IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOODHOPE PROVINCIAL DIVISION)

CASE NUMBER: A684/2007

DATE: 28 NOVEMBER 2008

In the matter between:

ROLAND JACOBS	**1st Appellant**
LLEWELLYN MANUEL	**2nd Appellant**
RICARDO GROENEWALD	**3rd Appellant**
and	
THE STATE	**Respondent**

JUDGMENT

YEKISO, J:

The appellants, who appeared as accused 1, 3 and 4 respectively, were charged in the regional court, Parow, with one count of abduction, six counts of rape and one count of indecent assault. In as far as the charge of abduction is concerned, the state alleged at the time that on 30 May 1999, and at Delft, in the regional division Western Cape, the appellants wrongfully and intentionally deprived the complainant, one A D, of her freedom of movement by, amongst other things, assaulting her and in the course of such an assault, took her to a derelict dwelling in Delft, where the appellants held her against her will.

As far as counts 2 to 7 are concerned, these being the six counts of rape, the state alleged that on 30 May 1999 and at or near Delft, in the regional division Western Cape, the appellants, being male persons, wrongfully and intentionally had sexual intercourse with the complainant, A D, who was 14 years of age at the time, without her consent.

In as far as the indecent assault charge is concerned, the state alleged that on 30 May 1999 and at Delft, within the regional division Western Cape, the appellants wrongfully and indecently assaulted the complainant, A D, by inserting their penises into her mouth, forcing her to suck their penises, inserting their fingers into her vagina and by having sexual intercourse with her per anum.

The appellants, all of whom were legally represented, pleaded not guilty to all the charges preferred against them. In a subsequent plea-explanation in terms of section 115 of the Criminal Procedure Act, 51 of 1977, and in as far as the

abduction charge is concerned, the first appellant denied the allegation against him, did not make any admission, thus placing virtually each element of the offence concerned in dispute. In as far as the rape counts are concerned, the first appellant admitted having had sexual intercourse with the complainant and stated that same had occurred with the complainant's consent. In as far as the charge of indecent assault is concerned, the first appellant denied the allegation levelled against him, making no admission in as far as this count is concerned as well, thus placing all the elements of the offence concerned in dispute.

The second appellant pleaded not guilty to all the charges levelled against him and elected not to disclose the basis of his defence. The third appellant similarly pleaded not guilty to all the charges levelled against him and in, as far as the rape charges concerned, whilst admitting that he was present in the dwelling where the complainant was allegedly sexually assaulted, he denied having had sexual intercourse with the complainant, nor having indecently assaulted her.

In an attempt to prove its case, and apart from the evidential material handed in, the state called six witness, while on the other hand each one of the appellants testified in their own defence. After hearing evidence for the state and the defence, the magistrate concluded that the state succeeded to prove its case against first and second appellant on the abduction charge; that the state succeeded to prove its case against all the appellants on only five of the rape charges; acquitted all the appellants on the seventh count, it being the last count in the rape charges and further convicted all the appellants on the eighth count, the latter being an indecent assault charge. The third appellant was acquitted on the abduction charge, as also

the seventh count, it being the last of the rape charges.

The appellants were subsequently sentenced as follows. On the abduction charges, the first and second appellants were sentenced to seven years imprisonment. On the conviction on the rape charges, each one of the appellants was sentenced to 15 years imprisonment, all charges having been considered as one for purposes of sentence. On the indecent assault charge, each one of the appellants was sentenced to a further 15 years imprisonment, the court ordering that the sentence in respect of the abduction charge be served concurrently with the rest of the sentences, thus effectively rendering the total period of imprisonment to one of 30 years. The first and second appellants' appeal is against the sentences so imposed, whilst the third appellant's appeal is against both convictions and sentences imposed.

It is worth mentioning at this stage of this judgment that Francois Erskine, who appeared as accused no 2 at trial, was similarly convicted and sentenced in respect of all those charges of which the first and second appellants were convicted and sentenced. He was similarly sentenced to an effective 30 year term of imprisonment. His subsequent appeal against conviction and sentences imposed was partially successful, in that whereas the conviction on all the charges were confirmed, the sentences imposed were reduced to an effective 20 year term of imprisonment. That appeal was before Veldhuizen, J and Klopper, AJ and the judgment was subsequently reported under citation S v Erskine 2008 (1) SACR 469 (C).

I shall now proceed to consider third appellants appeal against conviction on the five counts of rape. In the light of the conclusion I reach in as far as the third appellant's appeal against conviction on rape and indecent assault charges is concerned, it is not necessary for me, for the purposes of this judgment, to summarise the evidence tendered at trial in any great detail. Reference will only be made to the salient features of the complainant's evidence and of the two police officers who were called to the scene of crime.

It is common cause that the sexual assaults were perpetrated on the complainant in a derelict house in Delft. The complainant said it in so many words in her evidence that whereas she was a victim of a gang rape, the appellant is not one of the persons who forced themselves on her. However, there does not seem to be clarity, on basis of the evidence as a whole, whether the third appellant was present in the dwelling during the complainant's sexual ordeal. The complainant states in her evidence, under cross-examination, that the third appellant was present at some point in the dwelling in which she was raped and indecently assaulted.

The third appellant, on the other hand, states in his evidence that at no stage was he present in the dwelling whilst the complainant was being raped and indecently assaulted. He had not been inside the dwelling, so he states in his evidence, until the police arrived at the scene. The complainant goes so far as to say that at some point during her sexual ordeal, the third appellant demanded that she stimulates his genitals with her hand, whilst in the process of being raped by one of the perpetrators. She goes further to say when she refused to accede to the third

appellant's demand, the latter slapped her on her face, whereupon she did what the third appellant had demanded her to do.

The magistrate accepted the complainant's version that the third appellant was present in the dwelling when the complainant was sexually assaulted. Although the magistrate accepted that the appellant did not have sexual intercourse with the complainant, he nonetheless concluded that by his conduct, namely, that of demanding that the complainant masturbates him whilst in the process of being raped, the third appellant actively associated himself with the conduct of those who had sexually and indecently assaulted the complainant, more especially, the fact that the third appellant took out his penis and demanded that the complainant masturbates him as being indicative of his active association with the crimes which were being committed. The magistrate proceeded to convict the third appellant of rape on the basis of common purpose with the other perpetrators.

It was wrong for the magistrate to impute the conduct of the perpetrators of the sexual assault on the third appellant. Such imputation does not operate in respect of charges which can be committed only through the instrumentality of a person's own body, or part thereof, or which is generally of such a nature that it cannot be committed though the instrumentality of another. In support of this proposition, see C R Snyman, Criminal Law, 5th Edition, at page 269. See also S v Saffier 2003 (2) SACR 141 (SEC) at page 143, paragraph [9] - [17] and at page 145.

The definition of rape might differ from one writer to the other, but the essential element of this offence, namely that of it being wrongful and intentional sexual intercourse with a woman without her consent, remains intact. In the instance of this matter, there is no evidence to suggest that the third appellant had sexual intercourse with the complainant. On the contrary, the complainant says it explicitly in her evidence that the third appellant is not one of those who had sexual intercourse with her. It, therefore, follows, in my view, that it was wrong for the magistrate to have convicted the appellant of rape in the manner he did. Such evidence as there was, was insufficient to establish that the third appellant acted as an accomplice to the rapes. It further follows, in my view, that the conviction of the third appellant on the rape charges, cannot be sustained and falls to be set aside.

The third appellant was not amongst those who were arrested at the scene of crime after the police had arrived to rescue the complainant. No mention was made of the third appellant being involved in the commission of any crime when the three perpetrators were arrested. The third appellant was arrested somewhat three to four weeks later, ostensibly on the basis of the complainant's statement to the police to the effect that at some point, whilst she was being raped by one of the perpetrators, the third appellant was seated next to her and demanded that she masturbates him and when she refused to do so, the third appellant slapped her on her face, whereupon she acceded to his demand. The complainant did not mention this fact at all in her evidence in chief. It was only in her evidence under cross-examination that the matter of the third appellant's involvement in the commission of the crime surfaced.

The third appellant had consistently denied at trial having indecently assaulted the

complainant in any manner. The third appellant denies having been inside the dwelling when the complainant was sexually and indecently assaulted. Third appellant's evidence is that he had not entered the derelict dwelling on his return to the scene and that he was standing outside the dwelling and smoking when the police arrived.

Sergeant Carmen Jordaan, a female police officer, who was part of the team of police officers who were called to the crime scene, tends to confirm the third appellant's version that he was outside the dwelling when the police arrived on the scene. Sergeant Jordaan's evidence is that on their arrival on the scene, only three of the perpetrators were inside the dwelling and that the third appellant was taken into the dwelling from outside only after the police had arrived. This evidence is corroborated by Inspector Brian Daniels, who confirms that on their arrival on the scene, the third appellant was outside the dwelling in which the crimes were being committed.

The fact that the third appellant was outside the dwelling when the police arrived at the scene, the fact that the third appellant was not arrested shortly afterwards, the fact that the complainant omitted to mention the third appellant's involvement in the commission of any crime in her evidence in chief, tends to create doubt in my mind if the third appellant was involved in the commission of the crime of indecent assault in the manner suggested by the complainant. That the third appellant was not inside the dwelling when the crimes were being committed, is not only being a matter of the complainant's word against that of the third appellant. The third appellant's version is corroborated by the two police officers in the persons of

Sergeant Jordaan and Inspector Daniels.

I have already pointed out that there is doubt in my mind if the third appellant committed the crime of indecent assault as suggested by the complainant. It, therefore, follows that the third appellant is entitled to the benefit of such a doubt. In this regard, the magistrate should have found at trial that there is doubt if the third appellant did commit indecent assault as the complainant had testified; that the third appellant is entitled to the benefit of such a doubt and should accordingly have ordered his acquittal. It, therefore, follows that third appellant's appeal against conviction on indecent assault, should be upheld.

As regards sentence. Whilst a matter of punishment, is a matter which inherently is within the discretion of the presiding judicial officer, a court of appeal will rarely, if ever, interfere with the exercise of such a discretion. A court of appeal will only interfere with the exercise of such a discretion in those rare instances where such discretion has not been exercised judiciously, including those instances where the sentence imposed is exceedingly inappropriate.

Whilst the magistrate appears to have adopted a balanced approach in considering relevant factors in the determination of what he viewed as appropriate sentences, in my view the magistrate does not appear to have properly considered the cumulative effect of these sentences imposed. Although the offences of which the first and second appellants were convicted are serious, particularly those relating to the rape charges, a total period of 30 years imprisonment is too severe in the circumstances of this matter, particularly in view of the fact that both the first and

second appellants are first offenders. It is on the basis of this latter fact and the cumulative effect of the sentences imposed, that I feel interference with the magistrate's discretion in the circumstances of this matter is justified.

In my view, interference with the magistrate's exercise of his discretion in the instance of this matter, is justified. I would, therefore, in the instance of this matter and in line with the approach adopted by my brother Veldhuizen, J in S v Erskine supra, interfere with the magistrate's exercise of his discretion to the extent that the effective 30 year term of imprisonment be reduced to an effective 20 years imprisonment.

However, I am constrained to differ from the sentence imposed in respect of the rape charges. In view of the heinous nature of the crimes, there is, in my view, no reason to reduce the sentence imposed by the regional magistrate for those offences. The sentences in respect of the other counts, can be adjusted so as to ensure that the cumulative effect of the sentences will still be 20 years imprisonment, and in the result the three appellants will be treated equally.

All factors taken into account, I would, in the circumstances of this matter, propose the following order:

1. That the conviction of third appellant, that is Ricardo Groenewald on the charge of rape and indecent assault, be set aside.

2. That the sentences imposed on the first and second appellants, that is Ronald Jacobs and Llewellyn Manuel respectively, be set aside and be substituted with the following sentences:

(i) As regards count 1, which is the count of abduction, first and second appellants are sentenced to **FIVE (5) YEARS IMPRISONMENT.**

(ii) Counts 2 to 6, being counts relating to rape, all charges being considered as one for the purposes of sentence, each one of the appellants is sentenced to **15 (FIFTEEN) YEARS IMPRISONMENT.**

(iii) Count 8, indecent assault, each one of the appellants is sentenced to **EIGHT (8) YEARS IMPRISONMENT.**

3. The sentence of five years imprisonment on the abduction charge and three years of the sentence on the indecent assault charges, are to be served concurrently with the 15 years sentence imposed on the rape charges, these being counts 2 to 6.

4. The effective term of imprisonment, therefore, is accordingly 20 years and the sentences are antedated to 14 August 2002.

YEKISO, J

I agree and it is so ordered:

CLEAVER, J