IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A72/2012

DATE: 20 APRIL 2012

In the matter between:

BONGANI GEORGE Appellant

and

THE STATE Respondent

J U D G M E N T

STEYN, J:

In this matter the accused is a 30 year old male and he was charged with a multiple rape, three times, of a 23 year old woman, committed during the night of 3 February 2008. The offences attract a minimum sentence of life imprisonment, which aspect was explained to the appellant.

The appellant was represented during the trial, pleaded not guilty and chose to remain silent in regards to his defence. In due course it became clear that he admitted having had

consensual sex with the complainant on two occasions. The appellant was convicted of two counts of rape. The counts were taken together for purposes of sentence and he was sentenced to 13 years direct imprisonment.

At the stage when the appellant applied for leave to appeal, the trial court commented that the possibility of another court coming to a different conclusion was very slight and that the court had actually been very lenient towards the appellant with regards to sentence, and in finding that the complainant was raped twice instead of three times. The court noted that another court may wish to increase the sentence imposed. The state, however, did not counter-appeal.

After perusing the record, this court forwarded a note to the legal representatives in this matter, requesting the representative of the appellant to address the court on the following: whether the trial court was correct to find that the complainant was raped twice and not three times; and whether in the event that the conviction is confirmed, a sentence of 13 years imprisonment is not too lenient in the circumstances, and whether the sentence should not be increased by the court hearing the appeal.

During the trial the complainant testified that the appellant was

a friend of an ex-boyfriend, who called her on her cell phone one Sunday afternoon and invited her to accompany him to another friend and the friend's girlfriend in the appellant's car. They bought some Savanna's at one stage, of which she had one. They stopped at the appellant's home. There the appellant forcefully pulled the complainant into his shack. He closed and locked the door of the shack and assaulted her. She cried and screamed.

A lady spoke to the appellant through the window and told him to let the complainant leave, but he refused to do so. The appellant undressed her and had intercourse with her on three occasions. She gave a description of how the appellant went about the three rapes and how he continued assaulting her by hitting her in the face. He raped her, stopped and started again. After the second time, he removed his boxer shorts that he had put on and raped her a third time. After the third occasion, the appellant went to the toilet and the complainant escaped. It was in the early hours of the morning.

The complainant cried when she was cross-examined and from the record it appears that she was traumatised by the incident, as she must have been. The complainant went to the home of a friend nearby, where she slept. The next morning she reported the rape at the police station and she was taken to

the hospital. Later she was dropped at the home of another friend, whom she told what had happened. She told the police where the appellant stayed and he was later arrested. As far as I can gather he was only in custody from the date of sentence.

Complainant had a blue eye and her body was sore. Her friend noted bruises on her body. The J88, medico-legal report that was handed in by agreement, was completed by the chief nurse, Sister Bartlett. She examined the complainant on 4 February 2008 and found no injuries, save for bruising on the left side of her left eye. She did comment that the lack of injuries did not exclude a sexual assault. From this J88, it is apparent that the complainant was sexually active at the time of the alleged assault, which may account for the fact that no vaginal injuries were observed.

It is interesting to note that during cross-examination it was put to the complainant that somebody would have heard if she cried or made a noise. She confirmed her previous testimony that somebody did hear and came to inquire. She was then asked why this information was not contained in her statement and her reply was that it was because she was "not right" when she made the statement. I will refer to this aspect when I deal with the testimony of the appellant.

Nobele Nkladzala confirmed that the complainant came to her during the late afternoon in February 2008. She could see that something was wrong. The complainant had tears in her eyes. She held her hands as the complainant told her that the appellant had raped her. The witness noticed the complainant's face was swollen on one side and that she had a blue eye and bruises on her body. She confirmed that the complainant mentioned rape on three occasions, an aspect that was also recorded in the witness' statement.

The appellant was not a good witness, as correctly pointed out by the magistrate. His version of events was highly improbable. He testified how the complainant came with him willingly and how they kissed, an aspect not put to the complainant. He informed her he wanted to sleep. Under the blankets, they had sex twice. He then added "the third time her phone rang and she picked up the phone", and informed the caller that she was coming, but she was locked up. She then opened the window and wanted to leave, but he refused to let her go since it was not safe. This information was never put to the complainant. She started to cry and a family member arrived, whom she told that he had raped her, information that he had apparently not related to his representative, considering the cross-examination about the

arrival of the third person. The appellant then started to assault her, because she had "cried rape". He went to sleep with her still crying and when he later woke up, she was gone.

During cross-examination of the appellant, he alleged that the complainant was his girlfriend at the time of the incident, an aspect that was not raised with the complainant and, which considering his evidence on this aspect, was not only unlikely, but untrue. The appellant's explanation that the complainant cried because he would not let her go home as he was worried about her safety, was contradictory to his previous evidence and was a blatant lie in my view. The appellant could not explain why the complainant would falsely accuse him of rape. He could also not explain why he did not let the complainant leave when his family member arrived to inquire through the window about what was happening. The evidence of the appellant was by no means clear that sex did not occur three times, in fact at the end of his evidence he said "no, I didn't like it the third time round".

The witness called on behalf of the appellant, did not take his case any further. He did not appear to know that the complainant was a girlfriend of the appellant as the appellant had testified.

There was no misdirection by the trial court in the court's summary of, and evaluation, of the evidence. The court was aware of and applied applicable legal principles such as the cautionary approach to the evidence of a single witness on material aspects. The court correctly accepted the evidence of the complainant and took note that in certain respects there was corroboration for her version.

The court also correctly came to the conclusion that the accused was a poor witness, who fabricated evidence and whose evidence was not reasonably possibly true. It was unclear why the magistrate found that she would favour the appellant by finding that intercourse only took place twice and not three times. However, since there is no cross-appeal on this aspect, this court cannot interfere with this finding. The conviction of the accused on two counts of rape is confirmed.

As regards sentence, the court correctly evaluated the evidence and applied applicable legal principles when considering an appropriate sentence in this matter. As commented by the court, rape is regarded as serious offences that attract heavy sentences and in this case, due to the multiplicity of the offences, life imprisonment is the prescribed minimum sentence, unless substantial and compelling circumstances persuade the court to deviate from the

prescribed sentence.

The courts have been warned not to deviate from these prescribed sentences for flimsy, insubstantial reasons. The magistrate did not overemphasise the seriousness of the offence or the interests of the community. In finding substantial and compelling circumstances, the court took account of the fact that liquor was consumed, that the appellant was a first offender and a breadwinner and that the rapes were committed during one evening. The court concluded, correctly in my view, that life imprisonment was not an appropriate sentence in this matter.

However, this is a very serious offence, during the course of which the complainant was assaulted over a period of time, stubbornly kept captive, regardless of an attempted intervention by a third party and raped more than once. There are members of our community who seemingly have to be educated that it is not acceptable to insist on sexual intercourse when another person refuses consent. Vulnerable members of our community need to be protected from those who disregard their unwillingness to be sexual partners. I agree that the two counts of rape that the appellant was convicted of that took place during the course of the evening, will be taken together for sentencing purposes.

I accept that the circumstances mentioned by the magistrate, justify a lesser sentence than the minimum prescribed sentence of life imprisonment. However, I believe the imposed sentence of 13 years direct imprisonment is unduly and inappropriately lenient in the circumstances of the matter. In my view, the appropriate sentence in this matter would be **18 (EIGHTEEN) YEARS IMPRISONMENT**, of which **FIVE (5) YEARS IS SUSPENDED** for **FIVE (5) YEARS**, on condition that the appellant is not convicted of any sexual offence, or an offence where violence is an element, during the period of suspension.

Hopefully such a sentence will serve as a deterrent to the appellant and others, who are callous about the violation of a woman's body and privacy. The sentence will commence on the date of sentence in the Magistrate's Court, namely 23 October 2009. **I would accordingly dismiss the appeal on conviction and sentence, and increase the sentence as set out above.**

I concur:

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DOLAMO, AJ

/bw

In the circumstances, it is so ordered:

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STEYN, J