

SOUTH AFRICA / JUDGMENT

S v Gregory (SS 122/2022) [2023] ZAGPJHC 358 (21 April 2023)

[2023] ZAGPJHC 358**COURT**

South Gauteng High Court, Johannesburg

BEFORE

C B Bhoola

CASE / FILE NUMBER

SS 122/2022

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA,****GAUTENG****LOCAL DIVISION, JOHANNESBURG****CASE****NO. SS 122/2022****NOT****REPORTABLE****NOT****OF INTEREST TO OTHER JUDGES****NOT****REVISED****In****the matter between:****THE****STATE****and****NTOBEKO****MBONAMBI GREGORY****ACCUSED****Neutral****citation: The State v Ntobeko****Mbonambi Gregory (Case No. SS122/2022) [2023]ZAGPJHC358 (21 April 2023)**

JUDGMENT**– SENTENCE**

BHOOLA AJ

Introduction

- [1] This is a sentence following a conviction arising from a plea in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA).
- [2] On the 14th of February 2023, I convicted the accused of two counts of murder read with the provisions of section 51(1) of the General Law Amendment Act 105 of 1997 (the Minimum Sentence Act) and one count of rape whereby the accused contravened the provisions of section 3, read with sections 1 and 55 of the Criminal Law Amendment Act in terms of the Sexual Offences and Related Matters Matters) Amendment Act 32 of 2007 (SORMA)
- [3] Advocate Ehlers appeared for the National Prosecuting Director and Advocate Mthembu appeared on behalf of the accused at all material times.
- [4] Ordinarily, a conviction on the offence of murder read with section 51(1) of Act 105 of 1997 and rape warrants life imprisonment to be imposed in terms of the Minimum Sentence Act. However, on acceptance of the plea by the State, to the exclusion of section 51(1) of the Minimum Sentence Act, the court pronounced that the accused was convicted of rape in terms of section 3 of SORMA to the exclusion of section 51 (1) of the Minimum Sentence Act.
- [5] The State proved many previous convictions against the accused, The relevant related ones were assault, and attempted murder.
- [6] The defence submitted that the Court should find that there were substantial and compelling factors to deviate from the Minimum

Sentence Act and the State submitted that life imprisonment should be imposed in respect of all three counts.

General principles

- [7] In considering an appropriate sentence, the most important principle is the so-called triad as stated in *S v Zinn*[1] where it was held that the court should impose a sentence which in its view is appropriate:

“What has to be considered is the triad consisting of the crime, the offender and the interests of society”.

A fourth element for consideration, often emphasised by the courts is the impact on the victim.

[2]

[8] During the sentencing process a court should never lose sight of the element of mercy.[3] The factors for consideration of sentencing were succinctly summarised by the court in *S v Rabie*,[4] where Holmes JA said the following:

‘[...] 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 and (vi) The measure of the scope of mercy depends upon the circumstances of each case.’

[9] It is important to bear in mind that sentencing is about achieving the right balance and is proportional to the offence that was committed. In arriving at such sentence, one must consider the factual and legal findings relating to the crime, the offender, the interests of society and the victim. Consequently, I must balance these factors in conjunction with the principles relating to prevention, retribution, reformation and deterrence, exercising it judicious discretion. In doing so, I must ensure that one element is not unduly emphasised at the expense of the others[5] in arriving at a just and fair sentence.

[10] Sentencing has five important functions: (i) It must act as a general deterrent, in other words, it must deter other potential offenders from committing such acts; (ii) it must act as a specific deterrent, in other words, it must deter the perpetrator from being tempted to act in such a manner ever again; (iii) it must enable the possibility of rehabilitation or correction, unless this is very clearly not likely; (iv) it must be protective of society, in other words, society must be protected from those who do it harm; and (v) it must serve society’s desire for retribution, in other words, society’s outrage at serious wrongdoing must be placated.[6]

The Offence

[11] The accused in this matter was charged with serious offences of murder and rape. At the onset of the hearing, I explained to the accused and he understood that the provisions of section 51(1) read with section schedule 2 part 1 of the Minimum Sentence Act, would apply should he be convicted both of murder and/or rape in the absence of any substantial and compelling factors[7].

[12] When the accused visited both the deceased on the fatal day, his sister in law (deceased number one), took the time and decency to prepare a meal for him and treated him as her guest. Notwithstanding that he raped her and thereafter, violently bludgeoned her and her two-year-old son to death. The elements of planning and premeditation was present when he went outside to fetch a stone as a murder weapon and when that did not work he strangled the deceased and used a razor blade to cut the deceased in count one until she succumbed to death. He disregarded the fact that this was his sister in law and his nephew, who was only two years of age. He violated their Constitutional rights to life, to integrity, dignity and privacy and violated the sanctity of family values and the rights of women and children. Section 28 of the Constitution, 1996, RSA places an obligation on the courts to

ensure that the best interest of children is of paramount importance at all given times. The scourge of Femicide and Gender – Based violence is reaching astronomical heights and is referred to as a pandemic in our country. It must be addressed and be curbed. Many women and children in this country are almost daily faced with such violent crimes where they fall prey and suffer in silence.

- [13] Regarding the crime of murder and rape, the definitional elements of the crime have been satisfied in that the accused acted voluntarily, thereby causing the death of both the victims, which was unlawful, with the necessary intention. Crimes in general, but especially against woman offend against the aspirations and ethos of any civilized society. The victims in this case were a soft target for the accused. The sentence imposed upon him, in these circumstances, must accordingly in some measure reflect a censure to the accused's conduct and behaviour.
- [14] In the Welkom[8] case, the accused pleaded guilty to the charge of murder but not rape. On appeal, the full bench confirmed the sentence to life imprisonment on each count.
- [15] Similarly, in Peloeole[9], the accused was convicted of two counts of murder and sentenced to two counts of life imprisonment.
- [16] Regarding the conviction on rape, In Mudau v S[10] the Supreme Court of Appeal held as follows:

'It is necessary to re-iterate a few self-evident realities. First, rape is undeniably a degrading, humiliating and brutal invasion of a person's most intimate, private space. The very act itself, even absent any accompanying violent assault inflicted by the perpetrator, is a violent and traumatic infringement of a person's fundamental right to be free from all forms of violence and not to be treated in a cruel, inhumane or degrading way.'

- [17] It is accepted that after having raped the deceased in count one, the accused thereafter murdered her and her two-year-old son. Rape qualifies under the section 51(1) of the Minimum Sentence Act for life imprisonment to be imposed. The court is mindful on pronouncement of the conviction the accused was convicted of rape in terms of section 3 of SORMA.

Interest of Society

- [18] Murder and rape has become national sports in our Country. It has become second nature that children and women are brutally murdered. In most instance where women are involved, they are raped and then murdered. Equality and Gender Justice Forums demand that this issue is addressed in order to maintain a civilized society. The legislators have introduced victim centered legislation to deal with the scourge of gender-based violence and the Courts are expected to apply the letter of the law to protect and ensure the safety of its citizens by delivering value judgments. It is also for these reasons that the law has prescribed certain mandatory sentences that the court should impose in cases like these.

[19] Society has a legitimate expectation that apprehensible criminal activities as displayed by Mr. Mbonambi should not be left undetected and unpunished. It demands and commands that the courts send out a clear and strong message that such acts of gruesome criminality will not be tolerated and will be dealt with effectively. In *S v Holder*[11] the following was stated:-

‘In the application of the principle that imprisonment ought to be avoided, the penal element must, in serious offences, of whatever

nature, come to the fore and be properly considered, if punishment still has any meaning in the criminal law. The community expects that a serious crime will be punished, but also expect at the same time that mitigating circumstances must be taken into account and the accused’s particular position deserves thorough consideration. That is sentencing according to the demand of our time.’

Substantial and Compelling circumstances.

[20] The State submitted the defence did not submit any reasons to deviate from the Minimum Sentence Act and did not establish any substantial

and compelling reasons.

[21] He submitted with regard to the rape charges the court has inherent jurisdiction to impose the Minimum Sentence Act despite the plea being accepted in the absence of the Minimum Sentence Act. He submitted further that there are no substantial and compelling

circumstances to deviate from such a sentence.

[22] The leading case on what constitutes substantial and compelling circumstances, is *Malgas*, [12] where the SCA held that ordinarily the prescribed sentence should be imposed, and that the sentencing court should not deviate from the prescribed sentences for flimsy reasons[13]. However, if the prescribed sentence would be unjust or disproportionate to the offence, then it must be departed from. *Malgas*[14] does not replace the court’s unfettered discretion for the sentencing court to impose whatever sentence it considers fair and just.

[23] The SCA in *Matyityi*[15], clarified that *Malgas* simply established that the sentencing court must independently apply its mind to the question of whether the prescribed minimum sentence is proportionate to the crime that was committed. If not, substantial and compelling circumstances exist as contemplated in section 51(3) of the Minimum Sentence Act, and the court may not impose the prescribed sentence.

- [24] Section 51(3) (aA) of the Criminal Law (Sentencing) Amendment Act 38 of 2007, specifies, that when sentencing for rape, there are four factors which will not count as substantial and compelling circumstances to justify a lesser sentence. These factors are: the complainant's previous sexual history, the apparent lack of physical injury to the complainant, the accused's person's cultural or religious beliefs about rape, and any relationship between the accused person and the complainant prior to the offence been committed.
- [25] It is apposite to these facts that I would now balance and evaluate a just sentence by considering the mitigating and aggravating factors.

Personal Circumstances of the accused

Mitigating factors

- [26] The accused elected not to testify in mitigation of sentence, and no evidential material in which sufficient judicial probative weight could be attached was submitted on his behalf. Advocate Mthembu submitted he accused's personal circumstances in mitigation of sentence were that:
- (a) he pleaded guilty, thereby taking the court into his confidence and did not waste the courts time by indulging on hopeless defences. It is trite that a guilty plea in circumstances where the case against the accused is strong, does not serve as a mitigating factor but remains a neutral factor.[16] The evidence in this matter would have been direct evidence and overwhelming. DNA evidence linked the accused to the crime scene. The SCA in Matyityi[17] held in such instances, a plea of guilty was not a relevant factor in determining an appropriate sentence.
 - (b) The accused was remorseful for his actions by pleading guilty. I was referred in this regard to what was said in *S v Matyityi*[18] where Ponnann JA explained remorse as a gnawing pain of conscience for the plight of another and genuine contrition can only come from an appreciation of an acknowledgement of the extent of one's error, whether the offender is sincerely remorseful and not simply feeling sorry for himself at having been caught, is the factual question. For a court to find that an accused person is genuinely remorseful, it needs to have a proper appreciation of what motivated the accused to commit the deed; what had since provoked his change of heart; and whether he does indeed have a true appreciation of the consequences of those actions. I have considered the fact that the accused elected not to testify in mitigation of sentence, which is his Constitutional right and prerogative to do so. To me his silence had negative connotations and consequences in that he had nothing to say about his actions.[19] These factors lie purely within his knowledge. The implication of this is that generally where an accused elects not to testify, a finding of remorse cannot be made by the presiding officer.[20] I do not believe that the accused was remorseful but rather regretful that he was caught by his brother.

- (c) The accused has been incarcerated as an awaiting trial prisoner since October 2021 which is a long period of time. This may be taken into account when an appropriate sentence is imposed. On a strict interpretation of the law, this does not amount to a 'substantive and compelling circumstance', but that having been said, nothing prevents this court, to take into account the period that the offender has been incarcerated, pending his trial, for the purpose of imposing the appropriate sentence. However, this does not apply mechanically by way of an arithmetic calculation. In the present matter, it is so, that the accused has been an awaiting trial prisoner for a long period of time. However, I believe that the arrest of the offender, in this case, effectively brought an end to his criminal activity and resulted in the protection of women and children in society. Regarding the significance of time spent in detention, pre-sentencing, Lewis JA in *Radebe*[21], made it clear that this is merely one of the factors to be taken into consideration to determine whether the effective sentence imposed is proportionate to the crime committed and therefore justified.
- (d) The accused was 34 years of age at the time he committed these offences. He left school after passing standard eight (8). According to him he is on speaking terms with his brother but his brother denied this.

Aggravating circumstances and impact on the victim

- [27] Advocate Ehlers led the evidence of Mr. Hossain Mbonambi, who testified the deceased in this matter was his wife and son. He was married to the deceased since 2016. She was a home executive and housewife. Her duties included duties of cooking, house cleaning and looking after the family. There was no domestic help hired to assist the deceased. He was an auto electrician which entailed diagnosing motor vehicles. The deceased assisted him when he would instruct her to generate and make invoices when he was not at home. There was no one else assisting him with that since her demise. He had one child with the first deceased, who was the deceased in count two. The accused in this matter was his brother.
- [28] The aggravating factors relied upon by the State are:
- (a) that the accused and both deceased were related. Deceased one prepared food for the accused and he was accepted as a guest in her home because he was her brother-in-law.
- (b) the murder equates to gender-based violence and the murder of a child, who was only two years at the time of his death. The message that must go out to others in the community, that the law is serious about Femicide, Gender Based Violence and the protection of children. Violent men, who perpetrate Gender Based Violence and have no regard to the fundamental rights of our Constitution and the rights of our children, must be deterred and they must realise that a lengthy prison sentence awaits them when they cause the suffering to innocent family members.
- (c) the husband of the deceased relied on the deceased to assist with his work at home and assist him with his business. He was deprived of this assistance.

(d) deceased one was killed in three different methods, being hit over the head with a stone, strangled with a cord and cut on the neck with a razor. This was brutal and inhumane.

(e) the accused has two related previous convictions: assault with the intent to do grievous bodily harm in 2010 and attempted Murder in

2012. He has previously been found guilty and has a number of other unrelated previous convictions. The accused previous convictions indicate that he has a propensity to commit violent crime, and is therefore relevant to offences he has been convicted of. The fact that the accused has many other previous convictions, shows that he had not been deterred by his previous encounters with the law. He spurned the mercy showed by the previous court, by continuing with his lifestyle of criminal activities.[22] His previous convictions indicate that the prospects of rehabilitation are diminished and that he would not be deterred from the commission of crime.

[29] When I consider the totality of the matter before me, sentencing must serve as deterrence of others who consider embarking on a life of crime. At times rehabilitation will serve no purpose. In the present case, I find that rehabilitation should be diminished and deterrence should come to the fore.[23]

[30] A life sentence is the most severe sentence which a court may impose. It endures for the remainder of the natural life of the offender. Due to the gruesome and violent nature of the crimes committed and the serious physical injuries sustained by both the deceased prior to their deaths, I am unable to find that there are any substantial and compelling circumstances present which would warrant a deviation from the minimum sentence applicable as well as life imprisonment in the case of rape.

[31] In the present case, I am satisfied that the aggravating circumstances so far outweigh the mitigating ones, that the sentence

to be imposed is appropriate and just. I have taken into account cumulatively the accused's age, the time spent awaiting trial, the fact he pleaded guilty, the issue of remorse and he did not waste the courts time. I cannot find any factors or circumstances which in my view diminishes the moral blameworthiness of the accused's conduct.

[32] The accused was convicted with both counts of murder read with section 51(1) of the Minimum Sentence Act and therefore in the absence of substantial and compelling explanation, the appropriate sentence in both the counts of murder will be life imprisonment in respect of each count in accordance with the Minimum Sentence Act.

[33] The court is mindful of the fact that the Court pronounced at conviction stage that the accused was guilty of Section 3 of Act 32 of 2007, to the exclusion of section 51(1) of Act 1997. However, given the gravity of the offence and the inherent jurisdiction of this court, life imprisonment is clearly called for even if section 51(1) of Act 105 of 1997 is left out of the equation. The accused was informed of life imprisonment and the Minimum Sentence Act before he pleaded to the offence of both murder and rape that the likelihood that if

convicted on these charges, it will attract life imprisonment. He was at all times legally represented and it is on that basis that this court would proceed to sentence the accused to life imprisonment in respect of Count 3.

[34] As a result, I, therefore, impose the following sentence on the accused:

- (a) Count 1 Murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997: life imprisonment.
- (b) Count 2 Murder read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997: life imprisonment.
- (c) Count 3 Contravention of the provision of section 3 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) 32 of 2007: life imprisonment.

Ancillary

Orders

- (d) In terms of section 103(1) of the Firearms Control Act 60 of 2000 the accused is declared unfit to possess a firearm.
- (e) In terms of 103(4) of the Firearms Control Act 60 of 2000, a search and seizure order for competency certificates, licences, authorisations and permits, firearms and ammunition is made and the Registrar is to be notified in writing of the conviction.
- (f) Because life imprisonment has been imposed, all of these sentences automatically run concurrently in terms of section 39(2)(a)(i) of the Correctional Services Act 111 of 1988.
- (g) The complainant was informed of the provisions of section 299A and the impact and thereof was explained to him. The Registrar was ordered to complete the relevant forms has been handed to the complainant, which was done.

C B BHOOLA

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Appearances:

Date of plea: 3rd April 2023

Date sentence imposed: 21th April 2023

On behalf of the State: Advocate Ehlers On behalf of Accused: Advocate Mthembu

[1] S v Zinn 1969

(2) SA 537 (A) AT 540G

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- [2] S v Khumalo 1973(3) SA 697, S v Matyityi 2011 1 SACR 40 SCA
- [3] S v Rabie 1975
- (4) SA 855 A.D. at 862 D-F
- [4] S v Rabie 1975
- (4) SA 855 A.D. at 862 D-F
- [5] S v Banda 1991
- (2) SA 352(B-G) at 355A
- [6] S v Loggenberg 2012(1) SACR 462 GSJ Willis J
- [7] Section 51(30(a) of the Minimum Sentence Act.
- [8] Welkom v S (CA265/2016)
- [2017] ZAECGHC 52 (9 May 2017)
- [9] S v Peloeole 2022
- (2) SACR 349 (SCA)
- [10] Mudau v S 2013 (2) SACR 292 (SCA) at para [17] (See also S v Chapman [1997] ZASCA45; 1977 (3) SA 341 (SCA) at 345A-B.)
- [10] Mudau v S 2013 (2) SACR 292 (SCA) at para [17] (See also S v Chapman [1997] ZASCA45; 1977 (3) SA 341 (SCA) at 345A-B.)
- [11] S v Holder 1979 (2) SA 70 (A)
- [12] S v Malgas 2001
- (1) 1 SACR 469 (SCA) at para 25
- [13] S v Matyityi 2001(1) SACR 40 (SCA), S v PB 201 1 SACR 1 (SCA)
- [14] See footnote 12
- [15] See footnote 13.
- [16] S v Matyityi paragraph 13.
- [17] See footnote 14
- [18] S v Matyityi 2011 (1) SACR 40 (SCA) para 13, S v Martin 1996 (2) SACR 309 (SCA) par 9.
- [19] S v Matyityi paragraph 21
- [20] S v Matyityi 2011 (1) SACR 40 (SCA)

[21] S v Radebe 2013 (2) SACR 165 (SCA) at [14]

[22] S v Matyityi para 10

[23] S v Matyityi Para 10

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