SS03/2014

SENTENCE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: SS03/2014

DATE: 7 JUNE 2017

In the matter between:

THE STATE

and

ZWELETHU HAROLD JOSEPH MTHETHWA

S E N T E N C E

GOLIATH, DJP:

Mr Mthethwa, the accused, was convicted by this Court of murder with a form of intent, being *dolus eventualis*. The Court will now proceed to hand down sentence. Sentencing is in many instances the most difficult facet of a criminal case.

The imposition of sentence is not a mechanical process in which predetermined sentences are imposed for specific

crimes. In determining an appropriate sentence, the Court must have regard to the triad as per *S v Zinn* 1969(2) SA 537(A). The Court must therefore take into account the personal circumstances of the accused, the gravity of the crime and the interests of the community.

The Court must also endeavour to exercise a measure of mercy when sentencing an accused. The Courts are simultaneously enjoined to consider the objectives of punishment being prevention, deterrence, reformation and retribution and must decide what punishment would best serve the interest of justice when arriving at a conclusion.

A balance must be struck between the interest of the accused and that of society. The general rule is that, and I quote, as was stated in *S v Rabie* 1975(4) SA 855 (AD) at 862 G-H:

> "Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances."

Murder is considered by the Courts to be a very serious offence and one which would normally attract a severe sentence. The accused having been convicted of an offence of

murder, falling under Part II of Schedule 2 and being a first offender, should be sentenced by the Court to a minimum sentence of 15 years imprisonment in terms of Section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997.

The Court, however, has a discretion in terms of Section 51(3) of the Act, if the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence of 15 years imprisonment.

The determinative test for when the prescribed sentence can be departed from is expressed in *S v Malgas* 2001 SACR 496 (SCA) as follows:

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

In consideration of an appropriate sentence to be imposed, it is therefore incumbent upon this Court to "assess upon a

consideration of all the circumstances of a particular case whether the prescribed sentence is indeed proportionate to the particular offence".

In this regard, see *S v Vilakazi* 2009(1) SACR 552 (SCA) at 560 para 15. The criteria to be taken into account in deciding whether substantial and compelling circumstances exist was set out by Melunsky, AJA, in *S v Fatyi* 2001 SACR 485 d-e with reference to the judgment of Marais, JA, in *S v Malgas* 2001(1) SACR 469 (SCA) where the following was said:

> "The first is that a Court has the duty to consider all the circumstances of the case, including the many factors traditionally taken into account by Courts when sentencing offenders [paragraph 9]. It follows, too, that for circumstances to qualify as substantial and compelling, they need not be exceptional in the sense of seldom encountered or rare [paragraph 10], nor are they limited to those which diminish the moral guilt of the offender [paragraph 24]. Generally, however, the legislature aimed at ensuring a severe, standardised and consistent response from the Courts unless there were, and could be seen to be truly convincing reasons for a different response. In other words, the prescribed sentences were

to be regarded as generally appropriate for the crime specified and should not be departed from without weighty justification for doing so."

In *S v Malgas* (*supra*) at 481d it is stated that the minimum sentence is not to be deviated from "lightly or for flimsy reasons."

The accused was born and raised in Durban, being the youngest of seven siblings. He is 57 years old. He was previously married. He is now divorced, has one dependent child aged 15 years whom he supports financially and emotionally. The child resides with her mother in the UK. After matric the accused studied at UCT Michaelis School of Fine Art where he majored in photography. He was awarded a Fullbright Scholarship to study in the USA and completed a master's degree. He is currently self-employed as an artist. He has had numerous art exhibitions in at least 21 countries. He is a prolific and celebrated award winning artist and his impressive CV highlights the fact that he had shown impressive artistic talent.

The accused is involved in community upliftment projects. He provides financial support to disadvantaged students. He

provided emotional and financial support to his two nephews who look up to him as a father figure. Mr Mthethwa presented written testimonials of many people from many walks of life who were attest to his good character as a caring, emphatic and insightful man who can interact equally with people from all walks of life. He is also described as gentle, intelligent, gregarious, kind and generous.

Mr Mthethwa did not testify in mitigation of sentence. Two experts assessed him namely Anne Cawood, a social worker and Martin Yodaiken, a clinical psychologist. They had compiled detailed reports about various aspects of Mr Mthethwa's background, his family history, his career as well as his personal background and his personality. His personal circumstances are fully before Court.

Mr Yodaiken also conducted a psychometric evaluation. Yodaiken testified that after his detailed investigation, he concluded that Mr Mthethwa does not appear to have a predisposition to aggressive tendencies and violence. This was confirmed by Anne Cawood.

Both experts agreed that he appears to be a person with a great deal of love and respect for women and this respect is

displayed in his artwork. Both experts agree that the likelihood of the accused committing any further crime is remote, since criminality is not the fabric of his personality. Both expressed the view that Mr Mthethwa is not a danger to society and proposed that certain safeguards be put in place to ensure that he is aware of the dangers of drinking.

They therefore express the view that a custodial sentence would not be of much benefit to the accused, in particular and to society in general. Should direct imprisonment be imposed it will deprive society of his invaluable contribution to individuals, NGO's which he supports as well as to the art world at large. Both experts support non-custodial sentencing options.

Mr Booth argued that based on the fact that the accused was found guilty of murder with the intent form *dolus eventualis*, also considering the overall merits of this case, as well as the personal circumstances of Mr Mthethwa and the interest of the community, it was argued that the Court should find that there are indeed substantial and compelling circumstances which would justify a deviation from the prescribed minimum sentence of 15 years imprisonment.

That is insofar as the personal circumstances of Mr Mthethwa is concerned. Mr Mthethwa is also a first offender.

With regard to the interest of society, our society is currently experiencing high levels of violent crime, violent crime against women and children. Where a crime is prevalent in society, a severe sentence may be justified in order that it may act as a deterrent to others. See *S v Reay* 1987(1) SA 873(A) at 877C. The interests of society demand that offenders of serious crime be deterrently punished, hence the deterrent objective of sentencing as an element which seriously need to be considered in the interest of society.

If offenders are punished too lightly for serious offences, the respect which society has for law and order, would be undermined. See *S v Du Toit* 1979(3) SA 846(A). Serious crimes of this nature therefore require that the objectives of retribution and deterrence should weigh more than the objective of rehabilitation of the offender. The gravity of the offence the accused has been convicted of cannot be overemphasised. It is unimaginable to describe the horrific incident which saw a young woman attacked in the most brutal manner.

The aggravating features of the crime are overwhelming. The victim was a defenceless woman and the attack was unprovoked. The victim thus posed no threat and the evidence shows that she had alcohol in her system which lowered, or would have lowered her defences. The attack occurred in the early hours of the morning and it is common cause that the deceased was a sex worker and this fact multiplied her vulnerability. The appellant left a lounge, or the Corner Lounge, on this particular night, he went home and after about one hour and 10 minutes left for Ravenscraig Road, where he committed this horrific deed.

He had ample time to reflect while he was at home, but he was determined to confront the deceased and proceeded to execute this horrific attack. The appellant kicked the victim more than 60 times, he paused in-between the attack and elected to continue between pauses. His anger did not abate, yet he had time to reflect during pauses. His conduct during the attack, kicking the deceased to the head, the face and the body, and the manner in which he conducted himself during this attack by lifting the body of the deceased is indicative of his disrespect for the bodily integrity of the deceased.

A further aggravating factor is the serious nature of the injuries

sustained by the deceased. The injuries are indicative of a high degree of force. She suffered a total liver injury. The liver was virtually torn in half through the lobes. She had various rib fractures and abrasions as well as blunt force injuries to the face.

Mr Yodaiken indicated that the attack was personal, or very personal. The accused elected to remain silent and chose not to disclose the reasons for his rage. He attacked the deceased viciously while she laid motionless. The experts clearly did not investigate all layers of the accused and merely stated that he acted out of character.

The question that has not been answered to date is: what went wrong? The accused persisted with his defence of memory loss, or lack of recall, which was introduced belatedly during trial proceedings. This was clearly an attempt to deceive the Court and reduce his blameworthiness. The accused persisted with suggestions made by the experts that alcohol was the reason for his lack or recall, hence the recommendation in this regard that certain safeguards need to be put in place to ensure that he is aware of the dangers of drinking. The footage clearly shows that the perpetrator was not under the influence of alcohol.

The introduction of the involvement of alcohol was also clearly aimed at deceiving the Court. Whilst a lack of remorse is not an aggravating feature, the contents of the expert's reports is indicative that the accused lacks an appreciation of the seriousness of the offence. He elected not to take the Court into his confidence to explain his actions. The accused conducted himself with a flagrant disregard for the sanctity of human life. He acted in a manner that is unacceptable in any civilised society.

The callousness, cruelty and brutality of the attack, as well as the contempt displayed towards the victim, are all aggravating features.

It remains the duty of a sentencing Court to tirelessly balance the mitigating and aggravating factors in order to reach an appropriate sentence. In this regard see *S v Kruger* 2012(1) SACR 369 (SCA).

The Court also noted the comments made by Majiedt, JA, in *Mudau v S* 2013(2) SACR 292 (SCA) at para 13:

"Courts must therefore always strive to arrive at a

sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity as Corbett, JA, put in *S v Rabie:*

(a) judicial officer should not approach punishment in a spirit of anger, because being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender himself to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality."

In *S v Mhlakaza and Another* 1997(1) SACR 515 (SCA) at 518 e-g, the Court stated that:

"It is necessary to express a general note of caution. The object of sentencing is not to satisfy public opinion, but to

> serve the public interest. A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the Court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public."

The defence addressed the Court, listing various factors as substantial and compelling, justifying a deviation from the prescribed minimum sentence of 15 years. I am not persuaded that the cumulative impact of the personal circumstances of the accused should be considered as substantial and compelling.

As stated in *S v Hewitt* 2017(1) SACR 309 at 315 para 14, the accused standing as a celebrated artist who successfully exhibited worldwide does not earn the accused a special sentence. The aggravating features of the crime are overwhelming.

This is the type of case where the emphasis should fall on deterrence rather than other objectives of sentencing. The Courts need to send a clear message to tackle the scourge of gender based violence. The Court needs to send the clear message to the community and all would-be criminals that

violence against women will not be tolerated. The killing of women in general will not be tolerated. The killing of sex workers in particular, will not be tolerated.

Having taken into account all the aggravating factors as well as the mitigating factors, I have come to the conclusion that there are no substantial and compelling circumstances present that warranted a departure from the prescribed statutory minimum sentence of 15 years imprisonment. In fact, the Court is of the view, considering all the circumstances of this case, that a period longer than the prescribed minimum will meet all the objectives of sentencing and will be manifestly fair and just.

In the result, after weighing up all the relevant factors the accused is sentenced to **EIGHTEEN (18) YEARS IMPRISONMENT**.

GOLIATH, DJP