**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER: A737/2010

DATE: 20 MAY 2011

In the matter between:

**ALLAN DIEDERICKS** 1st Appellant

**LEONARD CLAASEN** 2nd Appellant

and

**THE STATE** Respondent

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**J U D G M E N T**

**FOURIE, J**:

The two appellants and their co-accused, one Wayne Petersen, appeared in the Regional Court on a charge of raping the complainant. First appellant and Petersen were found guilty of rape, while second appellant was convicted of attempted rape. Petersen was also convicted of indecently assaulting the complainant. First appellant was subsequently sentenced to 18 years imprisonment, while a sentence of eight years imprisonment was imposed upon second appellant. Petersen

was sentenced to 15 years imprisonment. The first and second appellants' applications for leave to appeal were unsuccessful and after petitioning the High Court, they were granted leave to appeal against their sentences only. Petersen did not seek leave to appeal.

The circumstances that gave rise to the commission of the relevant offences may briefly be described as follows. Appellants and the complainant reside in the same neighbourhood and know each other well. She testified that they grew up together. At the time of the commission of the offences, first appellant was 21 years old and the second appellant 25 years old. The complainant was then 29 years old.

On the night in question the complainant and the appellants had partaken of intoxicating liquor to excess. At one stage first appellant had invited the complainant to accompany him to his house, but in due course the two appellants and Petersen ended up with the complainant in a deserted area. There first appellant threatened the complainant with a knife, thereby subduing her to the extent that he succeeded in raping her. Petersen then followed by also raping the complainant.

Thereafter second appellant attempted to rape the complainant

in the sense that he performed movements of a sexual nature against her naked lower body with his penis, but without entering her. He was then followed by first appellant, who raped the complainant for a second time. Before allowing the complainant to leave, Petersen indecently assaulted her by forcing her to suck his penis.

In sentencing the appellants, the presiding magistrate was under the impression that the provisions of the Criminal Law Amendment Act 105 of 1997 are applicable to both appellants. The provisions of the Act are clearly applicable to first appellant as he had raped the complainant more than once and was party to the gang rape of complainant, together with Petersen. The provisions of section 51 of the Act read with Part I of Schedule 2 thereto, provide for a sentence of life imprisonment in these circumstances, but the court is entitled to impose a lesser sentence if it is satisfied that there are substantial and compelling circumstances to do so.

As far as the second appellant is concerned, it will be recalled that he was found guilty only of attempted rape. This is not an offence which triggers Act 105 of 1997 as the Schedule does not refer to attempted rape. The Act only applies to "a person convicted of an offence referred to in the Schedule". Second appellant may have acted in the execution or furtherance of a

common purpose or conspiracy to rape the complainant, but the fact of the matter is that, absent proof of rape by him personally, the provisions of the Act do not apply to him.

I should add that, if the second appellant had been prosecuted as an accomplice to rape and found guilty thereof, the provisions of Act 105 of 1997 would have applied to him. It follows that, if necessary, we are entitled, as a consequence of this misdirection, to interfere with the sentence imposed upon second appellant by the magistrate.

As far as the first appellant is concerned, the magistrate found that there are substantial and compelling circumstances justifying a lesser sentence than imprisonment for life. In particular the fact that appellant is a first offender; that intoxicating liquor played a role and that the complainant had, fortunately, not suffered any serious injuries. However, the magistrate, in my view correctly, took into account the seriousness of the offence and in particular the leading conduct of first appellant, who not only threatened the complainant with a knife, but raped her twice during this incident.

One cannot imagine the extent of the emotional trauma and humiliation this must have caused the complainant, particularly

bearing in mind that she is an adult woman and older than her attackers, whom she knew well. In these circumstances I am in full agreement with the magistrate that the first appellant deserves a lengthy term of imprisonment of 18 years. I find no basis upon which the exercising of the sentencing discretion by the magistrate can be faulted.

As far as the second appellant is concerned, it should be borne in mind that he was a willing party to this gang rape of the complainant. He actively assisted and participated while the complainant begged him to help her. He did not only ignore her pleas, but attempted to rape her in a manner which must have been especially degrading for her. The mere happenstance that he failed to penetrate her, saves him from facing the prescribed sentence of life imprisonment in terms of Act 105 of 1997.

The magistrate took into account the clean record of second appellant, as well as the other relevant factors, such as the presence of liquor and absence of injuries on the part of the complainant. Also that first appellant was the leader of the pack and that second appellant played the lesser role. The issue to be decided is whether the sentence of eight years imprisonment meets the requirements of the case, or whether it can be said that it is shockingly or disturbingly inappropriate.

In my view the sentence of eight years imprisonment imposed upon second appellant cannot be described as shockingly or disturbingly inappropriate.

On the contrary, I am of the view that in considering an appropriate sentence, the magistrate correctly took into account the fact that second appellant did not only attempt to rape the complainant, but joined in the attack upon her and associated himself with her being gang raped. In these circumstances I believe that the imposition of a sentence of eight years imprisonment does not amount to an unreasonable exercise of the magistrate's sentencing discretion. Conduct of this nature, especially in circumstances where no remorse is shown, should be punished in a manner which would dissuade others from following suit.

It was submitted by Mr Base, on behalf of second appellant in his heads of argument, that the magistrate ought to have considered a sentence of correctional supervision. I have no doubt, having regard to the circumstances of this case, that a sentence of correctional supervision would send out the wrong message, as it would grossly overemphasise the personal circumstances of second appellant and underemphasise the seriousness of the offence.

In the result I propose that the appeals be dismissed and that the convictions and sentences be confirmed.

WEINKOVE, AJ: I agree.

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WEINKOVE, AJ

FOURIE, J: It is so ordered.

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FOURIE, J