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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR455/14

In the matter between:

VUYANI SAMKELO MKHUNGO **1ST APPELLANT**

SIBONELO CYPRIAN MYEZA **2ND APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

Delivered on : MONDAY, 03 August 2015

OLSEN J (VAN ZŸL J and NAIDOO AJ concurring)

[1] The appellants in this matter appeal with the leave of the Court *a quo* against the sentences of life imprisonment imposed on them on 27 May 2013, three such sentences in the case of the first appellant and two in the case of the second appellant. These sentences were passed after a trial in which the State sought to prove the appellants' shared guilt on some 13 counts which generated 12 guilty verdicts in the case of the first appellant and 10 in the case of the second appellant. Leave to appeal against the convictions and against the sentences other than life imprisonment was refused. (The second

appellant was charged with and convicted on a further count on his own; it is not relevant to the present appeal.)

[2] The convictions concerned events which occurred on three days.

[3] On 29 December 2010 the appellants forced their way into the home of a Ms [N……..] with a view to robbing her of money. Ms [N……..] was alone at home. She attempted to resist their entry by holding the door closed against them. Each appellant was armed with a gun. The second appellant shot her in order to gain entry, and then she was shot twice more in the course of the robbery. She died as a result. The appellants left the scene with a cell phone and a pair of shoes. Their conduct was brutal. Each was sentenced to life imprisonment for the murder.

[4] On the night of 5 January 2011 the complainant regarding the events on that day, a 39 year old married woman who was at home with two of her children, was awoken by two men who eventually gained access to her house with intent to rob. They decided to rape her, one at a time. This was done in the presence of the children, one of whom was awake. The complainant could not identify her assailants as they had covered their faces. But the first appellant made an extra-curial statement which was admitted in evidence, in which he identified the second appellant and himself as the perpetrators. This evidence was not admissible against the second appellant. Only the first appellant was convicted and a sentence of life imprisonment was imposed in respect of the rapes.

[5] The third series of events occurred on 6 January 2011. On this night the appellants accosted an 18 year old complainant and raped her six times over a period of some hours, each of them being the actual perpetrator on three occasions. The convictions on these counts generated sentences of life imprisonment for each of the appellants.

[6] In giving his judgment on sentence the learned Judge *a quo* referred to the judgment in *S v Chapman* 1997 (2) SACR 3 (SCA) on the subject of the

humiliating and degrading nature of the crime of rape. He referred to *S v Malgas* 2001 (1) SACR 469 (SCA) on the subject of the sentencing provisions set out in the Criminal Law Amendment Act 105 of 1997, and made reference inter alia to paragraph 9 of the judgment in that case where it is stated that the specified sentences should not be departed from "lightly and for flimsy reasons which could not withstand scrutiny".

[7] The learned Judge took into account the personal circumstances of the appellants. The first appellant was just short of 25 years old when the offences were committed, had passed Grade 8 at school, was single and had two children supported by his grandmother. He was employed as a bricklayer at R800,00 per forthnight. He had previous convictions from malicious injury to property and possession of stolen property. The second appellant was 29 years old when the offences were committed. He had passed Standard 5, was single and had no children. He had a previous conviction for stock theft which had resulted in a sentence of 3 years imprisonment.

[8] In dealing with the sentences for the convictions other than murder and rape the learned Judge warned himself against overstating the severity of those crimes as a result of placing too much emphasis on the impact of the murder and the rapes which accompanied the events which led to the lesser convictions. However he could not conclude with respect to the convictions of murder and rape that there were substantial and compelling circumstances such as would justify the imposition of sentences other than life imprisonment.

[9] On the contrary, the trial Judge concluded that it appeared to him that the appellants were "dangerous men", and he could find no reason to think that they would be susceptible to rehabilitation. They demonstrated no hint of remorse. They perpetrated their crimes within a community with which they were quite familiar, and knowing that their victims were vulnerable people, of modest means, who did not live within the protection of fortified homes. The learned Judge drew particular attention to the responses of the appellants to the DNA evidence linking them to the multiple rapes of the complainant on 6 January 2011. Presumably advised of the implications of the evidence in

advance of the commencement of the trial, the second appellant made a statement in support of his plea of not guilty, that the complainant was his secret lover and that he had consensual sex with her during early January 2011. The day after the DNA evidence was led the first appellant claimed suddenly to have remembered that he had consensual sex with the complainant because she was a prostitute and he was one of her clients. Both these claims were rejected. It is apparent, although not expressly stated by him, that the trial Judge regarded these responses to what had befallen the complainant on 6 January 2011 as disturbing indicators of complete indifference on the part of the appellants to what they had put their victims through. The learned Judge *a quo* added this observation.

> "Having seen the accused in the witness box and having listened to them trying to avoid liability for what they have done I have little doubt that these two men constitute a danger to society"

[10] Counsel for the appellants informed us that she was unable to make any submissions at all in support of the appeal against the life sentences imposed for the multiple rapes which occurred on 6 January 2011. In my view she did not err in that regard and nothing more need be said about those sentences.

[11] Concerning the murder on 29 December 2010, and the rapes which occurred on 5 January 2011 (of which only the first appellant was convicted), counsel for the appellants was unable to identify any misdirection on the part of the trial Judge which would enable us to interfere on appeal. A full account of the circumstances in which the crimes were perpetrated would unduly burden this judgment. It suffices to say that a consideration of the record leads to a conclusion that the trial Judge was quite correct in describing the conduct of the appellants as "merciless". Against that factors such the relative youthfulness of the perpetrators (bearing in mind that they were already no strangers to brushes with the law), and the fact that the second appellant did the shooting when Ms [N……..] was murdered (bearing in mind that the appellants both entered her home armed with hand-guns) pale into

insignificance. The fact that the appellants had been in custody in advance of sentencing for a little over two years could in other circumstances have contributed to a finding that a sentence of life imprisonment was not required; but in my view in this case that factor does not support a conclusion, in combination with any other factors, that there was a misdirection which would justify upholding the appeals.

[12] The learned trial Judge addressed the question as to whether the life sentences were disproportionate. He concluded in respect of all the convictions attracting sentences of life imprisonment that such would likely have been the appropriate sentences in the absence of the governing legislation. In my view there is nothing on the record which would justify a conclusion that he misdirected himself in that regard.

[13] I conclude that there is no merit in the appeals and the following order is made.

The appeals against the sentences of life imprisonment imposed on the appellants on 27 May 2013 are dismissed, and those sentences are confirmed.

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OLSEN J

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VAN ZŸL J

V NAIDOO AJ

Date of Hearing:	MONDAY, 27 JULY 2015
Date of Judgment: :	MONDAY, 03 AUGUST 2015
For the Appellants :	Ms P Andrews
Instructed by:	LEGAL AID OF SOUTH AFRICA Appellants' Attorneys 20 OTTO STREET PIETERMARITZBURG (Ref.:) (Tel No.: 033 – 394 2190)
For the Respondent:	Ms K Shazi
Instructed by:	Director of Public Prosecutions Respondent's Attorneys 6th Floor, Southern Life Building 88 Joe Slovo Street Durban (Ref.) (Tel.: 031 – 3345114 / 033 – 845 4400)