

IN THE SUPREME COURT OF SOUTH AFRICA(APPELLATE DIVISION)

In the matter between:

NORMAN HENRI BAIN Appellant

and

THE STATE Respondent

CORAM : WESSELS, JANSEN, VILJOEN, JJA

HEARD : 26 NOVEMBER 1984

DELIVERED : 30 NOVEMBER 1984

J U D G M E N T

VILJOEN, JA

In the magistrate's court for the regional
division of Natal held at Durban the appellant faced

2/.... a charge

a charge of rape but was convicted of attempted rape and sentenced to five years' imprisonment.

His appeal against both his conviction and his sentence to the Natal Provincial Division of the Supreme Court failed, as did his application before that Court to appeal to this Court. With the leave of this Court, however, the appellant now comes on appeal against his sentence only.

The complainant was at the time of the offence a sixteen year old girl. The appellant's age is reflected on the charge sheet as 23 years.

The circumstances under which the offence was held to have been committed appear from the evidence of the complainant as paraphrased by the

magistrate:

"On the relevant date at about 2.20 pm she and a friend, Gail, sat on the verandah of the Malibu Hotel in Durban. They are both students at a secretarial college and live in the same hostel. They had come from college and intended going to the discotheque in the hotel's Port-O-Call which opens at about 17h30. They were drinking a beer when they were joined by four men, namely the accused, Peter Lucas and two others whose names are unimportant. She did not know any of them. The men arrived in pairs but she could not say, with certainty, who arrived first. But be that as it may, they all conversed and afterwards, at Peter's request, she accompanied him to a bottle store where she bought him a bottle of rum, (he had promised to refund her the money for it). When they got back to their table on the verandah the bottle was opened and concealed between Peter's legs under the table. Cokes were ordered from the hotel and the men drank rum and Coke. After the girls had each consumed two beers they were requested to accompany Peter and the accused to the latter's flat, which was nearby, so that the two men could change into suitable clothing for the disco. They were told that it would not take long and that

4/.... they

they would return soon. They agreed and en route a bottle of Coke was purchased by one of the two men. When they arrived at the flat, which is situated on the second floor, she and Gail were sober. They had not consumed any other than the two beers previously mentioned. She is used to having beer with her parents in Zambia.

When they arrived at the flat they were invited in and offered rum and Coke. Gail tasted her drink, found it too strong and left it alone. The complainant did not drink hers. The accused and Peter each had two drinks, whereupon the accused had a bath, whilst the girls prepared snacks. After the accused had had his bath they ate the snacks and the men continued drinking. Afterwards the complainant used the toilet in the bathroom and when she came out Peter pushed her back and she heard the accused say he was going to lock them up in the bathroom.

In the bathroom Peter kissed, or at least tried to kiss her but she pushed him away, walked out and returned to the couch where the others were. Whilst on the couch Peter again kissed her and started vomiting. He then got up and lay on the

bed. Gail also got up to fetch a glass of water but the accused grabbed hold of her and pushed her onto the bed where Peter had been lying a little earlier on. She heard Gail crying and asking the accused to leave her alone; she was unable to help Gail because Peter was then pinning her down on the couch. She could not see what was happening to Gail who was on the bed behind the couch. When she tried to look Peter pulled her shoulders around. Afterwards the accused came over to the couch and Peter then let go of her and she noticed that Gail had left the flat.

During this incident, she says, the accused and Peter were becoming aggressive, used foul language and: 'Were on their way to getting drunk.' When she saw that Gail had left she said that she was going to leave but the accused told her to clear the dishes and called her a Coolie bitch and enquired whether she enjoyed being one. That apparently annoyed her, she dropped the dishes which she had in her hand and ran towards the front door but Peter got there first and wouldn't let her out. She begged him to let her go but he refused so

she sat on the floor by the door. The accused then pulled her up by the hair, threw her onto the bed and in vulgar language told her that he was going to have intercourse with her. He pinned her down on her back with her hands at her sides and managed to slip out of his corduroy pants which he was wearing without underpants. She could see his erect penis. Whilst on top of her he tore her panties. She was afraid the accused would hit her if she resisted (She said she was limp with fear), but when he inserted his penis she felt a sharp pain in her vaginal area, panicked and pushed him away. She was very upset at the time and ran out of the flat along the corridor. When it appeared that she was running to a dead-end she turned around, ran in the opposite direction and saw the accused and Peter standing in the doorway of their flat. She became so frightened that she contemplated throwing herself over the side. She then saw Gail, Mr Cunningham and two other males coming up the stairs to the second floor and ran towards them. The males spoke to the accused but she was crying so much at the

time that she could not hear what was being said. She could see Gail was angry and heard her yelling at the accused and Peter. She left her books in the flat and returned with Gail and the others to Claridges Hotel where she told Gail that he had pulled up her skirt and tore her panties which, incidentally, she threw into the dustbin but did not specifically mention the intercourse part of the incident because she believed that Gail had guessed what the accused had done to her.

At the hotel she also met an attorney. He escorted her back to the accused's flat but when they arrived there there was no one in. She had no family in Durban to turn to for advice and it did not occur to her to report the incident to the police.

The following day Gail telephoned an ex-policeman who accompanied them to the accused's flat; he was out and, with the caretaker's assistance, they managed to get their books which they had left in the flat.

The police were informed of the incident and

she was taken to the district surgeon for an examination. She could not remember clearly whether she did have a bath after the incident and before the examination. She seemed to remember sitting on the side of a bath washing herself without allowing the water to enter her vaginal area."

The magistrate convicted the appellant of attempted rape on the following basis:

"Only one point requires further consideration and that is whether penetration had taken place or not. Complainant said that when accused's penis made contact with her vaginal area she felt a sharp pain, panicked and pushed him off. It seems that he ejaculated on contact which, incidentally, probably explains why he lost interest in her so soon afterwards. That incident lasted a very short while and in view of the district surgeon's evidence there is some doubt whether penetration had taken place. There is, however, not the slightest doubt that he had attempted to penetrate her and he is guilty of an attempted rape."

In sentencing the appellant the magistrate took into account the prevalence of rape in the area.

He said:

"Hardly a day goes by without the local courts dealing with one or more of these cases. And, as the prosecutor has indicated, they seem to be on the increase. It seems that the short terms of imprisonment which have been imposed in the past have not acted as sufficient deterrent. Parliament has set its face against this type of offence and has provided for the death penalty to be imposed in appropriate cases."

He found that when the appellant committed the offence he knew exactly what he was doing, but accepted in his favour that at the time he was intoxicated to some extent. The magistrate took into account the circumstances which prevailed when the appellant committed the offence. He addressed the appellant thus:

"You had the complainant at your mercy, pulled her around by the hair, assaulted her, humiliated her and attempted to rape her. You are a big strong person and she had no chance against you. Fortunately you did not succeed in deflowering her. Had that happened the court would have taken a much more serious view of this incident. But it was purely fortuitous that she was not deflowered. Had you not ejaculated prematurely she might not have been a virgin today."

In rape cases, the magistrate pointed out, it was not only the victim who had an interest in the outcome of the case and if the sentence were too lenient interested and affected persons might take the law in their own hands. He referred to R v Karg 1961 (1) SA 231(A) where at 236 Schreiner JA said:

11/.... "It

"It is not wrong that natural indignation of interested persons and of the community at large should receive some recognition in the sentence that the Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands."

The magistrate had regard, finally, to the criminal record of the appellant and expressed the view that the court had a duty towards women and was obliged to protect them against men like the appellant. The only way that could be done was by imposing an appropriate sentence, he said, and held that under all the circumstances a suspended sentence, as suggested by counsel for the appellant, would be inappropriate. The magistrate dealt with

the appellant's previous record as follows:

"You are by no means a first offender. Your first brush with the law was on the 27th of April, 1976, when you received five cuts following a conviction for theft. Since then you have been convicted of various other offences and your history shows a singular lack of discipline. You have become a liability to society. You committed the present offence whilst the suspended sentence dated the 20th February, 1979, was hanging over your head. Your counsel has explained the nature of the crimen injuria offence and the Court will accept what he said, namely, that there was no physical involvement in that incident and that what had happened is that you had sworn at a woman which led to that conviction and sentence."

The aims which the magistrate therefore had in mind were, in the first instance, deterrence of the appellant himself and, in view of the prevalence of rape and, indeed, an increase of rape cases heard

by the courts, deterrence also of others.

In view of the offence of rape being one of those

offences which evoke public indignation, and,

further, in view of the character and personality of

the appellant as revealed by his criminal record

the magistrate added a fair measure of retribution.

He obviously decided against a suspended sentence

because the suspended sentence which had previously

been imposed upon the appellant did not have any

deterrent or corrective effect upon him. It had

hardly been imposed when the appellant committed

the present offence of attempted rape.

It was submitted on behalf of the appellant,

firstly, that the magistrate misdirected himself

in over-emphasizing the deterrent and retributive aspects of punishment in assessing an appropriate punishment, secondly, that, regard being had to other sentences imposed in similar cases, the sentence in the present case was strikingly disparate and, thirdly, that the court failed to take into account certain mitigating factors.

In support of his first submission counsel referred this Court to the recent decision in S v Khumalo and Others 1984(3) SA 327 where, at 330 D-E Nicholas JA, in the course of his majority judgment, said:

"In the assessment of an appropriate sentence, regard must be had inter alia to the main purposes of punishment mentioned by Davis AJA

in R v Swanepoel 1945 AD 444 and 455,
namely deterrent, preventive, reformative
and retributive (see S v Whitehead 1970 (4)
SA 424(A) at 436 E - F; S v Rabie 1975 (4)
SA 855(A) at 862).

Deterrence has been described as the
'essential', 'all important', 'paramount'
and 'universally admitted' object of
punishment. See R v Swanepoel (supra at
455). The other objects are accessory."

The learned Judge of Appeal remarked that

in modern times retribution was considered to be of

lesser importance and referred to the very dictum

which the magistrate quoted from R v Karg supra,

adding, however, the following sentence which was

omitted by the magistrate:

"Naturally, righteous anger should not
becloud judgment."

Nicolas JA also referred to the following

16/.... dictum

dictum by Holmes JA in S v Rabie 1975(4) 855

at 862 A - B:

"The main purposes of punishment are deterrent, preventive, reformative and retributive: See R v Swanepoel 1945 AD 444 at 455. As pointed out in Gordon Criminal Law of Scotland (1967) at 50:

'The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation ... The other theories, reformative, preventive and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment.'

It is therefore not surprising that in R v Karg 1961 (a) SA 231 (A) at 236A Schreiner JA observed that, while the deterrent effect of punishment has remained as important as ever,

'the retributive aspect has tended to yield ground to the aspect of prevention and correction.'"

17/... I fully

I fully subscribe to these views. Whereas formerly, particularly in ancient and medieval times and even in the more enlightened period thereafter, the emphasis was on retribution, the outlook has gradually changed. In his De Jure Belli ac Pacis

2 20 4 1 Grotius said: nemo prudens punit

quia peccatum sed ne peccetur. But while this is

true, retribution, as Schreiner JA said, is by

no means absent from the modern approach. What

importance the component of retribution should be

accorded in a sentence depends upon the circumstances.

In R v Karg supra, for instance, this Court had to

consider whether mere negligence as opposed to

recklessness or some high degree of recklessness

merited a considerable degree of retribution in the sentence. And, as was made clear in the same case, an offence which evokes indignation from the public attracts a greater share of the component of retribution than an offence which does not. Further factors to be taken into account in this respect are the seriousness of the offence and the disposition and attitude of the offender, particularly to his victim.

In the present case one of the ingredients of the offence was intent and not negligence. The complainant, a girl of sixteen years was seriously manhandled by the appellant who showed no remorse afterwards. The magistrate correctly took into account his previous

criminal history which, he said, showed a singular lack of discipline and correctly described him as a liability to society. In my view the magistrate did not overemphasize the retributive aspect.

The magistrate has further correctly applied the deterrent aims both as far as the appellant himself as well as others were concerned. Considering that his previous sentences had had no deterrent effect upon him, as is illustrated by the commission by him of the present offence on 26 March 1979, barely a month after a portion of each of his sentences imposed on 20 February 1979 for crimen injuria, assault on a White male and a police officer and malicious injury to property was suspended

for three years on various conditions, the magistrate has not erred as far as deterrence of himself was concerned. The prevalence of the offence and the increase thereof was no doubt taken into account by the magistrate in the context of his aim to deter not only the appellant himself but also others. For that reason it does not serve any purpose, as appellant's counsel has invited this Court to do, to compare other sentences imposed for the same offence. Of course, a comparison of sentences meted out in other cases may serve as a guide to ensure some proportionality in sentences, but it is only a rough guide because there are so many factors, usefully collected under the term

21/.. 'individualisation

'individualisation', to be taken into account

that no tariff or standard sentence can be maintained.

One such factor is the personal circumstances of the offender. In the present case it was in fact submitted that the magistrate did not sufficiently take into account the appellant's personal circumstances. From the record very little appears as to the appellant's employment, his future prospects of advancement, the effect which a prison sentence was likely to have upon his life and other such circumstances. He was represented at the trial and it may be assumed that if any such personal circumstances which were likely to

22/.... affect

affect the sentence did exist it would have been brought to the notice of the magistrate.

It was finally submitted that the magistrate misdirected himself and failed in his duty when he ignored factors arising from the State's case which were mitigating in respect of the seriousness of the crime and therefore of sentence. The burden of the submission is that the conduct of the complainant and her friend was such as to encourage the appellant and his friend to pursue their aim to have sexual intercourse with the girls. It was submitted that in the circumstances which prevailed the complainant must have known that the visit to the flat would be an

opportunity for amorous pursuits and the inference should be drawn, counsel urged, that once the girls had settled at the flat there was no longer any question of going to the disco. It was finally submitted that the rape was not (for whatever reason) considered in a serious light by the complainant because she did not avail herself of the first opportunity to tell at least her companion about the attempted rape. Her first concern seemed to have been the retrieval of her schoolbooks even when the person she had recourse to was a person of some standing - an attorney.

The magistrate dealt with these submissions which were addressed to him in the context of the

conviction. He described the complainant as an intelligent and respectable young girl without any sexual experience who left the impression that she was shy to talk about sexual matters. The magistrate referred to the criticism levelled at her for not screaming when the appellant was supposed to have assaulted her. He believed her explanation that she was afraid of the appellant (limp with fear), and that she did not think of that at the time. In this connection it must be borne in mind that she was only sixteen years old and that the accused was a powerful man who could easily subdue her, said the magistrate. It must have been obvious to her that he was determined to have sexual intercourse

with her and that he would not tolerate any resistance, he added. It is true, he proceeded, that she did not tell her friend Gail about the sexual act but that might in his view be ascribed to the fact that she was too shy to mention it. "It is an extremely personal matter, possibly the worst form of invasion of a woman's privacy, and her reluctance to mention it is understandable. It is for that very reason that many rape victims refuse to report a rape. But of course it will be recalled that she did say that she believed that Gail had guessed what had happened to her," he said in his judgment.

I fully agree with the magistrate and as

far as the impression the complainant made on the magistrate is concerned, it must be borne in mind that he saw the complainant and formed an impression of her personality and character. He was, therefore, the best judge. The two girls might have been too trusting. The appellant, for all his long criminal record, was still young at the time and the girls were probably looking forward to an enjoyable evening at the disco with two pleasant young male friends. They might initially have created the impression that, morally, they were not too fastidious but the appellant and his companion must soon have realised in the flat, when they

27/.... tried

tried to force their amorous attentions on the girls, that the complainant and her companion were not amenable to their overtures and the appellant should have desisted. Instead he started to manhandle the complainant and tried to achieve his object by forcing her to submit.

It is a heavy sentence but the magistrate furnished good reasons for imposing the sentence.

In my view he has not erred in any respect and the sentence is not so severe as to lead to the conclusion that no reasonable court would have imposed it.

The appeal is dismissed.

WESSELS)
JANSEN) - JJA - CONCUR


JUDGE OF APPEAL