NOT REPORTABLE

REPUBLIC OF SOUTH AFRICA
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CASE NO: 203/2000

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

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In the matter between:

J P FOURIE
APPELLANT

and

THE STATE
RESPONDENT

CORAM: **HARMS, SCOTT and MTHIYANE JJA**

DATE OF HEARING: **22 MAY 2001**
DELIVERY DATE: **1 JUNE 2001**

Summary:

Petition - whether scope of appeal can be extended to deal with matters finally determined on petition i t o s 316(a) of Act 51 of 1977

JUDGMENT

. . .

MTHIYANE JA

MTHIYANE JA:

[1] The appellant was arraigned before the Witwatersrand Local Division (Nugent J sitting with one assessor) on charges of kidnapping, rape and murder. He was found guilty of kidnapping and attempted rape and of culpable homicide and sentenced to 12 years' imprisonment for the first two (they were taken as one for the purposes of sentence) and 16 years for culpable homicide. The sentences were ordered to run concurrently. Leave was given to appeal against the conviction of culpable homicide on a limited basis, and against the sentences in respect of all the charges. The appellant however was refused leave to appeal against his conviction for kidnapping and attempted rape. A subsequent petition for leave to appeal against his convictions for kidnapping and attempted rape was dismissed by this Court. He did not petition for leave in relation to the culpable homicide conviction on a wider basis as that granted by Nugent J.

[2] The events which gave rise to the appellant's convictions occurred on 6 October 1997 in an office building in Bedfordview. The deceased was a married woman, aged 26 years and employed on the first floor of the building. The appellant worked in the same building.

[3] The evidence was that the deceased arrived at the building at about 7:42am. Some two hours or so later her brutally battered

body was found in a cubicle on the second floor of the building, lying face down in a patch of blood on the concrete floor. She was dressed in a short black skirt but was stripped from the waist up. Her brassiére had been ripped apart and her panties were torn. Her white T-shirt type blouse was lying crumpled near her right shoulder. A strip of felt material was wound loosely around her neck and shoulders while the rest was draped across her back and trailed onto the floor. She had a shoe on her right foot and the other shoe was lying in the corner.

[4] An examination revealed a number of injuries to her head and body indicative of an attempted rape. The cause of her death was attributed to either a broken neck, suffocation or head injuries.

[5] There is no evidence as to when and how the deceased left her office on the first floor and ended up on the second floor. A Mrs Malherbe who worked for an attorney on the same floor as the deceased, testified that she found the door to the deceased's office wide open. Her handbag, keys, cell phone, lunch box, cheque book and other personal belongings were on her desk and the radio was on. This struck Mrs Malherbe as unusual and caused her some concern because the deceased was not the type who would leave her personal belongings lying about.

[6] The case against the appellant was that shortly after the deceased arrived at work, he abducted her from the first floor and took her to the second floor. Along the wall of the passage on the first floor some black marks were found, which the State alleged to be shoe marks. One of her earrings was found on the landing. There were no eyewitnesses to the

commission of the offences and the case against the appellant rested to an extent on circumstantial evidence.

[7] The appellant's version was that he had on the previous Friday arranged to meet the deceased on the second floor on the Monday. She had been his casual lover for three months prior to her death. When he reached the second floor the deceased was waiting for him in a room next to the cubicle where her body had been found. They kissed. He suddenly told her that their love relationship should come to an end. The deceased was upset, became violent and started to attack him. He then pushed her away, causing her to stagger backwards (for over 2 to 3 metres) and hit the back of her head against the wall. As a consequence she fell and lost consciousness. He approached her, shook her by the shoulders and when he got no response, and believing her to be unconscious but alive, he panicked, ran out of the room onto the balcony, dropped onto the ground and fled the scene. He denied having caused her injuries or having attempted to rape her and furthermore denied that he had met her in or thrown her body into the cubicle.

[8] He raised the possibility that after he had fled from the scene another unknown person may have stumbled upon her, attacked her and attempted to rape her and then dumped her body in the cubicle. For this supposition much was made of a semen stain found on the deceased's blouse. It was common cause that the DNA tests performed on the stain established that it was not from the appellant or the deceased's husband or, for that matter, another suspect. The stain was visible but its age

could not be established. The argument was therefore that the stain did not exclude the possibility that its depositor was the person who had attempted to rape her and who killed her.

[9] Nugent J, in a detailed judgment, rejected the evidence of the appellant. He relied on a number of incontrovertible objective facts for his conclusion concerning his guilt: a blood stain emanating from the deceased was found on one of the appellant's shoes, a bite and a number of scratch marks found on the accused, his admission that he had “killed” her shortly after the event without any excuse or explanation tendered , and the clear indications that she was forcibly removed from her office (the earring lost along the way and the marks against the wall seen with the fact that the bite mark on the appellant suggests that she was at that stage over his shoulder.

[10] The presence of the semen stain did not cause Nugent J that much of a problem. The aforementioned facts, he held, are conclusive of the appellant's involvement in the attack. The semen stain does not exclude the appellant from the scene. It does no more than to exclude him from having deposited it. It is highly improbable that another person may have stumbled upon the deceased as suggested. However, the stain may be consistent with the presence of an accomplice in the attack. The possibility that an accomplice was involved does not affect the appellant's guilt which would then be based upon a common purpose.

[11] As alluded to, the appellant was granted leave to appeal against the conviction for culpable homicide on a limited basis. In granting leave, Nugent J had regard to the fact that the cause of death may have been either the broken neck, a throttling or the head injuries. He said there was a reasonable prospect that another court might find (assuming that there was an accomplice) that the evidence was not sufficient to justify the inference that the act which caused the death of the deceased must necessarily have fallen within the terms of the common purpose.

[12] As to the kidnapping and attempted rape charges, one would have thought that with the petition for leave to appeal against the conviction on

the kidnapping and attempted rape charges having failed, this appeal would now focus only on the appeal against the conviction for culpable homicide and against sentence. Not so, contended counsel for the appellant. Relying on *Ngqumba & 'n Ander v Staatspresident en Andere* 1988(4) SA 224 (A), he submitted that the appeal should be dealt with on a wider basis and urged us to extend its scope so as to allow the appellant to attack, not only the conviction of culpable homicide, but also the convictions on the kidnapping and attempted rape charges. It was submitted that if the scope of the appeal is not extended an injustice might occur. Counsel reminded us of this Court's "inherent reservoir of power" to regulate procedure in the interests of the proper administration of justice. See *S v Malinde and Others* 1990(1) SA 57 (A) at 67 B; *Sefatsa and Others v Attorney-General, Transvaal and Another* 1989(1) SA 821 (A) at 834 E.

[13] The power to regulate its procedure does not include the power to hear a matter which is not the proper subject of an appeal. This is simply because this Court's appellate jurisdiction is not an inherent jurisdiction (*S v Mamkeli* 1992 (2) SACR 5 (A)). Section 168 of the Constitution did not change the position. *Ngqumba* is authority for the proposition that even in a criminal case the leave to appeal may be limited to one or more grounds in the case and if the trial court did so, this Court has the power to extend the scope of the appeal to cover other grounds. But, as was pointed out in *Mamkeli* at 7f-i:

"An appeal under s 316 [of the Criminal Procedure Act] could, depending on the extent of the leave granted, be against the conviction or against the sentence (or both) or any order following thereon. Where leave had been granted to appeal against sentence only, the Court was not competent to consider the merits of the conviction (*S v Matshoba and Another* 1977 (2) SA 671 (A) at 677G-H; *S v Cassidy* 1978 (1) SA

687 (A); *S v Langa en Andere* 1981 (3) SA 186 (A) at 189H). Where it emerged in such a case that there were reasonable prospects of a successful appeal against the conviction, the only available remedy was to postpone the appeal against sentence with a view to affording the appellant an opportunity to bring an application for leave to appeal against his conviction as well. (Compare *Matshoba's* case at 678H.) Naturally, had an application to do so already been refused by the trial Judge and by the Chief Justice, this course was no longer available."

The consequence of the refusal of a petition is that the decision taken, becomes final. Sections 316(9)(a) of the Criminal Procedure Act 51 of 1977 reads:

> "The decision of the Appellate Division or of the Judges thereof considering the petition, as the case may be, to grant or refuse any application, <u>shall be final</u>."
>
> [Emphasis added.]

It therefore follows that the conviction of the appellant on the kidnapping and attempted rape charges was finally decided when the petition for leave to appeal was refused. I may, however, add that having studied the whole record and counsel having been given full opportunity to argue the case on the merits, I am satisfied that no injustice has occurred in this case.

[14] On the basis of *Ngqumba* is it however possible to reconsider the scope of the appeal relating to culpable homicide, and to permit the appellant to argue other issues in this regard. But the facts of the present case do not permit us to do so because this could lead to inconsistent conclusions in one and the same case. To illustrate the

point. The conviction on the charges of kidnapping and attempted rape were predicated on the finding by the trial court (and this Court when considering the petition) that the appellant was involved in those crimes. These findings place him on the scene, attacking the deceased. If the scope of the appeal is widened in the manner sought by the appellant, it would mean that the matter will have to be approached on the basis that the appellant may not have been present at all, thus creating the potential of findings inconsistent with the final and binding rulings. That approach would fly in the face of the elementary principles of *res judicata*. A court cannot make conflicting findings in the same proceedings. There is only one possibility: the appellant was either involved or he was not involved.

[15] It follows that the appeal can only be dealt with on the limited ground on which leave was granted, namely whether, on the assumption that there may have been an accomplice, an inference can be drawn that the act which caused the death of the deceased fell within the common purpose between the appellant and the accomplice.

[16] Accepting Nugent J's finding that there was no latecomer (as I am bound to do), I have some difficulty with accepting the possibility of the appellant having had an accomplice. His own version excludes the possibility of there being any other person who participated in the assault,

the attempted rape and the killing of the deceased. Only one person jumped from the balcony. But even if there were an accomplice, I do not believe that there is merit in the argument that the whichever act caused the death, it was not within the contemplation of the appellant. The very nature of the sexual attack proves the opposite. Had there been a concerted attack in order to rape, it would merely aggravate the position of the appellant. The deceased was slightly built. The appellant was described as a 1.93 metre tall man weighing 97 kilograms. The trial judge noted that, when standing alongside the appellant, the top of the deceased's head would have reached no higher than his armpit. The scratch marks and the other injuries on the appellant and deceased's blood on his shoe confirm that she tried to defend herself. The appellant was unable to offer a satisfactory explanation for these scratch marks and in particular the fresh scratch mark in the pubic area. He was unable to explain satisfactorily how he got the blood on his shoe, why he fled the scene, why he had to jump over the balcony, and why he admitted without qualification that he had killed the deceased.

[17] Having regard to all these factors I am satisfied that the appellant's guilt on the charge of culpable homicide was proved beyond a reasonable doubt and that he was correctly convicted.

[18] It remains to consider the question of sentence. Counsel for the

appellant submitted that the sentence of 16 years' imprisonment for culpable homicide was harsh in the extreme and does not fall within the accepted range of sentences for this type of crime. Counsel for the State did not disagree but contended that the 16 year sentence was justified in the circumstances. It was not submitted that the sentence for the other crimes was out of order.

[19] Although Nugent J did not misdirect himself on the facts, I am satisfied that the sixteen years for the culpable homicide, taken in isolation, cannot be justified. We are therefore at large to interfere and to impose what we consider to be the appropriate sentence.

[20] In considering the question of sentence afresh I bear in mind that the crimes for which the appellant was convicted were committed at the same time and place, and in a single, unbroken sequence. In those circumstances I am of the view that justice demands that the incident be viewed as one whole and, in order to avoid any duplication and any resultant undue harshness, that a composite sentence be imposed (cf *S v Young* 1977 (1) SA 602 (A) 610 G). This will mean that the appeal against the twelve years' imprisonment must also succeed, albeit on pragmatic grounds.

[21] It cannot be overlooked that the appellant committed a savage attack on a defenceless woman. Society and women, in particular,

need to be protected from people of the appellant's ilk. This Court will be failing in its duty if the appellant were not removed from society for a long time. Taking all the relevant factors into account, a composite sentence of 15 years' imprisonment on all the charges would be appropriate. It will suffice, I believe, to bring home to the appellant and to anyone who may be tempted to follow his example the seriousness of the matter.

In the result the following order is made:

1. The appeal against the conviction of culpable homicide is dismissed.

2. The appeal against the sentences imposed in respect of attempted rape, kidnapping and culpable homicide, succeeds.

3. The sentences imposed in respect of kidnapping, attempted rape and culpable homicide are set aside. A sentence of 15 years' imprisonment is imposed.

K K MTHIYANE

JUDGE OF APPEAL

HARMS JA) Concur
SCOTT JA)