IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A392/2006

DATE: 7 MARCH 2008

In the matter between:

WAYNE DAVIDS Appellant

and

THE STATE Respondent

JUDGMENT

MOTALA, J:

[1] Appellant was charged in the Regional Court with two counts. On count 1 he was charged with housebreaking with intent to commit an offence unknown to the State. On count 2 he was charged with attempted rape. He pleaded not guilty on both counts. He was found guilty on count 1 of housebreaking with intent to commit kidnapping and kidnapping. He was sentenced to 12 years' imprisonment on that count. On count 2 he was found guilty of indecent assault and for that he was sentenced to one year's imprisonment. He appeals against both the convictions and the sentences.

[2] It has been submitted by appellant's counsel that the magistrate erred in several respects during the trial. Firstly, he allowed leading questions to be put to the complainant who was eight years old when she testified. He also repeatedly inhibited the appellant from highlighting what he alleged were discrepancies or inconsistencies between what was said in court and what was said in statements to the police. He even went so far as to say that the appellant, who was not legally represented, should concentrate on the evidence in court and not on the statements to the police. He certainly did not assist the appellant in any respect.

[3] Quite clearly, the conduct of the magistrate fell short of what is expected of a judicial officer who is trying an undefended accused. However, it is trite that not every irregularity or misdirection leads to a trial being vitiated. The question that arises is whether we can find that on the evidence unaffected by the irregularities I have mentioned, the State has proved its case beyond a reasonable doubt.

[4] A decisive fact in this matter is that it was common cause that the complainant, Synomia de Swardt, who was six years old at the time, was found that night in appellant's

room. Her father, Donovan Tony, testified that on receiving a report while in bed, he dressed quickly and went to search for Synomia. He found her in the appellant's room, on appellant's bed. She was fully dressed. He said appellant was also on the bed. He was naked. Appellant admitted that Synomia was found in his room on his bed, however he denied being naked and said he was lying on a mattress on the floor.

[5] Appellant testified that on his way home at about midnight he met Synomia in the street. He called out for her parents but received no response. He then took her home. Synomia testified that she and two other children, Marilyn aged 12 and Quinton aged 9, were asleep. She said that appellant came to their room and fell on top of her and then carried her to his room at his grandmother's house. He undressed himself and asked her to undress but she refused. He threatened to stab her. He then rubbed her vagina. She said he was drunk. Marilyn confirmed that evidence in material respects.

[6] Bettie Tony, Synomia's grandmother, testified that she lived in a brick house. Alongside it was what seems to be a wooden structure where the children slept. That night she checked that the children were inside that

annexe and that the door was firmly shut. She said that the door can, however, be forced open. She said that her husband, Jim Mahlasela, and Marilyn made a report to her and she sent an urgent message to Donovan Tony, Synomia's father. She said also that the door to the annexe was broken, it had earlier been in good condition.

[7] The evidence of appellant that a six year old child was left standing in the street while her father and grandparents were safely asleep in their bed cannot be reasonably and possibly true. On the other hand, the evidence of the complainant, of Marilyn, of the complainant's father and grandmother and of Jim Mahlasela is overwhelming – that the appellant took the complainant from her bed to his room.

[8] I turn now to the appeal against sentence. A perusal of the reported decisions on what is an appropriate sentence for kidnapping reveals, as one would expect, that a wide range of sentences have been imposed. In S v F 1983(1) SA 747 (O) in which, as the magistrate correctly pointed out, the facts were broadly similar to the facts in this case, the accused was sentenced in the Magistrate's Court to a fine of R500 or six months' imprisonment. The Court of appeal increased the

sentence to 12 months' imprisonment of which six months were suspended. In S v Levy & Another 1967 (1) SA 351 (W) a woman and her baby were kidnapped and held until a large ransom was paid. A sentence of 16 years' imprisonment was imposed. In S v Naidoo 1974(3) SA 706 (AD), a case referred to by the magistrate, a child was kidnapped and held for ransom. Sentences of eight years and nine years' imprisonment were confirmed by the then Appellate Division. Two other persons involved in the matter were sentenced to two years' and four years' imprisonment. Reference may also be made to S v Morgan & Others 1993(2) SACR 134 (A) and S v Fraser 2005(1) SACR 455.

[9] The conduct of the appellant on that night clearly indicates that he did not plan or think through what he was doing. He took the complainant in the presence of an older child Marilyn who, as would have been expected by anyone in his sound and sober senses, duly raised the alarm. He then took the complainant to his grandmother's house where he would clearly expect to be found, as indeed he was. His conduct can only be explained on the basis of his intoxication. His grandmother, Rose Titus, who displayed no bias towards him in that she did not corroborate his testimony in

material respects said he was so drunk that he could not hold the plate of food she gave him. She said she had to help him carry the plate to his room. He was clearly, in her words, "hopeloos dronk, hy het nie geweet wat rondom hom aangaan nie". Furthermore there was no evidence that he tried to rape Synomia.

[10] Appellant has several previous convictions, including convictions for assault and one for rape. Although he was a juvenile when convicted of rape and nearly 10 years have passed before he committed the present offences, his record must be given some weight. Of greater importance, however, is that there is an epidemic of violent crimes against and molestation of females of all ages.

[11] Taking all the circumstances into account, a substantial period of imprisonment is the only appropriate sentence. However, in my view, an effective sentence of 13 years is disturbingly inappropriate. In my view, as the two offences were so closely related I would take the two offences together for purposes of sentence and impose a sentence of seven years' imprisonment.

BUDLENDER, AJ: I agree.

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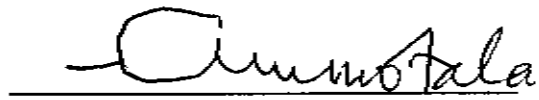
BUDLENDER, AJ

10 MOTALA, J: The appeal against the conviction is dismissed and the conviction is confirmed. The appeal against sentence succeeds, the sentence imposed is set aside and substituted by the following:

> "The accused is sentenced to seven years' imprisonment".



20 MOTALA, J