IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A151/2010

DATE: 11 JUNE 2010

In the matter between:

BONGANI J MKWANE Appellant

and

THE STATE Respondent

J U D G M E N T

LE GRANGE, J:

The appellant in this matter was convicted in the Regional Court, Wynberg on a charge of attempted rape and sentenced to an effective term of eight years' direct imprisonment. The appellant, with leave of the court *a quo*, now appeals against his imposed sentence.

The evidence relating to the conviction can briefly be summarised as follows. The appellant and complainant were known to each other and consumed some alcohol together at a

pub in Rondebosch. Later the same day, the appellant and the complainant visited a shebeen, also in Rondebosch, where more beer was consumed.

On their way home, whilst walking through a dark area with long grass, the complainant fell to the ground. The appellant, instead of helping her, told her that he wanted to have sexual intercourse with her. When she refused, he then attempted to pin her to the ground in order to rape her. The appellant then bit the complainant in the face, on her breast and other parts of her body. She screamed for help and a security guard came to her rescue. The appellant then fled the scene.

The complainant was taken to the police and later to the hospital for a medical examination. The complainant suffered certain open wounds as a result of the bite marks on her face, breast and other parts of her body.

It was argued on behalf of the appellant that the trial court misdirected itself in overemphasising the seriousness of the offence and the interests of society and failed to attach sufficient weight to the appellant's personal circumstances. Furthermore, the imposed sentence is shockingly inappropriate and disproportionate to the crime, the appellant's personal circumstances and the general interests of society.

It is well accepted in our law that a court of appeal will not interfere with a trial court's discretion in respect of sentence, unless the discretion of the trial court was not properly exercised or the imposed sentence induced a sense of shock or is disturbingly inappropriate.

The crime the appellant committed is a very serious offence. Society demands that when offenders are convicted of crimes, in particular that of attempted rape, the courts should impose appropriate sentences. The appellant was 36 years of age at the time of his arrest. He resided with his grandmother in Nyanga East and has three children, aged 16, 12 and two years respectively. He was employed at a private building company in Rondebosch for four years and earned R600,00 per week. He maintained the children in the sum of R1 300,00 per month and is a first offender.

The complainant was subject to a vicious and humiliating attack. She was bitten by the appellant and sustained various bite mark injuries on her body. Some were also in her face and her breasts. Crimes of rape and an attempt thereto, are degrading and a brutal invasion of the privacy and dignity of the victim. An aggravating factor is that the appellant showed no remorse for his despicable conduct and persisted with his

false denials even after the conviction. The appellant leaves this Court with little option, but to condemn his vicious and unprovoked attack on the complainant in the strongest terms possible.

The injuries the complainant suffered healed, but left certain scars on her body and in particular on her face, which is also an aggravating factor. The appellant is, however, a first offender and was a productive member of society, who had stable employment and supported his minor children financially. Inasmuch as society demands that severe sentences should be imposed for these types of offences, the offender's personal circumstances and the need to show mercy where necessary, should equally be taken into account when considering an appropriate sentence.

It appears from the record that the magistrate, in my view, failed to give due consideration to the appellant's personal circumstances, in particular the fact that he had minor children to support financially. Having regard to all the circumstances in this matter, I am of the view that a just and more equitable sentence would have been to suspend a portion of the imposed sentence. I am of the view that a period of four years of the sentence should have been suspended on certain conditions.

This misdirection is, in my view, sufficient to justify this Court to interfere with the sentence imposed by the magistrate. It follows that appeal should partially succeed. In the result the following order is made.

1. The appeal succeeds.

2. The imposed sentence of eight years imprisonment is set aside and replaced with the following sentence.

3. The accused is sentenced to EIGHT (8) YEARS' IMPRISONMENT, of which FOUR (4) YEARS is SUSPENDED for a period of FIVE (5) YEARS on condition that the accused is not convicted again of rape or attempted rape committed during the period of suspension.

LE GRANGE, J

I agree.

JOUBERT, AJ

/bw