

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO.: SS77/2006

In the matter between

THE STATE

vs

OMAR GENEVER

Accused 1

**RIEDEWAAN HENDRICKS
M.I.**

Accused 2

Accused 3

JUDGMENT DELIVERED ON 5 FEBRUARY 2008

SAMELA, AJ

[1] This matter came before me by way of committal of the accused to the High Court for consideration of appropriate sentences after conviction in the Regional Court. The alleged offences referred to fell under Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (hereinafter called the Minimum Sentences Act). All three accused were charged in the Regional Court, Wynberg, for kidnapping, three counts of rape, indecent assault and robbery. The allegations against the three accused were that on 8 January 2000 at or near Grassy Park, within the regional division of the Western Cape, the accused, all three adult males, wrongfully and intentionally kidnapped, had sexual intercourse with the complainant, one N.M.P., an 18 year old female person, without her consent and also robbed her of her goods.

[2] All the three accused pleaded not guilty to all the charges. However, they admitted having sex with the complainant and insisted that there had been consent. The court *a quo* rejected the accused versions and said the following:

“Dit is verder onwaarskynlik dat die beskuldigdes weer toestemming sal vra vir die klaagster nadat sy voor hulle gehoor het hoe Darwood sê sy is bereid om met almal geslagsgemeenskap te hê en sy het nie geprotesteer nie. As hulle dit werklik geglo het en dit die omstandighede was, is dit tog onwaarskynlik dat hulle weer eens sou toestemming vra voordat hulle voortgaan.”

[3] The trial culminated in the conviction of all three accused. Accused 1 and 2 were convicted of kidnapping, rape and indecent assault while accused 3 was convicted of kidnapping and rape. The accused were all acquitted of the robbery charge. All three accused were each convicted on three counts of rape. After the conviction, the Regional Magistrate was of the view that the offences which the accused were convicted of, were offences referred to in Part I of Schedule 2 of the Minimum Sentences Act. The component of the Act referred to above carries punishment in excess of the jurisdiction of the Regional Court, hence the Regional Magistrate’s referral to this court for consideration of appropriate sentences. After reading the record, I addressed a letter to the Regional Magistrate raising my concerns regarding conviction of each accused on three counts of rape and requested reasons thereof. The Regional Magistrate responded by saying:

“Each accused has been convicted on three counts of rape, i.e. counts 2, 3 and 4. It is the view of the Magistrate that all three accused acted with a common purpose.”

[4] The issue here is whether the Magistrate correctly convicted each accused on three counts of rape. Section 51(1) read together with Schedule 2 Part 1 of the Criminal Law Amendment Act 105 of 1997 provides:

Rape -

(a) when committed –

(i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;

(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy.

The section carries an obligatory life sentence subject to the provisions of section 51 (3)(a) of the Act which provides that:

“If any Court referred to in sub-section (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence proscribed in those sub-sections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.”

[5] Leading the complainant on rape charges the Public Prosecutor said the following:

STAAT: *Is dit 'n strandgebied*

GETUIE: *Ja*

STAAT: *En toe*

GETUIE: *Toe het hy vir die drie gesê hulle moet uitklim ... Toe klim hulle uit en toe trek hy vir my uit die kar uit en toe neem hy vir my oor die heuwel.*

HOF: *Wie trek vir jou uit die kar uit?*

GETUIE: *Darwood. ... En daar het hy gesê ek moet my broek aftrek en ek het vir hom gesê nee. ... Hy het gesê ek moet my broek aftrek, toe sê ek vir hom nee. Toe sê hy ek moet klaar maak toe sê ek weer nee. En toe het hy my broek self afgetrek.*

STAAT: *H'n?*

GETUIE: *En toe hy nou my broek afgetrek het, toe trek hy sy broek af.*

STAAT: *Het hy gesê wat hy gaan doen as hy gaan geraas maak?*

GETUIE: *Ja, hy gaan my vrek maak.*

STAAT: *En toe?*

GETUIE: *Toe trek hy my broek af en daar het hy seks gehad met my.*

STAAT: *En toe?*

GETUIE: *Toe hy nou eintlik klaar is toe skree hy vir hulle 'kamka' daardie beteken kom soos 'n bendetaal. ... En hulle het toe gekom toe staan hulle al drie daar, toe is hulle nou vier altesaam weer.*

STAAT: *Waar was, net vir ons verduidelik waar was jy toe die ander, of toe die drie beskuldigdes nou weer bykom het jy toe gestaan of..*

GETUIE: *Gelê op die grond ... En toe kom nommer 2 en met hom ook en hy ..., hy het net opgeklim en hy het ook net ... op my geklim ... op my .. bo-op my gelê.*

STAAT: *En wat doen hy toe?*

GETUIE: *Toe het hy ook seks met my gehad... Sy penis in my vagina in ..*

STAAT: *Het hy enigiets gesê terwyl hy dit gedoen het?*

GETUIE: *Nee, ek moet vir hom gesuig het .. op sy .. penis .. En toe wat hy klaar is en toe kom beskuldigde nommer 3.*

STAAT: *Wat doen beskuldigde 3?*

GETUIE: *Hy het ook net opgeklim en hy het ook seks saam met my gehad ... met sy penis in my vagina en dit is net daardie gewees.*

STAAT: *Het hy enigiets vir jou gesê daardie tyd? Jy skud jou kop ontkennend nê?*

GETUIE: *Nee ... Toe kom beskuldigde nommer 1. Hy het ook met my seks gehad en hy het dieselfde gedoen wat beskuldigde nommer 2 gedoen het ... met die gesingery ... om sy penis te suig.*

The witness indicated that she was gang raped and also that each accused raped her once not three times. The conviction of each accused on three counts of rape will have an impact on the sentence to be handed down by this Court on each accused. This means, that each accused is facing three life sentences unless compelling circumstances are found to exist on each count. Looking at the above factors, I am of the view that the Magistrate incorrectly convicted each accused on three counts of rape. The Magistrate in my view should have convicted each accused on one count of rape. The Magistrate incorrectly interpreted and applied section 51(1) of the Minimum Sentences Act. The act by the accused was one continuous act, that is, each accused raped the complainant once (see section 51(1) read with schedule 2 of Part 1 of the Act, stated above).

[6] The main purpose for enacting the Minimum Sentence Act was clearly stated by Marais JA in **S v Malgas** 2001 (1) SACR 485 (SCA) especially at paragraph 7 when he said the following:

“That situation was and remains notorious – an alarming burgeoning in the commission of crimes of the kind specified resulting in the government, the police, prosecutors and the courts constantly being exhorted to use their best efforts to stem the tide of criminality which threatened and continues to

threaten to engulf society. ... The very fact that this amending legislation has been enacted indicates that Parliament was not content with that and that it was no longer to be “business as usual” when sentencing for the commission of the specified crimes.”

[7] It is trite that prescribed sentence should be imposed in the absence of genuine convincing reasons what Marais JA called “weighty justification”. The learned judge said that:

“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.”

This means that if the prescribed sentence would result in an injustice being perpetrated against the accused, the disproportion between the prescribed sentence and just sentence would automatically qualify as substantial and compelling circumstances. [482 (el)]

[8] The seriousness of rape was clearly stated by Mahomed CJ in **S v Chapman** 1997 (2) SACR 3 (SCA) at 5, when he said:

“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 defensibly civilization. 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.”

[9] The victim in this matter is a young lady (who was 18 years at the time of the incident). She was very traumatised and vulnerable. The four men who raped this young lady showed her no mercy as they raped her in turns.

There is no doubt in my mind that the problem of high levels of crime, especially crimes of extreme violence and brutality to children, elderly people and women remains a stumbling block in our country. This case is one of many cases which occur daily in our society. The public or society is undoubtedly entitled to demand complete visible protection from the state and its organs from the escalating criminality within the limits of the law when these crimes are committed. In this matter it seems from the record that the mastermind behind these unfortunate incidents, is Darwood, whom I understand is now deceased.

[10] The person circumstances of the accused are as follows:

ACCUSED 1 is 29 years old and at the time of the incident he was 21 years old. He is married with two children whose ages are 9 and 7 years. At the time of the arrest he worked at a butchery in Grassy Park as a delivery boy earning R450.00 per week. At school he passed standard 7 and left due to poverty as he had to earn money to support the family. He has written a letter expressing remorse of the present crime.

ACCUSED 2 is 26 years old now and at the time of the incident was 19 years. He is single and has one minor daughter of 4½ years old. He worked at Westgate Timbers earning R450.00 per week. He passed standard 7 at school.

ACCUSED 3 is 25 years old and at the time of the incident was 17 years old. He is single and has a minor child of 5 years. At school he passed standard 5 and was working as a hawker earning R500.00 per month.

[11] In deciding on an appropriate sentence, Davis J emphasised in **S v Swartz And Another** 1999 (2) SACR 380 (C) at 387 h-j that:

“... the censure must have weight. The sentence of this Court should shout to the community at large that rape is unacceptable and that there is no basis upon which a first offender gets a ‘free rape’ (by virtue of a light sentence) and that only recidivists can expect an appropriately heavy sentence. In summary, the sentence must take full account of the nature of the offence. It must look carefully at the moral blameworthiness, while confirming the community values of dignity, equality and freedom in our society; in this way

the Courts can contribute to ensuring that women should benefit equally from a society based on those values. This latter promise is particularly important in a society in which male power and the abuse thereof has so perverted our communal life and threatens to make a mockery of our promise of gender equality.”

I must take into account each accused's personal circumstances while not forgetting the victim: I must also take into account the crimes which the accused have been convicted of, the interest of the society while simultaneously exercising a measure of mercy. I am mindful of purposes of punishment which are prevention, retribution, rehabilitation and deterrence. My duty is to impose sentences on all three accused to ensure that the community is satisfied and that it is unnecessary for the community to take the law into their own hands. Also to ensure that the crime victims and other member of the civil society have confidence in our courts. The sentences must also have deterrent factors as the court in **Chapman** case above said:

“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.*”

[13] In this matter, I am of the view that cumulative effect of a number of circumstances qualify them to be regarded as substantial and compelling and their presence justify the imposition of sentences less than life imprisonment. These factors are the following in respect of the accused:

ACCUSED 1 is a first offender. He has been in custody for almost 3½ years now. At the time of the incident he was also under the influence of drugs, namely, dagga. The socio-economic background of the accused will also be taken into account.

ACCUSED 2 was 19 years at the time of the incident. He has been in custody for 4 years and 2 months now. He is also a first offender. Also accused socio-economic background will be taken into account.

ACCUSED 3 was a juvenile at the time, that is, he was only 17 years of age. He has been in custody for 3½ years now, minimum sentence will not be applicable, instead usual sentence criteria will be applied.

[14] In the result,
Accused 1 and 2 are sentenced as follows:

Count 1 (Kidnapping) – Each accused is sentenced to four (4) years imprisonment.

Count 2 (Rape) - Each accused is sentenced to fifteen (15) years imprisonment.

Count 3 (Indecent Assault) – Each accused is sentenced to two (2) years imprisonment.

Sentences on count 1, 2 and 3 to run concurrently.

Accused 3 who was a juvenile at the time, as he was 17 years of age, will be sentenced as follows:

Count 1 (Kidnapping) – Accused is sentenced to two (2) years imprisonment.

Count 2 (Rape) – Accused is sentenced to twelve (12) years imprisonment.

Sentences on both counts to run concurrently.

SAMELA, AJ