THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 769/2010

In the matter between

DIRECTOR OF PUBLIC PROSECUTIONS,
NORTH GAUTENG, PRETORIA **Appellant**

and

THULANI SIBUSISO THUSI **First Respondent**

PROMISE LUCKY MATHEBULA **Second Respondent**

SIPHIWE NGWENYA **Third Respondent**

Neutral citation: *DPP v Thusi* (769/10) [2011] ZASCA 176 (29 September 2011)

Coram: **MTHIYANE, VAN HEERDEN and SHONGWE JJA**

Heard: **6 September 2011**

Delivered: **29 September 2011**

Summary: Sentencing – appeal by DPP in terms of Section 316B of the Criminal Procedure Act 51 of 1977 – rape and murder – substantial and compelling circumstances in terms of s 51(3) of the Criminal Law Amendment Act 105 of 1997 not present – sentences imposed by trial court set aside and replaced with minimum sentences of life imprisonment

ORDER

On appeal from: South Gauteng High Court (Johannesburg) held in Delmas (Khampepe J sitting as court of first instance):

The appeal is upheld. The sentence imposed by the court below is set aside and replaced with the following:

'1. The second accused is sentenced to life imprisonment on the rape charge (count 2).

2. All three accused are sentenced to life imprisonment on the murder charge (count 4).

3. All the other sentences imposed on the accused shall run concurrently with the life imprisonment.'

JUDGMENT

SHONGWE JA (MTHIYANE, VAN HEERDEN JJA concurring)

[1] This appeal is brought by the Director of Public Prosecutions (DPP), in terms of s 316B of the Criminal Procedure Act 51 of 1977, against the sentences imposed on the respondents by Khampepe J, sitting in the circuit court of the South Gauteng High Court (Johannesburg) held in Delmas. The appeal is with the leave of this court.

[2] The three respondents were convicted and sentenced on various counts. For

the purposes of the present appeal, the only relevant convictions are on count 4 (murder), in respect of all three respondents, and on count 2 (rape – involving the infliction of grievous bodily harm), in respect of the second respondent. On the murder count, all three respondents were sentenced to 15 years' imprisonment, while on the rape count, the second respondent was sentenced to 18 years' imprisonment. The appeal by the DPP relates only to these sentences.

[3] As will be seen below, the minimum sentence for each of these offences is life imprisonment. The only question for adjudication before us is whether the trial court misdirected itself in its finding that substantial and compelling circumstances existed in respect of the murder charge (as regards all three respondents) and the rape charge (in respect of the second respondent only), justifying the imposition of a lesser sentence than the minimum sentence.

[4] It is necessary to set out a brief backdrop of the facts leading to these sentences. The first incident was on 30 March 2005 when the three respondents unlawfully broke into and entered the house of Mrs Margaret McKnight, then 84 years old, in her absence. When she returned to her home, in the company of her elderly helper, Ms Masango, the three respondents were still on the premises. They attacked the two women and assaulted them. The second respondent raped Mrs McKnight in one of the bedrooms. As a result she sustained severe physical injuries and profound psychological trauma. The respondents ransacked the house, demanded money and eventually removed certain items such as a television set and jewellery.

[5] Seven days later, on 7 April 2005, the same trio unlawfully broke into and entered the house of Mr Dos Santos Andrade (the deceased), then 64 years old, in his absence. When he returned, they attacked and assaulted him, tied his hands behind his back, pushed a sock into his mouth and strangled him with an electric cord. He died as a result of suffocation by strangulation. They removed certain items, including a .32 Rossi revolver, a watch and his motor vehicle.

[6] The first respondent did not testify, nor did he tender any evidence on his behalf. The second respondent testified and admitted his participation in the incident at Mrs McKnight's house but totally denied his presence at Mr Andrade's house. He pleaded an alibi. The third respondent also testified, stating that he had broken into Mrs McKnight's house by himself and had stolen goods from that house. For the rest, he exculpated himself save for admitting his presence at Mr Andrade's house.

[7] During the proceedings on sentence, the State tendered the evidence of Dr Spyne, a gynaecologist. She testified as to the seriousness of the injuries sustained by Mrs McKnight after the rape. Mrs McKnight had severe vaginal bleeding and it was critical for her to undergo an operation to stop the bleeding. She sustained severe tears next to the urethra opening and an equally severe vaginal tear of about 4cm, all of which required suturing. Dr Spyne noticed severe bruising all the way around Mrs McKnight's neck and bruising right around her left upper arm. The court a quo found that this type of rape resides under Part 1 of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 (the Act), viz rape involving the infliction of grievous bodily harm. In terms of s 51(1) of the Act, the minimum sentence for this offence is life imprisonment.

[8] The murder of Mr Andrade was found to have been committed during the course of a robbery with aggravating circumstances. This being so, it falls within the ambit of Part 1 of Schedule 2 and, in terms of s 51(1) of the Act, the minimum sentence for this offence is life imprisonment.

[9] The trial court found that there were, in the case of all three respondents, substantial and compelling circumstances justifying the imposition of a lesser sentence than life imprisonment. These substantial and compelling circumstances were the relative ages of the respondents and their good prospects of rehabilitation. As regards the first respondent, the fact that he had assisted the police with the investigation of the offence also weighed with the trial court. As regards the murder count, Khampepe J, with reference to *S v Ndlovu* 2002 (2) SACR 325 (SCA), regarded the fact that the state proved only oblique intent to kill (*dolus eventualis)* as a mitigating factor of substance.

[10] During argument the state contended that the evidence showed that the respondents planned in advance to break into the relevant houses and, if any resistance was encountered, to kill the victims, if necessary. According to the State, the failure by the court a quo to make this finding was a misdirection which justifies this court in interfering with the sentences. The State also pointed out that the victims in both the murder and rape counts were defenceless old people who could not offer any resistance to attack. They were so-called ‘soft targets’. For example, in respect of the rape charge, the complainant was 84 years old at the time of the rape. She was attacked and raped in the safety of her home which she had made attempts to

secure with burglar bars. In respect of the the murder charge, the deceased was an old man of 64 years, who was unarmed, attacked by three young, strong and able-bodied men. He was also attacked in the safety of his own home which he had secured with an electric fence. He was strangled and tied with an electric cord and left for dead. The State submitted that the court below misdirected itself by placing undue emphasis on the youthfulness of the respondents and over-emphasised the respondents' prospects of rehabilitation at the expense of the seriousness of the crimes and the interests of society.

[11] This court has to decide whether, given the facts of this case, the trial court was correct in its conclusion that substantial and compelling circumstances as contemplated by that expression, were indeed present. As was pointed out by Ponnan JA in *S v Matyityi* 2011 (1) SACR 40 (SCA) para 11:

'*S v Malgas* is where one must start. . . *Malgas,* which has since been followed in a long line of cases, set out how the minimum sentencing regime should be approached, and in particular how the enquiry into substantial and compelling circumstances is to be conducted by a court. To paraphrase from *Malgas*: the fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer "business as usual". A court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing, conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed, unless substantial and compelling circumstances were found to be present.' (Footnotes omitted.)

[12] Regarding the rape charge, the court below, in sentencing the respondents, found that the complainant suffered grievous bodily harm, and that the rape 'has the hallmark of seriousness, which is savagery'. Mrs McKnight was clearly in great

anxiety and distress while testifying. Before the rape, the second respondent had pressed a knife to her throat and had threatened to kill her. He throttled her with his hands while he was raping her. She could not breathe. The second respondent also threatened to 'cut' her. According to her neighbour, she did not want to be touched after the rape. Her trousers had been completely ripped open. She could not return to her home, where she had lived for more than 30 years, after the incident. Her daughter testified that the house had had to be sold at a loss and everything packed up within an 8-hour period. At the time of testifying, more than two years after the incident, she felt 'terrible'. Her helper, who was 63 years old, was also assaulted. She had been with Mrs McKnight for 40 years, but it would seem that she lost her job in the aftermath of the incident. Mrs McKnight's extensive physical injuries have been referred to above.

[13] The social worker who compiled a victim impact report in respect of Mrs McKnight testified that she was reported to have been experiencing constant headaches which she did not have before the incident. She was terrified and hysterical two years after the rape. She seemed very embarrassed and ashamed of what had happened. When she had to face or recall the events which led to her trauma, she blocked them out psychologically. She was physically and emotionally traum atised. She was suffering from nightmares and was always scared. She was experiencing panic attacks, nervous tension and lack of emotional control. She still needed counselling two years after the rape. In short, the psychological trauma suffered by Mrs McKnight was profound and ongoing.

[14] The court below found that the second respondent behaved 'like a sex

savage'. The following extract from his testimony is revealing:

'Now why was it necessary for you to rape such an old vulnerable lady? – Yes, I also asked myself such questions, and myself could not understand why I did so.'

[15] Mr Andrade was cruelly and callously murdered in cold blood. His wife clearly suffered enormous trauma when she found him lying on the ground, tired up with 'wires' and with 'a stocking' in his mouth. She tried to help him but, when she saw the mess in the house, she realised that he had been murdered during the course of a robbery. She broke down sobbing in the witness box as she testified that she could never go back to that house again. The incident had effectively ruined her life. Not only did she lose her husband of 39 years and her home, but she also lost her job because she could not concentrate. She was suffering from depression and nightmares and could not sleep. She could not live on her own and had been living in various different houses since the incident.

[16] At this stage, I record the ages of the respondents at the time of the commission of the offences and their personal circumstances. As the argument in mitigation does not form part of the record, these can be gleaned only from the judgment on sentence of the trial court. The first respondent was 25 years old at the time. He had a previous conviction for receiving stolen property. He is single with no dependants. He had passed grade seven at school and was self-employed as a basket maker at the time of his arrest. According to the trial court, the second respondent was 20 years old at the relevant time. According to the charge sheet, however, he was 23 years old. He had a previous conviction for housebreaking and theft. He too is unmarried with no dependants. The third respondent was 20 years old at the time of commission of the offences. Like the other respondents, he is

unmarried with no dependants. He is a first offender.

[17] As indicated above, the court took into account, in favour of all three respondents, their 'relative youthfulness'. However, none of the respondents demonstrated immaturity, nor was it evident that any one of them was subjected to peer or undue pressure by one or both of the others. On the contrary, their conduct showed a brutality that is quite inconsistent with immaturity. Both on the rape count and on the murder count, it was argued for the respondents that no evidence existed that the housebreakings were planned to an extent which included the understanding that anyone offering resistance would be killed. It was contended that their *modus operandi* was to target houses where nobody was present. This argument must be weighed against the fact that they were armed with knives and made no attempt to flee when the owners returned. The evidence shows that their intention was to confront resistance, which was foreseeable, with force. If they only had the intention to steal, then it was certainly not necessary for the respondents to have raped Mrs McKnight, assaulted Ms Masango or killed Mr Andrade, all elderly people who offered no resistance. The method of operation in the two incidents was similar in all respects. The motive behind these offences was purely financial and personal gratification.

[18] The trial court considered that the personal circumstances and the relative ages of the respondents showed that they presented good 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.'

[19] So too, in *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo & others* 2009 (2) SACR 361 (SCA) para 22, Navsa JA stated that:

'Traditional objectives of sentencing include retribution, deterrence and rehabilitation. It does not necessarily follow that a shorter sentence will always have a greater rehabilitative effect. Furthermore, the rehabilitation of the offender is but one of the considerations when sentence is being imposed. Surely, the nature of the offence related to the personality of the offender, the justifiable expectations of the community and the effect of a sentence on both the offender and society are all part of the equation? Pre- and post-*Malgas* the essential question is whether the sentence imposed is in all the circumstances, just.'

In my view, when weighed against the objective gravity of these offences, their prevalence in South Africa and the legitimate expectations of society that such crimes must be severely punished, neither the youthfulness of the respondent, nor their prospects of rehabilitation, tip the balance in their favour.

[20] The trial court took into consideration on the murder count the fact that the first respondent greatly assisted the police in the investigation of the offences. Counsel for the first respondent argued that this fact, together with the fact that the first respondent pleaded guilty to the charge of murder (although the State did not accept his plea) was indicative of remorse on this part. Similarly, the second respondent pleaded guilty to the charge of rape, although the State did not accept his plea, and he also co-operated in the police investigation. His counsel also contended that this showed remorse. Although this is not clear from the judgment on

sentence, the trial judge seems to have regarded the assistance rendered by the first respondent to the police as an indication of remorse on his part.

[21] The problem is that the first respondent did not testify and that the second respondent, during his testimony, showed no sign of remorse for the rape of Mrs McKnight. In the words of Ponnan JA in *S v Matyityi* (supra) para 13:

'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.'

[22] The last factor taken into consideration by the trial court as a 'mitigating factor of substance' in relation to the murder count was the fact that the State proved only oblique intent (*dolus eventualis*). While this may be a relevant factor, I am of the view that it does not, in this case, constitute a substantial and compelling circumstance for departing from the prescribed sentence. The brutality and callousness of the murder was such that the deceased, a defenceless old man, was trussed up and simply left to die. The harsh consequences of his death for his family have been explored above.

[23] As appears from what has been said above, in imposing sentence on both the murder and the rape charges, the trial court over-emphasised the personal interests of the respondents over the seriousness and prevalence of the offences, the

interests of society and the harm suffered by Mrs McKnight and by the family of the deceased. In my view there were no substantial and compelling circumstances present in the case of either offence that warranted a departure from the prescribed statutory norm. To my mind, even having regard to the time spent in custody by the respondents pending finalisation of the trial, the prescribed minimum sentences are, in the totality of the circumstances encountered here, the only fair and just sentences.

[24] In the result, the appeal is upheld. The sentence imposed by the court below is set aside and replaced with the following:

1. 'The second accused is sentenced to life imprisonment on the rape charge (count 2)
2. All three accused are sentenced to life imprisonment on the murder charge (count 4).
3. All the other sentences imposed on the accused shall run concurrently with the life imprisonment.'

J B Z SHONGWE
JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT: L Pienaar
Instructed by: Director of Public Prosecutions, Pretoria.

FOR FIRST RESPONDENT: C Joubert
Instructed by: Legal Aid Board, Pretoria.

FOR SECOND AND THIRD RESPONDENTS	H L Alberts
Instructed by:	Legal Aid Board, Pretoria