IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)
CASE NO: CC 124/2004

In the matter between:

THE STATE	**APPELLANT**
AND	
JAN OLIVIER	**FIRST RESPONDENT**
COMFORT DINTWE	**SECOND RESPONDENT**

MMABATHO:

LANDMAN J
GURA J
MONALEDI AJ

JUDGMENT

LANDMAN J:

[1] The state appeals against the conviction and sentence imposed on Mr Jan Olivier (accused 1) and Mr Comfort Dintwe (accused 2).

[2] The respondents accompanied the complainant who was returning from a shop. Whilst walking, the first respondent all

of a sudden kicked the complainant on her stomach and she fell. He then choked her whilst she was lying on her back. He then called the second respondent to assist him to undress the complainant of her denim trousers and panty, which he did. The first respondent then had sexual intercourse with the complainant.

[3] The first respondent then told the second respondent that he must mount the complainant as soon as he (the first respondent) alighted. Whilst still choking the complainant, the first respondent dismounted her and the second respondent then mounted the complainant and also had sexual intercourse with her.

[4] They were each convicted in the Regional Court, Rustenburg, of two counts of rape. The Regional Court Magistrate referred the matter, in terms of section 52(1) of the Criminal Law Amendment Act 105 of 1997 to this court for sentence. Gura AJ (as he then was) directed a query to the Magistrate, to ascertain precisely on which two counts accused were convicted.

[5] The Magistrate replied. He said:

"1. Die beskuldigdes het in die streekhof op twee aanklagte van verkragting

tereg gestaan. Na aanhoor van die getuienis, is beide beskuldigdes op beide aanklagte van verkragting skuldig bevind en in terme van die bepalings van artikel 52(1) van die Strafregwysigingswet, 1997, (Wet 105 van 1997), na die Hoggeregshof vir vonnis vewys.

2. Die Hooggeregshof het by monde van Gura Wnd R (voor wie die saak gedien het), egter die volgende navraag gerig:

`On which two counts were the accused convicted?'

3. Ek weet nie, met die nodige respek gese, wat die betrokke probleem is nie. Die beskuldigdes is, soos reeds vermeld, op twee aanklagte van vekragting skuldig bevind. Dit was hulle ten laste gele dat hulle op die betrokke dag, beide die klaagster verkrag het. Die hof het bevind (a) dat beskuldigde 1 eerste die klaagster verkrag het terwyl beskuldigde 2 hom (beskuldigde 1) behulpsaam was, en (b) dat beskuldigde 2 daarna die klaagster verkrag terwyl beskuldigde 1 hom (beskuldigde 2) behulpsaam was. Wat bevinding (a) aanbetref, het die hof bevind dat beskuldigde 1 'n dader en beskuldigde 2 'n medepligtige was. Ten aansiens van bevinding (b), het die hof bevind dat beskuldigde 2 'n dader en beskuldigde 1 'n medepligtige was. Die staat het egter nie in die onderskeie aanklagte aangetoon in watter hoedanigheid (hetsy as dader of medepligtigheid), die beskuldigdes van verkragting beskuldig word. Dit is verkieslik dat dit gedoen behoort te word. Alhoewel die hof dit nie uitdruklik in sy uitspraak vermeld het nie, is dit duidelik dat bevinding (a) betrekking het op aanklag 1 en bevinding (b) betrekking het op aanklag 2. Sien in die verband S v Gaseb and Others 2001(1) SASV 438 (NSC) op 452 en 453 wat daderskap en medepligtigheid by verkragting aanbetref."

[6] Hendricks J considered the question whether it was proper to convict an accused person on multiple counts of rape when he is the actual perpetrator as well as an accomplice in one and the same criminal transaction. He considered various authorities and concluded at paragraphs 13 and 14 of his judgment that:

"{13} It is clear that the actual perpetrator and the accomplice or accomplices who assist can be convicted of rape, if it is one and the same criminal transaction. If thereafter, any one of them penetrates the victim again as a separate and distinct action, that constitute a separate criminal transaction and it amounts to a distinct separate crime of rape altogether. For example, if two male persons, acting in concert with one another, embark on the rape of a female person, one penetrating and the other assisting by holding the hands of the victim, both can be convicted of rape, (one as the actual perpetrator and the other as an accomplice). If the perpetrator takes the victim away and afterwards again has sexual intercourse with her without her consent, he commits a further crime of rape. The same applies to the accomplice, who after assisting the actual perpetrator, embarks on raping the victim, in a different criminal transaction, that constitutes a different crime of rape.

{14} I am of the view that if it is one and the same criminal transaction, the actual perpetrator and his accomplice or accomplices should each be found guilty on one count of rape, whether as actual perpetrator(s) or accomplice(s). If any of the accomplices, fail to be a perpetrator, (in himself penetrating the

> victim), he is still guilty of rape as an accomplice. Should however, any one of them, as a distinct different transaction, penetrate the victim, that would constitute a separate act of rape and he can be convicted on another charge of rape."

[7] Hendricks J came to the conclusion that the rapes occurred in the course of only one transaction. He decided that the conviction on two counts of rape must be set aside and replaced with one conviction of rape in regard to each accused.

[8] Hendricks J was of the opinion that another ground existed to set aside one count. He said:

> "I am inclined to set aside the convictions of the accused on the charges upon which they were not informed with sufficient detail about the case they had to meet as accomplices, but because it is not indicated on the charge sheet on which of the two counts each one of the accused is convicted as an accomplice, I am of the view that one of the counts, without specific reference to any one of them, should be set aside."

[9] He sentenced the respondents to 18 years imprisonment each. I am of the opinion that it is unnecessary for me to deal with the first question. The wording of counts one and two are precisely the same. Section 35(3)(a) of the constitution of The Republic of South Africa, Act of 1996 states:

"Every accused person has a right to a fair trial, which includes the right –

(a) to be informed of the charge with sufficient detail to answer to it: ....."

[10] None of the accused were informed that they are being charged as an accomplice, and not as a perpetrator. The magistrate affirms that the State did not make it clear in the charge sheet that the accused were each facing one count of rape as perpetrator and one count as an accomplice to the rape by the other accused.

[11] Mrs Mogoeng, who appeared on behalf of the appellant submitted that:

(a) the provisions of s 84 of Act 51 of 1977 were clearly complied with when the charge was made out. The accused persons were informed of the case the State intended to prove against them.

(b) the respondents knew exactly what the State intended to prove against them. They were able to plead, which is a clear indication that they were sufficiently informed of the nature of the charges against them. The second respondent was legally represented. No objection

whatsoever was raised regarding the charge as provided for by s 85 of Act 51 of 1977. This indicates that there was no defect whatsoever in the charge;

(c) the evidence of the complainant makes the role played by each of the accused very clear;

(d) the cross-examination of both respondents shows beyond doubt that they knew and understood the charges preferred against them;

(e) there is nothing on record to suggest that the respondents were prejudiced by the fact that the charges did not specify that they were charged either as an accomplice or a perpetrator; and

(f) the court clearly misdirected itself by setting aside one conviction of rape in favour of the accused on this ground as there is nothing on record to suggest that the two did not receive a fair trial.

[12] The first respondent was unrepresented. The second respondent was however represented. The identical charge sheets did not alert the accused to the intention of the State

to charge them in different capacities. A fair trial requires the accused to be informed, with sufficient particularity or detail about the charges they had to meet. In the context of this case, the charge sheet must inform the accused that he is charged as an accomplice to the one rape and as a perpetrator to the other rape. This was not done. I am not satisfied that the respondents knew the meaning and purport of the charges.

[13] I am of the opinion that Hendricks J correctly set aside one conviction. In the result the appeal is dismissed.

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A A LANDMAN

JUDGE OF THE HIGH COURT

I agree

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SAMKELO GURA

JUDGE OF THE HIGH COURT

I agree

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S R MONALEDI
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING:	30 SEPTEMBER 2005
DATE OF JUDGMENT:	-- OCTOBER 2005
FOR THE APPELLANT:	ADV MOGOENG
FOR THE RESPONDENT:	ADV ROODTMAN
APPELLANT'S ATTORNEY:	MAFIKENG JUSTICE CENTRE
RESPONDENT'S ATTORNEY:	THE DIRECTOR OF PUBLIC PROSECUTIONS