ERICH RUDATH v. THE STATE

CASE NO. CA 109/98

1998/09/21

Teek, J.P. et Maritz, J.

CRIMMINAL PROCEDURE

Sentence - rape - seriousness of the crime - interest of the victims, of women and of society in general in retributive, deterrent and preventative sentences - prevalence justifying emphasis of society's interest.

Appeal - Sentence - righteous anger clouding judgment - resultant failure to consider certain mitigating factors - "mercy" as element in dispensing justice - requires that it should be done in a judicially balanced, soberly objective, morally elevated and humane fashion - severity of 17 year sentence reduced by suspending 5 years thereof.

CASE NO. CA 109/98

THE HIGH COURT OF NAMIBIA

ERICH RUDATH **Appellant**

and

THE STATE **Respondent**

CORAM: TEEK, J.P. et MARITZ, J.

Heard on: 1999-08-20
Delivered on: 1999-09-21

JUDGMENT

MARITZ, J.: The Regional Court convicted the appellant of the crime of rape and sentenced him to 17 years imprisonment. This appeal is against that sentence.

Mr. Mostert, who appeared for the appellant, contended that the sentence was totally inappropriate, shockingly disproportionate and inconsistent with sentences generally imposed for crimes of that nature. In addition, he submitted that the regional magistrate had not given due consideration to the personal circumstances of the

appellant; had placed too much emphasis on the interest of society and, as a consequence thereof, had failed to exercise his discretion judicially. The trial court, so he argued, should have given more weight to the mitigating factors on record: The appellant was at the time gainfully employed, married, the father of three children, the sole breadwinner of the family and a first offender at the age of 35.

Of course, the combined weight to be given to mitigating factors cannot be determined in isolation. They must be weighed together with all aggravating factors to assess their comparative weight for purposes of sentence. All those factors should be considered as interrelated components of *Zinn's* oft-applied *triad* (i.e. the crime, the offender, and the interest of society) in designing a suitable sentence that satisfies the objectives of punishment.

In this context, it is only appropriate that I refer to some of the aggravating factors present in this case.

Rape is, by its nature, generally regarded as a vile and serious crime. The brutal sexual violation of a fellow being's physical integrity, human dignity, security of person and psychological well-being to satisfy the assailant's most primitive and bestial urges of lust, sexual domination and power should not be tolerated in any society - least in ours, which has constitutionally committed itself to the recognition and protection of the dignity, freedom and equality of all its members.

Women, in general, have been the suffering prey of this crime for too long and too often. Those who have fallen victim to it have a legitimate expectation to seek just retribution against the offenders though our judicial system. Moreover, as a class of persons constituting a significant portion of society, women have the most immediate, compelling and direct interest that the courts of this country should impose deterrent sentences to discourage potential offenders. The Namibian society shares those sentiments and demands that, in appropriate cases, offenders be incarcerated and rehabilitated to prevent recurrence of their crimes.

I find myself in respectful agreement with the strong views expressed in S *v Chapman,* 1997 (2) SACR 3 (SCA):

"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 defensible civilisation.
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." (at p 5A-C) and

"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." (at p 5E).

To aggravate the already serious nature of the crime, it and other crimes manifesting a *"blatant and flagrant want of respect for the life and property of fellow human beings",* have become increasingly prevalent in this country. There is a public outcry for more effective and more stringent measures to reduce the occurrence thereof. So universal and compelling has public opinion rallied against perpetrators that legislation is presently under consideration in Parliament to address and combat crimes of that nature more effectively. In the circumstances the trial magistrate justifiably emphasised the interest of society as an important consideration in the determination of the appellant's sentence. Such emphasis is also done in other jurisdictions: See for example the attitude of Lombard, J. expressed in *S v Matolo en 'nAnder,* 1998 (1) SACR 206 (O):

"In cases like the present the interests of society is a factor which plays a material role and which requires serious consideration. Our country at present suffers an unprecedented, uncontrolled and unacceptable wave of violence, murder, homicide, robbery and rape. A blatant and flagrant want of respect for the life and property of fellow human beings has become prevalent. The vocabulary of our courts to describe the barbaric and repulsive conduct of such unscrupulous criminals is being exhausted. The community craves the assistance of the courts: its members threaten, inter alia, to take the law into their own hands. The courts impose severe sentences, but the momentum of violence continues unabated. A court must be thoroughly aware of its responsibility to the community, and by

acting steadfastly, impartially and fearlessly, announce to the world in unambiguous terms its utter repugnance and contempt of such conduct."

Furthermore, the manner in which the appellant committed the rape has several aggravating elements. The appellant, driving a vehicle, found the complainant walking to her father's house early on a Saturday evening. He offered her a lift. When she declined, he forcibly and unexpectedly pulled her into the vehicle and drove off. She loudly protested her abduction and later in tears pleaded with him to release or return her, but to no avail. After making one stop near his brother's house, where the complainant's cries for assistance fell on the ears of a deaf or disinterested neighbourhood, the appellant eventually stopped the vehicle somewhere in the veldt on the outskirts of Windhoek. There he dragged the complainant from the car, tore the clothes off her body and raped her. He did so whilst her humiliation was witnessed in the glow of the vehicle's parking lights by two boys, aged 12 and 18 respectively, who were passengers in the car. Raping her was, however, not enough for the appellant. He then, telling the boys that he had "torn her up" demanded that they too should rape her. They declined. The appellant collected a revolver from the vehicle, cocked it and threatened, in the crudest of language, to shoot them should they persist with their refusal to comply with his demand. The complainant tried to get back into the vehicle but was again pulled out of it by the appellant. She then suffered the

devastating indignity of being raped by a 12-year-old boy she knew by name - he was attending the same school as her own child. Thereafter it was the other boy's turn. He was similarly threatened and at gunpoint had to violate her again. The boy, afraid of the consequences, at first merely pretended to have intercourse with the complainant, but the appellant, not to be denied macabre satisfaction of his demands, insisted and closely observed that he too violated her. To add insult to injury, the appellant then zipped up his fly and told the boys that they would not get into trouble because the complainant was "rubbish". Distraught, she eventually managed to run away to a not too distant neighbourhood where an unknown Samaritan eventually heeded her calls and took her to her father's house.

This brief summary cannot adequately describe the horrific experience suffered by the complainant. The complainant was also from time to time during her evidence at a loss for words to adequately relate her ordeal at the hands of the appellant and, on occasion, she could do no better than to compare his conduct to that of a "dog" and a "pig". The rape left the complainant, who was described by the magistrate as "a lady with good upbringing", emotionally devastated. So tormented was she by the events that she attempted suicide by taking an overdose of pills. To a certain extent, the emotional consequences of the complainant's ordeal is similar to those described by Van Deventer, J. and Prest, A.J. in S ***v C,*** 1996(2) SACR 181 (C) at 186E:

"A rapist does not murder his victim - he murders her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life - a fate often worse than loss of life."

And the appellant? He did not show any remorse. He sat smiling when the complainant tearfully related to the court particulars of her terrible experience at his hands. On one occasion he had to be admonished by the magistrate and on another the complainant had to remark on his demeanour in court. Even his legal representative, it appears, had to ask for an adjournment to counsel the appellant about the callous impression caused by his conduct. His demeanour must have given the magistrate some insight into his personality and character. The appellant showed a significant lack of appreciation for the gravity of the crime he had committed: He advanced in mitigation (through his legal representative) that he was going to be in a lot of trouble at work for being two days absent from work because of the trial and suggested a total suspension of his sentence!

It is perhaps the appellant's unrepentant and callous attitude that, more than anything, stung and, it appears, angered the experienced and sensible regional magistrate. That much appears from the last part of the magistrate's judgment on sentence:

"I could not help to observe this morning that you were laughing when the complainant was testifying. You were actually laughing at her, so that she had to turn to you and reprimand you for that. Now, a person who approaches a serious matter like this laughing needs a serious reprimand. A very serious one, otherwise you will think that you can come away with jokes. This is a joke? It is not a joke. You are sentenced, sir, to 17 years imprisonment. Nothing is suspended."

The approach to be adopted by this court in an appeal against sentence is trite:

"Punishment being pre-eminently a matter for the discretion of the trial Court, the powers of a Court on appeal to interfere with sentence are limited. Such interference is only permissible where the trial Court has not exercised its discretion judicially or properly. This occurs when it has misdirected itself on facts material to sentencing or on legal principles relevant to sentencing. It will also be inferred that the trial Court acted unreasonably if

> '(t)here exists such a striking disparity between the sentences passed by the learned trial Judge and the sentences which this Court would have passed (Berliner's case supra at 200) - or, to pose the enquiry in the phraseology employed in other cases, whether the sentences appealed against appear to this Court to be so startlingly (S v Ivanisevic and Another (supra at 575)) or disturbingly (S v Letsolo 1970 (3) SA 476 (A) at 477) inappropriate - as to warrant interference with the exercise of the learned Judge's discretion regarding sentence'

S v Whitehead 1970 (4) SA 424 (A) at 436D-E. Compare also S v Anderson 1964 (3) SA 494 (A); S v Letsoko and Others 1964 (4) SA 768 (A) at 777D-H; S v Ivanisevic and Another 1967 (4) SA 572 (A) at 575G-H and S v Rabie 1975 (4) SA 855 (A) at 857D-F.

which justice should be dispensed in a civilised and just society. (See *R v V,* 1972(3) SA 611 (AD) at 614D - F). "It is a balanced and humane state of thought" and "eschews insensitive censoriousness in sentencing a fellow-mortal, and so avoids severity in anger" - *per* Holmes, J.A. in S *v Rabie,* 1975 (4) SA 855 (A) at 682D - F. By its consideration, we remind ourselves that justice should be dispensed in a judicially balanced, soberly objective, morally elevated and humane fashion - and that the court is neither a sledgehammer to exact a victim's revenge nor a deity capable of absolving a perpetrator of his or her crimes.

Anger, occasioned by the offender's demeanour and conduct in or out of court, however righteous, justified or understandable it might be in the circumstances, "should not becloud judgement" *(R v Karg,* 1961 (1) SA 231 (A) at 236B). Should the trial court sentence in anger, it would be a misdirection justifying the court of appeal to consider the sentence afresh.

Having carefully considered the magistrate's judgment on sentence, I am left with the distinct impression that, angered by the accused's conduct, the element of mercy was not blended into the other relevant considerations when meting out sentence to the appellant.

Furthermore, it is not apparent from the judgment that the magistrate considered the following mitigating factors at all: The appellant was, according to the accepted evidence of the complainant, heavily under the influence of liquor at all relevant times during the incident. Intoxication, as Holmes, J.A. has said in S v *Ndlovo (2),* 1965(4) SA 692 (AD) at 695C-D, "is one of humanity's age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do. On the other hand intoxication may, again depending on the circumstances, aggravate the aspect of blameworthiness ... as, for example, when a man deliberately fortifies himself with liquor to enable him insensitively to carry out a fell design." I should point out that there is no indication on record that the complainant's abduction and rape were planned or that liquor was consumed to bolster the appellant's resolve with such purposes in mind. Other factors apparently not considered are that the revolver was not used as part of any threat made against the complainant and that there is no evidence of any real physical injuries sustained by her as a result of her treatment at the hands of the appellant.

I have no doubt that the imposition of a long term of imprisonment is appropriate in the circumstances of this case. However, imprisonment for an effective period of 17 years is indeed a very long time. Although sentences of such (and longer) duration are often fully justified, especially where it is necessary for the protection of society that the accused be removed from its midst and be placed in preventative custody for such a period, one should always be mindful of the cautionary remarks of Nicolas, J.A. in Si; *Skenjana,* 1985(3) SA 51 (AD) at 541 to 55D when it comes to the sentencing objectives of deterrence, retribution and rehabilitation:

"My personal view is that the public interest is not necessarily best served by the imposition of very long sentences of imprisonment. So far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length. Indeed, it would seem to be likely that in this field there operates a law of diminishing returns: a point is reached after which additions to the length of a sentence produce progressively smaller increases in deterrent effect, so that, for example, the marginal deterrent value of a sentence of 20 years over one of say 15 years may not be significant.

Similarly in regard to the aspect of retribution. This has tended to yield ground to the aspects of deterrence and reformation, but it is not wrong that, in determining a proper sentence, the Courts should give some recognition to the natural indignation and the fears and apprehensions of interested persons and the community at large. (See R v Karg 1961 (1) SA 231 (A) at 236A-B.)... But that demand may well be satisfied by the imposition of less than the most severe sentence.

Nor is it in the public interest that potentially valuable human material should be seriously damaged by long incarceration. As I observed in S v Khumalo and Another 1984 (3) SA 327 (A) at 331, it is the experience of

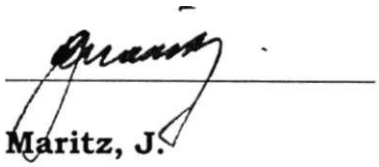
prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner. Wrongdoers "must not be visited with punishments to the point of being broken." (Per HOLMES JA in S v Sparks and Another 1972 (3) SA 396 (A) at 410G.)"

As a first offender at the age of 35 who in all probability acted at the time with a diminished capacity to exhibit good judgement (due to his state of intoxication), I would have suspended 5 years of his sentence. Such a partial suspension will, in my view, benefit the appellant's rehabilitation and serve as a deterrent not to commit a similar crime after his release from prison, yet, leave a sufficiently long effective term of imprisonment to impress upon him the gravity of his crime and to otherwise satisfy both the complainant's and society's interest in just punishment and the objectives thereof.

But even if the magistrate has not misdirected himself in the manner I have mentioned earlier, I am nevertheless of the view that the partial suspension of the appellant's sentence I would have ordered, had the matter come before me in the first instance, is sufficiently disparate from the actual sentence to justify interference by this court on appeal.

I the result I would confirm the sentence of 17 years imprisonment but suspend 5 years thereof for a period of 5 years calculated from the date of the accused's release from prison on the condition that the

accused is not convicted during the period of suspension of the crime of rape or indecent assault or of the statutory offence of carnal intercourse with a girl under the age of 16 in contravention of s. 14(l)(a) of Act 21 of 1980.



Maritz, J.

I agree.

Teek, J.P.

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