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CASE NO. 8/91 325/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JOSEPH VAN ROOYEN ..... FIRST APPELLANT

BENJAMIN LUKAS ..... SECOND APPELLANT

and

THE STATE ..... RESPONDENT

CORAM: JOUBERT, NESTADT JJA et VAN COLLER AJA

DATE HEARD: 22 August 1991

DATE DELIVERED: 10 September 1991

JUDGMENT NESTADT,

JA:

The two appellants were convicted of rape. They were sentenced to death. This appeal is against sentence.

The proven facts of the crime are, in

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summary, the following. At about 6:30 pm on Monday 20 June 1988 the complainant, a Mrs B, parked her car outside a cafe in Camps Bay, Cape Town. She, a married woman with three children, was aged 59 at the time. Having purchased a loaf of bread she returned to her vehicle. She was on her way home. It was dark and raining. Unbeknown to her, two coloured men were lurking in the vicinity. They were appellants. They were lying in wait for her. As she was getting into her car first appellant (Joseph van Rooyen), having suddenly approached her, pushed her into the car. He and second appellant (Benjamin Lukas) jumped in after her. First appellant sat in the driver's seat and second appellant in the passenger's seat. Complainant was now (in her words) "in the middle sitting on the hand brake virtually with a man on either side". This was the beginning of an ordeal

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that was to last some four hours. Second appellant was armed with a knife. He told complainant he would kill her if she screamed. He removed her watch and the rings she had on. He also took possession of her purse. It contained a small amount of cash and a credit card. At this stage the car was still stationary in its parked position. First appellant having obtained the key from complainant, then started the car and drove off. Complainant tried to draw the attention of a nearby motorist to her plight but was unsuccessful. First appellant proceeded in the direction of Hout Bay. It was already clear to complainant that appellants intended to rape her. She gathered this from their conversation with each other. There was talk of them "having sex with a white woman". And they used "filthy language" with a sexual connotation. The journey continued. They reached

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Hout Bay. First appellant drove the car along a side road. He halced at an isolated spot amongst some bushes. A strap was placed round complainant's neck. She was forced to lie on the passenger's seat. Second appellant, having ripped her slacks off then "punched me hard in my face" and had sexual intercourse with her. Whilst he did this first appellant, still in the driver's seat, held the strap around complainant's neck. Each time she made a sound or screamed he tightened it. This notwithstanding, complainant does not believe that she lost consciousness. After second appellant had finished, he moved to the back of the car whilst first appellant raped her. He too (ie second appellant) held and tightened the strap round her neck when she uttered any sound.

The remaining events of that night can be briefly recounted. During the following couple of

hours or so, appellants continued to hold complainant captive in the car whilst they attempted to withdraw cash at various so-called auto-banks by means of the credit card which they had taken from her. Complainant was made to lie on the back seat of the car. Second appellant sat "virtually" on top of her. First appellant drove. the car to a number of these auto-banks in Hout Bay and certain suburbs of Cape Town. However, he was unsuccessful in extracting any money with the card. Eventually he drove to and stopped off the road in the vicinity of the airport. Complainant's hands and feet were bound. She was convinced she was going to be killed. The trial judge doubted whether this was so. Fortunately the issue was not put to the test. No sooner had first appellant stopped the car, than the police were on the scene. They were fortuitously present in the area and

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on seeing the car decided to investigate. Appellants were arrested and complainant freed. She was taken to Tygerberg hospital where she was admitted. It was now midnight. She was very shocked. She was concerned that she may have been infected by appellants with some disease. She was found to have sustained various injuries. Her left eye was swollen to such an extent that it was closed. There were lacerations on the inside of her lips and tongue. Her nose and neck were bruised. As regards her genitals, the labia minora were bruised and contained blood. There were about six small tears in the vestibule. The vagina also contained blood. It was the opinion of the district surgeon who examined complainant that the intercourse had been accompanied by an abnormal degree of violence (though he conceded the possibility that the injuries were caused by an unusually large male organ). It is

not clear what treatment complainant received save that she was given pain-killers. She remained in hospital for five days. It would seem that by then she had recovered from her physical injuries save for what she describes as a "frozen shoulder". This was only diagnosed later. It gave her a great deal of pain and discomfort for almost a year. During this period she was obliged to undergo a number of manipulations of the shoulder under general anaesthetic as well as intensive physiotherapy. Finally there are the psychological sequelae that must be referred to. Complainant did not escape unscathed in this regard. Already in hospital she received psychiatric treatment. Thereafter, however, she did not seek any further treatment of this kind. It would seem that the support she received from her family made this unnecessary. But she still bears certain

mental scars. Even at the time of the trial (some eleven months later) she continued to have nightmares of the incident.

Those then were the events of the night in question which led to appellants' trial in the Cape Provincial Division before MUNNIK JP sitting with assessors. Besides being convicted of rape, appellants were also charged with and convicted of the kidnapping of complainant, robbery (of her personal effects and car) with aggravating circumstances and attempted theft (of the auto-bank money). On these counts they were sentenced to an effective period of eleven and nine years' imprisonment respectively. As I have indicated, however, only the death sentences for rape are in issue.

There can be no question that there are a number of aggravating features about this crime.

Complainant was subjected to a humiliating, indeed harrowing, experience. It was one which she had to endure over a lengthy period of time. From an early stage she knew what her f ate was to be. It was not found that appellants intended, when complainant was first accosted, to rape her. Even so, it is clear that soon after taking her captive, they had decided to have intercourse with her. They therefore had ample time for reflection. As MUNNIK JP found "dit (was) nie a verkragting wat skielik op die ingewing van die oomblik gepleeg is nie, soos so dikwels die geval is wanneer persone by 'n huis inbreek en h vroulike persoon daar vind of miskien op 'n vroumens afkom wat langs die strand loop of in die bos wandel nie". They were, moreover, sober. Appellants' version that they were intoxicated was rejected. Before us this finding was not attacked. So

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appellants (respectively aged 35 and 26 and therefore mature men) knew f ull well what they were about. Each of them assisted the other in subduing complainant whilst she was raped. I refer in this regard to the cruel use of a strap around her neck. And, in addition, second appellant struck her at the time. She sustained both physical injuries and adverse psychological consequences. Appellants have shown no genuine remorse. Finally, there are their personal circumstances. They both have previous convictions. Those of first appellant are particularly bad. They start in 1971. They inciude three of housebreaking, two of malicious damage to property, two for assault with intent to do grievous bodily harm, one for robbery, two of theft and one (in 1978) for sodomy. First appellant was sentenced inter alia to various terms of imprisonment. The last one was in 1985. It was one of five years for theft.

He was released in April 1988, ie about two months before the attack on complainant. Second appellant has two previous convictions; one in 1985 for attempted rape (a sentence of three years' imprisonment was imposed) and one for housebreaking. Both appellants have therefore committed sexual offences before.

What has been stated makes this a particularly serious case of rape. Indeed, I do not think I would have interferred with the exercise of the trial judge's discretion to impose the death sentence. MUNNIK JP rightly took into account the interests of society. He expressed himself as follows:

> "Dan is daar die kwessie van die belang van die publiek. Hier is h klaagster wat ewe onskuldig in h beboude gebied om 6:30, vroeë aand, soos talle mense daagliks doen, by 'n kafee stilgehou het om 'n brood te koop. Met haar terugkeer na haar motor het met haar

> gebeur wat ek alreeds beskryf het. Die publiek het h reg om vrylik en sonder vrees in die loop van hulle daaglikse lewensaktiwiteite hulle gang te gaan en om teen optredes soos dié van die twee beskuldigdes beskerm te word. Daar is by talle geleenthede in die Appelhof en elders gewag gemaak van die reg om rustig en sonder vrese in jou eie huis te verkeer sonder die vrees van inbraak en die feit dat die verkragting deur 'n inbreker gepleeg word is as erg verswarend beskou.
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> Na my mening is daar geen wesentlike verskil tussen daardie tipe sake en die huidige nie. Die klaagster het 'n reg gehad om haar pligte as huisvrou ongesteurd en sonder vrees uit te voer en om in haar eie motor te ry en veilig daarin te voel."

No fault can be found with these views. However, by reason of the Criminal Law Amendment Act, 107 of 1990, we have now to exercise an independent discretion. In doing so, the test, unlike previously, is whether the death sentence is the only proper sentence. Only if it is, can the death sentence be imposed. Applying this test, I have come to the conclusion, not without hesitation, that it is not the only proper sentence.

I cannot confidently say that the evil of appellants' deed is such that society would demand their destruction. As I have said, appellants did not lie in wait for complainant in order to rape her. She has not suffered any lasting serious effects. Physically she has recovered. I do not have the impression that the nightmares which she experiences are particularly worrying. Obviously each case must be decided on its own facts. And comparisons with sentences imposed in other similar matters must be made with extreme caution. Nevertheless, I cannot overlook certain recent cases in which this Court, in respect of rapes which in my judgment were at least as serious as the present one, did not impose the death sentence. I am referring to S vs P 1991(1) SA 517(A), S vs S 1991(2) SA 93(A) and the unreported case of Michael Matlala vs S, case no 233/90, decided on 28 March 1991.

The remaining question is, what period of imprisonment should be substituted? There is no

warrant for distinguishing between the two appellants. On a conspectus of all the relevant considerations, I have decided that it should be life imprisonment. This serves to reflect the gravity of the offence and the indignation that it would naturally cause in the minds of the public. And, it is to be hoped, it will also achieve the retributive, preventative and deterrent purposes of punishment.

The appeal succeeds. The death sentences in respect of appellants' convictions for rape (count 3) are set aside. There is substituted in the case of each appellant a sentence of life imprisonment.

NESTADT, JA

JOUBERT, JA )
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CONCUR
VAN COLLER, ÁJA )