Editorial note: Certain information has been redacted from this judgment in compliance with the law.

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
Case no: 456/03

In the matter between:

N.K. **Appellant**

and

THE MINISTER OF SAFETY AND SECURITY **Respondent**

Coram : **Scott, Mthiyane, Van Heerden JJA, Erasmus *et* Comrie AJJA**

Date of Hearing : **2 September 2004**

Date of delivery : **11 November 2004**

Summary: **Policemen guilty of rape – whether rape committed in the course and scope of their employment so as to render the respondent vicariously liable – order in para 9**

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JUDGMENT

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SCOTT JA/…

SCOTT JA:

[1] The appellant, a young woman in her early twenties, was raped by three policemen in the early hours of 27 March 1999 in circumstances described more fully below. She sued the respondent and the three policemen for damages in the Johannesburg High Court but subsequently abandoned her claim against the policemen, each of whom was sentenced to life imprisonment for rape and 10 years' imprisonment for kidnapping. The sole question in issue in the court below was whether the respondent was vicariously liable for the conduct of the rapists. The parties agreed upon a statement of facts and no evidence was led at the trial. Flemming DJP ordered absolution from the instance but granted leave to appeal to this court.

[2] The facts are shortly these. The appellant and her male companion had a disagreement at a place of entertainment in Westonaria and he refused to take her home. It was then about

3 am on 27 March 1999. She went to a nearby all-night shop at a petrol station to telephone her mother to ask the latter to come and fetch her. The person on duty at the shop explained that the telephone could take incoming calls only. In the meantime, a police vehicle pulled into the petrol station. The occupants were the three policemen. They were all in uniform and all enjoyed the rank of sergeant. The one entered the shop and, on overhearing the appellant's request to use the telephone, offered to give the appellant a lift home. She accepted, climbed into the car and sat in the back. The vehicle drove off in the direction of the appellant's house. The appellant did not talk to the policemen but at some stage they began speaking to each other in an African language which she did not understand. Thereafter she dozed off but awoke when the vehicle slowed down at a stop street. Instead of proceeding in the direction of her house the driver executed a turn to the left. She remonstrated with him and told him that they were on the wrong road. She was immediately told to keep quiet and one of the others threw a police jacket over her head and held her down. She resisted with fortitude, kicking and screaming, but to no avail. The jacket over her head was pulled tight and she was struck a hard blow to the stomach. The vehicle stopped and she bravely continued to struggle. She felt a knife at her throat and was told to keep quiet or she would be killed. Despite her resistance she was

overpowered and forcibly raped by each of the policemen in turn. When they had finished they drove off leaving her to find her own way home.

[3] As previously indicated, the sole basis on which it was sought, both on the pleadings and in argument, to recover damages from the respondent was that he was vicariously liable for the conduct of the rapists. The conduct relied upon was (a) the actual rape of the appellant by each of the three policemen and (b) the failure of each to intervene when one or other of their co-rapists was raping the appellant.

[4] The legal principles underlying vicarious responsibility are well-established. An employer, whether a minister of State or otherwise, will be vicariously liable for the delict of an employee if the delict is committed by the employee in the course and scope of his or her employment. Difficulty frequently arises in the application of the rule, particularly in so-called 'deviation' cases. But the test, commonly referred to as the 'standard test', has been repeatedly applied by this court. Where there is a deviation the inquiry, in short, is whether the deviation was of such a degree that it can be said that in doing what he or she did the employee was still exercising the functions to which he or she was appointed or was still carrying out some instruction of his or her employer. If the answer is yes, the employer will be liable no matter how badly or dishonestly or negligently those functions or instructions were being exercised by the employee. (See eg *Feldman (Pty) Ltd v Mall*

1945 AD 733 at 774; *Viljoen v Smith* 1997 (1) SA 309 (A) 315D-317A; *Minister of Safety and Security Services v Jordaan t/a Andre Jordaan Transport* 2000 (4) SA 21 (SCA) para 5 and more recently *Minister van Veiligheid en Sekuriteit v Japmoco BK* h/a Status Motors 2002 (5) SA 649 (SCA) paras 11-16 and *Minister van Veiligheid en Sekuriteit v Phoebus Appollo Aviation BK* 2002 (5) SA 475 (SCA) paras 8-18.) Notwithstanding the difficult questions of fact that frequently arise in the application of the test, it has been recognised by this court as serving to maintain a balance between imputing liability without fault (which runs counter to general legal principles) and the need to make amends to an injured person who might otherwise not be recompensed. From the innocent employer's point of view, the greater the deviation the less justification there can be for holding him or her liable.

[5] As far as the actual rape of the appellant is concerned, it was ultimately conceded by counsel for the appellant that if the test outlined above were to be applied, there would be no vicarious liability on the part of the respondent. The concession was well made. No doubt a rape which is shown to have been committed to intimidate for the purpose of illiciting information in solving a crime could possibly result in the respondent being held vicariously liable, but nothing like that occurred in the present case. By the very nature of the crime, the circumstances in which a policeman could commit rape in the course and scope of his

employment must be extremely rare. In the present case, everything points to the three policemen being motivated by nothing more than self-gratification. Acting in concert, they deviated from their functions and duties as policemen to such a degree that it cannot be said that in committing the crime of rape they were in any way exercising those functions or performing those duties.

[6] Counsel submitted, however, that a different test should be applied. He contended that once it was shown that the policemen were on duty when they gave the appellant a lift and that in offering to take her home safely they were acting within the course of their duties as policemen to prevent crime, then by the very act of deviating from those duties they rendered the respondent vicariously liable. In other words, it was the deviation itself that rendered the respondent liable and the degree of the deviation was wholly irrelevant. This is not the law and never has been; nor was counsel able to refer to any authority in support of such a novel proposition. In my view it is without merit.

[7] The further argument advanced on behalf of the appellant was that each policeman was under a continuing duty to prevent the commission of crime and that therefore while one was raping the appellant the other two remained under a duty to intervene. Accordingly, so the argument went, the respondent was vicariously liable by reason of the failure on the part of the other two to intervene. Counsel sought to rely on *Minister*

van Polisie v Ewels 1975 (3) SA 590 (A). The reliance was misplaced. The issue in that case was whether the failure on the part of a number of policemen to intervene when another, one Barnard, assaulted the plaintiff was wrongful for the purpose of establishing Aquilian liability. The matter was decided on exception and the decision was predicated on the assumption that the policemen failing to intervene were acting in the course and scope of their employment with the Minister of Police (at 594F) while Barnard, also a policeman, was not (595F). In the present case the element of wrongfulness is not in issue. The conduct of all three policemen was not only wrongful, it was criminal from the time they conspired to rape the appellant until the time the attack ended. Indeed, the inference is overwhelming that the three policemen formed a common intention to rape the appellant at some stage before the driver turned off the road leading to the appellant's house and drove to the spot where all three raped her. Each gave support to the others in committing the crime. If only one had physically raped the appellant, all three could nonetheless have been convicted of rape. They were at all times acting in pursuance of a common purpose. To suggest, therefore, that one would have been acting in the course and scope of his employment while another physically raped the appellant, would cease to so act when it was 'his turn', and then resume acting in the course and

scope of his employment while the third raped the appellant, borders on the absurd.

[8] Yet a further argument that was raised is that the common law must be developed so as to render the State vicariously liable in a situation such as the present. How this could be done without imposing absolute liability on the State was not spelt out; it was simply left in the air. It is, however, unnecessary to consider the question, which in any event would best be dealt with by the legislature should a change in the law be considered necessary. In the recent decision of this court in *Minister van Veiligheid en Sekuriteit v Phoebus Apollo, supra,* the facts, shortly stated, were that three policemen had obtained information as to where stolen money had been hidden; they travelled there in an official police vehicle, identified themselves as police officers to the father of the robbers and showed him their certificates of appointment. They then attached and stole the money. This court held the appellant not to be vicariously liable. In doing so it affirmed and applied the standard test as set out above. The appellant appealed to the Constitutional Court. The decision of that court is reported: *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 (2) SA 34 (CC). It appears from the judgment of Kriegler J that leave to appeal had been granted on the strength of a contention similar to the one advanced in this court, namely that because the case involved an infringement of the appellant's rights

under the Constitution there was a case for ‘developing the law relating to the vicarious liability of the State for delicts committed by police officers’. In that case the right in question related to the right to be protected in one’s property. Nonetheless, much of the reasoning of the court in dismissing the appeal is of equal application to a case such as the present. The court considered first an argument based on *Carmichele v Minister of Safety and Security and another* 2001 (4) SA 938 (CC) and observed that the case was not analogous as it dealt with the issue of wrongfulness. The same is true of a similar argument advanced in this court. In passing I should mention that cases such as *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) and *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) likewise dealt with the issue of wrongfulness and accordingly are of no assistance in resolving the issue of vicarious liability. In answer to a further contention Kriegler J said (at para 6):

‘It was also contended in argument that the respondent should be held liable for the wrongful acts of the policemen whether they were acting in the course of their employment or not. No convincing argument was, however, advanced to sustain this submission, or to show why the common law should be developed so as to impose an absolute liability on the State for the conduct of its employees committed dishonestly and in pursuit of their own selfish interest.’

Finally the learned judge observed (at para 9):

‘It is not suggested that in determining the question of vicarious liability the SCA applied any principle which is inconsistent with the Constitution. Nor is there any suggestion that any such principle needs to be adapted or evolved to bring it into harmony with the spirit, purport or objects of the Bill of Rights. On the contrary, counsel for the appellant expressly conceded that the common-law test for vicarious liability, as it stands, is consistent with the Constitution. It has long been accepted that the application of this test to the facts of a particular case is not a question of law but one of fact, pure and simple.’

It follows that in my view the ‘constitutional’ point raised by counsel is similarly without merit.

[9] The appeal is accordingly dismissed with costs.

[10] I would add just this: I have the deepest sympathy for the appellant, as I do for the thousands of women who are raped every year in this country. Ideally, they should all receive compensation, but that is something for the Legislature and beyond the jurisdiction of this court.

D G SCOTT
JUDGE OF APPEAL

CONCUR:

MTHIYANEJA
VAN HEERDEN JA
COMRIE AJA

AR ERASMUS AJA

[11] I have had the privilege of reading the judgment of my colleague Scott. I respectfully agree with his findings and the reasons therefor. I would, however, comment on the contentions of counsel for the appellant on the question of the respondent's liability for breach of a legal duty by members of the South African Police Service ('SAPS').

[12] Counsel submits that on the night in question, a legal duty came into existence in terms whereof the SAPS was required to protect the appellant from harm. The duty, so he contends, extended to all members

of the SAPS in general and to the three policemen in particular. Counsel's contention focuses on the fact of the breach of that duty rather than on the act constituting the breach.

[13] It is well settled that the wrongful and negligent breach of a legal duty by a policeman acting within the course and scope of his duty attracts liability for the State for damage resulting from the breach. See: the *Carmichele* series of cases;[1] *Van Eeden vs Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA). In *Van Eeden* a policeman had negligently allowed a dangerous serial rapist to escape from custody. The escapee thereafter sexually assaulted the claimant. Vicarious liability, negligence and quantum were conceded. This court held the State liable for the damages arising from the assault. The court found that the policeman had acted in breach of a legal duty which existed in the particular circumstances of the matter. The present matter differs from the situation in that case in that the acts of the three policemen, which constituted the breach, amounted to intentional criminal conduct falling outside the ambit of their employment. (I refer to the three policemen as the second, third and fourth defendants.)

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[1] *Carmichele v Minister of Safety and Security and another* 2001 (1) SA 489 (SCA); *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); *Carmichele v Minister of Safety and Security and another* 2003 (2) SA 656 (C); *The Minister of Safety and Security and another v Carmichele* 2004 (3) SA 305 (SCA).

[14] I accept for purposes of this judgment that the three defendants owed the appellant more than a general duty of care. I, further, accept that in the particular circumstances obtaining at the time, considerations of reasonableness (the legal convictions of the community and legal policy, as subsumed by constitutional values) placed a legal duty upon fourth defendant[2] to protect appellant (*Minister van Polisie v Ewels* 1975 (3) SA 850 (A)). That duty extended to the SAPS, and through it to all its other members, in particular the second and third defendants. Relevant in that regard were the circumstances in which the appellant, a young woman, found herself that night; the nature of the duties that the three defendants were performing; and the fact that they had the means, the time and the necessary **(**implied**)** authority to assume that legal duty. Due regard must be had to the appellant's fundamental rights under the Constitution,[3] as well as the dictates of the Constitution in regard to the SAPS.[4] The content of the duty was clear and specific: (a) that the fourth defendant would transport appellant from the garage shop in Westonaria to her home in Randfontein, and (b) that the three policemen would protect her from physical and psychological harm from the time of their departure until their arrival at her home. In acting in compliance with

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[2] Fourth defendant is the one who offered the appellant the lift: see para [2] above.
[3] The right to freedom and security of the person (S 12(1)(c) and 12(2)(b)); the right to human dignity (s 10).
[4] The Constitution: s 198, s 205, s 206; The South African Police Service Act 68 of 1995: Preamble, s 13.

that duty, second, third and fourth defendants would act in their capacity and within the scope of their employment as members of the SAPS.

[15] The legal duty subsisted even while the defendants were raping the appellant. In fact, in those terrible moments the duty was immediate and compelling. A policeman cannot unilaterally divest himself of his legal duty, therefore – so the argument for appellant runs – the breach of the duty occurred in the course and scope of the defendants' employment, and accordingly the State was vicariously liable for the consequences of the breach irrespective of the mode or manner in which it occurred. This contention finds support in *Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd* 1992 (3) SA 643 (D). The court held a security company vicariously liable for thefts committed by its security guards while guarding the plaintiff's business premises. Booysen J, after reviewing South African and English authorities, concluded as follows (651H-652A):

'It seems to me that, when considering the liability of an employer for intentional wrongdoing of the servant for his own benefit, it is important to distinguish between those instances in which the principal is simply under a duty not to cause injury to another and those instances in which the principal is in addition under a duty to prevent third parties from causing injury to that person. Where an employer is, unlike an ordinary citizen, indeed under a legal duty to be his brother's keeper or the guardian or custodian of his brother's goods, and he entrusts that function to a servant who then not only omits to perform his duty, but causes the very injury which

it is his and his master's duty to prevent, then, as a general rule, the master will be held liable. It is this feature, that it is the legal duty of the master to prevent harm by third parties, which distinguishes the State's liability for the wrongdoing of policemen, on the one hand, from its liability for wrongdoing of other civil servants and that of an ordinary employer for the wrongdoing of his servants on the other.

The basis of this liability is, with respect, not so much the risk created by policemen but the nature of the duty assumed by the State.'

The following criticism of this decision by Mervyn Dendy 1992 *Annual Survey of South African Law* at 484/5 is, with respect, well founded and effectively puts paid to counsel's contention:

'With respect, it is not convincing to say, as Booysen J did, that the theft of the guards amounted to "mismanagement in the performance of their work", for their act in stealing the plaintiff's property constituted, not the performance of their work, but the very antithesis of it: a person cannot be said to be engaged in furthering a particular purpose (here, the safeguarding of property against theft) when he performs acts in deliberate frustration of the purpose. The truth was surely that when they stole, the guards had abandoned their employment and embarked on a felonious frolic of their own, which took their conduct beyond the ambit of their employment (*see* 1991 *Annual Survey* 425[5]).'

The learned author, further, expressed the view (p 485) that -

'… vicarious liability for intentional wrongdoing must surely be limited in the same way as in the case of negligent conduct on the part of a servant: by applying the

[5]This reference is to the discussion by the author of *Fawcett Security Operations (Pvt) Ltd vs Oman Enterprises (Pvt) Ltd* 1991 (2) SA 441 (ZH), where it was held that a theft by a security guard could be regarded as a mode - albeit an improper one - of doing what was authorised by his employer. This decision would appear not to accord with our law and was reversed on appeal (1992 (4) SA 425 (ZSC).

settled principle that the servant must have been acting within the course and scope of his employment. Intentional wrong-doing would then entail vicarious liability if it was done in furtherance of the employer's business, but not if, as in *Hirsch*, the delict was perpetrated in frustration of the employer's purpose.'

[16] The vicarious liability of an employer arises from the unlawful actions of its employee. If those actions take the employee out of the course and scope of his employment, then liability for the employer cannot arise. That is the case in the present matter in regard to the liability of the first defendant for the criminal acts of second, third and fourth defendants. I must accordingly find, on the law as it stands, that appellant's claim was correctly dismissed in the court *a quo*.

[17] In the result, I would dismiss the appeal with costs.

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AR ERASMUS
ACTING JUDGE OF APPEAL