IN THE CAPE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE CASE NO: A290/2008

In the matter between:

ACHMAT WILLIAMS Appellant

and

THE STATE Respondent

JUDGMENT BY	:	JAMIE, AJ (ZONDI, J Agrees and it is so ordered) Snr Judge
For the Appellant(s)	:	Adv. JC LOUW
Instructed by	:	Zirk MacKay Attorneys 11 Manatoka Avenue Amandelrug KUILS RIVER (Ref: Zirk MacKay)
For the Respondent(s)	:	Adv. CJ DE JONGH
Instructed by	:	The Director of Public Prosecutions
Date(s) of hearing	:	Friday 21 NOVEMBER 2008
Judgment delivered	:	Friday, 12 DECEMBER 2008

[REPORTABLE]

IN THE HIGH COURT OF SOUTH AFRICA
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CASE NO.: A290/08

In the matter between:

ACHMAT WILLIAMS Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 12 DECEMBER 2008

JAMIE AJ:

[1] The Appellant was convicted on 14 April 2008 on one count of rape and one count of assault, in the Regional Court for the Cape held at Parow. He was sentenced in respect of these offences, on 14 April 2008, to life imprisonment in respect of the rape and to six months imprisonment in respect of the assault. The Appellant now appeals, as he is entitled to do, as of right to this Court against both his conviction and sentence in relation to these offences.

[2] Prior to the commencement of the appeal hearing, the Court requested counsel to submit further argument to it in relation to the effect of the Criminal Law (Sentencing) Amendment Act 38 of 2007, which came into operation on 31 December 2007. This Act, *inter alia*, empowered Regional Courts to impose a sentence of imprisonment for life for offences referred to in Part 1 of Schedule 2 of Act 105 of 1997 and, which sentence had been beyond its jurisdiction prior to 31 December 2007. I should mention that the offences were allegedly committed on 2 September 2005 and that Appellant's trial commenced on 3 November 2006.

[3] In response to the Court's request, Mr Louw, who appeared for the Appellant, submitted additional written argument. In such argument Mr Louw contended, *inter alia*, that Act 38 of 2007 should not be given retrospective effect and that, accordingly, the Regional Court had erred in imposing the increased sentence, and that the maximum sentence that should have been imposed under the circumstances, was the maximum sentence that was available to the Regional Court before 31 December 2007, viz a sentence of a maximum of 15 years.

[4] To the extent that the Appellant's argument is premised upon the principle that legislation does not have retrospective or retroactive

application, and that a penalty cannot be increased after the commission of an offence, these principles are inapplicable.

[5] Firstly, the aforementioned principles are always subject to the express wording of the amending act. In this case, section 53A(b) provides unequivocally-

> "*If a Regional Court has, prior to the date of commencement of the Criminal Law (Sentencing) Amendment Act, 2007-*
>
> *(a) . . . ;*
>
> *(b) not committed an accused for sentence by a High Court under this Act, then the Regional Court must dispose of the matter in terms of this Act, as amended by the Criminal Law (Sentencing) Amendment Act, 2007."*

[6] Inasmuch as the Regional Court had not reached the stage of committing the Appellant for sentence by a High Court at the time that Act 38 of 2007 came into effect, it was bound to itself dispose of the matter and to sentence the accused in terms of its increased jurisdiction.

[7] As pointed out to Mr Louw during argument, Act 38 of 2007 is quite unambiguous in its intent. In the absence of any constitutional challenge

to the provision, which it is not for a moment suggested would have any merit, the clear wording of the Act must be complied with. Accordingly, the Regional Court clearly had the increased jurisdiction to impose imprisonment for life upon convicting the Appellant, as it did on 14 March 2008. The sentence of imprisonment for life was accordingly a competent one when the Regional Court sentenced the Appellant on 14 April 2008.

[8] The second argument advanced by Mr Louw is that the Appellant's fair trial rights were breached because he was not given adequate or proper notification of the fact that he would be essentially convicted of and sentenced for two rapes. The argument appeared to be that he should have been specifically charged with separate counts of rape.

[9] As pointed out by Mr De Jongh, who appeared for the State, the charge sheet specifically referred to sections 51 and 52 of Act 105 of 1997 and further indicated in bold letters that the minimum sentence that was applicable was that of imprisonment for life.

[10] Given that the Appellant was legally represented, there is, in my view, no merit in the contention that his fair trial rights were breached as he was at all times aware that the minimum sentence legislation was applicable

to the charge that he faced. (See *S v Ndlovu 2003(1) SACR 331 (SCA) 227 A-C*).

[11] In any event, the relevant section of Part 1 of the Second Schedule to Act 105 of 1997 does not refer to separate charges or convictions in respect of rape but to "*circumstances where the victim was raped more than once."* This wording is to be contrasted with that in paragraph (a)(iii) which refers to rape by "*a person who has been convicted of two or more offences of rape."* In other words, where the Legislature envisaged separate charges or convictions of rape, it made this clear.

[12] Inasmuch as it was permissible for the State to charge the Appellant in one charge with multiple counts of rape, the conviction is, in my view, one contemplated by paragraph (a)(i) of Part 1 of Schedule 2 to Act 105 of 1997, and accordingly the prescribed minimum sentence of imprisonment for life was applicable. (See *S v Blaauw 1999(2) SACR 295(W) at 300 A-B*).

[13] This brings me to the merits of the appeal. The essentials of the State's case were:

13.1 The complainant and her cousins and friend were at a club in Goodwood;

13.2 During the course of the evening the Appellant introduced himself to the complainant and complimented her;

13.3 At a later stage, he followed her to the womens' bathroom and said that he wished her to have sex with him. He also showed her what appeared to be a firearm that was stuck in his pants. She only saw the handle of the firearm. He asked her why she was not afraid of him and told her not to try any tricks. They then left the bathroom;

13.4 She and her friends continued to socialise with Appellant and his friends. The Appellant bought the females drinks and they danced;

13.5 On a number of occasions, she tried to pull away from him during the course of the evening when Appellant's attentions became too overbearing;

13.6 Later they decided to go to a shop to buy cigarettes. On her return, her cousin, Kurt, got out of Appellant's vehicle, while the complainant, at Appellant's request, remained behind so that they could talk;

13.7 Instead of talking, Appellant drove away. He wanted the complainant to masturbate him and when she refused he hit her in the face so that her head struck the window of the vehicle;

13.8 She had no idea where they were going but eventually they ended up in a secluded area, apparently near Oudekraal along the Atlantic seaboard;

13.9 Appellant tore off her clothes, continued to hit her in the face in order to subdue her, then raped her. When he was done, he attempted to turn her over in order to rape her anally. She resisted. He threatened to kill her;

13.10 She located a bottle of beer in the car and hit him in the face with it. She also stabbed him in the stomach with a piece of the bottle. The Appellant again threatened to kill her as she was leaving evidence in his car, referring presumably to the blood from his head wound;

13.11 She begged him not to kill her and smaid that he could do anything, even rape her and even take her anally, provided that he did not kill her. She then allowed him to rape her again;

13.12 While he was busy, she managed to get the door open. She kicked him off her and tried to get out. He grabbed her arm and threatened to break it if she did not get back into the car. She kicked him again, spat in his face and then ran away;

13.13 He caught up with her and while lying on top of her, he hit her in the face on a number of occasions with an empty cooldrink can. She managed to escape again and then fell into a ditch and played dead. Appellant eventually left. The complainant was left alone in the dark, naked except for her socks;

13.14 She managed to flag down a passing delivery vehicle and was taken to the police station and then to hospital.

[14] Viewed as a whole, I agree with the Magistrate that the complainant testified in a coherent and satisfactory manner and provided a credible and convincing account of events that, moreover coincided with the objective facts. The major issue on which she was criticised was the incident in the bathroom.

[15] While I agree that it is unlikely that Appellant could have had a firearm in the club, the fact of the matter is that there is no direct evidence, save for that of the Appellant himself, that he was in fact searched that evening.

Certainly, the complainant and the other females in her party were not searched that evening. In the absence of such evidence, it cannot be ruled out that, for whatever reason, the Appellant was not searched that evening, and that he was able to take a firearm into the club.

[16] The complainant was also criticised for her conduct in the club before she left with the Appellant and Kurt. In particular, she was criticised for not informing her friends of the Appellant's threats and the fact that he had a firearm. Seen in context, however, I consider the complainant's conduct to be such that it does not detract from the reliability of her overall account of events. While it is so that she acted irrationally, even foolishly, in remaining in his company, going with the Appellant to the shop in his vehicle, and even more so, in remaining behind in the vehicle after Kurt had left, this must be seen in the context of her evidence that she was scared of him, although she did not think that he would actually carry out his threats with reference to the firearm.

[17] In any event, I do not consider the complainant's evidence in relation to events at the club, and whatever criticism might be directed in that regard, as detracting from the reliability of her evidence as to what transpired in the vehicle while she and the Appellant were alone.

[18] In the premises, and regard being had to the so-called cautionary rule in relation to single witnesses in sexual offence cases, I am satisfied that the complainant's evidence as to events in the motor vehicle is satisfactory and reliable in all material respects.

[19] In contradistinction hereto, the Appellant's evidence was unsatisfactory and not reasonably possibly true. In this regard:

19.1 His entire account of going to the shop, or the *"tik stop"* on his version, is unconvincing. On his version, the shop next to the club was open and sold cigarettes. Yet he, the complainant and Kurt went in search of another shop. Furthermore they did not go to a shop at all but to an unknown part of a residential area. The Appellant, considerably older than the others, allows himself to be directed as to where he should go by two young strangers. He merely goes along with them and neither before nor after the stop at this unknown house does he ask them what they were doing or where they were going or for what purpose. Finally, and fatally for his version, Kurt testified that he took the cigarettes which they purchased at the shop into the club and left them with one of the girls. On Appellant's version however, there were no cigarettes at all;

19.2 Secondly, the circumstances under which complainant was left in Oudekraal, namely naked alongside the road, is consistent with her version, but not his. The suggestion by the Appellant that complainant had taken off her clothes in order to remove evidence of her assault on him is preposterous and not reasonably possibly true. Thus, it makes no sense that she would have undressed herself in order to hide evidence of her assault on the Appellant. If she had indeed unlawfully assaulted the Appellant, and was now intent upon crying rape in order to disguise her own crime, the logical and obvious thing to do would have been to retain the bloodied clothing, not get rid of it. She would then be able to indicate to the police how she had been bloodied during the course of her defending herself against the supposed rapist. To unclothe herself in these circumstances makes no sense;

19.3 Furthermore, the idea that a 19 year old girl would, under the circumstances then prevailing, undress herself leaving only her socks on, for the far-fetched reason that she wanted to get rid of the evidence of her assault of the Appellant, is so unlikely and in fact incredible, that it can be dismissed out of hand;

19.4 The complainant's account of events is further borne out by the medical evidence and also the evidence of Ronel Coetzee, the woman who stopped for her, and who described the complainant's emotional state. Unless the complainant was an accomplished actor, her conduct is entirely consistent with her version of events, and not consistent with that of the Appellant.

[20] For the aforesaid reasons I am satisfied that there is no merit in the appeal against the conviction of rape and that of assault, and the appeals in this respect are dismissed and the convictions confirmed.

SENTENCE

[21] The Appellant is not a first offender and has a previous conviction for rape for which he was sentenced to seven years imprisonment. This obviously counts against him.

[22] The Regional Magistrate appears to have found that the amended section 51(3) (aA) was of application and that he accordingly could not take into account, *inter alia*, the fact that complainant was not physically injured as a substantial and compelling circumstance. To the extent that the Magistrate did take this factor into account, he erred, as the change to the substantive, as opposed to procedural, law does not find

application because of section 12(2)(e) of the Interpretation Act which provides:

"12(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not –

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this sub-section mentioned,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed."

[23] No contrary intention as contemplated in section 12(2) of the Interpretation Act appears from Act 38 of 2007, and accordingly the amendments do not, otherwise then as already dealt with, affect this matter.

[24] I have accordingly considered all the relevant facts, including the Appellant's personal circumstances, the lack of physical injuries, or at least any severe physical injuries, the circumstances of the crime, and

the fact that Appellant effectively abducted the complainant in order to carry out his intentions. On a conspectus of all these factors, I am of the view that the Magistrate was correct in finding no substantial and compelling circumstances to depart from the prescribed minimum sentence in respect of the conviction for rape.

[25] In relation to the conviction of assault, the Appellant was sentenced to a relatively light 6 months' imprisonment, which is, in all the circumstances, unobjectionable.

[26] Accordingly, the appeal against sentence is, similarly, dismissed.

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JAMIE AJ

I agree, and it is so ordered.

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ZONDI J