THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 654/02

In the matter between :

THE STATE Appellant

and

RIAAN SWART Respondent

Before:	**STREICHER, NUGENT JJA, SOUTHWOOD, VAN HEERDEN & MOTATA AJJA**
Heard:	**18 NOVEMBER 2003**
Delivered:	**28 NOVEMBER 2003**
Summary:	**Sentence – rape – gravity of offence to be given due weight**

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] The respondent was convicted in the High Court at Johannesburg (by Borchers J and assessors) of housebreaking with intent to rape, two counts of rape, and two counts of indecent assault. The two convictions for rape brought the matter within the terms of s 51 read with Part I of Schedule 2 to the Criminal Law Amendment Act No 105 of 1997 but the court was satisfied that substantial and compelling circumstances justified the imposition of a lesser sentence than the prescribed sentence of life imprisonment. For the offences taken together the respondent was sentenced to seven years' imprisonment which was suspended for five years on the following conditions:

'1. That he is not convicted of rape, indecent assault or housebreaking, committed during the period of suspension.

2. That he abstain from the use of any alcoholic beverage during the period of suspension.

3. That he submit himself to correctional supervision in terms of s 276(1)(h) of Act 51 of 1997 for a period of 3 years.

4. That such sentence of correctional supervision shall include the following components:

   (a) That he receive therapy from Dr Aaron Segal for such period as Dr Segal and the officials of the Department of Correctional Supervision, in consultation with each other, deem necessary.

   (b) That he place himself under the control and supervision of the Correctional Supervision Officer stationed at Benoni.

   (c) That he fulfil all the requirements of Dr Segal and the said officials, including possible placement for therapy at the Christian Alcoholic Services, including

attendance of any courses and therapy to be determined by them, and including admission as an in patient for therapy at any institution determined by them.

(d) That he be subjected to house arrest, the precise times and the period thereof to be determined by the officials of Correctional Services Department.

(e) That he render 300 hours of community service, at the venues and for the periods determined by the said officials.

(f) That he reside at the home of his aunt, Mrs Claassen (sic), and does not leave or change this address without the consent of the said officials.

5. That he report to Mrs Stander, or to Mrs Snyman, of the Department of Correctional Services at First Floor, Mutual & Federal Buildings, Elston Avenue, Benoni by noon on Monday, 31 July 2001.'

[2] The State now appeals against that sentence as provided for in s 316B of the Criminal Procedure Act No 51 of 1977 with leave granted by the trial court. There are two preliminary matters that need to be dealt with before turning to the merits of the appeal.

[3] The respondent was sentenced on 26 July 2001 and leave to appeal was granted on 15 February 2002. Section 316 (5) of the Criminal Procedure Act (which is made applicable to appeals by the State by s 316B (2)) provides that once leave to appeal to this court has been granted

'… the registrar of the court granting such application … shall cause to be transmitted to the … registrar [of the Supreme Court of Appeal] a certified copy of the record, including copies of the evidence, whether oral or documentary, taken or admitted at the trial, and a statement of the grounds of appeal.'

The record of the trial was lodged with the registrar of this court on 17 December 2002 (the record was lodged by the Director of Public Prosecutions

rather than by the registrar of the Johannesburg High Court but that is not material).

[4] Rule 5(5) of the former rules of this court required an appellant in a criminal case to lodge the record within three months of being granted leave to appeal. That has not been repeated in the current rules, for in my view Rules 8(1) and (3), properly construed, apply only to appeals in civil cases. (Rule 52 of the Uniform Rules also stipulates no time for the filing of the record). But no doubt this court may make an appropriate order if the record is not lodged within a reasonable time, either in terms of s 342A of the Criminal Procedure Act or in the exercise of the inherent power to protect and regulate its own process that is conferred upon it by s 173 of the Constitution. At the commencement of the hearing of this appeal counsel for the respondent said that she left it in the hands of the court to decide whether the appeal had lapsed because of the delay. Only when asked whether it was her contention that the appeal had lapsed did she submit that it had. However, on the assumption that an appeal will lapse if the record is not lodged within a reasonable time, in the absence of facts indicating that the delay was unreasonable in the circumstances of the present case I do not think it can be said that this appeal has lapsed. The respondent's counsel submitted further that the delay in pursuing the appeal is a consideration that ought in any event to be borne in mind in deciding whether to interfere with the sentence and I have done so.

[5] The respondent also applied to place before us further evidence that was said to be relevant to sentence. The evidence was contained in affidavits

deposed to by Mrs Classen (the respondent's aunt referred to in paragraph 4(f) of the order made by the trial court) and a senior horticulturist employed by the Ekurhuleni Metropolitan Municipality (which is where the respondent performed the community service referred to in paragraph 4(e) of that order).

[6] Section 322(2) of the Criminal Procedure Act provides that upon an appeal against sentence the court of appeal may confirm the sentence or it may delete or amend the sentence and impose 'such punishment as ought to have been imposed at the trial'. It has been held that it is implicit in the powers conferred upon a court of appeal that it may take account only of circumstances that existed at the time the trial court imposed its sentence (*R v Verster* 1952 (2) SA 231 (A) at 236 A-D; *R v Hobson* 1953 (4) SA 464 (A) at 466 A-B; *S v Marx* 1992 (2) SACR 567 (A) at 573 i-j) but it has been suggested that exceptional circumstances might permit a departure from that rule (*S v Marx* 1989 (1) SA 222 (A) at 226C). I have assumed that this court may indeed admit further evidence in exceptional circumstances, bearing in mind particularly that a court is bound to ensure that every accused is given a fair trial as provided for in s 35 (3) of the Bill of Rights. In the present case no such circumstances exist for the evidence that is sought to be adduced does not take the matter further and its exclusion cannot prejudice the respondent. To the extent that the evidence is admissible at all it constitutes no more than confirmation that the respondent has thus far observed all the terms of the sentence that the trial court imposed and that he is a person who is ordinarily polite and well-behaved. We would in any event assume that the respondent is complying with the terms of his sentence (if

that were to be relevant) and the respondent's character was in any event established before the trial court. The evidence accordingly adds nothing material and no purpose is served by admitting it.

[7] At the time the offences were committed the respondent (who was then 30 years old) was a lodger at the home of Mr and Mrs Ferreira. The complainant (who was about fifteen years older than the respondent) and her husband also lodged on the premises. The respondent lived in the main house together with Mr and Mrs Ferreira and the complainant and her husband lived in a separate cottage. Contact between the respondent and the complainant had been limited to an occasional exchange of greetings. The offences were committed between approximately 20h30 and 21h00 on 5 November 1999 while the complainant's husband was at work and the complainant was alone in the cottage.

[8] The circumstances in which the offences were committed are summarised in the trial court's chronological narrative of the evidence. All the material evidence dealt with in that narrative was accepted by the trial court and none of its findings of fact were placed in issue before us. The trial court's narrative, appropriately adapted, and abridged where necessary, provides a convenient means for setting out the material facts (stylistic adaptations have also been made where it was considered to be appropriate):

1. At about 20:30 on 5 November 1999 Mr and Mrs Ferreira set out from home on an outing that they had planned earlier that week. The respondent, who was almost in the position of a member of the family and often accompanied the family when they went out, elected not to accompany them.

2. Bennie Ferreira, the teenage son of Mr and Mrs Ferreira, remained at home for a while after his parents had left. He came across the respondent in the main house. The respondent was drunk and was pouring himself more liquor (which Bennie thought might be brandy, whisky or beer). The respondent asked Bennie whether the complainant's husband was with her. Bennie told the respondent that he did not know and soon thereafter went out himself. The only people left on the premises were the accused and the complainant.

3. Soon after Bennie left the complainant heard a knocking on one of her windows. She went to it and saw the respondent outside with a beer can in one hand and a brown 750 ml bottle - which she thought contained liquor - in the other. He was standing outside her door. To her surprise - as they did not ordinarily communicate with one another - he asked her if she was all right. She replied that she was and she moved away from the window.

4. A very short while later the respondent again rapped on the window. The complainant went to the window and the respondent asked her whether she was lonely. She was irritated by his return and replied curtly that she was fine and that she was in bed. She returned to her bed, switched off the light, and dozed off.

5. Some time later (she could not say what time had elapsed but it was probably no more than a few minutes) she woke to find the respondent in her room, crouching beside her bed.

6. The complainant screamed, whereupon the respondent pounced onto the bed, pulled aside the duvet that was covering the complainant, and hit her in the face, at the same time saying "Shut up, you bitch".

7. The respondent then forced the complainant's legs apart. She was dressed only in a long T-shirt and wore no underwear. The respondent was wearing a T-shirt and shorts. The

respondent overpowered the complainant and when she tried to scratch him with her fingernails he held her down with one hand and again hit her in the face with the other.

8. The respondent then tried to penetrate the complainant sexually but his penis was not sufficiently erect, so he pushed one of her legs up behind her head and then succeeded in penetrating her vagina. He had only a semi-erection and struggled to do so.

9. The respondent then asked "Where is the butter?" and extracted his penis and dragged the complainant by her hair to the kitchen area (according to Mrs Ferreira the respondent had been in the cottage before the complainant moved in and would thus have known its layout).

10. In the kitchen the respondent exposed his penis and ordered the complainant twice to put butter on it. She applied margarine to his penis as she was ordered to do. He had her in his control all the time as he was holding her by her hair and pulling her about by it. He then ordered her to spread margarine on her vagina and again she did as she was ordered.

11. The respondent's manner of speech was abnormal. The complainant said that he was speaking slowly and in a tone that made her cringe. The respondent's usual language was Afrikaans but whenever he spoke to the complainant that night he did so in English (she was English-speaking).

12. Still pulling the complainant by her hair the respondent then dragged her to the adjoining bathroom where he pushed her over the bath and penetrated her anally. That caused pain to the complainant and she screamed again, whereupon the respondent hit her hard on one of her ears.

13. The complainant felt a bowel movement commencing and begged to use the toilet. The respondent appeared to comprehend her request because - still pulling her by the hair - he dragged her from the bath and pushed her onto the toilet. However the complainant

had lost control of her bowels and defecated on the floor on her way to the toilet and then again in the toilet.

14. While the complainant sat on the toilet the respondent manoeuvred her head by pulling hard at her hair and put his penis into her mouth causing the complainant almost to choke.

15. The respondent then pulled the complainant back to the bedroom, pushed her onto the bed, and penetrated her vagina with his penis.

16. Again the complainant screamed, whereupon the respondent put his hand into her mouth, with his fingers behind her teeth, and pulled her jaw. The complainant bit his hand and the respondent in turn bit her breast. The respondent then altered his position, withdrew his penis, and penetrated the complainant yet again. On that occasion he pinned her arm to her chest and she felt as if she was suffocating.

17. All the incidents of penetration seem to have been of very short duration. On one occasion, while he was penetrating her, the respondent asked the complainant whether she liked what he was doing and she smelt liquor on his breath.

18. After the third act of penetration the respondent shifted upwards and the complainant attempted to fight back. She tried to scratch him and she grabbed his penis and testicles as he knelt on the bed. She twisted or grabbed them forcibly with the obvious intent to cause him pain but he showed no signs of pain – in fact he did not react at all. The complainant said that he made no attempt to stop her and it almost appeared that he was enjoying it.

19. Then - and for no apparent reason –the respondent toppled off the bed onto the floor. The respondent sat on the floor with his head between his hands and twice said "The bitches, tell them I love them". He then moved to the single step between the bedroom and the sitting room where he sat - his head between his hands - muttering something to himself in Afrikaans that the complainant did not understand.

20. The complainant noted a complete change of attitude - from aggression and control to passivity and apparent confusion. She seized the opportunity to move, as calmly and unobtrusively as possible, past the respondent towards the door. The respondent made no attempt to stop her.

21. The complainant opened the door leading outside and went to the gate that opened onto the street. Meanwhile the respondent had followed her. At the gate he fell against her. She moved away and he fell to one side.

22. The complainant ran to a nearby house. It was then shortly after 21:00. Injured, half-dressed, and highly upset, she reported that she had been raped. Assistance was summoned from various quarters. A traffic officer was one of the first to arrive. He went to the Ferreiras' home, where the door was opened by Bennie Ferreira who must just have arrived home. Bennie found the respondent in the house still noticeably drunk, and talking what seemed to him to be drunken nonsense. He said to Bennie words to the effect "Vlieënde pierings, vlieënde pierings, kyk hoe lyk ek nou", and Bennie saw marks on the accused's body. He was at this point dressed only in shorts.

[9] Two completed acts of rape were found to have been committed, which brought the matter within the terms of Part I of Schedule 2 to the Criminal Law Amendment Act No 105 of 1997 (potentially attracting a prescribed sentence of life imprisonment). Had the respondent's conduct constituted only one act of rape the matter would have fallen within the terms of Part III of Schedule 2, attracting a potential minimum sentence of ten years' imprisonment. It is not necessary to consider whether the trial court was correct in that conclusion, (even if it was open to us to do so, bearing in mind that the respondent has not appealed against his convictions), and I expressly refrain from doing so, for the

trial court found that there were substantial and compelling circumstances that justified the imposition of a lesser sentence than the minimum sentences prescribed by the Act and that finding has not been placed in issue by the State. The trial court was thus at large to impose the sentence that was appropriate on a conspectus of all the facts and it was not material whether those facts strictly fell within Part I or within Part III of the Schedule.

[10] It is almost otiose to repeat what was said by this court in *S v Zinn* 1969 (2) SA 537 (A) at 540G – in approaching the question of sentence a court must consider 'the triad consisting of the crime, the offender and the interests of society' – and in *S v Rabie* 1975 (4) SA 855 (A) at 862G-H – 'punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances'. In *Rabie's* case at 862A-B Holmes JA reiterated that 'the main purposes of punishment are deterrent, preventive, reformative and retributive'.

[11] While it was observed in *S v Karg* 1961 (1) SA 231 (A) at 236A that the retributive aspect of punishment has tended to yield ground to the aspects of prevention and correction, more recently this court said the following in *S v Nkambule* 1993 (1) SACR 136 (A) at 147c-e:

'Retribusie moet nie uit die oog verloor word nie. Retribusie het nie 'n vaste plek laag op die rangorder van strafoorwegings nie. Sy oorwegingskrag hang van die omstandighede af. *R v Karg* 1961 (1) SA 231 (A) op 235G-236D bevestig dit … Niemand is geneë om strafoplegging aan die hand daarvan te motiveer nie omdat dit die indruk van 'n oog-vir-oog benadering skep. Ek het vantevore in *S v Mafu* 1992 (2) SASV 494 (A) 497 gepoog om

vergelding in sy juiste perspektief te stel. Dit is nie 'n oorweging wat in isolasie staan nie maar wat in samehang met die faktor deur *Nigel Walker* 'denunciation' (dit is 'to show society's abhorrence' : sien *Grosman* a w op 23) genoem, gesien word. En hoewel dikwels reeds gesê is dat retribusie sy belang verloor het, het hierdie Hof dit reeds by herhaling as deurslaggewend by die oplegging van bepaalde doodvonnisse gegee. Sien bv *S v Nkwanyana and Others* 1990 (4) SA 735 (A) op 749C-D.'

And in *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 519d-e:

'Given the current levels of violence and serious crimes in this country, it seems proper that, in sentencing especially such crimes, the emphasis should be on retribution and deterrence (cf Windlesham '*Life Sentences: The Paradox of Indeterminacy'* [1989] *Crim LR* at 244, 251). Retribution may even be decisive (*S v Nkwanyana and Others* 1990 (4) SA 735 (A) at 749C-D).'

And earlier in *S v di Blasi* 1996 (1) SACR 1 (A) at 10f-g:

'The requirements of society demand that a premeditated, callous murder such as the present should not be punished too leniently lest the administration of justice be brought into disrepute. The punishment should not only reflect the shock and indignation of interested persons and of the community at large and so serve as a just retribution for the crime but should also deter others from similar conduct.'

[12] What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.

Moreover, as pointed out in *S v Malgas* 2001 (2) SA 1222 (SCA) at 1236E, where a court finds that it is not bound to impose a prescribed sentence 'the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided'.

[13] The sentence that was imposed by the trial court – and the reasons that were given for doing so – all point to those considerations having been given little weight. Dealing with the four aims of punishment the learned judge concluded that none, except retribution, would be served by a sentence of direct imprisonment. After noting that retribution (the proper meaning of which is discussed in Terblanche *The Guide to Sentencing in South Africa,* esp para 8.6) is a legitimate aim of punishment the learned judge went on to say

'… but it is in my view also a worthless and perhaps primitive objective if it leaves the offender unrehabilitated, and society as a result in danger on his release from prison. Society's interests are better served by the rehabilitation of the offender, if such be possible …'

Dealing with the element of deterrence the learned judge said that she

'…strongly doubt[ed] that a sentence of imprisonment, imposed in this present matter, will convey the message to those of the general public who drink heavily, that they will be imprisoned if they commit rape while heavily intoxicated, for the simple reason that most of such people, like the accused when sober, simply cannot conceive of themselves performing such an act'.

As for the deterrence of the accused himself the learned judge expressed 'similar doubts about such a result occurring from a sentence of direct imprisonment', for she was of the view that unless the respondent was cured of his drinking problem he might well offend again when he was released from prison.

[14] The sentiments expressed by the learned judge were translated into a sentence that was directed towards curing the respondent of his drinking problem, while the grave crimes that he committed faded far into the background. In my view the learned judge was materially misdirected in the approach that she took. I have pointed out that in the case of serious crimes society's sense of outrage and the deterrence of the offender and other potential offenders deserve considerable weight. Amongst the permissible sentencing options that the Legislature has made available to the courts, imprisonment is pre-eminently designed to fulfil those purposes and I do not think it is open to a court to dismiss it perfunctorily, as the trial court was inclined to do. The result in the present case was that the sentence imposed was startlingly inappropriate and the misdirection allows this court to reconsider the sentence.

[15] The appellant committed a deplorable offence. He subjected the complainant to extreme humiliation and degradation. Her uncontested evidence as to the effect of the assault on her was:

'Well, I had no confidence in myself. I have not been able to work. I have not been able to look for work, I could not bring myself to. In the first few weeks after it if I went outside I wore dark glasses. I wore this skirt that I am wearing today. I hardly go anywhere without it because it covers me up. I did have a breakdown within the Lynnmed. I could only stay in for a week because our medical aid, we did not have enough money on our medical aid. I have been on Prozac and I have been on Urbanol. I had to give those up because our medical aid ran out towards the end of the year. It has affected my sex life with my husband. It was at least five months before we had any sexual relationship after this and at the moment it is about nil because I just get all uptight and everything when he comes near me. I had

flashbacks. When my husband was having to work the shifts that he started that night I was lying in bed with every light in the flat on with all my clothes on, with three kitchen knives and my husband's gun in the bed. That is how badly I felt. I was a wreck.'

[16] In *S v Chapman* 1997 (3) SA 341 (SCA) at 344J-345B this court said the following:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.

Women in this country are entitled to the protection of these rights. They have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.

The Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.'

[17] No doubt the court did not intend to suggest that the quality of mercy should be altogether overlooked – for it is an intrinsic element of civilised justice – but rather to emphasise that retribution and deterrence will come to the fore in relation to such crimes.

[18] The personal circumstances of the respondent were set out fully in the judgment of the trial court and I do not intend to do more than summarise the principal features. The respondent is one of a number of siblings who was brought up in modest circumstances. His upbringing was uneventful except that

he has a relatively low IQ and experienced learning difficulties, with the result that he has a negative self-image and came into conflict with his mother. After completing school he spent two years in the army, which was at that time being used to quell civil unrest, and he is said to have suffered emotionally as a result. While he was in the army the respondent began to drink heavily. After leaving the army the respondent went through an unsettled period until he commenced employment as a spray-painter and he remained in that employment until his arrest. He had a short and unsuccessful marriage.

[19] The respondent was a regular abuser of alcohol and would often have no recall of what had happened while he was intoxicated. On one occasion he found himself in a police cell when he recovered his sobriety. On another occasion he found that he had been injured. At the time he committed the offences he was severely intoxicated, which constituted the 'substantial and compelling circumstances' that were found to exist by the trial court. But while his state of intoxication is also a consideration to be taken into account in determining a proper sentence it is not one that can be permitted to obscure the gravity of the crimes.

[20] In my view the offences, taken together, in the circumstances warranted a sentence of twelve years' imprisonment. I have taken into account, however, that the respondent was imprisoned for twenty-one months while awaiting trial, and that he has already served a substantial portion of the sentence of correctional supervision that was imposed by the trial court. With those

considerations in mind in my view the appropriate sentence to be served by the respondent at this stage is imprisonment for eight years.

[21] The appeal is upheld. The sentence imposed by the trial court is set aside and the following sentence is substituted:

'The accused is sentenced to imprisonment for eight years.'

NUGENT JA

STREICHER JA)
SOUTHWOOD AJA)
VAN HEERDEN AJA) CONCUR
MOTATA AJA)