

MP
259/83

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

RUDOLF MBUYISELE BONAKELE

Appellant

and

THE STATE

Respondent

CORAM: CORBETT, KOTZÉ et CILLIÉ, JJA

GALGUT et SMUTS, AJJA

HEARD: 15 February 1984

DELIVERED: 16 March 1984

J U D G M E N T

GALGUT, AJA

The appellant was found guilty, by a

Judge

Judge and two assessors in the Springs Circuit Local Division, of kidnapping (count 1), indecent assault (count 2) and rape (count 3). Separate death sentences were imposed on counts 1 and 3. The sentence on count 2 was ordered to stand over until such time as it was decided whether or not the death sentences would be carried out. The appellant, to whom I shall refer as the accused, appeals, with leave of the trial Judge, against the sentences on counts 1 and 3.

Because of the submissions made by Counsel for the accused I deem it advisable to set out the evidence in some detail. The accused is a strongly built black man, aged 24. He has passed standard 7. He was then working

working for a white employer, mainly in the garden. His employer was frequently away for long periods. It would appear that the accused had access to the house during his employer's absence.

The complainant is a young white girl.

She was at the time of the events 11 years old, slightly built and small for her age. The record reflects that she was "3ft 4ins" tall and weighed "74,8 lbs". She is an intelligent child and was in standard 4. On her way to and from school she would regularly pass the place where the accused worked. She told the court the following

story:

story: On the afternoon of Friday the 29 April 1983 she was on her way home from the school and about to pass by the place where the accused was working; he came out and grabbed her, from behind, by the throat; when she made a noise his grip on her throat tightened in order to keep her quiet; he took her into the garage of the house; there he closed the doors and instructed her to lie down on some blankets and cushions which were there; he told her he wished to marry her; she told him she was too young and he said that that did not matter; she asked him when she could

go

go home; he first said at 5 pm; then at 5 pm he said
7 pm; at 7 pm he said the next day; at some time thereafter
she fell asleep; he woke her in the early hours of the
morning and took her into a room in the house; there he,
over her own clothes, dressed her in trousers, a shirt,
jacket and shoes so that she looked like a boy; he then
rubbed brown shoe polish on her face; thereafter he took
her from the house to a place where there was a small
opening in the surface which led to a hole underground;
he told her to go down into the hole. More as to this

hole

hole later. The complainant then went on to give some details of what happened in that hole up to the time she was found there on 9 May 1983. It is obvious from her evidence that she lost all track of time and was unable to recall events in their sequence and when they happened.

What does emanate from her evidence is that she and the accused slept on blankets which he had brought to the hole; that the accused went off to work each morning and came back later in the day; that a wire was tied to her arm and this was tied to a pole; that the length of the wire from the pole was only "10 inches"; that after some days in the

hole

hole she managed to free herself from the wire; that
having done so she went to the opening to get out; that
she saw him coming back from work and immediately went
back into the hole; that he was angry and again used wire
to secure her to the pole; that he thereafter brought a
chain and two locks and chained her to the pole; that
she then had more freedom of movement; that he regularly
brought food and water; that on two occasions he brought
her chicken to eat; that shortly before she was found he
brought a radio for her use; that he also brought her two
books to read; that she was only able to read them by the
light

light of a small gas stove; that she was never allowed out of the hole; that on one occasion, after releasing her from the chain, he did allow her to put her head through the opening to get some fresh air; that when she wished to relieve herself she had to use a plastic bag which the accused had provided.

Her evidence as to the indecent assaults

(count 2) and the rape (count 3) was very short. It is best related in the following extracts from her evidence:

"En toe het hy daardie aand teruggekom en toe het hy daarso langs my kom lê en hy het my broekie uitgetrek en hy het sy piepie in my boudjies ingedruk vir die eerste paar aande.

Ja? -----En toe kan ek nie meer onthou wat het

verder

verder gebeur nie, maar dan weer vir die laaste paar aande het hy sy piepie in my piepie ingedruk."

"Nou wil ek net weet was dit vir jou seer of hoe was dit?

-----Dit was vir my seer.

Elke keer? ----- Ja. En hy het gesê dat ek - as ek eers gewoond is daaraan dan sal hy vir my laat losgaan.

Goed, nou jy het alreeds(Hof kom tussenbei).

HOF: Het jy gehuil toe hy hierdie dinge met jou doen? --- Ja."

She also told the Court a quo that she was afraid of him; that when, prior to being taken to the hole, she raised her voice or made a sound he grabbed her by the throat and tightened his grip on her throat; that she frequently asked him, during the period that she was in the hole to let her go and he told her not to persist in this request.

request. On the occasion on which she had loosened the wire he threatened her by saying that if she freed herself he would find her and kill her and nobody would know that he had done it. As will be seen later the accused admitted virtually everything the complainant had said.

In the morning of 9 May 1983 a Mr Liebenberg received a report from one of his employees. He went to the opening. He, being a big man, could not enter and so he reported to the police and asked that they send a thin policeman. A constable Adendorff was sent. He entered the hole and found the complainant; she was crying and needed to be comforted and soothed; he had to saw through the chain to free her; she was weak and could hardly walk; he had to carry her. From the photographs and the evidence

it

it would seem that the hole was a small concrete chamber such as could have been used as a water tank. Adendorff, having freed the complainant, waited in the hole to apprehend the accused. His description of the hole reads:

"U Edele, dit was baie benoud en warm onder in die gat. Dit was klammerig en 'n mens sukkel redelik om asem te haal, jy kry 'n benoude gevoel op die bors.

En die beligting konstabel? --- Dit was pikdonker, 'n mens kan nie sien nie, jy sien net die lig wat deur die opening skyn, verder kan jy niks verder in die gat rond sien nie."

Major van Tonder, the investigating officer having told the court that he found dirt, rubble, loose bricks and plastic bags containing human excreta in the hole went on to testify:

"Mnr D'OLIVEIRA:.....

"Mnr D'OLIVEIRA:Wat is die toestande onder in daardie gat, kan u dit net beskryf vir Sy Edele? --- Dit was haglike toestande. Dit was pikdonker, benoud, en 'n mens kry die engte-vrees daar binne. Dit is so donker dat die donker jou toedruk en die komberse en kussings en goed was vreeslik vuil gewees, en ek glo die klaagster kon nie beweeg nie dan sou sy teen die bakstene moes afgegely het na die teenoorgestelde muur toe."

The complainant was, shortly after her release, examined by the district surgeon, Dr Bowden. He has had 29 years experience as such. He testified that, apart from the genitalia, he found no abrasions, wounds or other external signs of injuries. The following findings of Dr Bowden are relevant to counts 2 and 3:

"The vestibule was reddened and oedematous as indicated and there were multiple small tears of the hymen which was also oedematous and red. I did not attempt inserting a

finger

finger into the vagina in view of the state of the hymen, I did not want to cause this child any additional pain. The fourchette was oedematous and red. There was a sero-sanguinon discharge present. This is a bloody plasma like discharge. It is more a plasma discharge mixed with blood. There was no actual haemorrhage although in actual fact there must have been haemorrhage some time certainly to cause this sero-sanguinon discharge.

In addition to these findings, My Lord, there was a 1,5 cm tear in relation to the anus as indicated on the diaphragm just superior to the anus.

Yes? --- As a result of these findings it was my opinion that rape and sodomy were both clinically suggested."

Dr Bowden went on to say that during the examination complainant appeared to be normal but went on to add:

"It may be said and I may be asked why is it -

why

why do I find this child normal after what could in my opinion have been a prolonged period of exposure, not only exposure to physical trauma but psychological trauma to an extreme degree over a period - I think I can only say, I do not know if this is out of place, but I believe that during the concentration camps in the war the victims walked to the gas chambers in absolute stupor, accepting their fate. I personally think that this could be said of this little mite, that she was subjected to such terrific trauma in both senses, that she got to the stage that she did not care anymore.

I cannot accept a child that portrayed the injuries, the physical injuries which were beyond doubt, with no supposition, which were present, could act perfectly normally as she did in my presence that afternoon, without being if I may put it plainly "shocked to hell" because of her experiences."

Complainant's father, in answer to a question as to whether she had been affected by what had happened said:

"U Edele, voor die voorval was sy 'n vriendelike, innemende kind wat natuurlik gereageer het, en

na die voorval het sy geheel en al stil geword. Wat ek ook opgemerk het sy het nagmerries begin kry. Wat ek ook opgemerk het was dat sy nie wou gaan slaap sonder dat die lig aan was nie. Voor die voorval het sy outomaties gaan slaap, die lig afgesit, in die bed geklim en dit was nie nodig gewees om die lig aan te hou nie."

He also stated that there was a marked deterioration in her school work.

Dr du Toit, a doctor of psychology, testified that he had treated the child; that everything had been done to take the child's mind off the traumatic events; that her detention had, to all intents and purposes, been solitary confinement; that the periodic presences of the accused had probably aggravated the position in that his presence was something unpleasant and caused her fear and anxiety. He handed in two reports to which he adhered in evidence.

Extracts therefrom read:

"Dit het gelyk of sy die gebeure goed verwerk het en goed aangepas het. Sy het goed saamgewerk en goeie rapport is bewerkstellig.

Daar is by haar 'n begeerte om die verlede te ontvlug en haarself te onttrek ten einde verdere pyn te vermy.

Uit onderhoude wat met die dogter gevoer is het dit vir my al meer duidelik geword dat ons hier te doen het met 'n dogter wat weens haar traumatiese ervarings, in 'n akkute stadium van post-traumatiese skok verkeer en dat sy die gebeure na die onbewuste vlak gerepreseer het. Sekere gebeure is so geïnhibeer dat sy dit selfs moeilik vind om dit doelbewus op die bewustelose vlak te laat verskyn. Hierdie emosionele labiliteit kan seker die beste verstaan en verklaar word teen die agtergrond van die depriverende omstandighede waaronder die trauma plaasgevind het. Uit die dogter se rekonstruering van die gebeure het dit duidelik geblyk dat sy vir ongeveer tien dae onder uitsers traumatiese omstandighede in 'n pikdonker gat aangehou is. Die vrees, spanning en angs wat sy gedurende hierdie periode moes deurstaan is bykans onberekenbaar.

Dit

Dit staan bo alle twyfel dat dié omstandighede 'n geweldige inpak op die kind se persoonlikheid, sekuriteitsbelewing en emosionele belewenis moet hê. Dit is verder opvallend dat die dogter instaat is om in redelike detail te gesels oor die gebeure wat die trauma voorafgegaan het, maar dat sy erg emosioneel raak wanneer sy gekonfronteer word met die feite van die seksuele daade wat plaasgevind het. Dat hierdie gebeure op die bewustelike vlak vir haar erg skokkend was en nog steeds op onbewustelike vlak, erg skokkend is, laat min twyfel."

Dr du Toit was asked what his prognosis was

and his reply reads:

"Ek wil nie graag my uitlaat op hierdie stadium oor 'n langtermyn prognose nie. Ek wil net volstaan deur te sê dat hierdie kind op hierdie stadium volgens my mening intensiewe pedoterapie nodig het en dat ek verwag dat dit op die langtermyn voortgesit sal moet word."

The accused, shortly after his arrest, made

two statements. One before Major van Tonder and one before a magistrate. These statements were admitted without objection in the Court below. The accused, when giving evidence, adhered to these statements. The statement to the Magistrate sets out his story coherently. It reads:

"Ek het 'n wit meisie in Geduld gesien en het van die meisie gehou toe ek haar sien. Sy het so af en toe verbygehoop party dae en partykeer was sy op pad skool toe. Ek het 'n kans gesien om haar te steel want die pad waarlangs sy loop is langs die hek van die plek waar ek werk. Sy het verby geloop en is skool toe en ek het vir haar toe gewag want sy sou terug kom. Toe sy teruggekom het was ek gereed en het die hek oopgemaak om haar te kry. Toe sy nader gekom het het ek haar gevra hoe laat dit was en aangesien sy duideliker wou gehoor het het sy nader gekom. Ek het haar vasgehou en in die motorhuis geneem. Ongeveer 1 vm het ek haar my hemp en my sweetpakbroek gegee om aan te trek sowel as skoene en 'n hoed. Ek het haar 'n "Lumberjacket" gegee om aan te trek. Ek het

haar

haar gesig met politoer gesmeer sodat haar gelaatskleure nie duidelik is nie. Ek het haar geneem deur saam te loop en partykeer het ek haar vasgehou. Ons is na die gat toe waar sy opgespoor is. Ons het daar gebly vir 'n paar dae en ek het 'n draad om haar pols gebind, maar ek het die draad so aan haar gehad dat dit op en af kan beweeg. Ek het haar getoets of ek met haar gemeenskap kan hou. Ek het haar getoets deur my privaatdeel in haar privaatdeel te steek en wanneer sy geskreeu het het ek haar gelos. Ek het die ding in party dae gedoen om haar te probeer gewoond te raak. Sy het my ook versoek om haar na haar ouerhuis te laat gaan en ek sê toe ek sal haar laat gaan wanneer sy my gewoond geraak het. Ek het haar ook goed hanteer en het vir haar goedere gekoop en te probeer dat sy van my hou. Sy het gesê op 'n stadium dat sy so effentjies van my hou en op 'n dag het ek haar deeglik ondervra en sy het toe gesê dat sy nie van my hou nie. M.a.w. ek het al die dinge gedoen omdat ek van haar gehou het en ek wou haar my vrou gemaak het. Al kan ek nie daarin geslaag het om met haar gemeenskap te hou nie sou ek haar kans gegee het om te groei totdat sy gegroei het soos ek wou gehad het sy moet wees."

The following passage in his evidence is significant:

"Right, now do you think that your family and your fellow residents in the location would approve of your tying up a little child for a period of time? --- They would not accept it. Precisely, and especially tying up a child underground for ten to eleven days? ---But they do not know what I am thinking.

Yes, but if you were to have done it there with them in their - your own community, they would have condemned it, is that correct? --- Doing that on a black child?

Forget about the colour. Yes, a black child? --- Not a single person would accept that, even the father of the child.

And yet you proceed here to tie a person as you would probably tie a dog? --- It was only my plan to steal this child."

The accused was examined by Dr Bowden who found that there was nothing wrong with him physically and mentally.

After

After sentence had been passed Counsel applied to the learned Judge a quo for leave to appeal. He urged that the Judge had erred in imposing the death sentences on counts 1 and 3 and submitted that the Appeal Court might well find that no reasonable court would have imposed the sentences. The Judge, when granting leave, said:

"The application made by Mr Beaton is opposed by the State. Mr Beaton has not said I have misdirected myself. He says no reasonable Court could have imposed the death sentence. Moral judgments differ widely. Leave is given on both counts."

Counsel for the accused correctly conceded that this Court is not free to interfere with a discretionary imposition of the death penalty unless the sentence is:

(a) vitiated

(a) vitiated by irregularity or misdirection: or

(b) is so severe that no reasonable court would have

imposed it.

In his written heads of argument he relied on both grounds. As to ground (a) he urged that there had been three misdirections and detailed them. As to ground (b) he urged that no reasonable Court would have imposed the death sentences. As to this ground more later.

Section 316(2) of Act 52 of 1977 provides that every application for leave to appeal shall set out clearly and specifically the grounds on which the accused desires to appeal. If the application is made verbally the grounds are to be taken down in writing and they then form part of the record.

In

In the beginning paragraphs of his heads of argument, Counsel for the State quoted sec 316(2). He referred to what Counsel for the accused had submitted when leave to appeal was sought and to what the Judge stated when granting leave. He stressed that no mention had been made of misdirections and submitted that it followed that leave was granted only on ground (b) above and that the accused was precluded from relying on any alleged misdirection.

In my view the above statements by the learned Judge do not necessarily mean that he intended limiting the grounds of appeal. They do not necessarily mean that he intended to preclude the accused from arguing the appeal on general grounds. Hence, the grant of leave must

be

be construed in favour of the accused as enabling him to raise the alleged misdirections. I proceed, therefore, to discuss the appeal on that basis.

Ad. ground (a) above. The first misdirection urged is:

(aa) that it does not appear from the judgment on sentence that the Judge considered imposing a sentence other than the death sentence; that inasmuch as the imposition of the death penalty was discretionary and inasmuch as accused was a young man, he should have considered whether a long term of imprisonment with the attendant discipline could have led to the rehabilitation of the accused.

The

The second misdirection urged, reads:

(bb) that the Judge erred in overemphasizing the gravity of the two offences at the expense of the personal circumstances of the accused.

The third misdirection submitted is

(cc) that the Judge erred in finding that the accused had shown no compassion and that the purpose of the gifts brought to complainant was to make her amenable to his purpose.

The record reflects that Counsel for the accused when arguing the question of sentence submitted all the mitigating factors. These included the accused's age; that he had only one previous conviction for a minor theft for

for which a fine had been imposed; that no physical injuries, other than the injuries to the anus and genitalia had been inflicted; that the nature of the injuries to the anus and genitalia showed that the accused had not been unduly violent and had acted with a measure of restraint; that the accused's motive, misguided though it was, was to make complainant his wife; that he had shown compassion by seeking to alleviate her plight by bringing adequate food, the books, the radio and the chain; that he had, when giving evidence, shown remorse. The record reflects further that Counsel referred the Judge a quo to what was said in S v Ntuli 1978(1) SA 523(A) and urged that, in the exercise of his discretion, the Judge should not impose a death sentence but should impose a long prison sentence.

Counsel

Counsel for the State urged in the Court a quo

that the accused was not an unintelligent person; that he was at all times fully aware of the wrongfulness of his actions; that he had planned and deliberately gone ahead with the kidnapping and sexual assaults; that he had held the complainant in grossly traumatic and psychologically adverse conditions. He submitted that this was a very serious case which warranted the imposition of the extreme penalty.

Ad (aa) above: The learned Judge did not mention possible rehabilitation resulting from imprisonment when imposing the death sentences. The fact that he did not do so does not mean that he did not have regard thereto.

It

It is clear from his detailed reasons for imposing the sentences that he did have regard to all the factors submitted by both counsel; that having done so he came to the conclusion that the crimes were so serious that the death penalty and not a long term of imprisonment should be imposed. The whole tenor of the judgment on sentence points to the fact that imprisonment as a possible alternative sentence was definitely in the mind of the trial Judge. It follows that this alleged misdirection has not been established. See also what is later said when discussing above ground (b).

Ad (bb) above: As already stated, Counsel in his argument detailed the relevant personal factors relating

relating to the accused. The Judge had regard to all of them. He also had regard to the kidnapping and its purpose; to the period and nature of the captivity and to the happenings, including the sexual assaults, in the hole. He regarded the offences as extremely serious. It therefore, cannot be said that he attached too much weight to the gravity of the offences and too little weight to the personal factors of the accused.

Ad (cc) above: This submission is based on statements in the Judge's reasons. One of these reads:

"Mr Beaton has said also that the accused showed a certain care and concern by bringing the little girl a radio and some reading material and also sweets. Yes, I have borne that in mind: but this was to make

her

her amenable and is not proof of care or compassion."

After having said the above the Judge went on to discuss the rape charge and the fact that the rapes and the sodomy were repeated over a period and resulted in bleeding and pain. In regard to this conduct the Judge said the accused had shown no compassion.

If one has regard to the accused's own story it is clear that he hoped to make complainant amenable to his wishes and that the gifts were for this purpose. It is true that he did not physically assault her. There was no need to do so. She was too small to offer resistance. It is also true that in the sexual acts he did not show undue violence. There can, however, be no

doubt

doubt that his conduct, in keeping her confined and chained in the conditions described, in repeatedly performing the sexual acts, in repeatedly ignoring her weeping, in repeatedly ignoring her requests to be allowed to go home, in threatening to kill her if she sought to escape, cannot qualify as compassion. At best all that can be said for the accused is that he sought to make the terrible ordeal less dreadful. This does not indicate true compassion.

It follows from what has been said above that there is no merit in the suggestion that the learned Judge misdirected himself in the respects alleged.

I turn now to consider ground (b) above,

viz.,

viz., that no reasonable court would have imposed the death sentences. Section 277(b) of Act 51 of 1977 provides that a sentence of death may be imposed upon a person convicted of kidnapping, child stealing or rape. When a death sentence is discretionary, it may be imposed if the trial Judge is of the opinion that the crime is of such a serious nature that it would be an appropriate punishment.

S v Tshomi en n Ander 1983(3) SA 662(A) at p666.

Ad. the kidnapping charge (count 1): The accused found the hole and then carried out his plans. His whole conduct in grabbing complainant by the throat in order to keep her from making a noise, in taking her to, and locking her up in the garage, in taking her into the house and there dressing her in his clothing, in putting shoe polish on her face, in taking her to the hole in

the

the middle of the night, in taking blankets with him, in tying her to the pole, shows that he had carefully planned the kidnapping and that the purpose was to have sexual intercourse. He continued despite her supplications to hold her captive in the appalling and harrowing conditions detailed above. It certainly was a very serious case of kidnapping.

Ad. the rape charge (count 3): As stated in regard to (aa) above, Counsel urged all the mitigating factors. There is no need to repeat the evidence of the complainant and Dr Bowden. The accused raped this small eleven year old girl on a number of occasions. It may well

well be that in doing so he, as urged by Counsel, showed a measure of restraint. This, however, cannot be allowed to obscure the full picture of maltreatment. The fact remains that he did on each occasion cause her pain and a degree of physical injury. Despite this he did not desist from raping her. She was a helpless victim. The psychological shock caused by the rapes appears from the relevant extract from Dr du Toit's evidence. He also added that she will, in all probability, have repulsive memories when she begins menstruating and when she gets married. In R v Sibande 1958(3) SA 1 at p6 SCHREINER, JA said:

".....the

"...the character of the complainant has always, and rightly, been regarded as of significance in deciding upon the penalty to be imposed upon the raptor. Rape upon a prostitute, for example, though it is the crime of rape, would not ordinarily call for a penalty of equal severity to that imposed for rape upon a woman of refinement and good character."

See also R v S 1958(3) SA 102(A) at p105.

There can be no doubt that the Judge was correct in regarding the rapes as very serious.

Where the death sentence is discretionary the fact that there is a possibility of rehabilitation does not mean that a long term of imprisonment is for that reason the only appropriate sentence. It is only one of the circumstances which a trial Judge has to consider together

with

with the particular gravity of the offence and all the relevant circumstances, aggravating and mitigating, when imposing sentence. Cf. S v Sithole 1983(3) SA 610(A) at 615C. In S v Fazzie and Others 1964(4) SA 673(A) at p684 B it was said:

"This Court will not readily differ from the Court a quo in its assessment either of the factors to be had regard to or as to the value to be attached to them."

See also S v Pillay 1977(4) SA 531 (A) at p535 and S v Nel 1974(1) SA 29 (A) at p32.

As we have seen there were no misdirections and the Judge a quo had regard to all the relevant circumstances. It cannot be said that he did not exercise his discretion judicially. It follows that it has not been shown

shown that no reasonable court could have imposed the

death sentences on each of counts 1 and 3.

The appeals in respect of both counts 1 and
3 are dismissed.

O. GALGUT AJA

CORBETT,	JA	)	
KOTZé,	JA	)	
CILLIé,	JA	)	Concur
SMUTS,	AJA	)	