IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: SS225/2006

DATE: 2007-09-21

In the matter between:

THE STATE

and

MELIKHAYA NGCOBO

S E N T E N C E

MULLER, A J:

The accused has been convicted of the murder of Mrs Bisset, of the rape of Mrs Bisset, and of robbery with aggravating circumstances.

Yesterday we heard submissions on behalf of both the State and the defence in relation to an appropriate sentence to be imposed for each of these offences.

The accused has previously been convicted of three offences, namely the offence of abuse of a dependence-inducing drug,

on the 13th of October 1994, for which he was sentenced to 30 days imprisonment or R100 fine; of the offence of housebreaking with intent to steal and theft, committed on the 9th of November 2001, for which he received a sentence of 18 months imprisonment. On the 12th of August 2002, however, he was placed under correctional supervision for a period of 12 months. On the 16th of April 2003 the accused committed an act of theft, for which he was convicted on the 17th of March 2004. For that offence, which was committed some five days after the offences committed by the accused at 40 Lochiel Way on the 11th of April 2003, the accused was sentenced to five years imprisonment.

Each of the offences for which the accused has been convicted in this court is mentioned in section 51 of the General Law Amendment Act 105 of 1997. In terms of section 51(1) of that Act, a High Court shall, if it has convicted a person of an offence of murder, inter alia, sentence that person to imprisonment for life. Section 51(1) is subject, however, to section 51(3), which reads as follows:

> "If any Court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it

shall enter those circumstances on the record of the proceedings, and may thereupon impose such lesser sentence."

Subject to a finding of substantial and compelling circumstances, it is not only murder which enjoins the Court to Court to impose a life sentence, but also rape, in certain circumstances.

Of relevance in these proceedings is the requirement in part 2 of the second schedule to the Act, which provides that a minimum sentence of life imprisonment, in the absence of substantial and compelling circumstances, is required when rape is committed, involving the infliction of grievous bodily harm.

In the case of murder, the life sentence is obligatory where, inter alia, the death of the victim was caused by the accused in committing, or attempting to commit, or after having committed, or attempted to commit one of the following offences. Firstly, rape; and secondly, robbery with aggravating circumstances. Section 51(5) provides that the operation of a sentence imposed in terms of the section shall not be suspended, as contemplated in section 297(4) of the Criminal Procedure Act 51 of 1977. Clearly, the Criminal Law

Amendment Act of 1997 was a response by the legislature to the spate of violent crime which has swept the country.

Parts 2 and 3 of the schedule to the Act provide for lesser minimum sentences for convictions of rape and murder in circumstances which do not fall within those mentioned in part 1. And so, section 51(2)(b), read with the third part of the second schedule, requires the imposition of a minimum sentence of 10 years for rape, in the case of a first offender, in the absence of substantial and compelling circumstances, and where the rape does not fall within the categories listed in part 1.

As regards the conviction of robbery, section 51(2)(a), read with part 2 of the schedule, requires the imposition of a minimum sentence of 15 years for a first offender convicted of robbery with aggravating circumstances, or where the taking of a motor vehicle is involved.

A minimum sentence of life imprisonment for the accused's conviction of murder, in this case, absent substantial and compelling circumstances, is clearly prescribed in terms of part 1 of the schedule. Although there is insufficient evidence for us to find that the murder was planned and premeditated, as contemplated in the schedule, it clearly was caused, or, at least, occurred in the commission of the crimes of rape and

robbery with aggravating circumstances. Those circumstances, accordingly, trigger the minimum sentence of life imprisonment, unless we conclude that substantial and compelling circumstances are present which entitle me to reduce the sentence, in my discretion.

Whether a similar minimum sentence of life imprisonment is required in respect of the accused's conviction of rape - again absent substantial and compelling circumstances - occasions more difficulty. The only category mentioned in part 1 of the second schedule which might trigger such a minimum sentence in the case of the conviction for rape, is if it involved the infliction of grievous bodily harm.

Clearly, the accused launched a vicious and a brutal attack on Mrs Bisset. Of that there can be no doubt. What the evidence does not reveal clearly, however, is whether the attack, and the rape, and the strangulation of Mrs Bisset, which led to her death, occurred as one continuous assault, or whether, for example, the rape of Mrs Bisset occurred first, and she was only later assaulted, and sustained the manifold and severe injuries to which Dr Liebenberg testified. The injuries sustained by Mrs Bisset were not only described by Dr Liebenberg, but they are also graphically illustrated by the photographs taken on the 12th of April, as well as

by Dr Liebenberg during her autopsy.

I mentioned that the evidence does not tell us precisely how the assaults progressed, because although part 1 of the second schedule prescribes a minimum sentence of life for rape involving the infliction of grievous bodily harm, the question is whether applying the minimum sentence requirements of the Act to the rape of Mrs Bisset in the present case, would not perhaps amount to an impermissible duplication of sentence.

Prior to the passing of the minimum sentence legislation in 1977, the common law warned against the danger of duplicating sentences in cases of this kind, a warning which is illustrated by the instructive case of S v S 1987(2) SA 307 (A), a decision of the Appeal Court. The facts of that case have certain similarities to the facts of the present case. The appellant accused in that case, was a 38-year-old male who was convicted of the rape of a 70-year-old woman. As in the present case, the rape occurred after he had entered her home, and, as in the present case, the assault which he perpetrated on the victim, caused her death. Because the Trial Court could not be certain that the death had been caused intentionally, he was convicted of culpable homicide, and not of murder. The Trial Court sentenced the accused to a

term of imprisonment on the charge of culpable homicide, but to death on the charge of rape. The accused, in that case, had two previous convictions for rape, and the rape and the negligent killing of his victim had occurred on the same day as his release from prison on another charge. In the course of his judgment in passing sentence, the Judge *a quo* made the following remarks – and I quote from page 311, opposite the letter, I, to 312, opposite the letter, A, of the judgment:

> "Jy het dit goedgevind om in die donker ure van die nag by haar eie huis gewelddadiglik in te breek. Dit is vir my nou duidelik, in terugskou van al die feite, met een doel alleen, en dit was om haar te verkrag. Jy het dit nodig gevind om in die proses van verkragting soveel geweld op haar toe te pas, dat sy gesterf het. Jy is verantwoordelik vir die feit dat sy dood is. Hierdie verkragting val, in my oordeel, in die heel ernstige kader van verkragting. Jy het nie alleen by die vrou se eie huis in die donker gaan inbreek waar sy alleen was nie, maar jy het haar in haar eie slaapkamer gaan verkrag, en jy het nog haar dood ook veroorsaak deur die geweld wat jy op haar toegepas het."

In the course of its judgment, in which it set aside the Court *a quo*'s sentence of the death penalty for the rape, the Appeal

Court made the following remarks, indicating that the Court *a quo* had erred in its approach to the sentence. At 313A to F of the judgment, Smalberger, A J said the following:

"Tweedens blyk dit dat die verhoorregter die dood van die oorledene in aanmerking geneem het by die bepaling van 'n gepaste vonnis op die verkragtingaanklag. In dié opsig het hy fouteer. Daar moet 'n duidelike verskil getref word tussen die doodsveroorsaking van die oorledene, wat 'n element van die strafbare manslag is, en die geweldpleging, wat 'n bestanddeel van die verkragting is. Die verhoorregter moes noodwendig die doodsveroorsaking van die oorledene in aanmerking neem by die bepaling van 'n gepaste straf ten opsigte van die strafbare manslagaanklag. Hy was nié geregtig om dit ook in aanmerking te neem met betrekking tot die vonnis op die verkragtingaanklag nie. Op hierdie aanklag was alleenlik die aard en omvang van die geweldpleging tydens die verkragting 'n relevante oorweging. Dit is ongeoorloof om die doodsveroorsaking by straftoemeting twee keer in aanmerking te neem, omdat dit sou indruis teen die beginsel dat duplisering van vonnisse vermy moet word. Gevolglik moes die verhoorregter die oorledene se dood wegdink toe hy die appellant op die verkragtingaanklag gevonnis het, maar hy het klaarblyklik

nagelaat om dit te doen."

As to the danger of taking into account the same aggravating factors twice for the purpose of imposing sentence in respect of separate offences, see also S v Witbooi 1982(1) SA 30 (A) at 35, and S v Pietersen 1989(3) SA 420 (A) at 426E to G.

It is against this background that I am required to interpret section 51 of the Criminal Law Amendment Act of 1997, read with part 1 of the second schedule to that Act. I have not, in the time available, been able to find any authority in point, and it seems to me that I am required to interpret the legislation in the light of the common law, and that, unless a clear contrary indication is evident, I must assume that the legislature did not intend to alter the common law in this respect. The fact that, by passing this legislation, the legislature clearly signalled an intention to require the Courts to stiffen the sentences for the types of crimes mentioned in the Act, does not, in my view, detract from this conclusion.

To revert then to the facts of the present case. If, of course, the act of the rape of Mrs Bisset itself involved the infliction of grievous bodily harm, quite apart from the violent assault on her which caused her death, then a minimum sentence of life imprisonment, prescribed by part 1 of the schedule, would be triggered. What I cannot do, is take into account the fact that

Mrs Bisset was killed, and assaulted in the course of that killing, in determining whether the minimum sentence for rape, in the present case, is also required.

The phrase, "grievous bodily harm", used in part 1 of the schedule, is well known in our law. It connotes something more than the casual and comparatively insignificant and superficial injuries which ordinarily follow an assault. It connotes harm which, in itself, is such as seriously to interfere with health, to use one of the descriptions of that term. See in this regard Burchell, The Principles of Criminal Law, 3rd Edition, 2005 at 689.

All rapes are, of course, egregious, but some are worse than others. Cameron, J A, in S v Abrahams 2002(1) SACR 116 SCA at 127D to E, made the following remarks in this regard:

> "Some rapes are worse than others, and the life sentence ordained by the legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust."

As Davis, J stated in S v Swarts and another, said at 1999(2) SACR 380 (C) at 386B to C:

"As controversial a proposition as this is bound to be, as not all murders carry the same moral blameworthiness, so, too, not all rapes deserve equal punishment. That is, in no way, to diminish the horror of rape. It is, however, to say that there is a difference, even in the heart of darkness."

The evidence of Dr Liebenberg was to the effect that the injuries she observed in and around Mrs Bisset's genitalia, led her to conclude that the intercourse had been forced. This is, of course, the case with virtually all rapes. On the medical evidence presented, however, I am unable to conclude, isolating the rape from the other attacks, that the rape itself involved the infliction of grievous bodily harm in the sense that I have described above. For this reason, in my view, a minimum sentence of life imprisonment for the conviction of rape, in this case, is not compelled by the provisions of section 51, read with part 1 of the second schedule to the Act.

Turning then again to the conviction for Mrs Bisset's murder, I am required to impose a life sentence, in the absence of substantial and compelling circumstances. In considering whether I am obliged to impose that minimum sentence of life, or some different sentence, I have had regard to the effect of section 51 of the Criminal Law Amendment Act, as articulated

in the judgment of Marais, J A in S v Malgas 2001(1) SA SACR 469 (SCA) at paragraph 25, and as endorsed by the Constitutional Court in the judgment of S v Dodo 2001(1) SACR 594 (CC) at paragraph 11. As noted in these judgments, the specified sentences in the legislation are not to be departed from lightly or for flimsy reasons. The legislation in question has limited, albeit not eliminated, the Court's discretion in imposing sentence in respect of the listed offences.

In considering whether there are substantial and compelling circumstances present, I have account all the factors mentioned by Mr Ramovha in support of his submission that I should find that such factors are present. These factors related exclusively to the accused's particular personal circumstances, and do not require enumeration.

The evidence which we heard during the course of the trial made clear that this was a callous and horrible murder, perpetrated on a defenceless old woman. The evidence given by Mrs Starke yesterday eloquently conveyed the terrible effect which acts like this have on the victim's immediate family. The murder of Mrs Bisset occurred in circumstances which I can only describe as unfeeling callousness, and the accused has shown no evident remorse. In my view, the

ultimate punishment for the murder of Mrs Bisset is amply justified, in the present circumstances. I can find no compelling or substantial circumstances which would warrant any lesser sentence.

The accused is, accordingly, sentenced to LIFE IMPRISONMENT FOR THE MURDER of Mrs Bisset.

As regards the rape charge, a minimum sentence of 10 years is prescribed by part 3 of the second schedule to the Act, in the absence of substantial and compelling circumstances. There are none. On the contrary, there are aggravating circumstances, chief amongst them being the fact that this rape was a gratuitous sexual attack on an elderly woman in the supposed sanctity of her own home.

In the circumstances, I am obliged to impose a minimum sentence of at least 10 years. I am not, however, obliged to impose a sentence of only 10 years. In my view, the circumstances of this rape justify a longer sentence than 10 years. Although comparisons must be carefully drawn, by way of comparison, in the case of S v S, to which I referred earlier, a sentence of 15 years was imposed in circumstances which may be considered somewhat similar. It is true that, in that case, the accused had two previous convictions for rape, but

our society's attitude to rape and the convictions appropriate to punish it, have hardened over the intervening years. This fact is reflected in the minimum sentence legislation which I have mentioned earlier.

In all the circumstances, in my judgment, a sentence of FIFTEEN (15) YEARS IMPRISONMENT IS WARRANTED FOR THE RAPE of Mrs Bisset.

As regards the robbery conviction, in the absence of substantial and compelling circumstances, a sentence of 15 years is also prescribed by part 2 of the second schedule to the Act. This is so, because, inter alia, it involved the taking of a motor vehicle, and the accused is, in relation to the robbery charge, a first offender. I can find no substantial or compelling circumstances which warrant the imposition of a lesser sentence.

A sentence of FIFTEEN (15) YEARS IMPRISONMENT IS THEREFORE IMPOSED FOR THE CHARGE OF ROBBERY WITH AGGRAVATING CIRCUMSTANCES.

In terms of section 280 of the Criminal Procedure Act, I make the following orders in relation to the sentences which I have imposed.

SENTENCE

The sentence of 15 years on the rape conviction shall run concurrently with the life sentence on the conviction of murder. Ten years of the sentence of 15 years for the conviction of robbery, shall run concurrently with the life sentence imposed on the murder charge.

MULLER, AJ