IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

[REPORTABLE]

Case No: A214/19

In the matter between:

JOHANNES PIETERSE **Appellant**

and

THE STATE **Respondent**

Coram: Dolamo, J et Wille, J et Kusevitsky, J

Date of Hearing: 29th of January 2020

Date of Judgment: Delivered via email on the 2nd of June 2020

JUDGMENT

KUSEVITSKY, J:

INTRODUCTION

[1] This is an appeal with leave of the court of first instance[1], against sentence only. The appellant was convicted of rape and was sentenced to (10) years imprisonment. The appellant was also convicted of murder and was sentenced to life imprisonment.[2]

[2] The victim that was murdered by the appellant was the same victim that was subsequently raped by the appellant. The appellant received a sentence of - *life imprisonment* - because he raped the victim that he had murdered. He was however, also sentenced to (10) years imprisonment for the rape. This is the issue that bears further scrutiny on appeal, bearing in mind that in any event, the sentence handed down in connection with the rape charge was ordered to run concurrently with the sentence of life imprisonment.

[3] The appellant initially pleaded guilty to murder and entered into a plea and sentence agreement[3] in terms of section 105A of the Act.[4] Further, certain admissions were recorded in terms of section 220 of the Act. He was legally represented for the duration of his trial.

[4] The trial judge questioned the appellant thoroughly in connection with his agreement and was not satisfied that the appellant had admitted guilt on all of the elements of the offence and accordingly entered a plea of not guilty on his behalf. The trial judge correctly advocated that the trial of the appellant was to proceed - *de novo* - before a differently constituted court in view of the 'proceedings' that unfolded before him. The appellant and the appellant's counsel however waived all of the appellant's rights in this connection.

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[1] Henney, J
[2] In terms of section (c) of Part 1 under Schedule 2 of the Criminal Law Amendment Act, 105 of 1997
[3] The agreement
[4] Act 51 of 1977

A SUMMARY OF THE RELEVANT FACTS

[5] In a fit of rage and jealousy the appellant raped and murdered the complainant, who was a family relative. This, because she did not want to be romantically involved with him and rebuffed him.

[6] The appellant admitted to murdering the complainant. During the trial, it emerged that the deceased had ignored the appellant at a family party held the previous evening. When the deceased left this function, without speaking to the appellant, he followed her and confronted her. Thereafter, he strangled her and dragged her to a nearby shed. Her torture continued until her demise.

[7] Whilst the appellant admitted that he kicked and jumped on the head of the deceased, he denied that he had raped her. The deceased was found in the shed, partially naked. The appellant led the police to her body after confessing both to his employer and his family, that he had murdered her.

[8] The deceased suffered significant injuries. A specialist forensic pathologist who performed the autopsy on the deceased, concluded, inter alia, that the deceased suffered a serious assault upon her. She opined that the person who inflicted the injuries must have used extreme force to have caused these extensive injuries. She concluded, from these injuries, that it must have been a continuous intensive assault upon the deceased and she would have suffered because of the injuries to her face and head.

[9] The cause of death was due to extensive brain damage and bleeding on the brain. Her jawbone was fractured. She did not die due to strangulation.

[10] The forensic pathologist also testified that the deceased had severe vaginal injuries. The combination of the vaginal injuries and the fact that she was found semi-naked, were strong indicators that she was raped. The deceased suffered 'epithelial' loss and severe bruising. These injuries must have been inflicted when she was still alive, because the bruising was an inflammatory reaction. Post-demise, bruising does not occur in this fashion. Further, even though there was no evidence of semen found on the deceased, this did not rule out that no rape had occurred.

THE APPELANT'S CASE

[11] The appellant denied having sexual intercourse with the deceased and suggested that she was severely intoxicated and accordingly it was possible that the deceased had indulged in sexual intercourse with someone else, prior to his assault upon her.

[12] However, the appellant advised the police officer who was called to the scene that the deceased was his girlfriend and that he wanted to have sex with her, but she refused. Further, a knife was found next to her body and the appellant admitted that he wanted to slit her throat.

THE RESPONDENT'S CASE

[13] The respondent relied almost exclusively on the plea offered up by the appellant, read together with his recorded admissions and upon the medical evidence presented. The medical evidence was not seriously engaged with and was left largely unchallenged.

DISCUSSION

[14] After careful consideration and analysis of the totality of the evidence presented, the court a *quo* accepted that the medical evidence supported the conviction of rape. I say, correctly so. The appellant was found guilty of murder on the basis '*dolus eventualis'*.

[15] The appellant submits in the main, that the court a quo erred by failing to find that all the mitigating factors, viewed together, were not of sufficient weight, to meet the threshold of - *substantial and compelling circumstances* - to justify the implementation of a lesser sentence as enunciated in S v *Malgas*[5]. It is advanced that the court failed to attach sufficient weight to the personal circumstances of the appellant, in that; he was a first offender; that he showed remorse; that he pleaded guilty; that there was a prospect of rehabilitation and that the murder was not pre-meditated.

[16] It is trite that matters of appeal on sentence that an appeal court is only entitled in law to interfere, if the trial court misdirected itself, alternatively if the sentence imposed was so disturbingly inappropriate or disproportionate that no reasonable court would impose it. A

[5] 2001 (1) SACR 469(SCA)

court of appeal should also be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and that a court of appeal should be careful not to interfere with this discretion.

[17] The appellant contends for the position that minimum sentences should not be imposed lightly. Long term imprisonment such as life imprisonment is the most severe sentence that a court may impose. It was submitted that it was evident that the appellant's behavior was - *materially influenced* - because he was angry, felt rebuffed by the deceased and was under the influence of dependence producing substances. Finally, that this was a 'crime of passion'.

[18] In my view, these arguments are misplaced for not only does it perpetuate the stereotypical and patriarchal notion that a woman 'deserves what she gets' by her actions, but that the appellant would consequently have been justified by his actions. The appellant, in this situation, could never justify his actions. The deceased was not interested in having a relationship with the appellant. She was being harassed by him at a party, and when she left the party without his knowledge, this infuriated him.

[19] I find it unacceptable that the appellant felt that he had some kind of - *entitlement* - to the deceased because his advances were not reciprocated. This behavior, in my view, would not justify the imposition of a lesser sentence. Rather, in my view, this is an aggravating feature of the appellant's behavior.

[20] The appellant was (30) years old at the date of the commission of the offences. He is the father of three minor children. He took care of his mother. Regrettably, he only advanced

to grade eight before he left school. He worked as a shepherd and earned R 600,00 per week. He handed himself over to the police and admitted to the crime of the murder.

[21] It is trite that in matters involving serious crime, the personal circumstances of the offender, by themselves, will not assist the offender in avoiding the consequences of the minimum sentencing regime. In *Malgas*[6], it was emphasized that flimsy grounds should be avoided when seeking to deviate from the minimum sentencing regime.

[22] It is common cause that the *court a quo* found no substantial and compelling circumstances present to have justified a deviation from the minimum sentence. During argument, an interesting sentencing issue was debated. This is, whether the *court a quo* effectively sentenced the appellant - *twice* - for the rape of the complainant.

[23] If this did indeed occur, was this purported 'duplication' not a substantial and compelling circumstance, *standing alone*, to justify a deviation from the minimum sentence regime? The appellant was sentenced to (10) years imprisonment for raping the deceased. Thereafter, he was sentenced to life imprisonment because he murdered and *'raped the deceased'* as contemplated in the 'offence' as defined in section 51(1) of the Criminal Law Amendment Act.

[24] In *Malgas*, the court stated that the minimum sentence provisions must be construed in accordance with the values enshrined in our constitution and interpreted in a manner which respects those values. Due weight must be given to the fact that these provisions were not intended to be permanent fixtures in our law and were initially intended to lapse after a

[6] S v Vilakazi 2012 (6) SA 353 (SCA) para 58

period of two years, unless extended annually. Crime in our country and more specifically crimes against woman remain shocking and unacceptable. The police, prosecutors and the courts are constantly being exhorted to use their best efforts to stem the tide of criminality which continues to threaten to engulf our society. [7]

[25] The legislature aimed at ensuring a severe, standardized, and consistent response from the courts to the commission of serious crimes unless there were, and could be seen to be, truly convincing reasons for a different response.[8] These specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses favorable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances.[9]

[26] The appellant is a first offender and in terms of the minimum sentence regime, he would be subject to a minimum sentence of (15) years' imprisonment in connection with the murder conviction, had he, in addition, not raped the deceased.

[27] The minimum sentencing regime may, in my view, become somewhat problematic when it attempts, via its - *sentencing regime* - to create new offences defined essentially by the ordained sentence to be imposed. This anomaly may arise in cases where common law offences morph into statutory offences, primarily due to the sentence that falls to be imposed.

[7] At para 7
[8] At para 8
[9] At para 9

[28] By way of example, reference may be had to offences committed under the Prevention of Organized Crime Act[10]. A specified offence may on its own constitute a 'stand-alone' offence and at the same time render the offender guilty of another statutory offence, on exactly the same facts. These offences are also known as 'predicate' offences.

[29] In such a case, to sentence an accused for both these offences, could in my view, lead to a 'duplication' of sentences. In *S v De Vries and Others*[11], Bozalek J, made the following relevant comment;

> *'Secondly, in regard to a possible duplication of convictions in respect of the predicate offences, as discussed above in relation to s 2(1)(f), the elements of the offence of contravening s 2(1)(e) are quite different to those involved in the predicate offences themselves. Again, in my view, in creating the new statutory offences the legislature must have foreseen that in given circumstances an offender could be convicted of both managing and participating in the affairs of an enterprise through a pattern of racketeering activity and of committing the offences which make up the pattern of racketeering. Through its sentencing discretion a court will be able to ameliorate any possible sentencing anomalies which may arise'*

[30] The *court a quo* did order that the sentences run concurrently. That having been said, I am of the view that the rape of the deceased was taken into account - *twice* - when the sentences were imposed. This is in itself, in these particular circumstances, is a weighty factor, which may in itself be a substantial and compelling reason to deviate from the

[10] Act 121 of 1998
[11] Case 67/2005 [2008] at para 398

minimum sentencing regime. I do not however propose to suggest that all potential 'duplicate' sentences may as a matter of course be elevated to be substantial and compelling circumstances which would entitle an offender to an automatic deviation from any minimum sentence imposed. This would water down the efficacy or render nugatory the very purpose of the minimum sentencing regime. I must emphasize that each case must be considered on its own facts as in some cases this ostensible 'duplication' may not be a weighty factor worthy of consideration at all.

[31] The relevant provisions of the prescribed minimum sentencing regime, in connection with the murder charge, only become relevant for the purposes of sentencing. In my view, the crime of murder, read with the relevant provisions of the prescribed minimum sentencing the regime, is not to be construed as a totally discrete offence. In my view, it remains the offence of murder, just with more serious consequences. No new mental element is required, but rather the enquiry is to the objective facts surrounding the murder, which in turn materially bear down - *only* - on the sentence to be imposed.

[32] Whilst I remain mindful of the fact that a court exercising appellate jurisdiction cannot, in the absence of a material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at, by it, simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.[12] However, taking into account the 'duplication' of the appellant's sentences on the rape charge, combined with all the appellant's personal circumstances, coupled with the fact that he did exhibit some remorse, brings me to the conclusion that the appellant may be rehabilitated and that he is unlikely to re-offend. Further, it is harsh sentence that was

[12] Malgas *supra* at para 12

imposed on the appellant in connection with his conviction on the murder charge, that had the effect of a possible - *duplication of the sentences* - albeit for a single charge of rape. All these factors, in my view, are weighty factors that militate for a deviation from the provisions of the minimum sentencing regime. The respondent's counsel conceded this during her argument.

CONCLUSION AND ORDER

[33] In all the circumstances, I propose the following order namely;

1. **That the appellant's conviction and sentence on the charge of rape is hereby confirmed and it is ordered to be served concurrently with the sentence imposed in connection with the murder conviction as set out below.**

2. **That the appeal succeeds only in connection with the sentence imposed on the conviction of murder, in that the life imprisonment sentence imposed by the court a quo, is set aside and replaced with the following**;

'The appellant is sentenced to direct imprisonment for a period of (23) years to run with effect from the 20th of August 2015.

_____

KUSEVITSKY, J

I agree, and it is so ordered:

_____

WILLE, J

DOLAMO, J;

[34] I have read the judgment of Kusevitsky, J and regrettably cannot agree with the reasoning and the outcome of this appeal. It is common cause that the appellant was convicted on (1) count of murder read with the provisions of section 57 (1) of Act 105 of 1997 and rape. He was sentenced to life imprisonment on the count of murder and to (10) years imprisonment for the rape. The appeal against the sentence of life imprisonment is with the leave of the *court a quo* (Henney, J).

[35] Before I deal with the question of whether there were any substantial and compelling circumstances that could have justified the imposition of a lesser sentence than life imprisonment which, if they exist, would entail overturning on appeal, the sentence of life imprisonment, I deem it apposite to outline some essential facts, pertinent to the outcome of this appeal.

[36] The appellant, who was (30) years old at the time of the commission of the offence, and was related to the deceased Anita Rochelle Pieterse who was (28) years old at the time, lived and was employed on a farm. Appellant claimed to have been in a love relationship with the deceased. On the night preceding the one on which he raped and murdered deceased, appellant and the deceased were socialising with other people where alcohol was consumed. Appellant alleged to have also used drugs on this occasion. In the course of the evening deceased, as she was entitled to, engaged socially with other people. This did not go down well with the appellant who felt that deceased was ignoring him. Appellant did not know the reason why deceased did not want to talk to him, but this made him feel rejected.

[37] The next day, the deceased and the appellant again socialised with other people and also consumed alcohol. When, the deceased later left the place, the appellant followed her. On realising that the appellant was following her, deceased tried to run away but he chased and caught up with her. He dragged her into a barn where an argument or altercation ensued. Appellant started to strangle her. He had a knife and allegedly used it to cut off her clothes. It would appear that the appellant and the deceased engaged in a struggle, but he overpowered her, and the latter ended on the ground. The appellant started to stomp and kick her all over her body and head with his booted feet. He continued to kick and stomp her until she died. After the deceased had died, the appellant concealed her body under a canvas. He claimed that he did all this because he was angry with her, an anger which was sparked when she merely ignored him.

[38] The following day, a Sunday, appellant felt remorseful about what he did and as a result went to his mother where he confessed to the murder. He also confessed to his employer who handed him over to the police. Upon his arraignment appellant tendered a plea

and sentencing agreement in terms of the provisions of section 105A of the Criminal Procedure Act[13] (the CPA) but the court *a quo* did not accept it. The Learned Judge was not satisfied that the appellant admitted all the requisite elements of the crime, in particular, whether he had the intention to kill the deceased. Since there is no provision under section 105A of the CPA to the effect that those admissions which appellant correctly made, may stand once the plea and sentence agreement was rejected, the trial had to start *de novo,* as provided for in section 105A (6)(c). Appellant and the State agreed that the trial may proceed before Henney J.

[39] The appellant pleaded not guilty to the charge of rape which necessitated that Dr Hurst, a pathologist who conducted the post-mortem examination on the body of the deceased, had to testify. Dr Hurst's chief post-mortem findings were that the deceased's body had multiple injuries; notably numerous abrasions and contusions, severe skull, facial bone fractures and a fracture of the mandible, haemorrhage in and around the brain; blood in the stomach, trachea and aspiration of blood as well as vaginal injuries suggesting sexual assault.

[40] Based on these injuries, Dr Hurst was of the view that the assault on the deceased was carried out with a blunt object with such brutal force as to crush the skull, facial bones and jaws. She conceded, however, that kicking and stomping on the deceased with booted feet could cause these injuries. These injuries showed that the deceased must have died swiftly but would have endured severe pain while the assault was taking place.

[41] Regarding injuries to the deceased's vagina, Dr Hurst testified that there was a 3,5 x 1,5 cm area of epithelial loss of vagina posteriorly and laterally, a 1 x 0,5 cm contusion to the left

[13] Act 51 of 1977.

of the urethral opening, a 2 x 2cm contusion of the inner aspect of the vaginal wall anteriorly. There were signs of penetration as well. These injuries which were on the inside of the vagina and could not have been caused by her being kicked, as was suggested in cross-examination. These injuries and the fact that the deceased was naked pointed to a rough and not normal sexual intercourse. The absence of semen in her vagina could only have been as a result of there being no ejaculation or the rapist wearing a condom.

[42] Based on the evidence, particularly of Dr Hurst and the admissions made by the appellant in terms of section 220 of the CPA, the trial court was satisfied that the State had proved the guilt of the appellant beyond reasonable doubt and consequently convicted him of murder read with the provisions of section 51(2) of Act 105 of 1997 and rape. The trial court remarked that:

> *'Ondanks die feit dat hy erken het dat hy die oorledene doodgemaak het, hy het nie ver genoeg gegaan om 'n eerlike relaas van wat gebeur het die betrokke dag aan die Hof voor te hou nie. Hy het op 'n selektiewe wyse vrae geantwoord waar daar van hom 'n antwoord verwag was…'*[14]

[43] Coming to sentencing, the appellant the trial court concluded that the aggravating factors far outweighed any migratory circumstances. The court found it aggravating that the deceased knew the appellant; that during the rape, which preceded the murder, the deceased suffered serious injuries to her private parts; that the deceased was small of stature, only weighed (45) kilograms and consequently was defenceless against the onslaught mounted by the appellant; that the appellant repeatedly and continuously stomped on the deceased and, in so doing, broke her skull, cheekbones and jaws and, lastly, as if the assault was not enough,

[14] Loosely translated:

that he left her out there and only covered her with a piece of canvass. The trial court also remarked that by killing her, the appellant tried to cover up the rape.

[44] Before determining whether there were substantial and compelling circumstances to justify a departure from imposing the minimum discretionary sentence the trial court, correctly in my view, stated that it had to also consider the interest of society. In this respect it held that the interest of society came strongly to the fore in matters of this nature, where the crime was one of rape and where a defenceless woman, after being raped by someone known to her, is killed. The trial court was accordingly not persuaded that the fact that the appellant was a first offender, as far as violent crime was concerned; had showed remorse for the murder, was responsible for the welfare of his mother and had minor children constituted substantial and compelling circumstances to justify a departure from imposing the minimum discretionary sentences.

[45] On appeal it was argued on behalf of the appellant that the trial court erred in not holding that the appellant's cumulative personal and mitigating circumstances amounted to substantial and compelling circumstances to justify the imposition of a lesser sentence than the minimum sentences prescribed. It was submitted that it was evident, which was argued to be a relevant factor, that the appellant's behaviour was influenced by rage as he felt rejected by the deceased, which made this a crime of passion; that he was under the influence of substances; and that he showed remorse which was an indication that he was a candidate for rehabilitation. The appellant was furthermore lauded for entering into a plea and sentencing agreement on the count of murder and, when this was not accepted by the court, shortened the proceedings by making the necessary formal admissions.

[46] It was further argued that a minimum sentence of life imprisonment, being the most severe sentence a court can impose, should not be imposed lightly; that the object of sentencing should not be to satisfy public opinion but to serve the public interest and that, when considering the triad, the one factor should not outweigh the others. In this respect, it was submitted that a measure of mercy should always be considered and coupled to possible prospects of rehabilitation.

[47] While conceding that the sentence was severe the respondent argued that the trial court took into consideration the personal circumstances of the appellant, the seriousness of the crime as well as the interest of society but could not be faulted for concluding that there were no substantial and compelling circumstances to justify a deviation from the minimum discretionary sentence. According to the respondent gender-based violence, especially of a sexual nature, is a serious crime. The appellant has abused the trust that the deceased had in him.

[48] The approach of a court of appeal to a sentence imposed in terms of the Minimum Sentence Legislation was formulated by Bosielo JA in *S v PB*[15] as follows:

> *'[20] What then is the correct approach by a court on appeal against a sentence imposed in terms of the Act? Can the appellate court interfere with such a sentence imposed by the trial court's exercising its discretion properly, simply because it is not the sentence which it would have imposed or that it finds shocking? The approach to an appeal on sentence imposed in terms of the Act should, in my view, be different to an approach to other sentences imposed under the ordinary sentencing regime. This, in my view, is so because the minimum sentences to be imposed are ordained by the Act. They cannot be departed from lightly or for flimsy reasons. It follows therefore that a proper enquiry on appeal is whether the facts which were considered by the sentencing court are substantial and compelling, or not'*

[15] 2013 (2) SACR 533 at para [20].

[49] The central question for determination therefore is whether the facts which were placed before the trial court for consideration amounted to substantial and compelling so as to justify a departure from imposing life imprisonment. Although there is no onus on an accused to prove the presence of substantial and compelling circumstances, it must be so that an accused who intends to persuade a court to impose a sentence less than that prescribed should pertinently raise such circumstances for consideration. In a given case it may not be enough for an accused to argue that such circumstances should be inferred from or found in the evidence adduced by the State.[16]

[50] Life imprisonment is an obligatory sentence for a murder in circumstances where the victim was first raped by the perpetrator. Only if the court found the existence of substantial and compelling circumstances, as described by Marais JA in *S v Malgas*[17] *(Malgas)*, can the court deviate from imposing the sentence which is ordained by the Act. Substantial and compelling circumstances are[18]:

> *'[25] What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary –*
>
> *A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).*

[16] See *S v Roslee* 2006 (1) SACR 537 at para [33].
[17] 2001 (1) SACR 469 (SCA).
[18] *Malgas supra* at para [25].

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 the sentence that 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, truly 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 doubts 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 the 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 that 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'

[51] In an attempt to persuade us that the trial court erred the following factors and circumstances were present as cumulatively constituting substantial and compelling circumstances that this was a crime of passion. The courts have traditionally treated a crime of passion with a measure of compassionate understanding of the strong emotions which are produced when a person finds his/her lover in compromising circumstances. But there must be signs of infidelity and the appellant's reaction must be an immediate response to the situation unfolding before his eyes which provokes an emotional upheaval, to serves as a mitigating factor. Pursuing a person who merely ignored you is not such a situation. I accordingly do not agree that this was a crime of passion. Even if appellant was in a secret love relationship with his niece his actions were not motivated by any obsession with her. In his own words he was angry after she ignored him. He did not know the reason why she chose to ignore him. It would be speculative to conclude that he acted as he did out of a passion.

[52] It was also argued that the appellant was under the influence of substances when he committed the offences. There is no evidence to support this conclusion. Appellant admitted to using drugs on the previous night and not on the day he committed the murder. Although on the day of the murder he had consumed alcohol there is no evidence to indicate the extent

to which he was intoxicated. A call on the use of substances, without any evidence of the extent to which this affected him, would be nothing but speculative.

[53] Appellant was described as remorseful. This conclusion is drawn from the fact that he tendered a plea of guilty to the murder, which was preceded by his confession. Strong evidence of remorse is required before a court can be satisfied that the offender is truly remorseful. It is not what the appellant says but his actions which would determine whether he is truly remorseful. The appellant, as the trial court correctly remarked, was not completely truthful with the court. He tried to mitigate his blameworthiness by claiming that he did not intend to murder the deceased and secondly, he denied raping her. This conduct is hardly the hallmark of an accused who is truly remorseful. It was incumbent on the appellant, if he was truly remorseful to unequivocally admit all the elements of the two crimes.

[54] Lastly, appellant claimed to have been angry as a result of the deceased ignoring him. Actions based on anger may be mitigating if the action of the victim is such that the emotional upheaval in the perpetrator is considered reasonable in the ordinary reasonable human being[19]. Other than to ignore the appellant the deceased did nothing to provoke the appellant. There is no evidence of any altercation prior to the deceased leaving the place. After the deceased had left the appellant had the opportunity to compose himself but he elected to pursue her. He chased, caught up with her and dragged her to an isolated place. If indeed he was provoked, as he alleged, he would have confronted her there and then, where he caught him with her. His actions, of dragging her to a secluded place, are not of a reasonable person who has been provoked by the actions of his victim.

[19] *S v Mvuleni* 1992 (2) SACR 89 (A) at 94 f – g.

[55] I turn now to deal with the aspect of the main judgment, with which I do not agree, which led to upholding the appeal. My Learned Sister found that the rape of the deceased was taken into account "*twice*" when the sentences were imposed. Respectfully, I do not agree with this conclusion. Nor do I agree with the sentiment that the minimum sentencing regime creates new offences defined essentially by the ordained sentences to be imposed. The rape and the murder remain two distinct offences for which all the elements must be separately proved during the trial on the merits. Only at the sentencing stage, when the murder has already been proved, it is opposite to look at the circumstances under which this was committed.

[56] Where an accused has been convicted of murder, section 57(1) requires of the regional court or the High Court to sentence him to life imprisonment if the murder is one that is referred to in Part I of Schedule 2. Reference to Part I of Schedule 2 is a jurisdictional factor for imposing the prescribed sentence. It is not an element of the offence. Even if the jurisdictional fact has been established the court is obliged in terms of section 51(3), if it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence, to follow the prescripts of this sub-section and impose a lesser sentence.

[57] Any deviation from the minimum sentence prescribed for a particular offence which is not underpinned by substantial and compelling circumstances, would be a deviation for flimsy reasons[20]. Weighing the mitigating factors with the aggravating ones, I am not persuaded that there are substantial and compelling circumstances to justify the imposition of

[20] See *Malgas supra* at paragraph [9].

a lesser sentence. The trial court therefore did not misdirect itself in imposing the sentence of life imprisonment.

[58] In my view the trial court did not err in concluding that there were no substantial and compelling circumstances. The deceased was killed in a gruesome manner. The appellant used brutal force to such an extent that the face and the head of the deceased, made up of tough bones, was crushed. Under the repetitive and continuous blows, the deceased was deprived of her most precious right: a right to life. This after she had been sexually violated. As Mohamed CJ remarked in *S v Chapman*[21] the courts are under a duty to send a clear message to the accused, to other potential rapists and to the community that they are determined to protect the equality, dignity and freedom of all woman and shall show no mercy to those who seek to invade those rights.

[59] In the circumstances I will make the following order:

"*the appeal is dismissed*".

DOLAMO, J

[21] 1997 (2) SACR 3 at 5 e.