

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: SS 031/2021

Reportable: NO

Of interest to other Judges: NO

Revised: NO

16/03/2022

IN THE MATTER BETWEEN:

THE STATE

VERSUS

SPHAMANDLA KHUMALO

Accused No: 1

BERTHWELL NKOSI

Accused No: 2

JUDGEMENT: SENTENCE

MOILA AJ:

[1] Mr Khumalo on the 09th of March 2022, this court found you guilty of Murder of Luciano Tapers, Rape of a minor, attempted rape and housebreaking with intent to rob and robbery with aggravating circumstances.

Mr Nkosi, this court found you guilty of murder of Luciano Tapers and house breaking with intent to rob and robbery with aggravating circumstances.

[2] The court will now hand down an appropriate sentence for the crimes you have been convicted of.

[3] In considering an appropriate sentence, the court is mindful of the foundation sentencing principle, that the punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy.

In addition to this, the court also considers the purposes of punishment, namely deterrence, prevention, rehabilitation and retribution.

In *S v Swart*¹ the court held that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed.

[4] In order to impose a sentence in which all objectives are embodied, the court has to consider and balance evenly, the nature and seriousness of the crimes committed, the personal circumstances and your needs and the impact of the crimes on the community and the victims in particular.

[5] I will now turn to the triad factors, starting with your personal circumstances:

[6] Mr Khumalo, you testified that you are 32 years' old and you have passed grade 7. You are single but residing with the mother of your children. You have six (6) children who are residing with their mothers. Prior to your arrest you were a painter, earning R180,00 per day. You intended to plead guilty from the beginning to all counts, to show remorse and to apologise to the people you have wronged. Your wish is for them to forgive you. You apologize to all the women living on this earth and to victim you raped.

Your legal representative has conceded that you have been convicted of serious offences. The victims were attacked in the sanctity of their homes.

You have pleaded guilty and admitted that you have committed these offences, and that you are a candidate for rehabilitation.

[7] Mr Nkosi, you testified that you are thirty (30) years old, from Zimbabwe. You were self-employed before arrest, working as a painter and a plumber. You are married with two (2) children, a boy and a girl, your wife is in Zimbabwe. You do not know why accused no one (1) is implicating you. You have never broken into a person's house nor killed a person. You are in South Africa legally.

[8] I now turn to the second factor to be considered being the crimes you have been convicted of, the seriousness of the offences and the impact thereof.

The serious nature of the offences need no undue emphasis. What makes the accused's action all more reprehensible is that the complainant's were supposedly safe in the sanctity of their homes, with doors locked and windows closed. The one place in a troubled world where everyone is entitled to feel safe and secure.

[9] Murder is essentially a violation of the victim's constitutional right to life. You carried out a vicious assault without regard to the consequences therefore and specifically whether he dies or not.

You have both informed the court that you were employed prior arrest.

What aggravates this matter is that you could only have been motivated by greed.

[10] It is true that rape is a serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, dignity and the

¹ S v Swart 2004 (2) SACR 370 (SCA).

person of the victim. (see *S v Chapman*²).

[11] The court will be failing in its duties if it ignored the interest of the community and the expectations and demands of the community about crimes of this nature.

In *S v Mhlakaza and another*³, The court held that given the high level of violence and serious crimes in this country the emphasis in sentence should be on retribution and detention.

It is undeniable that we are experiencing high levels of violent crimes and in particular violent crimes against women and children.

There is a general outcry for protection from criminals who commit violent crimes.

The court also takes into account the interest of the deceased family and the impact of these crimes on the victims.

[12] Mrs D[....], the deceased mother testified that the late Luciano was 22 years old when he passed away and her daughter was 14 years old when she was sexually penetrated. Further that they are still tormented by the events of that night. Her daughter will never be the same again. When she hears sounds at night she goes to the curtains to peep. She doesn't sleep.

They had to move out of their house at 84 Great Britain, children had to relocate schools.

They attended counselling as a family.

[13] The legislature has recognized that certain serious crimes must be met

² *S v Chapman* 1997(2) SACR 3 SCA.

³ *S v Mhlakaza and another* 1997(1) SACR 515 SCA.

with a minimum sentence. You have both been convicted of murder falling under part I of schedule 2 of the Criminal Law Amendment Act⁴ and housebreaking with intent to rob and robbery with aggravating circumstances falling under part II of schedule 2 of the Criminal law Amendment Act.

[14] Mr Khumalo, you have also been convicted of rape of a minor which also fall under part I of schedule 2 of the Criminal Law Amendment Act.

The courts have a discretion in terms of section 51(3) of the Criminal Law Amendment Act to impose a sentence lesser than the prescribed minimum sentence if it is satisfied that substantial and compelling circumstances exist, which viewed cumulatively will justify the imposition of a lesser sentence.

[15] The court has a duty to implement these sentences unless there are truly convincing reasons for departing from it. (see *S v Malgas*⁵ and *S v Matyityi*⁶)

It held that, in determining whether there are substantial and compelling circumstances present, a court must be aware that the legislature has set a benchmark of the sentence that should ordinarily be imposed for a specified crime, and that there should be truly persuasive reasons for a different response.

In deciding whether substantial and compelling circumstances exist, the court is required to look at all the mitigating and aggravating factors, and consider the cumulative effect thereof.

[16] Other than your personal circumstances there is not much that can be said in your favour. On the other hand, the intrusion into the home of people cannot be disregarded. Neither can the physical attack on them. Indeed,

⁴ Criminal Law Amendment Act 105 of 1997.

⁵ *S v Malgas* 2001 (1) 469 SCA.

⁶ *S v Matyityi* 2011(1) SACR 40 (SCA).

these factors serve as aggravation. Nothing lends itself to sympathise with you. The injuries sustained by the complainants/victims illustrate the brutality with which the attack on the defenceless people occurred.

Mr Khumalo, you alleged that you are remorseful. Before a court can 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. The accused is expected to place detail before the court of his remorse. Which was not done.

[17] In *S v Beyi*⁷ the court held that I quote

"appellant, as a father and the sole breadwinner of 8 children, should have known, more than anyone else that he was placing the wellbeing of his family in jeopardy by resorting to crime"

[18] The following are found to be aggravating in the circumstance:

I am satisfied that the prescribed sentence of 15 years' imprisonment is fully justified in respect of the robbery committed by both of you. The robbery was planned; knives were used to subdue the victims.

Life of a young man was cut short. The family is still tormented and had to relocate.

[19] In the Supreme Court of Appeal decision, *S v PB*⁸, the court confirmed the trial court's decision that, as no substantial and compelling circumstances were present, there was no justification to deviate from the minimum sentence.

⁷ *S v Beyi* 2011 (2) SACR 23.

⁸ *S v PB* 2011 (1) SACR 448 (SCA)

Of further relevance in *S v PB* (supra) is an issue which all our courts should be taking into consideration and which is of particular relevance in this matter, where the appellant did not use a condom. Tshiqi JA stated at 455: 'The appellant did not use a condom. This is yet another aggravating factor, specifically at a time when the whole world is grappling with the scourge of the HIV and Aids pandemic. The majority of rape victims are not only left to deal with the physical, emotional and psychological trauma of the rape, but are also exposed to the possible hardships associated with living with HIV, its side effects and stigma. The only manner in which victims may be protected is through anti-retroviral drugs, which also have side effects. It is not clear ex facie the medical report (J88) whether or not this precaution was taken with regard to this young girl. No evidence was led in this regard.'

[20] No condom was used *in casu*. This is yet another aggravating factor which counts against Mr Khumalo.

[21] Having considered all the evidentiary material, I'm of the view that there are no substantial and compelling circumstances justifying the imposition of a lesser sentence. On the contrary, there are more aggravating features in the evidence than mitigating circumstances.

The court considered various decided cases for guidance in giving an appropriate sentence including *Madiba v S*⁹.

The court is, after careful consideration of all the factors placed before it, of the opinion that in the circumstances an appropriate sentence is:

[22] Accused no one (1)

Count no 1-murder: life imprisonment Count no 2-Rape: life imprisonment

Count no 3 -Attempted rape: 5 years' imprisonment

Count no 7 - Housebreaking with intent to rob and robbery with aggravating circumstances: 15 years' imprisonment

In terms of section 280(2) Criminal Procedure Act¹⁰ the sentences in count 2, 3 and 7 shall run concurrently with the sentence in count 1.

[23] Accused no two (2)

Count 1-Murder: life imprisonment

Count 7- Housebreaking with intent to rob and robbery with aggravating circumstances: 15 years' imprisonment

In terms of section 280(2) Criminal Procedure Act the sentences in count 7 shall run concurrent with the sentence in count 1.

[24] Orders:

a) In terms of section 103(1) of Firearms Control Act¹¹- no order is made. (Both accused automatically deemed unfit to possess a firearm)

b) In terms of section 50(2) (a)(i) of Criminal Law (sexual offences and related matters) Amendment Act¹² the court orders that the particulars of the accused number one (1) be included in the National Register for Sexual Offences.

c) In terms of section 120(4) Children's Act¹³ accused number one (1) is found unsuitable to work with children and his particulars must be included in Part B of the National Child Protection Register.

⁹ *Madiba v S* 2015 JOL 33686 SCA.

¹⁰ Criminal Procedure Act 51 of 1977.

¹¹ Firearms Control Act 60 of 2000.

¹² Criminal Law (sexual offences and related matters) Amendment Act 32 of 2007.

¹³ Children's Act 38 of 2005.

d) If the complainant is present or the mother of the deceased, the court informs them that in terms of section 299A Criminal Procedure Act they have a right to make representations when placement of the accused on parole or under correctional supervision is considered or to attend any relevant meeting of the parole board.

N.L MOILA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

On behalf of accused 1: Mr S. Nobangule
Instructed by Legal Aid South Africa

Accused 2: Advocate Thipe
Instructed by Legal Aid South Africa

On Behalf of the State: Adv. V Maphiri
Instructed by Director of Public Prosecutions (DPP)

Date Judgement handed down: **16 March 2022**