IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A253/2010

DATE: 20 AUGUST 2010

In the matter between:

THABO NCOTO Appellant

and

THE STATE Respondent

JUDGMENT

FORTUIN, J:

On 5 June 2006 the appellant, Mr Thabo Ncoto, was convicted of kidnapping, assault with intent to do grievous bodily harm and rape and sentenced as follows. Two years imprisonment on count 1, three years imprisonment on count 2 and 12 years imprisonment on count 3. The sentences on counts 1 and 3 was ordered to run concurrently, resulting in an effective sentence of 15 years imprisonment. Leave to appeal against sentence was granted on petition.

The conviction was based on the following facts. On 1 January 1999, in

Kalkfontein in the District of Kuils River, the appellant assaulted Ms Bonsiwa Poni by striking her several times in two different locations with his open hand and fists and by kicking her several times. He also abducting her in an apparent search for his wife and then raped the complainant. It appeared that the complainant was raped on four separate occasions and by at least two men. By reason of the injuries which she sustained, she was unable to identify the other person who raped her.

The grounds of appeal are in short that:

1. The minimum sentence legislation was applied when, in the circumstances of the matter, it should not have been.

2. The undue delay in the finalising of the matter and the lengthy awaiting trial period when the appellant was held in custody, not properly taken into account in the determination of sentence.

On behalf of the appellant it was submitted that the magistrate wrongly applied the minimum sentence legislation ("the Act") when sentencing the appellant, even though he declined to send the matter to the High Court. It was further submitted that once the magistrate had determined that the Act's life sentence provisions were not applicable, he ought not to have had regard to these provisions at all.

In the ordinary course of events, the appellant qualified for a possible

sentence of life imprisonment since the evidence revealed that the complainant had been raped on more than one occasion and/or by more than one person. There had, however, been no reference at all to the provisions of the minimum sentence legislation in the charge sheet and for large parts of the trial, the appellant had been unrepresented. For this reason the magistrate advised the appellant that the matter would not be referred to the High Court for sentencing, but that he would be sentenced in the regional court.

Even though he referred to the Minimum Sentence Legislation on several occasions, I am satisfied that the magistrate made it clear that he regarded the legislation as not applicable and that he was sentencing the appellant in terms of the court's ordinary jurisdiction. The magistrate was entitled, in so sentencing the appellant, to have regard to the existence of the minimum sentence legislation. Insofar as the sentences is provided for therein, indicated the seriousness with which offences such as the rape committed by the appellant were viewed by the legislature and by extension, by the community.

There is in my view no misdirection on this score, entitling this Court to interference with sentence. What remains for determination is whether the delays in finalising the trial prejudiced the appellant and whether the magistrate adequately took into account the long period that he was in custody as an awaiting trial prisoner when sentencing the appellant. It is

indeed so that there was a lengthy delay in the prosecution of this matter. It took from January 1999, when the appellant was first arrested, to 5 June 2006 for him to be convicted. Today, on the hearing of this appeal, it is ten and a half years since he was first arrested and appeared in court.

Delays of this order are unacceptable. Regarding the delay post trial it appears that within days of his conviction, the appellant gave notice of the attention to appeal and his application for leave to appeal was disposed of within a few months. It is not clear why it took another three years for the appellant to launch his petition for leave to appeal, but the fact that he enjoyed no legal representation, in all probability played a role therein. It was only in September 2009 that the appellant petitioned for leave to appeal and therefore this last process was not being unduly prolonged.

Nonetheless the long delay between conviction and the hearing of this appeal is to be deplored and points to the need for convicted prisoners to be made aware of their rights to petition for leave to appeal and to be assisted in exercising such a right. The question that needs to be answered, however, is whether the delays in the trial it self affected the outcome thereof and, ultimately, whether the appellant's rights to a fair trial was prejudiced thereby. A good number of delays, although by no means all, were attributable to the appellant himself. He changed his legal representative on more than one occasion and for reasons, which on the face thereof, did not appear particular convincing.

Another substantial delay was caused when the appellant was arrested and convicted on another charge or charges after having been released on bail in the present matter. Towards the latter stages of the trial there were a number of postponements while the State sought to find witnesses whom the appellant wished to call in his defence. The details of these witnesses furnished by the appellant was sketchy to say the least and this led to further delays. Unfortunately it appears to be the practice of the regional court to often grant lengthy remands, possibly as a result of the state of its roles. Throughout the trial, it should be said, the magistrate concluded the trial with exemplary patience and concern for the rights of the appellant.

Against this background, I am of the view that the delays did not result in prejudice in relation to the fairness of the trial of the appellant, but that it should be considered during sentencing. In this regard see Sanderson v Attorney-General Eastern Cape 1998(1) SACR 227 (CC). The magistrate mentioned in his judgment on sentence that the appellant had spent a long time in custody awaiting trial but in the same breath said that he had been mainly responsible for the various delays. Although the magistrate added that he took this period into account in arriving at the sentences he imposed he did not make it clear what weight he attached thereto and the indications are that it did not count for much.

In my view this was a misdirection on the part of the magistrate. By any

standards, a period of some five years in custody awaiting trial, that is six and a half years between arrest and conviction, less some 18 months while the appellant was free on bail, is an extraordinarily long period. If the awaiting trial period during which the appellant was incarcerated is added to his effective sentence the result is a sentence of some 21 years, a severe sentence even for a first offender convicted of serious rape.

As regards the magistrate's reason for discounting this period, I consider that at the sentencing stage the precise reasons why a trial is so long delayed are of lesser importance than the fact that the accused has spent that period or a large portion thereof in custody awaiting trial. The issue of awaiting trial prisoners was discussed in S v Brophv & Another 2007(2) SACR 56 and in S v Steven & Another 1994(2) SACR 163, and recently S v Sebeko 2009(2) SACR 573 (NC). In all of these judgments, following the Canadian decision of Gravino (70/71), 13 Crim LQ 434 (Quebec Court of Appeal) it is argued that the term of imprisonment while awaiting trial is the equivalent of twice that length of time-.

It is trite that the court of appeal can only interfere with the sentence imposed when a trial court exercises its discretion improperly or unreasonably. It is now five years since the appellant's conviction and ten and a half years since his arrest. Rape is a serious crime and the rape which the complainant endured was particularly brutal involving as it did two persons and multiple rapes. So terrified was the complainant that she attempted to stab herself and drank paraffin rather than be dragged out into the night by the appellant. After

the rape she was so traumatised that she spent two days in hospital and went into a temporary psychological shutdown.

On behalf of the State it was correctly submitted that the sentiments expressed in S v Chapman 1997(2) SACR 2 (SCA) must be borne in mind. It is clear therefore that, notwithstanding the period the appellant spent in custody awaiting trial, the only appropriate punishment is long term imprisonment.

Taking all the circumstances into account, I consider that an appropriate effective sentence would be one of ten years imprisonment. I propose then the following order:

> "The appeal against sentence is upheld and the magistrate's order is substituted with the following: The accused is sentenced to TWO (2) YEARS IMPRISONMENT on count 1, THREE (3) YEARS IMPRISONMENT on count 2, TEN (10) YEARS IMPRISONMENT on count 3. In terms of section 280 of the Criminal Procedure Act 51 of 1977 the sentences imposed on counts 1 and 2 are to run concurrently with the sentence imposed on count 3. The sentences are to be antedated to 5 June 2006.

FORTUIN, J

BOZALEK, J: I agree

BOZALEK, J