IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A481/2007

DATE: 29 FEBRUARY 2008

In the matter between:

MOEGAMAT CASSIEM DAVIDS Appellant

and

THE STATE Respondent

J U D G M E N T

JOUBERT, AJ:

[1] The appellant was convicted in the Wynberg Regional Court on 14 December 2006 on one charge of rape and another of indecent assault. He was sentenced to seven years' imprisonment on the rape charge and two years' imprisonment on the indecent assault charge. It was ordered that the sentences run concurrently.

[2] The appellant initially faced two charges of indecent assault and two charges of rape. He was acquitted on two of these charges and convicted on the two charges referred to above. The trial was a lengthy one. It commenced on 26 April 2006 and ran for a number of

days interspersed with adjournments and postponements. Both the complainant and the appellant were subjected to lengthy and repetitive cross-examination much of which, in the case of the appellant, was also argumentative. The State's case consisted only of the evidence of the complainant and her mother. The appellant himself gave evidence as did his daughter and his sister-in-law. No medical evidence was led either by the State or the defence.

[3] The appellant is the complainant's uncle. He is married to the father's eldest sister. It was common cause during the hearing that prior to the very belated report made by the complainant, initially to her sister and thereafter to the police, that there had been a very close relationship between the family of the complainant and the family of the appellant.

[4] The first count of indecent assault, that is to say the one of which the appellant was convicted, related to events which allegedly took place during 1991 and/or 1992 when the complainant was nine or ten years of age. It was alleged that the appellant had rubbed his penis against the complainant's body and that he had touched her chest or breast area and rubbed his hands between her

legs "and/or touching her vagina". The first count of rape on which the appellant was acquitted was alleged to have taken place during the same period.

[6] The second count of indecent assault on which the appellant was acquitted is alleged to have taken place during the period between 1993 to 1999. The allegations in this regard were to the effect that he had indecently assaulted the complainant "by rubbing his penis against her body and/or touching her breasts and/or touching her vagina and/or pressing a glue stick up her vagina". The second count of rape on which the appellant was convicted related to an event which allegedly took place during October 1999, that is to say almost seven years before the trial. The appellant appeals against both conviction and sentence.

[7] The complainant's evidence in respect of the first count of indecent assault was to the effect that the incidents took place when she visited the appellant's house with her parents, mostly over weekends and usually on Saturdays when her mother and the appellant's wife would go shopping together. She claimed that these incidents took place over a period of time. It was during this period that the first rape had allegedly occurred.

Understandably the complainant could not recall the date.

[8] She gave evidence to the effect that she was playing with her cousin who was about the same age when the appellant appeared and told her cousin that somebody was looking for him. After the cousin had left she apparently found herself on the floor, the appellant having removed her underwear and with the appellant having intercourse with her. She did not report these incidents to anyone and explained her failure to do so by pointing out that she was too afraid, did not know what to do and did not even know what was happening to her at the time as she did not understand what was going on. She stated that she was afraid of her father because he was a very strict person and she was afraid of his reaction and the effect it would have on the family relationship when she reported the incidents. She also thought that nobody would believe her because the appellant was an adult and she was a child.

[9] She claimed that the incidents stopped for a few years, although the family still saw each other on a regular basis, and had started again when she was a teenager. She claimed that the appellant again started touching her

and rubbing up against her and claimed that sometimes she and her cousin, as well as her younger brother and some friends would lie on a bed in her aunt's room which is the room in which the appellant also apparently slept, under blankets and watched films ("movies and stuff"). She claims that whilst this took place the appellant, on more than one occasion, attempted to insert a glue stick into her vagina. She stated that he kept a glue stick in a drawer next to his bed and that one day she went to look for it and threw it away.

[10] It appears that the magistrate was not that convinced by her evidence in respect of this count as, as with the case with the first count of rape, he acquitted the appellant. The charge of rape on which the appellant was convicted related to an incident which she stated took place in October 1999 when she was 16 or 17 years old. She stated that she had attended a slumber or pyjama party at the appellant's home and that during the course of the evening appellant had asked her to go to his son's room. She was apparently younger than the other girls who were also to be bridesmaids at a wedding which was due to take place soon.

[11] It appears that the appellant's son (the complainant's cousin referred to above) was sleeping in the other bed in the room and the television was on whilst the appellant had intercourse with her. She claimed that the appellant's wife walked in on them and, having caught the appellant in the act, kicked the appellant and swore at him.

[12] What causes concern about her evidence in regard to the date on which this incident allegedly took place was her difficulty in deciding precisely on what date the incident took place. She had regard to the wedding which was to take place shortly afterwards, and it emerged later that that date, the date on which she thought the wedding was to take place, was the wrong date. Now this date being the central pillar on which she seemed to found the date on which she said she was raped was not a very sturdy pillar. If she was uncertain about that date one must have concerns about the correctness about her recollection as to what actually transpired.

[13] It did emerge from the evidence later that the date on which the wedding was to take place was 17 October, whereas she said it was the 22nd. According to the complainant, the appellant's wife saw the appellant and

pulled the complainant to the bathroom where she wiped her private parts off and told her to stop crying. It would appear that the appellant's son, who was sleeping in the same room, did not wake up whilst there was all this commotion. The appellant's wife then asked the complainant whether she should not tell the complainant's father about the matter. The complainant however did not wish her to tell her father as she did not wish to break up the family and she was fearful about her father's reaction.

[14] Towards the end of 2005 the complainant told her sister of the incident when her sister advised her that something similar had happened to her. She then made a report to her mother and the matter was eventually reported to the police. The complainant claimed that it was her fear that the same thing might happen to her sister and others that led her to report the matter.

[15] The complainant's mother was the next witness called by the State and she confirmed that the complainant had reported to her that she had been raped by her uncle. The State then closed its case without calling any further evidence.

[16] The appellant gave evidence and denied the allegations against him. He was cross-examined at great length and was repeatedly asked by the prosecutor what motive the complainant and her mother would have to falsely implicate him. He also explained that he suffered from an erectile dysfunction as a result of which he had difficulty in maintaining an erection for longer than a minute. He denied all the allegations relating to the four charges.

[17] It had been put to the State witnesses that the slumber party during which the second rape occurred, never took place. The slumber party allegedly took place shortly before the appellant's daughter's wedding. The complainant was one of the bridesmaids. The appellant's daughter testified that no such slumber party took place as all the bridesmaids lived close by and it was unnecessary for them to have slept over.

[18] The appellant's sister-in-law was also called and she stated that at a meeting between the families after the incident had been reported, the complainant's mother had stated that the reason why the complaint had been laid was because the complainant's fiancé had discovered that she was not a virgin and she had

explained that she had lost her virginity because of the incident. Apparently the husband-to-be was not prepared to marry the complainant unless she reported the matter. This version had also been put to the State witnesses, who denied it. The witness in question who was the complainant's aunt being the sister of her late father, stated she was present when the appellant asked the complainant why she was accusing him. According to the aunt, the complainant then started crying.

[19] Under cross-examination she stated that she did not believe the complainant and when asked by the prosecutor why this was so she stated that she was aware of the fact that the complainant is "very promiscuous". She also knew the appellant very well and could not believe that he would have done the things he was accused of.

[20] The complainant created a favourable impression as a witness on the trial magistrate. He further found no reason to reject the evidence of the complainant's mother. He formed a less favourable impression of the appellant. The magistrate characterised the evidence of the appellant as being a bare denial. This is, however, not accurate. It is difficult to conceive what else the

appellant could have said in answer to the questions if in fact he did not commit the crimes. He did point out that he suffered from an erectile dysfunction. The magistrate also formed the opinion that "the accused's evidence seemed to be rehearsed".

[21] From a reading of the record it is not apparent why the magistrate made this observation. The magistrate also made much of the fact that the appellant sat in the dock looking down throughout the complainant's evidence. When taxed with this in cross-examination the appellant explained that he suffered from a cough and had meant no disrespect to anybody by sitting in the way he had. There could be numerous reasons for the way in which the appellant comported himself during the trial. It must have been a very humiliating experience for the appellant to have to listen to his niece make these allegations against him. In my view, the appellant's failure to sit up straight in court could be attributed to a number of other factors and is not necessarily an indication of a guilty conscience or guilty knowledge.

[22] The magistrate further found that the complainant's aunt "clearly showed she is biased". The reasons given by the magistrate for this finding are not convincing. It also

emerged from the evidence that the complainant's family, including the complainant, were prepared not to report the matter to the police if the appellant apologised for his actions. The fact that he was not prepared to do so led to their decision to report the matter to the police. This is hardly consistent with the complainant's version that she decided to report the matter in order to protect her sister and possibly others from the same fate.

[23] In my view, the complainant's version of the rape on which the appellant was convicted was highly improbable. If in fact her cousin was sleeping in the same room at the time when the appellant's wife set upon him in the way in which the complainant described, it is inconceivable that he would not have woken up and witnessed the appellant's wife kicking him and swearing at him.

[24] In S v Van Aswegen 2001(2) SACR 97 (SCA) at 101a-e the following passage from the judgment of Nugent, J (as he then was) in S v Van der Meyden 1991(1) SACR 447 (W) at 449h-450b was cited with approval:

> "The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt and the logical corollary

is that he must be acquitted if it is reasonably possible that might be innocent.

The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the Court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable and some of it might be found to be only possibly false or unreliable but none of it may simply be ignored".

After citing the passage, Navsa, JA in S v Trainor 2003(1) SACR 35 (SCA) at 40i-41a continues:

"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated as must corroborative evidence, if any. Evidence of course must be evaluated against the *onus* on any

particular issue in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong".

[25] Whilst it is so that the trial court has the advantage of hearing *viva voce* evidence from a witness, a court of appeal is not bound by the evaluation of such evidence by the trial court. In Protea Assurance Ltd v Casey 1970(2) SA 643 (A) at 648E the Court pointed out that:

> "Over-emphasis of the advantages which the trial court enjoyed is to be avoided lest the appellant's right of appeal becomes illusory".

In my view, the following statement in the judgment of H J Erasmus, J in Timothy Lotter v The State case number A84/2007, a judgment which was delivered on 29 November 2007 is apposite:

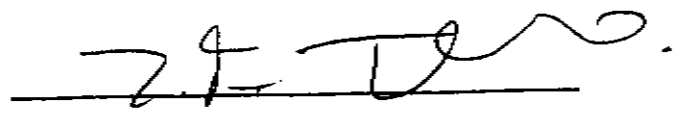
> "A conspectus of the totality of the evidence before the Court reveals a case built upon the evidence of a single witness whose credibility was highly rated by the trial magistrate, yet there are features, as pointed out above, which cast a shadow of doubt and uncertainty over the cogency of the whole. Add to this simple denial by the accused of involvement in the events of the evening in question, a denial that in the end emerges unscathed, then it cannot

be said that on the evidence before the Court the guilt of the accused has been established beyond reasonable doubt.

In the ultimate result one is left with the uncomfortable feeling that the full story of the events of the evening, whatever that may be, has not been placed before the Court".

[26] That is not to say that the complainant is to be disbelieved. On the other hand, it is further not to say that the evidence of the appellant is to be disbelieved. The State has to prove the guilt of the appellant beyond a reasonable doubt. If there is a reasonable possibility that the appellant's version might be true then he must enjoy the benefit of the doubt. That, in my view, is the position in this matter.

[27] I am accordingly of the view that the appeal should be upheld and that the conviction and sentence should be set aside.



JOUBERT, AJ

VAN REENEN, J: I agree. The appeal succeeds and accordingly the conviction of the appellant on counts 1 and 4 is set aside, as are the sentences imposed in respect thereof.

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VAN REENEN, J

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