Sneller Verbatim/lr

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: SS42/05

2005-08-04

In the matter between

THE STATE

and

MOODLEY, DONOVAN STANLEY Accused

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S E N T E N C E

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LABUSCHAGNE, J: Mr Moodley you have pleaded guilty and have been convicted of kidnapping, extortion and murder. It is my unpleasant and difficult to task to impose an appropriate sentence. In deciding what that sentence should be I have to bear in mind mainly three important factors. These are your personal circumstances, the seriousness of the crimes you have been convicted of and lastly the interests of society. Although these interests may be conflicting in nature, it is expected of me to keep a fine balance between them, and I must endeavour not to over or to under emphasise anyone of them. These opposing interests and the tension one finds in our criminal law system are well illustrated by the facts of this matter.

Two parents gave evidence before me. On the one hand Mr Matthews the father of the deceased on behalf of the Matthews family read out a letter in which he expressed their horror, grief and suffering when they learnt that their daughter

had disappeared. The deceased had just turned 21 and the family was busy preparing her 21st birthday party. You knew about that fact as Mr Matthews told you about it, but notwithstanding that knowledge you brutally and cold-bloodedly decided not to return her to her family, but instead to kill her in order to prevent identification.

On the other hand your father Mr Moodley senior, testified in mitigation of sentence. From what I have seen he and probably the rest of your family are good people. He and your mother brought you up in a stable environment and tried to teach you the moral values of life. He expressed the family's absolute horror and devastation when they learnt of the terrible deeds that you had committed. He told me that in a way he feels responsible for what you have done because you are his son. It must have been very traumatic and uncomfortable for him to stand up in public and to face the Matthews family and I admire him for his courage.

In any event the correct approach to be adopted at this stage was set out by the Appellate Division some time ago in *S v Holder* 1979 (2) SA 70 (AD) and *S v Zinn* 1969 (2) SA 537 (A) at 540G. My task at this stage is also somewhat different to the one which is performed by a trial court when dealing with the merits of the matter. At this stage I am entitled to take into account any factor which may have influenced your moral blameworthiness. It was status thus by Beyers JA in *Ex Parte Minister of Justice: in re R v Burger & Another* 1936 (AD) 334 at 341:

"Tereg word gesê dat na skuldigbevinding die Regter in 'n ander sfeer verkeer waar die oplê van die straf gepaard moet gaan met oordeelkundige genade en menslikheid ooreenkomstig die feite en omstandighede van die geval."

Another factor to be borne in mind is the question of mercy. I can do no better than to quote from the well-known judgment of Holmes JA in *S v Rabie* 1975 (4) SA 855 (AD) at 862E-F:

"To sum up, with 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 has 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."

I firstly deal with the personal circumstances of the accused. He is 25 years of age. At the time of the commission of the crimes he was 24 years old. What weighs heavily in his favour is the fact that you are a first offender. You are unmarried and have no children. I was told that you were engaged but broke off the engagement as a result of the fact that you realised that you would be going to prison for a lengthy period of time. You were unemployed at the time when the offences were committed as you had resigned from your previous employment in order to attend the Bond University full-time. You enrolled at that institution during January 2004, but did not return to classes after the first term. You were self-supporting at the time as you had saved some money. You also sold your BMW motor vehicle to your sister and brother-in-law and received a monthly installment from them.

Furthermore you were the owner of two pool tables at businesses or cafes which generated an amount of cash each month. You were staying with your parents at the time. You are the only son and you have a sister. You were promoted to the financial manager post at the early age of 21 at the firm where you originally took up employment. You remained in that position for approximately three and a half years, and it is clear that you have a good working record. You obviously come from a good and religious family who supported you throughout this trial. You were arrested on 4 October 2004 and have been in custody ever since.

In dealing with the seriousness of the crimes it is clear that the crime of

murder is one of the most serious crimes that a person can commit. Murder is not only prevalent in the jurisdiction of this court, but sadly also throughout the whole country. People and especially women are not safe on the streets or in public places anymore, and as some cases indicate not even in the sanctity of their homes or in their motor vehicles.

The deceased in this matter was peacefully going about her ordinary business. I know that she was a very private person and that she was very conscious of her safety and security. You somehow persuaded her to give you a lift which she did resulting in a frightening and cruel nightmare. A plan to extort a large amount of money from rich people was carefully planned executed. You yourself say in your statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 that you started to toy with the idea and afterwards decided to do it and then started to plan how you would kidnap a student and how you would go about demanding the payment of a large amount of money for the victim's release. The deceased was tied up and gagged and you drove around with her in the boot of your motor vehicle for hours before she was killed. One cannot possibly imagine the utter anguish and horror that the deceased must have endured before her untimely death.

The late chief-justice in *S v Chapman* 1997 (2) SACR 3 (SCA) at 5B-E said the following in connection with a rape case:

"Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation. Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The Courts are under a duty to send a clear message to the accused,

to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights."

The principles laid down in this case are equally applicable to the crime of murder. As a consequence of this brutal and horrific conduct of the accused, the Matthews family has been deprived of the love, friendship and companionship of the deceased. Nothing that I can say or do today can possibly properly comfort them for the tragic loss that they have suffered. I am convinced the ordinary law-abiding citizens in this country and more particularly those in Johannesburg and surrounding areas are sick and tired of the ongoing and senseless crimes involving violence. I am also convinced that members of the community are entitled to expect of the courts to protect their rights by imposing appropriate sentences. I must impose a sentence which will not only deter the accused from committing similar crimes in future, but which will also deter other people who may be similarly inclined.

I can therefore take note not only of the terrible loss suffered by the Matthews family and the deceased's friends, but also of the indignation and outrage of other interested persons as was stated in *R v Karg* 1961 (1) SA 231 (A) at 236B. It is generally accepted that in crimes of this nature the elements of deterrence and retribution come to the fore. More recently in *S v Swart* 2004 (2) SACR 370 (SCA) at 378C-B the Supreme Court of Appeal said the following:

"In our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment does not require to be accorded equal weight but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role."

And at 379B:

"I have pointed out that in the case of serious crimes society's sense of outrage and

the deterrence of the offender and other potential offenders deserve considerable weight."

The outrage and indignation of the community at large in this case was clearly reflected in the wide publicity it attracted both on television, the radio and the newspapers. It was also reflected in the number of reporters and public who attended the trial.

I must impose a sentence which will not only deter the accused from committing similar crimes in the future, but which will also deter other people who may be similarly inclined. I must also have regard to the possible rehabilitation of the accused. The accused is a relatively young man and a factor which weighs in his favour is that he has no previous convictions. A factor which may have in influence on his rehabilitation is his remorse for what he has done. Remorse can be demonstrated by the fact that the accused in this matter pleaded guilty and during the trial made admissions more than is usually done.

One must however, be careful not to accept that fact at face value as an accused may be compelled to plead guilty and to make admissions because of an overwhelmingly strong case against him. The accused admitted that the State had a very strong case against him. The question in the end is whether the remorse demonstrated by an accused is genuine or not.

The State disputed two aspects in the statement made by the accused in terms of section 112(2) of the Criminal Procedure Act and proceeded to lead evidence in regard thereto. These aspects bear upon the question of remorse. They were firstly whether the deceased was killed where her body was found, and secondly whether her body had been kept in some cold place for approximately ten days before it was transported to the place where her body was found and left there together with four empty cartridges.

It is common cause that the deceased's body was found sometime during 20 July 2004. In this regard the State led the evidence of a forensic pathologist Professor Scholtz, a ballistics experts Inspector Nieuwenhys, entomological evidence of Sergeant Marsay, Dr Mansell and Professor Dippenaar. The accused

failed to lead any evidence in this regard.

On a conspectus of the evidence it is clear that the deceased was not killed at the place where her body was found, and that she must have been kept in some cold place for a period of approximately ten days. The accused however, in statements put on his behalf during cross-examination, persisted in denying the above facts and it is clear to me that he is untruthful in this regard. His counsel in argument asked the question why the accused would be lying about these aspects especially in the light of the fact that he had admitted most of the State case.

It is not necessary for me to make any definite finding in this regard, but on the totality of the evidence the reasonable inference that someone must have assisted the accused at some stage in transporting and storing the body of the deceased in some cold place, and that the accused is protecting this person or persons, comes to mind. It is therefore clear that the accused is not candid with this Court and that his assertion of remorse is questionable. This fact to my mind simply illustrates he is cunning.

The accused had 77 days to repent and hand himself over to the police. This he did not do. He simply went on with his life. He got engaged and spent some of the money he had received from the Matthews family on the engagement ring and odds and ends, as he put it in his statement. Furthermore one of the best ways of demonstrating remorse for an accused is go into the witness-box and to say so. He did not have the courage to do that, instead the only witness called by him was his father.

On the evidence was a whole, therefore I cannot find that the accused has at any time demonstrated remorse for the despicable and cruel deeds done by him. On the evidence before me I cannot find that he was motivated to plead guilty by remorse.

This fact may negatively impact on any possibility that he may rehabilitate himself. However, in view of his age and the important fact that he is a first offender I cannot totally exclude that possibility. I know that there are certain rehabilitation programs offered in prison, and I want to express the wish that the

accused will take part in some of those programs as it can only be to his own benefit.

In an effort to curb the wave of violent crimes which threatens to destroy or society parliament enacted section 51 of the Criminal Law Amendment Act 105 of 1997 (the Act). The Act prescribes minimum sentences for certain serious crimes which must be imposed by the courts unless substantial and compelling circumstances exist which would justify the imposition of a lesser sentence. It is common cause that the sentence prescribed by the Act on the count of murder is life imprisonment, and five years imprisonment in respect of the kidnapping and extortion. It is not possible to give an all-embracing definition of what the term substantial and compelling circumstances means. It will depend upon the facts and circumstances of each case and it may also vary from one case to another.

It is clear however, that I should not deviate from the prescribed sentences for flimsy reasons. The Supreme Court of Appeal has found that there must be some weighty justification before a lesser sentence can be imposed. What is clear furthermore is that the ordinary judicial factors taken into account in the sentencing process are also relevant in deciding whether substantial and compelling circumstances exist or not. See *S v Malgas* 2001 (1) SACR 469 (SCA) at 481F to 482F. Mr Van Zyl on behalf of the State argued that there are no substantial and compelling circumstances present in this case. On the other hand Mr Pretorius argued that there are and that I should not impose life imprisonment on the count of murder, but a rather lengthy period of imprisonment.

I have listed the accused's personal circumstances above and it is not necessary for me to repeat them here. On a proper consideration of the facts as a whole the only real mitigating factors of this case are the age of the accused and the important fact that he is a first offender. On the other hand there are the following aggravating factors: the crimes and the execution thereof were carefully planned. In order to execute his plan the accused moved away from home and told his parents that he was going away on some trip. He booked

himself into the Formula 1 Hotel, Sandton for approximately eight days. He took with him a loaded firearm, duck tape, a balaclava and a blanket. He persuaded the deceased to give him a lift by pretending that he was a fellow student. He throughout the day used the deceased's cellphone to communicate with her parents. He kept the deceased in a secluded place and lied to his family about the reasons for his absence from home.

After he had decided to kill the deceased, he ordered her to undress because he wanted to destroy her clothing and any other physical evidence linking him to these crimes. He handed her a blanket, and while she turned away from him putting the blanket around her body, he cold-bloodedly shot her in the back of the head. Thereafter he shot her three more times to ensure that she was dead. The place where the murder was committed is still to be identified. He caused the Matthews family immense psychological anguish and suffering. He promised to release the deceased, a promise he did not keep even though an amount of R50 000 was handed over to him.

He had many opportunities to reconsider his callous criminal deeds. He did all this because of greed. It reminds one of what Lyle at 604 to 531 BC once said:

"There is no greater calamity than lavish desires. There is no greater guilt than discontentment and there is no greater disaster than greed."

The actions of the accused are heinous, callous and simply beyond comprehension. Not only has he ruined his own life, but he has also devastated the lives of his own family and the Matthews family. It is clear from the above that the aggravating factors by far outweigh any mitigating factors.

On a balanced consideration of the totality of the evidence relating to count 3 I have come to the conclusion that the accused must be removed from society for as long as possible. I can also not find any compelling and substantial circumstances which on the facts of this matter would justify the imposition of a lesser sentence than one prescribed by the Act. I must also indicate that even in the absence of the provisions of the Act, I would have imposed the same sentence

in the exercise of my ordinary discretion.

It is necessary for me to make a few remarks in regard to counts 1 and 2 relating to kidnapping and extortion. Kidnapping is a serious crime and constitutes a deliberate depravation of liberty, more particularity the freedom of movement of a person. The degree of seriousness of the depravation depends on the period of detention, the conditions of detention and the circumstances generally. The right to freedom is a precious right which is basic to the ethos of the Constitution. *S v Morgan & Others* 1993 (2) SACR 134 (A) at 177G-H.

As the facts of this matter indicate kidnapping my furthermore constitute a humiliating and degrading invasion of the privacy and dignity of the victim. I was told in evidence that the deceased was a sensitive and private person. The accused used her cellphone to contact her parents and the conversations were probably conducted in her presence. Before she was killed she was ordered by the accused to undress and to put a blanket around her. She was also tied up and gagged and it is common cause that the accused did not give her anything to eat or drink for virtually a full day. The deceased was also kidnap in order to demand a ransom from her parents.

Although each case must be considered in the light of its own facts and circumstances I am entitled to have regard to reported cases insofar as the facts thereof may be broadly comparable. Examples of reported kidnapping cases are relatively scarce in our Law Reports, but I have had regard to the following cases:

1.*S v Levy & Another* 1967 (1) SA 351 (W).

In this case four persons conspired to kidnap the wife and 22 month old child of a wealthy man from whom they demanded a ransom of R140 000 which was paid over. The victims were held captive for approximately 12 to 14 hours. Neither the woman nor the child was ill-treated, and no firearm was involved. The police arrested the kidnappers and the ringleader committed suicide. The remaining kidnappers were tried and convicted of kidnapping. One of them a first offender, was sentenced to 16 years imprisonment.

2.*S v Naidoo & Others* 1974 (3) SA 706 (A).

In this case six persons conspired to kidnap a 13 year old boy and to demand a ransom of R45 000 from his parents. The boy was held captive for approximately 12 days. He was blindfolded with his hands tied for considerable periods. No money was paid over. Sentences of the kidnappers ranged from two to eight years imprisonment. No firearm was involved, nor was any violence used.

On the facts of this case I am of the view that the minimum sentences prescribed by the Act on counts 1 and 2 are inadequate. In regard to counts 1 and 2 I have carefully considered the totality of the evidence and in my view the sentences which I intend to impose are fair to the accused and the community at large with due consideration of the seriousness of the crimes.

Lastly counsel for the State urged me to make a recommendation that the accused be incarcerated for a period of imprisonment of more than 25 years. As I understand the position when life imprisonment is imposed the prison authorities will only consider releasing an accused on parole after he or she has served 25 years. In this regard I agree with Van Der Westhuizen J in *S v Sideno* 2001 (2) SACR 613 (T) that such a recommendation should only be made in exceptional circumstances.

I am not persuaded that this is such a case specially in view of the fact that the facts in that matter are clearly distinguishable from the present, and also the Supreme Court of Appeal has held and recognised that life imprisonment is the most severe and onerous sentence that can be imposed. See *S v Ball & Another*; *S v Chavula & Others* 2001 (2) SACR 681 (SCA) at 693J to 694A.

On a balanced consideration of the facts and legal principles involved I have come to the conclusion that the following sentences are appropriate: count 1, 15 years' imprisonment, count 2 ten years' imprisonment, the sentences in counts 1 and 2 to be served concurrently. Count 3 life imprisonment. Lastly it is clear that the accused is not fit to possess a firearm and the 9 mm Taurus Pistol which was handed in as Exhibit 1 is declared forfeited to the State in terms of

section 31(1) of the Criminal Procedure Act 51 of 1977.

In conclusion I would like to thank both counsel for the way in which they presented their case and the assistance which they gave me in a very serious, difficult and traumatic matter. Lastly I think it is also apposite to mention that it is clear that there was excellent work done by the South African Police generally and more particularly by senior Superintendent Beyleveldt.

ASSESSORSPROF E LABUSCHAGNE

MRS B SIDWELL

ON BEHALF OF THE STATEADV VAN ZYL (SC)

ON BEHALF OF ACCUSED ADV PRETORIUS

Date of Judgment:

Date of Hearing: 25/07/2005