IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: SS41/2012

DATE: 14 JUNE 2013

In the matter between:

THE STATE

and

SANDISILE MAKHAKHA Accused

S E N T E N C E

BOQWANA, AJ:

Sentencing requires balancing of all the relevant factors. The starting point is the much quoted case of S v Zinn 1969(2) SA 537 (A) at 540G-H where the Appellate division established the triadic sentencing formula as follows:

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

In S v Banda and Others 1991(2) SA 352 (BG) at 355A-B and C the Court held the following:

> "The elements of the triad contain an equilibrium and a tension. A Court should, when determining sentence, strive to accomplish and arrive at the judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation; the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern."

In appropriate circumstances a Court will also exercise a measure of mercy. See S v Rabie 1975(4) SA 855 (AD) and S v Khumalo 1973(3) SA 697 (A) at 698 and S v Sparks & Another 1972(3) SA 396 (A) at 410A. The time spent by the accused in custody whilst awaiting trial may also play a role depending on each case. The criminal record of the accused is also important and must be considered together with other relevant factors. In evaluating an appropriate sentence the Court is also required to have regard to the main purposes of

punishment, namely its deterrent, preventative, reformative and retributive aspects.

In this regard the state submits that the retributive object of sentencing must get preference above the object of rehabilitation in the sense that the accused is convicted of extremely anti-social conduct. Two persons lost their lives and a third one was fortunate to escape from such a fate. Accordingly, no restitution is possible.

Starting with the personal circumstances of the accused. He is a young man born on 16 June 1986. He was 21 years old when he committed the offences of attempted rape and murder of Nozukile Ntshoze ("deceased 1"), and robbery with aggravating circumstances and attempted murder of Phindiwe Cecilia Keswa ("Keswa")and 25 years old when he committed offences of rape and murder of Azavela Ziwele ("deceased 2").

The accused is currently 26 years old to turn 27 in a few days. He was unemployed when he got arrested in July 2011 whilst living in Balasi, Eastern Cape. During 2007 (when he committed the offences against deceased 1 and Keswa) he however received some casual employment in Atlantis *perlemoen* factory where he worked at least once a week, when

he was still residing in Gansbaai. For the most part he however stayed at home doing nothing. He testified that both his parents are deceased and he was living with his brother whilst in Gansbaai in 2007 and with his sister in 2011 in Balasi. He is not married and has no children. He passed grade 8 and did not drink. The accused also has no previous convictions. The accused did not testify or call witnesses in mitigation of sentence. These circumstances must be weighed against other competing considerations, with the context in which these offences took place as being a key factor.

Turning to the seriousness of the crimes. The accused has been convicted of very serious crimes. In the matter of S v Tikini 2008(1) SACR 42 (EC), Plasket, J referred to a judgment of S v Stonga 1997(2) SACR 497 (O), where the appellant had been convicted of raping and murdering an eight year old by strangling her and then dumping her body in a toilet.

In that case the accused was 25 years old and a first offender who had cooperated with the police throughout. He had been sentenced to 12 years imprisonment for the rape and life imprisonment for the murder. It had apparently been argued in an appeal against the sentence of life imprisonment that the

trial Court had overemphasised the interest of society at the expense of personal circumstances of the appellant.

Plasket, J agreed with the reasons in the Stonga case (at 501a) that the remorse that the appellant had shown when viewed against the callousness of his conduct paled in its significance as a mitigating factor. He concluded that the personal circumstances of the accused in the Stonga case were not weighty enough to justify deviation from the minimum sentences imposed by the Act and had to bow to the interest of society, particularly if one has regard to the brutality involved and the callous way in which those offences were committed.

Here there appears to have been some planning of the attacks, involving vulnerable young women who were alone whom the accused targeted and isolated into the bushes where he attacked them. He repeated this conduct over a period of four years and it had deadly consequences for his victims, except in one instance where one of the victims was rescued.

Turning to the interests of society. The interests of the society cannot be ignored in cases like these. Our country is ravaged with acts of violence and abuse against women and children every day and many of which lead to the death of helpless victims.

The remarks of the SCA in S v Chapman 1997(3) SA 341 (SCA) at 344J-345B are worth repeating:

> "Rape is a very serious offence constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim.
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> The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.
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> Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives."

In a case where the brutality and callousness of the murder was such that the deceased, a defenceless old man, was trussed up and simply left to die, and an old lady raped, the

SCA in DPP v Thusi (769/10) [2011] ZASCA 176, (29 September 2011) found that there were no substantive and compelling circumstances justifying deviation from the minimum sentence prescribed. The Court held in paragraph 19 of the Thusi case that when weighed against the objective gravity of these offences (which were rape and murder of the elderly in that case), their prevalence in South Africa and the legitimate expectation of society that such crimes must be severely punished, neither the youthfulness of the respondent nor the prospects of rehabilitation tip the balance in their favour. In that case one of the accused was 20 years old, unmarried and a first offender. In that case the Court found that none of the respondents (the accused in that case) demonstrated immaturity, nor was it evident that any one of them was subjected to peer or undue pressure by one or both of the others. On the contrary, their conduct showed a brutality that was quite inconsistent with immaturity. The trial Court was found to have overemphasised personal interests of the respondents over the seriousness and prevalence of the offences, the interest of the society and the harm suffered by the raped victim and by the family of the deceased. The appeal Court found that there were no substantial and compelling circumstances and it overturned a sentence of 15 years imprisonment for murder and 18 years for rape and

imposed life imprisonment on both the rape and murder charges.

The accused in this case has showed no remorse whatsoever for his actions. He remains adamant that he did not commit these offences, in the face of overwhelming evidence against him. There has been no attempt to explain his actions at all, except a bare denial and a repeated statement that he was not there but sitting at home the whole day.

Turning to the individual counts and dealing with counts 1 and 2. The right to life is a fundamental right in our Constitution, and the accused violated that right. The senseless killing of the victim who was pregnant by strangling and being buried in a shallow grave deprives her husband and the family of the enjoyment and pleasure of raising their unborn child. This unborn child's prospect of life was brutally taken away by murderous person who refuses to take responsibility for his actions.

This unborn child could have become a productive member of the society. Dr Potelwa testified that no abnormality was detected from the foetus, therefore the unborn child would have been born alive and in normal health in all likelihood.

The impact this has had on deceased 1's husband is unimaginable in light of the fact that he and his deceased wife had previously lost a child. These actions demand no less than long term imprisonment. Similarly the killing of both deceased 1 and 2 deprived their families of the opportunity to share in their potential achievements and to watch them grow up. Deceased 1 was only 22 years old when she died. The post-mortem report shows that the killing was brutal in that her hyoid bone broke. She had a dotted eye and a protruding tongue with blood spots in her tongue and neck indicative of the amount of force and pressure used to strangle and kill her.

In respect of count 1, general principles of sentencing are applicable. In respect of Count 2 the provisions of section 51(1) of the Criminal Law Amendment Act, Act 105 of 1977 read with Part 1 of Schedule 2 of that Act, a minimum sentence of life imprisonment is prescribed in an instance where the death of the victim was caused by the accused in committing an offence of rape.

Counts 3 and 4. Keswa was walking alone and minding her own business when the accused came from behind and attacked her. The accused did not listen to her pleas to stop his attack and to rather rape her. He insisted that he wanted to kill her.

He dragged her into the bushes and kicked her and she sustained injuries. He strangled her to the point of unconsciousness. Had the unknown man not rescued her she probably would have died like the other two women. Keswa was subjected to extreme trauma and fear.

Robbery with aggravating circumstances is rife in our society. It is common knowledge that people get attacked for no reason. Keswa was evidently affected by the ordeal. This was very clear in court as she became very emotional and cried while giving her evidence. This was an indication that the ordeal still affected her emotionally.

In the case of robbery with aggravating circumstances, count 3, the provisions of the Criminal Law Amendment Act are applicable and the prescribed minimum sentence is 15 years imprisonment. In respect of count 4, attempted murder will be dealt with in terms of the general principles of sentencing.

Counts 5 and 6. The post mortem report of Dr John estimated the body of deceased 2 to be approximately 16 years of age. It has however transpired during the State's address for sentencing and upon the Court's enquiry that deceased 2 was in fact born on 25 March 1991 which makes her 20 years old at

the time of the commission of the crime according to her father's affidavit which the State referred to. The Court was also furnished with a letter from deceased 2's father, Mziwandile Ziwele, which was read into the record before sentencing wherein Ziwele describes the impact his daughter's death has had on his family, which included the grandmother and him suffering sickness, a loss of concentration on his part and loneliness felt by the living daughter.

Ziwele appealed to the Court in his letter not to impose a lenient sentence on the accused in that he is dangerous and does not deserve to be part of the community.

Deceased 2 was also strangled and according to Dr John it appears that the bleeding on the soft tissues in the neck was possibly due to the application of blunt force in the neck. Accused was apparently known to deceased 2 and he could have targeted her in the bushes whilst walking alone.

In terms of section 51(1) of the Criminal Law Amendment Act read with Part 1 of Schedule 2 of the same Act, the minimum sentence prescribed in respect of rape as contemplated in section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, involving infliction of grievous

bodily harm, is imprisonment for life.

In terms of section 51(1) of the Criminal Law Amendment Act read with Part 1 of Schedule 2 of that Act the minimum sentence is imprisonment for life when the death of the victim was caused by the accused in committing the offence of rape. The defence has referred the Court to the case of S v Willemse 2011(2) SACR 531 at page 539, paragraph 25 as a case to be considered in relation to the conviction of rape as a consideration to deviate from the minimum sentence prescribed but no submissions in this regard were made in relation to murder and other counts. The defence however requested the Court to have regard to the personal circumstances of the accused in respect of all the counts. The Court has considered the circumstances of the Willemse case and it has found that that case is distinguishable from this case. Willemse dealt with two counts of rape committed on one complainant which followed closely upon one another, i.e. on her vagina and her anus. The Court found in that case that there were substantial and compelling circumstances, having regard to the nature of the offences, which in its view could have been treated as one. This case however involves serious grievous bodily harm inflicted upon the victim with strangulation causing her death. The rape charge cannot be viewed in isolation. It must be

viewed in the context in which the offence on the deceased was committed which was violent and brutal. Therefore, the youthfulness of the accused, the clean record and other factors submitted cannot justify deviation from minimum sentence in the context of counts 5 and 6 or all counts for that matter.

In conclusion the Court must emphasise what was said in S v Malgas [2001] 3 All SA 220 (A) at para [25], where the Court held the following:

> "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.
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> "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."

Having taken into account all factors discussed above and

even the time spent by the accused in custody pending finalisation of the trial, the Court is of the view that there are no substantial and compelling circumstances warranting deviation from the minimum sentences prescribed in respect of counts 2, 3, 5 and 6.

As regards counts 1 and 4 and the context in which those crimes occurred the Court has considered other sentencing options and found that direct imprisonment would be the only appropriate sentences in respect of these offences.

The accused is accordingly sentenced as follows:

IN RESPECT OF COUNT 1 OF ATTEMPTED RAPE - A TERM OF 8 (EIGHT) YEARS IMPRISONMENT. IN RESPECT OF COUNT 2 OF MURDER - A TERM OF LIFE IMPRISONMENT. IN RESPECT OF COUNT 3 OF ROBBERY WITH AGGRAVATING CIRCUMSTANCES – A TERM OF 15 (FIFTEEN) YEARS IMPRISONMENT. IN RESPECT OF COUNT 4 OF ATTEMPTED MURDER - A TERM OF 10 (TEN) YEARS IMPRISONMENT. IN RESPECT OF COUNT 5 OF RAPE - A TERM OF LIFE IMPRISONMENT. IN RESPECT OF COUNT 6 OF MURDER - A TERM OF LIFE IMPRISONMENT. IT IS ORDERED THAT THE SENTENCES ON COUNTS 2, 5 AND 6 OF IMPRISONMENT FOR LIFE SHALL RUN CONCURRENTLY.

THE SENTENCES IN RESPECT OF COUNTS 1, 3 AND 4 SHALL RUN CONCURRENTLY WITH THE SENTENCE OF LIFE IMPRISONMENT IMPOSED. IN TERMS OF SECTION 103 OF ACT 60 OF 2003, THE ACCUSED IS DECLARED UNFIT TO POSSESS A FIREARM. THE EFFECTIVE TERM OF IMPRISONMENT IS LIFE IMPRISONMENT.

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NP BOQWANA
ACTING JUDGE OF THE HIGH COURT