IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: A296/2009

In the matter between:

JEFFREY HEINRICH RABIE Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED: FRIDAY 10 DECEMBER 2010

SALDANHA, J

[1.] The appellant Mr. Jeffrey Heinrich Rabie was convicted on the 14th of February 2008 in the High Court (Eastern Circuit Local Division) at Oudtshoorn on charges of abduction, rape and the murder of a six year old child. He was sentenced to five years imprisonment on the count of abduction, 20 years imprisonment for the rape and 25 years imprisonment for the murder. The sentences were ordered to run concurrently in terms of section 280(2) of the Criminal Procedure Act which resulted in an effective term of imprisonment of 25 years.

[2.] The appellant had successfully obtained leave to appeal against the convictions on the charges of abduction and the rape and leave to appeal against the sentence imposed on the charge of murder.

[3.] The charges arose out of an incident on the 3rd of February 2007, near Dysselsdorp in the district of Oudtshoorn where the appellant was alleged to have abducted M-A D a 6 year old child with the intention of having sexual intercourse with her and whereafter he was alleged to have raped and murdered her. The appellant

had been legally represented at the trial and had tendered a plea of not guilty to the charge of abduction and claimed that it amounted to an unfair duplication of the charges with that of the alleged rape. The appellant tendered pleas of guilty to an indecent assault and the charge of murder and made various formal admissions in terms of section 220 of the Criminal Procedure Act. The state however was not prepared to accept the pleas and elected to lead evidence on each of the charges.

[4.] At the trial the state tendered the evidence of five witnesses. A set of photographs of the scene at which the deceased was found near a bush on the banks of the Olifantsrivier near Dysselsdorp and photographs which had been taken during the post mortem examination of the deceased were by agreement submitted into evidence. A plan and satellite photographs of Dysselsdorp were also used during the course of the trial. During the course of the trial the appellant made further admissions in terms of section 220 of the Act with regard to the analysis of a specimen of blood as being that of the deceased and which had been found on his clothes. He also admitted that a specimen of his semen was found on a long pants worn by the deceased. During the course of the state's case the court undertook an inspection in loco of the area at which the incidents of the 3rd of February 2007 were alleged to have occurred.

[5.] The appellant for his part chose neither to testify nor lead any evidence in support of his defence.

[6.] It appeared that as a result of the evidence for the state and the admissions made by the appellant much of what had occurred on the 3rd of February 2007 was largely common cause.

[7.] Ms Sofie Erasmus a resident of Dysselsdorp who lived at no 270 Dysselsweg testified that during the

afternoon of the 3rd February 2007 while sitting in her front yard she saw the deceased in the company of the appellant together with another young girl. She had overheard the appellant say to the deceased and the other girl words to the effect, "ja man ek gaan dit vir jou gee." She thereafter saw the deceased hand over a bar of soap to the other girl who then walked off in the direction of her home in Koeriesweg. The appellant proceeded further up Dysselsweg while the deceased followed him and Erasmus recalled that the deceased had uttered words to the effect that she did not want "minder as vyf rand." She last saw the appellant and the deceased as they took a turn in Dysselsweg.

[8.] A A a 17 year old young man to whom the appellant was known as 'Oubaas' claimed that he and the appellant had previously lived and worked together. He had seen the appellant on two separate occasions on the morning of Saturday 3rd of February 2007. A testified that during the afternoon between 4pm and 5pm while he and two others were sitting under a tree in Koeriesweg he saw the appellant again. The appellant approached them from the direction of Dysselsweg and A saw that there was blood on his clothes. On enquiry, the appellant said to him that he had been involved in a fight and that his mouth had been cut and had bled. A claimed that the appellant appeared afraid as if something had happened to him and was also in a hurry to get home. He later saw the appellant again and it appeared that the appellant had washed himself and had on a change of clean clothes.

[9.] The body of the deceased was found on Sunday the 4th of February 2007 by a reservist, Constable McKenna, lying in a footpath near a bushy area on the farm Ebenheizer in Dysselsdorp near the Olifantsrivier. Save for a long pants that she had on, the rest of her body was naked. Her panty was found approximately 5 meters along the footpath from where she lay. There was blood on the front and back of the long pants near the thigh area. Blood was also found on the panty in the area of the vagina and rectum. Semen which was analyzed and found to be that of the appellant was found on the long pants worn by the deceased. No semen was found in

a vaginal specimen which had been obtained during the postmortem examination and none was found on the panty of the deceased.

[10.] The appellant, as indicated, had tendered a plea of guilty to indecent assault and the murder of the deceased. His description of the events that led to the death of the complainant was set out in his statement in terms of section 112

(2) where in paragraph 7 he claimed;

"Hoewel dit aanvanklik my bedoeling was om bloot huis toe te loop en dit nie my aanvanklike intensie was nie, het ek op n stadium besluit om haar eenkant te kry met die doel om geslagsgemeenskap met haar te hou. Ek het op 'n stadium, ek weet nie presies wanneer nie, wel gese dat sy saam met my moet kom en sy het my agtervolg".

[11.] At paragraph 8 he explained;

"Ek het saam met die ooriedene gestap in die rigting van die bosse by die Olifantshvier soos blyk uit Bewysstuk "B" hieronder gemeld. Naby die rivier by die bosse het ek haar klein broekie en ook haar sweetpakbroek afgetrek. Ek het ook haar bostuk, ek kan nie onthou wat dit was nie, uitgetrek. Ek wou met haar gemeenskap gehou het. Toe ek egter haar broekie afgetrek het, het ek gesien dat sy te klein was en dat sy my hoegenaamd nie kan akkomodeer nie. Ek het toe besluit om haar onsedelik aan te rand. Ek het my regterwysvinger gebruik om haar anale kanaal te penetreer. Dit kan wees dat ek ook in die proses ook haar vaginaal kon penetreer het met my wysvinger. Die ooriedene het egter begin skreeu. Ek het gesien dat my hand vol bloed is en het besef dat ek haar beseer het. Ek het ook later gemerk dat my klere vol bloed was." The statement further dealt with the appellant's version as to how he was alleged to have murdered the deceased. The appellant had also admitted that the route which the court had followed during the inspection in loco from Dysselsdorp to the area where the deceased had been found was the same as that he and the deceased had taken on the day of the incident. They had walked passed the residence of Ms Erasmus on Dysselsweg and turned right into Magerman Street and proceeded into a

T Junction with Belelie Street. There they turned right and walked along a passage-way between the Pinkster Kerk and houses and emerged into an open veld where they followed a footpath and walked through a ditch and around a sportsfield. On the other side of the sportsfield they followed a footpath through another ditch and proceeded to an open field. From there they walked along a footpath into a bushy area near the banks of the Olifantsrivier where the incident occurred. The distance covered along the route was estimated as between 1 and 2 kilometres from the residence of Ms Erasmus in Dysselsweg.

[12.] Dr. Adam Johannes EJarnard a district surgeon from Oudtshoorn conducted the post mortem examination on the 5th of February 2007 on the body of the deceased. Barnard had practised as a medical practitioner for approximately 49 years of which 40 years was as a district surgeon. He concluded that the cause of death was as a result of multiple injuries. He had observed a tear of approximately 2cm x 1cm in the area between the deceased's vagina and her anus. He was of the view that the tear had been caused by a blunt instrument which had been forced into the entrance of the vagina but without fully penetrating it. Based on his many years of experience, Barnard claimed that the tear appeared to be typical of an attempt at a forceful insertion of a penis into the relatively small vagina. Barnard was cross-examined at length by the appellant's legal representative as to whether the tear could have been caused by the use of a finger. In this regard the version of the appellant (as set out in his plea explanation of indecent assault) was put to Barnard. He maintained though that it was improbable that a finger would have caused the injury but did not rule out the possibility thereof.

The conviction of rape

[13.] The court a quo found that the injuries to the vagina of the deceased had been caused by a blunt instrument although only through partial penetration. The finding was based largely on the evidence of Barnard and from

the photographs taken at the post mortem examination. The question that arose was whether the only reasonable inference to be drawn was that the appellant had attempted to penetrate the vagina of the deceased with his penis. Based on his experience and observations Barnard held the very strong view that the vaginal injuries sustained by the complainant were caused as a result of an attempt to insert a penis into the deceased's vagina. He considered that the injury was also consistent with the angle at which the attempted penetration of the vagina had occurred. The court a quo also took into account that semen had been found on the long pants of the deceased although no semen had been found on the blood stained panty which had been found almost 5m from the place where she lay. Although no semen was found on the vaginal smear the court was correctly of the view that for the purposes of proving rape it was not necessary for the state to prove that there had been an ejaculation. In order to determine what in fact occurred the court considered all the surrounding circumstances. The court was mindful of the appellant's version as it appeared from the plea explanation, in particular his claim that he had taken the deceased from Dysseldorp to have sexual intercourse with her. It therefore considered it improbable in the circumstances that the appellant would not have attempted to have sexual intercourse with her and that in doing so, had inflicted the injuries to her vagina. Moreover all of the evidence had to be considered in the context of the appellant's election not to put his version before the court by way of testimony. In this regard the court appropriately referred to the judgment in S v Boesak 2001 (1) SACR 11 at para 24 where it was held;

> "The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence What is stated above is consistent with the remarks of Madala J, writing for the Court, in Osman and Another v Attorney-General, Transvaal, 24_when he said the following:
>
> > 'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient

to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would A destroy the fundamental nature of our adversarial system of criminal justice.'

[14.] This view was also supported in S v Buda and Others 2004 (1) SACR 9

(T) in which the following was stated;

"Yet there are, as has been held by the Supreme Court of Appeal and the Constitutional Court limits to this right. There comes a stage in a prosecution where an accused has a duty to tell her or his story or to lead other evidence, which would show that, for example, the denial of participation is reasonably possibly true. The question is, of course, whether that stage has been reached in this case. "

[15] In the matter of S v Chabalala 2003 (1) SACR 134 (SCA) at para 20,
Heher AJA stated;

"As was pointed out in S v Mthethwa 1972 (3) SA 766 (A) at 769D: Where . . . there is direct prima facie evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general ipso facto tends to strengthen the State case, because there is nothing to gainsay it, and therefore less reason for doubting its credibility or reliability; see S v Nkombani and

Another 1963 (4) SA 877 (A) at 893G and E S v Snyman 1968 (2) SA 582 (A) at588G.'"

[16.] In the circumstances, I am of the view that the court a quo correctly found that the appellant having been faced with the evidence of the state called for a response on his part. In the absence of such response the state was correctly found to have proved beyond reasonable doubt that appellant had raped the deceased.

The conviction of abduction.

[17] In S v Whitehead & Others 2008 (1) All SA 257 (SCA) at 268 Nafsa JA (on behalf of the majority court) on the question of a duplication of convictions stated that;

> "[34] The proper enquiry is whether in reality there has been a duplication of convictions. In order to address this issue it should be borne in mind that a single act may have numerous criminally relevant consequences and may give rise to numerous offences. Robbery, for example, may be committed by means of more than one act.
>
> [35] There is no infallible formula to determine whether or not, in any particular case, there has been a duplication of convictions. The various tests that have been formulated by our courts (to which Combrinck JA refers) are not rules of law, nor are they exhaustive. They are simply useful practical guides and in the ultimate instance, if these tests fail to provide a satisfactory answer, the matter is correctly left to the common sense, wisdom, experience and sense of fairness of the court.
>
> [36] It has always been accepted that a logical point of departure is to consider the definitions of those offences in regard to which a possible duplication might have taken place".

[18.] The court a quo adopted a similar approach and considered each of the definitial elements of the offence of

abduction. The authors C R Snyman in Criminal Law (5th ed) at pages 405 to 407 and Jonathan Burchell, Principles of Criminal Law (3rd Ed) pages 764 to 767 define the offence of abduction as the

> "....unlawful and intentional removal of an unmarried minor , male or female from the control of his or her parent or guardian and without the consent of such parent or guardian, intending that he or she or somebody else may marry or have sexual intercourse with the minor"

[19.] The arcane origins of the offence of abduction regarded minor females as subservient in society largely subject to the authority of their parents and as economic assets. Snyman correctly holds the view that although the offence is today largely limited in application it appropriately punishes "unscrupulous people who entice young people away from their parental homes", in order to have sexual intercourse with them or oy placing them at the disposal of others for such purposes. (Snyman at pages 403-404.) In this context it is important to note that the offence is committed against the parent or the guardian of the child.

[20.] In the application of the elements of the offence to the facts of the matter it appears that the evidence established the following: (a) "the removal", the appellant had enticed the deceased with the promise of an amount of money to accompany him, (b) of an "unmarried minor", the deceased was a 6 years old child, (c) "from the control of her guardian", her grandmother was her guardian at the time of the incident and in whose care and custody she had resided, (d) "with the intention of having sexual intercourse with the minor", which on the evidence appears to have been the intention of the appellant and based also on his own statement in terms of the section 112, (e) "without the consent of the guardian," clearly the removal occurred without the consent and knowledge of the deceased's grandmother, and (f) "having acted unlawfully without any justification for his conduct" as is apparent from all of the evidence and on the admissions made by the appellant himself.

[21.] The court a quo also considered whether the requirement that the removal had to be for a substantial period had been proved and in this regard took note of the route taken by the appellart and the deceased and distance that they had walked, approximately 1,5km from the residential area of Dysselsdorp to the banks of the Olifantsrivier where the rape and murder occurred.

[22.] The court a quo had also considered the various tests to be applied with regard to the question of a duplication of convictions and in this regard referred to the decision of Comrie J in S v Davids 1998 (2) SACR 313 at 316 B-E;

"Over the years various tests have been devised by the Courts, as aids to the determination of what can be a very difficult question. The case law is collected and considered in Du Toit et al: Commentary on the Criminal Procedure Act ad s 83. See too the commentary on s 106(1). Compare Hiemstra SA Strafproses 5th ed (per Kriegler) ad s 83 and s 106. The two principal tests may be called the evidence test and the intention test. They are not rules of law, nor are they exhaustive. They are no more than useful practical guides. R v Kuzwayo 1960 (1) SA 340 (A). If these tests fail to provide a satisfactory answer, then the matter is left to the wisdom, experience and sense of fairness of the Court. Indeed, the leading cases acknowledge that it has not been possible to develop a comprehensive principle, or set of principles, which will resolve all the many questions which may arise in this grey area of the law. Gordon v R 1909 EDC 254 at 268; S v Prins en 'n Ander 1977 (3) SA 807 (A) at 813; S v Christie 1982 (1) SA 464 (A) at 485.

[23.] In respect of "the evidence test" the factors to be considered were "whether the evidence necessary to establish the commission of one crime involves proving the commission of another crime". In respect of the "intention test" the enquiry related to "whether the two criminal acts are done with a single intent and constitutes one continuous criminal transaction." [See S v Davids above]

[24.] Ms Andrews who appea-ed on behalf of the appellant relied on the "intention test" in support of the contention that there was an unreasonable duplication of convictions. She submitted that the appellant only had a single and continuous intention in respect of the offences of abduction and the indecent assault/rape. The court a quo in this regard referred to the decision of Wessels J in S v Grobbelaar 1996 (1) SA 507 (A) as a useful basis

for the application of the "intention test", which decision was also referred to by Nafsa JA in S v Whitehead (above) with approval at para 42;

"[42] Another test which is sometimes applied by the courts in determining whether there is a duplication of convictions is the so-called 'intention test'. In terms of this test, if a person commits several acts, each one of which could be a separate offence on its own, but they constitute a continuous transaction that is carried out with a single intent, his or her conduct would constitute only a single offence. However, as pointed out by Wessels JA in Grobler (supra) at 523F - H:

> 'Insofar as the 'single intent' and 'continuous transaction' test is concerned, the distinction between motive and intent and the different intents inherent in different offences must not be overlooked . . . If a person breaks into a room intending to steal from the occupiers and does so at one and the same time it might be said that in substance he committed only one offence. Assuming he enters and steals the goods of the first person while he is asleep and then proceeds to the next person who awakes after his property has been stolen. In order to silence this person the accused renders him unconscious with a blow to the head. The third person is awakened, and the accused then forcibly deprives him of his goods before departing. Common sense suggests that the accused may properly be convicted of housebreaking with intent to steal and theft, assault and robbery".

[25.] The court a quo was correctly of the view that unlike the offence of rape, it is only necessary to prove the mere intention to have sexual intercourse for the offence of abduction. The court correctly found that the offence of abduction had been completed as soon as the deceased had been removed by the appellant with the intention of having sexual intercourse with her. Whether or not sexual intercourse in fact ensued was irrelevant. However, besides the actual removal, sexual intercourse did in fact take place with the rape of the deceased. Such sexual intercourse was not an element of the offence of abduction and the mere intention of having sexual intercourse without the consent of the deceased was not also an element of the offence of rape. Moreover the abduction was an offence against the guardian of the deceased whereas the rape was perpetrated against the deceased. The

evidence therefore proved two separate offences, one of abduction and the other of rape. There was, therefore, in my view no unreasonable duplication of charges.

Sentence

[26.] Ms Andrews submitted that the trial court committed various irregularities in sentencing the appellant, such as over emphasizing of the severity of the offences, a failure to accord sufficient weight to the appellant's personal circumstances (he was a young adult with no previous convictions for violent offences) and that the court had over emphasized the deterrent value of the sentence. She further submitted that the court a quo had also failed to take into account that the offences had been committed by the appellant while under the influence of alcohol and drugs.

[27.] It is an oft stated principle that sentencing resides primarily in the domain and at the discretion of the trial court. In S v Kibido 1998 (2) SACR 213 (SCA)

these principles were expressed as follows;

> "..... it is trite law that the determination of a sentence in a criminal
>
> matter is pre-eminently a matter for the discretion of the trial Court. In the exercise of that function the thai court had a wide discretion in (a) deciding which factors should be allowed to influence the court in determining the measure of punishment and (b) in determining the value to attach to each factor taken into account A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carried clear conviction that an error has been committed in this regard.

[28.] The appellant having been convicted of the offences of rape and murder, to which the provisions of section 51(1) of Act 105 of 1997 read together with Part 1 of Schedule 2 (the Minimum Sentence Legislation) applied,

was faced with sentences of life imprisonment unless substantial and compelling circumstances which justified the imposition of a lesser sentence were found to be present. In S v Malgas 2001 (1) 469 (SCA), Marais JA held that the courts are enjoined by the legislature not to deviate lightly from the prescribed minimum sentence but when doing so the courts are required to take into account all of the circumstances peculiar to the offence.

[29] The appellant did not testify in mitigation of sentence. There was, therefore, no explanation from the appellant as to the reasons or motivation for the commission of the offence of murder despite his having initially tendered a plea of guilty thereto. However a relative of the appellant a Mr. Hansen Jordaan, a building contractor (without being solicited) testified in respect of sentence. Jordaan claimed that his intention was not to testify in mitigation or in aggravation of the sentence but that he felt compelled to testify so that the court could fully appreciate the appellant's background and circumstances. The appellant's parents had separated shortly after his birth. He, together with a brother and two sisters were brought up by their maternal grandparents. It appears that the attention that they received from the maternal grandparents was short-lived as the appellant's cousins and their mother also moved in with the grandparents and according to Jordaan the grandparents shifted their attention away from the appellant and his siblings. The appellant had progressed no further than grade 2 at school and out of embarrassment left school at the age of 14. He had since worked in the building industry and according to Jordaan was both hardworking and a reliable labourer. He was regarded as exceptionally good with the use of his hands, especially with paint work. The appellant had moved from one residence to another and at some stage had lived with the grandmother of the deceased. He had worked for Jordaan and Jordaan related how the appellant in a conversation with him about his behaviour burst out into tears and claimed that nobody had cared for him. Jordaan thereafter took the appellant under his wing and attempted, rather unsuccessfully, to curb his abuse of and dependence on alcohol and drugs. Jordaan had also been troubled by the appellant's inappropriate behaviour. He had, therefore, asked the appellant to vacate his premises approximately a week

prior to the incident. He claimed that with hindsight he ought rather to have shown greater insight into the appellant's problems and should have given him more attention. The court was impressed with the evidence of Jordaan, whose evidence largely formed the basis of the court's finding that there were indeed substantial and compelling circumstances that enabled the court to deviate from the prescribed sentences of life imprisonment. The court had also considered the role that the appellant's alcohol and drug abuse had played in the commission of the offence and that the appellant was to be regarded as a first offender for having no history of violent crime. The appellant was relatively young and the court was of the view that he had the potential to be rehabilitated in the light of the skills that he had displayed as a worker in the building industry. The court was correctly of the view that insofar as the possibility existed that the appellant could be rehabilitated it was in the public interest that he be given such an opportunity.

[30.] In balancing the appellant's circumstances with that of the interests of the community and the nature of the offence the court was mindful of the seriousness of the offences, their high prevalence and the intervention by the legislature in prescribing minimum sentences for the offences. The gruesomeness of the murder of the deceased is evident from the photographs and the medical report which formed part of the record. The deceased was both a vulnerable and defenseless six year old child who endured a brutal attack at the hands of the appellant who callously left her for dead. The court was correctly of the view that, had it only looked at the nature and gruesomeness of the offence together with the public interest, no substantial and compelling circumstances would have been found. However, on a proper consideration of all the circumstances the court correctly found that there were substantial and compelling circumstances and appropriately imposed a sentence of 25 years imprisonment for the murder.

[31.] In the result I would uphold the conviction on the abduction and rape charges as well as the sentence of 25

years imprisonment which was imposed for the offence of murder be confirmed.

I accordingly propose that the following order be made:

(1.) That the appeals against the convictions of abduction and rape be dismissed.

(2.) That the convictions in respect of abduction and rape be confirmed.

(3.) The appeal against sentence be dismissed and the sentence of 25 years on the count of murder be confirmed.

SALDANHA, J

I agree.

VELDHUIZEN, J

I agree and it is so ordered.

CLEAVER, J