Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Coram: LE GRANGE, J et SABA, AJ

Case No: A497/10
- Reportable-

In the matter between:

ELTON EVERTS **Appellant**

And

THE STATE **Respondent**

Appeal was heard on 18 February 2011.

Judgment was handed down by Judge A Le Grange on 31 May 2011.

Counsel for Appellant: **Adv LA Base**
Counsel for Respondent: **Adv SFA Raphels**

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JUDGMENT: 31 May 2011

LE GRANGE, J:-

[1] This is an appeal against conviction and sentence where the main legal issue for determination is whether the Court *a quo* misdirected itself by convicting the Appellant of rape.

[2] The Appellant was Accused 2 during the trial together with five co-accused, who were convicted in the Parow Regional Court on two counts of

robbery, one count of kidnapping, one count of attempted rape and a count of rape.

[3] The Appellant was sentenced to a term of ten (10) years' direct imprisonment on the robbery counts and a further fifteen years on the remaining counts, resulting in an effective term of 25 years' direct imprisonment.

[4] The facts underpinning the convictions briefly stated are the following. The complainant, who was 19 years old at the time, and her boyfriend "John" drove in a bakkie from Knysna to Delft, Cape Town. They arrived at John's house in Delft at approximately 18h00. Whilst there, the complainant received a message that her cousin, who also stays in Delft, was looking for her. She and John then decided to go and visit her cousin.

[5] At some stage during the night at her cousin's house, John decided to go and sleep in the back of the bakkie which was parked in the back of the yard. The bakkie had a canopy on. The complainant later joined John in the back of the bakkie. Later that same night they were woken up by men who were standing around the bakkie. The complainant testified about the attempted rape, how she was later raped and how she and John were robbed.

[6] The complainant testified that the Appellant and some of his co-accused attempted to rape her. She testified that her pants and underwear were removed; how she kept her legs closed and felt their private parts between her thighs.

[7] According to the complainant it was only Accused 6 who raped her after she was hit repeatedly with a gun in the face. The Appellant was holding her hands whilst Accused 6 was raping her. He also had a torch which he shone on her private parts during the rape and later made derogatory remarks about her vagina.

[8] John's evidence does not take the rape and attempted rape charges any further as he did not witness the rape. He was taken away to another place when the rape of the complainant occurred.

[9] The Appellant's evidence also does not take the matter any further. Although the Appellant admits being on the scene, he denies any wrongdoing. He in fact testifies that everything that he is blamed for was done by Accused 3, who died before the trial began.

[10] The trial court found that the complainant and her boyfriend, John, were credible and honest witnesses and accepted their version of events. This finding is not attacked on appeal by the Appellant.

[11] Counsel for the Appellant relied heavily on the unreported judgment of Fourie, J et Botha AJ, concurring in Hess and another v The State (A 596/ 2005) dated 22 August 2008 of this Division for its contention that the Appellant *in casu* was wrongly convicted of rape. In the Hess matter the present Appellant's co-accused, being Hess (accused 1) and Nomdoe (accused 4), were granted leave by the trial court to appeal only against their sentence. At the appeal hearing the question was for the first time raised whether Hess was correctly convicted of count 5, i.e. rape, as the evidence shows only Accused 6 raped the complainant.

[12] At page 3 of the Hess judgement the court held the following:-

> *"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 the first appellant was, at best for the State, an accomplice to the rape committed by the accused number 6. He was not only present on the scene, but actively assisted in subduing the complainant. However, the first appellant was not charged as an accomplice to the rape. As explained in 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, 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."

[13] Regrettably, I am constrained for the reasons stated herein to disagree with my learned Brothers view that where a person was not formally charged as an accomplice as in casu and the elements of accomplice liability have been overwhelmingly established, a verdict of guilty in the same form of the perpetrator cannot follow.

[14] It is correct as stated by Fourie, J that "*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".* In S v Saffier 2003 (2) SASV 141 (SOK), at 145 para [18] – [19], it was also held that rape can only be committed by a man who personally had sexual intercourse with a woman without her consent and how unsatisfactory it is that an accused who compels another to have intercourse with a woman without her consent should escape liability on a charge of rape.

[15] The legislature, in terms of section 155(1) of the Criminal Procedure Act 51 of 1977, regulated the procedural aspect relating to the doctrine of participation. Section 155(1) provides as follows: "*Any number of participants in the same offence may be tried together and any number of accessories after the same fact may be tried together or any number of participants in the same offence and any number of accessories after that fact may be tried together, and each*

participant and each such accessory may be charged at such trial with the relevant substantive offence alleged against him." Two concepts are used in this subsection, namely, 'participant' and 'accessory after the fact'. For the present discussion an accessory after the fact is not relevant.

[16] This subsection clearly sanctions the joint trial of multiple accused and the charging of participants with the same substantive offence even though their individual roles in the commission of the offence in question may differ. The scheme of the legislation is clearly intended to avoid repetition of evidence where possible. It is only at sentence stage that the court will take into account the degrees of the individual participant's role in the commission of the offence. See, S v Smith 1984 (1) SA 583 (A) at 596 A.

[17] In S v Khoza 1982 (3) SA 1019 (A) at 1031 B-F, the proper terminology in the participation doctrine was discussed. A participant may take the form of a perpetrator, co-perpetrator or an accomplice. This distinction between the forms of participations in an offence was recently restated in S v Kimberley and Another 2004 (2) SACR 38 ECD at Para [10] where the following was held:-

> *"Perpetrators and accomplices are all participants in a crime. A perpetrator is one who performs the act that constitutes the particular crime with the intention required by law for that crime. Where two or more persons together perpetrate a crime, they are termed co-perpetrators. An accomplice is neither a perpetrator nor a co-perpetrator, in that the acts performed by him do not constitute a component of the*

actus reus of the particular crime. He is one that consciously associates himself with the commission of the crime by aiding or assisting the perpetrator, which generally involves affording him or her opportunity, means or information in respect of the commission of the crime. The criminal liability of an accomplice is therefore accessory in nature."

[18] In *casu*, the Appellant did not commit the *actus reus*. He did, however, actively and knowingly assist with the commission of the rape by Accused 6. He held the complainant's hands whilst she was being raped. He shone a light at her private parts in order for accused 6 to penetrate her and later made certain lewd remarks about her vagina. He was constantly standing at the scene watching what was happening. The Appellant, shortly before the rape, also attempted to rape the complainant. He never disassociated himself with the act of Accused 6. The Appellant's conduct amounted to futhering the commision of rape by accused 6. The Appellant's participation in the rape therefore falls squarely in the legal definition of an accomplice. Snyman (Criminal Law 5th edition at pg 268) states the following: "*where another male (Z) assists the real perpetrator (X) to commit rape without himself having sexual intercourse with the woman, (Z) is not a co-perpetrator but an accomplice*". This is in my view the correct and more sober approach. See S v Msomi 2010 (2) SACR 173 (KZP), and LAWSA 2 edit. Vol 6 at para 130 and the cases referred to therein, where the following is stated: "*An accomplice can, moreover, be liable on account of his or her contribution towards an offence which the accomplice cannot commit as perpetrator. Thus a woman can be liable as an accomplice in an offence*

which can only be committed by a man and vice versa; a passenger can be liable as an accomplice in an offence which can only be committed by a driver; and a non-licensee can be liable as an accomplice in an offence which can only be committed by a licensee". If this approach was adopted and the participation doctrine, properly considered and applied the outcome in the Saffier matter may have been different.

[19] The authors De Wet and Swanepoel Strafreg 4 ed. (1985) at 199-200 insist that the charge sheet should distinguish between perpetrators and accomplices. Burchell, Principles of Criminal Law, 3rd Edition, page 602, holds a similar view where the following is stated. *"An accomplice therefore, commits a crime in his or her own right....Depending on the degree of participation before the completion of the crime; a person may be either a perpetrator or an accomplice. The charge should, in fact, stipulate whether the accused is charged with being an accomplice so that he or she knows the case that has to be met."* At footnote 180, the authors state the following *"One consequence of the recognition that an accomplice commits an offence in his or her own right is that the criminal Procedure Act may have to be amended to make specific provision for a competent verdict of being an accomplice where the substantive elements of a crime have not been proven, but the elements of accomplice liability have been established."* This is also the approach adopted by my learned Brothers in the Hess matter.

[20] The authors in Hiemstra's Criminal Procedure have adopted a different view. At pg 22-27, the authors state the following:

"Wording of the charge sheet – De Wet and Swanepoel Strafreg 4 ed. (1985) at 199 – 200 insist that the charge sheet should distinguish between perpetrators and accomplices. In a matter such as S v M 1989 (4) SA 421 (T) where the accomplice could not have committed the crime physically or mentally, it is agreed that this should be done. In practice, however, the prosecutor frequently cannot, on the facts available, determine in advance who was a perpetrator and who was an accomplice. As a result it is not possible to agree on practical grounds that there should normally be a distinction. It also very often happens that the state cannot prove at the trial who of a number of perpetrators performed the actus reus; in other words who in, for instance, the case of a gang murder or gang rape did and who did not perform the criminal acts."

[21] The approach adopted by Hiemstra is in my view the correct one. It is less stoic and engenders real world experience. In R v M 1950 (4) SA 101 (T) at 103 F the court followed the dictum in the case of *Rex v Jackelson (1920, A.D. 486 at 490,* where Juta JA held the following:-

> *"All persons who knowingly aid and assist in the commission of a crime are punishable just as if they had committed it."*

[22] In practice, experience has taught that prosecutors often, as a result of the available evidence, are unable to determine in advance who

was a perpetrator or an accomplice. Moreover, in gang related crimes, it often happens that the state cannot prove the number of participants whom have indeed committed the *actus reus*. Common-sense dictates that it is not possible in practice to insist on this distinction in a charge-sheet. Moreover, an accomplice is nothing more than a fellow participant in the same crime. In my view if, a person has been charged as a participant in a crime, and the evidence overwhelmingly establishes his liability as an accomplice, then in law it will not be wrong to return a verdict of guilty of the substantive offence. This approach can hardly impede an accused's right to a fair trial if he, as a participant, had been informed of the charge(s) with sufficient detail to answer it. See however, the *dictum* in S v Wannenburg 2007 (1) SACR 27 C at 33 g -34 a.

[23] In *casu*, the facts overwhelmingly demonstrate that the Appellant was a participant as an accomplice in the substantive offence committed by Accused 6. As an accomplice is always convicted of the main offence, it follows that the Appellant must be convicted of rape. See Hiemstra *supra* at 22-27 and the cases referred to therein. The conviction of the Appellant of rape is therefore not bad in law, despite the trial court conflating the role of the accomplice and co-perpetrator and applying the doctrine of common purpose. It follows that the appeal of the Appellant against the conviction of rape cannot succeed.

[24] The long overdue new Sexual offences and Related Matters Amendment Act 32 of 2007 came into operation on 16 December 2007. The new Act has finally done away with the common law definition of rape that for so long presented these challenging legal conundrums.

[25] Returning to sentence, the Appellant was 17 years old at the time of the incident. He completed only grade 7 at school and entered the labour market where he did some casual labour in Grabouw. He was in custody awaiting trial for almost two years and eight months. The trial court also found that the Appellant, together with accused 2 and 4, were under the influence of their co-accused 5 and 6 who were much older in years when committing these offences.

[26] The offences the Appellant and his co-accused committed are very serious. They acted in a gang format when they attacked the complainant and her boyfriend. These crimes falls within the ambit of the minimum sentence legislation, Act 105 of 1997. Rape is a very serious offence and constitutes a humiliating and brutal invasion on the person of the victim. Society demands that Courts protect the dignity of vulnerable women by imposing appropriate sentences.

[27] Taking into account all the relevant factors pertaining to sentence, the trial court, in my view, erred in imposing the same sentence on the Appellant as accused 6, who was much older and the main perpetrator in the rape

count. The seriousness of the offences and the interest of society were clearly overemphasized at the expense of the Appellant's personal circumstances. The trial court manifestly failed to properly consider the fact that the Appellant was an accomplice in the commission of the offence and in custody for nearly three years. The imposed sentence of 25 years imprisonment does induce a sense of shock if one considers that the Appellant was only 17 years old when these crimes were committed. For these reasons the imposed sentence must be set aside and considered afresh.

[28] In considering all the factors pertaining to sentence, I am of the view that substantial and compelling circumstances do exist that justify the imposition of a lesser sentence and that a more just and equitable sentence should be an effective term of 12 years imprisonment. It follows that the appeal against sentence must succeed.

[29] In the result the following order is made:-

a) The appeal against conviction is dismissed.

b) The appeal against sentence succeeds.

c) The term of 25 years imprisonment is set aside and substituted with the following:-

i) Counts 1 and 2 are taken together for the purpose of sentence and a term of 10 years' imprisonment is imposed.

ii) Counts 3 - 5 are taken together for the purpose of sentence and a term of 10 years' imprisonment is imposed.

iii) It is further ordered that 8 years of the sentence on counts 1 and 2 must run concurrent with the sentence of 10 years imposed on Counts 3 – 5.

d) In the result the effective term of imprisonment is 12 years. The sentence is backdated to 21 September 2001.

LE GRANGE, J

I agree.

SABA, AJ