

SOUTH AFRICA / JUDGMENT

S v Chauke (Sentence) (CC46/2023)

[2024] ZAGPPHC 219 (11 March 2024)

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COURT

North Gauteng High Court, Pretoria

BEFORE

PD Phahlane

CASE / FILE NUMBER

CC46/2023

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: CC46/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE 11-03-2023

SIGNATURE: PD. PHAHLANE

In the matter between:

THE STATE

And

LEONARD LEMMY CHAUKE ACCUSED

JUDGMENT ON SENTENCE

PHAHLANE, J

- [1] Sentencing is a judicial function sui generis. It is regarded as the most difficult stage of a criminal trial[1] which a presiding officer in any criminal matter has to deal with - and has been described as a painful difficult problem that involves careful and dispassionate consideration of all factors.
- [2] It is appropriate to refer to the guidelines on sentencing as was aptly articulated by the court in *S v Thonga*[2] that during the sentencing phase, the trial court is called upon to exercise its penal discretion judicially after careful and objectively balanced consideration of all relevant material, and the punishment must be reasonable and reflect the degree of moral blameworthiness of the offender, as well as the degree of reprehensibleness or seriousness of the offence. Further that punishment should ideally be in keeping with the particular offence and the specific offender.
- [3] Thus, there must be an appropriate nexus between the sentence and the severity of the crime, so that the punishment [itself] should clearly reflect a balanced process of careful and objective consideration of all the relevant facts, and the mitigating and aggravating factors surrounding the accused.
- [4] Having said that, it is trite law that sentencing the accused should be directed at addressing the judicial purposes of punishment which are deterrence; prevention; retribution and rehabilitation as stated by the Appellate Division in the case of *S v Rabie*[3]. In considering an appropriate sentence to be imposed on the accused, I must in the exercise of my sentencing discretion have due regard to the “triad” factors pertaining to sentence namely: – the nature and seriousness of the crimes committed by the accused including the gravity and extent thereof, the personal circumstances of the accused, and the interests of society[4].
- [5] The court in *S v Zinn* supra recognised that the seriousness of the offences and the circumstances under which they were committed, as well as the victims of crimes are also relevant factors in respect of the last triad, where the interest and protection of society’s needs should have a deterrent effect on the would-be criminals. It is therefore imperative that these factors should not be over or under emphasized. Nonetheless, the court has a duty, especially where the sentences are prescribed by legislation, to impose such sentences. Added to these basic triad is the fourth element distinct from the three: ‘the interests of the victim of the offence’. These factors fit perfectly into the foundational principle that the sentence or punishment to be imposed should fit the crime, as well as the criminal, and it must be fair to society.
- [6] It is common cause that the accused was convicted by this court of twenty-six (26) counts, having pleaded guilty in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (“the CPA”). These can briefly be summarized as follows:

- (a) 1 count of contravening the provisions of section 117(a) of the Correctional Services Act - (ie. Escaping from lawful custody)
- a) 3 counts of House breaking with the intent to rob – in respect of counts 2; 7; and 20 where the provisions of section 51(2)(c)(i) of Act 105 of 1997 (“The Act”) are applicable.
- (b) 4 counts of Robbery with aggravating circumstances, read with the provisions of section 51(2) of the Act - in respect of counts 3; 8; 11; and 21.
- b) 3 counts of Kidnapping – in respect of count numbers 4; 12; and 22 - where the provisions of section 51(2) of the Act are applicable.
- (c) 2 counts of Rape (ie. Gang rape) read with the provisions of section 51(1) of the Act - in respect of counts 5 and 23.
- (d) 1 count of Rape read with the provisions of section 51(2) of the Act - in respect of count 13.
- (e) 6 counts of Unlawful Possession of Firearm, read with the provisions of section 1, 103, 117, 120 and 121 and Schedule 4 of The Firearms Control Act 60 of 2000) - in respect of counts 6; 9; 14; 17; 24; and 25.
- (f) 4 counts of Unlawful Possession of ammunition - in respect of counts 10; 15; 18; and 26.
- (g) 1 count of Murder read with the provisions of section 51(1) of the Act - in respect of count 16.
- (h) 1 count of contravening the provisions of section 49(1)(a) of the Immigration Act 13 of 2002 as amended by Act 19 of 2002 (ie. Illegal immigrant)
- [7] Between the periods of 21 January 2022 and 9 June 2022, the accused and his accomplices from Zimbabwe went on a rampage, terrorising the community of Olievenhoutbosch and Wierda Park in the district of Pretoria, where they not only broke and entered into the homes of the victims to rob them of their properties at gun point, but they also kidnapped some of the victims by forcefully removing them from the safety of their own homes and took them to a secluded area where they took turns raping the victims in counts 5 and 23. With specific reference to the complainant in count 5, the complainant’s mother was tied up and the complainant was taken to a nearby park where she was raped by the accused and two of his accomplices, and one of the men raped her twice. The complainant in count 23 was also taken at gun point from her mother after they were robbed of their belongings and was taken to a bush where she was raped by the accused and his accomplice. The youngest of the two victims of rape was 17 years of age at the time.
- [8] In his section 112 statement admitted as exhibit A, the accused explains that in respect of count 1, he escaped from Kgosi Mampuru Correctional Centre through a hole which was dug on the wall by his inmate and thereafter covered it with a calendar to conceal it. In respect of counts 7 to 10, the accused and his friends attacked an elderly couple, Mr and Mrs W[...], both 81 and 82 years old respectively, and tied their hands with a cell phone charger cord, while also being in possession of a firearm, and proceeded to rob them of their property.

8.1 In counts 11 to 15, they found the occupants of the house situated in Olievenhoutbosch sitting around the fire and assaulted the complainants, robbed them of their property at gun point, and proceeded to the rooms of the tenants and robbed them. Thereafter

they forcefully took the complainant's daughter, the victim in count 13 – from her room where she had locked herself

- to the bush where the accused raped her at gunpoint.

8.2 With regards to count 16 of murder, the accused and two of his accomplices, Asina and Adron, were armed with a firearm and went to look for the deceased at a squatter camp in Olievenhoutbosch. They found the deceased in the company of other people, and they took him to a nearby footpath where they shot and killed him and left him there. According to the post-mortem report, the cause of the deceased's death was "Gunshot wound to the head".

[9] It is the State's contention that after the arrest of the accused on 9 June 2022, he pointed out - to the police - a fully loaded firearm that was used to kill the deceased. The firearm was discovered to have been one of the items robbed during the house robbery in count 7 on the 17th of April 2022 at the house of Mr and Mrs W[...].

[10] The offences which the accused has been convicted for are very serious in nature and are prevalent in our society at large. With particular reference to the count of murder, the Constitution[5] of our country provides in section 11 that "everyone has the right to life". This right is guaranteed as an unqualified right because human life cannot be intentionally terminated. The right to life is the most basic, the most fundamental, and the most supreme right which every human being is entitled to have and can never be compromised because every human being have the right not to have the quality of their life diminished.

[11] Dr Musa Aubrey Makhoba who conducted a post-mortem examination on the body of the deceased noted that "the full metal jacket projectiles are recovered in the head and back respectively (2 in total). In respect of the injuries, he noted an oval-shaped punched-out wound above the left eyebrow that was in keeping with an entrance gunshot wound. He further noted that there is no corresponding exit wound to the above-mentioned entrance gunshot wound.

11.1 There is an oval-shaped laceration directly left of the entrance gunshot wound. There is a full metal jacket projectile recovered subcutaneously between the rib cage and muscles of the posterior wall of the thoracic cage around the vicinity of the laceration. There is another punched-out bone defect of the skull bone immediately underneath the entrance gunshot wound where the projectile was recovered in the sub-scalp tissue on the skull.

[12] These injuries give a clear picture of the brutality with which the deceased's life was ended. Our communities are terrorized by violent criminal activities committed by people such as the accused who simply do not care and respect other people's basic human rights such as the right to life. Violent robberies, gang rape, and murder are the order of the day.

[13] As much as the accused have the right to the benefit of the least severe of the prescribed punishments[6], society and communities must be protected against violent crimes and against the greed for money resulting in people's lives not being respected. Law abiding citizens must be protected against this lawlessness and extreme disrespect for the law. Accordingly, the constitution cannot only be used as a tool or a shield by criminals in the event of any violation of their constitutional rights which in anyway, is extremely important in our constitutional democracy in general and our criminal justice system.

[14] It is important to remember that our constitution, including the Bill of Rights, also protect all the citizens of this country including the victims of crimes who also have, and are entitled to the protection of their constitutional rights such as the right to life and the right of the victims of rape in this case - to have their dignity respected and protected. As far as all the victims of robberies are concerned, the accused disregarded their rights to the enjoyment of their properties which they have worked hard for.

[15] It is therefore the duty of the courts to protect the society from the scourge of these violent crimes and to send a clear message that this behaviour of the accused is unacceptable. The court in *S v Msimanga and Another*, [7] held that: "violence in any form is no longer tolerated, and our courts, by imposing heavier sentences, must send out a message

both to prospective criminals that their conduct is not to be endured, and to the public that courts are seriously concerned with

the restoration and maintenance of safe living conditions and that the administration of justice must be protected".

[16] Because of these serious and violent crimes such as the ones the accused has been convicted for, Parliament saw it fit to step in and address the problem by enacting the Minimum Sentences Act with the intent to prescribe a variety of mandatory minimum sentences to be imposed by the courts in respect of a wide range of serious and violent crimes, and the relevant sections being section 51(1) and section 51(2) which have been explained by the court to the accused at the commencement of the trial.

16.1 These include the count of murder which carry a mandatory sentence of life imprisonment; four

(4) counts of robbery with aggravating circumstances which carry a prescribed sentence of 20 years imprisonment for each count because the accused is not a first offender; two (2) counts of rape which also carry the prescribed sentence of life imprisonment for each count, and a 10 years' imprisonment sentence on the third count of rape.

16.2 The actions taken by the legislature to fix prescribed terms of imprisonment for offences such as murder, robbery and rape, is clearly an indication that these offences are prevalent and problematic, and the society needs to be protected from people committing these types of offences.

- [17] To avoid these sentences, the accused must satisfy the court that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence than the prescribed minimum sentences. For a court to come to that conclusion, it must evaluate and consider the totality of the evidence before it, including weighing the mitigating factors with the aggravating factors, and decide whether substantial and compelling circumstances exist[8].
- [18] The SCA in *S v Malgas*[9] which has since been followed in a long line of cases, set out how the Minimum Sentences Act should be approached and in particular, how the enquiry into substantial and compelling circumstances is to be conducted by a court. The SCA in *S v Matyityi*[10] referring to *Malgas*, reaffirmed that: “The fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer 'business as usual'. A court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed unless substantial and compelling circumstances were found to be present”.
- [19] The principle was further endorsed by the unanimous decision of the Constitutional Court in *Tshabalala v S; Ntuli v S*[11] when the following was stated: “In 1997, Parliament took a bold step in response to the public outcry about serious offences like rape and passed the Criminal Law

Amendment Act which prescribes minimum sentences for certain specified serious offences. The Government's intention

was that such lengthy minimum sentences would serve as a deterrent as offenders, if convicted, would be removed from society for a long period of time. The statistics sadly reveal that the minimum sentences have not had this desired effect. Violent crimes like rape and abuse of women in our society have not abated. Courts across the country are dealing with instances of rape and abuse of women and children on a daily basis”.

- [20] Having said that, the court is enjoined with the powers in terms of section 51(3)(a) of the Act to deviate from imposing the prescribed minimum sentences where substantial and compelling circumstances exist justifying such a deviation. This means that the Legislature has left it to the courts to decide whether the circumstance of the case before it justifies the imposition of a lesser sentence than the prescribed minimum sentence. It is for this reason that courts have not attempted to define what is meant by substantial and compelling circumstances. This is in keeping with the principle that the imposition of sentence is pre-eminently in the domain of a sentencing court. Of course, every case should be determined according to its own merits.

[21] As indicated supra, the sentence proceedings are proceedings sui generis. Both the State and the accused may lead evidence to aggravate or mitigate the sentence[12]. The State presented the Victim Impact Statements (VIS) of the complainants in counts 1 to 21 admitted as exhibits B1 to B7 respectively. I will deal with these exhibits later in the judgment. The accused took to the witness stand and testified in mitigation of his sentence, and placed the following personal circumstances on record:

- a) Although his SAP 69 criminal record reflects the date of 28 August 1988, he informed the court that he was born on 20 August 1988 in Mnyemezi district in Zimbabwe.
 - b) He has two children, boys, aged 8 and 11 respectively. He testified that the mother of the children passed away in 2017 and his sister has since been taking care of them. He explained that his sister is unemployed, but she receives money from her deceased husband's estate.
 - c) Before his arrest, he was employed as a gardener, working for two employers and earning between R150 per day per employer which would make it a total of R6000.
 - d) He came to South Africa by crossing through the river, and proceeded to Musina where he got a lift to Gauteng.
 - e) He is not a first offender. His criminal record shows that he has two previous convictions, one housebreaking committed on 12 December 2018 and was sentenced to six months imprisonment. The other one is for robbery committed on 16 October 2017, and he was sentenced to 15 years imprisonment on 20 October
2020. The SAP 69 does not specify whether this offence of robbery was aggravated robbery or not, but the accused clarified that and informed the court that it was robbery with aggravating circumstances because he used a weapon when committing this offence and that is why he was convicted to 15 years imprisonment.
- f) He has been in custody since 9 June 2020 awaiting finalisation of his trial.

[22] He explained under cross-examination that he came to South Africa in 2010 and has been illegal since then. He testified that he obtained an asylum permit in 2011 which expired in 2015. He further testified that all the robberies were planned in that he would discuss with his friends when and how the robberies and attacks would be perpetrated. He confirmed that all the offences were committed around 9pm and said they always carried firearms because they knew that if they did not have weapons with them, the victims would resist. According to him, when he was committing all these offences with his friends, they used firearms to instil fear on their victims.

19.1 In respect of counts 7 to 10, the accused and his accomplices gained entry to the premises of Mr and Mrs A[...] W[...] by jumping over the palisade fence, and while in the yard, the accused took a spade that he found next to the wall of the house and broke the palisade with it so that it would be easy for them to escape when they finish robbing the complainants in those counts. He testified that they gained entry to the house through the aluminium window, and once inside,

they attacked the complainants. He confirmed that when they were attacking the complainants in this house, he realized that they were elderly, but they nevertheless assaulted them, tied them up, and thereafter ransacked the house and took the items mentioned in count 8 which included a revolver with serial number 1[...].

19.2 The accused testified that he smoked drugs (ie. Crystal and Kat) to give him courage before going on a rampage with his accomplices but on the day he went to the W[...]’s home, he did not take drugs. He explained that when he was in his sober senses, he would regret his actions the next day after committing the offences and that is why he decided to take drugs every time he committed the offences. He explained how the offences were committed and when questions became tougher when asked about his actions on the days he committed the offences, he on several occasions elected not to respond and came up with a defence and stated that he did not remember any of the offences he committed but was told of what happened by his friends.

19.3 When confronted about how he got to know of the full details of how the offences were committed, he once again changed his version and said he got the details of what happened from his counsel. With regards to the offence of rape, when asked why was it necessary for him and his gang to kidnap his youngest victim and gang rape her in the bush, he was unable to give an answer. It is worth mentioning that this young female was with her parents and other family members when the accused forcefully took her away at gunpoint.

19.4 He pleaded with the court to be lenient when passing sentence because he has children back home in Zimbabwe.

[23] Counsel on behalf of the accused submitted that he could not advance any substantial and compelling circumstances that would persuade the court to deviate from imposing the prescribed sentences but argued that by pleading guilty, the accused has prospects of being rehabilitated. He further submitted that the accused was taking responsibility for his actions by pleading guilty even though his actions do not warrant substantial and compelling circumstances.

[24] The State on the other hand submitted that the defence correctly conceded that there are no substantial and compelling circumstances because it can be gleaned from the evidence before court that in all the offences, the victims and their families have suffered emotionally and are scarred and damaged for life. It was submitted that none of the circumstances of the accused justify a deviation from the imposition of the prescribed sentences.

[25] It is on record that after exhibit A was read into the record, and before the State could accept the plea, the court questioned the accused as set out in section 112(1)(b)[13] in order to satisfy itself that the accused intended to plead guilty, and to ascertain whether the accused admits all the elements of the offence to which he has pleaded guilty to. The court also enquired from the accused whether the contents of exhibit A are a true reflection of the incidents as they occurred and whether the facts of each individual count were the true facts given independently out of his own personal knowledge and the accused confirmed same.

- [26] There was no defence raised either in exhibit A or by the accused, and the court was satisfied that all the elements of the offences in every count the accused is facing are complied with and are contained in exhibit A. This court will reiterate on what the SCA said in DPP: Gauteng v Hamisi[14] that: “the written plea is aimed at ensuring that the court is provided with an adequate factual basis to make a determination on whether the admissions made by an accused support the plea of guilty tendered”.
- [27] Having regard to the above, I am of the view that the accused knew exactly what he was doing when he committed all the offences which he was convicted for because he specifically said under oath that all the offences were well planned and that they armed themselves because they did not want any resistance from the victims of these despicable crimes. His evidence was clearly that he was taking drugs so that he could have some courage to go and commit these heinous and vicious crimes.
- [28] His last-minute excuse that he did not remember any of the crimes he committed is in my view, an afterthought aimed at avoiding taking responsibility for his actions. Had that been the case, he would have informed his counsel from the onset and gave him instructions in that regard. I am alive to the fact that the explanation and details he gave in exhibit A in respect of some of the counts, is not contained in the indictment, and that includes the names of his accomplices.

That leaves the only inference to be drawn that the accused was fully aware and conscious of his actions when all these crimes were committed. Consequently, I do not agree with the defence’ submission that the accused pleaded guilty because he is taking responsibility for his actions.

25.1 On the contrary, he refused to take the court into his confidence, because he also deliberately misled the court into believing that he co-operated with the police by taking them to the house where his accomplices resided, and when it was put to him that he was not being honest, he changed his version and stated that he did not get a chance to tell the police where his friends were because their phones did not go through when he tried to call them, and as such, he thought they had already gone back to Zimbabwe.

- [29] I will now address the offences which the accused has been found guilty of. In respect of count 1, he conceded that he was aware that entering the Republic of South Africa without relevant documentation was an offence and acknowledged that he was illegal in the country. Strangely enough, he claimed to have applied for an asylum permit in 2011 which according to him, expired in 2015 as indicated above. When he was confronted about blatantly being dishonest with the court and made aware that an asylum permit issued in terms of section 22 of the Immigration Act is only valid for six (6) months and has to be renewed every six months, and not every four years as he had suggested, he was shocked and speechless, and could not give an explanation of why he was misleading the court.

- [30] It is very disturbing, to say the least, that people such the accused who have been illegal in the country for over ten (10) years - would have the audacity to terrorize people in their own homes where they were supposed to feel safe and free. A home is like a safe haven for every homeowner; a sanctuary; and a place of safety. One would have expected the accused to have a sense of Ubuntu which is referred to as humanity or humanness towards others. Even though he was illegal in the country, he did not appreciate the fact that he was a guest and had the duty to respect the laws of this country and do right by the citizens who accommodated him. However, for his own selfish reasons, he broke into the complainant's homes and robbed them of their properties which they worked hard for.
- [31] If one considers the circumstances in which the offences of aggravated robberies were committed, the case of *S v Mhlakaza & another*[15] comes to mind. This court stated the following regarding the offence of robbery and the sentence to be imposed: "Robbery is the most feared and despicable crime. The sentence must express the indignation of society about the crime. The more heinous the crime in the view of the law-abiding public, the more severe the sentence needs to be". In *S v Dlamini*[16] the court described robbery as an aggravated form of theft, namely, theft committed with violence.
- [32] On the same token, without a reason, the accused and his accomplices shot and killed the deceased in count 8 and does not explain why he killed him. If one has regard to the photographs of the body of the deceased and the post-mortem report together, they clearly show that the deceased died a gruesome death. Two projectiles were found lodged in his skull. The deceased was killed by the accused who had no regard for human life and left him on a pathway. The violent attack by the accused in the course of viciously and brutally killing the deceased by shooting him, is an aggravating factor which the court cannot turn a blind eye to.
- [33] With regards to the counts of rape, this offence has been described by the SCA in *Kwanape v The State*[17], as "a horrifying crime and a cruel and selfish act in which the aggressor treats with utter contempt, the dignity and feelings of his victim". The court in *Masiya v Director of Public Prosecutions*[18] expressed that: "rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy". This rings true to all three counts of rape in this case when regard is had to the manner in which the victims were violated and humiliated by the accused and his gang.
- [34] In *S v Chapman*[19] the SCA stated as follows: "Rape is a very serious offence constituting as it does, a humiliating, degrading and brutal invasion of the privacy, dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilization. Women in this country are entitled to the protection of these rights". In *S v Ncheche*[20] the court stated that: "Rape is an appalling and utterly outrageous crime, gaining nothing of any worth for the perpetrator and inflicting terrible and horrific suffering and outrage on the victim and her family. It threatens every woman, and particularly the poor and vulnerable. In our country, it occurs

far too frequently and is currently aggravated by the grave risk of the transmission of Aids. A woman's body is sacrosanct and anyone who violates it does so at his peril and our Legislature, and the community at large, correctly expects our courts to punish rapists very severely.”

[35] It is clear from the circumstances of this case that the accused and his gang preyed on vulnerable and defenceless people. I say defenceless because in all the counts, the accused and his criminal gang were armed with firearms and used violence to terrorize their victims. The accused stripped the rape victims off their innocence and infringed their right to dignity by sexually violating them using firearms to put more fear on them.

[36] While the offence of rape is endemic in our society and the country at large, it remains a repulsive crime from which all victims should be protected against. Like any other violent crime, rape has become a scourge in our society which appears to be damaging the very fabric of our society. It should therefore not be treated lightly but deplored and severally punished. It is the duty of the courts to send a clear and consistent message that this onslaught will not be tolerated in a democratic society which prides itself with values of respect for the dignity and life of others.

[37] The complainants in counts 5, 13 and 23 have similar post-traumatic experiences and they explained in their respective VIS that they get panic attacks especially at night; they cannot stand being around a group of men; they have now turned to abusing

alcohol – either to sooth the pain or try to erase what seems to be continued flashbacks; the feeling of being afraid to be alone is a daily struggle; the victim in count 5 is fearful that her daughter might go through the same experience. These victims have stated that they are not psychologically stable and suffer from anxiety. The victim in count 5 does not even trust her own family members who are male.

[38] The victim in count 23 has isolated herself completely from other family members as she prefers being alone at all times. She indicated that she struggles not only with flashbacks of the incident itself and remembering the faces of her attackers, but what is traumatic for her is that she can still smell the scent of the person who raped her. She noted that her family is so affected to an extent that her mother was diagnosed with a chronic illness after the incident and the robbery has put a strain on the family financially. What stands out in her statement is that she now blames her father and thinks that ‘he is a loser because he failed to protect her and fight for her during the incident’.

[39] I have already indicated that “the interests of the victims of the offence” is an important consideration as the fourth triad factor pertaining to sentence. In this regard, the court in *Matyityi supra* held that: “by accommodating the victim during the sentencing process, the court will be better informed before sentencing about the after-effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim and in that way hopefully a more balanced approach to sentencing can be achieved[21].

[40] With regards to the question whether the accused is a candidate for rehabilitation as argued by his counsel, the case of Mhlakaza supra is apposite. This court held that – ‘because of the seriousness of offences, it is required that the elements of retribution and deterrence should come to the fore, and that the

rehabilitation of the accused should be accorded a smaller role. The court also pointed out that, given the high levels of violent and serious crimes in the country, when sentencing such crimes, emphasis should be on retribution and deterrence. Is it therefore not wrong to conclude 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 may fall into disrepute and victims of crime, may be inclined to take the law into their own hands’[22].

[41] In light of the circumstances surrounding all these cases, and taking into account the accused last-minute defence, it is my considered view that the accused does not appreciate the wrongfulness of his actions. Neither can one come to a conclusion that the accused is a candidate for rehabilitation as argued by his counsel - because even though he has pleaded guilty, he has never apologized for his actions or attempted to do so through his counsel.

[42] I am mindful of the previous convictions of the accused which are relevant to the current offences. These relates to house breaking and robbery with aggravating circumstances. What is interesting about the accused’s previous conviction of robbery is that, hardly a month after he was convicted and sentenced to 15 years imprisonment, the accused escaped from lawful custody at Kgosi Mampuru. Two years later, he continues with his chosen career and commits twenty-five

(25) offences in a space of four (4) and a half months. That is between 22 January 2022 and 7 June 2022. I can say without a doubt that the accused cannot be rehabilitated. Furthermore, it is my considered view that the accused has no remorse. Our court have recognized that “the expression of true remorse is an important factor in the imposition of sentence because it is an indication that the accused has realized that he has done wrong and has undertaken not to transgress again”. [23]

[43] I have in the exercise of my sentencing discretion, taken due consideration to the triad factors as articulated by the court in Zinn such as the personal circumstances of the accused, the seriousness of the crimes committed by the accused, the interests of society, as well as the purposes of punishment as pronounced in Rabie, and having done that, it still remains the paramount function of this court to objectively apply its mind to the consideration of a sentence that is proportionate to the crime committed by the accused, and the cardinal principle that ‘the punishment to be imposed should fit the crime - should not be ignored’.

[44] Having considered the cumulative circumstances of this case, the submissions made by the State and the defence, and applying the above principles as they relate to sentence, and the question whether or not substantial and compelling circumstances exists justifying a

deviation from the imposition of the prescribed minimum sentences, there is no doubt in my mind that the only appropriate sentence to be imposed is a long term of imprisonment. It is also imperative that this court should not lose sight of the fact that the legislature has ordained specific sentences for the offences which the accused has been convicted for.

- [45] The SCA in *S v Vilakazi*[24] the stated that: “In cases of serious crime, the personal circumstance 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 in employment, 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”.
- [46] This position was reaffirmed by the Supreme Court of Appeal in *S v Matyityi*[25], when the court stated that neither youthfulness nor the accused’s background and circumstance constitute substantial and compelling circumstances. The court further stated that the courts are duty-bound to implement the sentences prescribed in terms of the Act.
- [47] This position has over the years been recognised by the courts. Thus, in *S v Lister*[26] the court held: “To focus on the well-being of the accused at the expense of all other aims of sentencing such as the interest of society is to distort the process and to produce in all likelihood a warped sentence”.
- [48] The majority of the Supreme Court of Appeal in *S v Ro and Another*[27] held that:
- “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 aims of sentencing, including deterrence and retribution”.*
- [49] It is on record that the accused has been in custody since 9 June 2020. No submission was made in respect of the pre-sentence detention.

However, the court has also taken into account this aspect. There is no rule of thumb in respect of the calculation of the weight to be given to the time spent by an accused awaiting trial. The SCA in *S v Livanje*[28] considered the role played by the period that a person spends in detention while awaiting finalisation of the case, and referred with approval, to the decision in *S v Radebe*[29] 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 all the circumstances, including the period spent in detention, prior to conviction and sentencing, is a just one.

49.1 The court further stated that, instead of a so-called mechanical approach, a better approach...is that the period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified, and whether it is proportionate to the crime committed.

49.2 In my view, the time spent by the accused in custody awaiting finalisation of his case is not proportionate to the crimes he committed and does not justify a deviation from the imposition of the prescribed sentences.

[50] Having considered all the circumstances of this case, and the question whether substantial and compelling circumstances exist which

call for the imposition of a lesser sentence than the prescribed minimum sentences in terms of the Act, I am of the view that the

aggravating factors in this case far outweigh the mitigating factors, and there are no substantial and compelling circumstances which warrant a deviation from the imposition of the prescribed minimum sentence. It is also my considered view that the personal circumstances of the accused are just ordinary circumstances, and I can find no other suitable sentence other than the one of life imprisonment on the count of murder and the two rapes in counts 5 and 23-, and 20-years imprisonment on each count of robbery. I cannot find any justification why this court should depart from imposing the prescribed sentences.

[51] In the circumstances, the accused is sentence as follows:

1. 1 count of Escaping from lawful custody:- 2 years imprisonment
2. 3 counts of House breaking with the intent to rob in respect of counts 2; 7; and 20:- 5 years imprisonment on each count, with a total of 15 years imprisonment to be served by the accused.
3. 4 counts of Robbery with aggravating circumstances in respect of counts 3; 8; 11; and 21:- 20 years imprisonment on each count, with a total of 80 years imprisonment to be served by the accused.
4. 3 counts of Kidnapping in respect of count numbers 4; 12; and 22:- 5 years imprisonment on each count, with a total of 15 years imprisonment to be served by the accused.
5. 2 counts of Rape (ie. Gang rape) in respect of counts 5 and 23:- Life imprisonment on each count, with a total of 2 Life imprisonment sentence to be served by the accused.
6. 1 count of Rape in respect of count 13:- 10 years imprisonment.
7. 6 counts of Unlawful Possession of Firearm in respect of counts 6; 9; 14; 17; 24; and 25:- 15 years imprisonment on each count, with a total of 90 years imprisonment to be served by the accused.
8. 4 counts of Unlawful Possession of ammunition in respect of count 10; 15; 18; and 26:- 3 years imprisonment on each count, with a total of 12 years imprisonment to be served by the accused.
9. 1 count of Murder in respect of count 16:- Life imprisonment.

10. 1 count of contravening the Immigration Act (ie. An Illegal immigrant) 2 years imprisonment.
11. The sum total of the sentence to be served by the accused is three (3) life terms and 226 years imprisonment.

PD. PHAHLANE

JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the State: Adv. Masilo Instructed by: Director of Public Prosecutions, Pretoria

Counsel for the accused: Adv. Kanyane Instructed by: Legal Aid South Africa Heard on: 12

February 2024 Date of Judgment: 11 March 2024

- [1] Ndou v S 2014 (1) SACR 198 (SCA) at para 14.
- [2] 1993 (1) SACR 365 (V) at 370 (c)-(f).
- [3] 1975 (4) SA 855 (A).
- [4] See: S v Zinn 1969 (2) SA 537 (A)
- [5] Act 108 of 1996.
- [6] In terms of section 35(3)(n) of the Constitution Act 108 of 1996.
- [7] S v Msimanga and Another 2005 (1) SACR 377 (A).
- [8] S v Sikhipha 2006 (2) SACR 439 (SCA) at para 16.
- [9] 2001 (1) SACR 469 (SCA).
- [10] 2011 (1) SACR 40 (SCA).
- [11] (CCT323/18; CCT69/19) [2020] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) (11 December 2019) at para 61.
- [12] In terms of section 274(1) of Criminal Procedure Act 51 of 1977 which provides that: "A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed".
- [13] Section 112(1)(b) provides that: "(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea-

- (b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine question the accused in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.

[13] Section 112(1)(b) provides that:

“(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea-

- (b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine question the accused in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.

[14] (895/17) [2018] ZASCA 61 at para [8] (21 May 2018)

[15] 1997 (1) SACR 515 (SCA).

[16] 1975 (2) SA 524 (N).

[17] (422/12) [2012] ZASCA 168; 2014 (1) SACR 405 (SCA) (26 November 2012).

[18] 2007 (2) SACR 435 (CC) at para 78.

[19] [1997] ZASCA 45; 1997

- (3) SA 341 (SCA) at paras 3-4; 1997 (2) SACR 3 (SCA) at 5a-d [1997] ZASCA 45; (1997 (3) SA 341) (at 345A-B).

[20]

[2005] ZAGPPHC 21; 2005 (2) SACR 386 (W) at para 35.

[21] S v Matyityi (695/09) [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) ;

[2010] 2 All SA 424 (SCA) (30 September 2010)

[22] See also: R v Karg 1961 (1) SA 231 (A) at 236A-B; S v Swart 2004 (2) SACR 370 (SCA)

[23] S v Brand 1998 (1) SACR 296 (C) at 299i-j.

[24] 2009 (1) SACR 552 (SCA) at para 58.

[25] S v Matyityi 2011 (1) SACR 40 (SCA) at para 23.

[26] 1993 SACR 228 (A)

[27] 2010 (2) SACR 248 (SCA)

[28] 2020 (2) SACR 451 (SCA).

[29] 2013 (2) SACR 165 (SCA) at para 14.

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