



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

**Case Number: A 62 / 2021**

In the matter between:

**ANDREW JORDAAN**

Appellant

and

**THE STATE**

Respondent

**Coram: Baartman *et Wille et Slingers*, JJ**

**Heard: 21<sup>st</sup> of July 2021**

**Delivered: 30<sup>th</sup> of July 2021**

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**JUDGMENT**

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**WILLE, J:** (Baartman *et* Slingers JJ, concurring)

## **INTRODUCTION**

[1] This is an appeal directed solely against a life sentence imposed upon the offender. The appeal is with the leave of the court a quo<sup>1</sup>. The appellant was convicted on a single charge of rape and on a single charge of murder. The minimum sentencing regime found application in connection with the conviction of murder in that the demise of the victim was caused by the appellant during the commission of the crime of rape. This crime is also commonly known as a ‘rape homicide’.

[2] The appellant was sentenced to life imprisonment in connection with his conviction of murder and was sentenced to (10) years direct imprisonment in connection with his conviction for the rape of the deceased. By way of operation of law, the period of imprisonment imposed upon the appellant in connection with his rape conviction is to be served concurrently with his sentence of life imprisonment for the murder of the deceased.

## **GROUND OF APPEAL**

[3] In the appellant’s application for leave to appeal, the following grounds of appeal are advanced, namely: that the sentencing court erred by not finding that there were sufficient substantial and compelling circumstances to enable it to deviate from the prescribed minimum sentencing regime: that the sentencing court over-emphasized the need to prevent and protect public safety at the expense of the offender: that the appellant

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<sup>1</sup> Leave to appeal the sentence of ‘life imprisonment’ was granted by the court of first instance.

was under the influence of alcohol when he raped and killed the deceased: that these circumstances amounted to substantial and compelling circumstances which obligated the court to deviate from the minimum sentencing regime and finally, that the appellant's personal circumstances, viewed holistically, legally placed an obligation upon the sentencing court to deviate from the minimum sentencing regime. The personal circumstances contended for, also included a 'reference' to the past poor socio-economic conditions experienced by the appellant.

#### **THE APPELLANT'S CASE**

[4] The core arguments advanced on behalf of the offender are: that he endured a dysfunctional relationship with his mother: that this affected the manner in which he dealt with or associated with women: that the appellant exhibited aggressive behaviour when he consumed alcohol and that the sentence of life imprisonment does not countenance for his rehabilitation. This, also because he was only (22) years old at the time of the rape homicide.

#### **THE CASE FOR THE RESPONDENT**

[5] The respondent advances: that it is common cause that these offences were committed during May 2007: that the offender was convicted of the murder<sup>2</sup> of another female person during June 2007 and that he was sentenced to (10) years imprisonment for this latter offence: that the deceased's children have suffered unnecessarily as a result of the offenders' actions; that the appellant was well known to the deceased and socialized

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<sup>2</sup> It is conceded that this conviction cannot be regarded as a 'previous' conviction.

with him and trusted him; that the ripple effect of the offender's crimes is very significant, as the secondary victims of these crimes have suffered psychological and emotional trauma: that the offender has not displayed any genuine remorse: that the crime scene photograph album and post-mortem report both demonstrate that the offender showed no mercy when he killed the deceased: that the murder of the deceased was to an extent planned<sup>3</sup>, and finally that the deceased was defenceless and there was no evidence to suggest that the offender was in any manner provoked to commit the rape homicide.

## THE FACTUAL MATRIX

[6] Briefly the following: that the offender met up with the deceased one evening<sup>4</sup>: that this was the last time that the deceased was seen alive: that the deceased's body was thereafter found on the 30<sup>th</sup> May 2007; that the deceased died as a result of, inter alia, blunt force trauma to her head, neck and lower jaw: that the deceased had also been forcibly raped: that the expert evidence demonstrated that the deceased had been strangled to death: that the appellant was apprehended in part due to the fact that the police determined a similar *modus operandi* between the murder of the deceased in this case and the murder of another victim<sup>5</sup>, during June 2007: that the DNA sample of the offender matched the DNA sample of the deceased: that the offender initially denied ever having sexual intercourse with the deceased: that the offender advanced an - *alibi defence* - which was false and that the offender's version at his trial was that he met the deceased at a 21<sup>st</sup> birthday party and they thereafter had consensual sexual intercourse.

## DISCUSSION

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<sup>3</sup> This, inter alia, because the deceased was taken to a secluded area before she was raped and killed.

<sup>4</sup> This was on the 26<sup>th</sup> May 2007.

<sup>5</sup> It bears emphasis that this latter incident was not and is not relevant for the purposes of sentence in this matter.

[7] I need to examine not only the nature and seriousness of the crimes committed by the offender, but also the aggravating circumstances and weigh these up against the mitigating circumstances (if any), in order to determine whether the sentence of life imprisonment was, in the circumstances of this case, appropriate and proportionate to the offence committed. As further held in *Malgas*<sup>6</sup>, in addition, a court of appeal is enjoined to consider all other circumstances bearing down on this question, to enable it to properly assess the trial court's finding and to determine the proportionality of the sentences imposed upon the offender.

[8] The constitutional court<sup>7</sup>, has described an appeal court's discretion to interfere with a sentence only: when there has been an irregularity that results in a failure of justice: or when the court *a quo* misdirected itself to such an extent that its decision on sentencing is vitiated: or when the sentence is so disproportionate or shocking that no reasonable court could have imposed it.

[9] In the written argument on behalf of the appellant, it was submitted that the trial court had indeed misdirected itself in finding that there were no substantial and compelling circumstances to justify the imposition of a lesser sentence than the prescribed sentence of life imprisonment that was imposed upon the offender. Further, it was suggested that the court *a quo* misdirected itself by not exercising its discretion with regard to sentence, in a '*fair and just manner*' and therefore did not consider all the relevant factors to be taken into account with regard to the sentencing procedure.

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<sup>6</sup> *S v Malgas* 2001 (1) SACR 469 (SCA)

<sup>7</sup> *S v Boggards* 2013 (1) SACR (CC) at [4]

[10] This, was however not vigorously pursued on behalf of the appellant during argument at the hearing of the appeal. The focus shifted rather to the unfortunate and difficult personal circumstances endured by the appellant during his youth and his ultimate development to maturity, as an adult. The difficulty with this approach is that there was no ‘evidential material’ before the court a quo in this connection. Besides, there is no fresh ‘evidential material’ before us on appeal in this connection. In my view, the court a quo dealt with all the material at its disposal, on this score, when the appellant was sentenced.

[11] To determine whether a fact is proved, there are of course certain ‘criteria’ which have to be complied with. The noun ‘proof’ should not be confused with ‘evidence’. Evidence is merely a means to prove a fact, whereas proof is the goal aimed at. Whereas, in turn, ‘evidential material’ refers to all the material which can supply proof in a court. All the facts that a party has at his or her disposal can be submitted to a court in various ways. Evidence is merely the most important part of the evidential material and does not only include *viva voce* evidence under oath, but also real and documentary evidence.

[12] The appellant did not testify in mitigation of sentence and further no ‘evidential material’ to which sufficient judicial probative weight could be attached, was submitted and entered into the record, on the appellant’s behalf. It now hardly lies in the arsenal of the appellant to ‘argue’ that his peculiar personal circumstances, as contended for on his behalf, amount to both sufficient substantial and compelling circumstances which enabled or obligated the court a quo, to deviate from the prescribed minimum sentencing regime. Put in another way, there was no misdirection or irregularity in the approach adopted by the court a quo.

[13] That having been said, the only peculiar personal circumstances contended for on behalf of the appellant were, inter alia, the following: that the accused was (22) years old when he committed these offences and was (35) years old when he was sentenced: that his educational career came to an end after the completion of grade (7): that he did not have the benefit and privilege of a positive and stable father as a role model: that he suffered from a sense of an ‘unknown’ or ‘misplaced’ identity in that he did not appreciate his position or place in his particular socio-economic society: that the pre-sentence reports exhibit that the offender was possessed of (2) discrete personality traits: that the offender suffers from depression and is in receipt of therapy and treatment and that the negative characteristics connected to his (2) distinct personality traits, indeed pose a threat and harm to society. Most importantly however, it seems evident that the offender does now exhibit insight into his behaviour.

[14] Further, it is submitted on behalf of the appellant that he was in custody awaiting trial since his arrest and was so incarcerated for approximately (15) months. Regarding the significance of time spent in detention, pre-sentencing, Lewis JA in *Radebe*<sup>8</sup>, made it clear that this is merely one of the factors to be taken into consideration to determine whether the effective sentence imposed is proportionate to the crime committed and therefore justified. In a case involving an armed robbery<sup>9</sup>, she held that in determining whether substantial and compelling circumstances warrant a lesser sentence, than the prescribed minimum one, the following:

*‘the test is not whether on its own that period of detention constitutes a substantial and compelling circumstance, but whether the effective sentence proposed is proportionate to the*

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<sup>8</sup> *S v Radebe* 2013 (2) SACR 165 (SCA) at [14]

<sup>9</sup> *Director of Public Prosecutions, North Gauteng; Pretoria v Gcwala and Others* 2014 SACR 337 at [16]

*crime or crimes committed; whether the sentence in all circumstances, including the period spent in detention prior to conviction and sentencing, is a just one'*

[15] The appellant in this case had been incarcerated for almost (2) years before he was sentenced in the court a quo. In *Fortune*<sup>10</sup>, it was held that although the fact that a convicted offender has spent time in prison awaiting trial or for the duration of the trial, is undoubtedly a relevant consideration in determining an appropriate sentence, it is not one that '*carries any mechanical effect*' and this must be even more so, as a matter of logic, when a life sentence is imposed.

[16] The SCA in *Radebe*<sup>11</sup>, disapproved of the previously held notion that time in prison before sentence should count as the equivalent of double the time of post-sentence incarceration. Lewis, JA made it clear that there should be no rule of thumb or mechanical formula regarding the calculation of the weight to be attached to the period spent awaiting trial. Rather, in each case the court should assess the individual accused's circumstances to determine the extent to which the proposed sentence should be reduced, if at all. In determining whether the effective period of imprisonment is justified and proportionate to the crime committed, the period in detention pre-sentencing is but '*one of the factors*' to be taken into account.

[17] In *Fortune*, it was noted that the enquiry by the court a quo, in respect of the period spent in custody awaiting or during trial, was whether its effect, taken together with the prescribed minimum sentence, would render the imposed sentence so disproportionate to the

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<sup>10</sup> *S v Fortune* 2014 (2) SACR 178 (WCC)

<sup>11</sup> *S v Radebe* 2013 (2) SACR 165 (SCA)



offence for which the offender had been convicted, so as to amount in the context of all the relevant factors, to substantial and compelling circumstances, therefore warranting the imposition of a lesser sentence. In the present case, the crime of which the offender has been convicted for the purposes of this appeal, is that of a rape homicide. This manifestation of rape has been regarded as so serious by the legislature, enough to make it punishable with a minimum sentence of life imprisonment, even for first offenders.

[18] I remain persuaded by the submissions on behalf of the respondent that a severe degree of violence was used during the murder and rape of the deceased in the particular circumstances of this case. Purely by way of simple illustration, in *Fortune*, where the appellant had threatened the complainant with a knife on a street in broad daylight and robbed her of her handbag without causing her any physical injury, the court held the offence to have been at the ‘lower end’ of the scale of instances of robbery with aggravating circumstances, and stated that this is a factor which should have been taken into account in the assessment of an appropriate sentence. This case on the other hand, may very well be regarded as one on the ‘higher end’ of the scale of a rape homicide.

[19] Further, where there are no substantial and compelling circumstances to justify a decremental deviation from the prescribed minimum sentencing regime, aggravating factors may even in certain circumstances, persuade the sentencing court to increase the sentence to a level above the prescribed minimum sentence. In this case, this would not apply as life imprisonment is the highest sentencing threshold.

[20] The facts in this appeal are that the evidence exhibited that the deceased was strangled and violently murdered by the offender. One has to keep in mind that in the present case a high degree of violence was used in that the victim was not only strangled but she was thereafter literally - *bludgeoned* - to death by the offender. In addition, the following must be born in mind: that the offender was well known to the deceased: that the offender socialized with the deceased and her family and some measure of trust had been established: that the domino effect of the deceased's murder manifested in psychological and emotional trauma<sup>12</sup> and the deceased's family also endured pain for a significant time before accepting and finding closure.

[21] It is in the interests of the community to be rid of such violent crimes and this is a material factor in considering whether a sentence is appropriate and proportional to the crime. As alluded to earlier, it is trite that a court of appeal will not easily interfere with a sentence just because it would not have imposed the same sentence. The test rather, is whether the sentence imposed is vitiated by an irregularity, misdirection or induces a sense of shock. The principle being that - *sentencing* - is pre-eminently a matter for the discretion of the trial court and a court of appeal should be careful not to erode that discretion, unless it is judicially sound to do so.

[22] The respondent, inter alia, takes the position that the court a quo, took into consideration the relevant 'triad' of factors: being the personal circumstances of the appellant: the seriousness of the crimes and the interests of society. It is accordingly

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<sup>12</sup> The deceased's (3) children suffered severely as a result of the loss of their mother. They endured for some time in foster care. Thereafter, they were placed in the care of their aunt and then their father. Her youngest child also sadly passed away during this time. The deceased's elder children both associated themselves with a negative circle of friends, dropped out of school and both started using cannabis to 'ease their pain'.

submitted that there was not any striking, startling or disturbing disparity between the trial court's sentence and that which a court of appeal would have imposed.<sup>13</sup>

[23] The argument by the respondent is that the conclusion is therefore that no interference is justified. Further, it is submitted that the court of first instance correctly found no substantive or compelling circumstances - *justifying* - a deviation from the minimum sentencing regime. Besides, the domino effect of this rape homicide, in my view, cannot be discounted.<sup>14</sup> Certain family members of the victims suffered severely as a result of the crimes perpetrated and seemingly will so suffer going forward. Their socio-economic circumstances are not good and their opportunities for proper counselling are regrettably very limited.

[24] By contrast, the appellant contends for the position that the prescribed minimum sentences should not be imposed lightly. It is so that 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* - by his unfortunate upbringing. However, on this score the appellant's counsel wisely conceded that the evidential material in support of these propositions, was markedly absent. In summary, it was contended, that this in itself, or cumulatively, with the other mitigating factors, constitute substantial and compelling circumstances which would warrant the imposition of a lesser sentence, other than life imprisonment.

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<sup>13</sup> *S v B* 1996 (3) SACR 543 (C)

<sup>14</sup> The deceased's family described feelings of , inter alia, shock, anger, upsetting emotions, anxiety and feelings of depression.

[25] I disagree. In my view, these arguments are somewhat misplaced as the appellant, in this situation, could never justify his actions. I find it unacceptable that the appellant took the deceased away to a secluded area and then raped and killed her. This behavior, in my view, does not justify the imposition of a lesser sentence and is an aggravating feature of this rape homicide.

[26] Crimes in general, but especially against woman offend against the aspirations and ethos of all South Africans. The victim in this case was a soft target for the offender. The sentences imposed upon the appellant, in these circumstances, must accordingly in some measure reflect a censure to this conduct and behaviour. Not only do crimes against woman in this country amount to a serious invasion of the dignity of the victims, but these crimes do not contribute towards our claims that we live in and are a civilized society.

[27] 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. Flimsy grounds should be avoided when seeking to deviate from the minimum sentencing regime.

[28] On this score, in the judgment on sentence, the court a quo, made some significant observations. It was, inter alia, noted as follows: that the appellant did not show any remorse for his actions: that the appellant did not divulge to the relevant probation officer what drove him to committing these offences: that the appellant elected not to testify in mitigation of sentence, this, despite some inconsistencies in the information provided to the

probation officer and that which was offered up by his family and the mother of the child of which he was the alleged father.

[29] In a final throw of the dice, it is contended on behalf of the appellant that alcohol may have played a role in the behaviour of the appellant in these circumstances. Clear and strong ‘evidential material’ in support of this submission, again is absent. I accept that it may be so, that in certain cases, that an offender, because of a physical or mental impairment, may be lacking of the substantial capacity for judgment, when certain offences are committed. The voluntary use of intoxicants (such as drugs or alcohol), in my view, falls to be excluded. A careful perusal of the record does not uphold a finding of any misdirection by the trial court in this connection and there is accordingly no room for this court to interfere on appeal. Besides, this issue was dealt with in terms by the court a quo.

[30] In the present case, I am satisfied that the aggravating circumstances so far outweigh the mitigating ones, that the sentences imposed were appropriate and just, this despite the appellant’s age, the time spent awaiting trial and his peculiar personal circumstances. In my view, there would be no justification for this court to intervene. I cannot find any factors or circumstances which in my view diminish the moral blameworthiness of the offender’s conduct.

[31] It is incumbent upon the courts, in circumstances such as these, to impose heavy sentences on the grounds of deterrence coupled with the avoidance of sentences that are grossly disproportionate to the specific crimes that have been committed. In my view, the

sentences imposed are not in any manner disproportionate to the crimes that were committed by the offender.

[32] In the result, I propose that the following order should be made: -

*‘That the appeal against the sentence of life imprisonment imposed upon the appellant is dismissed and that the appellant’s convictions and sentences are hereby confirmed’*

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**WILLE, J**

**I agree and it is so ordered:**

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**BAARTMAN, J**

**I agree:**

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**SLINGERS, J**