IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO: 138/90

In the appeal of

LOUIS BETERSEN APPELLANT

and

THE STATE RESPONDENT

Coram: VAN HEERDEN, KUMLEBEN et GOLDSTONE JJA.

Date heard: Monday 5 November 1990

Date delivered: Thursday 15 November 1990

J U D G M E N T

GOLDSTONE JA:

The appellant in this case, Louis Petersen, was convicted by Munnik JP and assessors on thirteen counts which included rape, robbery, housebreaking, culpable homicide and assault with intent to do grievous bodily harm. In respect of three of the four counts of rape the appellant was sentenced to death. On the remaining counts he was sentenced to a total period of imprisonment of 33 years. Certain of the periods of imprisonment were ordered to run concurrently and the effective period of imprisonment is 20 years. The appellant sought leave from the Court a quo to appeal against the imposition of the three death sentences. The application was refused. However, leave to appeal was granted in

consequence of a petition to the Chief Justice.

It is necessary to consider each of the rapes in turn.

The First Rape:

This took place on 3 March 1987 at a house in Tamboerskloof, Cape Town. The victim of the rape was a young 18 year old girl ("the first complainant"). She was living in her father's home. She was in her bedroom at about 8h30. She was wearing only a dressing gown. She was dozing on her bed. When she woke up she saw the appellant standing at the entrance to her bedroom. He said he was looking for money. The first complainant went to her handbag and took out her purse. She took out what money she had in it. The appellant grabbed her arm with one hand. In the other he held a screwdriver. He told the first complainant that he wanted more money and that he was going to rape her. The first complainant then

made an attempt to escape through the kitchen. The appellant followed her and picked up a knife from the kitchen table. He prevented the first complainant from opening the kitchen door. He held the knife at her throat and told her that if she screamed he was going to kill her. She managed to move into the lounge where she picked up some video cassettes and hit the appellant with them. He then grabbed her about the neck and lifted her off her feet. She fell down. She reached for an ashtray and attempted to hit the appellant with it. He then punched her in the mouth and her lip started to bleed. The appellant pinned the first complainant to the floor and raped her. Thereafter, still in possession of the knife, the appellant warned the first complainant not to move and left with a bundle of clothing that was lying in the room.

The complainant required four or five stitches in consequence

of the injury to her lip. In answer to a question as to how the incident had affected her, the first complainant said:

> "My sense of security and safeness has been totally violated. I'm terrified to stay alone. I find that I'm incredibly nervous when in the company of a man. A certain amount of confidence is shattered."

She said that she had not thought about seeking psychiatric treatment. She felt that she was able to cope with the situation on her own. In answer to a question from the learned Judge a quo, the first complainant described the appellant as a "lower class coloured". She stated that at the time of the rape she was not a virgin and used an oral contraceptive.

The appellant admitted guilt on this count and the first complainant was not cross-examined by the appellant's counsel. The first complainant's mother testified and confirmed that her daughter had become nervous and could not be left alone. Her daughter had become very quiet and introverted. She thought that the first complainant would require psychiatric help.

The Second Rape:

This was committed on 2 April 1987 also at a house in Tamboerskloof. The complainant was a 37 year old woman ("the second complainant"). At the time of the incident she had three children and was 6 months pregnant. On the day of the incident the second complainant was in her room at about 11h00. She was alone and asleep. She was awoken by the appellant who had his hand around her neck. He told her to lie still and that he wanted money or would "sleep" with her. The second complainant then proceeded to wrestle with the appellant.

He put a cushion over her mouth to prevent her from screaming. He attempted to throttle her with the corner of a duvet cover. The appellant tore off the clothes she was wearing. The second complainant then began to scream. The appellant then produced a screwdriver and stabbed at her three times. Two of the blows did not penetrate the duvet but the third injured her in her upper left arm. In the ensuing struggle the screwdriver fell off the bed. The appellant reached for it and the second complainant ran for the door. It had been locked by the appellant and he grabbed the second complainant and threw her to the floor. He proceeded to rape her.

According to the second complainant, in consequence of the assault upon her she was unable to give normal birth to her child and required surgery.

The appellant admitted having had sexual intercourse with

the second complainant. His evidence that she consented was properly rejected by the Court a quo.

The Third Rape:

The third complainant was a young girl of 19 years. At the time she was living with her boyfriend in Kloof Nek, Cape Town. On 15 May 1987 at about noon, the third complainant was asleep in the bedroom. She was wearing no clothes. She heard someone in the house and the appellant entered the room. He said he wanted money. She asked him to pass her a bathrobe which was hanging on the door. He did so. After she put it on the appellant grabbed her by the scruff of her neck and pulled her out of bed. He had a knife in one hand. He forced the third complainant to empty her handbags. He took her to other rooms in the house and instructed her to open the cupboards. She did so. Suddenly the appellant told the complainant to lie on the bed. He forced her to do so by

pushing the knife at her throat. She struggled and he threatened to kill her. He raped her. The third complainant was bruised on her hands and neck. In consequence of the rape the third complainant contracted a vaginal infection which was cured by medical treatment. She said that the experience had deleteriously affected her sexual relationship with her boyfriend (who at the time of the trial was her husband).

In answer to questions from the learned Judge a quo, the third complainant said that she had been raped by a coloured man when she was seven years old and that had caused her to be scared of men including her own father. In particular she was frightened of coloured men.

The appellant admitted raping the third complainant and she was not cross-examined with regard thereto.

At the time of commission of the offences the appellant was about 21 years of age. He had attended only one year of school. His previous convictions were for housebreaking and theft. The first of the convictions, one for housebreaking, was dated June 1980 when the appellant was only about 12 years of age. In 1981 he was sent to a reform school where he remained for two years. Five months after his release he was sentenced to six months' imprisonment for theft. In June 1984 he was sentenced to three years' imprisonment, again for theft. He was released on parole on 17 May 1986. The series of offences now in question were committed between 3 March 1987 and 18 May 1987. The appellant was arrested on 19 May 1987, a year after he was released on parole.

The learned Judge a quo took into account the following general factors when he came to consider sentencing the appellant in respect of the rape charges:

(a) His youth;

(b) The absence of violence in the previous offences committed by the appellant;

(c) The fact that he apparently thought that he was entering deserted residences;

(d) That the three complainants were not virgins.

Munnik JP then considered each of the four counts of rape separately. In respect of the one count, not now directly relevant, he sentenced the appellant to imprisonment for ten years. In respect of that count the learned Judge a quo held that the death sentence was not appropriate because the rape had not caused a severe emotional or psychological reaction in the complainant.

In respect of the three remaining rapes the learned Judge a quo took into account that:

(a) Three similar rapes on private premises were committed within a period of two and a half months:

(b) The rapes were committed in conjunction with housebreaking and theft;

(c) The increase in the number of similar rapes within the jurisdiction.

With regard to the first rape, the learned Judge a quo referred to the fact that the first complainant came from a good family and from a social class far removed from that of the appellant. He took into account that the experience had a severe and traumatic effect on the first complainant, leaving her with a fear and loss of self-confidence. He held that the death sentence was the only appropriate sentence.

With regard to the second rape, the learned Judge a quo took into account that a short time before the appellant had committed

the first rape. In that regard he referred to the judgment of Nestadt JA in S v S 1988 (1) SA 120 (A) at 123 F - H. He had regard to the fact that the second complainant was six months pregnant at the time. He referred to the effect of the rape upon the second complainant and that the appellant showed no remorse but that, on the contrary, had falsely alleged consent by the third complainant. He held that the death sentence was the only appropriate sentence.

In respect of the third rape, the learned Judge a quo took into account the previous two rapes. He referred to the traumatic effect the offence had upon the third complainant. He also had regard to the disparity in the social standing of the appellant and the third complainant. Munnik JP said the following:

"Daar is geen getuienis dat jy hervormbaar is nie, dit

is ook 'n faktor in die ander twee gevalle waarmee ek gehandel het. Die afwesigheid van berou sou gevangenissetting vir 'n lang periode weer eens 'an exercise in futility' maak."

He held that the death sentence was the only appropriate sentence.

Since the appellant was sentenced, the legal position with regard to the imposition of the death sentence has been changed by the provisions of the Criminal Law Amendment Act, 107 of 1990. ("the Act"). The effect thereof has been considered in detail in three recent decisions of this Court: Obed Masina and Two Others v The State, delivered on 13 September 1990; Abel Senonohi v Die Staat, delivered on 17 September 1990; and John Memfu Nkwanyana and Two Others v The State, delivered on 18 September 1990.

In terms of section 227 of the Criminal Procedure Act, 51 of 1977, as amended by the Act, the basis upon which a trial court must approach the imposition of a death sentence is the same in respect of all capital offences. The trial court is obliged to make a finding in respect of the presence or absence of any mitigating or aggravating factors. With due regard to that finding the presiding judge may impose the death sentence only if satisfied that it is "the proper sentence". In terms of section 20 of the Act an appeal such as the present must be continued and concluded as if section 227 of the Criminal Procedure Act had been amended at all the relevant times.

The position which now applies in a case such as the present was explained as follows by E.M Grosskopf JA at p15 of the Senonohi judgment:

"By 'n appèl teen 'n doodvonnis oefen die Appèlhof dus nou 'n onafhanklikke diskresie uit. Hy moet self oordeel of, met inagneming van die strafversagtende en -verswarende faktore wat uit die oorkonde blyk, die doodvonnis 'die gepaste vonnis' ingevolge die nuwe artikel 227(2)(b) is. Deur die invoeging van art 322 (2A) het die Wetgewer dus afgewyk van die beginsel wat tot dusver in appèlle teen vonnis gegeld het, naamlik dat die hof van appèl slegs kan ingryp as die verhoorhof nie sy diskresie behoorlik uitgeoefen het nie. Tans kan hierdie hof 'n doodvonnis tersyde stel waar die verhoorhof se diskresie-uitoefening onbesproke is, en bloot op grond daarvan dat hierdie hof 'n ander mening huldig oor die gepastheid van die doodvonnis."

It follows that in this appeal it is unnecessary to consider whether the Court a quo correctly exercised its discretion

in deciding to impose the death penalty. Whether it is the appropriate sentence in the present case must now be determined by this Court in the exercise of its own discretion.

With regard to the concept of "the proper sentence", in the Nkwanyana case (supra), Nestadt JA said the following at pp 30-32 of the typed judgment:

> "In deciding whether the death sentence is 'the proper sentence' (an expression which the Legislature has understandably not defined), mitigating and aggravating factors are not the determining consideration. The section merely provides that 'due regard' be had to them... Inherent in the expression therefore is a recognition that other matters may be relevant if not decisive. The absence of mitigating factors (or, as before, extenuating circumstances) will not mean that the death

sentence must or should be passed. Conversely the presence of mitigating factors will not mean that the death sentence must or should not be passed. And when both mitigating and aggravating factors are present, their respective force or significance will have to be weighed in order to determine whether the death sentence is the proper one. In doing this I agree with the view of E M GROSSKOPF, JA in Senonohi v S, supra (at pp 18-19) that regard will be had to the main purposes of punishment, namely, deterrent, preventive, reformative and retributive. This means that in deciding whether the death sentence is the proper one, consideration will be given to whether these objects cannot properly be achieved by a sentence other than the death sentence (generally a lengthy period of imprisonment). If they can, then the death sentence will not be passed. This is because 'the proper sentence' (unlike 'a proper sentence') must be interpreted to mean

'the only proper sentence'. It follows that the imposition of the death sentence will be confined to exceptionally serious cases; where (in the words of NICHOLAS, AJA in S V J 1989 (1) SA 669 (A) at 682 D, albeit in a different context) 'it is imperatively called for.'"

It follows that in cases of rape also, the imposition of the death sentence will be confined to exceptionally serious cases where "it is imperatively called for".

As far as the deterence of other prospective rapists is concerned it has never been established, as far as I am aware, that the death sentence is more efficacious than a long period of imprisonment. As to prevention, in the course of his judgment in S v J, (supra) Nicholas AJA said, at 683 E - F:

> "Among considerations which might well weigh with a trial Judge in considering whether to impose the death sentence for rape, are the following: evidence which tends to show that the accused has an ungovernable sex drive, or a propensity from whatever cause, to commit violent sex crimes against women, or the fact that the accused has, despite previous sentences, not been deterred from again committing rape."

In the present case, there is, of course, the seriously aggravating circumstance that the appellant , within a relatively short period of time, committed four separate acts of rape. Society is entitled to demand protection from such a man and he should not be allowed back into society for so long as he may reasonably pose a threat thereto.

With regard to retribution, Nicholas AJA in S v J (supra)

at 682 H - J said the following:

"In regard to retribution it is a remark of Holmes JA which is apposite once more. In S v Mathee 1971 (3) SA 769 (A) at 771D, he said that the evil of the accused's deed may be

'...so shocking, so clamant for extreme retribution, that society would demand his destruction as the only expiation for his wrongdoing'.

Generally speaking,however, retribution has tended to yield ground to the aspects of correction and prevention, and it is deterrence (including prevention) which has been described as the 'essential', 'all important', 'paramount' and 'universally admitted' object of punishment."

In no way would I wish to minimise the aggravating features

of the crimes which were perpetrated upon the complainants in question or to discount the physical and mental trauma to which they were subjected. At the same time it must be borne in mind that they were not seriously physically injured and there is no evidence which establishes that they will endure long-lasting psychological effects in consequence of their experiences. I do not consider that the conduct of the appellant was such that society demands "his destruction as the only expiation for his wrongdoing".

It remains to consider reformation. As emerges from the passage in the judgment of the learned Judge a quo cited above, he held that the absence of remorse on the part of the appellant made a long prison sentence "an exercise in futility". For that approach reliance was placed upon the judgment of Wessels JA in S v Ntuli 1978 (1) SA 523 (A). At 528 A - C the learned Judge of Appeal said this:

"A further submission was that the Court a quo had misdirected itself in not posing the question whether, in the absence of any prior punishment having been imposed on appellant, it appeared that even a lengthy period of imprisonment was unlikely to result in his rehabilitation, and in concluding that the death sentence was, therefore, the only appropriate punishment. On the facts of this case, the Court a quo was, in my opinion, not required to pose or consider the question suggested by counsel in argument. Appellant throughout falsely denied complicity in the commission of the crimes in question. At no time did he show any remorse for his criminal activities. To have considered the possibility of appellant's possible rehabilitation in these circumstances would, in my opinion, have constitued an essay in futility."

Read in context, Wessels JA did not hold that an absence of remorse on the part of an accused person rendered him incapable of reform. The "circumstances" to which the learned Judge referred were all the circumstances of the case including the absence of remorse. In Ntuli's case the accused had falsely denied complicity in all the crimes. In the present case, as has already been mentioned, the appellant admitted guilt in respect of two of the three rapes in question and raised a false defence of consent in respect of the third instance.

The evidence in this case does not establish at all that a very long sentence of imprisonment will not result in the reform or rehabilitation of the appellant. I am not satisfied that if he regains his freedom as a middle aged man, or even later, he necessarily would still constitute a threat to society: see S v S 1987 (2) SA 207 at 314 C - H.

Having regard to all the facts and circumstances of this case I am of the opinion that the death sentence for each of these three rapes in question might well be an appropriate sentence. However, not without much anxious consideration, I have come to the conclusion that the death penalty is not the only proper sentence. In particular I have reached that conclusion with due regard to the amendment by section 18 of the Act of section 64 of the Prisons Act 8 of 1959. It now provides that:

"64(1) A prisoner upon whom a life sentence has been imposed, shall not be released unless the advisory release board-

(a) after having been requested by the Minister to advise him in relation to that prisoner; and

(b) after considering a report of a release board, with due regard to the interests of society, has made a recommendation to the Minister for the release of the

prisoner and the Minister has accepted that recommendation.

(2) If the Minister accepts the recommendation for the release of such a prisoner, he may authorize the release of the prisoner on the date recommended by the advisory release board or on any other date, either unconditionally or on probation or on parole as he may direct".

In Robert Mdau v Die Staat, an unreported judgment of this Court delivered on 28 September 1990, Eksteen JA said at pp20-23 of the typed judgment:

"Die bepalinge van hierdie artikels hou dus in dat 'n Hof sy plig om die gemeenskap te beskerm teen die aanslae van so 'n geweldenaar soos wat die appellant is, kan nakom deur hom 'n lewenslange gevangenisstraf op te lê. Wat die Hof betref, sal so 'n persoon finaal uit die gemeenskap geneem word en die res van sy natuurlike lewe in

gevangenisskap deurbring. Die enigste manier waarop hy weer tot die gemeenskap kan terugkeer is as die Minister die inisiatief neem en die vrylatingsadviesraad vra om hom te adviseer oor sy moontike vrylating. Die vrylatingsadviesraad moet dan, 'met behoorlike inagneming van die belange van die gemeenskap', sy vrylating oorweeg.

...

Waar 'n Hof dus 'n vonnis van lewenslange gevangenisstraf oplê, is dit die klaarblyklikste bedoeling van die Hof dat die beskuldigde uit die samelewing verwyder moet word en vir die res van sy lewe in die gevangenis vasgehou word. Hy kan dan slegs in die uitsonderlike omstandighede hierbo uiteengesit, waar die Minister vir hom tussenbei tree, weer na die samelewing terugkeer. Lewenslange gevangenisstraf is dus 'n vorm van straf wat as alternatief vir die doodvonnis oorweeg moet word waar die beskerming van die samelewing 'n gebiedende oorweging is."

In my opinion this is a case where the cumulative effect of the three rapes in question make life imprisonment and not the death penalty the only proper sentence.

The appeal succeeds. The death sentences are set aside. There is substituted therefor in respect of counts 3, 8 and 13 a sentence of imprisonment for life.

R J Goldstone

VAN HEERDEN JA)
) CONCUR
KUMLEBEN JA)

GOLDSTONE JA