REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNEBURG)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

_____ _____
DATE SIGNATURE

CASE NUMBER: SS243/2015

In the matter of

THE STATE

V

THOKOZANI NKOSIYAKHANYA MNGENELWA **ACCUSED**

JUDGMENT

DOSIO AJ:

SENTENCE

[1] The accused has pleaded guilty to both counts. Count one is the crime of murder read with the provisions of section 51(1) and schedule 2 of the Criminal Law Amendment Act 105 of 1997 “Criminal Law Amendment Act”. Count two is the crime of robbery with aggravating circumstances as intended in section 1 of Act 51 of 1977 read with the provisions of section 51(2) and schedule 2 of the Criminal law Amendment Act as amended.

[2] For purposes of sentence this court has taken into consideration the accused's personal circumstances, the seriousness of the offence and the interests of the community. The court has borne in mind the main purposes of sentence which is deterrence, retribution, reformation and prevention.

[3] As regards the events of this fateful evening in respect to count 1 and the robbery on count two, this court has merely the accused's explanation incorporated in the guilty plea

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REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBUR

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED

_____ _____
DATE SIGNATURE

CASE NUMBER: SS 308/07

In the matter of

THE STATE

V

SEROBA FRANS **ACCUSED**

JUDGMENT

DOSIO AJ:

INTRODUCTION

[1] The accused is arraigned on three counts. The first two counts are of murder read wit section 51(1) of the Criminal Law Amendment Act 105 of 1997 ("Criminal La Amendment Act") in that the State alleges that in respect to count one he shot an killed Refilwe Martha Seroba on the 20th of January 2007 in Buccluech in the district

s well as the accounts given by the accused to the social welfare officer Maggie Mathye who interviewed him in preparation for her evidence during the sentence proceedings. This report was handed in by agreement and marked as exhibit “E”. The accused has not testified under oath.

[4] The personal circumstances of the accused are that he is originally from Tembisa at Madelakufa Squatter Camp. The parents of the accused met in Tembisa. The accused is the only child born from this relationship however he has six half brothers and sisters. There are seven children in the family and the accused is the sixth born. He was raised by his parents from birth until eleven years old. At the age of twelve years his parents terminated their relationship and the accused was taken care of by his mother alone as a single parent with the assistance of his half-sisters and half-brothers. When the accused grew up his parents were employed and provided the family with the basic needs. The accused did enjoy his childhood and got support from his family members. After his parents separated he still contacted his biological father and developed a close bond with him.

[5] The accused’s brother and the Community Policing Forum informed the social welfare officer that the accused developed bad behaviour when he was young. He started stealing at school, from the community members and the family. No one in the community suspected that he was using Nyaope.

[6] The accused is eighteen (18) years old, is unmarried and has no dependants. Prior to his arrest he was staying with his family members at Madelakufa Squatter Camp in Tembisa. The accused was staying in a shack with his family members. The Madelakufa Squatter Camp is characterized by a high rate of drug abusers who drop out of school at early ages.

[7] The accused started school at Khulasizwe Primary School in Tembisa where he completed grade 1 to grade 7. He completed grade 8 to grade 9 at Masiqxakaze High School. The accused was absent from school for some weeks and was behind at school. He then dropped out of school.

[8] The accused has never been employed and is financially dependent on his half-brother. A cousin and a half-brother informed the social welfare officer that the family is not getting along with him due to the substance he abuses. They both stated that the

behaviour of the accused is not good. The half-brother was called a few times to school as they complained about his behaviour. The Community Policing Forum in Madelakufa Squatter camp were also involved in disciplining the accused. The cousin of the accused informed the social welfare officer that the accused used to do well at school, but bunked classes. The crowd he hanged out with influenced him to abuse Nyaope. The accused prior to his arrest was involved with friends older than him who were involved in crime activities to get money to buy Nyaope.

[9] The accused informed the social welfare officer that he started smoking Nyaope at primary School and that prior to his arrest he was smoking Nyaope every day, more than twice. When he smoked it he felt good and had energy. When he did not smoke it he felt pain in his stomach, was dizzy, restless, had difficulty to sleep, and was weak and tired. The accused told the social welfare officer he committed the crime to get money to buy Nyaope.

[10] According to the social welfare officer the accused has taken responsibility for the allegations made against him. The accused informed the social welfare officer that he feels embarrassed of his actions.

[11] The social welfare officer submitted that peer pressure played a negative role on the accused when the accused was eleven years old. During the commission of the crime the accused was seventeen years old. He murdered his aunt after she refused him money to buy drugs. He also robbed an innocent woman, in respect to count two, to sell her cell phone in order to buy Nyaope.

[12] The social welfare officer believes that the environment in which the accused was living might have influenced the accused to commit crime. The Community Policing Forum complained about how crime takes place in their community due to Nyaope abusers. The social welfare officer believes the drugs were a contributing factor to the accused committing the crime. Due to the fact that the accused pleaded guilty to the crime the social welfare officer is of the view that the accused is remorseful. The social welfare officer submitted that the accused is a danger to himself and to the community and that he needs to be placed in a Drug and Treatment Center which will help him to rehabilitate. Due to the accused being a minor the social welfare officer recommended that the accused be sentenced in terms of the Child Justice Act 75 of 2008, “Child Justice Act”. The social welfare officer did not recommend imprisonment, citing the fact

that in terms of section 77 (1) (b) of the Child Justice Act, imprisonment must only be imposed as a measure of last resort. The social welfare officer recommended that the postponement or suspension of the passing of sentence may be a good option if it was made a condition that the accused attend counselling and drug treatment at the Dr Fabian and Florence Ribeiro Treatment Centre in Cullinan.

[13] In respect to the seriousness of the offences this court would like to state as follows:

In respect to count 1

The deceased was the aunt to the accused. She lived on the same premises as him. On this day, although the aunt insulted him, there are no grounds of provocation on the side of the deceased. She was an innocent victim, who due to drinking too much became drunk and was lying on the ground at the time the accused and his friends came across her. The accused watched how Lungisani Vumbi raped the deceased, after which the accused took out a knife and slit her throat. He watched as Lungisani Vumbi intervened and slit the throat of the deceased for a second time. He watched as Boilundou Tunzi cut the deceased on her private part with a broken beer bottle. He then left the deceased at the scene. It is only after some weeks that he informed his brother and sister about the involvement in the killing of the deceased. Although this accused confessed, he did so after a very long time. The accused showed no mercy to his aunt during the commission of the offence. It almost seems like it was a revenge attack for her not giving him money and for insulting him. Although he was not charged for rape, he was still an accomplice in respect to that crime and also did nothing to prevent Boilundou Tunzi from cutting the genitals of the deceased.
Instead of alerting the police he remained quiet for some time.

[14] This is a savage attack on an innocent victim with the aim of not only degrading her by raping her, but also disfiguring her by cutting her genitals. It is clear the deceased did look after the accused as he shared a shack with her and slept in her shack. The deceased to a certain extend was caring for the accused as she would pay for food when his own mother could not buy food. The deceased did not deserve this brutal attack inflicted on her.

[15] It is clear that the death of the deceased has had an impact on the children of the deceased. The daughter of the deceased after the incident has found it difficult to sleep as the memories of the incident were vivid in her mind. The deceased was also their

breadwinner. After the funeral of the deceased the family has started to struggle financially. From the report of Mrs Mathye is appears that after the death of the deceased her children are experiencing poverty as she deposited money every month to support her children.

[16] The brother of the deceased informed Mrs Mathye that the family cannot forgive the accused as the deceased was brutally killed.

[17] The post mortem report states that there is external evidence of sharp trauma in the form of a penetrating incised wound to the neck and a post-mortem wound of the genital and pubic area. There is also evidence of blunt trauma to the face in the form of lacerations and a loose tooth. The penetrating incised wound to the anterior neck measured 12.2 cm long and 5.1 cm wide. The carotid arteries were severed bilaterally as well as the jugular vein, the pharynx and oesophagus. The genitalia involved in the incised area included the prepuce, the right vestibule, the right labia majora and the clitoris. The photos handed in showing the area where the deceased was found and the condition in which her body was deformed by the attack are horrific, and confirms the callousness of the attack.

In respect to count 2

Whilst craving Nyaope and having no money to pay for it, he attacked the complainant on count two by stabbing her with his knife and thereafter took her cell phone valued at R1500-00 and money to the amount of R130.

[18] In respect to the interests of the community, this court has taken note of the fact that the community observes the sentences that courts impose and the community expect that the criminal law be enforced and that offenders be punished. The community must receive some recognition in the sentences the courts impose, otherwise the community will take the law into their own hands. If a proper sentence is imposed it may deter others who are tempted to use drugs and commit similar crimes to be deterred in committing them.

[19] The provisions of the Criminal Law Amendment Act with specific reference to section 51 (1) dictates that if an accused has been convicted of an offence referred to in part 1 of schedule 2, he shall be sentenced to life imprisonment.

[20] The murder on count one was planned and in addition it was committed by a group of persons acting in the execution or furtherance of a common purpose.

[21] The provisions of the Criminal Law Amendment Act with specific reference to section 51 (2) dictates that notwithstanding any other law but subject to subsection (3) and (6), an accused who has been convicted of a Part two of Schedule 2 offence, which in this instance includes robbery with aggravating circumstances, he shall in the case of a first offender be sentenced to a period of imprisonment for a period of not less than 15 years, and in respect of a second offender to imprisonment for a period not less than 20 years.

[22] The State has accepted that the accused was seventeen (17) years old at the time of the commission of both offences. Accordingly the minimum prescribed sentences are applicable.

[23] Section 51(3) of the Criminal Law Amendment Act states that if any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in these subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence.

[24] As stated by the learned Marais JA in the case of *S v Malgas* 2001 (1) SACR 469 SCA, paragraph I;

"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."

[25] The court has notwithstanding the application of the prescribed minimum sentences, considered other sentencing options. This court does not find that a fine, a suspended sentence or correctional supervision is appropriate in these circumstances.

[26] In the case of *S v Mabuza & Others* 2009 (2) SACR 435 (SCA) at paragraph 23, the learned Cachalia JA stated that;

"…So while youthfulness is, in the case of juveniles who have attained the age of 18, no longer per se a substantial and compelling factor justifying a departure from the prescribed sentence, it often will be, particularly when other factors are present. A court cannot therefore, lawfully discharge its sentencing function by disregarding the youthfulness of an offender in deciding on an appropriate sentence, especially when imposing a sentence of life imprisonment, for in doing so it would deny the youthful offender the human dignity to be considered capable of redemption."

[27] In *S v Matyityi* 2011 (1) SACR 40 (SCA) at paragraph 14 the learned Ponnan JA stated in respect to 'relative youthfulness'

"It is trite that a teenager is prima facie to be regarded as immature and that the youthfulness of an offender will invariably be a mitigating factor, unless it appears that the viciousness of his deeds rule out immaturity…the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduce his blameworthiness. Thus whilst someone under the age of 18 years is to be regarded as naturally immature the same does not hold true for an adult".

[28] In the case of the *Centre for Child Law v Minister of Justice and Constitutional Development and others* 2009 (2) SACR 477 (CC) the learned Cameron J recognised that youthful offenders may be in more need of protection and that their crimes may stem from immature judgment, however at paragraph [29] he stated;

"…the children's rights provision itself envisages that child offenders may have to be detained. The constitutional injunction that "(a) child's best interests are of paramount importance in every matter concerning the child" does not preclude sending child offenders to jail"

[29] The facts of this matter are similar to the facts of the matter before the learned Brand JA in the matter of *Du Plooy v The State* [2014] ZASCA 200 where the appellant was sentenced to 12 years imprisonment on each of the two counts of murder. The learned Carelse J in the Circuit Local division of the High Court for Delmas ordered that twelve years imprisonment on count two would in terms of section 280(2) of the Criminal Procedure Act run co-currently with the twelve (12) imprisonment imposed on count one. The appeal court upheld the sentence imposed by the court a quo. The appellant in that matter was seventeen (17) years old at the time of the commission of the

offence and had spent the whole day drinking and smoking crack with a friend. He started using cannabis, crack and heroin from the age of fourteen (14). After asking his parents for money to buy more drugs an argument arose between himself and his parents over his drug abuse. This angered the accused. Accordingly he hit both his parents with a cricket bat causing fractures to their skulls, and later in the company of his friend stabbed his mother and father a further 20 times in their chest and later slit the throat of his father from ear to ear. The accused also pleaded guilty to both counts of murder.

[30] The crime of murder and the cutting of the genitals of the deceased, are heinous. A sentence of life imprisonment is applicable in these circumstances. The facts before me are slightly different to the case of *Du Plooy supra*, however, the accused is still young enough to make rehabilitation a real prospect even after a long period of imprisonment. In addition, the accused made a confession, pleaded guilty, and is willing to help trace the other two remaining accused. It is also clear that no one would have known of this offence had the accused not elected to tell anyone about it. Another factor which is clearly mitigatory is that the accused has a substance dependence problem, and that at the crucial time of the commission of these offences was most probably under the influence of narcotic drugs. This court accepts that the abhorrent nature of the crimes, must at least to some extent be ascribed to that influence. These circumstances, cumulatively assessed, render a sentence of life imprisonment unjust. They qualify as substantial and compelling circumstances.

[31] Counsel for the Defence requested this court to give the accused a second chance.

[32] Irrespective of these mitigating factors, I come to the conclusion that the crimes which the accused committed are so severe that a long term of incarceration cannot be avoided.

[33] Although the social worker Mrs Mathye recommended that the accused be referred to a six week rehabilitation program this court does not regard this sentence as appropriate. There are no guarantees that after such a short period of time the accused will be rehabilitated. Although the social welfare officer has stated that a prison usually only has a substance program and not a treatment program for drugs, this court still finds it inappropriate to send him to the rehabilitation centre suggested by the social welfare officer without a custodial sentence being imposed.

[34] This court in addition to considering the accused's drug dependency, must also consider the interests of the community as well as prevention and deterrence. To focus on the well-being of the accused to the detriment of the interests of the community would result in a distorted and warped sentence. The accused in his current state is a danger to the community. Failure to address his drug dependency may illicit a further attack on the community in order to address and satisfy his drug dependency. If the prison is only able to address the substance component of the drug dependency then the court would order that he also receive some treatment in respect to the drug dependency.

[35] This court has attempted two weeks prior to this matter being placed on today's roll to ask the State Counsel to obtain the evidence of a correctional supervision officer who could assist the court with the best programs available pertaining to drug users in prisons, however, the State Counsel for the reasons placed on record was unable to do so. The State Counsel did however consult with a correctional supervision officer today who advised him that the court can make an order that the accused be kept at Boksburg prison with an order by the court that the accused be referred to the rehabilitation centre referred to by the social welfare officer.

[36] The accused has a previous conviction of robbery committed on the 23rd of February 2014. There is no evidence placed before this court whether the robbery was one envisaged to fall under a Part two of schedule 2 offence. It does not appear this previous conviction was one of robbery with aggravating circumstances or the robbery of a motor vehicle. Accordingly this court will deal with the accused as if he was a first offender of robbery with aggravating circumstances.

[37] The cumulative effect of sentences must also be considered because the accused has been in custody for a few months.

[38] In the result the following order is made:

The accused is sentenced to 10 years imprisonment on count 1

The accused is sentenced to 10 years imprisonment on count 2.

In terms of section 280(2) of the Criminal Procedure Act, the court orders that 10 years imprisonment imposed on count two will run concurrently with the ten (10) years imprisonment imposed on count one.

[39] This court orders that the accused be kept at the Boksburg prison youth facility and that he be brought on Monday the 18th of May 2015 to the Dr. Fabian and Florence Ribeiro Treatment Centre in Cullinan to complete the six week treatment program after which he will be returned to the Boksburg prison to complete his term of imprisonment and any additional programs Boksburg prison has in respect to substance abuse programs.

[40] In terms of section 103 (1) (g) of the Firearms Control Act 60 of 2000, the accused is declared unfit to possess a firearm.

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D DOSIO
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the State	Adv Rampyapedi
On behalf of the Accused	Adv Dube
Date Heard:	15 May 2015
Handed down Sentence:	15 May 2015