IN THE HIGH COURT OF SOUTH AFRICA

[NORTHERN CIRCUIT LOCAL DIVISION, CERES]

[*REPORTABLE*]

CASE NO: CC66/15

In the matter between:

THE STATE

vs

MKHULULI NTETA	**Accused 1**
MONDE TANANI	**Accused 2**
PATRICK NDZONGANA	**Accused 3**
APIWE DILIZA	**Accused 4**

JUDGMENT ON SENTENCE: 22 JULY 2016

Judgment by : **HENNEY, J**

For the State : **Adv Kriban Pillay**

Instructed by : **Office of the Director of Public Prosecutions**

CAPE TOWN

For accused 1 : **Adv G J Badenhorst**

For accused 2 : **Adv J du Preez**

For accused 3 : **Adv B Maditzeli**

For accused 4 : **Adv T Dodgen**

Instructed by : **Cape Town Justice Centre**
Legal Aid Board
CAPE TOWN

Date(s) of Hearing : **30 MAY 2016**

Judgment delivered on : **22 JULY 2016**

HENNEY, J

Introduction

[1] The Court in considering an appropriate sentence must have regard, and take into consideration the aims of punishment, which are deterrence, retribution, rehabilitation and prevention. During the sentencing process the Court should never lose sight of the element of mercy. In ***S v Rabie*** **1975 (4) SA 855 (A)** *Holmes JA* said the following in this regard at 862 D-F:

"…[W]ith particular reference to the concept of mercy-

(i) it is a balanced and humane state of thought;

(ii) it tempers one's approach to the factors to be considered in arriving at an appropriate sentence;

(iii) it is nothing in common with maudlin sympathy for the accused;

(iv) it recognises that fair punishment may sometimes have to be robust;

(v) it eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger;
(vi) the measure of the scope of mercy depends upon the circumstances of each case."

[2] A further important factor that the Court has to take into account is the so-called triad (*S v Zinn*)[1]. These are the personal circumstances of the accused, the offence, of which had been committed (which includes the circumstances under which it had been committed), as well as the interest of society. In considering the aforementioned factors, the Court should at all times strive to impose a proportionate sentence without over or under emphasising any of these circumstances at the expense of the other.

The personal circumstances of the Accused

[3] Accused 2 is 34 years old. Before he arrived in Prince Alfred Hamlet in September 2014, he stayed in Strand. His highest level of education is Grade 12. He was born in Queenstown in the Eastern Cape and has 2 brothers and 2 sisters. He is unmarried and is the father of two children, aged 6 years and 10 years old respectively. The children stay with his mother in Queenstown. He has one previous conviction of theft that was committed in 2009 for which a fine of R150 or 30 days imprisonment was imposed. In his evidence in Court during the sentencing procedure, accused 2 expressed his regret and apologised to the family of the deceased and to the Court that he could not do more to protect the deceased.

[4] Accused 3 is 53 years old and is married for 16 years. He is the father of 2 minor children, 15 years and 11 years respectively. Both are still at school. His wife has 2 major children from a previous relationship. He as well as his wife is unemployed. He stayed at 2 Sol Plaaitjie Road, Prince Alfred Hamlet since 2001. He came to know the

[1] S v Zinn 1969 (2) SA 537 (A) at 540G

other accused in this matter about 7 days before the incident occurred. All the accused came to visit the sister of accused 1 who stayed in an outbuilding at the back of the yard. He also informed the Court that he suffers from high blood pressure. His wife Nsosaka Ndzongana also testified and said that the arrest and involvement of the accused in this case placed the family under a tremendous amount of strain and they are not coping very well. She further informed the Court that she is a seasonal worker and have to find employment in order to support her and the children. She also informed the Court that accused 3 has a sum of money in the bank which she needs to gain access to in order for her to support her and the children and his incarceration will make it difficult for her to have access to the money. The Court has already given the police instructions to assist her and accused 3 in this regard. The children are in grade 5 (the 11-year-old) and grade 9 (the 15-year-old) respectively.

Position of Accused 4

[5] Accused 4 was 17 years, 11 months and 2 hours old at the time of the commission of the offence on 14 September 2014. He turned 18, hours before his arrest on 15 September 2014. He is now 20 years of age. He has been in custody since his arrest. Mr Dodgen argued that given the fact that accused 4 had committed the offences in question when he was under the age of 18 years that the provisions of the Child Justice Act 75 of 2008 ("CJA") should be applicable during the sentencing proceedings. Mr Pillay, the prosecutor, argued that when Accused 4 was arrested he was 18 years old and therefore the provisions of the CJA find no application as far as he is concerned.

The Applicable Legal Provisions

[6] The applicability of the CJA is regulated by section 4 which reads as follows:

'*Application of Act*

(1) Subject to subsection (2), this Act applies to any person in the Republic ***who is alleged to have committed an offence and-***

(a) …

(b) *was 10 years or older* ***but under the age of 18 years when he or she was-***

(i) *…*

(ii) *…*

(iii) **arrested in terms of section 20, for that offence***.'*

(Emphasis added)

[7] A "*child"* in terms of s 1 *of* the CJA "*means any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4 (2)*[2] *".* Section 4(2) is not applicable in this case.

[8] Accused 4 was arrested a mere few hours after he committed the offences and by that time he was already 18 years old. He was under the age of 18 at the time of the commission of the two offences, but 18 years and a few hours old at the time of his arrest. He was therefore under 18 years old at the time he was alleged to have committed the offence and NOT also under the age of 18 years at the time of his arrest as contemplated by s 4(1)(b)(iii). The question that now needs to be considered is whether the close proximity between the commission of the crime when he was under the age of 18 years and his subsequent arrest a few hours thereafter, is whether the provisions of the CJA would be applicable. Clearly, should the Court find that the CJA is

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[2] (2) The Director of Public Prosecutions having jurisdiction may, in accordance with directives issued by the National Director of Public Prosecutions in terms of section 97 (4) (*a*) (i) (*aa*), in the case of a person who—

(*a*) is alleged to have committed an offence when he or she was under the age of 18 years; and

(*b*) is 18 years or older but under the age of 21 years, at the time referred to in subsection (1) (*b*), direct that the matter be dealt with in terms of section 5 (2) to (4).

In terms of S5 – a preliminary enquiry should be held.

applicable, the sentencing of the accused must take place in terms of the provisions of chapter 10 of the CJA. Section 68 of the CJA states: "*A child justice Court must, after convicting a child, impose a sentence in accordance with this Chapter".* See *S v CS 2016 (1) SACR 584* and *S v RS and Others 2012 (2) SACR 160 (WCC)*.

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[9] The question now to consider is what meaning should be given to s 4(1)(b)(iii). The primary rule of interpretation states that if the meaning of the word is clear, it should be put into effect and it must be equated with the legislator's intention.[3] The words of an enactment must be understood in their ordinary sense.[4] If the plain meaning of the word is ambiguous, vague or misleading or if a strict literal interpretation would result in absurd results, then the Court may deviate from the literal meaning to avoid such an absurdity. This is also known as the golden rule of interpretation.[5] In this case, however, the Act is very clear and states that the provisions of the CJA only applies to a person who is alleged to have committed an offence ***and*** was 10 years or older but under the age of 18 years when he or she was arrested for that offence. The meaning of the word 'and' is therefore clear and unambiguous and should be given its literal meaning.

[10] The CJA is therefore clear that a person should not only be under the age of 18 years when he/she committed the offence, but he/she should also have been under the age of 18 years when he/she was arrested. It may be argued that given the close proximity between the commission of the offence, when the accused in this case was under the age of 18 when he committed the offence and that only a few hours thereafter

[3] Du Plessis LM in *Re-interpretation of Statutes* (2002) chapter 5 (Butterworths, Durban)

[4] See *Union Government v Mack* 1917 AD 731 at 739: "*the language of the legislature should be read in its ordinary sense"*

[5] In *Venter v R* 1907 TS 910 at 914, INNES, CJ says, after referring to the golden rule, "*that when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the court is justified in taking into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature*".

before his arrest he turned 18 years old, that the Court should give an expansive interpretation to the words: *and was 10 years or older but under the age of 18 years when he was arrested for that offence.*

[11] In my view, there is a perfectly logical and rational reason as to why the legislature required that the child offender should have been under the age of 18 years when he is alleged to have committed the offence and, similarly, also have been under the age of 18 years when he was arrested in order for the CJA to find application. The very purpose of the CJA was clearly to establish criminal justice for children and children only who are in conflict with the law and accused of committing offences. The CJA was tailor-made to suit the needs of the child offender (under 18 years) and not that of an adult offender. Some of the important purposes of the CJA as set out in the preamble is for children "*to be kept separately from adults…… while in detention."*

[12] Furthermore, the CJA takes into consideration "*the long-term benefits of the less rigid criminal justice process that suits the needs of children in conflict with the law in appropriate cases by ensuring that the individual needs and circumstances of children in conflict with the law are assessed; creating an informal, inquisitorial, pre-trial procedure, designed to facilitate the disposal of cases in the best interests of children by allowing for the diversion of matters involving children away from the formal Court proceedings in appropriate cases; providing for the adjudication of matters involving children which are not diverted in child justice Court; and providing a wide range of appropriate sentencing options specifically suited to the needs of children."*

The very purpose of the CJA was to give effect to the rights of children as enshrined in s 28 of the Constitution, Act 108 of 1996 which aims to serve the best interests of the child. Sec 28(3) of the Constitution also describes a "child" as a person **under** the age of 18 years.

[13] Clearly it could not have been the intention of the legislature to have a situation where a person who has committed an offence when he was under the age of 18 years and arrested after he became an adult or has reached the age of 18 years or older to be dealt with in accordance with the provisions of the CJA. It would also have as a consequence that the erstwhile child offender who was under the age of 18 years when he/ she committed the offence and was not immediately arrested and subsequently reached adulthood at the time of his arrest to be dealt with in accordance with the provisions of the CJA, which the Act was not intended to protect.

[14] It could lead to a situation where a child offender would end up being detained with an adult offender. In some instances, especially with regards to the detention or placement in the compulsory residence in the child and youth care centre, it would be impractical for such an offender to undergo such detention or such sentence which was specifically tailor-made for the child offender.

[15] At best for an offender such as accused 4 that falls within such a category, a sentencing Court must take into consideration as a strong mitigating factor the fact that when he or she committed such an offence that it was committed when he/she was a child at that stage.

[16] Coming back to this particular case, and especially regarding the position of accused 4, I am therefore not persuaded that he should be dealt with in terms of the provisions of the CJA during the sentencing proceedings.

[17] The Court was presented with a Probation Officer's Report of accused 4's personal circumstances as well as an investigation into his background and the socio economic conditions. According to the report, the accused hails from Butterworth in the Eastern Cape. He is one of 6 children. One of his sisters passed away in 2008. His father passed away in a motor vehicle accident in 2009. His parents separated in 2008.

Despite this, his father kept a close relationship with them. The death of his father had a negative impact on him and the rest of the family.

[18] During 2011, accused 4 moved to the Western Cape and stayed with a family friend, who he believed would assist him with his education, but this did not materialize. He moved to Strand and had lost contact with his family in 2014. He passed Grade 7 in 2010. This may be a reason why he became involved with the other accused, who clearly was not good role-models to him.

The Offence

[19] All the accused have been convicted of two very serious offences. Both of which attracts the prescribed sentence in terms of the provisions of the Criminal Law Amendment Act 105 of 1997 ("Act 105 of 1997"). The particular circumstances of this case need some special mention. The deceased was brutally assaulted as is evidenced from the number of wounds that he sustained on his body and which has been meticulously set out by Dr Lourens in the post mortem report. One person could not have done this alone because the deceased was also a big man who had to be restrained. Clearly, when he was strangled he must have been held back in order for those who strangled him to do so.

[20] As I said in my main judgement the murder as well as the sexual assault on the deceased could not have been committed had there not been assistance in one or other form from among the accused conduct can be described of those of a coward. The deceased was trapped like a wild animal in the vehicle with the doors closed and he was sandwiched in between the accused and had nowhere to run to. When he tried to escape he was prevented from doing so. He was left to the mercy of the accused none of whom had the decency to assist him while he was viciously and brutally beaten and strangled. They showed no mercy and further showed no respect to the deceased and

further violated the dignity and humiliated the deceased by using an object to penetrate his anus.

[21] If this was not enough, they further went ahead and violated and disregarded the sanctity of the deceased by throwing his body off the side of the bridge. And with utter disdain left his lifeless body that was exposed in the open which must have been a further cause of pain and sorrow for his family when they became aware of this. The conduct of the accused was utterly reprehensible, coward and shocking.

Interests of Society

[22] Society demands that wanton criminal acts as displayed by the accused should not be left unpunished. It demands of the Courts to send out a clear and strong message that such acts of criminality will not be countenanced and further demands that the strictest and severest punishment should be meted out to individuals such as the accused. It is also for these reasons that the law prescribed certain sentences that the Court should impose in cases like these. In respect of Count 1, which is a Rape committed in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("SORMA") where more than one person acted in common purpose and also where the rape was committed involving grievous bodily harm, a sentence of life imprisonment is prescribed. In respect of Count 2, Murder, where the death of the deceased was caused by more than one person in the furtherance of a common purpose and also that the death of the victim was caused by the accused by committing an offence of Rape as contemplated in section 3 of SORMA, a sentence of life imprisonment is also prescribed in terms of Act 105 of 1997.

[23] In terms of section 51 (3) of Act 105 of 1997 the Court must impose the prescribed sentence unless there is substantial and compelling circumstances to deviate from such prescribed sentence. The approach a Court should follow in determining whether there are substantial and compelling circumstances present had been laid down in the oft quoted ***S v Malgas*** **2001 (1) SACR 469 (SCA)** at 470G – 471D:

"B. *Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as a sentence should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.*

C. Unless there are, and can be seen to be, thoroughly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe standardised and consistent response from the Courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubt as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The Legislature has however deliberately left it to the Courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against a composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.

H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I. If the sentencing Court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be

disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided."

[24] Before coming to a conclusion whether there are substantial and compelling circumstances warranting the imposition of a lesser sentence in respect of each of the accused to who the prescribed sentences is applicable, the Court will first deal with the question whether, as professed by the accused, they have shown remorse.

[25] As referred to in my Judgment none of the accused had taken the Court into their confidence. All of them tried to mislead the Court and the Court had difficulty in accepting what the true circumstances and facts of this case were which led to the rape and murder the deceased. The accused, either individually or collectively, could have assisted the Court in trying to find out what really happened. All of them expressed their regret and also apologised to the family of the deceased. Given the circumstances I am not convinced that they have shown genuine remorse for their actions. In ***S v MATYITYI* 2011 (1) SACR 40 (SCA)** *Ponnan JA* had the following to say about this aspect at para 13:
"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been 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."

None of these attributes referred to by *Ponnan JA* as to what genuine remorse is, was displayed by the accused in this case. In fact, some of them, especially accused 3 persisted with his dishonesty and lack of remorse.

[26] In respect of accused 2, this Court is not convinced that there are substantial and compelling circumstances to deviate from the prescribed sentence of life imprisonment in respect of both these offences. Similarly, in respect of accused 3, the Court is also not convinced given the totality of the circumstances of this case which includes his personal circumstances as well as the circumstances relating to the offence and the interests of society, that there are substantial and compelling circumstances to deviate from the prescribed sentence of life imprisonment. In respect of accused 4, the provisions of Act 105 of 1997 in respect of the two offences committed are not applicable to him. He was under the age of 18 years when he committed this offence. In terms of section 51 (6) of Act 105 of 1997, the section dealing with the prescribed sentence, does not apply in respect of an accused person that was under the age of 18 years at the time of the commission of the offence. The Court therefore has to exercise its ordinary jurisdiction in respect of sentence as far as accused 4 is concerned.

[27] It does not, however, mean that the Court cannot impose a sentence of direct imprisonment as far as accused 4 is concerned. He himself formed a common purpose with the other accused in committing these gruesome and heinous crimes. In this particular case, in my view, the seriousness of the offence requires that retribution and

deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role. In ***S v Senatsi and Another* 2006 (2) SACR 291 (SCA)** *Mthiyane JA* held at para 7: "*In the present matter the relative youth of the appellants must give away to the deterrent and retributive effects of punishment. The aggravating features of the case justify such an approach. This is one of those cases where any law-abiding and self-respecting citizen would be repelled by the conduct of the appellants."* Although he was 17 years 11 months and 2 hours old in my view he played an active part in the commission of the offence. Given the accused's personal circumstances, it seems he was abandoned by his family at a very young age. In my view, as held in the matter of ***S v Jackson & Others* 2008 (2) SACR 274 (C)**, there is a real possibility that he could have been influenced by the other accused in this matter. He was clearly by far the youngest of all the accused in this matter. The sentence of accused 4 therefore has to be tempered to take into consideration his youthfulness.

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A further very important factor which the Court has to consider is that Accused 4 was the only accused who was in custody awaiting trial since his arrest on 15 September 2014.

[28] I will now impose sentence on each of the accused.

ACCUSED 2

Count 1: LIFE IMPRISONMENT;

Count 2: LIFE IMPRISONMENT, to be served concurrently.

ACCUSED 3

Count 1: LIFE IMPRISONMENT;

Count 2 : LIFE IMPRISONMENT, to be served concurrently.

ACCUSED 4

Count 1: 10 years imprisonment.

Count 2: 12 years imprisonment. It is further ordered that 7 years of the sentence imposed in respect of count one be served concurrently with the sentence imposed on count two. Accused 4 is therefore sentenced to an effective 15 years imprisonment.

In terms of section 103 of the Firearms Control Act 60 of 2000 all the accused are declared unfit to possess a firearm.

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R.C.A. HENNEY

Judge of the High Court