

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO:

SS31/09

DATE:

18 March 2011

5 In the matter between:

THE STATE

and

RASHAAD KRUGER

10

SENTENCE

SABA, AJ

15 This Court has reached the most difficult and most important stage of this case. Difficult because the Court has to look at different aspects, objectively consider relevant factors and interests in order to reach an effective sentence.

20 The accused, Rashaad Kruger, was convicted of incitement to commit a sexual assault, in c/s 55(c) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32/2007, assault common and murder on 22 February 2011. In determining an appropriate sentence this Court has to take into account the well-known triad in Zinn consisting of the
25 crime, the offender and the interests of society. These three

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elements must be judicially and equilaterally applied without over emphasizing one to the detriment of the other. The Court will not forget the aims of punishment which are retribution, prevention, deterrence and rehabilitation. Du Toit, AJ in S v

5 Tonga 1993(1) SACR, pg 365 V at c-d stated the following:

“Injured feelings and interests of complainants (and close relatives) as well as the attitude of the community are relevant, but equally relevant are the consequences of punishment for the offender. Modern times and recent
10 penal development require of the presiding officer considering a sentence to impose an effective punishment. A sentence is only effective when it strikes a fine balance rather between the interests of society and
15 of the offender. It brings about retribution but of a balanced nature; it deters moderately, individually, as well collectively or generally. It makes provision for the person and the unique characteristics.”

20 In mitigation of sentence, the counsel for the defence did not lead any evidence but placed the following facts on record from the bar:

(i) The accused is 50 years old and was divorced by
25 his wife while in prison, he also lost his house to

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his wife in the divorce;

- (ii) He only completed grade 7 and has three children, two sons and a daughter;

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- (iii) He has had health problems for the past three years.

In aggravation of sentence the State proved 15 previous
10 convictions against the accused. They included five sexual offences, including four rapes. One of the rapes was committed when the accused broke into a house. The State also led evidence from three witnesses who testified as follows.

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Jerome Gertse, a captain and health care manager in the health section at Pollsmoor Prison said that when the accused was admitted for the first time at Pollsmoor Prison on 1 April 2008 he alleged that he suffered from heart attacks,
20 hypertension, three strokes previously and was wheelchair bound. He was then examined by Dr Johnson and referred several times for Groote Schuur Hospital where he was found to have high cholesterol gastritis as well as a malignant tumour in his stomach. In May 2009 his condition became
25 critical due to the cancer in his stomach. He was treated at

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Victoria Hospital and subsequently admitted at Groote Schuur Hospital for follow-up treatment. Due to excellent nursing care in the hospital section of Pollsmoor the accused was stabilised and was given physiotherapy. He can now walk independently
5 without the wheelchair. Jerome Gertse also mentioned that the cancer of the accused has been cured and the accused only suffers from epileptic fits and hypertension for which he uses medication and still needs frail care. He pointed out that if sentenced the accused will be transferred to the medium B
10 section of Pollsmoor prison where he will continue to be cared for and taken to Groote Schuur Hospital and other hospitals when the need arises.

Nadia Kruger, the former wife of the accused said that in the
15 27 years that she had been married to the accused the accused never worked and she was the one who worked for the children. They would conceive a child and shortly thereafter he would be arrested and sent to prison. She said the children grew up and wanted to know where their father was, she would
20 tell them that he had gone to study further about the prison life. She once laid a charge against the accused for abusing their two children who were still toddlers at the time. Accused was sentenced to one year imprisonment for that. She said the deceased was a very helpful child, who cared for her and
25 her 84 year old aunt. She said if the accused apologised in

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court she would forgive him.

Faldilah Kruger, the eldest daughter of the accused then testified that when she was between 13 and 14 years old the
5 accused raped her at gunpoint. He did that in such a violent manner that the blood vessels from her eye burst.

Mr Kortje for the State submitted that the aggravating circumstances outweigh the mitigating factors in that the
10 accused executed a death sentence on the life of his helpless daughter. She pointed out that the accused had only known the deceased for three years as he had been in prison when the deceased was born, and whilst she was growing up. She further stated that the accused had a record of violent crimes
15 against women and children. She said the family has not come to terms with the death of the deceased, and there were no substantial and compelling circumstances justifying the imposition of a lesser sentence. She informed the Court of a petition she received from the community of Retreat relating to
20 what the accused had done. She asked the Court to take into account that Portia was saved from the accused by Igshaan and that the accused used a dangerous weapon against Portia and that had Igshaan not intervened, Portia would have ended like the deceased.

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I do not need to emphasize that the crimes the accused has been convicted of are very serious. They were committed on young and defenceless women, the accused used very dangerous weapons in executing these crimes. Both victims
5 looked upon the accused as their father, in fact he is the biological father of the deceased and according to him, Portia was like a daughter to him. Portia may not have sustained physical injuries as a result of the assault by the accused but she definitely carries emotional scars from what the accused
10 did to her that day.

Section 51(1) of the Criminal Law Amendment Act 105 of 1997 prescribes a life imprisonment if a High Court has convicted a person of an offence referred to in part 1 of Schedule 2. In our
15 case murder found to have been planned or premeditated and where the victim was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act 51 of 1977, that is unless there are substantial and compelling circumstances justifying the
20 imposition of a lesser sentence. The type of murder the accused was convicted of falls squarely within the ambit of the abovementioned provisions of the Act. The question to be decided by this Court is whether there are substantial and compelling circumstances justifying the deviation from the
25 prescribed sentence of life imprisonment.

The counsel for the defence submitted that the age and health of the accused should be taken as substantial and compelling circumstances justifying a departure from the minimum sentence. The counsel for the State submitted that there are no circumstances justifying a departure from the prescribed minimum sentence of life imprisonment for the following reasons:

- 10 (i) The accused has 15 previous convictions which include the ones for rape and sexual assault. One of the rape convictions was committed when the accused broke into a house and another was committed on his own daughter.
- 15
- (ii) The accused never learnt anything from the previous sentences he served for committing the same crimes because after a lengthy sentence for rape he came back and committed a similar offence
- 20 on Portia.
- (iii) The accused used dangerous weapons in victimising two young females who were defenceless.

(iv) He executed a death sentence on his own daughter and has not shown any remorse for that.

5 S v Malgas 2001 (1) SACR 469 (SCA) is a starting point when dealing with substantial and compelling circumstances. In paragraph 8 and 9 of this judgment it was stated that:

10 "specified sentences should not be departed from lightly and for flimsy reasons which could not withstand scrutiny. The Court should weigh all the circumstances traditionally relevant to sentencing in order to determine whether a departure is called for. If the circumstances of the case call for a departure the Court should not
15 hesitate to do so."

The principles stated in Malgas were echoed in S v Matyityi (695/09) [2010] ZASCA at 127, a judgment which was delivered on 30 September 2010 in the Supreme Court of
20 Appeal, Ponnar, JA in the same judgment at paragraph 11 states the following:

"The fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no
25 longer business as usual. A Court no longer has a clean

5 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."

10 The previous convictions of the accused show that he is a violent person who has no regard whatsoever for the rights of other people, especially women. This is evident in the evidence of Nadia Kruger in aggravation of sentence where she depicts him as a person whose only contribution in the common home was to make children and neglect them afterwards. Four of the accused previous convictions are for rape, one is for sexual assault, which is indecent assault on a girl under 16 years of age. One is for housebreaking with intent to rape, one is for housebreaking with intent to commit an offence unknown to the State, one is for housebreaking with intent to steal and theft, one is for common assault, two are for assault with intent to do grievous bodily harm, one is for possession of dagga, one is for ill treating a child, one is for possession of a dangerous weapon. Lastly one is for escaping from lawful custody after detention.

25 It is interesting to note that the accused has a previous

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conviction for possession of drugs when he denied in his testimony that he did use drugs. The accused did not only practice his violence outside his home, his own children became victims of abuse at his hands, he threw his first two
5 children over the fence when they were still toddlers. His first daughter was only 13 or 14 when he raped her at gunpoint. Also the sentences of ten years and eight years imposed on 27 October 1994 show clearly that the circumstances of the rape were very serious. The assault of Portia and the killing of
10 Moenieba did not come as a surprise because the accused displayed his ugly side at an early stage of his life and marriage when he spent the better part of his life committing crimes and ending up serving sentences in prison when he was supposed to be taking care of his family. It is also interesting
15 to note that his first previous conviction dates as far back as 1978 when he was only 18 years old. He is now 49 or 50 years old and that indicates that he is not the type of person that can easily change form his wayward behaviour, no matter what type of sentence he is given.

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Portia might not have sustained physical injuries as a result of the assault, but she definitely suffered emotional scars which she will carry throughout her life. The brutal, callous and degrading manner in which the accused killed his daughter and
25 later denied committing the murder indicated that he is a cold

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and cruel man. He was given an opportunity to apologise to his wife here in court about what he did to their daughter, he never apologised. He cried throughout the proceedings, pretending to be a heartbroken poor man who was falsely
5 accused of killing his daughter when he knew that his hands were full of his daughter's blood. He never showed any remorse at all for his deeds. One can only imagine the sad state Moenieba was in when she realised that the person she once could not leave the house without, as the evidence
10 suggests, the person who was supposed to protect her from the evils of this world, was actually extinguishing her life when she was looking forward to her next birthday. She suffered a lonely, painful and undignified death as she was prevented from seeking help when her mouth was closed tightly so that
15 she could not make any noise. The manner in which she was killed is just horrific, she was slaughtered like an animal by her own father.

Both victims in our case were below 18 years during the
20 commission of the offences. Section 28 (2) of the Constitution of the Republic of South Africa 1996 provides that a child's best interest is of paramount importance in every matter concerning the child. This right definitely has to be taken into consideration for purposes of sentence.

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In S v Di Blasi 1996(1) SACR 1 (A) at page 10e-g the following was stated:

5 "The requirements of society demand that a premeditated
callous murder such as the present should not be
punished too leniently lest the administration of justice
be brought into disrepute. The punishment should not
only reflect the shock and indignation of interested
persons and of the community at large and so serve as a
10 just retribution for the crime, but should also deter others
from similar conduct."

Taking into account the abovementioned circumstances the
health of the accused alone cannot serve as a substantial and
15 compelling circumstance justifying a departure from the
minimum sentence. From what was presented to this Court as
mitigating and aggravating circumstances I share the same
sentiments with the counsel for the State that the aggravating
factors outweigh the mitigating factors in this case. I could
20 also not find any factors that could be relied upon as
constituting substantial and compelling circumstances
justifying the imposition of a lesser sentence than the life
imprisonment for murder.

25 In the result the accused is sentenced as follows:

In respect of COUNT 1 THE ACCUSED IS SENTENCED TO 3
(THREE) YEARS IMPRISONMENT; in respect of COUNT 2
ACCUSED IS SENTENCED TO 12 (TWELVE) MONTHS
5 IMPRISONMENT; in respect of COUNT 3 HE IS SENTENCED
TO LIFE IMPRISONMENT.

In terms of Section 280(2) of the Criminal Procedure Act 51 of
1977 it is ordered that the sentences imposed on counts 1 and
10 2 should run concurrently with the sentence imposed on count
3.

In terms of Firearms Control Act 60 of 2000 the ACCUSED IS
DECLARED UNFIT TO POSSESS A FIREARM.

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SABA, AJ