IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DENNIS WILLIAMS ..... Appellant

AND

THE STATE ..... Respondent

Coram: MILNE, EKSTEEN, JJ A et VAN COLLER, AJA

Heard: 7 May 1993

Delivered: 24 May 1993

J U D G M E N T

EKSTEEN, JA :

The appellant was convicted in the South East Cape Local Division on three counts of rape and one of robbery. In the light of the seriousness of the offences and the appellant's previous convictions he was sentenced to death on each of the three counts of rape. On the robbery count he was sentenced to five years imprisonment. The present appeal is brought in terms of section 316 A of the Criminal Procedure Act (No 51 of 1977) ("the Act") against the convictions and sentences on the three counts of rape.

The complainant, a 44 year old woman,

went riding on her horse at about 11 am on Saturday 19 October 1991. From the aerial photographs handed in at the trial her home appears to have been situated near the end of a tarred road on the outskirts of an extensive area of indigenous scrub and lowish trees. Various footpaths wind their way through this scrub and it was along one of these that the complainant rode. When she was some considerable distance from her home she came across the appellant walking towards her on the same path she was following. He could not have presented a particularly prepossessing picture at the time, as, on his own evidence, he had been involved in a fight at a bottle store earlier that

morning and, on the evidence of the district surgeon who examined him that same morning, his mouth and his lips were bleeding. He accosted the complainant and said something to her which she did not hear clearly. So she stopped her horse in order to speak to him. He then came up to her and asked her whether the horse could bite. At the same time he caught hold of her arm and her leg and pulled her off the horse. She shouted and attempted to defend herself with her riding crop. The appellant, however, soon overpowered her and dragged her into the bushes where he raped her. Any attempt at resistance was met by him banging her head against the

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ground and threatening to kill her. Having raped her there he dragged her off to another place where he again raped her. He then got up and ordered her to get up too. While he was busy adjusting his clothes she attempted to run away. Appellant, however, ran after her and caught her. He picked up a brick and threatened to kill her. He then dragged her back into the bushes, threw her down onto the ground and sat astride her while he took off her necklace, her earrings and her watch. He then raped her a third time before telling her to go. She ran off in the direction of her home naked from the waist down. The upper part of her body was

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still clothed, and her riding jacket or "wind-cheater" came down well below her waist and covered her private parts. She describes it as something like "a very mini skirt".

When the appellant pulled her off her horse, the horse turned round and ran back home. On its arrival there her husband immediately realized that something was amiss. He mounted the horse and set off to find her. As he left his home he came across his neighbour in a "bakkie". with a two-way radio. The neighbour followed him to the end of the tarred road, after which the husband rode along one of the footpaths. As he came to a clearing in the bush he saw complainant

running towards him. She was visibly upset and almost incoherent. Her face showed scratches and contusions. She kept repeating that she had been raped. He asked her to get onto the horse, but she declined "due to the nature of what had happened to her", and because she hoped that her husband might yet be able to catch up with her assailant if he went on. He then told her that their neighbour was waiting in his "bakkie" at the end of the tarred road. She went off in that direction while he rode further along the path in the hope of being able to apprehend his wife's assailant. In this he was unsuccessful and so he returned home to where she was. The police were informed and soon

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thereafter, with the help of a helicopter, the appellant was arrested. The complainant's watch was found in his possession but her necklace and earrings were not recovered. At about 3 pm the police brought the appellant to complainant's home and she immediately identified him as being her assailant. Later that afternoon her husband went to the police station where he saw the appellant sitting in the back of a police car. The appellant, he says, was "like a wild animal" and said to him "Ek sal haar kry, ek weet waar jy bly."

The appellant's defence in the court a quo was that he had a previous liason with the

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complainant and that they had arranged to meet each other again in the bushes on this particular Saturday. Complainant kept his appointment and was a consenting party to the intercourse which ensued. The fact that her horse had broken loose from the branch to which she had tethered it and ran home while they were having intercourse prompted her falsely to trump up a charge of rape in order to placate her husband. The injuries to her face, he suggested, were caused by her running into a tree on her way home.

This highly improbable story was re-

jected by the court a quo. The appellant was

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described as a "shocking" witness. On the other hand the trial court found that -

> "the complainant's demeanour in the witness box was beyond reproach and she made an excellent impression on us."

She was corroborated by her husband who was found to have given his evidence "extremely well."

The complainant's evidence was also supported by that of the district surgeon who examined her and the appellant on the afternoon of the crime, and also certain other features in the evidence which I find unnecessary to deal with in the judgment. On a mere reading of the record the findings of credibility of the trial

court are amply born out, and there seems to be no reason to differ from them.

Mr Daubermann who appeared for the appellant, without abandoning the appeal against the conviction, chose not to address any argument to us on this issue. - This decision was in my view a wise one as no valid argument can be advanced against the conclusion to which the trial court came. The appeal against the conviction cannot be sustained.

Mr Daubermann limited his argument before us to the appeal against the sentence. His main argument was that owing to a so-called "moratorium" which, the executive authority seems

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at present to be applying to the execution of death sentences imposed by the courts, that sentence has lost all its deterrent and retributive effect, and that consequently courts of law should no longer impose such sentences as they served no purpose.

However cogent this argument may be from a political platform or in an academic debate, it is not one which can be entertained by this Court. In the first place this "moratorium" is not contained in any law or proclamation, and so its nature and ambit - whether it contains any provision for exceptional circumstances, or how long it is to be applied -

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cannot be ascertained. In any event, and even if we were to assume that some general "moratorium" existed as a matter of government policy in respect of all death sentences imposed by the courts, it could still not serve to deter this Court from carrying out its duty in terms of the law. Sec 277(2) of the Act provides that :

> "(2) The sentence of death shall be im-
> posed -
> (a) ....
> (b) if the presiding judge ....
> is satisfied that the sentence of
> death is the proper sentence."

In S v Nkwanyana and Others 1990 (4) 5A 735 (A) at 745 F this Court, in considering the above-

mentioned section, held that

> "the imposition of the death sentence will be confined to exceptionally serious cases; where ... 'it is imperatively called for'."

Where the presiding judge, after considering all the mitigating and aggravating factors, is satisfied that it is so imperatively called for, then he is enjoined to give effect to the law and impose the death sentence. (S v Nkambule 1993 (1) SACR 136 (A) at 146 f.)

That this whole argument was one very much ad hoc became apparent by Mr Daubermann's ready concession that should the "moratorium" be terminated forthwith, his whole argument would fall away. Nothing more need therefore

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be said on this score.

Although the appellant was properly convicted on three separate counts of rape it appears from the evidence that they were all committed within a comparatively short period of time. The complainant's husband deposed to her having been away from home for approximately 45 minutes before her riderless horse returned. He thereupon immediately set out in search of her. The three offences would therefore probably have been committed within the space of 30 or 40 minutes. Although they properly form three separate offences they may, for purposes of sentence be

regarded as one continuous transaction as it were. Without seeking in any way to detract from the extremely serious nature of the crimes, they do not seem to have been committed with such undue or extreme brutality as has occurred in other matters that have come before us. The complainant sustained no serious physical injuries. She also appears from the evidence to have a strong well-integrated personality - "very strong emotionally" is how her husband described her. She undoubtedly endured considerable mental anguish as a result of her experience, but she does not seem to have sustained any serious psychological harm of a permanent nature, and

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her marriage-relationship with her husband has not been impaired. She no longer feels safe in riding alone along lonely paths in the bush and limits her riding to the more frequented roads in the vicinity of her home. This would seem to be a salutary- precaution for any woman to take in the times in which we live.

Subsequent to the rapes the complainant developed a somewhat persistent vaginal in-fection, which required prolonged anti-biotic treatment. What caused the infection does not appear from the evidence. There may well be a suspicion that it resulted from the rape, but this has not been shown with any degree of

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certainty on the evidence.

The appellant, on the other hand, showed no remorse for his deed. On the contrary, when he saw her husband at the police station he threatened to "get" the complainant at some future time. This certainly serves to aggravate his offence. The most serious aggravation however lies in his shocking list of previous convictions. On 29 June 1979 he was convicted on eight counts of housebreaking with intent to steal and theft for which he was sentenced to a total of 10 years imprisonment of which 6 /2 years was conditionally suspended. In July of the same year he

was again convicted to one count of theft and one of robbery for which he was sentenced to corporal punishment. Then on 30 October of that year he was sentenced to 15 years imprisonment for murder, and on 7 February 1990 to 10 years for another murder and 3 years for robbery. These latter two sentences were ordered to run concurrently with the sentence of 15 years in respect of the first murder. He was released from prison on 28 May 1990 and some 18 months later he committed the present offence.

Not only is the appellant a recidivist as appears from this record, but he is a

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man given to the commission of the most serious crimes of violence. The present convictions of rape fall clearly within that category. He has become a menace to society and the courts are called upon to protect it against his persistent depredations.. This can be achieved in one of two ways viz by the imposition of the death sentence or by the imposition of a sentence of life imprisonment. The death sentence in this case was, in my view, an appropriate sentence, and had this Court not been vested with an independent discretion of its own in terms of sec 322(2A)(b) of the Act, I would not have interfered with the sentence imposed by the

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trial judge in the exercise of his discretion. Sec 277(2), however, requires the presiding-judge -and therefore also this Court in the exercise of its discretion - to be satisfied that the death sentence is not only an appropriate sentence, but that it is the "proper sentence". This has been held to mean "the only proper sentence" (S v Nkwanyana (supra) at 745 E - F). Had the appellant been a first offender the possibility of a death sentence being imposed in the circumstances would not, in my view, have arisen for consideration at all. What makes it a real possibility and an appropriate sentence is the list of previous con-

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victions to which I have referred.

In S v Mdau 1991 (1) SA 169 (A) at 177 C this Court held that life imprisonment, i e the imprisonment of the appellant for the rest of his natural life, is a sentence which should be considered as an alternative to the death sentence where the protection of society is a compelling consideration. It complies with the deterrent, retributive, and preventive objectives of punishment. - In imposing such a sentence the Court clearly intends the appellant, in the interest of society, to be kept in prison for the rest of his life.

On mature reflection, and without in

any way seeking to detract from the seriousness of the offences of which the appellant has been convicted, I have come to the conclusion that it cannot be said that the death sentence is the only proper sentence in this case, but that life imprisonment can also, be regarded as a proper and appropriate sentence.

The appeal against the conviction is therefore dismissed, but the sentence of death is set aside and for it is substituted a sentence of life imprisonment.

J.P.G. EKSTEEN, JA

MILNE, JA)
VAN COLLER, AJA) concur