IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION

MTHUNZINI

Reportable/Not reportable

CASE NO: CCD14/2022

In the matter between:-

THE STATE

and

[redacted]

JUDGMENT

Delivered on 18 March 2022

MOODLEY J

The accused was indicted in this court on the ffg 3 charges:

COUNT 1:

RAPE in contravention of section 3 read with sections 1, 55, 56(1), 58 and 60 of the of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with the provisions of section 51and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, further read with the provisions of sections 256 and 261 of Act 51 of 1977.

The state alleged that on or about 8 September 2019 and at or near Dokodweni in the district of Mthunzini the accused unlawfully and intentionally committed more than two acts of sexual penetration with the female complainant without her consent.

The provisions of Section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1977 are applicable to count 1 because the victim was raped more than once.

COUNT 2:

RAPE in contravention of section 3 read with sections 1,55, 56(1), 57 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with the provisions of section 51 of Part I OF Schedule 2 of the Criminal Law Amendment Act 105 of 1997 and further read with the provisions of sections 256 and 261 of Act 51 of 1977.

The state alleged on or about 14 June 2020 and at or near Dokodweni the accused, unlawfully and intentionally committed an act of sexual penetration with Amanda Mthembu, a female child, without her consent.

The provisions of Section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 are applicable to count 2 because

(i) The victim was a child below the age of 16 years.

(ii) The offence involved the infliction of grievous bodily harm.

COUNT 3:

MURDER read with the relevant provisions of section 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

The state alleged that on or about 14 June 2020 and at or near Dokodweni the accused unlawfully and intentionally killed the aforesaid Amanda Mthembu.

The provisions of Section 51(1) and Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 are applicable to count 3 in that the death of the victim was caused by the accused in committing or attempting to commit or after having committed the offence of rape as contemplated in Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

The accused who is legally represented by Mr SG Masondo pleaded not guilty to all the charges. He elected not to disclose his defence and disputed all the allegations by the state, including the DNA forensic results. Mr MES Buthelezi who represents the state herein commenced the state case by leading the evidence of the

complainant in Count 1. After her evidence in chief was concluded, and prior to commencement of cross-examination, the court was advised that the accused had rethought his plea and intended making certain admissions.

Subsequently the accused's admissions in terms of S220 of the CPA 51 of 1977 were admitted into evidence as EXh A. The Accused admitted that he was fully appraised of the relevant minimum prescribed sentences. He admitted further that he intentionally and unlawfully penetrated the vagina of the complainant in count 1 with his finger and his penis. He also admitted that he raped the complainant in Count 2 and then murdered her by strangling her because she threatened to expose him to her uncle, whom he knew. The accused also admitted the contents of the ffg reports:

1 Exh B The J88 report on the complainant in count 1: in this report the examining doctor recorded that the complainant was emotionally distressed and crying. She had bruises on both sides of her neck and on, in and around her genitalia which caused her so much pain that she could not be examined through insertion of even a finger.

2 Exh C and D Post mortem report and J88 reports on the deceased in count 2 and 3 respectively

The J88 and the PM recorded that the gynaecological examination on the deceased revealed multiple abrasions and tears in the genitalia; the conclusion is 'definite forced vaginal penetration evident.'

The cause of death of the deceased as recorded in the PM report is blunt force trauma to head and neck'. The injuries included serious trauma to the skull and neck which are not consistent with the accused's allegation that he strangled the deceased.

3 the photo album of the deceased in Counts 2 and 3, depicting the naked and decomposing state in which she was found, was admitted as Exh E

4 Exh F The DNA forensic reports which matched the accused's DNA with that of his victims

5 Exh G The birth certificate of the accused reflecting his DOB as 30 Jan 2003

The State thereafter closed its case and the defence led no further evidence and closed the accused's case. The accused was convicted as charged on all 3 counts.

6 The State proved no previous convictions against the accused. SAP 69 admitted as Exh H

Given the age of the accused at the time of the commission of the offences and the nature of the offences, and being mindful of what the SCA said in *Sv Mholongo* 2016(2)SACR 611 (SCA) at para 22 -23 the court held that pre-sentencing and victim impact reports ' properly prepared, would have given the court deeper insights into the personality and identities of the appellant and the complainant, why he committed the crime and how she reacted to it,' I deemed it prudent to call for presentence reports and a victim impact report.

The matter was adjourned pending the finalisation of the reports which Mr Buthelezi helpfully expedited with the cooperation of the relevant stake holders. I place on record the court's appreciation for their assistance.

At the resumed hearing on 17 March 2022, the ffg reports were admitted by consent:

7 Exh J the probation officers report – I have drawn some of the more pertinent excerpts from Ms Biyela report :

Page 3 – background

Page 4 education

Page 5 appearance and behaviour during the interview

Page 6 criminal record – no PC but there was an incident where the accused was in conflict with the law in April 2020.

Accused's social behaviour

Page 7 Interview with the victim in count 1-

Page 8 Interview with the deceased's family

Psychological trauma

Interview with the accused's family

Page 9 15 Findings

Page 10 recommendations

8 Exh K – the Correctional Supervision suitability report

Outcome of the assessment – accused is not a suitable candidate : The correctional supervision report recognises the inadequacy of his domestic circumstances to sustain correctional supervision as an option.

Page 5 2.1

9 Exh L affidavit of the court preparation officer to which is attached the VIS by the complainant in count 1
She records the effect that the rape has had on her personally and the conduct of other people towards her, particularly those who were sceptical about her rape. Physical effect of the rape and the medication she had to take because of the rape.
It seems appropriate to record at this point that I have also remained mindful of the evidence of the complainant during the trial which remains uncontroverted and that I have had the opportunity to observe her while she testified about how she was accosted, attacked and raped despite her efforts and struggle to escape. Although she testified bravely she was unable to remain calm when she turned to face and identify the accused and broke down, revealing the depth and effect of the traumatic sexual assault on her.

Law and relevant legal principles

As already stated the charges against the accused are read with the relevant provisions of s51 of the CLA Act 105 of 1997, which prescribes the minimum sentence to be imposed in offences of this nature. However the accused was 16 years and 9 months old when he committed the first rape and 17 years and 6 months old when he committed the second set of offences. Therefore Subsection (6) of s51 which provides that 'This section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence contemplated in subsection (1) or (2)', applies and the minimum sentence provisions are therefore not applicable to the accused.

Therefore the sentencing court must start with a clean slate, while being mindful of the harsh sentences prescribed in Act 105 of 1997 for the offences of which the accused has been convicted. This in effect necessitates that a court's approach to sentencing is not curbed by obligatory predisposing constraints, but, instead, depends on individualised factors relating to the crime and the offender while duly considering the interests of justice. [*Centre of Child Law v Minister of Justice* 2009(2) SACR 477(CC) @489e-f]

Section 28(3) of the Constitution provides that a person under 18 is a “child”. The accused was therefore a “child” when he committed the offences. Since the adoption of the Constitution the principles of sentencing of youthful offenders needed to be adapted to give effect to the provisions of section 28, which provisions have their origins in those international instruments enumerated in *S v Brandt* [2005] 2 All SA 1 (SCA); *DPP, KZN v P* 2006 (1) SACR 243 (SCA); *S v M* 2007 (2) SACR 539 (CC) and *Centre for Child Law v Minister of Justice* supra.

In *S v N* 2008(2) SACR 135 (SCA) the SCA dealt with the sentencing of a 17-year-old convicted of rape. The majority judgement ruled in favour of correctional supervision while MAYA JA in a dissenting judgment decided that direct imprisonment was appropriate. In *DPP, KZN v P* supra, quoted with authority by MAYA JA in *S v N* supra, Mthiyane JA noted that incarceration of children is not forbidden, and that courts would quite conceivably encounter cases where detention is necessary.

In *S v PB* 2013 (2) SACR 533 (SCA) at para 19 Bosielo JA stated:
'. . .it remains an established principle of our criminal law that sentencing discretion lies pre-eminently with the sentencing court and must be exercised judiciously and in line with established and valid principles governing sentencing . . . .’

These established and valid principles as set out in *S v Zinn* 1969 (2) SA 537 (A) at 540G-H in which the appellate division formulated 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.”
Therefore the punishment should fit the offender and the offence, the interests of society must be considered and there should be a measure of mercy. The court must also consider the main purposes of punishment which are deterrence, reformation or rehabilitation and retribution.

I acknowledge that I been guided in my deliberations by A Guide to Sentencing in South Africa 3rd edition 2016 by SS Terblanche. I have also remained mindful of the submissions by counsel for the State and the accused, which are on record.

The offences

Terblanche states that first and foremost, the sentence should reflect the severity of the crime. The modern approach to determining the seriousness of a crime is that consists of the following two considerations: (1) the degree of harmfulness of the offence, and (2) the degree of culpability of the offender

In his comments on the seriousness of crime, Terblanche points out that 'Almost every kind of crime has its own inherent set of factors which aggravate that crime and, therefore, calls for a more severe sentence. In crimes of violence major factors which may aggravate the crime include the degree and extent of violence used, the nature of any weapon, the brutality and cruelness of the attack, the nature and character of the victim, including whether the victim was unarmed, or helpless.'

The complainant in count 1 was a 16 year old virgin, on her way to Sunday school alone, dressed in her uniform when she was accosted and raped by the accused. She described in vivid detail how she struggled and attempted to flee from the accused who deliberately followed her until she was in an isolated area and wielded a knife with which he threatened her. He also penetrated her forcefully with his fingers when he was unable to penetrate her with his penis and then penetrated her with his penis. As a result she sustained very painful injuries and aggravated trauma. When at the end of her testimony she was requested to identify her assailant she broke down, displaying her vulnerability and the severe impact of the traumatic attack on her. She also had to relive the attack when testifying. Her personal comments in the VI statement speak to the impact of the atrocity on her. It affected even her schooling although it is a testament to her bravery and resilience that she has now passed her Grade 12 examinations successfully.

The victim in count 2 and 3 was only 11 years old. The accused provided the details of his attack and rape of the child and admitted that he then strangled her to avoid being exposed. However it is clear from the PM report that the accused perpetrated more violence on her than he admitted to because of the injuries to her head. It is also apparent that she, like the complainant in count 1, was also completely vulnerable and unable to defend herself against the accused while he perpetrated the acts of violence and violated her innocence.

At this stage he had already been a suspect in respect of the first rape but was undeterred. It is also relevant to note that he was almost 18 years old. Cameron JA in *S v N* supra, at par 45 postulated that the accused in that case might have matured sufficiently in 9 months (when he turned 18) to have made a more mature decision than he did at age 17 years and 3 months when he committed the offence. However the conduct of the accused in this matter does not lend itself to the optimism. In my view, the deliberate killing of the child to protect himself aggravates his culpability, which his age cannot detract from. It is also relevant that only a few weeks ago he pleaded not guilty to all the charges and only made the admissions when it was clear that the evidence against him was overwhelming. Nevertheless I am mindful of the positive impression he made on the probation officer that he has since realised the consequences of his unlawful conduct .

The prevalence of the offences of which the accused has been convicted is also relevant: Rape and murder are a scourge that women and children who are the vulnerable members of our society, are constantly exposed to. Projects such as the 16 days activism against GBV and programs introduced into schools to educate those of school going age have not had the desired effect of curbing these offences.

The offender

The personal circumstances of the accused have been placed on record in the reports before the court. The most important are his upbringing and his age. Firstly although the accused's family have attempted to lay the blame at the door of his paternal family the accused was far more fortunate than many children in the SA society. He had the support and care of his maternal family especially his grandmother and was under social work supervision. There are a large number of children in our society who are totally neglected, there are child headed households and other very unfortunate circumstances which rob our children of their childhood – but this cannot be seen as an acceptable excuse or reason for the child to turn to a life of violent crime. Therefore I am of the view that despite his support and opportunity to turn for guidance to adults, especially those who were supervising him, the accused deliberately chose to allow his criminal instinct to run rampant instead.

I also cannot ignore the fact that after he raped the first victim, he was apprehended but the charges were provisionally withdrawn because of the delay in obtaining the DNA analysis result. Mr Buthelezi has attempted to explain the stance of the prosecuting authority and the risk run that the accused may be discharged because of the delay in proceeding to trial. I am also aware of the media reports and the concern raised with the Minister of Justice and the President of this country of the adverse impact of the DNA analyses delays on the Victims of GBV and the administration of justice. This is a clear example of how one such case was impacted with severe and tragic consequences: the accused was not deterred despite being warned that the charge of rape was only provisionally withdrawn. He within a short period of time attacked, raped and killed his next victim. Tragic consequences and the loss of an innocent life.

As a result the accused has the benefit of being sentenced as a first offender, which is recognized as a mitigating factor, as the offender may have committed his only offence. (See Stephen Terblanche Guide to sentencing) However this factor must be considered together with the fact that he committed the crimes sequentially, and when he was already aware of the legal consequences of the first rape.

The next relevant factor is the age of the accused. At the time of sentencing he is 19 years and 2 months. He is therefore still comparatively young, which constitutes a mitigating factor. In *S v Matyiyiti* 2011 (1) SACR 40 SCA Ponnen JA in paragraphs [9]–[14 stressed that a person of 20 years or more had to show by acceptable evidence that he or she was immature to the extent that the immaturity was a mitigating factor. The learned judge therefore seems to indicate that he considered a person under the age of 20 to be immature. The CLA itself seems to acknowledge that immaturity is a criterion when it removes persons under the age of 18 from its ambit. However the accused was aware that his conduct was unlawful. Not only did he admit his awareness, but the facts bear out his awareness that he deliberately followed and attacked his victims in isolated areas where he would not be exposed or discovered. Such premeditation is an aggravating factor.

The accused has been in custody since June 2020. I am mindful that ‘the period in detention pre-sentencing is but one of the factors that should be taken into account

in determining whether the effective period of imprisonment to be imposed is justified.' Para 14 *Radebe and Director of Public Prosecutions North Gauteng, Pretoria v Gcwala & Others* 2014 (2) SACR 337 (SCA). Therefore a pre-conviction period of imprisonment is a factor in determining whether the sentence imposed is disproportionate or unjust. However in this case the accused's period of pre-conviction custody was due to his failure to admit or acknowledge his guilt.

It is also relevant that the accused was in Grade 10 when he was arrested. Although he is older than he should be at that grade, it is not unusual in our schools for the learners to be above the average age. Nevertheless he ought to have acquired a measure of discipline during his time at school. However it is in his favour that he has indicated his intention to continue his education. As properly submitted by Mr Buthelezi a term of imprisonment will not jeopardize the ambition of the accused as he will be able have access to further education even while in custody.

I turn now to the interests of society and the objectives of the punishment. The interests of society demand that incidents of gender based violence be treated seriously and suitably severe sentences are imposed for such offences, as these are extremely prevalent and serious offences which threaten the cohesion of family and community structures and have tragically permeated South African society regardless of social or economic standing. I nevertheless remain mindful that each case must be dealt with on its merits and that the accused should not bear the brunt of the measures taken to discourage and deter perpetrators of gender based violence, or as reminded by Mr Masondo, that the accused should not be sacrificed on the altar of deterrence.

Nevertheless, in the particular circumstances of this matter, the accused's violent sexual assaults and the taking of the deceased's life cannot be countenanced with a short custodial sentence. Firstly, rehabilitation can only properly take place when an offender is genuinely remorseful. On the assessment of remorse, in *S v Matyiti* at [14] Ponnen JA stated: 'whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at being caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence

must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.'

Therefore while to an extent in this case, the court must rely on the pre-sentence report on how the accused conducted himself when interviewed by the probation officer, other relevant facts such as his failure to admit his guilt for almost 1 and a half years and even in this court, must remain relevant. The accused has requested further counselling –and he stated that he did not know where this behaviour came from. But as I have already pointed out he had access to such counselling before he committed the crimes and after the first offence. Even after he was charged and the charge was provisionally withdrawn he could have taken the counsellor into his confidence and sought help. Therefore how genuine his remorse is will only become apparent in due course, and he will have access to the counselling which will help him understand where his actions came from while he is in custody.

The accused's age should also enhance his prospects of rehabilitation. However, as was pointed out by Nugent JA in *S v Swart* 2004 (2) SACR 370 (SCA) para 12:
'[I]n our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.'

Therefore the sentences imposed must also have a strong deterrent effect on both the accused and any other like-minded individual. I am satisfied that there is merit in the Mr Buthelezi's contention and Mr Masondo's concession that a substantial period of custodial detention is appropriate in this case. A long term of imprisonment will give the accused the opportunity to benefit from the rehabilitative and educational

programmes available in prison and teach him to exercise self restraint and respect for other more vulnerable members of society.

Having thus balanced the factors relevant to sentencing, and being mindful that the courts should mete justice with a measure of mercy, if deserved, an appropriate sentence, in my view, is twenty (20) years imprisonment on each count.

Order

Count 1 Rape – 20 years imprisonment

Count 2 Rape – 20 years imprisonment

Count 3 Murder – 20 years imprisonment

The sentences on Counts 2 and 3 are ordered to run concurrently with the sentence of 20 years imprisonment imposed on count 1.

Effectively the accused is sentenced to 20 years imprisonment.

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Moodley J

APPEARANCES

Date of hearing	:	23 February / 17-18 March 2022
Date of delivery	:	18 March 2022
For the State	:	Mr MES Buthelezi Director of Public Prosecutions Pietmaritzburg
For Defendant	:	Mr Masondo Durban Justice Centre