SEBEDEUS HOASEB v THE STATE

CASE NO. CA 131/2004

2005/06/01

Maritz, J. *et* Mainga, J.

SENTENCE

Sentence – minimum sentence of 15 years – statutory rape – s 3(1)(a)(iii)(ff) of Combating of Rape Act – meaning and import of phrase “uses a firearm or other weapon for the purpose of or in connection with the commission of the offence” – relationship between weapon and rape need not be substantial or direct but poses question of proximity and degree – some activity connected with the crime must have involved the utilisation or employment of the weapon with the purpose of committing or furthering the commission of the rape – such not established – minimum sentence of 10 years substituted

CASE NO. CA131/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SEBEDEUS HOASEB

APPELLANT

versus

THE STATE

RESPONDENT

(HIGH COURT APPEAL JUDGMENT)

CORAM: MARITZ, J. *et* MAINGA, J.

Heard on: 2005-02-18

Delivered on: 2005-06-01

JUDGMENT

MARITZ,J: The crisp issue presenting itself in this appeal is whether the Regional Magistrate misdirected himself when he considered himself bound by the provisions of section 3(1)(a)(iii)(ff) of the Combating of Rape Act, 2000 to sentence the appellant to 15 years imprisonment. The section provides as follows:

> "3.(1) Any person who is convicted of rape under this Act shall, subject to the provisions of sub-sections (2), (3) and (4), be liable –
>
> (a) in the case of a first conviction …
>
> (iii) where …
>
> (ff) the convicted person uses a firearm or any other weapon for the purpose of or in connection with the commission of the rape,
>
> to imprisonment for a period of not less than 15 years…"

Mr Van Vuuren, appearing *amicus curiae* on behalf the appellant, contends that the evidence does not support a conclusion that the appellant used any weapon "for the purpose of or in connection with the commission of the rape".

In the absence of an appeal against his conviction, the Learned Magistrate's acceptance of the complainant's evidence about the incident remains unchallenged and it is on the basis of her evidence that the issue falls to be determined. She testified that she was one of a group of four girls who had been confronted by the appellant and his co-accused near a cemetery in one of Windhoek's suburbs.

A verbal altercation between the two groups soon deteriorated into an acrimonious quarrel during which the appellant's beer was apparently kicked over. When the complainant tried to run away from the scene, the appellant grabbed hold of her hand and demanded his beer from her. He took her back to the scene where they found the beer bottle lying empty in a flowerbed. The appellant insisted that she should buy him another beer. When she retorted that she did not have the money to do so, the appellant "broke this bottle and then he said we should go to his house". She refused, but he pulled her in the direction of the house. It was about that time that the appellant's co-accused struck her with a brick on her cheek. The appellant also slapped her and took her against her will to a house which he identified as that of his grandmother.

Once there the appellant sent his co-accused on an errand and, whilst waiting for him, he promised that he would take the complainant home upon the return of his co-accused. Needless to say, the promise did not materialise. Upon his co-accused's return, he and the appellant got involved in a quarrel as a result of which the co-accused left. The complainant again asked the appellant to take her home but the appellant told her in no uncertain terms that she should not prescribe to him what he should do and that he would take her home whenever he pleases. He obtained a key and a

blanket from his brother who was staying at the house and took her into a room where he spread the blanket on the floor.

He asked her why she did not want to take him as her boyfriend and when she said that she already had a boyfriend he demanded of her to take off her trousers. She complied and, as she did so, he told her to lie down and suggested sexual intercourse. She declined his advances whereupon he threatened that if she did not "want to have sex with (him) then (he) will hurt (her)". She testified that she had been scared that the appellant would hurt her and added that "he also had a knife". Also afraid that she may contract a sexually transmittable disease, she suggested to him that he should at least use a condom. As he left her to put the condom on, he instructed her to take off her panty. She complied and did not resist when he returned and raped her. During the incident she complained about pain and he told her that the people would hear if she made any noise.

After he had done the deed they heard voices. When the appellant looked through the window, the complainant recognised her eldest sister who came to look for her. The appellant said to her that if she should "make any noise ... then he (would) stab her with a knife" and instructed her to stand in a corner. The complainant's sisters kept knocking on the door for a while and when they did not get any

response, they departed. That is when the complainant asked the appellant to open the door for her to leave. He did so. The complainant did not return home immediately because it was dark and she was scared. She sat, crying, on a rock where she was later found by her sister. She immediately made a report that she had been raped and went to the police and for a medical examination the next day. The doctor only examined her private parts but not detect any injury.

Mr Truter, appearing on behalf of the respondent, submits that the complainant referred to the use of a weapon on three occasions: The bottle which the appellant broke during the quarrel near the cemetery; the complainant's statement made in the room of the house to the effect that she was scared that the appellant would hurt her and that the appellant also had a knife and, lastly, the incident after she had been violated when the complainant's sister came to look for her and when he threatened that he would stab her with a knife if she would make any noise.

In assessing, as we must, whether these actions by the appellant were brought within the four corners of section 3(1)(a)(iii)(ff) of the Act, it is apposite to consider the meaning and import of the words "uses a firearm or any other weapon for the purpose of or in connection with the commission" of the offence. Those words, as far

as I was able to ascertain, have received judicial interpretation on numerous occasions, but only in the context of forfeiture orders. So, for instance, does section 35(1)(b) of the Criminal Procedure Act, 1977, authorise a Court which has convicted an accused of an offence referred to in Part I of Schedule 2 of the Act to declare "any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence" and which was seized under the provisions of the Act, forfeited to the State. Similar phrases are also used in section 8(1) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, 1971 in relation to drugs, plants, vehicles, vessels, aircraft, receptacles or other things; section 89(1)(a)(c) of the Nature Conservation Ordinance, 1975; and section 35(1)(3) of the Sea Fisheries Act, 1992.

In *S v Vorster*, 1996 NR 177 (HC) at 180, Hannah J considered the meaning of that phrase in section 89 of the Nature Conservation Ordinance, 1974. At issue was the forfeiture of a large number of items seized from the accused upon his arrest on a charge of hunting huntable game in contravention of section 30(1)(a) and protected game in contravention of section 27(1) of that Ordinance. Whilst noting that no technical difficulty arises from the forfeiture of the motor vehicle, the trailer, the rifle, its ammunition and the binoculars used for the purpose of or in connection with the illegal

hunting expedition, he remarked the following as regards the other items:

> "But in the case of the other items forfeited there is a very real difficulty. Although the pistol was used to kill a jackal the appellant was not charged with any offence in connection with the jackal. And although it is clear that the appellant had the pistol, the shotgun, the ammunition for these weapons, the ropes and the rolls of wire with him with the intention of using them for the purpose of or in connection with the commission of an offence, should they be needed, it cannot be said that they were actually used for the purpose of or in connection with an offence or, more particularly, the offences charged: *S v Smith & Others*, 1984(1) SA 583(A) at 597(E). The leather holster, the tyre pressure gauge, the groundsheets and the trailer spare wheels also cannot be said to have been used in connection with the commission of either offence. As was said by Kumleben, J in *S v Bissessue*, 1980(1) SA 228 (N) at 230A:
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> > 'In terms of the sub-section the 'thing' is subject to forfeiture if it is used in connection with the commission of the offence. It follows that to qualify for forfeiture the thing must play a part, in a reasonably direct sense, in those acts which constitute the actual commission of the offence in question. This conclusion conforms to the meaning normally attached to the phrase.'"

In *S v Vermeulen*, 1995(2) SACR 439 (T) the Court had an opportunity to deal with the interpretation of a forfeiture provision contained in the Drugs and Drug Trafficking Act, 1992 (RSA) and held that –

> "In terms of section 25(1)(b)(i) there had to be a necessary connection between the use of the vehicle and the commission of the offence. Where the use of the vehicle was merely incidental to the movements of the accused which were relevant to the offence, it could not be said that the vehicle had been used in terms of section 25(1)(b)(i) 'for the purpose of or in connection with the commission of the offence'."

More recently in case of *National Director of Public Prosecutions v Prophet*, 2003(2) SACR 287(C), N C Erasmus J dealt with the interpretation of those words in the forfeiture provisions of Chapter 6 of the Prevention of Organised Crime Act, 1998 (RSA). Referring to what Blignaut J, perceived to be the "lack of clarity" in the use of the words "which is concerned in" in the case of *National Director of Public Prosecutions & Another v Carolus & Others*, 1999(2) SACR 27(C) at 39*g-h* and the unreported case of *National Director of Public Prosecutions*: *Re application for forfeiture of properties in terms of sections 48 and 53 of Act 121 of 1998*, he expressed the view that the word 'concerned' suggested the need for a direct connection to the offence. He then continues to reason as follows (at 297e-h):

> "[22] Civil forfeiture in South Africa is based largely on statutory provisions in the USA and New South Wales in Australia. The Australian approach in New South Wales provides for forfeiture orders for 'tainted property', used in, or in connection with the commission of a serious offence. This has been interpreted by the Courts as meaning that

> ‘There must be a relationship between the commission of the offence and the property in question. That relationship need not be substantial or direct, but the need for the connection poses questions of proximity and degree ... and this is essentially a question of fact.’ (*Director of Public prosecutions (NSW) v King* [2000] NSWSC 394 at paragraph 14)

It becomes more difficult where the property is merely the place where the offence was committed. Merely being the *locus in quo* and nothing more would not be sufficient. Ultimately, O’Keefe, J in the King case held that when it came to tainted property

> ‘Some activity connected with the relevant crime must have involved the utilisation or employment of the property with the aim or purpose of committing or furthering the commission of the crime in question’.”

It is with the judicial approach to the interpretation of these words in mind that I now turn to the circumstances of the case in question.

The appellant’s act of breaking the empty beer bottle was not taken any further during examination. There is no suggestion that the appellant used the broken bottle as a weapon to threaten the complainant or to cause her to submit to his intentions. On the contrary, the complaint’s testimony that she was subsequently struck with a brick by the appellant’s co-accused and slapped by the appellant is of some significance in assessing whether the appellant had done anything more than simply breaking the bottle. If he had

used it in any way to threaten the complainant, one would have expected her to mention that – as she had done in respect of the other forms of assault perpetrated on her.

The appellant threatened the complainant that he would hurt her if she would refuse him. The complainant remarked that she was scared that he would hurt her and added: "...he also had a knife". No evidence was presented as to the whereabouts or the nature of the knife. It is not clear whether it was a pocketknife which he had in his pocket or whether it was a piece of cutlery lying on a cupboard somewhere inside the room. There is no evidence that he had, in any way, used the knife to impose his will on the complainant or to obtain her submission. It was not even suggested during his examination that he had made her aware of the presence of the knife so as to instill fear in her mind. There is, in my view, simply no evidence of any activity on the part of the appellant which "involved the utilisation or employment of the (knife) with the aim or purpose of committing or furthering" the rape. The sub-section contemplates the "use" of the knife. There is no evidence that he had done so.

The threat made subsequently to the rape that he would stab the complainant with the knife if she would make any noise which would alert her sister to her presence in the room would have brought the

appellant's conduct within the provisions of section 3(1)(a)(iii)(ff) of Act No. 8 of 2000 had it happened before the rape. As it were, that threat was made after the appellant had already committed the rape. Therefore, the purpose of the threat cannot be regarded as one bearing on "the commission" of the rape. It was rather intended to prevent disclosure of the victim's presence in the room before her subsequent release.

I am therefore satisfied that the prosecution failed to prove that the appellant used any "weapon for the purpose of or in connection with the commission of the rape". It follows that the Magistrate misdirected himself when he imposed the sentence of 15 years imprisonment on the premise that the minimum sentence prescribed in section 3(1)(a)(iii) of the Combating of Rape Act, 2000 applies.

In my view, the provisions of section 3(1)(a)(ii) of the Act should have been applied because the rape was committed under the coercive circumstances referred in paragraphs (a) and (b) of sub-section 2 of section 2 of the Act. The "coercive circumstances" defined in those paragraphs include the following:

> "(a) The application of physical force to the complainant ...;
> (b) Threats (whether verbally or through conduct) of the application of physical force to the complainant ..."

The minimum sentence prescribed in those circumstances for first offenders is 10 years imprisonment.

The appellant pointed out in argument that the complainant did not suffer any physical injuries during the rape; that the crime was not planned and that the degree of violence used by the appellant was not significant. The appellant was 18 years of age at the time and a first offender. He was still a pupil at one of the local schools and frankly admitted that his conduct had been influenced by the liquor he had consumed that day. In the absence of evidence about any significant degree of psychological trauma suffered by the complainant, it does not seem to me as if this case requires the imposition of a more severe sentence than the minimum prescribed.

Counsel for the appellant did not contend that "substantial and compelling circumstances" exist which justify the imposition of a lesser sentence than the minimum prescribed as contemplated in section 3(2) of the Combating of Rape Act, 2000. I agree with the view of Stegmann, J that "for 'substantial and compelling circumstances' to be found, the facts of the particular case must present some circumstances that is so exceptional in its nature, and so obviously exposes the injustice of a statutory prescribed sentence in the particular case, that it can rightly be described as 'compelling' in the conclusion that the imposition of a lesser sentence than that

prescribed by Parliament is justified" (See: *S v Mofokeng & Another,* 1999(1) SACR 502(W) at 5023B-D). Such circumstances do not present themselves in this case.

In the result the following order is made:

1. The appellant's conviction of the crime of rape as defined in section 2 of the Combating of Rape Act, 2000 in the Regional Court, Windhoek, is confirmed.

2. The appellant's sentence of 15 years imprisonment imposed pursuant to the conviction referred to in paragraph 1 of this order, is set aside and the following sentence is substituted:

> "The appellant is sentenced to 10 years imprisonment."

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MARITZ, J.

I concur

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MAINGA, J.