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IN THE SUPREME COURT OF SDOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NTOBEKO MBI — Appellant

and

THE STATE — Respondent

CORAM: GROSSKOPF, JA VILJOEN et NICHOLAS, AJJA

HEARD: 15 September 1988

DELIVERED: 29 September 1988

J U D G M E N T

GROSSKOPF, JA

The appellant and four other Black men were charged in the East London Circuit Local Division before JANSEN AJ and

assessors with a number of offences. The appellant, who was accused no. 1 in the court a quo, was convicted of housebreaking with intent to rob and robbery with aggravating circumstances (count 2); rape (count 4); murder (count 5) and kidnapping (count 6). No extenuating circumstances were found in respect of the count of murder, and the appellant was sentenced to death on that count. On the count of rape the trial judge also imposed a sentence of death. On counts 2 and 6 the appellant was sentenced to periods of imprisonment of twelve years and six years respectively which were ordered to run concurrently. With the leave of the trial judge the appellant now appeals against his conviction of murder; against the finding that there were no extenuating circumstances and the consequent death sentence on the murder charge; and against the death sentence on the rape charge.

The offences of which the appellant was convicted all stem from the events of a single night, that of Friday to Saturday 4 to 5 October 1985. The State evidence on what

happened that night was accepted by the trial court and this finding was, rightly, not attacked on appeal. The evidence may be summarized as follows.

Rajasagren and Govindamall Moodley were a married couple living in Braelyn Heights, an Indian residential area in East London. Mr. Moodley was a data engineer and the couple occupied a comfortable and well-equipped home. At the relevant time Mrs. Moodley was thirty years old. They had a two year old daughter.

On Friday 4 October 1985 Mrs. Moodley (to whom I shall henceforth refer as the deceased) was not feeling well. The Moodleys consulted a doctor at about 7.30 pm. The doctor informed them that the deceased was two months pregnant, and gave her an injection to make her feel better. They returned home and the deceased went to bed. A friend helped them look after the household and the child. The friend left at about 10 pm.

The Moodley family were then alone in the home - two teachers, who lodged with them, were attending a school concert.

After the friend had left, Mr. Moodley settled himself before the television set. He was under the impression that he had locked the front door, but he must somehow have failed to do so, because at about 10.30 pm. the appellant and three of his co-accused entered the house through the front door. They were all armed with knives, that of the appellant being a home-made one measuring about 30 cm. The appellant and no. 2 accused pointed their knives at Mr. Moodley and demanded money. He handed them R150 which he had in his pocket, and told them to take whatever they wanted in the home, but to leave his family alone. At more or less this time a fifth man (accused no. 5) also entered the house. The five strangers proceeded to ransack the house, moving in and out to remove various articles.

Accused nos 3 and 4 went into the bedroom, where they took hold of the deceased, who was trying to communicate with the police by means of a two-way radio. They first brought her to the lounge where the appellant and accused no. 2 were holding Mr. Moodley at knife-point. Thereafter no. 3 and no. 4 took the

deceased with them as they were moving to and fro while removing articles from the house.

At this stage the appellant demanded the key to the Moodleys' car which was parked outside the house. Mr. Moodley could not find it immediately, and the appellant slashed him on his temple with the knife. The key was found and given to the appellant. From the lounge Mr. Moodley saw accused nos 3 and 4 kicking the deceased while she was lying on the floor in the passage. He saw approximately four kicks.

Thereafter the appellant took Mr. Moodley outside and the deceased accompanied them. The appellant tried to start the car, but a burglar alarm in the car went off. He told Mr. Moodley to switch the alarm off, but Mr. Moodley delayed, hoping that the sound of the alarm would attract attention and bring assistance. The appellant again slashed him with the knife, this time on his eyebrow. While Mr. Moodley was still trying to switch the alarm off in the company of the appellant, he heard the deceased screaming, and saw her lying on the ground some

distance from him. His evidence then continues:

> "Why was she screaming? --- I don't know whether they pushed her or kicked her. I cannot say that, but I did see that she was being dragged.
> Dragged? --- Yes, they were pulling her with one - well the accused that was holding her was pulling her with one arm and she was screaming."

Mr. Moodley saw the deceased being dragged in the direction of Duncan Village, a black township about half a kilometre away. He left the appellant at the car (in fact the appellant never managed to start it), and went after the deceased. While he was looking for her and shouting, he was attacked by two men, probably two of the accused. He pretended to be dead, but after a while accused no. 5 came to him and told him to run away. He did so.

Although the appellant was not one of those who removed the deceased from the Moodleys' premises, she was in his presence later that night. Ayanda Matjamela was a 23 year old black man who knew the appellant well. During the night of 4-5 October 1985 he was asleep in his shack with his girl friend

when the appellant knocked at the door. This shack is close to the appellant's home in Duncan Village. Matjamela opened the door and lit a paraffin lamp. The appellant entered hugging the deceased. He hugged her, Matjamela said, "as someone who was showing affection to a girl". When asked in what condition she was, he said "she looked as if she was not in the positive" but "she knew what was going about her". She was dressed in a nightie, which was dirty, and she had blood below her nostrils. The appellant and the deceased sat down on the bench. The deceased seemed unhappy - she did not speak to the appellant. Later he said she appeared to be there against her will. The appellant touched her and occasionally brushed her hair with his hand. She did not respond. The appellant told Matjamela that he had come to sleep with the deceased there at his place. Matjamela told him to go away. The appellant asked for a washing rag so that he could wipe the blood from her nose, but Matjamela refused. Thereafter the appellant and the deceased left. When asked whether she went voluntarily, Matjamela said:

"He held her and again hugged her as before, then they left."

At about 4 o'clock that morning det. sgt. Schwartz visited the home of the Moodleys to investigate the matter. After speaking to Mr. Moodley, who was in the home of a neighbour, sgt. Schwartz and other members of the police force patrolled the Duncan Village area to look for the deceased. During that period there were riots in the area. At about 6.15 a.m. they saw a group of Blacks gathered in an open space next to a road. On the approach of the policemen the group scattered, and the policemen saw the deceased sitting there on the ground. She was dressed in a bra and a little petticoat. These garments were dirty. She was shivering and staring straight ahead of her. She had blood under her nose. One of the policemen, W.O. Mc Laren, spoke to her but she did not respond at all. W.O. Mc Laren took her to the Frere Hospital.

At about 6 a.m. that morning the deceased was examined by dr. B. Wingreen, the principal district surgeon for the

district of East London, and by dr. D.A. Williamson, who was attached to the casualty department of the Frere Hospital. Her condition and the treatment given to her in the casualty department were summed up as follows by dr. Williamson:

> "Well the general impression and first impression I had was that it was a very seriously ill patient. Her temperature was less than normal and she was covered in mud, dust and she had multiple bruises and abrasions scattered throughout the body. Her blood pressure was low, indicating to me that she was shocked. Her level of consciousness was such that she was not able to clearly answer any questions I put to her or respond in a way that a normal fully conscious person would. Her abdomen showed that she was very tender and had signs indicating that there might have been damage inside the abdominal cavity. I checked the level of her blood sugar, which was normal and also I checked to make sure that she was not anaemic, that she had not lost an excessive amount of blood, which she had not at that stage. I put up an intravenous infusion - that is a drip - into the vein in the arm and started running warm fluid in to try and correct her low body temperature and her low blood pressure, the shock ,and at that stage, I referred her to one of the specialised departments for admission to hospital."

Dr. Wingreen examined her genitalia and formed the opinion that she had been recently raped.

At about 10 a.m. that morning the deceased was seen by

dr. S.D. Meintjes who was on duty in a surgical ward at the hospital. He later reported on her as follows:

> "I saw the patient at about 10 am. She responded to my questions and only complained of abdominal pains. On examination of her abdomen she was only slightly tender. There was no distention or signs of an acute abdomen. I ordered a chest X-ray to exclude air under the diaphragm (which one gets when the bowel is ruptured). At ± 2 pm I checked the X-rays. They were normal. The patient received treatment in the form of intravenous fluids and was kept nil per mouth. The next morning I was called to see her at ± 9 am. She had a respiratory arrest. We (myself, Dr Kirden, Dr Reed) resuscitated her unsuccessfully. She was taken to the intensive care unit where she died later the afternoon."

The post mortem examination on the deceased was conducted by dr. Wingreen. Apart from superficial injuries over her whole body, the deceased had sustained three groups of injuries which were particularly significant. The first group consisted of injuries to the brain. These were bruising of the brain with subdural haemorrhages and cerebral oedema. These injuries were caused, in dr. Wingreen's opinion, by the application of heavy blunt force to the head. Then there were

injuries to the neck, and, more particularly, bruising of the muscles with a fracture of the hyoid bone. Allied to this was the condition of the lungs, which dr. Wingreen described as emphysematous with bullae. These findings were indicative of the application of considerable force to the neck (as in manual strangulation) which resulted in a lack of oxygen supply to the lungs, which in turn caused the above-mentioned condition in the lungs. The third important group of injuries was in the abdominal region. There she had sustained bruising of the muscles and a ruptured mesentery with blood-vessels thrombosed. In addition there was a rupture of the diaphragm with a right haemothorax. These injuries, dr. Wingreen said, were not common in assault cases, but were very common where considerable force was used, such as in motor vehicle accidents. Summing up, dr. Wingreen said that death had been caused by multiple injuries, but that each of these three groups of injuries could by itself have caused the death of the deceased.

The appellant was arrested on 5 October 1985 at

approximately 4.15 p.m. at a shebeen. He was under the influence of drink. He was taken to the Cambridge Police Station where det. sgt. Schwartz took control of him. At about 2 or 3 o'clock the next morning sgt. Schwartz again interviewed the appellant who was then sober and co-operative, and assisted in the investigation. On Monday 7 October 1985 the appellant made a statement before a magistrate. The admissibility of this statement was contested during the trial, but after a trial-within-a-trial the court ruled it admissible, and this ruling is not challenged on appeal. The statement reads as follows (the Lindile to whom reference is made in the statement was accused no. 5):

> "Ek het Xolanie teëgekom, hy sê toe ons moet geld gaan soek by witmense se plek. Ons was vier toe ons daar na die plek toe gegaan het. Toe ons daar kom het ons messe uitgehaal en gevra vir geld. Dit is nie witmense se plek nie, dit is Indiërs. Die man het geld uit sy sak gehaal en dit aan ons oorhandig. Drie van my maats het goed uit die huis uit gehaal. Ek het hulle gaan help om ook goed uit te haal. Lindile het by ons aangesluit, hy is nog nie gearresteer nie, hy het nie geweet dat ons na die huis gaan nie, hy het skielik daar by die huis opgedaag. Lindile het die eienaar met

die gebalde vuis waarin die mes was geslaan. Lindile het die Indiërvrou uit die huis uit geneem en haar na buite gevat. Lindile het sonder die vrou terug in die huis ingekom.

Drie van my maats het uitgekom en ek het hulle gevolg. Hulle het die goed buite gevat wat ons na buite gedra het. Later het ek en Lindile uit die huis uitgegaan. Ons het die ander goed gevat wat hulle daar agter gelaat het. Ons is daarmee weg.

Onderkant die huis van die Indiërs het ons die Indiërvrou aangetref, sy het daar gesit. Lindile het gesê ons moet saam met die vrou loop. Terwyl ons geloop het, het ek die klere gedra en Lindile het die vrou met sy hand vasgehou. Terwyl ons gestap het, het Indiërs na ons gewys en geraas. Ek het my goed neergegooi en weggehardloop maar Lindile het die vrou vasgehou en met haar weggehardloop.

Tussen Mpaku- en Mkuzestraat het Lindile gesê ek moet saam met die vrou met Mkuzestraat afhardloop. Hy sê toe hy gaan kyk eers na Lekise wat in Mpakustraat bly. Ek het daar buite koud gekry, en ek en die Indiërvrou het toe by my maat se huis (pandok) ingegaan. Nadat ek en die Indiërvrou die pandok verlaat het, het ons vir Lindile in Mkuzestraat teëgekom. Ek vra hom toe waarheen ons die Indiërvrou neem en wat ons met haar sou doen. Hy sê toe dat hy nooit met 'n Indiërvrou vleeslike gemeenskap gehad het nie, maar dat ons vandag met haar gaan gemeenskap hê. Ons neem haar toe na 'n bos anderkant Gavustraat. Hy sê toe ek is klein ek moet eerste begin om met die vrou gemeenskap te hê. Ek klim toe op die vrou omdat hy gesê het ek moet opklim. Toe ek klaar is toe sê ek vir hom dat ek eers

> ons maats gaan soek, ek kom weer. Ek het hulle gaan soek, kon hulle nie vind nie en toe gaan slaap ek by my ouerhuis."

This then concludes my summary of the relevant evidence. It will have been noted that it contains no direct evidence that the appellant inflicted any of the injuries which caused the death of the deceased. The trial court dealt as follows with the manner in which the deceased sustained her fatal injuries:

> "It is clear that the deceased died as a result of injuries inflicted upon her during the night in question. She was kicked inside the house on her body. She fell outside the house. She was dragged away from the premises. She must have received some injuries at this stage. Thereafter accused No 1 took control of her. ... Accused No 1 took the deceased to the hut of Ayanga Machamela. At that stage she was not yet seriously injured. There was only some blood on her nose. Her nose was not bleeding at that stage. She knew what was going on and clearly displayed displeasure at the advances made by accused No 1. We find that at that stage she had not yet been seriously injured. Accused No 1 then left with the deceased and raped her and severely and brutally assaulted her. He left her in the veld plus/minus 150 paces from Machamela's place. He strangled her to such an extent that he fractured her hyoid bone in her neck and caused a lack of oxygen in her lungs."

The crucial finding in this passage is that the deceased had not yet been seriously injured when she was taken to Matjamela's shack. Is this finding justified beyond reasonable doubt? Now we know, as the trial court acknowledges, that the deceased had been assaulted at her home. One assumes that the reason for the assault inside the house was that she was showing some resistance. We do not know how serious this assault was as there is no reason to assume that her husband saw all of it. Then, later, she was dragged away from the house by some of the robbers. It is clear that the appellant was not one of them, since he was trying to get the car started. It is difficult to imagine that her assailants had any purpose other than to rape her. It is a fair inference that she would at that stage have resisted with all her power - she was being dragged away from her home, her husband and her child by assailants from whom she could expect no mercy. What exactly she suffered at their hands is unknown, but there seems to be an obvious

possibility, even a likelihood, that she would have sustained injuries.

At some time thereafter she came into the appellant's company. We do not know when or how this happened. The appellant himself stated, both in his statement quoted above and in evidence in mitigation, that he found her sitting next to the road. Some reliance was placed on these statements by Mr. Fourie, who appeared for the appellant, but in view of the appellant's general untruthfulness it might be better to disregard them.

The only real evidence we have of the deceased's condition after she was taken from her home is that of Matjamela. Matjamela's evidence does not, in my view, indicate that the deceased was not seriously injured when he saw her. The only features relied upon by the court a quo for its conclusion that she was then not yet seriously injured were that she knew what was going on and clearly displayed displeasure at the appellant's advances. The evidence of her displeasure does

not, it seems to me, support the court's conclusion. In this regard Matjamela's evidence reads as follows:

> "Did this Indian woman appear to be happy to be in the company of accused no.1? --- No she did not appear that way.
> Did she appear to be unhappy to be in his company? -- Yes.
> How did she display this unhappiness? What signs were there that she did not want to be in his company? --- She was not speaking with him.
> Did accuse no. 1 at any stage touch her or not? --- Yes, he touched her and occasionally brushed her hair.
> Brushed her hair with what? --- With his hand.
> Stroked her hair? ---Yes.
> How did she respond to these affections? --- She did not respond.
> Did she simply sit? --- Yes."

This passage does not show a clear display of displeasure, as found by the court, but rather a state of apathy on her part.

As for her knowing what was going on, it may be accepted that, when she was with Matjamela, she was conscious and aware of her surroundings, but this does not appear to be inconsistent with her having already sustained the injuries which eventually caused her death. Even later that morning at the

Frere Hospital she knew what was going on. Although not fully conscious when she was examined by dr. Wingreen and dr. Williamson, she could provide them with the most pertinent information required, eg., that she was two months pregnant and had been raped. Thereafter, at 10 a.m., after she had apparently received no treatment other than an intravenous infusion of warm fluid to correct her low body temperature and her low blood pressure, dr. Meintjes recorded that "she responded to my questions and her only complaint was that of abdominal pains". At that stage dr. Meintjes considered that there were no clear indications that surgery was required. It is true that dr. Meintjes was described by the court as "a very inexperienced young doctor" who "appeared to be uncertain of himself", but he was obviously better qualified and able to assess the deceased's condition than Matjamela. One must also bear in mind that dr. Meintjes saw her in full daylight whereas Matjamela's shack was illuminated only by a paraffin lamp. The fact that Matjamela apparently did not consider that she had been

seriously injured consequently cannot carry any weight. Moreover the medical evidence does not indicate what the deceased's condition was likely to have been at Matjamela's shack if she had by then already sustained the injuries which ultimately caused her death. It is certainly conceivable that she would then have appeared much healthier than later in the morning.

My view is accordingly that the evidence of Matjamela provides no positive support for the finding that the deceased had not yet sustained her fatal injuries when he saw her. But I would go further: there are in my view indications to the contrary in his evidence. His evidence that the appellant hugged the deceased when they arrived and when they left may be an indication that she had difficulty in walking and required support. Moreover, the picture of an apathetic woman sitting there without saying a word stands in sharp contrast to the description of her at her home, screaming and resisting. Of course, her passivity at Matjamela's house may have been induced

by despair and submission, but it does seem remarkably similar to the state in which Mc Laren found her later that morning. In addition there was Matjamela's rather cryptic remark that she looked "as if she was not in the positive". This also suggests that her appearance was not quite as normal as he would have the court believe.

I conclude therefore that the evidence is consistent with the deceased having already sustained her fatal injuries when the appellant took her to Matjamela's shack. It follows from this conclusion that there is nothing to indicate beyond reasonable doubt that she may not already have sustained them when the appellant assumed control over her. The trial court's finding that it was the appellant who had caused these injuries can accordingly not be sustained.

This conclusion necessarily results, in my view, in the conviction for murder having to be set aside. There is no room on the evidence for a finding of common purpose, in relation to the murder, between the appellant and any of his co-accused who

might have inflicted the fatal injuries on the deceased. They clearly had a common purpose to rob, but there was nothing to suggest that this common purpose extended also to the rape or murder of the deceased. During argument it was suggested that the mere act of raping a woman as seriously injured as the deceased could be sufficient to constitute murder. However, there was no medical evidence that a rape would have accelerated her death. Moreover, on the hypothesis that the appellant raped her after she had sustained the fatal injuries at the hands of others, there is insufficient evidence that he had an intention to kill her. Clearly he had no dolus directus. As to dolus eventualis, there is insufficient evidence to justify an inference that he knew that he was risking her life by raping her. Her major injuries were internal and not obvious even to the trained eye. What was obvious to the doctors was her state of shock, but as I have already stated with reference to Matjamela's evidence, we do not know when and how this state of shock would have manifested itself during earlier stages of the

night. Nor would a layman necessarily have appreciated its significance.

In the result the appeal against the conviction for murder must succeed.

I turn now to the appeal against the death sentence on the rape count. In sentencing the appellant, the trial judge said the following:

> "When imposing sentence on accused No 1 on count 4 - that is the charge of rape - I do not take into consideration the fact that the deceased died as a result of the injuries she sustained. That forms part of a completely different count. I take into account that accused No 1 admitted when he gave evidence on the question of extenuating circumstances that the deceased had been taken into the township of Duncan Village with the specific intention to rape her. During the night she was subjected to a brutal prolonged attack with the intention to overpower her and subject her to accused No 1's lust. The fact that the deceased received all the injuries found by Dr Wingreen is indicative of the fact that she heavily resisted the attempts of accused No 1 to have intercourse with her. She was, however, overpowered and raped and left virtually naked in the veld."

It is clear from this passage that the learned trial judge held the appellant responsible for all the injuries which

the deceased had sustained. For the reasons which I have already given this was not justified. It follows that the trial judge was guilty of a misdirection in sentencing the appellant and that this court is now at large to impose an appropriate sentence. The offence committed by the appellant was clearly a most serious one. The deceased had been dragged from her home and family, and although this had not been done by the appellant himself, he knew that it had happened and nevertheless took her with him, raped her, and abandoned her almost naked. Moreover, although one cannot find that the appellant knew how seriously she had been injured (assuming in his favour that she had already sustained the fatal injuries when he met her) he clearly knew that she had been assaulted, and that even her visible injuries must have been painful. This did not deter him. As far as the appellant's personal circumstances are concerned, he has a bad record, including a previous conviction for rape when he was still a juvenile. In all these circumstances I considered whether this court should not reimpose the death sentence, but

decided against it, mainly for two reasons. The first is his youth - at the time of the commission of the offence he was not yet 22 years old. The second reason is that he has not previously been sentenced to a long term of imprisonment and might benefit from such a sentence. In the circumstances of this case I consider a sentence of twenty years' imprisonment, to run concurrently with the sentences on counts 2 and 6, to be appropriate.

In the result the appeal succeeds. The appellant's conviction of murder (count 5), and the consequent death sentence, are set aside. In regard to the sentence for rape (count 4) the death sentence is set aside and replaced with the following: Twenty (20) years' imprisonment, to run concurrently with the sentences imposed on counts 2 and 6.

E M GROSSKOPF, JA

VILJOEN, AJA
NICHOLAS, AJA Concur