

IN THE HIGH COURT OF SOUTH AFRICA

WITWATERSRAND LOCAL DIVISION

Case No. A1/1504/05

Registrar Ref. No. 29/08

THE STATE

versus

BONGANI JOE NTSELE

Accused

SENTENCE

[1] On 6 August 2007, the accused, Bongani Joe Ntsele, was convicted in the regional court, Johannesburg of two offences of rape of a certain female ('the victim') on 30 July 2005 (*counts 1 and 2*), and one offence of assault on her with the intent to do grievous bodily harm (*count 3*). The learned regional magistrate committed the accused for sentence by this Court in terms of the provisions of the Criminal Law Amendment Act No. 105 of 1997 ("the Act")

[2] Once I had considered the record of the proceedings and heard argument on the issue of the accused's convictions, I required from the learned regional magistrate a statement as contemplated in s 52(3)(b) of the Act, and particularly for convicting the accused on count 3.

[3] The reply received from the learned regional magistrate allayed my concerns. I was satisfied that the accused was correctly and fairly convicted on all three counts and that the proceedings were in accordance with justice.

[4] The convictions on all three counts were accordingly confirmed on the 20th June 2008 in accordance with the provisions of s 52(3)(b) of the Act. What remains is to consider and determine an appropriate sentence for the accused.

[5] The State, represented by Adv Muvhulawa, led no *viva voce* evidence in aggravation of sentence. The accused, represented by Adv Mlazo, also led no *viva voce* evidence in mitigation of sentence and the accused elected not to testify, but Adv Mlazo placed facts before me in mitigation of sentence from the bar. The parties handed in a pre-sentence report (*exhibit "B"*) prepared by a probation officer, Ms J Payne, which report includes the impact of the offences on the victim, and counsel for the State and for the accused agreed on the correctness of the information therein contained. Counsel for the State and for the accused also addressed me on the matter of sentence.

[6] The victim was raped twice by the accused. He has been convicted of two offences of rape and he has not yet been sentenced in respect of such convictions. The offences of rape in respect of which the accused has been convicted are therefore offences referred to in Part I of Schedule 2 to the Act for which it is necessary, in terms of ss 51(1) and 51(3)(a), to impose a

sentence of imprisonment for life unless '*substantial and compelling circumstances*' justify a lesser sentence.

[7] In considering whether or not substantial and compelling circumstances exist which would justify the imposition of lesser sentences than those prescribed, the traditional objectives of punishment, namely prevention, retribution, deterrence and rehabilitation, still apply, and I am enjoined to weigh the personal circumstances of the accused against the seriousness of the offences committed by him and the interests of society.

[8] Rape is always a very serious crime. In this instance the accused forced his victim's compliance by threatening her with physical violence, by being armed with a broken bottle and a knife, by grabbing her with his arm around her neck, by biting her on her shoulder, and by pushing her further into the veld where he then raped her twice.

[9] The victim was 30 years old at the time of the incident and a mother of four young children. She was severely traumatized by the rape incident and, even though it occurred in 2005, she still relives the incident in her memories and suffers from emotional and psychological consequences as a result thereof. It was a humiliating and degrading experience for her and she feels vulnerable and violated. The incident resulted in the break-up of her relationship with her boyfriend. She also needed to relocate which had negative financial consequences for her and her children.

[10] Our country suffers an unacceptable and distressing incidence of violence, and especially rape against women and children, and the needs of society require courts to deal severely with sexual offenders such as the accused.

[11] On 3 January 2002, the accused was convicted of theft and sentenced to 18 months imprisonment of which 6 months was suspended for 5 years on certain conditions. On 23 August 2004, the accused was convicted of housebreaking with the intent to steal and theft that had been committed by him on 25 June 2004, and he was sentenced to two years imprisonment. I accept that the accused's two previous convictions bear no relationship to his present convictions and they

'...are relevant in a limited sense only and simply with a view to determining to what extent, if any, the forms of punishment imposed for those crimes served as effective deterrents for the person in his or her career of crime and also to indicate the extent to which the person has an uncontrollable urge to lawlessness which reduces the chances of reform.'

[see: S v Muggel 1998 (2) SACR 414 (CPD), at p 419 f – g].

[12] The accused still denies his guilt and has not shown any remorse. The accused is presently 30 years of age and he was 27 old at the time of the commission of the offences under consideration. He is relatively young and he may accordingly be a suitable candidate for rehabilitation. On the other hand, his prognosis for rehabilitation does not appear favourable in the light of his previous convictions and his present lack of remorse. To consider the possibility of his possible rehabilitation in the circumstances would accordingly

constitute ‘...an essay in futility.’ [see: S v Ntuli 1978 (1) SA 523 (AD), at p 528 B – C].

[13] The probation officer reported that the accused was raised in a stable family environment. He is one of five siblings. His late father appeared to have been a successful businessman in Soweto, but he was killed in 1985. His death devastated the family. The accused’s mother became very ill and she was financially unable to support the family. This led to the accused and two of his siblings leaving school in order to assist their mother in sustaining the family. The accused and his family have always shared close relations and his family members have been supportive of him throughout the trial and they regularly visit him in prison. The accused is not married, but has been involved in a committed relationship with his girlfriend for the past ten years.

[14] The accused has two children. They are attending school and live with their mothers in KwaZulu-Natal. The accused moved to Johannesburg during 1997 in search of employment, but, due to his lack of education, was only able to secure part-time employment at Smart Light Factory in Soweto where he earned approximately R80.00 per day. He was also a member of the Bapedi Boxing Club in Soweto for the past ten years before his arrest, where he used to box as an amateur and later professionally. He got paid R5,000.00 per fight and it appears that he was able to secure one boxing fight per month.

[15] It appears from the evidence led in the regional court that the accused was under the influence of alcohol at the time of the incident. In answer to a question from the learned regional magistrate, the victim testified that the accused '*...seemed drunk on the day that he raped me. This is why I say I did not believe that he recognised that it was me that he had raped.*' I accept in the accused's favour that his intoxication probably influenced his state of mind in the commission of the crimes, and that such influence is of a nature that reduces his moral blameworthiness.

[16] The accused has been in custody since his arrest on 3 August 2005, which is now nearly 3 years [see: S v Vilakhazi 2000 (1) SACR 140; S v Brophy 2007 (2) SACR 56 (WLD)]. This is a weighty factor favouring the accused in the determination of an appropriate term of imprisonment.

[17] The personal circumstances of the accused, his reduced moral blameworthiness, and his time spent in custody awaiting the finalisation of these proceedings cumulatively, in my view, amount to substantial and compelling circumstances within the meaning of the Act when balanced against the seriousness of the rape crimes, the impact thereof on the victim, the public interest in an appropriately severe punishment being imposed for them, the general deterrence aspect, and the personal deterrence aspect. Such circumstances cumulatively regarded satisfy me that a sentence of imprisonment for life would be unjust. I am satisfied that a departure from the prescribed minimum is justified on the basis that such a sentence would be

disproportionate to the crime, the criminal and the legitimate interests of society.

[18] I am of the view that concurrent sentences should be imposed since the assault and the two rapes in respect of which the accused has been convicted are closely related in time and place and all form part of the same incident.

[19] In the result:

A. The accused is sentenced to:

1. Imprisonment for a period of 16 years pursuant to his first conviction of rape (*count 1*);
2. Imprisonment for a period of 16 years pursuant to his second conviction of rape (*count 2*); and
2. Imprisonment for a period of 2 years pursuant to his conviction of assault with the intent to do grievous bodily harm (*count 3*).

B. The sentences of 16 years' and 2 years' imprisonment imposed in respect of counts 2 and 3 shall run concurrently with the sentence of 16 years' imprisonment imposed in respect of count 1.

P.A. MEYER
JUDGE OF THE HIGH COURT

17 July 2008