

community. The court has borne in mind that the main purposes of sentence are deterrence, retribution, reformation and prevention.

THE PERSONAL CIRCUMSTANCES OF THE ACCUSED

- [2] The personal circumstances of the accused were obtained from a pre-sentence report compiled by the probation officer Ms Mulalo Nemutandani. The personal circumstances are as follows;

The accused was born in the Eastern Cape and is the second last born child in a family of 6 children. He and all his siblings were raised in the care of both his parents. He had a normal childhood and never experienced any form of abuse. He grew up with the love, care and protection from his parents. He commenced his primary schooling in 1995 at Eskhobeni Primary School where he did grade 1 until grade 7. He decided to drop out of school after passing grade 7 due to peer pressure and he never went back to school. He lost both his parents and also three of his siblings. This affected him badly causing him to relocate from the Eastern Cape to Johannesburg where he stayed with his older sister. The probation officer's report states that accused's sense of belonging was catered for by his family and his childhood did not have an impact on his current behaviour.

The accused has two children who are born from different mothers aged 11 years and 7 years old respectively. The 7 year old child stays with his mother in Port Elizabeth, whereas the 11 year old child is in the care of the accused. The accused is presently in a relationship with his partner for 4 years, however, they do not have a child together. The accused has never secured any formal permanent employment as he has always been employed under a contractual basis. He has worked at various places, his final place of employment was in RAW industry where he was employed as a general worker in 2015 and was earning R3500 per month. The accused has 2 previous convictions for assault with intent to cause grievous bodily harm. His first sentence he was given 2 years imprisonment and his second sentence was a five year suspended sentence. It is clear to this Court that the accused has not learnt anything from his previous convictions and neither have the sentences imposed deterred him in anyway from committing such a serious crime.

The probation officer's report states that the accused does not acknowledge the charges and that on the day of the incident he was not at home as he was assisting his

sister's partner to find a place to stay. He reported to the probation officer that he left home early in the morning and he was surprised when he was fetched by members of the community at the tavern and accused of raping a child. The accused reported that he feels he has been failed by justice because he is being convicted for a crime he did not commit, accordingly, he maintains his innocence which shows that he is not remorseful about his actions.

THE SERIOUSNESS OF THE OFFENCES

- [3] This was a very young child aged 4 years old. She was brutally raped and strangled. Her body was then concealed. The accused has shown no signs of remorse and has put this court through a lengthy trial, disputing all the chain evidence that related to the conveyance of the body from the scene up to when the post-mortem took place. It is clear that this child was well known to the accused and she trusted him. He however breached this trust and lured this child to his home after which he raped and murdered her. It is clear that this must have been a very painful and traumatic ordeal for this child. The seriousness of this offence is heightened by the fact that this adult man used a ligature to strangle this innocent and helpless child. The post-mortem report showed injuries to this child's vagina, caused by the penetration and also injuries on her neck caused by the strangulation. It is clear to this Court that his actions were dictated to by pure sexual gratification.

- [4] What heightens the callousness of his deeds is that he hid the body of the deceased under his bed as if she was not even a human being. There was no respect to her body or to the feelings of her family should they discover the body under the bed. The family has been robbed of a loved one in the worst possible way. According to the probation officer, the family of the deceased faced secondary victimization from the accused and his family because they were swearing at the family for having opened up a case against the accused.

- [5] The probation officer's report states that this offence has affected the mother and siblings of the deceased greatly. The mother reported that what hurt the most was that the accused was her best friend's brother and she never thought the accused would do anything like this. The probation officer observed that the mother still breaks down in tears every time she attempts to explain the incident to someone else. Every time she sees other children playing in the streets she gets sad and relives the pain all over

again as she would think that she might see the deceased again. The psychological impact on this mother must be very great as the death of her child was unexpected and according to the probation officer it still causes her nightmares as she keeps thinking about the pain that her child might have gone through while the accused was raping her.

- [6] This incident has also caused financial hardship to the family of the deceased, in that the mother's partner reported that the family did not have any money to bury this deceased. They also did not have any policies, accordingly a loan of R8000 was taken, which unfortunately did not cover the funeral costs. Due to the partner's employment income, he did not qualify for more money and had to go to loan sharks to borrow more money to give the deceased a decent burial. The mother's partner could subsequently not afford the loan repayments and as a result has been blacklisted.

- [7] It is a sad reality that crimes of this nature are increasing against children. Children in this country are entitled to their rights and also the freedom to enjoy an undeterred and happy childhood and to roam and play in our streets. This legitimate right should never be curtailed by the likes of the accused. There a plethora of awareness campaigns against the abuse and violence of children, yet it seems to have no impact, because crimes against children continue unabated.

- [8] The crime of rape entails power and control. Children are the vulnerable groups and most perpetrators take advantage of their vulnerability. The acts of the accused not only killed the deceased, but also left a deep and emotional impact on the life of the deceased's mother and the community where this child resided. The family of the deceased were forced to restructure their lives to adjust to this void caused by the accused's actions. The family of the deceased, according to the probation officer's report, have found themselves entangled in a complex web of emotions an reactions resulting from the actions of the accused. The family have undergone an overwhelming, frightening and painful experience, which in has also sent shock waves in the community where they reside, as it is after all the community who got actively involved to find the deceased and who also experienced this gruesome finding.

INTERESTS OF THE COMMUNITY

- [9] There is justification for society demanding that an accused who has raped and killed a child to be sentenced harshly. Such a person is regarded by society as inherently evil. These criminals are the most feared and loathed. Society demands protection from these criminals and requires courts to impose heavy sentences to remove these criminals from the society, thereby preventing them from continuing to commit such atrocious crimes. Retribution and deterrence needs to come to the fore when sentencing these types of criminals.
- [10] The accused's personal circumstances have not demonstrated anything out of the ordinary and accordingly recede into insignificance against the gravity of the offences he has perpetrated.
- [11] Due to his lack of remorse, it is highly unlikely that he can be rehabilitated. Rehabilitation can only commence once an accused accepts full responsibility for the crimes he has committed. Remorse is what motivates change, and if it is lacking, there will be no change in an accused's behaviour. The accused poses a significant risk to other children. He is a danger to society and his permanent removal is justified. The accused also has a history of violent behaviour.

Sentences applicable

- [12] In respect to counts 2 and 3, both these offences fall within the ambit of part 1 of schedule 2 offences. Section 51 (1) of the Criminal Law Amendment Act 105 of 1997 ("Criminal Law Amendment Act") states that the court shall sentence the accused to a term of life imprisonment in respect of each of these counts unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.
- [13] In respect to count 2, this rape was committed on a victim below the age of 16 years, and there was the infliction of grievous bodily harm to her neck which resulted in her death. In respect to count 3, the death of the victim was caused whilst the accused committed the crime of rape. Accordingly, both counts 2 and 3 fall within the ambit of part 1 of schedule 2.

- [14] This court has notwithstanding the applicability of prescribed minimum sentences in respect to counts 2 and 3, still considered other sentencing options. However, this court does not consider any other sentence, apart from direct imprisonment as appropriate, due to the heinousness of the crimes, and also due to the accused not taking responsibility for his actions.
- [15] 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, then the court may impose a lesser sentence.
- [16] 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.”
- [17] This court has considered the fact that the accused has been in custody for approximately 12 months, however, seen against the background of his violent tendencies, this court finds that he is a danger to the community and must be removed from society. It is this Courts duty to protect vulnerable children in the society and to act whenever their rights are violated, in order to restore faith in the South African justice system.
- [18] The fact that the accused is 37 years old, becomes totally insignificant against the background of the serious crimes he committed. This is not a substantial or compelling circumstance not to impose the prescribed minimum sentences. His reluctance to play open cards with this court, has prevented this court from understanding why he transformed himself from an ostensibly normal person into a child rapist who violently raped and killed this child.

SENTENCE

- [19] In respect to **count 1**, on the charge of kidnapping the accused is sentenced to **two (2) years imprisonment**.

- [20] In respect to **count 2**, on the charge of rape, the accused is sentenced to **life imprisonment**.
- [21] In respect to **count 3**, on the charge of murder, the accused is sentenced to **life imprisonment**.
- [22] In terms of section 39 (2)(a)(i) of the Correctional Services Act 111 of 1998 ("Correctional Services Act") any determinate sentence of incarceration in addition to life imprisonment is subsumed by the latter. Accordingly, in terms of section 39 (2)(a)(i) of the Correctional Services Act the sentence on count 1 is automatically subsumed under the life sentence imposed.
- [23] This Court orders that the life imprisonment imposed on count 3 will run concurrently with the life imprisonment imposed on count 2.
- [24] The court requests the Department of Correctional Service to encourage the accused to participate in any sex offender programs that it may offer. It is also recommended that the accused should engage in psychotherapy with an appropriately trained clinical psychologist whilst in prison.
- [25] In terms of section 103 (1) of Act 60 of 2000 the accused is declared unfit to possess a firearm.



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ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the State	Adv T. Buitendag
On behalf of the Accused	Mr Nobangule

Handed down Sentence:	15 March 2018
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