IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: A596/2005

DATE: 22 AUGUST 2008

In the matter between:

1. EON HESS 1ST APPELLANT

2. BRADLEY NOMDOE 2ND APPELLANT

and

THE STATE RESPONDENT

JUDGMENT

FOURIE, J

First appellant and four co-accused appeared in the Regional Court at Bellville on two charges of robbery, one of kidnapping, one of attempted rape and one of rape. First appellant and his co-accused pleaded not guilty, but after hearing evidence, the regional magistrate convicted first appellant on all five charges and on 21 September 2001 he was sentenced as follows: The two counts of robbery were taken together for purposes of sentence and a sentence of ten years imprisonment was imposed. The counts of kidnapping, attempted rape and rape were taken together for purposes of sentence and in respect thereof, a sentence of 15 years

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imprisonment was imposed.

These sentences were not ordered to run concurrently, with the result that an effective term of 25 years imprisonment was imposed. On 2 November 2007 the court *a quo* granted first appellant leave to appeal against the sentence imposed by the regional magistrate. This appeal is accordingly not directed against first appellant's convictions, but at the hearing of the appeal we raised the question whether first appellant was correctly convicted on count 5, i.e. the charge of rape. The evidence shows that the complainant, Sophia Manual, was only raped by accused number 6, who had penetrated her vagina with his penis. Although first appellant had also threatened to rape her, he did not carry out this threat. I should add that prior to being raped, this complainant was sexually assaulted by a number of the accused, including first appellant, and as I have mentioned, first appellant was accordingly found guilty on count 4, i.e. of attempted rape.

However, in the process of sexually assaulting the complainant, first appellant did not have intercourse with her. It is clear from the magistrate's judgement on the merits, that he convicted first appellant of rape on the basis of a common purpose that he had shared with the other accused, including accused number 6, who had actually raped the complainant.

In my view first appellant's conviction of rape is bad in law, as the common purpose doctrine is not applicable to crimes, such as rape, that can be committed only through the instrumentality of a person's own body. See in this regard Snyman, Criminal Law 4th Edition, page 268 and the authorities there cited.

It follows, in my view, that first appellant was, at best for the State, an accomplice to the rape committed by accused number 6. He was not only present on the scene, but actively assisted in subduing the complainant. However, first appellant was not charged as an accomplice to the rape. As explained by Burchell, Principles of Criminal Law, 3rd Edition, page 602, an accomplice commits a substantive crime in his or her own right. The Criminal Procedure Act does not make provision for a competent verdict of being an accomplice where the elements of a crime, such as rape in this instance, have not been proved, but the elements of accomplice liability have been established.

In particular, Section 261 of the Criminal Procedure Act, which lists the competent alternative verdicts on a charge of rape, does not include liability as an accomplice to rape. It follows that the conviction of first appellant on the charge of rape should be set aside. This we are empowered to do,

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notwithstanding the absence of an appeal against conviction, by exercising our powers of special review in terms of Section 304(4) of the Criminal Procedure Act.

Returning to the question of sentence, it is trite that a court of appeal should only interfere with a sentence imposed by a lower court if it is satisfied that the sentence discretion has been exercised improperly or unreasonably, or if there has been a material misdirection on the part of the trial court. In my view the conviction of first appellant on the charge of rape and the sentence imposed upon him in regard thereto, constitute, for the reasons already furnished, a misdirection which entitles this Court to interfere with the sentence handed down by the regional magistrate.

In addition, I am of the view that the following material factors should play a role in determining a suitable sentence. At the time of the commission of these offences, first appellant was 16 years and three months old. The regional court found that to a great extent first appellant had, together with accused number 4, acted under the influence of accused numbers 5 and 6. This is clear from the record of the proceedings in the court *a quo*. It also has to be taken into account that first appellant was five days shy of his 19th birthday when he was sentenced. He had one previous conviction for theft, which had been

committed when he was 15 years old. In addition thereto, it appears from the record that he had been in prison as a trial awaiting prisoner for approximately 32 months before being sentenced.

I have no doubt that first appellant's youthfulness at the time of the commission of these offences, as well as the influence which his older co-accused obviously had over him, constitute important mitigating factors. On the other hand, however, the conduct and measure of participation of first appellant in these heinous crimes, should not be under-emphasised.

By way of comparison, it is clear that his role and measure of participation by far exceeded that of his other youthful co-accused number 4, who was 17 years old at the time of the commission of these offences. First appellant did not only wield a knife, but threatened the complainants and assisted in tying them up. He also assisted in the robberies by dispossessing John van Wyk of his firearm holster and taking his wristwatch.

In addition, he sexually assaulted the female complainant by straddling her and inserting his penis between her bare legs. He was, therefore, far from being a fallen angel and although he was young and under the influence of the older accused, he

has, to a certain extent, to take responsibility for his outrageous conduct that evening. I should, however, in his favour say that when accused number 6 asked him for his knife to enable accused number 6 to attack the complainants, first appellant refused and probably saved the complainants from further harm.

In my view the crimes committed were of such a serious nature that the magistrate correctly concluded that direct imprisonment was the only suitable sentencing option. I am, however, of the view that in the light of the mitigating circumstances to which I have referred, an effective of sentence of 25 years imprisonment does induce a sense of shock, especially if it is compared to the effective sentence of 25 years direct imprisonment received by accused number 6, whose blameworthiness by far exceeded that of first appellant's and who had also raped the complainant.

After considering all the relevant factors and bearing in mind that the conviction of rape falls to be set aside, I am of the view that an effective sentence in the order of 12 years imprisonment would be a suitable sentence. In the result I would uphold the appeal and make the following order:

1. The first appellant's conviction on count 5, i.e. the

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charge of rape, is set aside. The remainder of the convictions are confirmed.

2. The sentences imposed upon first appellant are set aside and the following substituted therefor:

"(a) Aanklagte 1 en 2 word saamgeneem vir vonnisdoeleindes en tien jaar gevangenisstraf word ten aansien daarvan opgelê.

(b) Aanklagte 3 en 4 word saamgeneem vir vonnisdoeleindes en tien jaar gevangenisstraf word ten aansien daarvan opgelê.

(c) 1) Dit word gelas dat agt jaar van die gevangenisstraf opgelê ten aansien van aanklagte 3 en 4, samelopend uitgedien word met die gevangenisstraf opgelê ten aansien van aanklagte 1 en 2. Die effektiewe termyn van gevangenisstraf is derhalwe 12 jaar.

(d) Die voormelde vonnisse word ingevolge artikel 282 van die Strafproseswet no. 51/1977, terugdateer tot 21 September 2001."

This brings me to the appeal of second appellant. He

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appeared as accused number 4 in the Regional Court at Bellville on the same charges as first appellant. He pleaded not guilty, but after hearing evidence, the regional magistrate convicted him on the two charges of robbery with aggravating circumstances and the charge of kidnapping. He was acquitted on the remaining charges.

On 21 September 2001 he was sentenced to ten years imprisonment on the two robbery charges, which were taken together for purposes of sentence and an additional ten years on the charge of kidnapping. These sentences were not ordered to run concurrently, with the result that an effective term of 20 years imprisonment was imposed. On 2 November 2007 the court *a quo* granted second appellant leave to appeal against the sentences imposed by the regional magistrate.

It is trite that a court of appeal should not interfere with the sentence imposed by another court, unless it is satisfied that the sentence discretion has been exercised improperly or unreasonably. I should add that our courts of appeal are also prepared to interfere with sentences imposed upon different accused appearing in the same trial, on the ground of a disturbing disparity between such sentences. See S v Marx 1989(1) SA 222 (A) at 225 G and Hansen v Regional Magistrate, Cape Town & Another 1999(2) SACR 430 (C) at

432 a to f.

At the time of the commission of these offences second appellant was 17 years old. The regional court found that to a great extent second appellant had, in the commission of the offences, acted under the influence of his co-accused numbers 5 and 6. It is also clear from the evidence that second appellant had played a very limited role, and in fact left the scene before his co-accused proceeded to sexually assault and rape the one complainant. He played no active role in the kidnapping of the two complainants and the only evidence of his involvement in the robberies was that he had pushed the one complainant against the vehicle and warned him "not to try anything". It was then that accused number 2 had taken some money from the pocket of this complainant.

The magistrate did however find, correctly in my view, that second appellant and his co-accused had the necessary common purpose to rob and kidnap the complainants. Second appellant was a first offender, aged 20 years at the time when he was sentenced. In addition, it should be borne in mind that he had been in prison for approximately 32 months as a trial awaiting prisoner. In the circumstances, it was submitted on his behalf that the effective sentence of 20 years imprisonment induces a sense of shock and that the magistrate ought, in

any event, to have obtained a probation officer's report regarding the personal circumstances of second appellant, before sentencing him.,

I do not agree with the submission that a probation officer's report ought to have been obtained before sentencing the second appellant. As I have mentioned, he was already 20 years old at the time of the imposition of sentence and, therefore, not a juvenile. The fact that he was only 17 years old at the time of the commission of the offences, is a mitigating factor which was taken into account by the magistrate. I am, however, in agreement with the submission that in the circumstances of this case, the sentence imposed upon first appellant induces a sense of shock.

I have alluded to the mitigating circumstances, which, viewed collectively, in my opinion justify the imposition of an effective term of imprisonment substantially less than the 20 years imposed by the magistrate. There is also, in my opinion, a disturbing disparity between the sentence imposed upon second appellant and, for example, the sentenced of accused number 6, who was found guilty on all five counts and sentenced to an effective term of imprisonment of 25 years.

The evidence shows that accused number 6 did not only play a

major role in the robberies and kidnapping, but also took the leading role in indecently assaulting and raping the one complainant. The evidence further shows that accused number 6 was armed with a firearm and had no hesitation in physically assaulting the complainants. The second appellant, on the other hand, as I have indicated, played a far lesser role and was hardly actively involved in the robbing and kidnapping of the complainants. His role also ended prior to the sexual assaults being perpetrated. This notwithstanding, his effective sentence of imprisonment is only five years less than that of accused number 6.

In the circumstances, I conclude that the magistrate exercised his sentencing discretion unreasonably and that this Court should interfere. In my view the period of effective imprisonment imposed upon second appellant should be substantially reduced. In the result, I would uphold the appeal and make the following order:

The second appellant's convictions are confirmed, but the sentences imposed are set aside and the following substituted therefor:

"1. Aanklagte 1 en 2 word saamgeneem vir

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vonnisdoeleindes en agt jaar gevangenisstraf word ten aansien daarvan opgelê.

2. Op aanklag 3 word gevangenisstraf van agt jaar opgelê.

3. Dit word gelas dat die gevangenisstraf opgelê ten aansien van aanklag 3, samelopend uitgedien word met die gevangenisstraf opgelê ten aansien van aanklagte 1 en 2. Die effektiewe termyn van gevangenisstraf is derhalwe agt jaar.

4. Die voormelde vonnisse word ingevolge artikel 282 van die Strafproseswet 51/1977 terugdateer tot 21 September 2001."

Ek stem saam.

BOTHA, A J

It is ordered accordingly,

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FOURIE, J