IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A459/2011

DATE: 18 NOVEMBER 2011

In the matter between:

MOEGAMAT FAIZEL DAVIDS Appellant

and

THE STATE Respondent

J U D G M E N T

BOZALEK, J:

The appellant was convicted in the Parow Regional Court on 14 April 2011 on eight charges comprising two counts of kidnapping, three counts of rape of a person under the age of 16 years, two counts of indecent assault and one count of assault with the intent to do grievous bodily harm. The appellant pleaded not guilty to all the charges and was legally represented throughout his trial.

He was sentenced to various terms of imprisonment,

amounting to an effective sentence of 42 years. With the leave of the magistrate he now appeals against both conviction and sentence. The main grounds of appeal in relation to his conviction are firstly that, as a result of an inordinate number of postponements, his right to a fair trial was infringed. Secondly, it is contended that the magistrate erred in not finding that the appellant's version of events was reasonably possibly true. In this regard it was contended that the evidence of the complainant, a single witness, should not have been accepted.

Section 35(3) of the Bill of Rights provides that every accused is entitled to a fair trial which, in terms of section 35(3)(d) includes the right to have one's trial begin and conclude without unreasonable delay. In Sanderson v The Attorney-General, Eastern Cape 1998 (2) SALR 38 (CC), that court had to consider whether the appellant was entitled to a permanent stay of prosecution following the delay in his prosecution. The court noted that the relief that the appellant sought was radical, both philosophically and socio-politically. It noted in paragraph 39:

> "Ordinarily, and particularly where the prejudice alleged is not trial-related, there is a range of "appropriate" remedies less radical than barring the

prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand or damages after an acquittal arising out of the prejudice suffered by the accused."

I would observe that the remedy which the appellant impliedly seeks in this particular case, namely an acquittal not based on the merits of the evidence, is no less radical.

The Constitutional Court considered that three of the most important factors bearing on the inquiry before it, were the nature of the prejudice suffered by the accused, the nature of the case and the systemic delay. The bare facts in the present matter are that the accused first appeared in the Regional Court on 19 January 2007, after first being arrested on 9 October 2006. There followed some 45 postponements before the trial proper commenced on 8 March 2011. Thereafter it was speedily concluded by 14 April 2011. There was indeed an inordinately long delay but for much of this period the appellant was either on bail or in custody on other charges or had his bail on these particular charges estreated for failure to comply with his bail conditions.

Furthermore, when one has regard to the reason for the

individual postponements, it is apparent that the majority of them were either at the instance of the appellant or arose out of difficulties caused by him or his fellow accused, his wife. These postponements related to his or her failure to appear in court, the fact that the appellant's wife was placed in a rehabilitation unit at some stage and the appellant's obtaining of and changing his legal representation.

As far as prejudice is concerned, the appellant complains that his wife, as well as potential witnesses, Nicole, Whitney and Figaro, became untraceable as a result of the delayed trial. There is no reason why the appellant could not have called his wife as a witness. He chose not to do so. As far as the other witnesses are concerned, their evidence could only have been relevant to the question of whether the complainant consented to the various sexual acts that were performed on her. It was common cause that her account of what took place in this regard, apart from the issue of consent, was essentially not challenged by the appellant. I regard it as unlikely that, to the extent that those remaining witnesses could testify on whether the sexual activity was consensual or not, they would have supported the appellant's version. They were state witnesses and were unsuccessfully sought by the investigating officer for the purposes of leading them on behalf of the state.

The delay between arrest and trial was inordinate and the state must bear at least partial responsibility for it. However, in the circumstances of this matter, the delays did not, in my view, result in an infringement of the appellant's right to a fair trial, certainly not such as to warrant his acquittal on these various charges.

I turn now to the appeal on the merits of the conviction. On behalf of the appellant, Mr Burgers criticised various aspects of the complainant's evidence. The difficulty that he faces in this regard, however, is that, save for the question of consent, the appellant's version of events is essentially the same as the complainant's in all material respects. Without expressly stating so, the magistrate clearly found that the complainant's evidence met the test for a single witness and could safely be accepted on the issue of the consensual or non-consensual nature of the sexual encounters between her and the appellant. He noted that the complainant gave a chronological and coherent account of the events in question which, moreover, extended over a prolonged period. I can find no reason to disagree with these conclusions.

What is more, the medical evidence, the surrounding circumstantial evidence and, most significantly, the

probabilities all support the complainant's version that she was raped rather than that she consented to the appellant's sexual attentions in return for drugs, this being the basis of his defence. Very shortly after the events in question, the complainant advised the police that she had been raped by the appellant. The appellant's attempts to explain this away as an attempt by the complainant to forestall or anticipate a criminal charge of theft by the appellant fell flat because, on his version, when he had a chance to complain to the police about the theft of his laptop and cell phones he did not do so. Secondly, on his own version he appeared to accept that the thief was Figaro and not the complainant. If the complainant had consented to sex for drugs why would she report being raped to the police and thus open up a hornet's nest?

The medical evidence bore out the complainant's evidence that she was a virgin before the incident and, furthermore, that she had been anally penetrated as well. I regard it as highly improbable that in return for some drugs, the complainant would agree to a sex orgy involving herself, being a 15 year old girl with no sexual experience, her friend, the appellant, being a 35 year old drug merchant, and his wife. Rendering it even more improbable, furthermore, is that in this encounter she would consent to multiple vaginal penetration, and penetration and performing oral sex on the appellant, all in the

presence of two other persons.

The magistrate noted, correctly it would appear, that the appellant created a poor impression as a witness. In particular his evidence of how the alleged drugs for sex agreement was reached with the complainant and Whitney was vague and unsatisfactory. All things considered, I am unpersuaded that the magistrate erred in rejecting the appellant's version of events where it differed from that of the complainant's as false beyond any reasonable doubt.

Mr Burgers raised specific criticisms relating to the convictions of abduction and assault with the intent to do grievous bodily harm. As regards the latter, I disagree that the complainant's injuries were consistent with merely being tripped by a hockey stick flung by the appellant at the legs of the complainant as she ran from him. The complainant testified that she was beaten by the appellant with a baton on her legs and was then pulled by her shoulder back to the appellant's flat. The medical evidence revealed multiple bruises appearing on both the front and back of the appellant's legs and on her shoulder and thus presenting a picture consistent with her account. It is so that she testified that she was also beaten on her back and no bruises were found on her back but it does not follow, in my view, that her account that she was beaten on her back is

false.

Mr Burgers also took issue with the conviction on count 1, namely kidnapping, on the ground that the State had failed to prove the removal of the complainant from the custody of her parent and on the basis that the complainant could have left the flat after the sexual encounter ended. The complainant testified specifically, however, that the apartment was locked that night and that the appellant's wife had to unlock one or more gate for Whitney and her the following morning so that they could leave the premises. The appellant's own evidence was that there was an elaborate system of gates which were locked for his own safety.

As Ms Van der Merwe pointed out on behalf of the State, the evidence, when read in context, seems to be, furthermore, that when then sexual encounter started in the appellant's bedroom he locked the door of that bedroom. The complainant was 15 years old and the appellant must have realised that by keeping her overnight or even for the duration of the sexual activities he was both removing her freedom of movement and he was depriving her custodian parent of control over her child.

As far as intention is concerned, as it is put in the Criminal Law, 5th Edition, C R Snyman, LexisNexis, at page 482:

"X must know that Y has not consented to the removal, or if Y is a child, that her parents or custodians have not consented."

Once the appellant's version of events is rejected, it follows that, for at least a substantial part of the night when the rapes took place, the appellant had the required intent. In the result, I consider that there are no grounds to interfere with any of the convictions.

The grounds of appeal against sentence are principally that the several rape convictions amounted to a duplication of charges and further that the effective sentence of 42 years was a so called "Methuselah" sentence which was in the circumstances startlingly inappropriate. A duplication of charges is not addressed by reducing the sentence and in any event this criticism is not borne out by the evidence. The complainant described the first vaginal rapes in some detail. She testified further that thereafter the appellant had intercourse with Whitney and forced the complainant to perform oral sex with him and then had anal intercourse with her.

The complainant testified further that the appellant had vaginal

intercourse with her on three occasions that night. There is some ambiguity as to whether this was on three occasions in total or three occasions after the first rape. Since the appellant did not take issue with how many times he had vaginal intercourse with the complainant and he was convicted of only three counts of rape there can, however, be no question of a duplication of charges.

As regards the second ground of appeal, it would appear that the magistrate may have been aware of the potential danger of imposing a Methuselah sentence which was far too lengthy but that he failed in his attempt to circumvent this difficulty. He sentenced the appellant to three and six years imprisonment respectively on the counts of kidnapping, that is counts 1 and 8, to 15 years imprisonment on the counts of rape, taking them together for the purposes of sentence, that is counts 2 to 4, to 15 years imprisonment on the two charges of indecent assault, i.e. counts 5 and 6, also taking them together for the purposes of sentence, to six years imprisonment on the second charge of abduction, that is count 8, and to three years on count 7, namely assault to with the intent to do grievous bodily harm.

After imposing the individual sentences, the magistrate is recorded as stating: "in terms of section 51(2)(b) of the Criminal Law Amendment Act 105 of 1997, to the effect of 30

years". It appears that his intention may have been that all sentences would run concurrently with the sentences on the convictions of rape and indecent assault. On the other hand, as was pointed out in argument, it may be that he was merely indicating what part of the overall sentence had been imposed in terms of Act 105 of 1997.

Even if the former were the case, however, the magistrate failed to give effect thereto. The result is that the effective sentence of 42 years imposed is, in my view, indeed one which induces a sense of shock or is vitiated by a material misdirection, namely the magistrate's failure to take into account the cumulative effect of the individual sentences. This misdirection entitles this court to sentence afresh.

As regards the individual sentences I can see no good reason why the sentence in respect of the second kidnapping should be double that on count 1, the first kidnapping and consider that a sentence of three years imprisonment in respect of each count would be appropriate. As far as the counts of rape are concerned, although the appellant qualified for a minimum sentence of life imprisonment in respect thereof I agree with the magistrate's reasoning as far as the existence of substantial and compelling circumstances is concerned. I agree furthermore with the sentence which he imposed, namely

one of 15 years imprisonment, taking the various counts of rape together for the purposes of sentence.

The appellant was convicted of two counts of indecent assault in respect of the anal rape of the complainant and then forcing her to perform oral sex and these counts were taken together for the purposes of sentence. The first conviction, count 5, would appear to have qualified for a minimum sentence of 10 years under Act 105 of 1997 as it then stood at the time of sentencing. However the magistrate imposed a sentence in excess thereof, 15 years. In my view a sentence of 10 years imprisonment on that count was appropriate, i.e. for the anal rape, which was a very serious incident of indecent assault. I also consider that the appellant should be separately sentenced in respect of the other count of indecent assault, count 6, and in my view, an appropriate sentence there would be one of five years imprisonment.

That leaves count 8, a conviction for assault with the intent to do grievous bodily harm and in this regard I consider that an appropriate sentence there would be one of three years imprisonment. The cumulative effect of these sentences is 39 years imprisonment which, in my view, is clearly excessive. I consider that a distinction must, in the first place, be drawn between the events of the two separate days. On the second

day the second count of abduction and the assault took place. Those events on the second day constituted a new course of action on the part of the appellant.

Secondly, recognition must be given, at least partially, to the fact that the rapes and the indecent assaults form part of one sequence of events. Thirdly, of course, regard must be had to the overall or effective sentence by considering, *inter alia*, the appellant's personal circumstances, the nature and seriousness of the offences and the interests of the community. I take into account the appellant's personal circumstances, including the fact that he spent a long period awaiting trial and the fact that he was 37 years of age at the time of sentencing.

The sentences of which the appellant was convicted, most notably the rapes and the anal rape, were very serious and clearly had a profound and negative effect upon the complainant, completely altering the trajectory of her life. The community demands the protection of the legal system against someone like the appellant who has absolutely no scruples about sexually violating minors. His lifestyle, in fact, demonstrates contempt for the law and this is borne out by his previous convictions. On the other hand, care must be taken to sacrifice the appellant on the alter of deterrence and not to

impose a sentence upon him which loses sight of his humanity and capacity for rehabilitation.

In the result, for these reasons I would dismiss the appeal against conviction but uphold the appeal against sentence by setting aside the sentences imposed by the magistrate and replacing them with the following sentences:

1. Count 1, **THREE (3) YEARS IMPRISONMENT**.

2. Count 2, 3 and 4 are taken together for the purposes of sentence and the appellant is **SENTENCED TO 15 (FIFTEEN) YEARS IMPRISONMENT**.

3. Count 5, **10 (TEN) YEARS IMPRISONMENT**.

4. Count 6, **FIVE (5) YEARS IMPRISONMENT**.

5. Count 7, **THREE (3) YEARS IMPRISONMENT**.

6. Count 8, **THREE (3) YEARS IMPRISONMENT**.

7. I would order that the sentences on counts 1 to 4, count 6, seven years of the sentence on count 5 and two years of each of the sentences on counts 7 and 8 should run

concurrently in terms of section 280 of Act 51 of 1997, with the result being an effective sentence of **20 (TWENTY) YEARS IMPRISONMENT**.

8. I would also antedate the sentences in terms of section 282 of Act 51 of 1977 to 14 April 2011.

I agree:

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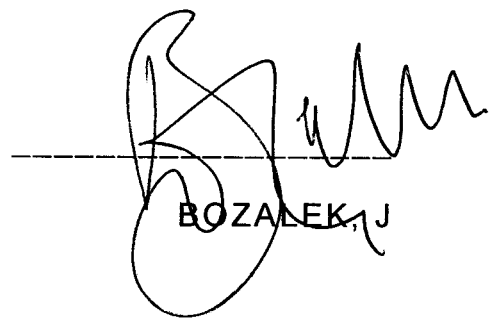
MANTAME, AJ

It is so ordered:



BOZALEK, J