing, she was loved and adored by her peers and family. Throughout the record before me, I note that C dreamt of being a teacher. This was her life's ambition. She animated being a teacher to other children, mimicking the environment of a classroom in the company of her friends and cousins, pretending to be teaching them. She would teach dancing routines to neighbourhood children at the school aftercare.
- [21] Her friends, her family (which includes your family and children), her teachers as well as the community are shocked and saddened by your despicable and wicked actions to a child, let alone a child belonging to your own family. C's death has had a reeling effect on everyone. Your family not only struggle to accept her death but they are also devastated in the wake of discovering that you had killed her and the manner in which you had executed it. C's dream of being a teacher had been taken away from her in the most brutally shocking way. However, through her death, she continues to teach her fellow classmates, her cousins, her friends and children of her community an important aspect, namely, that violence against children will not be tolerated: that the life of a child is precious, that their lives and their safety are of utmost importance and in no way will the violation of a child become the order of the day.

INTERESTS OF THE COMMUNITY:

- [22] The community has been unnerved and outraged by this brutal crime. It is another heinous reminder that our children are under attack and detonation. The petition placed before this Court by the community of Manenberg where this horrific rape and murder of their child had happened laments the extent of their concerns and fears. It is undeniable that we are experiencing high levels of violent crime and in particular with reference to this case, violent crime against children. As we build a cohesive society within our communities and in our country, we need to send a clear and an even louder message to our youth that violence has no place in our society and that it is strongly condemned. It can never be seen to be the order of the day and in that way, by way of social fatigue, become an acceptable form of life. Our Courts need to continue to send a very strong message that this conduct is morally and legally reprehensible and that offenders will be punished accordingly, for if not, it could and would also result in society losing faith in the justice system and taking the law into their own hands to administer justice. It is thus important and the duty of the Courts to contribute in their role as the justice system to impose appropriate sentences, particularly where children are the victims of violent crimes, sexually violated and murdered.
- [23] Section 28 of the Bill of Rights in our Constitution states that in addition to basic nutrition, shelter and care, every child has: 'the right to be protected from maltreatment, neglect, abuse or degradation.' The inclusion in the Constitution of a special section on the rights of the child was an important development for South African children to secure their safety and protection. Unfortunately children continue to be exploited physically and sexually, notwithstanding the inclusion of their fundamental rights to safety and protection. The Court must take these rights into account when meting out punishment for offences, such as the ones of which you, Mr. D, had been convicted.
- [24] Children have the right to feel safe and protected wherever they go, to play happily in their playgrounds, to walk to and from school freely without fear of violation or attack. Children have the right to be nurtured within their homes and community; to expect a haven in which they can put all of their enquiring minds to the fascinating world around them; to explore the innocence of their youth and to draw strength from the memories of their childhood to become fulfilled and balanced adults. In short, they have the right to look to the world around them to create an environment free and protected from crime and violence. The late Chief Justice Mahomed echoed similar sentiments regarding the rights of women and the acts of violence and crime that they are subjected to in the well-known and oft quoted dictum of *S v Chapman* [1997] ZASCA 45; 1997 (3) SA 341 SCA at 345 A-8 .
- [25] As the accused, you cannot be sacrificed at the altar of deterrence for other would-be offenders, nor can it impose punishment on you anger. However the interests of the community must be satisfied that offenders of serious crimes such as these be punished accordingly. If offenders are punished too lightly for serious offences, society would lose confidence in our Courts and so too would law and order be undermined. Serious crimes of this nature therefore compel that the objectives of retribution and deterrence weigh more than the objectives of rehabilitation of the offender and accordingly the interests of the

accused would recede to the

background.

CONCLUSION:

[26] Your counsel submitted that, inter alia, your youth, prospects of rehabilitation, the fact you are a first offender for this type of offence, that you had expressed remorse through pleading guilty and that you had spent time awaiting trial as cumulative justification for departing from the life sentences you face. However taking into account the excessive and brazen nature of the violence you had inflicted in the course of raping and murdering your young victim as well as other aggravating features of these offences, I can find no other suitable sentence other than to remove you from society for the duration of your life. I can find no justification to depart from the prescribed minimum sentences of life. No other sentence would be just and equitable other than to imprison you for life and accordingly I sentence you as follows in order of the charges in respect of which you had been convicted:

- (i) Count 1: Kidnapping of C M from the lawful custody of her mother, H M, I sentence you to five years direct imprisonment;
- (ii) Count 2: Raping of C M, I sentence you to life imprisonment;
- (iii) Count 3: Murder of C M, I sentence you to life imprisonment;
- (iv) Count 4: Defeating or obstructing the course of justice by disposing of the deceased body of C M, and cleaning of the crime scene, I sentence you to 5 years direct imprisonment.
- (v) In terms of Section 50(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the particulars of the accused, as a convicted sexual offender, must be included in the National Register for Sex Offenders;
- (vi) In terms of Section 120(4) of the Children's Act 38 of 2005 (the 'Children's Act') and Section 41 of the Criminal law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 you are declared to be unsuitable to work with children. In terms of Section 122(1) of the Children's Act, the Registrar of this Court is directed to notify the Director-General: Department of Social Development in writing of the findings of this Court in terms of Section 120(4) supra;
- (vii) Finally, in terms of the Firearms Control Act 60 of 2000, you are declared to be unfit to possess a firearm.

SALIE-HLOPHE, J

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