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IN THE HIGH COURT OF SOUTH AFRICA

(TRANVAAL PROVINCIAL DIVISION)

PRETORIA

CASE NO.: CC79/03

2003-05-22

DELETE WHAT IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF IMPORTANCE TO OTHER JUDGES YES/NO
(3) REVISED

DATE 20/9/2005 [h/w]

[Signature appears]
SIGNATURE

In the matter between

THE STATE

22/9/05 [h/w] [Signature appears]

and

WALTER RAULINGA

Accused 1

OSCAR VUSI THWALA

Accused 2

JUDGMENT

ELS J: The two accused are standing trial for a total of 12 charges. These 12 charges all stem from one event.

It is claimed that the two accused together with others abducted the deceased of count 1 and the complainant of count 2 and took them to the veld. There they took turns raping the complainant, the deceased on count 1, six times while they were in possession of a firearm with ammunition. After the rape the deceased was unlawfully and intentionally killed.

7/11 gm

[Translator's note: Page 18/27 of the file Record 3.pdf of Afrikaans transcript – it is unclear where in the sequence of pages this page would belong. The first line of this page is illegible.]

five said they must leave the man and the two men then moved away from the other group. Three remained behind. One of those three had a firearm with him and the three men then took turns raping her while one of them stood with a firearm in his hand pointing at her.

He says that after they had finished, they walked a distance, the three. He then heard one of the three telling the other two that he had forgotten something on the ground. That person then returned and he then shot at both the witness and the deceased. He was wounded in his *[Translator's note: next words are illegible]*. He was in hospital for three days. He says one of the five was wearing an Adidas tracksuit.

The next witness was Patrick Klaas Nyalunga. He is referred to as Klaas by the other witness. He testifies that he was together with accused 1 and 2, the witness Sipho and a certain Isaac at a tavern where they had drunk. After they had drunk, they walked and he says accused 1 and 2 and Isaac then went onto the premises there in Block X and brought two persons out of the property. He and Sipho walked together with the others, but a bit further behind them, whereas accused 1 and 2 and Isaac and the man and the woman walked in front to the veld. There he heard that the people were ordered to take off their clothes, that is the man and the woman, and to lie on the ground. He says that he had not known the man before that time, but the man mentioned there he recognised and that is the witness Lucky who testified. He says that Isaac raped the woman first, then Walter and then *[Translator's note: It seems that the next page is missing.]*

[Translator's note: Page 17/27 of the file Record 3.pdf of the Afrikaans transcript – it is unclear where in the sequence of pages this page would belong.]

he said to Sipho, "no, they now need to leave". Sipho then said to him that he would tell them that he would now leave and then the two at last left. He said that while Isaac and accused 1 raped the woman, accused 2 stood there and he had the firearm with him.

It was put to him that accused 1 would deny that it was him, that he had indeed been drinking with them but that he left them from the tavern. He denies this.

It was put to him by Mr Moja, on behalf of accused 2, that the latter was very drunk and cannot really remember what happened, but will say that he was not part of the rape and he says that he was there and that he went onto the premises where the people were caught.

The manner in which the statements were made to the witness on behalf of accused 2 it is very clear that he can remember certain things but not everything because it is explicitly said that he will say he can remember that he was not on the premises where the persons were.

The next witness was Francinah Matlou. On 11 May 2002 she was on the scene where the body of the deceased was found. There she picked up a cap, Exhibit 1.

The witness Dorah Makgotla does not bring the matter forward in any way.

Jerry Mosipha testified. He is the person known as Sipho. I shall not repeat his testimony in detail. He indeed confirmed the testimony of Klaas that I referred to earlier. It was put to him under cross-examination that accused 1 was not there, that he had left from the tavern. He denied this. It was

put to the witness that mention was made of a vehicle that he wanted to leave with accused 1, that they later left it with accused 2 and that, because the police confiscated it, it caused a problem between himself and the accused persons. This witness denied that there was any mention made of a vehicle and that there was a problem between him and 1 and 2.

The version of accused 2 that he was drunk, that he vomited, was put to the witness. He could not say whether accused 2 had vomited but did acknowledge that he had been drunk. He says he was drunk, but not that drunk that he staggered and fell. He knew what he was doing.

This concluded the case of the state.

Accused 1 and 2 testified themselves in their defence.

Accused 1 confirms that he was together with the other four on that evening, that is, accused 2, Isaac, Klaas and Sipho at the tavern where they had been drinking. He said that at one stage accused 2 went outside. He then also went outside. He saw that accused 2 was busy vomiting. He then told the others that they would now leave. He then walked to his house and accused 2 left with a rented vehicle.

The version of accused 2 is that he was at the tavern and remembers that he drank there. He got drunk. He vomited. He cannot remember anything else. When he regained his senses he was in his room. He does not know how he got there, but he then continues saying that he heard from Sipho on the day of his arrest that he had gone home from the tavern with the rented car. But when he was asked why

[Translator's note: This page is contained twice in the file Record 3.pdf of the Afrikaans transcript: 16/27 and 20/27, it seems to be in the correct position here.]

Sipho now wanted to give this false evidence against him, then he said that this was as a result of the Mazda vehicle about which accused 1 testified that the police had confiscated it. He cannot explain why Sipho was angry with him about this and it also does not make sense, because upon his arrest Sipho confirms that he was not present at the rape and that he left in a rented vehicle from the tavern.

This concluded the evidence for the defence and the state.

The state then requested conviction on charges 1, 2, 3 up until and including 7 and then on charges 11 and 12 with regard to accused 2.

Upon evaluation of the testimony, the two state witnesses, Jerry Mosipha, that is Sipho, and the other one, Patrick, also Klaas, made a very good impression on me.

It was argued that they could possibly have committed the deeds themselves and then transferred what they had done to the accused 1 and 2. It is of course so that where witnesses themselves committed a deed, they know everything about the deed and can thus give testimony on the commitment of the deed easily and well, and simply replace the name of the person who committed it. But this is not the defence of accused 1 and 2. Their defence comes down to them not having been there.

And then we need to consider Lucky's testimony that was an honest, upright testimony, who had no reason to implicate anyone in the deed. His testimony is very clear. There were five people where they were originally taken away from Block X to the veld. He says that when they were ordered

to undress and to lie down, two of them, of those five, withdrew from the group. The other three continued with the rape. He indeed confirms, fully, the testimony of Klaas and of Sipho.

When we come to the evidence of the accused, isolated, it may certainly be said that their evidence could reasonably possibly be true, but the Court does not approach their evidence as isolated evidence, but globally from all the evidence placed before the Court.

It is clear that there were five persons on the scene, if I accept the testimony of Lucky. This confirms, as I already said, the testimony by Sipho and Klaas, but according to the accused they were not at the scene. This evidence by them is rejected as false and I accept that they participated in what took place there that evening.

As far as charge 1 is concerned it is clear from Lucky's evidence that the three people who committed the rape walked away. That is, accused 1 and 2 and Isaac. One of them said that something had been forgotten and then shot at the deceased and the complainant.

It is so that all three of them knew that there was a firearm involved, but from the evidence it is clear that they must have known the firearm was there to intimidate the complainant so that they could rape her. So, the fact that they knew of the firearm cannot lead to conclusions that they should have foreseen that the deceased would be killed.

From the evidence before me it is not very clear who the one was

that walked back, but the probability that it was Isaac, that the three were involved in the abduction of the two persons, the complainant and the deceased, is certain. They took the persons against their will and wish to the veld where the deeds were eventually committed. They thus deprived the deceased and the complainant on count 2 of their freedom, albeit only for a brief period, before the deeds of the murder and the rapes were committed.

From the evidence it is also clear that there were at least three rapes. Isaac, accused 1 and accused 2 took turns raping the complainant. While the one was raping, the other two were present and clearly intimidated the person and kept her under constraint so that the rape could actually be committed.

I cannot reach a finding that there were more than three rapes.

As far as charges 11 and 12 are concerned, there is evidence by Siphon and by Klaas that accused 2 at one stage had the firearm in his possession while the other raped the complainant. It is admitted by his advocate that if he indeed had the firearm in his possession, and that the court accepts that evidence that he had the firearm in his possession for that time, that he is then guilty on those two counts.

On charge 1 both accused are found not guilty and are acquitted.

On charge 2 both accused are found not guilty and are acquitted.

On charges 3 and 4, the two charges of abduction, both accused are found guilty as charged.

On charges 5, 6 and 7 both accused are found guilty. These are three charges of rape and the finding is that this was a gang activity, the rape.

On charges 8, 9 and 10 both accused are found not guilty.

On charges 11 and 12 accused 1 is found not guilty and is acquitted and on charges 11 and 12 accused 2 is found guilty.

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Sneller Verbatim/hvr

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA

CASE NO.: CC79/03

* 2003-5-03 * [h/w]

~~2000-05-01~~

DELETE WHAT IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF IMPORTANCE TO OTHER JUDGES ~~YES~~/NO
(3) REVISED

DATE 2/12/2005 [h/w]

[Signature appears]
SIGNATURE

In the matter between

THE STATE

[Seal appears]

and

W. RAULINGA

Accused 1

O.V. TWLALA

Accused 2

SENTENCE

ELS J: The accused were found guilty of a total of two charges of abduction. Three charges of rape. Accused number two was further found guilty on one charge of illegal possession of a firearm, and a further charge of illegal possession of ammunition.

In terms of section 52(1), of Act 105 of 1997, read with the schedule thereto, this Court is obliged to impose upon the accused imprisonment for life on

the charges of rape in view of the fact that these rapes were committed as a gang action.

It is of course within the power of the Court to impose a lighter sentence if the Court is satisfied that there are substantial and compelling circumstances that would justify such lighter sentence.

In order to determine whether there are substantial and compelling circumstances, the Court will consider personal circumstances of the accused, and the Court shall consider the crimes themselves, the interests of the community, and the Court shall also take into consideration aggravating and mitigating factors.

The accused number one is twenty-two years old, unmarried with no children and he passed standard nine at school. He worked as a vegetable and fruit hawker with an income of R400,00 per week. He has already been in custody since May 2002, awaiting the outcome of this trial, that is one year, and he is a first offender.

Accused number two is also twenty-two years of age, also unmarried and has no children. He also passed standard nine, but he did not work during the incident. He has been in custody since May 2002, that is one year, and he has no previous convictions.

As far as the crimes are concerned, and here I concentrate myself only on the rape, the accused, a group of three, abducted the complainant and her companion and threatened her with a firearm. Forced her to take off her clothes and, when she did not want to take off her panties, they took it off and they, that is the two accused and a certain Isaac, took turns raping her. While the one was

raping, another one of them kept the firearm pointing at her to instil fear in her and to force her to lie still.

Such gang rapes cannot be tolerated. The humiliation a woman experiences during such an incident and the fear that she experiences is unimaginable. It is unacceptable in a civilised society as the one in which we are supposed to be living.

The interests of the community are based on the Court endeavouring to prevent that similar deeds are committed and to ensure that such deeds are not repeated. It is so that the accused had clearly consumed alcohol, but they clearly knew what they were doing and that in itself is no excuse whatsoever.

In my opinion there are no true mitigating factors that were placed before the Court, besides the fact that they may perhaps have consumed alcohol. Usually the Court shall take into consideration the fact that they have no previous convictions and that they have already spent considerable time in custody when imposing a sentence. But these facts cannot be considered as substantial and compelling circumstances that would justify a lighter sentence.

I am satisfied that there are no substantial and compelling circumstances that would justify a lighter sentence than the compulsory sentence. The accused shall be sentenced separately.

On charge three, both are sentenced to three years imprisonment, that is the abduction.

On charge four both are sentenced to three years imprisonment. That is

second charge of abduction.

On charge five, the charge of rape, both are sentenced to lifelong imprisonment.

On charge six, the charge of rape, both are sentenced to lifelong imprisonment.

On charge seven both are sentenced to lifelong imprisonment.

On charge eleven accused two is sentenced to two years imprisonment.

On charge twelve accused two is sentenced to one year imprisonment.

The effective sentence imposed on accused number one is thus one of three life sentences, plus another six years imprisonment.

The effective sentence imposed on accused number two is thus one of three life sentences, plus nine years imprisonment.

jm
7/11