Case No 617/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

DAVID MASIZA Appellant

and

THE STATE Respondent

CORAM: Van Heerden, Nienaber et Harms JAA

HEARD: 2 MAY 1994

DELIVERED: 19 MAY 1994

J U D G M E N T

/NIENABER JA

NIENABER JA:

The deceased was only eight months old when she died. The appellant, 20 years old at the time, was accompanying her parents and carrying the child when he slipped away from them in order, so he admitted, to have sexual intercourse with her. Twice he tried to penetrate her. Her vagina was torn open as far as the rectum. Then he abandoned her in the open veld. This was at night, in the winter, on the highveld. Her body was discovered some two days later. The appellant was captured by members of the African National Congress and was about to be taken before a so-called street committee when the investigating officer rescued and arrested him. Eventually he appeared before Cloete J, sitting with assessors, in the Vereeniging Circuit Local Division, charged with one count of rape and one count of murder. On each count he was convicted and sentenced to death. This is an appeal, in terms of section 316A of Act 51 of 1977, against both the convictions and the sentences.

There is some dispute about events prior to the death of

the deceased. According to her parents the appellant had been known to them for several years. On the evening or Saturday 6 July 1991 he was accompanying them en route to block E at the hostels at Sebokeng near Vanderbylpark where they lived. The deceased's mother was carrying the deceased's twin brother and the appellant was carrying the deceased. She had on a dress and a diaper. The appellant was walking a few paces behind the parents. He excused himself saying that he wanted to urinate. He remained behind. They never saw their daughter again. The next morning they reported the matter to the police. The deceased's body was discovered the following Tuesday in a grassy patch some 10 paces from a footpath, 300 meters or so from the hostel where the deceased was last seen by them. She still had on her dress but her diaper was in a plastic bag next to her body.

The appellant's version is that he met the deceased's parents, with their two children, at a stokvel at hostel 1, Sebokeng, on the Saturday morning. A stokvel has been described as an African syndicate or club of closed membership

operating mainly on food and liquor sales at parties held at members' homes in rotation, with an entrance fee to members and their guests as low as 50c (cf Branford, A Dictionary of South African English). On this occasion, according to the appellant, the entrance fee was R20,00. In return he was entitled to drink as much as he wanted. He drank during the entire day and by nightfall was thoroughly intoxicated, or so he claimed. In his evidence-in-chief the appellant stated:

> "Right, what happened that evening? -- I don't recall everything that happened that particular evening. As I have already said, I saw the two state witnesses, that is Johannes and Julia at that stokvel. Their two children were also there at the stokvel. At a certain stage the deceased was with me and I saw myself trying to put my private part into her private part, but I cannot tell how did she come to me, because that was the first thing that happened in my life and thereafter I saw myself already at home. I don't know how did I get home, but I think I walked home and on my arrival at home at one stage I wanted to urinate and at that time I saw blood stains in the vicinity of my trouser's fly. I then got frightened and I went to Bophelong to one of my relatives and I started thinking what could have happened, but even at that stage I could not recall what happened."

Under cross-examination his memory deteriorated even further and he eventually declined to respond to any

questioning about the episode. His professed loss of memory cannot be reconciled with the various versions he had tendered before the trial commenced. On 12 July 1991, six days after the incident, he had made a statement to a magistrate, the admissibility of which was not contested. In it he said:

> "Op Saterdag 1991-07-06 was ek by Hostel 3, Sebokeng. Daar was 'n stokvel by een kamer en ons het daar drank gedrink. Dit was ek, die klaer en die klaer se vrou. Ek het wel die verkragting gepleeg. Ek het die kind gevat en na die oop veld langs die hospitaal gevat en haar verkrag. Die kind is nog klein maar ek kon nie die ouderdom skat nie. Ek het net die kind 'n bietjie verkrag - ek het gemeenskap gehou met haar. Ek het die kind daar gelos. Ek het nie 'n lang tyd met haar gevat nie. Ek het toe huis toe gegaan. Ek het probeer om my geslagsdeel in die kind se geslagsdeel te sit maar dit kon nie, ek het 'n tweede keer probeer maar dit kon nie ingaan nie. Ek het die kind toe gelos en huis toe gegaan. Gister het die kind se pa saam met die Comrades gekom en gesê hulle gaan my brand. Die speurder kom en vat my weg van die Comrades af."

On 15 July 1991 the appellant pleaded guilty to a charge of murder and, on being questioned by the magistrate, stated:

> V Wat het gebeur, daar by die hostel?
>
> A Dit was ek en die oorledene se ouers. Ons was by 'n "Stock Fell" gewees en ons het almal gedrink. Die "Stock Fell" was by Sebokeng Hostel.
>
> Ek het met die kind, die oorledene, wat 'n kleinkind van my is, na buite toe gegaan.

> Ek het probeer gemeenskap hou met die kind, maar ek kon haar nie penetreer nie.
>
> Ek het twee keer probeer om te penetreer maar kon dit nie regkry nie.
>
> Ek het toe die kind daar gelos en gaan slaap.
>
> Ek het later gehoor op Donderdag die 11.7.1991 gehoor die kind is oorlede.
>
> Ek het baie bier gedrink asook "Gin" Jenewer. Ek kan nie alles onthou wat daar gebeur het nie."

A plea of not guilty was thereupon entered. At the trial proper certain photographs taken of a pointing out were formally admitted by the defence. The state rid not lead evidence about the pointing out but in his evidence-in-chief the appellant said, apropos of a photograph taken a few yards from the place where the deceased's body was discovered:

> "In photo number 2 I was pointing out the place where the incident happened, because I also told them it might be around there where I am pointing.
>
> What might be around there where you pointed out? -- I said to the police, it might be the place where I did this to the deceased.
>
> Did what to the deceased? — Where I attempted to rape the deceased."

In the light of these explanations the differences in detail as to what occurred at the hostel before the appellant disappeared with the deceased, have little bearing on the real

issues in the case.

The first such issue is whether the medical evidence supports a conviction of murder rather than of culpable homicide.

The post mortem examination was conducted by Dr A s Niemann on 11 July 1991. He also testified. The main points made by him were the following:

(a) He described the appearance of the body in his report in the following terms:

> "Die anus en die vagina is groot oopgeskeur met fekale materiaal wat die hele area besoedel."

(b) Although the injuries suffered by the deceased were serious not a great deal of force would have been required to inflict them, since the tissues of a nine month old child (which was the doctor's estimate of her age) are particularly soft.

(c) According to Dr Niemann it was not possible for him to conclude whether the deceased died immediately after these injuries were inflicted on the deceased, or only after a few

hours. That is the reason why he found the cause of death to be: "Moontlik verkragting". Under cross-examination he elaborated as follows:

> "Would the injuries as described have caused the death of the deceased? -- Well I can speculate on this, what I would think that after these injuries the child could have been unconscious for a period of time and this being in winter time during July, which is a very cold period of the year, and the child lying in the open, everything together can be the cause of death. But that is merely speculating now, but it could have happened."

And again:

> "Alles in ag genome kan ek hierdie tipe afleiding maak dat die kind in die winter in die veld gelê het na erge besering en dan dat blootstelling moontlik bygedra het tot die oorsaak van die dood."

The argument based on the evidence of Dr Niemann, if 1 understood it correctly, was this. Dr Niemann was unable to state exactly when the deceased died. She could have died immediately as a result of the injuries described by Dr Niemann. Accordingly it remains a reasonable possibility that death was instantaneous when the appellant raped her. If that is so the subsequent exposure of the deceased to the elements became causally irrelevant. And since little force was

required to inflict these injuries it cannot be said that the appellant must of necessity have appreciated, when he raped her, that this would cause her death. Consequently, lacking the requisite dolus, he should at worst for him have been convicted of culpable homicide.

There may have been some merit in this approach if the appellant had testified that he had noticed, after violating the deceased, that she was dead or dying and that he then left her body in the veld. But that was not his evidence. And in the absence of such testimony Dr Niemann's reluctance to commit himself to the precise moment when the deceased died cannot support the hypothesis that the appellant believed her to be dead when he abandoned her in the veld. The sexual assault and the abandonment of the deceased comprised one uninterrupted course of conduct spurred on by a single state of mind, namely, that the appellant was conscious of the likelihood that she might die but remained indifferent to her fate. She did die. He caused her death. In law he intended it to happen.

But it was also argued on behalf of the appellant that he was so befuddled by drink as to have been incapable of forming the requisite intention to murder. Admittedly, according to counsel, he did have the intention to rape - since the sexual assault on the deceased could only have been deliberate - but he lacked the intention to murder. That is why counsel persevered with the appeal against the murder conviction but not the rape. 1 am not clear how a man can simultaneously be too drunk to murder but sober enough to rape. But it is not necessary to pursue the point since it is plain on the facts, as the court a quo found, that the appellant, judging from his appearance, his actions and his subsequent accounts of what had happened, was not behaving mindlessly, without realisation of the enormity of his actions. The deceased's parents both testified that the accused was walking and talking normally; they entrusted the child to his care; he carried her under his lumberjacket; he dodged them with the pretext that he wanted to urinate; thereafter he carried her into the veld for 300 paces or so; he undressed her and placed her diaper in a

plastic bag; after raping her he made good his escape until the Comrades caught up with him two days later. Afterwards, on different occasions, he gave substantially the same account, with enough detail to make it plain that his professed amnesia under cross-examination was a mere pretence. Given that he acted impetuously, perhaps even irrationally, in the sense that if he had given the matter any thought he would have realised that his involvement would inevitably be exposed, it was still not the behaviour of a man who was unmindful of what he was doing.

The appellant's conviction on the rape charge was not, and his conviction on the murder charge cannot, be disputed. The appeal against the appellant's convictions is to be dismissed.

1 turn to the appeal against the sentences. The appellant was twice sentenced to death. Leaving aside, for the moment, the constitutionality of such a sentence in the light of sections 9 and 11(2) of the Constitution of the Republic of South Africa, Act 200 of 1993, as amended, this

court is enjoined to determine whether those sentences were the only proper sentences in the circumstances. That was the considered view of the court a quo, mainly on the grounds that the aggravating features greatly outweigh the mitigating features and that "this is the type of case where ... retribution should come to the fore." The demands and hence the interests of society must undoubtedly be taken into account and may indeed be an overriding factor. In this instance the conduct of the appellant was so depraved, so perverse, that a lesser sentence than the death sentence might well not appease the outrage felt by the community, in particular that section of the community most directly touched by the death of the deceased. His conduct, in a word, was sub-human and one can readily appreciate why the court a quo treated it as an extreme case meriting the extreme penalty.

Yet his behaviour must not be judged solely on the strength of its tragic consequences. And if it is viewed in context there are one or two factors rendering it marginally less reprehensible. The appellant, to begin with, was a

youngster. He had also been drinking at the stokvel since early that morning. This is confirmed by the deceased's father. He drank beer and what he later described as "hot stuff". Liquor can arouse senses and inhibit sensibilities. It is for the state to discount it as a mitigating factor, to show that it did not materially affect the appellant's behaviour. The appellant was most likely not thinking rationally when he abducted the deceased. He had been carrying the child in the presence of her parents. He was known to them. If anything happened to the deceased, if it was thought that someone had interfered with her, he would immediately be suspected. It might be that he mistakenly believed that he could have intercourse with her without it being detected but at the very least he must have realised that to carry her into the night for more than 300 paces would cause concern and suspicion and require him to account for his absence with the child. And once she was in fact injured he probably panicked. He fled leaving the deceased to her fate. It is doubtful if he consciously desired her to die. That

would have served no purpose. She was too young to implicate him in any event. Her death was a sequel to the rape, the one evolving from the other. If, therefore, the death sentence were to be the only proper sentence it should be imposed for the rape rather than the murder, even though, notionally at any rate, murder ranks as a more serious crime than rape.

The case is on the borderline. But in the end one cannot ignore the possibility that the liquor the appellant had consumed during the day, combined with his immaturity, impaired his faculties and loosened his grip on events. He undoubtedly had the volition to act. He knew what he was about. But he was less in command of himself than he would have been if he had not been drinking. And in the final analysis one cannot confidently say that it did not contribute to the enfolding of the events ending in the death of the deceased.

The court a quo came to the opposite conclusion: while the state had not discharged the onus of proving that the accused's conduct was not influenced by liquor, it did not, in

the court's view, play a significant role. What decided the matter for the court a quo was the appellant's reaction the next morning, after the effect of the liquor had presumably worn off and he noticed that there was blood on his trousers. Yet he made no effort to discover whether the deceased was still alive and whether he could render her assistance. This consideration, in my opinion, is not conclusive. It demonstrates his state of mind the next morning, that he was solely concerned about himself and suffered no real remorse. It does not show that the liquor had not affected his better judgment the night before.

Viewed dispassionately it seems to me that one cannot discount the features I have mentioned: his youthfulness, the liquor he had consumed and, in the context of the murder count, the possibility that he lost his head when he realised that the child was injured and that he would be held accountable.

On that approach the death sentences were not the only proper sentences to be imposed. In the result no

constitutional issue is involved and no obstacle exists which prevents this court from disposing of the appeal.

What then should be the proper sentences? The appellant proved himself to be so depraved, so lacking in remorse, that he ought for ever to remain an outcast from society. Anything less than life imprisonment would in my opinion not be adequate. But to impose life imprisonment for the rape and a lesser sentence of imprisonment for the murder, to run concurrently with the life imprisonment, would not reflect the reality that in sequence and intent the rape and the murder constituted a single continuing event. This appears to me to be one of those exceptional cases where, because of its own peculiar circumstances, it would not be inappropriate to take several counts together and to impose a globular sentence. This court has in the past commented unfavourably on that practice when adopted by lower courts. Thus it was stated by Trollip JA in S v Young 1977 (1) SA 602 (A) 610E-G:

> "That procedure [i.e. taking different counts together for the purpose of sentence] is neither sanctioned nor prohibited by the Criminal Procedure Act, 56 of 1955.

> Where multiple counts are closely connected or similar in point of time, nature, seriousness, or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused. But according to several decisions by the Provincial Divisions (see, e.g., S. v. Nkosi, 1965 (2) S.A. 414 (C), where the authorities are collected) the practice is undesirable and should ony be adopted by lower courts in exceptional circumstances. The main reason for frowning upon the practice mentioned in these cases is the difficulty it might create on appeal or review, especially if the conviction on some but not all of the offences were set aside. As any sentence imposed by this Court is definitive, that objection to the practice is, of course, not applicable."

(See also S v Mofokeng 1977 (2) SA 447 (0) 448H-449A; S v Immelman 1978 (3) SA 726 (A) 728H; S v Tshomi en 'n Ander 1983 (3) SA 662 (A) 665F-666H; S v Nkosi 1993 (1) SACR 709 (A) 7l7h-i; S v Keulder 1994 (1) SACR 91 (A) 101j-102b).

None of the problematic features mentioned in the cases relating to this procedure is of application in this one, and I accordingly propose to follow it.

The following order is made:

1. The appeal against the convictions on counts 1 and 2 is dismissed.

2. The appeal against the sentences imposed in respect of counts 1 and 2 is upheld.

3. The death sentences imposed are set aside and the following sentence is substituted in their stead: A sentence of life imprisonment in respect of counts 1 and 2, taken together for that purpose.

P M Nienaber JA

Van Heerden JA)
Concur
Harms JA)