

SOUTH AFRICA / JUDGMENT

S v Ntombana (54/2022) [2022] ZAECELLC 37 (1 December 2022) [2022] ZAECELLC 37

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Govindjee

CASE / FILE NUMBER

54/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION

(CIRCUIT

COURT HELD AT KOMANI)

NOT

REPORTABLE

Case

no: 54/2022

In

the matter between:

THE
STATE
and
AKHONA
NTOMBANA
Accused

JUDGMENT**ON SENTENCE**

Govindjee J

- [1] Mr Ntombana was convicted of four counts of rape, two counts of attempted rape and assault with intent to do grievous bodily harm. The state argued for the imposition of three life sentences, given the circumstances of the offences, together with various other periods of imprisonment.
- [2] Mr Ntombana was found to have committed a series of sexually-related crimes between 21 November 2021 and 17 January 2022. He targeted young females who appeared to be alone. in particular, wearing a modified pair of pantyhose to cover his face, and using a knife to threaten his victims.
- [3] AS was 14 years of age when she was raped twice by Mr Ntombana. This was after he had threatened to kill her cousin, AY S, with a knife, forcing AS to return to him after she had run away. A social worker report provides insight as to the devastation that this has caused on the household of the victim. AS struggles to sleep, experiences nightmares and an overwhelming fear of being surrounded by other people, especially males. She also experiences feelings of fear, shame, terror and guilt. She spends much of her time trying to make sense of what happened, causing the social worker to note possible long-term health and emotional well-being consequences and to recommend therapy.
- [4] Mr Ntombana attempted to rape AY S, a 15-year-old girl, but was physically unable to do so at the time. In addition to being threatened and being forced to undress, AY S was in close proximity to AS while the latter was being raped. The incident has affected her family in various ways, as confirmed by a social worker report. She now requires transportation to school and the family experiences guilt based on their socio-economic circumstances. Because of the lack of toilets in the area, AY S is forced to relieve herself in the same place as where the incident occurred. Her self-esteem and sense of trust, particular in respect of male persons, have been negatively affected, and she experienced nightmares, also requiring therapy.
- [5] SS was 16 years of age when she was accosted by Mr Ntombana. She was dragged into the bushes and made to undress before being raped without a condom. A psycho-social report accepted into evidence explains the various ways in which the incident has affected the child's life. She does not sleep properly and becomes distressed, losing concentration while at school. She fears a repeat of what occurred and has required counselling.

- [6] KM, a 13-year-old girl, was assisted by her boyfriend when Mr Ntombana attempted to rape her after she had gone to relieve herself. She had been pulled towards him and he had tried to lower her panty while she lay on her back and he was on top of her. AN S, after having removed Mr Ntombana from on top of KM, had fought to prevent himself from being stabbed, but suffered injuries to his head when hit with a stone.
- [7] Ms ML, a 22-year-old woman, was raped by Mr Ntombana, who also performed fellatio on her without her consent and against her will, while covering her face. He had carried a knife and a stick and she had feared for her life. A social worker report links her ordeal to subsequent bouts of anger and the development of low self-esteem. She experiences flashbacks and sleepless nights and has been referred for counselling.
- [8] NM was 12 years old when Mr Ntombana threatened her with a knife and forced her to accompany him to a secluded area, where he raped her four times, causing her to bleed. She was also slapped in the face. A psycho-social assessment report explains how her life has changed following the incident. She is extremely fearful, particularly in the presence of males and at night, does not sleep properly and is defensive.
- [9] As a result of the fact that Mr Ntombana was found to have raped AS, Ms ML and NM more than once, and given the age of AS and NM, the prescribed sentence in each instance, unless substantial and compelling circumstances justify a less severe sentence, is life

imprisonment.[1] In respect of count three, the minimum prescribed sentence is ten years' imprisonment, in the absence of substantial and compelling circumstances.[2]

- [10] In determining whether substantial and compelling circumstances exist to justify the imposition of a less severe sentence than that

prescribed, all the factors traditionally considered by courts in imposing sentence must be taken into account.[3] Broadly speaking, these involve a consideration and balancing of the nature and seriousness of the crimes, the personal circumstances of the accused and the interests of society.[4]

- [11] The nature and seriousness of the crime of rape requires little amplification. Rape involves a horrific invasion of the dignity and security of the person of the victim. Certain features of the offences already described escalate the seriousness of some of the offences committed. In particular, the display of the knife, or in one instance sticks, and the threat of stabbing was a feature of most of the offences. Mr Ntombana also threatened to kill one of his victims if her companion did not return to the scene. While there was no gratuitous resort to violence over and above the sexual offences, all of this was designed to induce submission to the sexual act.

- [12] It is clear from the psycho-social reports accepted into evidence that Mr Ntombana's conduct has had a profound, adverse emotional impact on the lives of his victims, and their families. Fear, particularly of men, nightmares, insomnia, anger and sadness feature prominently in the complainants' description of the outcome of these events.
- [13] The personal circumstances of Mr Ntombana were placed before me by Mr Geldenhuys, who appeared for him. He was born on 4 March 1999 and was therefore 22 years old at the time when the offences were committed. He was raised by a single mother. He is unmarried but has two young children who stay with their mother, who testified in the proceedings before this court. It may be accepted, for present purposes, that he completed grade 11 schooling. He performed casual work as a self-employed general labourer, earning approximately R1200 per month. He has no previous convictions or pending cases against him, and has been in custody since his arrest.
- [14] Mr Ntombana pleaded not guilty, resulting in the complainants being required to testify and relive their experiences at his hands. It was submitted, on his behalf, that imposition of life sentences would be unjust and disproportionate when considering the triad of factors, particularly the absence of prior convictions, his relative youthfulness and prospects of rehabilitation, also given the absence of gratuitous violence and considering that the rapes did not fall in the worst category of the crime.
- [15] Plasket J has described the interests of society in such cases in the following eloquent terms: [5]
- 'In a case such as this, the legitimate interests of society come strongly to the fore: right-thinking members of society – who, I venture to suggest, make up the overwhelming majority – want to see the attainment of the type of society envisaged by our Constitution where everyone can live without the fear that is currently ever-present for so many women as a result of the scourge of rape. In the criminal context, that interest includes an interest in effective sentences being imposed by the courts to punish wrongdoers appropriately and to deter those who may wish to follow the same path.'
- [16] Society expects that the scourge of gender-based violence must be addressed and must cease. In addition, children's rights are constitutionally protected, and rape of a child is by its nature one of the worst kinds of offences imaginable.
- [17] Mr Ntombana has displayed a propensity for preying on vulnerable victims, notably young girls in their teens. He embarked on what can only be described as a brazen, calculated spree to attempt to rape people he found walking or relieving themselves alone in a particular part of Aliwal North. In most instances this occurred in broad daylight. Between November 2021 and January 2022 he

raped four victims, three of whom were children, and three of whom were raped more than once. One of the children was as young as twelve. He also attempted two further rapes during this period. The modus operandi was the same and these victims were 13 and 15 years of age respectively. Although not wielded in a manner directed to cause physical harm, the presence and threat of the knife to induce submission constitutes an aggravating feature of the rape and attempted offences.

[18] The impact on the victims has become part of a sad narrative for an increasing number of people in the country. Children, who are meant to be free to play, laugh, go to school and enjoy everything that childhood offers are instead scared to walk alone, even when seeking merely to relieve themselves. The socio-economic situation of parts of this province, in particular, reflect the disturbing relationship between lack of access to basic sanitation services and criminal conduct. Some of the victims were attacked while in the field satisfying the most basic of urges. In some instances, they were accompanied by a friend or relative, which also failed to prevent the attack. At least two of the victims' family members have suffered angst and helplessness related to their inability to change the reality of living in a place which has no toilet, so that their children are forced to walk into a dangerous

space to find relief. This is a sad indictment of the state of development of our society and communities should be encouraged and supported to find collective ways to address the situation.

[19] The sentences prescribed by the Act are to be regarded as the sentences that are ordinarily appropriate, unless there are and can be seen to be 'truly convincing reasons for a different response'. While courts are enjoined to temper punishment with a measure of mercy, departures from prescribed sentences are not to be made lightly and for flimsy reasons.[6] I am also cognisant that a finding of an absence of substantial and compelling circumstances will result in the gravest of sentences

being passed and that the consequences of this are profound, effectively removing an individual from society.[7]

[20] I have specifically considered that Mr Ntombana is a young adult who is a father of young children, who has no previous convictions and who has already spent time in custody. Against his various personal circumstances, which I have considered in their totality, stands the multiple convictions for which he is about to be sentenced, the planned and premeditated execution of the crimes, featuring the use of the balaclava to hide his face from his victims, and the threat of further violence and death, to be caused by a knife he carried, in the event of non-submission. As an aside, the facts show that Mr Ntombana was also arrested while wearing the balaclava, concealed under his beanie, and again in possession of the knife, suggesting that he had been on the prowl once again.

[21] As Mr Mgenge argued, he has not demonstrated any remorse for his conduct, and its impact on his various victims. The nature of the various offences

involving prescribed minimum sentences and the interests of society far outweigh Mr Ntombana's personal circumstances so that I am unable to find that substantial compelling circumstances exist to justify a less severe sentence than life imprisonment in respect of counts one, seven and eight. I do not consider the imposition of these sentences to be disproportionate to these crimes, which involve more than one rape of a 14-year-old girl, a 22-year-old woman and a 12-year-old girl respectively, each of whom were forced to submit to him either due to the explicit or implicit threat of stabbing. Given the nature of the offences, various other consequences emanating from legislation follow. These have been included as part of the order to follow.

[22] I consider sentences of ten years' imprisonment to be appropriate for each of the attempted rape counts (counts two and five). Although that is also the prescribed sentence for count three, given the age of the victim and circumstances surrounding the incident I consider that to be altogether inappropriate. A sentence of 18 years' imprisonment is to be imposed for count three, involving the rape of a 16-year-old girl. A sentence of five years' imprisonment is imposed for the assault with intent to commit grievous bodily harm count (count 6). All these sentences automatically run concurrently with the sentences of life imprisonment.

[23] The following sentence is imposed:

- a. In respect of count 1, the accused is sentenced to life imprisonment.
- b. In respect of count 2, the accused is sentenced to ten years' imprisonment.
- c. In respect of count 3, the accused is sentenced to eighteen years' imprisonment.
- d. In respect of count 5, the accused is sentenced to ten years' imprisonment.
- e. In respect of count 6, the accused is sentenced to five years' imprisonment.
- f. In respect of count 7, the accused is sentenced to life imprisonment.
- g. In respect of count 8, the accused is sentenced to life imprisonment.
- h. In terms of s 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the particulars of the accused, as a convicted sexual offender, must be included in the National Register for Sex Offenders.
- i. In terms of s 120(4) of the Children's Act 38 of 2005 and s 41 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the accused is declared to be unsuitable to work with children, and it is directed that his particulars be entered in Part B of the National Child Protection Register.
- j. In terms of s 103(1) of the Firearms Control Act 60 of 2000, the accused is declared unfit to possess a firearm.

A GOVINDJEE

JUDGE OF THE HIGH COURT

Heard:21-29 November 2022

Delivered:01 December 2022

Appearances:

For the State:

Adv S Mgenge

Director of Public Prosecutions

Makhanda

046 602 3000

For the defence:

Adv D Geldenhuys

Legal Aid South Africa

046 636 9350

[1] S 51(1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997) ('the Act'), read with Part I of Schedule 2.

[2] S 51(2) of the Act, read with Part III of Schedule 2.

[3] S v Malgas 2001

(1) SACR 469 (SCA) paras 9 and 25.

[4] S v Malgas id para 22.

[5] S v Falo [2019] ZAE CGHC 37 para 25.

[6] S v Malgas n3 para 9.

[7] S v Bull 2001

(2) SACR 681 (SCA) para 21.

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