

SOUTH AFRICA / JUDGMENT

S v Rasedumo and Others (99/0017)

[2000] ZAGPHC 6 (26 January 2000)

[2000] ZAGPHC 6**COURT**

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

99/0017

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IN THE HIGH COURT OF SOUTH AFRICA

(Witwatersrand Local Division)

CASE NO: 99/0017

DATE:26/01/2000

THE STATE

V.

RASEDUMO,TEBOGO WILSON (17)..... First Accused

CHAUKE, THULANI PATRICK (16).....Second Accused

MKHWAYI, JOHANNES GUDTJ (18).....Third Accused

NTULI, ANANIAS (24)Fourth

AccusedTHSABALALA, JABULANE ALPHEUS (19)..... Sixth

AccusedLED WABA, (also known as PHETOE),

TEBOGO PATRIC (23).....Seventh Accused

JUDGEMENT**ON SENTENCE**

WILLIS J:

It is well established in these courts and reflects the accumulated wisdom of many-generations that sentence should fit the criminal as well as the crime, be fair to the state and to the accused, and be blended with a measure of mercy.

It must also reflect the interests of society.

I have received in evidence, reports of probation officers in respect of each of the accused (exhs "NN" to "SS") and taken serious note of the thereof. It is unnecessary to detail an analysis of these reports. They show that all of the accused come from socially and economically deprived backgrounds, that their academic accomplishments are poor and that none of them came from a stable nuclear family. The accused, with regard to the material aspects of the evidence repeated their versions given under oath in the witness box to the probation officers.

None of the accused had any previous convictions. This operates in their favour.

These crimes of rape, robbery and assault with intent to commit grievous bodily harm are very serious indeed. The accused stooped very low to commit them. These crimes illustrate very clearly that crime is the scourge of all law-abiding sectors of our society. In this case, ordinary people living in the most simple of circumstances - in shacks, had their utter vulnerability exploited. Their sleep in the dead of night was cruelly disturbed. They were robbed of possessions that were preciously few. The accused, as a group, forced entry into almost every shack in the yards of properties in the "nines" section of Umthambeka Section of Tembisa and, once inside, proceeded to terrorise the occupants. This group, whom I shall call a gang, raped eight of the women who occupied these shacks. Several of the women were raped repeatedly and by a number of different men. In almost every instance, where the women had boyfriends occupying the shacks .with them, the boyfriends were assaulted by members of this gang. What appeared to be firearms, or at least one firearm, were held by some or at least one of the participants and were from time to time pointed at various of the occupants of these shacks. Money was demanded from the occupants of the shacks and in a number of instances taken. The shacks were, on almost every occasion, looted and ransacked. In almost every instance, items were removed from the shacks.

These crimes were deliberate. They were premeditated. They were ruthlessly executed. Crimes such as these affect society at the core of its being. Ordinary, hardworking citizens live, walk and sleep knowing that they cannot carry on their ordinary, everyday activities without fear for their safety.

I accept in the accused's favour that they were all, in all probability, to some extent under the influence of alcohol at the time of the commission of these offences.

Rape is among the most serious crimes that a person can commit. It is difficult to imagine a more profound invasion of a woman's privacy or a more drastic infringement of her dignity. It is deeply damaging to a woman emotionally and psychologically. Time's sands must run long and slowly for the trauma to heal, if ever it does.

Rape is a radically anti-social act. It is not only an act of humiliation to a woman but it carries with it the risk of the transmission of disease which can be life threatening. There exists the potential of inflicting the most unwanted of pregnancies. The moral consequences of this are appalling. Abortion is a decision that is almost always traumatic and , in some instances,

excruciating; there are those for whom religious conviction prohibits it. And if a child conceived in rape is born, what of that child and who will take care of it? Rape often intrudes upon the commitment between another man and the woman who is the victim to keep the intimacies of their bodily affections exclusively for one another. Rape is thus not only an act of contempt for the woman who is its victim but an act of contempt for the other man to whom she has chosen to commit herself. Rape is an act of violence not only upon the woman who is its immediate victim but an act of violence towards the concept of family. The family is the granite corner-stone of society.

Whatever one's religious views, it is clear, in my view, that Nature intended that giving passion should occur if not in a moment of affection, then at least one of joy. Nature also clearly intended that there should be a choice. Rape, in this sense is, it seems to me, deeply unnatural. It is not simply a perversion of natural desires, a case of natural desires somehow run amok; it is the antithesis of natural sexuality.

The tragedy is that very often the rapist is insufficiently aware of the extent to which his act is not only anti-social but also unnatural. He is furthermore often insufficiently aware of the extent to which every act of rape damages relations between men and women generally in society.

It may be that very often the rapist suffers from feelings of inadequacy and seeks to compensate therefor by a display of power and strength. This is not the tall, towering, majestic strength of a man. Strength without honour, strength without humility, strength without compassion, strength without love is but a pathetic remnant of the strength which it is a male's privilege to enjoy. Paradoxically, the rapist in seeking to display his strength, diminishes himself. He does not enhance the majesty of his masculine sexuality, he beggars it.

The accused have a lot to learn.

In addition to what I have said in the opening lines of this judgement, sentence also has five important functions:

- (i) It must act as a general deterrent, i.e. it must deter other members of the community from committing such acts or thinking that the price for wrongdoing is worthwhile;
- (ii) It must act as a specific deterrence, i.e. it must deter this individual from being tempted to act in such a manner ever again;
- (iii) It must enable the possibility of correction, unless this is very clearly not likely;
- (iv) It must be protective of society, i.e. society must be protected from those who do it harm;
- (v) It must serve society's desire for retribution, i.e. society's outrage at serious wrongdoing must be placated.

Clearly, in this case a lengthy period of imprisonment is warranted in order to serve each of these five functions. I have no doubt that the community as a whole cries out aloud for a lengthy and severe sentence in a case such as this.

We live in a society where it has become a cliché to say that violent crime has reached alarming proportions. Cliches, of course, become clichés because, very often they express a truism very well.

Violent crime instills fear in all law-abiding citizens. It affects the culture in which our children grow up. It adversely affects

confidence in our economy and, in turn, the capacity of our economy to create new jobs. A vicious cycle is set in motion from which there is no easy escape and for which there are no easy solutions. Crimes sue! as these affect not only the victims and their families. And they are not mere statistics. They deter investment. In consequence a vicious cycle of joblessness and more crime is set in motion with relentless force. Part, but certainly not all, of the solution lies in the courts having regard to the function of general deterrence. In other words, lengthy prison sentences are part of the solution but we delude our selves if we believe that this alone will solve our problems with crime. We need jobs, we need more police men and women, prosecutors, magistrates and judges. We need, by earnest endeavour, to increase the efficiency of the sectors in which these persons operate. Above all, we need a culture of non-violence. It is beyond my understanding to know how we can create a culture of non-violence. Perhaps the great institutions of society, such as our Courts can make a contribution by reflecting compassion in their judgements.

The causes of crime are complex. Undoubtedly they require complex solutions. The complexity of the problem and the solution clearly

lies beyond our collective wisdom at the moment.

It has to be accepted that not only do we live in a violent society but that our society has, for the past few decades, undergone great turmoil, suffering and distress. These have been the decades of the accused's life.

Not only South Africa, but almost every society in the world, has been undergoing rapid and deep social and economic change. This affects our relations with one another as human beings as well as relations between genders and among classes. Most of this change is much to be welcomed. Nevertheless it comes at a cost. It seems to leave in its wake an underclass which suffers not only from material poverty but social and psychological poverty as well. This underclass lacks the resources of almost every kind which are needed in order to escape from this malaise; it is profoundly alienated from the rest of society; it has little sense of belonging to the whole. It is, I believe, true that there is a strong correlation between a person's sense of belonging to others and his or her sense of moral responsibility to them. Crime, in other words, is very often an indicator of a lack of a sense of community between the criminal and his or her victim.

I am convinced that our deeply troubled history has eroded our sense of right and wrong. Too many are confused. I am convinced that part of the solution lies in each of us, rich or poor, black or white, male or female having a clear understanding of right and wrong when it comes to the basic issues of law, order and morality.

I must try in sentencing the accused to send out a clear affirmation that it is wrong to commit crimes such as theses. There are no excuses. There are no qualifications. To affirm that something is wrong is not to assert that it is beyond understanding. That, in part, is why there is a concept such as mitigation.

It would be wrong of me to ignore the fact that the background of the accused has all probability contributed to the commission of these ghastly crimes.

While each of us is responsible for his or her acts, it has to be accepted that each of us is the product of his or her times and circumstances. I spoke earlier of a vicious cycle. There are others that move in parallel with the one I mentioned earlier. A harsh and often vicious society which experienced great social upheaval inevitably fashioned the accused and all of us share some blame for the hardness of the character of the accused. It is this hardness which resulted in these dreadful crimes.

With the exception of count 16 each of the rapes was a gang rape. For gang rapes the court is obliged in terms of Section 51 of the Criminal Law Amendment Act No. 105 of 1977 to impose a sentence of life imprisonment for those accused who were over eighteen years at the time of the commission of these offences and for the robberies with aggravating circumstances a sentence of fifteen years. This section is saved by the provisions of subsection 3 which permit a lesser sentence if there are substantial and compelling circumstances which justify the imposition of a lesser sentence. In the overall circumstances of this case a sentence of life imprisonment would not be disturbingly inappropriate for those who were over eighteen years of age. There are, in my view no substantial and compelling

circumstances present to justify the imposition of a lesser sentence than life imprisonment for the rape counts other than count 16 or a lesser sentence than fifteen years for the robberies committed with aggravating circumstances.

Accused 1, 2 and 3 were each under the age of eighteen years at the time of committing these offences. It seems fair to assume in their favour, if a conspectus is taken of all the facts in this case, that they acted under the influence of the older participants. Taking everything into account it seems fair that accused 1, 2 and 3 should receive lesser sentences than the others.

With regard to count 16, although a sentence of life imprisonment is not warranted, it was nevertheless a serious crime. The victim was pregnant at the time and her pregnancy was visible. A suitably severe sentence is accordingly justified.

I said earlier that the accused have a lot to learn and I intend that they should have plenty of time to do so,

It seems to me that these crimes occurred sufficiently close in the time and place of their commission to justify an order that the sentences should run concurrently. A further factor that operates in their favour is they did not act in some more extreme manner such as killing their victims. In any event, section 39 (2) of the Correctional Services Act, No 111 of 199S directs that this should occur.

A. Taking all the above into account the following are the sentences which I impose;

1. Housebreaking with Intent to Rob and Robbery with aggravating circumstances as defined in Section 1 of Act 51 of 1977

For Accused 1,2 and 3 TEN YEARS, for Accused 4, 6 and 7 FIFTEEN YEARS

2. Rape

For Accused 1,2 and 3 TWENTY YEARS, for Accused 4,6 and 7 LIFE IMPRISONMENT

3. Assault with Intent to do Grievous Bodily Harm

For Accused 1,2 and 3 TWO YEARS, for Accused 4,6 and 7, THREE YEARS

6. Housebreaking with Intent to Rob and Robbery and Attempted Robbery with Aggravating Circumstances as defined in Section 1 of Act 51 of 1977

7. Rape

8. Assault

For Accused 1,2 and 3 EIGHTEEN MONTHS, for Accused 4,6 and 7 TWO YEARS

9. Housebreaking with Intent to Rob and Robbery with Aggravating Circumstances as defined in Section 1 of Act 51 of 1977

10. Rape

11. Rape

12. Housebreaking with Intent to Rob and Robbery with Aggravating Circumstances as defined in Section 1 of Act 51 of 1977

For Accused 1,2 and 3 TEN YEARS, for Accused 4,6 and 7 FIFTEEN YEARS

13. Rape

14. Malicious damage to Property

For Accused 1,2 and 3 TWO YEARS, for Accused 4,6 and 7 THREE YEARS

15. Housebreaking with Intent to Rob and Robbery with Aggravating Circumstances as defined in Section 1 of Act 51 of 1977

- 16 Rape

For Accused 1,2 and 3 FIFTEEN YEARS, for Accused 4,6 and 7 TWENTY YEARS

17 Housebreaking with Intent to Rob and Robbery with Aggravating Circumstances as defined in Section 1 of Act 51 of 1977

18. Rape
19. Assault with Intent to do Grievous Bodily Harm
21. Attempted Robbery

For Accused 1,2 and 3 FIVE YEARS, for Accused 4, 6 and 7 EIGHT YEARS

22. Housebreaking with Intent to Rob and Robbery with Aggravating Circumstances as defined in Section 1 of Act 51 of 1977

For Accused 1,2 and 3 TEN YEARS, for Accused 4,6 and 7, FIFTEEN YEARS

23. Rape
25. Assault with Intent to do Grievous Bodily Harm
26. Malicious damage to Property, and
27. Housebreaking with Intent to Rob and Robbery with Aggravating Circumstances as defined in Section 1 of Act 51 of 1977.

B. IT IS ORDERED THAT THE SENTENCES IMPOSED ON ALL OTHER COUNTS ARE TO RUN CONCURRENTLY WITH THE SENTENCE IMPOSED ON COUNT 2.

TO SUMMARIZE: ACCUSED 1,2, AND 3 ARE SENTENCED TO AN EFFECTIVE TWENTY YEARS IMPRISONMENT AND ACCUSED 4,6, AND 7 ARE GIVEN AN EFFECTIVE SENTENCE OF LIFE IMPRISONMENT.

DATED IN JOHANNESBURG, THIS 26th DAY of JANUARY, 2000.

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Prepared on 9 October 2026 · Esheria