MULTIPLE ACTS OF SEXUAL PENETRATION WITHIN A SHORT PERIOD OF TIME – SINGLE OR MULTIPLE ACTS OF RAPE?

S v Willemse 2011 (2) SACR 531 (ECG)

1 Introduction

The case under discussion exposes a particular twilight zone in respect of the sexual offence of rape, and more specifically, the question as to when multiple acts of sexual penetration perpetrated by the same perpetrator within a relatively short time span, will constitute multiple acts of rape. The latter, in addition, specifically becomes problematic during sentencing. Once it has been established that a victim was raped more than once by an accused, a court is obliged in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (hereinafter "the Act") to impose a sentence of life imprisonment, unless substantial and compelling circumstances exist to depart from the prescribed minimum sentence (see s 51(1) and 51(3)(a) of the Act read in conjunction with Part 1 of Schedule 2 to the Act; Du Toit, De Jager, Paizes, Skeen and Van der Merwe *Commentary on the Criminal Procedure Act* (2012) 28–14-28–16A; Snyman *Criminal Law* (2008) 368–369; Snyman *Strafreg* (2012) 382–384; *S v Mofokeng* 1999 (1) SACR 502 (WLD); *S v GN* 2010 (1) SACR 93 (TPD); *S v Nkomo* 2007 (2) SA 198 (SCA); *S v Blaauw* 1999 (2) SACR 295 (WLD); *S v Vilakazi* 2009 (1) SACR 552 (SCA); *S v Mahomotsa* 2002 (2) SACR 435 (SCA); and *S v Mvamvu* 2005 (1) SACR 54 (SCA)). The decision under discussion is of particular interest as the court was once again required to assess whether multiple acts of sexual penetration constituted a single act of rape, or multiple acts of rape and as such falling within the ambit of the provisions of the Act with regards to sentencing. A related issue addressed by the judgment, relates to the anomaly in respect of the appropriate approach to follow in cases of this nature relating to multiple acts of sexual penetration in order to assess whether these acts should be construed as multiple acts of rape, or as one single and prolonged act of rape.

2 The facts

The salient facts appear from the judgment given by Griffiths J: The appellant was charged with, and convicted of, two separate counts of rape. The charges of rape related to the same complainant which resulted in the matter falling within the ambit of section 51 of the Act which, as stated above, provides that the accused has to be sentenced to life imprisonment, unless there are substantial and compelling circumstances justifying the imposition of a lesser sentence. The magistrate found that no such

substantial and compelling circumstances existed and accordingly sentenced the appellant to imprisonment for life. The appellant appealed against both convictions and sentence. It is to be noted that the appellant relied on two grounds of appeal. In terms of the first ground of appeal, the appellant contended that the magistrate ought to have accepted his defence to the effect that he was at the time of the commission of the offences not criminally responsible for his actions as a result of being under the influence of alcohol. In terms of the second ground of appeal it was contended that the appellant should not have been convicted of two separate offences of rape since the act of penetrating the complainant vaginally and the act of penetrating her anally was part of one continual act of rape. For purposes of this discussion, the first ground of appeal will not be addressed save to note that it was rejected by the court as it was only raised as a defence for the first time on appeal. The focus of this discussion will fall on the second ground of appeal. The facts indicated that the appellant was extremely well-known to the complainant having lived with her for a period of more than a year. He was, in addition, very well acquainted with the complainant's son who was regarded as a foster son to the complainant. On the day in question, the appellant and the complainant consumed a reasonable amount of liquor. The complainant further testified that she had also consumed liquor with her grandchild, but had retired to bed and slept for a while. During the course of the afternoon, and whilst she was still lying on her bed, the appellant entered the complainant's house and first went to the bathroom. Thereafter he closed the door and grabbed hold of the complainant and began to strangle her. Thereafter the appellant removed the complainant's underwear and his own trousers and proceeded to rape her. After having raped the complainant vaginally, he turned her onto her side and continued to rape her in her anus. It transpired from the evidence by the complainant that she was unable to resist the appellant due to the fact that the appellant held her neck in such a manner as to force her to submit to his demands. After the appellant had completed his act or acts of rape, he went to the bathroom where he removed his clothing and took clothing belonging to the complainant's son for himself. The appellant retired to the bedroom again where he fell asleep. The complainant was later found by family members in her bedroom naked whilst the appellant was still lying on a small bed in the bedroom. The appellant was later arrested.

3 The judgment

As stated above, the first ground of appeal and accordingly a discussion of the portion of the judgment pertaining to it, falls outside the scope of this contribution and will not be addressed. In terms of the second ground of appeal, the question was raised as to whether the appellant should have been convicted of two separate acts of rape. More specifically, the question arose as to whether the two acts of penetration, namely first vaginally and then anally, should have been construed as one single act of rape. The evidence indicated that the appellant never climbed off the bed during the course of the two acts of penetration. The complainant, in addition, failed to provide much detail pertaining to whether or not the appellant had ejaculated during the course of any of the two acts of rape, or both (par 16). The aspect of whether or not ejaculation took place could be indicative of a second act

of penetration which took place as will be seen from the *dictum* in *S v Blaauw* (*supra*). The evidence was also vague in respect of the time taken to commit both acts of rape. The court (par 17) proceeded to refer to the *dictum* by Borchers J in *S v Blaauw* (*supra* 300a-d), where it was held:

> "Mere and repeated acts of penetration cannot without more, in my mind, be equated with repeated and separate acts of rape. A rapist who in the course of raping his victim withdraws his penis, positions the victim's body differently and then again penetrates her, will not, in my view, have committed rape twice. This is what I believe occurred when the accused became dissatisfied with the position he had adopted when he stood the complainant against a tree. By causing her to lie on the ground and penetrating her again after she had done so, the accused was completing the act of rape he had commenced when they both stood against the tree. He was not committing another separate act of rape.
>
> Each case must be determined on its own facts. As a general rule the more closely connected the separate acts of penetration are in terms of time (ie the intervals between them) and place, the less likely a court will be to find that a series of separate rapes has occurred. But where the accused has ejaculated and withdrawn his penis from the victim, if he again penetrates her thereafter, it should, in my view, be inferred that he has formed the intent to rape her again, even if the second rape takes place soon after the first and at the same place."

The court (par 18) proceeded to distinguish the facts from the decision in *Blaauw* (*supra*) and held that the fact that the appellant first penetrated the complainant vaginally and had intercourse with her in that manner and then withdrew, changed her position, whilst controlling her forcefully, and then proceeding to rape her anally, must have involved a distinct thought process on the part of the appellant during the course of which he proceeded to rape the complainant in a completely different manner to that which he had initially done. Griffiths J held (par 18):

> "By doing so, in my view, the appellant formed a completely separate intent to rape the complainant in a manner which was different to that in which he had initially raped her and is a strong indication that this was a separate form of rape, even though it may have occurred reasonably close in time to the initial act."

Consequently, the court (par 19) held that these two acts were two separate and distinct acts of rape committed by the appellant and that the magistrate had been correct in convicting the appellant of two separate acts of rape. The court then proceeded to assess whether there were substantial and compelling circumstances to depart from the prescribed minimum sentence of life imprisonment. The court (par 21) held that the rape was a particular serious case of rape of an elderly woman as a result of which the complainant suffered a severe degree of trauma. The court (par 22-25) proceeded to analyse various decisions such as *S v Nkomo* (*supra*); *S v GN* (*supra*); *S v Mahomotso* (*supra*) in order to assess whether substantial and compelling circumstances existed justifying deviation from the prescribed minimum sentence of life imprisonment. Consequently the court ruled that substantial and compelling circumstances existed in the appellant's case and substituted the sentence of life imprisonment with a sentence of twenty years' imprisonment. In respect of the offence, Griffiths J held the following (par 26):

> "as bad as it was, it is so that the two acts of rape did follow closely upon one another and there was no lengthy time lapse between them. Had the appellant not proceeded to rape the complainant in her anus and had he removed and reinserted his penis into her vagina as part of a single transaction, he probably would not have been convicted of two separate acts of rape."

4 Assessment

On a primary level, the judgment seems sound in the sense of regarding the two separate acts of sexual penetration as two separate and distinct acts of rape. The judgment, however, becomes problematic in respect of the dictum by Griffiths J quoted above, where it was held that had the appellant withdrawn his penis from the complainant's vagina and reinserted it again as part of one act, he would not have been convicted on two counts of rape. From the latter finding by the court, the inference could easily be drawn that multiple acts of penetration, for example vaginally, will constitute a single act of rape, whilst if a change occurs in terms of the body part being penetrated, it could be indicative of a separate intention to rape. To date the decisions dealing with multiple acts of sexual penetration committed by the same person in respect of the same victim, have not been clear in respect of the benchmark by which to determine whether multiple acts should be construed as separate and distinct acts of rape, or whether they form part of one single act of rape. The most prominent decision dealing with cases of this nature is the decision in *Blaauw* (*supra*). The facts of the *Blaauw* decision were briefly that the accused had raped the victim by having sexual intercourse with her on the ground where after he took her to a tree, made her stand against it and penetrated her again. The position was, however uncomfortable and the accused then, without having ejaculated, made the complainant lie on the ground at the foot of the tree and again had intercourse with her. The evidence disclosed three separate occasions of penetration. The court held, however, that the accused had raped the victim twice (300f-g). Borchers J then proceeded to lay down the principles as quoted earlier in this discussion under paragraph 3 above. It is apparent from the *Blaauw* decision that the court seemed to have placed much emphasis on the aspect of ejaculation and also the time factor or lapse of time between the acts of penetration. Borchers J in addition held (299C):

> "Ejaculation is not an element of rape, though it would seem to me that if the rapist had indeed ejaculated, withdrawn from the victim and then shortly thereafter again penetrated her, he would on the second occasion be guilty of raping her for the second time. Not only is there a second act of penetration, it would be reasonable to infer that the rapist had formed a new intent to have intercourse for the second time."

The Sexual Offences and Related Matters Act 32 of 2007 (hereinafter "SORMA") came into effect on 16 December 2007, in terms of which the common-law definition of rape was repealed and replaced with a new definition of rape in terms of section 3 of SORMA (see Smythe and Pithey *Sexual Offences Commentary Act 32 of 2007* (2011) 30-2–30-3 as well as 2-1–2-26; Snyman *Criminal Law* 355–369; and Snyman *Strafreg* 367–383). In terms of the common-law definition of rape, rape is defined as the unlawful and intentional intercourse with a woman without her consent. Intercourse in

the latter sense referred to a male inserting his penis into a woman's vagina (Snyman *Criminal Law* 355; *S v Blaauw supra* 299b–c; and Burchell and Milton *Principles of Criminal Law* (2005) 699). In terms of section 3 of SORMA, rape is currently defined as follows:

> "Any person (A) who unlawfully and intentionally commits an act of sexual penetration with complainant (B), without the consent of B, is guilty of the offence of rape."

SORMA, in addition, defines "sexual penetration" as follows:

> "'sexual penetration' includes any act which causes penetration to any extent whatsoever by –
> (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
> (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
> (c) the genital organs of an animal, into or beyond the mouth of another person,
> and 'sexually penetrates' has a corresponding meaning" (see s 1 of SORMA; Smythe and Pithey *Sexual Offences Commentary Act 32 of 2007* 2-2; and Snyman *Criminal Law* 358).

It accordingly becomes abundantly clear that the definition of rape has been extended vastly and accordingly vaginal, anal, oral as well as penetration by means of for example, a sex toy will suffice as acts of penetration in terms of SORMA (see Snyman *Criminal Law* 357). The latter inadvertently exacerbates the problem of multiple acts of sexual penetration committed by the same perpetrator on the same victim as the definition of penetration comprises a much wider purport as opposed to the common-law definition of rape. It is submitted that the leading case law, on this topic such as for example *Blaauw* (*supra*) should also be assessed within the ambit of SORMA and as such having regard to the extended definition of rape and inadvertently the meaning ascribed to "sexual penetration" in terms of section 1 of SORMA. In the case under discussion, emphasis was pertinently placed on the change of organ penetrated indicating a separate intent to rape, yet in terms of SORMA, these acts qualify as separate acts of sexual penetration.

In terms of *Blaauw* (*supra*), much emphasis was placed on the aspect of ejaculation as indicative of the perpetrator forming a second intention to rape. Obviously in terms of the new SORMA, the latter will not prevail within the context of for example penetration by means of an object or sex toy. In the recent decision of *S v Mavundla* (2012 (1) SACR 548 (GNP)) the appellant was charged and convicted in terms of section 3 of SORMA in that he had penetrated the complainant and had intercourse with her until he ejaculated. After that he told the complainant to climb off the bed and hold onto it and he then penetrated her again from behind and had intercourse with her until he ejaculated. The appellant then ordered the victim to get onto the bed again where he again had intercourse with her until he ejaculated for a third time. The appellant was convicted of raping the complainant more than once and sentenced to life imprisonment. The appellant appealed against his sentence and on appeal Southwood J held (Preller J concurring)

(par 8) whilst also referring to *Blaauw* (*supra*) but distinguishing the *Blaauw* decision on the facts:

> "While I agree with the approach (in terms of Blaauw *supra*), the facts of the present case are clearly different from those in Blaauw. In the present case the complainant was emphatic that there was no interruption in the intercourse, the appellant simply shifted the position of the complainant. While ejaculation could determine the end of intercourse, in this case that clearly did not happen. There is no suggestion that the intercourse ended and that the appellant withdrew his penis twice and formed the intention to rape the complainant on two further occasions. This was one prolonged act of intercourse."

The sentence of life imprisonment was set aside on appeal and replaced with a sentence of twelve years imprisonment (par 13). Unfortunately the court did not elaborate with specific reference to the new definition of rape and sexual penetration, when multiple acts of sexual penetration will amount to multiple acts of rape. The dividing line between multiple acts of sexual penetration constituting multiple or single acts of rape accordingly becomes blurred. The predominant consideration to be borne in mind during the assessment of multiple acts of sexual penetration remains the minimum sentence prescribed, namely life imprisonment (see Du Toit *et al Commentary on the Criminal Procedure Act* 28-16–28-18B–1). A court however, still has a discretion in terms of section 51(3)(a) of the Act to impose a lesser sentence, if substantial and compelling circumstances existed (see, *eg*, *S v Nkomo supra*, [2007] 3 All SA 506; *S v GN supra* par 10–12; *S v Malgas* 2001 (1) SACR 469 (SCA); *S v M* 2007 (2) SACR 60 (W); *S v MN* 2011 (1) SACR 286 (ECG); and *S v PB* 2011 (1) SACR 448 (SCA)). In *S v Mahomotsa* (*supra*) Mpati J held the following in respect of the Act (par 18):

> "it does not follow that simply because the circumstances attending a particular instance of rape result in it falling within one or other of the categories of rape delineated in the Act, a uniform sentence of either life imprisonment or indeed any other uniform sentence must or should be imposed. If substantial and compelling circumstances are found to exist, life imprisonment is not mandatory nor is any other mandatory sentence applicable" (see also *S v Abrahams* 2002 (1) SACR 116 SCA; and *S v Mvamvu supra*).

Multiple acts of sexual penetration will undoubtedly present numerous challenges to courts in future with specific reference to the broadened definition of rape in terms of SORMA and the definition ascribed to sexual penetration. Whilst each case will have to be assessed according to its own unique circumstances it is submitted that multiple acts of sexual penetration should be carefully assessed with due regard to the serious nature of the crime of rape and also having regard to the objects of SORMA. In this regard the dictum by Mahomed CJ in *S v Chapman* (1997 (2) SACR 3 (SCA) 5a–b) comes to mind in respect of the severity of the offence of rape where it was eloquently held:

> "Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation."

The case under discussion seems to be a move in the right direction by regarding multiple acts of sexual penetration as separate and distinct acts of rape. The approach to follow in these cases, however, remains a twilight zone where consensus has not been achieved. The problem is exacerbated when the multiple acts of sexual penetration occur within a short period of time as opposed to where there is a lapse of time between the acts of rape (see, *eg*, *S v Swart* 2000 (2) SACR 566 (A)). Where one act of rape ends and new act of rape begins remains problematic and contentious. With the broader definition of rape provided for in SORMA, courts called upon to adjudicate such cases in future could very well face numerous challenges with specific reference ultimately to harmonizing the provisions of SORMA with minimum sentences provided for in the Act.

GP Stevens
University of Pretoria