



CASE NO CC47/2018

In the matter between

THE STATE

AND

THOBILE DYONASE

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JUDGMENT ON SENTENCE-01 SEPTEMBER 2020

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THULARE AJ

[1] The facts of this case are fully set out in a written judgment in which the accused was convicted, dated 1 June 2020. He was convicted of eight (8) counts of kidnapping, eight (8) counts of robbery with aggravating circumstances, one (1) count of sexual

assault and six (6) counts of rape. Two (2) of the rape counts are in contravention of section 5(1) whilst four (4) are in contravention of section 3 read with the applicable provisions of the Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 2007 and the Criminal Procedure Act 51 of 1977.

[2] A total of seven (7) adult women have on different dates between 12 August 2017 and 2 October 2017 fallen victim to the accused. One of the women went through the ordeal in the presence of her young son who was also kidnapped and robbed. The accused was arrested the same morning of his attack on the last of his victims, following an alert observation of a police officer. At the request of the accused's legal representative, the matter was postponed for sentence.

[3] In *S v Zinn* 1969 (2) SA 537 (A) at 540G it was said:

"What has to be considered is the triad consisting of the crime, the offender and the interests of society."

### *The criminal*

[4] Ms Mangalisa, a probation officer, at the request of the accused legal representative, prepared a pre-sentence report which was handed in by agreement between the parties and was admitted by the court into evidence. In *A forensic case study of a paedophile illustrating the presentation and value of the pre-sentence evaluation report*, Acta Criminologica 16(2) 2003, A Van der Hoven and M Ovens said in their introduction at page 19:

"The primary purpose of the pre-sentence report is to provide the court with comprehensive information about the offender as a person in order to assist in the passing of an appropriate sentence. The report provides details with regard to the accused's childhood years, education and training, personality make-up, relationships as well as an explanation with regard to the causes and the context within which the crime took place. This is information which, up to this stage in the court process, is often not known to the magistrate and can serve to individualise the offender."

[5] The accused's family roots, both maternal and paternal, are in Engcobo, Eastern Cape. He is the 5<sup>th</sup> of 7 children. His father was reported to have been killed by his own brother (accused's uncle) when the accused was about 4 years old. As a result the mother had to leave the children in the care of the maternal grandmother whilst doing odd jobs in the community. The accused's eldest brother assumed the father figure role. In his youth, there were no negative reports about the accused. He was, whilst growing up, a member of Ikhaya Labangcwele Zionist Church where he was an usher. He still practiced traditional customs and attended initiation school. He did not smoke and did not use any drugs. He used alcohol only on special occasions since he was 21 years of age.

[6] He herded cattle and dropped out of school at primary level. He had been an average learner. He could not remember what grade he was doing when he dropped out of school. Education was not much valued within his family to the extent that even when he dropped out of school, nobody bothered about it. He moved to Cape Town in 2008 to look for job opportunities. His eldest brother, who was already in Cape Town, supported him. In 2012 he got employed as a taxi marshal at Dunoon taxi rank. In 2014 he started working as a taxi driver at the same rank. In that same year his employer was shot dead. He got employed as a taxi driver at Nyanga terminus in 2015. He spent most of his time at the rank and driving the Avanza taxi.

[7] He had been in a relationship since 2015 and had two children. He was unmarried. He earned a living as a taxi driver, from which he occasionally provided for his mother and children. He had been renting a backyard room in Phillipi before his arrest. He still occasionally visited his homestead in the Eastern Cape where his mother resided with his children. He had a good relationship with his mother, siblings and children. The mother of his children, after learning of his arrest, removed his children from his mother and took them away. Their whereabouts are currently unknown.

[8] The report from the correctional officer, Ms Jikitha, who was interviewed by the probation officer, was that the accused was one of the well-behaved inmates and that

he related well with most of the correctional officers. He was also described as a friendly person who enjoyed meaningful conversation with staff members at the correctional facility. He had been in custody for the past 3 years. He maintained his innocence and felt that he was wrongfully accused and convicted. Most of the time, according to him, the Avanza he used to drive was driven by another, Xolisa, whose whereabouts were unknown.

[9] Accused's eldest brother indicated to the probation officer that the accused did not share with the family what he was accused of, and that they only heard in court and that the family was shocked when they heard during the trial. He did not inform his mother about his arrest and the mother heard from his eldest brother. The accused had several girlfriends and his family could not associate him with sexual assaults. His eldest brother referred to the accused as a womanizer.

[10] In her evaluation, the probation officer noted that the accused did not take responsibility for his involvement in the commission of the crimes and remorse for his actions was questionable. Although the accused's childhood had been fragile financially, he was cared for by caregivers and had developed a sense of belonging. He shared good interpersonal relationships with his immediate family members, had strong attachments to his maternal and paternal relatives and got along with his siblings.

[11] He had two traumatic incidents where he lost people close to him as a result of brutal violence and never received counseling. The reports from his family and correctional officer spoke to his ability to control his behavior and to make choices needed to adjust his behavior to his structured environment. His dropping out of school, and seemingly not bothered thereby, spoke to a poor sense of decision-making. The probation officer recommended a sentence of direct imprisonment.

*The crime*

[12] Section 12(1)(c) of the Constitution of South Africa provides that everyone has a right to be free from all forms of violence from either the state or private source. The complainants' rights to be free from violence as envisaged in the Constitution were violated when the accused attacked the complainants, violated their privacy, their integrity and them of their valuables. Young mostly working women who commuted on taxis between their residences and place of work were targeted. They were preyed upon when they would be walking alone whilst it was still dark in the early hours of the morning. Once they were in the taxi the accused would lock the doors. He would engage them in an innocent conversation and convince them that it was necessary for him to divert from the ordinary route which taxis ordinarily use. His smile, calm and respectful demeanour would earn their trust whilst he drove to isolated spots.

[13] "Lady, today you have boarded the wrong taxi": was his opening chilling remark that made them realise for the first time that they were in trouble after he stopped. Because of his earlier demeanour, most victims initially thought he was joking, until they saw a knife, crow-bar or his hand behind his body in a manner suggesting that he held a dangerous weapon. He would then demand money, bank cards and phones. He would then search their handbags and physically searched their bodies, including in their bras. Sometimes he was not alone during this first ordeal of kidnapping and robbery. Ms Motshonga was robbed by the accused and another.

[14] After the robbery, he would move to the second leg of their ordeal, which was of a sexual nature. For Ms Motshonga, the accused unzipped her pants, put his hand in her pants and inserted his fingers in the lips of her vagina. Ms Sidumo had her breasts fiddled with. Her pants were unzipped and the accused forced to kiss her. He forced his hands into her tights jean pants and moved his fingers further down between her jeans and panties until he reached her pelvic region just before her vagina. All this happened with her son sitting next to her and watching, crying and pleading with the accused to stop. She was also pleading with him not to rape her in front of her son.

[15] Ms Kabena had her breasts fiddled with and was forced to suck the accused penis. The accused then moved from the driver's seat to the back seat, forced her to undress and raped her by penetrating her vagina with his penis. Ms Dyani was forced to lie down at the backseat of the Avanza, the accused removed her panties and inserted his penis in her vagina and had intercourse with her. Ms Nyanhinda gave the accused a platonic kiss when he demanded to be kissed, and he demanded to be kissed properly which she was forced to do. She was forced to touch his private parts and to give him a blow job. Ms Rum watched as the accused pulled down his pants, exposed his private parts and instructed her to suck his penis repeatedly. As she lifted her head when she felt like vomiting, the accused would pull her by her neck and force her back to his penis to suck it.

### *The interests of society*

[16] There are strong feelings of annoyance, displeasure and opposition to gender-based violence. Women in particular are experiencing worry and unease. They are very eager and concerned to have something done for their safety and security. They move about with an instinctive and intuitive feeling of anxiety and fear from the knowledge and reason that they may suffer gender-based violence. More than just repetition of old slogans is necessary to push back the frontiers of patriarchy.

[17] There are serious problems with the mind and its functions, of men like the accused, which affected their behavior. His mental characteristics and his attitude towards women led to abnormal, disorderly and violent behavior. The decision to wake up in the morning, drive out of your ordinary route with the sole purpose of kidnapping, robbing and raping or sexually assaulting women arise in the mind and is related to the mental and emotional state of a person, in my view.

[18] The taxi industry prides itself as being the backbone of the economic and social life of the poor black majority. It is one of the first entrepreneurial adventures of blacks, which did not depend on government for its sustenance, as they struggled to get out of

poverty into business. The working class majority without their own mode of transport depend on it to commute for any activity which required human transportation in the public transport space. It is responsible for human movement from maternity ward to home, from home to crèche, school, university, work, old age pension pay-point and ultimately to the graveyard.

[19] It cannot afford to be the hide-out for those who abuse women. The industry, to maintain moral authority and trust, cannot afford to be a safe haven for criminals. Zapiro, one of South Africa's leading cartoonist, may portray the industry as above the Constitutional Court in the hierarchy of the judicial system of the country. It may often create a perception, in the mind of the public, that it is above the Legislature and the Executive as well. However, it ought not be allowed to be a conducive environment to nurture and advance gender-based violence.

### *Victims*

[20] The rule in *Zinn, supra*, include the perpetrator, generally men, and exclude victims, generally women, in gender-based violence, as a self-standing constituent factor to be considered for purposes of sentencing. I am unable to find a cogent reason why a Judge-made law, pronounced by an impartial judicial officer free from the chains of patriarchy which is notorious for its different standards for women, would seek to exclude women's voices as a factor in a sentence individualized and specifically tailored to pronounce justice for them. In my view, the time has arrived for the triad to mature to the quadrant in respect of gender-based violence.

[21] In her article, *The judicial relevance and impact of victim impact statements in the sentencing of rape offenders*, 2018 SACJ 212, Amanda Spies began her concluding remarks as follows at 231:

"For victims of crime, a great shock is how little they matter in criminal justice processes, as they expect their interests to be of equal concern in terms of the impact the crime had on their lives.

In sentencing offenders, the central focus remains giving effect to traditional sentencing goals that cater very little for real involvement from victims.”

She continued at 232:

“The actual purpose of victim impact statements is to include victim’s voices in the criminal justice system, to provide them with a public forum to communicate their harm and to recognize the wrong they suffered.”

[22] The Supreme Court of Appeal in *S v Abrahams* 2002 (1) SACR 116 (SCA) at 30 said:

“[30] The amicus rightly pointed out that our Constitution, as well as international treaty obligations, require the government and the courts to take special steps to protect the public in general and women in particular against violent crime. The Constitutional Court has given these obligations emphasis in recent decisions (*S v Baloyi (Minister of Justice and another intervening)*) and *Carmichele v Minister of Safety and Security*), and in the sentencing process they must be accorded appropriate weight.”

In *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at para 13 it was said:

“[13] ... In the present matter evidence relating to the extent to which the complainant has been affected by the rape and will be affected in future is relevant, and indeed important. Such evidence could have been led from the complainant's mother, her school teacher or a psychologist. No attempt was made to do so.

[23] In *S v Matyityi* 2011 (1) SACR 40 (SCA) it was said:

“[16] An enlightened and just penal policy requires consideration of a broad range of sentencing options, from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim-centred. Internationally the concerns of victims have been recognised and sought to be addressed through a number of declarations, the most important of which is the UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power. The declaration is based on the philosophy that adequate recognition should be given to victims, and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. A Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the State - it is an injury or wrong



done to another person. The Service Charter for Victims of Crime in South Africa seeks to accommodate victims more effectively in the criminal justice system. As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values, namely human dignity. It enables us, as well, to vindicate our collective sense of humanity and humanness. The charter seeks to give to victims the right to participate in and proffer information during the sentencing phase. The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and, in future, is likely to have. By giving the victim a voice the court will have an opportunity to truly recognise the wrong done to the individual victim. (See generally Karen Muller & Annette van der Merwe *'Recognising the Victim in the Sentencing Phase: The Use of Victim Impact Statements in Court'*.)

[17] By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after-effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim, and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim, the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence, but also the impact of the crime on the victim, be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality, rather than harshness. Furthermore, courts generally do not have the necessary experience to generalise or draw conclusions about the effects and consequences of a rape for a rape victim. As Muller & Van der Merwe put it:

'It is extremely difficult for any individual, even a highly trained person such as a magistrate or a judge, to comprehend fully the range of emotions and suffering a particular victim of sexual violence may have experienced. Each individual brings with himself or herself a different background, a different support system and, therefore, a different manner of coping with the trauma flowing from the abuse.'

[24] In *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) at para 21 it was said:

"That the victim's voice deserves to be heard admits of no doubt. After all, it is the victim who bears the real brunt of the offence committed against him or her. It is only fair that he/she be

heard on, amongst other things, how the crime has affected him/her. This does not mean, however, that his/her views are decisive.”

In *S v Mhlongo* 2016 (2) SACR 611 (SCA) at para 22 and 23 it was said:

“[22] In *Matyityi* this court, with reference to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, and the Service Charter for Victims of Crime in South Africa, sent a powerful message on the importance of a VIS, which seems to be disregarded wantonly and without fear of any repercussions by the state. A VIS forms an integral part of the last phase of the trial. It is essential for the court in arriving at a decision that is fair to the offender, victim and the public at large. It serves a greater purpose than contributing only to the quantum of punishment. It generally gives the sentencing court a balanced view of all aspects, in order to impose an appropriate sentence. It accommodates the victim more effectively, thus giving her or him a voice and the only opportunity to participate in the last phase of the trial. Moreover, the VIS gives the victim the opportunity to say in her or his own voice how the crime has affected him or her. This is particularly so where no expert evidence is led by the state to indicate the impact of the crime on the victim.

[23] After several judgments of this court have pointed out the substantial importance of the VIS and that it must form part of the sentencing process, the South African criminal-justice system requires the permanent infusion of a VIS into the justice process.”

[25] The voices of the victims, in this case were heard from their own mouths, were incorporated by reference into the probation officer’s report and were also set out in the Victim-Impact Statements prepared by the Social Worker, Ms Shafieka Moos, from the Rape Crisis, Cape Town Trust. What she went through had long lasting effects on Ms Nyamhinda. She felt violated, angry, disgusted and terrified at the time of the incident. After that incident she was not coping. Whenever she saw a male walking, she ran. Whenever she was in a car and its doors were locked, she jumped. Whenever an unknown male looked at her and greeted her, she jumped. She had trouble sleeping. Her reaction included nightmares, flashbacks and difficulty concentrating. Ms Motshonga was scared, shaking and did not know what to say as things turned for the worst inside the Avanza taxi. She said to the accused: “*I am sorry*”. She said these words to apologise or plead for mercy. She said these words for she wanted the

accused to feel sorry for her, to have mercy on her. She was scared and shocked. At the time that the accused touched the lips of her vagina with his fingers she was shaking and upset.

[26] Ms Sidumo broke down and cried at the time that she related how the accused unzipped her pants and placed his hand inside her pants above her panty after he had forced to kiss her, with all these happening whilst her 11 year old son was seated next to her in the Avanza. He ignored her pleas not to rape her in front of her son, and instructed her to lower her zip whilst both, she and her son, were crying. He instructed the young child to look the other way and continued. The child also pleaded with him to stop but the accused continued kissing her. She was so shocked and scared by the experience. After that day, she did not use public transport anymore as she was scared and shattered. The world does not feel a safe place anymore. She felt dirty and had low self-esteem. The son, Wonga's observation was that the accused failed to open her mother's pants because they were tight on her and that was the reason he stopped. He could not help her mother because the accused had a knife, and when he cried the accused told him to just look away. It is a traumatic experience he will never forget.

[27] Ms Kabena felt very threatened and was really scared. She was a virgin before the day the accused raped her. It was painful. After the incident she isolated from other people. Her attitude towards sex changed and she had no interest. She felt humiliated and shameful and scared and anxious whenever she was outside her home. She had obsessive compulsive behavior and struggled to feel hopeful about the future. Ms Rum was very emotional and cried when she testified. When the accused demanded money, she could only give the R100 which was the only money she had. The accused asked her if she was prepared to die or to give the money. He told her the money was too little and for that she had to suck him. She pleaded with him: *"Bhuti, can you please forgive me because I don't have money?"* The accused simply told her that he won't. She was terrified and sucked him. When she felt like vomiting and pulled out, the accused grabbed her by her neck and pulled her back to continue to suck his penis. He was groaning as she sucked him. She was shocked by what happened to her. She was

suffering from panic attacks. She could not eat well and had difficulties accepting what happened to her. She cannot stop thinking about what happened to her and these recurring thoughts upset her greatly. This caused complications in her intimate relationship.

[28] In count 15 and 16 the accused raped the victim by forcing her to suck his penis without her consent whilst he sat on the driver's seat and she was seated on the rear seat. He thereafter crossed over to the backseat where he forced her to undress and then raped her by penetrating her vagina with his penis without her consent. The discretionary minimum sentence for these serious offences where the victim was raped more than once by the accused, is imprisonment for life unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence [Section 51(1) read with (3) and Schedule 2 Part I of the Criminal Law Amendment Act 105 of 1997 (CLAA)]. For each count of robbery when there are aggravating circumstances, for a first offender, as is the position with the accused, the discretionary minimum sentence is imprisonment for a period not less than 15 years [Section 51(2)(a)(i) read with Part II of Schedule 2 of CLAA]. For rape other than as referred to in Part 1, the discretionary minimum sentence is 10 year [Section 51(2)(b)(i) read with Part III of Schedule 2 of CLAA]. For kidnapping, the minimum sentence is 5 years.

[29] The accused had a disrupted emotional development which arose out of traumatic experiences which had profound implications for his life when he was still young and fragile. This included the violent killing of his father by his uncle. The accused had poor decision-making skills. He had the ability to control his behavior and to make choices needed to adjust his behavior to his structured environment. This was what I understood, from the probation officer's report, to be an explanation with regard to the causes and the context within which the crimes took place.

[30] To achieve a sense of distorted importance and control, in order to feel gratified, the accused asserted sexual dominance and power over vulnerable women. His use of

sexual relations to satisfy emotional needs is what his eldest brother observed and termed “a womanizer”. It is a mind-set with toxic implications for the distribution and exercise of masculine power. It manifested an unusual need for power and dominance. Women, in his world, were objects, and that explained why in my view, he saw nothing wrong with his gender-based violence perpetrated against them.

[31] Van der Hoven and Ovens, *supra*, at page 28 said:

“In this instance the crime is of such a nature that it is important to consider the interests of the community and ensure their protection at all costs. The harm done to the victims, their families and the morale of the whole community, and the offender’s inability to accept responsibility make incarceration a viable mechanism to restore the imbalance caused by the crime.”

Consideration of the crime, the criminal, the victim and the interests of the community is a viable mechanism to restore the imbalance. A short-term imprisonment will neither hold any deterrent or rehabilitative value for the accused as an individual nor set an example and send a clear message to potential offenders. The severity of the crimes made retribution a factor that balanced the scales of justice. For justice to be served in this case, severe punishment was called for.

[32] Gender-based violence is serious and prevalent. Rape in particular, has a deleterious effect on the victims personally and extends to their relations. According to the probation officer, it left its victims scared, angry, guilty, anxious and sad and its stigma caused others to feel embarrassed and ashamed whilst others developed post-traumatic stress disorder. This court has an obligation, in its pronouncement on sentence, to reflect the society’s legitimate outrage. The sentence had to reflect cognizance of the pain, heartbreak and destruction of the lives of the victims. The personal circumstances of the accused, seen against the background of the crime, the interests of the community and the impact on the victims, do not satisfy me to be substantial and compelling to justify a departure from the discretionary minimum sentences.

[33] For these reasons I found that there are no substantial and compelling circumstance to deviate from the prescribed sentences and the accused is sentenced as follows:

- (a) Count 1 accused is sentenced to 5 years imprisonment.
- (b) Count 2 accused is sentenced to 15 years imprisonment.
- (c) Count 5 accused is sentenced to 5 years imprisonment.
- (d) Count 6 Accused is sentenced to 15 years imprisonment
- (e) Count 7 accused is sentenced to 10 years imprisonment
- (f) Count 8 accused is sentenced to 5 years imprisonment.
- (g) Count 9 Accused is sentenced to 5 years imprisonment.
- (h) Count 10 accused is sentenced to 15 years imprisonment.
- (i) Count 11 accused is sentenced to 15 years imprisonment.
- (j) Count 12 accused is sentenced to 10 years imprisonment
- (k) Count 13 accused is sentenced to 5 years imprisonment
- (l) Count 14 accused is sentenced 15 years imprisonment.
- (m) Count 15 and 16 accused is sentenced to life imprisonment.
- (n) Count 17 accused is sentenced to 5 years imprisonment.
- (o) Count 18 accused is sentenced to 15 years imprisonment.
- (p) Count 20 accused is sentenced to 10 years imprisonment.
- (q) Count 21 accused is sentenced to 5 years imprisonment.
- (r) Count 22 accused is sentenced to 15 years imprisonment.
- (s) Count 23 accused is sentenced to 10 years imprisonment.
- (t) Count 24 accused is sentenced to 5 years imprisonment.
- (u) Count 25 accused is sentences to 15 years imprisonment.
- (v) Count 26 accused is sentenced to 10 years imprisonment.

The sentences in counts 1-14 and 17-26 will run concurrently with life imprisonment.

Before I rise, the conscience of justice weighs heavily upon me to ask the Chairperson of the Portfolio Committee on Justice in the Parliament of the Republic of South Africa,

the Honourable Mr Bulelani Magwanishe, MP: “Is it not about time that persons in the category of the accused have their names entered on the National Register for Sex Offenders?”

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DM THULARE  
ACTING JUDGE OF THE HIGH COURT