IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A251/2008

DATE: 24 OCTOBER 2008

In the matter between:

HEIN BOTHA

versus

THE STATE

JUDGMENT

MAQUBELA, A J:

The appellant was found guilty and sentenced on 18 February 2003 on three counts as follows: count 1, attempted murder, ten years direct imprisonment; count 2, rape, 15 years direct imprisonment; count 3, robbery, five years direct imprisonment. The trial court further ordered that counts 1 and 3 were to run concurrently. The appellant is therefore serving an effective sentence of 25 years imprisonment.

The appellant applied for leave to appeal against both conviction and sentence on 19 February 2008. Leave to

appeal was granted against sentence only. He now pursues the appeal against sentence.

The main grounds of appeal against sentence are that the magistrate did not take into account the cumulative effect of the sentences imposed in respect of multiple counts flowing from one incident, that he disregarded the personal circumstances of the appellant and that the magistrate therefore erred in imposing a sentence which is shockingly inappropriate in the given circumstances.

The facts of the case appear from the judgment of the trial, Court which found that on 11 November 2000, at or near Delmar Street, Bellville South, the accused unlawfully and with intent assaulted the complainant, Ms Edwina Afrikaner by stabbing her, throwing her on the ground, kicking her, trampling her body and beating her with unknown objects and inflicting violence on her with intent to commit murder. At the same day and place each of the accused raped the complainant in turn. They also robbed her of her jewellery, clothes, dentures, shoes and gold earrings. The total value of these possessions was some R4 000,00.

All four accused had pleaded not guilty, but the Court found all four guilty as charged.

Accused No 3 appealed against his conviction and sentence, whilst accused No 4 initially appealed against his conviction only. Accused No 3's appeal against conviction succeeded, while No 4's conviction was confirmed, but his sentence was altered to an effective one of 18 years imprisonment. The reason for the partial success of the appeal was to counter the cumulative effects of the sentences, which, according to Veldhuizen, J "was buitensporig swaar".

The guidelines in appeals against sentence were set out succinctly in S v Malgas, 2001(1) SACR 469 (HAA), where it was said:-

> "The test for interference in sentences on appeal were evolved in order to avoid subverting basic principles that are fundamental in our law of criminal procedure, namely that the imposition of sentence is the prerogative of the trial court for a good reason, and that it is not for appellate courts to interfere without the exercise of discretion unless it is convincingly shown that it has not been properly exercised. The adjectives, "shocking", "startling", "inappropriate" and the like that have been employed to drive that point home should not

simply be appropriated indiscriminately for use in a situation which is very different."

Also, according to "Terblanche's Guide to Sentencing in South Africa" at page 138:-

> "Consistency in sentencing has the basic function of requiring that similar sentences should be imposed when similarly placed offenders commit similar crimes."

However, on page 139 the learned author states that:-

> "Consistency does not require that exactly the same sentence should be imposed in similar cases."

Judgment of Veldhuizen, Judge, in the appeal of co-accused Nos 3 and 4, dealing as it does with the same offence, although different accused, has relevance in regard to the present appeal insofar as it may point towards an appropriate sentence and at the same time establish an expectation of consistency in the sentencing of the appellant and his fellow-accused. However, the mere fact that accused No 4's effective sentence was reduced to 18 years does not mean that the present appellant can expect the same result.

Accused's personal circumstances and his particular role in the offences must be taken into account.

One other guideline I consider relevant in this appeal is the view expressed in the case of R v Zonele and Others, 1959(3), SALR, page 319 (AD), where at page 330, it was said:-

> "Generally speaking, previous convictions aggravate an offence because they tend to show that an accused has not been deterred by his previous punishments from committing the crime under consideration in a given case."

The questions, therefore, to be answered, are whether indeed the trial court properly took into account the cumulative effect of the sentences imposed in respect of multiple counts flowing from one incident, and also whether the personal circumstances of appellant were disregarded or not. The overall question is whether, in the circumstances, the trial court imposed a sentence which is disturbingly inappropriate.

The answer to the above questions can best be made by looking at the triad of the appellant's personal circumstances, his role in the crimes of which he had been convicted, also the seriousness or otherwise of the offences, and the interests of

the community.

A reading of the record reveals that the appellant played a leading role in the events of the day in question. It is also clear from the record that this was a brutal and violent gang-rape. The assault on an innocent and defenceless woman was particularly vicious. The appellant himself hit the complainant with a plank, kicked her head, removed her clothing and was the first to rape her. Appellant had six previous convictions, including two for robbery. He had been released on parole barely a month before he committed the present offences. Clearly this is a case where the interests of society must take priority.

Personal circumstances of the appellant themselves are not remarkable, they are largely outweighed by the seriousness of the crimes and the interests of the community.

It appears from the record that the appellant was part of the so-called Fanta Kids Gang, or a gang of sorts anyway, a factor which acts as an aggravating circumstance as far as I consider the matter.

The Court must obviously consider whether there are any possible mitigating circumstances. The most compelling such

factor to me is the fact that appellant had already been in custody for two years and three months as an awaiting-trial prisoner before sentencing.

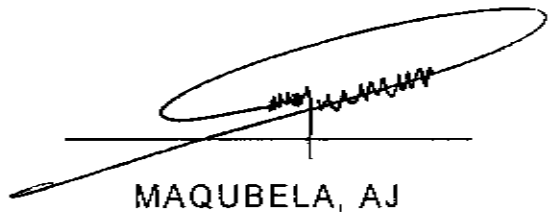
Taking all these circumstances into account and in particular the fact that all three offences arose out of the same incident, I consider that the magistrate did indeed err in not giving sufficient weight to the cumulative effect of the sentences. I consider further that, notwithstanding the aggravating factors present, the effective sentence of 25 years is disturbingly inappropriate, with the result that this Court is entitled to interfere with the sentence.

Taking into account the seriousness of the crime and the interests of society which requires protection against, in particular, brutal and violent crimes against women and children, I consider that an appropriate effective sentence would be one of 20 (TWENTY) YEARS IMPRISONMENT. In the result, I would allow the appeal and make the following order:-

1. The appeal against sentence is UPHELD.

2. The sentences of 10, 15 and five years imprisonment imposed on counts 1, 2 and 3 respectively are confirmed,

but it is ordered that the sentence imposed on count 3 will run concurrently with that imposed on count 2, whilst five years of the sentence imposed on count 1 will also run concurrently with the sentence imposed on count 2, thereby producing an effective sentence of 20 (TWENTY) YEARS IMPRISONMENT.



MAQUBELA, AJ

I agree and it is so ordered.

BOZALEK, J