

Case no 415/90.

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ERNEST MBONGENI DUMA

Appellant

and

THE STATE

Respondent

Coram: CORBETT CJ, F H GROSSKOPF JA et KRIEGLER AJA.

Heard:

30 August 1991

Delivered:

27 September 1991

J U D G M E N T

F H GROSSKOPF JA:

The appellant was convicted in the Durban and Coast Local Division by Alexander J and assessors on 17 counts. These counts related to eight different incidents which occurred during the period 2 August 1988 to 8 December 1988 in the district of Pinetown. The Court a quo found that on each one of these eight occasions the appellant had committed robbery with aggravating circumstances as well as a sexual crime. The sexual crimes of which he was convicted were six instances of rape, one of attempted rape and one of indecent assault. In two cases the conviction for robbery was coupled with a conviction for housebreaking with intent to rob. There was also a conviction for common assault committed on a maid-servant. The victims were women living in the Pinetown area. These crimes were usually committed during the morning or early afternoon while the victim was alone at home. In two instances there were also maid-servants on the premises.

The appellant was sentenced to death on four of the six rape counts, and to an effective term of imprisonment of 25 years in respect of all the other charges. The learned trial Judge granted the appellant leave to appeal against the convictions on counts 5 and 6 and the sentences of death imposed in respect of counts 3, 5, 7 and 12.

I shall first deal with the appellant's appeal against his conviction on counts 5 and 6. The State case was that the appellant had raped the complainant at her home in Pinetown on 12 October 1988 (count 5), and that he robbed her of R30,00 in cash and a wristwatch on the same occasion (count 6).

The complainant on these two counts was a divorced woman who was 41 years old. She had taken her children to school early that morning and when she returned home she locked the doors. She was alone in the house at the time. At about 11 o'clock that morning, and while she was busy sewing in her sewing room, a man suddenly appeared in the

doorway and demanded money. She stabbed him in the cheek with a small sharp instrument used in sewing; he grabbed her by the neck and throttled her until she lost consciousness. As soon as the complainant had regained consciousness her assailant again demanded money. She gave him R30,00 from her purse, but he was not satisfied and he demanded more money. She told him that she kept money in the kitchen, but when they got there she could not produce any and he became very angry. A struggle ensued in which her jacket came off. He noticed her wristwatch and removed it. They moved towards the lounge where the complainant tried to escape through one of the doors leading into the garden. Her assailant brought her down and started kicking her in the face and elsewhere on her body. This attack went on for some time and left her with a broken nose, four fractured ribs and multiple bruises and abrasions. Thereupon her assailant raped her twice in succession in the lounge.

The facts relating to the commission of these two

offences were not in dispute. The only issue was the identity of the assailant. An identification parade was held, but the complainant failed to point out the appellant or anybody else as her assailant.

The appellant admitted in a confession made before a magistrate that he had committed most of the other crimes charged in the indictment, but he made no mention of this particular incident in his confession. The appellant also pointed out the various houses where all the other crimes had been committed, but the house in question was not pointed out to the police. When the appellant first appeared in the Magistrates' Court on 1 February 1989 he was not required to plead to the rape and robbery charges now set forth in counts 5 and 6. He did, however, plead guilty on that occasion to a number of charges relating to the other incidents. Charges in connection with the rape and robbery in question were first put to him on 17 February 1989, but he then pleaded not guilty to those charges.

At the trial the appellant testified in the course of a trial within a trial relating to the admissibility of the confession and the pointing out. His evidence was rejected and the disputed evidence was admitted. At the close of the prosecution case the appellant, significantly, elected not to give evidence on the merits.

Counsel for the appellant submitted that the complainant had ample opportunity to observe her assailant and that she ought to have been able to identify the appellant if he had been the rapist. One should not, however, lose sight of the complainant's evidence in this regard. She testified that she was under such emotional strain when she attended the identification parade that she was unable to look at the people on the parade or to register any face.

Counsel further pointed out that unlike other counts where the appellant initially had admitted his identity, he denied his involvement in these two crimes. The

inference which counsel asked the Court to draw is that the appellant was indeed truthful when he denied any knowledge of this particular incident. There is the possibility, however, that when the appellant was first confronted on 17 February 1989 with these two additional charges he had already reconsidered his position and decided to deny his involvement in any of the crimes. At the trial he actually pleaded not guilty to all counts.

The Court a quo considered the complainant's inability to identify the appellant, and the appellant's earlier admissions regarding the other crimes, but found that the appellant's identity in respect of counts 5 and 6 had nevertheless been clearly established. In coming to this conclusion the Court a quo relied on two aspects in particular: the appellant's use of the words "sleep down", and the appellant's possession of the complainant's keys.

The complainant on counts 5 and 6 testified that her assailant had told her to "sleep down" before he raped

her. He used the same words again at a later stage when he required her to lie down. It is common cause that these same words were also used by the appellant about six weeks later when he raped the complainant on count 12. The learned trial Judge held that these words were so distinctive as to be receivable as similar fact evidence tending to establish the appellant's identity. The expression "sleep down" may be distinctive to an English speaking person, but there is no evidence to suggest that it is equally distinctive to Zulu speaking people. The expression "sleep down" was otherwise proved to have been used by the appellant on one occasion only. The complainants on the other rape counts made no mention of hearing any such expression. If this had been the appellant's peculiar way of expressing himself in English one would have expected him to have used these words on at least some of the other occasions as well. In my opinion the evidence of the appellant's use of the words "sleep down" in the case of count 12 is of insufficient weight by itself

to provide material confirmation of the appellant's identity as the rapist on count 5. This evidence will, however, acquire some probative value once it is considered in conjunction with the other similar fact evidence referred to hereinafter.

Evidence of offences other than those with which an accused had been charged was admitted as similar fact evidence in the case of Director of Public Prosecutions v Boardman [1975] A C 421 (H L). The following passage appears in the speech of Lord Wilberforce at 444 D-E:

"The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence. The jury may, therefore, properly be asked to judge whether the right conclusion is that all are true, so that each story is supported by the other(s)."

(See also R v Kalkiwich and Kruger 1942 AD 79, at 86/87; S v M 1985(1) SA 1 (A), at 4B-F).

The facts surrounding the rapes and robberies proved to have been committed by the appellant in the present case bear such a "striking similarity" to the facts of the rape and robbery committed by the unidentified assailant, that evidence of the former should in my opinion be admissible as similar fact evidence. A comparison between the offences charged in counts 5 and 6 on the one hand, and the offences committed by the appellant on the other hand, in my view reveals a clear connection between these various offences and provides confirmation of the identity of the assailant on counts 5 and 6. It is in this connection that some weight can also be attached to the expression "sleep down" which was used by the appellant on one occasion and by the unidentified assailant on the occasion in question.

The appellant committed a series of rapes and robberies in a particular area and within a period of about four months. The crimes referred to in counts 5 and 6 were committed in the same area and in the middle of this series

of similar crimes. The same pattern of conduct which was followed by the appellant in all the other cases was also followed by the assailant in the case of counts 5 and 6. These crimes were all committed during the morning or early afternoon when the victims would likely be alone. The appellant would enter a particular house surreptitiously and confront the unsuspecting victim. He would first demand money and then rape the victim. The same pattern was followed by the assailant on counts 5 and 6. The appellant appeared to have a predilection for wristwatches. In almost every instance he removed the complainant's wristwatch, or at least asked for her watch. It is of some significance in my view that the assailant on counts 5 and 6 also robbed the complainant of her wristwatch.

Taken together these similarities are sufficiently striking in my judgment to corroborate the other circumstantial evidence pointing to the appellant as the culprit, i.e. the evidence with regard to the appellant's

possession of the complainant's keys.

The complainant on counts 5 and 6 testified that her assailant took her bunch of keys on 12 October 1988 when he left the house. The police subsequently found these keys in the appellant's possession when they arrested him on 25 January 1989. There was some dispute in the Court a quo about the identity of these keys, but counsel for the appellant has now conceded, quite properly in my view, that the keys which were found in the appellant's possession were the same keys which had been removed by the assailant from the complainant's house on the day of the incident. The fact that these keys were only found in the appellant's possession some three and a half months after their removal from the complainant's home cannot in my view assist the appellant. The appellant's version, as put to Captain Dutton, the investigating officer in this matter, was that he had picked up these keys in the street in Pinetown on some unspecified date. The appellant, however, failed to confirm this

"version" under oath and the Court a quo in my respectful view rightly rejected such a proposition on the following grounds:

"If, in truth, and without hearing any evidence to that effect, the accused had picked up those keys, then we are asked to believe that one man who is a rapist has picked up a bunch of keys abandoned by another rapist. Apart from the fact that the area is the same area where the accused lives, it is remarkable that if the keys recovered by the police were not stolen from the complainant's house by the accused, but by a man who had raped her, that they should come into the possession of another man who is a proved rapist. We think such a proposition would be stretching the bounds of coincidence beyond any possible limits."

One may also ask why the appellant would have retained a bunch of keys which had been picked up in the street and could be of no apparent use to him. The appellant's silence with regard to the keys leaves one without any plausible explanation for his possession thereof. The only reasonable inference to my mind is that the appellant is indeed the rapist who removed the bunch of keys from the complainant's home on 12 October 1988. This conclusion is confirmed by the

similar fact evidence referred to above.

Counsel for the appellant submitted, however, that such a conclusion fails to take account of the fact that the appellant was suffering from gonorrhea at the time when the complainant on count 5 was raped, and that she would most probably have contracted this venereal disease if the appellant had been the rapist. There is indeed no evidence that she suffered from any sexual infection after having been raped on 12 October 1988.

It appears from an affidavit handed in at the trial, and made by the medical superintendent of the KwaDabeka Clinic, that the appellant was treated at the clinic on 21 October 1988 for gonorrhea, and that he had been suffering from this condition for at least a month. The complainant on count 3, who had been raped by the appellant on 30 August 1988, was subsequently treated for an unidentified sexual infection, and so were the complainants on counts 7 and 12, who had been raped by the appellant on 3

and 28 November 1988 respectively. The other victims who had been raped after 28 November 1988 gave no evidence of having contracted any sexual disease. The medical superintendent of the clinic also gave oral evidence. He was asked whether intercourse with a person suffering from a sexually transmitted disease would necessarily infect the other party, and he gave the following answer:

"I have heard there is a remote chance that the other party may not, may escape."

This evidence appears to me to be inconclusive, and certainly not of such a cogent nature that it should create a reasonable doubt as to the appellant's identity. I am, therefore, in respectful agreement with the finding of the Court a quo that the identity of the appellant has been properly established in the case of counts 5 and 6. The appellant's appeal against his conviction on counts 5 and 6 must accordingly fail.

There is the further appeal against the death

sentences imposed in respect of the four rape charges set out in counts 3, 5, 7 and 12. It should be borne in mind that the appellant was also sentenced to 15 years' imprisonment on each of two further rape charges.

It was not contended by counsel for the appellant that the learned trial Judge had misdirected himself in imposing the four death sentences, or that he had failed to exercise a proper discretion. Counsel for the appellant based his argument mainly on the new section 277 of the Criminal Procedure Act 51 of 1977 ("the Act"), which was substituted by Act 107 of 1990, and submitted that the sentence of death was not the only proper sentence in respect of each of these four rape charges.

The circumstances surrounding the rape charge in count 5 have been set out above. What follows is a summary of the facts relating to the rape charges in counts 3, 7 and 12 respectively.

The complainant on count 3 was a married woman of

35 years who was robbed and raped by the appellant. She was alone at home during the morning of 30 August 1988. The appellant apparently effected an entry into the house by forcing open the burglar guards in front of the bathroom window. He confronted the complainant in the lounge where she was reading a book and drinking coffee. He immediately demanded money. The complainant's husband had given her R400,00 for groceries. She handed this money to the appellant and then threw the coffee in his face. This made him very angry and he hit her in the face with his open hand. The appellant took the complainant to the bedroom. There she tried to spray him with a marking dye. He forced the bottle out of her hand and hit her in the face once again. He tried to tie her hands, but she stuck her fingers in his eyes. The appellant got hold of a small wooden chair and broke it upon her shoulder. She grabbed a piece of wood to defend herself while the appellant was hitting her in the face with his fist. He also kicked her repeatedly in her stomach. He

forced her to undress and then raped her. Thereafter he took her wristwatch and left. The complainant suffered from shock and was treated in hospital for severe bruising and for a sexual infection. She was detained in hospital for seven days. This experience had a detrimental effect on her sense of security and she complained that she always felt scared.

The complainant in the case of count 7 was a 31 year old married woman who was 35 weeks pregnant at the time. She was also robbed and raped by the appellant. She and her small son, who was about two years old, were alone at home during the early afternoon when there was a knock at the front door. It was the appellant who was professedly seeking work. When the complainant opened the door he forced his way into the house and started hitting her over the head with a truncheon. The appellant put his hands round her neck, threw her on the floor, dragged her to the bedroom and threatened to kill her. He asked her for a gun, but she told him she did not have one. He also demanded money and she gave him a

purse with R50,00 to R60,00 in it. It was obvious that she was pregnant, and she also told him that she was expecting a baby. That did not deter him from raping her, and he proceeded to do so in front of her two year old son. Before he left he tied her wrists with an electric cord and took her wristwatch. The doctor who examined her later that day in hospital found two lumps on the back of her head which were probably caused by the blows with the truncheon. This complainant was also treated for a sexual infection. The child she had been expecting was fortunately born normal a few weeks later. Her evidence was that she had been very scared of black men since this incident. Her two year old son, who had always been a sensitive child, had also been adversely affected by this experience.

The complainant on count 12 was a married woman aged 51. She too was robbed and raped by the appellant in the privacy of her home. It happened during the latter part of the morning on 28 November 1988. She had been working in

the garden and when she went inside to prepare lunch she encountered the appellant in the house. He had a knife in his hand and demanded money. The complainant informed him that she had only R30,00 in the house. He was not satisfied, and he showed it by hitting the complainant on the head with his hand. He then proceeded to drag her from room to room. He kept on asking for money while calling her a "white bitch". She was unable to produce more money and he hit her hard across the face. He also kneed her in the stomach with such force that she collapsed into a chair. He pulled her out of the chair and punched her on her breasts. He also threatened to kill her. There was a maid servant on the premises who suddenly appeared on the scene. The complainant told the maid to go and get help, but the appellant threatened to kill the complainant if the maid were to do so. The appellant then pulled the complainant into the lounge and told her to "sleep down". She refused at first, but he threatened once more to kill her. The complainant, who had

suffered a heart attack some months before, told him that she had a bad heart. She even pretended to have a heart attack, but this did not prevent the appellant from raping her twice in succession. The complainant later managed to escape, and when she returned home she discovered that the appellant had taken the R30,00 as well as her watch.

The complainant was examined by her doctor who found her to be badly bruised and in a shocked and hysterical condition. She was taken to hospital and then transferred to a psychiatric unit where she was detained for a week. She received further psychiatric treatment for about another two months. She too contracted a sexual infection. This incident affected the complainant and her family also in other respects. As a result of what happened to her she could not stand a black man walking behind her. She was further obliged to go and work to help pay for additional security installations at the house.

The appellant was sentenced by the trial Court

before the 1990 amendment of the Act came into operation. The position with regard to the imposition of the death sentence has since changed. The Court must now be satisfied that the death sentence is the only proper sentence to impose. (S v Senonohi 1990(4) SA 727(A), at 734F-H; S v Nkwanyana and Others 1990(4) SA 735(A), at 745A-G; S v P 1991(1) SA 517(A), at 524G-H; S v S 1991(2) SA 93(A), at 107I and 108B-E.)

This is no doubt a very serious case. There are indeed a number of aggravating features which have to be taken into account in considering the proper sentence. Each one of the individual cases of rape under consideration was serious in itself. They were all committed in the privacy of the victims' own homes. (S v S 1988(1) SA 120(A), at 124D; S v G 1989(3) SA 695(A), at 705G). In some cases there was more violence than in others, and some of the victims were more detrimentally affected than others. On the other hand, none of the victims appears to have suffered serious physical

injuries. This also applies to the victim who was 35 weeks pregnant at the time, and the other victim who had previously suffered from a heart attack. The sexual infection contracted by three of the victims has subsequently been cured. Some of the victims had been psychologically affected and suffered from a feeling of insecurity, but the psychological effect does not appear to have been all that serious or prolonged. The victims in these four cases were not young children; they were all women who were either married or previously married and who seem to have been able to cope with the crisis with which they were confronted.

The most aggravating feature to my mind is the fact that the appellant committed a series of sexual offences within a relatively short period of time. The learned trial Judge described it as "a rampage of rape and robbery". Yet the evidence shows that the appellant is neither a psychopath nor a person who committed these sexual offences to gratify a sexual lust. This is further borne out, to some extent, by

the fact that he has no previous convictions for sexual offences or offences involving violence. His two previous convictions are for crimes which were not serious at all and which were committed during 1983 and 1984 respectively. Otherwise the appellant appears to have been a law abiding citizen. This is certainly a mitigating factor. One does not know what gave rise to this bizarre conduct on his part; it seems completely out of pattern. Having regard to all the facts and circumstances of this case I cannot find that this young man of 24 years is beyond reform and rehabilitation.

The learned trial Judge considered the main purposes of sentence and emphasised the importance of protecting society against rapists such as the appellant. Society certainly needs to be protected, but in my judgment that can also be achieved by a sentence of life imprisonment. (S v Mdau 1991(1) SA 169(A) at 177A-C.) In my opinion neither deterrence nor retribution demands the ultimate

penalty in this case. The same conclusion was reached by this Court in S v P 1991(1) SA 517(A), a case very similar to the present one. The appellant in that case had committed four separate acts of rape within a relatively short period of time. The trial Court sentenced him to death on three of the four rape counts. On appeal this Court substituted a sentence of life imprisonment for the three death sentences.

Having regard to all the facts and circumstances of the present case I am not satisfied that the sentence of death is the only proper sentence on counts 3, 5, 7 and 12. In my judgment a sentence of life imprisonment would be a proper sentence in respect of these four counts. The appeal against sentence therefore succeeds.

The following order is made:

1. The appeal against the conviction on counts 5 and 6 is dismissed.
2. The appeal against the four death sentences is allowed. The death sentences are set aside and a

sentence of life imprisonment is substituted therefor in respect of counts 3, 5, 7 and 12.

3. The sentences of imprisonment imposed by the Court a quo in respect of all the other counts shall run concurrently with the sentence of life imprisonment.

F H GROSSKOPF JA

CORBETT CJ
KRIEGLER AJA Concur.