

10/1988

PAULOS SEKONYANE FOFO

APPELLANT

and

THE STATE

RESPONDENT

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

PAULOS SEKONYANE FOFO

APPELLANT

and

THE STATE

RESPONDENT

CORAM: VAN HEERDEN, NESTADT JJA et KUMLEBEN AJA

HEARD: 16 FEBRUARY 1988

DELIVERED: 11 MARCH 1988

J U D G M E N T

NESTADT, JA:

This appeal is against the sentences imposed by VERMOOTEN AJ, sitting in the Witwatersrand

Local/

Local Division, for a series of crimes of which appellant was found guilty. After a lengthy trial, he was convicted on ten counts of rape, one of attempted rape, one of indecent assault, one of assault to do grievous bodily harm, ten of housebreaking with intent to rape (nine of which were with aggravating circumstances), one of housebreaking with intent to steal, twelve of robbery (ten with aggravating circumstances) and one of theft of a motor vehicle. In respect of four of the convictions of rape, three death sentences were imposed. For the rest, he was sentenced to varying periods of imprisonment, totalling 155 years. The individual sentences range from ten years for housebreaking and rape to four years for robbery. They were ordered to run concurrently

in/

in such a way as to produce an effective period of imprisonment of 41 years.

Appellant was a hawker, aged 28, at the time of his trial (in November 1986). He was born in Lesotho where he received a Std 1 education. Nevertheless, he was regarded by the trial judge as "a very intelligent man". According to the court's observations, he is strongly built and has a "forceful nature". He came to the Republic in 1978. He has one previous conviction but it is not relevant. He is unmarried.

The crimes were committed in or near Johannesburg during the period 9 October 1984 to 3 August 1985. Save for the theft of the car, they concerned fourteen women. Of these, one an 18 year-old girl, was robbed of some money

at/

at knife-point in a suburban street one morning. The other thirteen were accosted by appellant in their homes into which he had broken, save that in one case he was able to enter without effecting a breaking. Except in this last instance the crimes were committed at night (usually in the early hours of the morning). In most cases, the complainants either lived alone or were alone at the time. The others lived either with a child, mother or girl friend. As I have indicated, ten of the women were raped; one was the subject of an attempted rape; and the other two were assaulted in the manner stated. The latter were aged 15 and 17. Those who were raped were in their twenties save for three who were aged 31, 45 and 51. Other than in one instance, each of them

was/

was at the same time robbed of relatively small amounts of money. On seven of the thirteen occasions, appellant wielded a knife or similar weapon with which he threatened his victims. In one case, as will be seen, he actually injured one of the women with it. Five of the other complainants did not see that he was armed but each time there was a threat by appellant to kill them.

That, in outline, is an account of appellant's nefarious conduct. His denial of any participation in the crimes was rejected by the trial court. In considering the appeal it is necessary to deal separately and independently with the (effective) sentence of 41 years' imprisonment on the one hand and the death sentences on the other,

irrespective/

irrespective of the fate of the latter. I commence with the former. I do not recount, in any greater detail, the circumstances of the crimes. Without detracting from their seriousness, I entertain no doubt that the resultant sentence of 41 years' imprisonment is unduly severe and cannot be allowed to stand. As appears from what was said in S vs Sibiya 1973(2) S A 51(A), a sentence of longer than 25 years' imprisonment is an unusual one and is not often imposed in this country. The longest effective sentence, according to certain sample statistics referred to in the judgment (at 57 in fin - 58 B), was, up to that time, 32 years (imposed in 1964). I have been unable to procure any more recent figures but my

impression/

impression is that a sentence in excess of 25 years remains an exceptional one. The reason is that it does not, in comparison with a lesser one, more effectively promote the main purposes of punishment, especially those of deterrence and reformation (S vs Khumalo & Others 1984(3) S A 327(A) at 330 D, 331 A - B and E - F; S vs Skenjana 1985(3) S A 51(A) at 54 I - 55 E). In my opinion, an effective sentence of 25 years' imprisonment would be an appropriate one in this matter. The individual sentences will be ordered to run concurrently in such a way that this will be achieved.

I turn to a consideration of the appeal against the death sentences. It requires a closer analysis of/

of the facts of each of the three incidents. The trial court gave a direction that the identity of the complainants be not disclosed. In order to preserve the effect of this order, I refer to the complainants by fictitious initials. The one rape involved AB. She was a 27 year-old, unmarried air hostess who lived on her own in a cottage adjoining the main house on the property. At about 10 o' clock on the morning of 9 October 1984 she was doing some washing. Whilst in the lounge-cum-bedroom of her home she suddenly noticed appellant in the room. He had obviously entered through the open, outside door. He had a knife in his hand. He held it aloft. He told her to be quiet. He demanded money. She gave him what cash she had in her nearby

bag/

bag, viz, R54. He then said that he wanted "her". He grabbed her by the arm. She tried to break loose. He held the knife against her neck. He threatened to kill her if she tried to escape. They struggled. She was thrown to the floor. He began throttling her. She felt herself losing consciousness. His reaction to her plea that he release her was to laugh. He then took off his pants and raped her. At one stage he wanted her to kiss him. She managed to escape when he sprang up to retrieve his knife which was lying nearby. She sustained several minor injuries in the attack, viz, a cut on the front part of her neck (which has left a prominent scar), as also cuts on the palm of her hand and on one of her fingers. She also suffered various bruises and abrasions.

When/

When medically examined about four days later she was still, in the words of the doctor, "very upset and shocked". He gave her a tranquilliser (in addition to a penicillin injection, to avoid infection). She was off work for a week. She felt herself unable to continue living in the cottage and left it a week later. She moved to another city. As to the effect of what befell her, she testified:

"Mens kan nie daarvan wegkom nie... Kom dit neer op die feit dat u nooit weer vertrouë in 'n man sal kan hê, of sal die tyd kom wanneer u weer vertrouë in 'n man kan hê? --- Ek het tot dusver nog nie vertrouë in 'n man gekry nie, en ek twyfel of ek dit weer sal hê... Ek kan nie in my woonstel ingaan sonder om die deur toe te sluit en die vensters toe te maak nie. Ek is chronies behep met alles toesluit. Oor ek bang is. Ek weet nie waarvoor nie, maar ek bly bang."

She/

She added that at the time "het (sy) op trou gestaan"

but the relationship was subsequently terminated.

This was apparently because she became frigid as a

result of her experience. According to the evidence

of her landlady (who lived in the house) she was now

"different"; she had become "very nervy" and withdrawn.

The second death sentence was imposed for the rape of two women. The offences were taken together for the purposes of sentence. CD, a university lecturer aged 27, and EF, a university student aged 21, both unmarried, shared a house. They slept in separate bedrooms. At about 2 am on 1 June 1985, EF was in bed, though not asleep. She heard her curtains rustling. She put the lights on. She saw appellant next to her

bed./

bed. He was undressing himself. She screamed. He threatened to kill her if she did not keep quiet. He said he had a knife (though he never produced it). She offered him money and gave him R30 from the purse in her bag. At about this stage, CD, who had been awoken by EF's screams and had gone to investigate, asked her (from outside the door of EF's bedroom) whether anything was wrong. Appellant, on hearing this, went out, grabbed hold of CD and pulled her into EF's bedroom. He ordered both of them to undress and lie on the bed. On his instructions the light was switched off. He then proceeded to rape each of the women alternately a number of times. According to CD, she was raped four times/

times and EF three times. The evidence of EF was that she was raped twice. At one stage during the approximately 45-minute encounter, they asked him to allow them to go to the toilet. He did so but he insisted on accompanying them there. When EF was being raped she cried out and asked appellant to stop. He said he would kill them if they made a noise or resisted. He had also ordered EF to put her arms round him. Having eventually satisfied his lust, he demanded money from CD. She gave him a cash cheque for R100 which he accepted. He also took a radio which he found in the room. Before leaving he said that he wanted to cut the telephone cord. CD pulled the plug out and he

left/

left it at that. It was later established he had broken into the house by removing the burglar bars and climbing through a window of one of the rooms. On examination by a doctor soon after the attack, both women were found to be in a state of shock. Neither felt able to continue living in the house after the events of that night. They feared appellant's return. CD went to England for a year. Whilst there, she received psychological therapy for the distress from which she was suffering. Though she had since formed friendships and trusting relations with men, her evidence was that "psychologically I will always remember what has happened and I will not be the same again as I was before". She still feels the need for therapy. Her doctor testified that she was depressed and anxious. EF, who was a virgin at the time,

sustained/

sustained a small laceration of the hymen. She described herself as having become "very nervous and scared". She feels "suspicious" of men; her social life has been adversely affected. She believes it will take a long time to recover. She has been receiving treatment from a psychologist who testified that she is depressed.

The conviction giving rise to the third death sentence arose from the rape of GH. She was a 23 year-old divorcee who lived with her four year-old child in a house which they shared with a woman friend of hers. Some time after midnight on 17 June 1985 she was woken by appellant. He had gained entry through the window of her child's bedroom. He was standing

next/.....

next to her bed with a knife in his hand. Later she also saw that he had an axe. He threatened to kill her if she "made a move". She began to tremble. He hit her in the face with a cupped hand. He demanded money and then took some from the pocket of her jacket where she indicated it could be found. He ordered her to undress. Apparently, in order to stifle the sound of her crying, he covered her face with a pillow. He then had intercourse with her whilst she lay on her back on the bed. At about this time she fainted. He raped her a second time from the rear. Thereafter, whilst lying on her for what, according to her, "seemed like a year", he engaged her in conversation, asking her questions

about/

about what type of work she did. Before leaving and having taken her watch, which he found next to the bed, he ascertained that there was no telephone in the house. Obviously he wished to ensure that it could not be used to raise the alarm. He told her to remain lying on the bed until he had gone and that, if she did not do so, he would kill her. He again hit her in the face about four times with his hand. Soon after he had gone, he returned to retrieve the axe he had left behind. He repeated his threat to kill her if she did not remain where she was. She did this until she was sure he had finally left. In an hysterical condition, she then ran to the room of her friend. She now lives in another city. She could no longer stay in the house. She feared that appellant would

return/

return and attack her again. But even where she now lives, she is "neurotic" about living alone. She does not sleep well; she reacts "irrationally" (as she put it) to noises. She was asked whether her experience had affected her social life. She replied:

"Well first I could not relate to anyone, I broke my relationship with my boyfriend ... I could not stand he must come near me... Are you able to trust men? --- With difficulty."

A psychologist is treating her for depression. She has lost her self-confidence.

Those then are the circumstances of the crimes in respect whereof the learned judge a quo exercised his discretion in favour of the imposition of the death sentence. He did so because, so it was

found, each was an "extreme case", ie it was sufficiently serious to warrant the death sentence; indeed, it was the only appropriate sentence; appellant had shown no true remorse; there was no prospect of his reform; appellant was "a menace to women".

The submission of Mr Nowitz, on behalf of appellant, was that the trial judge had not properly exercised his discretion, that the death sentences should therefore be set aside and that (lengthy) periods of imprisonment should be substituted. In broad terms it was founded on the contention, firstly, that the learned judge had misdirected himself and, secondly, that, in any event, the death sentences were not the only

suitable/

suitable sentences; imprisonment would have been an

appropriate punishment; none of the offences in

question constituted an extreme case; and the death

sentences should therefore have been avoided. In

support of the second proposition, certain dicta in

S vs V 1972(3) S A 611(A) at 614 F - G and S vs K en

n Ander 1972(2) S A 898(A) at 902 A were referred to.

It is possible and convenient to deal with both argu-

ments together. In summary, the following was said in

support thereof:

(i) The crimes were not accompanied by excessive

brutality or violence. Only minor physical

injuries were inflicted. Nor should too much

be/

be made of the psychological scars which had resulted. The trial judge had been unduly influenced by the complainants' distraught condition when giving evidence. This was temporary. No permanent damage had resulted. Moreover, appellant had not displayed an entirely callous attitude in the treatment of his victims. He showed glimpses of compassion towards some of them. Thus, in the case of CD and EF, he acceded to their request to be allowed to go to the toilet. And, on being told that EF was a virgin, he ceased his sexual assault on her.

(ii)/.....

(ii) For the most part appellant employed the same

modus operandi in the execution of the crimes.

Many of the features which the trial court had

regarded as aggravating, also existed in those

cases where the death penalty had not been imposed.

This showed its imposition in the instances under

consideration to have been unjustified.

(iii) Insufficient consideration was given to the as-

pect of appellant's rehabilitation. He had ex-

pressed remorse for what he had done. He needed

to be taught, and would in prison learn, the value

of discipline and training. He had been denied

these by his lack of education. He was thus not

able/

able to control his sexual urges. He was a first offender. He was therefore a good candidate to be reformed.

I am unable to agree with the argument.

This court cannot interfere with the sentences of the trial judge unless, in imposing them, he improperly exercised his discretion. I do not think VERMOOTEN AJ did. I do not think he committed any misdirection of any consequence. The further question is whether the death sentence could in each case reasonably have been imposed. That, rather than whether it was the only suitable sentence or an extreme case, is the test to be applied (S vs Pieters 1987(3) S A 717(A)). In my opinion, the question must be answered/

answered in the affirmative.

These were serious crimes. The following highlights this assessment. They were part of a series of crimes which were committed over a period of some ten months. It would seem that this was a factor that the trial judge took into account. In my view, he was entitled to (S vs Kok 1974(1) P H H2 AD; S vs S 1988(1) S A 120(A) at 123 E - H). But even individually regarded, it cannot be said that the death sentence could not reasonably have been imposed. The offences took place in the privacy of the complainants' homes. Each one involved a degree of planning and pre-meditation. Appellant did not act on a sudden impulse.

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In two out of the three cases, there was a breaking-in.

AB was throttled; she almost lost consciousness. When she asked appellant to desist, he laughed. In the struggle between her and appellant, she was injured by his knife. She was further humiliated by being asked to kiss him.

GH's face was smothered with a pillow. She was also hit as has been described. She was raped twice. And it will be remembered that he threatened to kill her.

He had a knife and an axe. He also threatened to kill CD and EF. They did not see that he was armed but it is clear that they, with justification, took his warning seriously. Each was raped a number of times in each others presence. The fright, fear and revulsion of

appellant's/

appellant's victims must have been only too apparent to him. The effect of their ordeal was such that each felt it necessary to leave their home. And, over a year later, each was still suffering from certain residual psychological after-effects of what they had gone through. The trial judge did not, as was argued, misdirect himself in finding that CD "has received permanent psychological and emotional damage". Her evidence was that "I will not be the same again as I was before".

It is true that many of these factors were not peculiar to the offences which carried the death sentence. A number of them featured in the other rapes as well. It does not, however, follow that

there/

there was an improper exercise by the trial judge of his discretion. In my view, he was entitled to regard (as he obviously did) the counts under consideration as having more of these common characteristics, and therefore as being more serious, than the others. He cannot, in these circumstances, be faulted for confining the death sentence to them.

As to the argument that insufficient regard was had to appellant's possible rehabilitation, it must be remembered, in the first place, that it is incorrect to say that the death sentence can only properly be imposed where the possibility of an accused being rehabilitated by a period of imprisonment does not exist

(S vs/

(S vs Tshomi en n Ander 1983(3) S A 662(A) at 667 A - D;

S vs Mooi 1985(1) S A 625(A) at 631 A). In any event,

there was no evidence relating to the likelihood of

appellant's rehabilitation. The fact that he is, in

effect, a first offender, does not per se suffice. Unlike

the accused in S vs V (supra), appellant is no youngster.

Moreover, I agree with the finding that he showed no

real remorse. In his testimony in mitigation, he

stated that he was "sorry about these incidents which

I have participated in". However, he immediately added

that "all these things happened to me without my intention.

I did not intend to do such things. I did not intend

to hurt anybody". He was cross-examined on this state-

ment as follows:

"What/

"What do you mean that you did not intend to do such things? --- The reason is that as I have told the Court that I was a sick person and I could not find out what I was doing. I thought you said you were sorry that you committed these crimes, or sorry for these incidents which you participated in? --- Yes, that is so. Are you now admitting that you did participate in these incidents as you call them? --- Well, I do admit as the Court has decided that I am the person who did these things. I cannot argue that point that I had never done such things. You yourself, do you admit that you attacked these females? --- Yes, according to the evidence that had been given here I do admit to that, but I was not aware of the fact that I was doing such things."

The allegation that he did not know what he was doing

was/

was quite rightly rejected. In these circumstances,

his statement that he was sorry is a hollow one.

To sum up, it was in the discretion of the trial judge whether to impose a lengthy period of imprisonment or the death sentence. After a careful review of all the circumstances he decided on the latter. He took into account the nature of the crimes, the personal circumstances of appellant and the interests of society. In my opinion, and for the reasons given, it cannot be said that he improperly exercised his discretion. He committed no material misdirection.

And, though a long period of imprisonment may have been a suitable punishment, the death sentence was, in each

case/

case, also one that could reasonably have been imposed.

It is, therefore, on the authority of S v Pieters (supra),

not possible to interfere with any of the death sentences.

The following order is made:

- (1) The appeal against the imposition of an effective sentence of 41 years' imprisonment in respect of counts 2, 7 - 11, 15 - 18, 20 - 26, 29 - 33 and 35 - 45 succeeds. Such effective period of imprisonment is reduced to 25 years' imprisonment by ordering that the sentences imposed on counts 10 - 11, 15 - 18, 20 - 21, 23 - 26, 29 - 33 and 35 - 45 run concurrently with the sentences/.....

sentences imposed on counts 2 (5 years' imprisonment), 7 and 8 (10 years' imprisonment), 9 (5 years' imprisonment) and 22 (5 years' imprisonment).

(2) The appeal against the death sentences imposed on counts 3, 27 and 28, and 34 is dismissed.

H H NESTADT, JA

VAN HEERDEN, JA)
)
) CONCUR
KUMLEBEN, AJA)