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

CASE NUMBER: **A533/2010**

DATE: **4 MARCH 2011**

In the matter between:

CHARLES BOER **Appellant**

and

THE STATE **Respondent**

JUDGMENT

LOUW, J:

The appellant, who was legally represented throughout, pleaded not guilty in the Regional Court. Worcester, on 24 January 2006 to two charges, namely that of kidnapping and thereafter indecently assaulting the complainant, V R, on 27 October 2004 in Riverview, Worcester. The appellant provided no plea-explanation. On 3 March 2009, the appellant was convicted on both counts and was thereafter, on the same day, sentenced to five years and 10 years imprisonment respectively on the two counts.

The appellant's application for leave to appeal against his conviction and sentence was refused on 16 February 2010. However, the appellant now appeals, with leave given by this court on petition on 11 August 2010, against both his conviction and sentence.

Complainant, who was born on 8 April 1988, was 16 years old at the time of the incident and on 24 January when she gave evidence, she was 17 years old. She testified that on the night in question at approximately half past nine, she and three of her girlfriends, Rozelle, Grizelda and Hildegard were sent to a shop by her mother to buy sugar. At the shop they saw the appellant, whom they knew from sight and by his nickname, Maleita. The appellant had previously shown an interest in the complainant and she was afraid of him. The appellant was in the company of a friend, one Clayton.

The appellant called out to the complainant, using her name. She wanted to turn away, but he shouted at her and came to her and took her by the arm and told her to tell her friends, in a rude way, to go away It was at this time that the friends saw Hildegard's father. He did not see them, but the complainant's friends were afraid of him and they then left. The complainant also wanted to leave, but the appellant took out a knife, which was folded in a piece of paper and he hit her over the finger with the knife. The appellant then took her with him along Buitenkant Street towards a field near Shortle Street. While they were walking, the appellant's phone rang and he had a short conversation. They then proceeded to an abandoned building in Shortle Street, which the

complainant said was used by gangsters who smoked dagga and to gather.

The appellant took her into an empty room where he proceeded to sexually assault the complainant in a disgusting and humiliating manner. Details of his assault appear from the record and amounts to this that he held her by the hair and put his penis in her mouth and eventually ejaculated ail over her. After the assault, the appellant asked whether he could see her again and insisted that they leave the building together and told the complainant not to tell anyone about what had happened to her After a while the appellant left the complainant and soon thereafter she saw her mother and friends, who were out looking for her. She told her mother what had happened and she told the police, who had been contacted earlier by her mother and also appeared on the scene. Apart from the injury to her finger, the complainant says she did not suffer any further physical injuries.

Ms Fatiema Cloete, the complainant's mother, testified that the complainant's three friends came to her house on the night in question and told her that the complainant had been taken away by the appellant. The complainant's mother immediately contacted the police and they all went out looking for the complainant. After about 30 minutes they saw the complainant in the street. She started crying when they saw her and she told her mother what had happened. The police also arrived and the complainant told the police what the appellant had done and in which direction he had gone. The mother testified as to the condition in which the complainant was. that is that she was shocked, she was crying and that her hair was full of semen. According to her the

complainant had an injury to her hand and also her shoulder where the appellant had nicked her with a knife. She also stated that she knew the appellant and explained that sometime previously when her older son was in Standard 8, the appellant and others had surrounded her son with knives.

Grizelda Carolis was one of the complainant's friends who were with her on the night of the incident. She also knows the appellant by his name and his nickname. She confirmed the complainant's evidence that the appellant called the complainant and when she did not want to go with him, he came and pulled her with him to where his friend, Clayton, was standing. He had a piece of paper in his hand, which he opened to reveal a knife with which he hit the complainant.

She explained that the friends then ran to the complainant's mother and told her what had happened and they went out looking for the complainant.

She says that the appellant was angry with the complainant when she did not want to go to him when he first called her and that although she resisted, the appellant pulled her away by the arm. She also confirmed that they found the complainant in the street about 30 minutes after she had been taken away and that the complainant was crying and she confirms the state in which the complainant was when they first found her.

The appellant testified that although he had been at the shop in question on the night with his friend, Clayton, this was much earlier at approximately 7 p.m.

He then went home and it was later that night that the police came to arrest him. He denies that he was present at the shop when the incident took place and according to him, he had no knowledge of the assault on the complainant. According to the appellant, the complainant came to see him after the charges had been laid against him and apologised to him for the charges being laid, saying that her mother had insisted that he be charged and had forced her to lay the charges against him, because he had earlier robbed her brother. He denied that he had robbed the complainant's brother and stated that alt he can say is that for some unknown reason, the complainant's mother did not like him.

This version of why the charges were laid was not put to any of the state witnesses. In fact another version was put, namely that it was the complainant who was after the appellant and that because he did not want to have anything to do with her, she laid false charges against him. The magistrate found the complainant, her mother and the state witness Grizelda Carolis to be credible and reliable witnesses. They corroborated one another and there is objective confirmation of the complainant's version of what had happened to her in the emotional state in which she was when her mother and friends found her and in the condition of her hair and the injuries sustained by her. A perusal of the appellant's evidence, shows him to be an untruthful witness and the magistrate's finding in this regard is completely justified. The evidence against the appellant was overwhelming and his version is clearly not the truth.

The question is whether the appellant is guilty of both kidnapping and

indecent assault in this case. Kidnapping is the unlawful and intentional depravation of a person's freedom of movement. See Snvman. Criminal Law. 5lh Edition, page 479. In this case the appellant clearly deprived the complainant of her freedom of movement for a comparatively short time. He did so with the use of force and threats of force. The depravation of the complainant's freedom of movement was, however, clearly done by the appellant with the intention to sexually assault the complainant. The question is, therefore, whether this is not a case where a duplication of convictions has occurred. Although the time over which the person is deprived of his or her freedom of movement, is not material to the question whether the crime of kidnapping was committed, Snyman. at 482, points out that:

> **"The time factor may have relevance in distinguishing kidnapping from some case of assault involving only a transient and incidental seizure of a person for a short period."**

In other words the question is whether the grabbing hold of the complainant, the assault with the knife and the threats were not all conduct incidental to the indecent assault which took place soon thereafter. Our courts have over the years formulated a number of tests to determine whether there has been an unjustified duplication of convictions. The two principle tests are, firstly, the so called same evidence test, which asks whether the evidence which is necessary to establish one charge, also establishes another charge. If this is the case, only one offence has been committed. However, if one charge does not contain the same elements as the other charge, there are two offences. The

magistrate, in his judgment, appearfito have applied this test and came to the conclusion that two separate crimes were committed and that two separate convictions were justified.

The second test is the so called single intent test. This arises when there are two acts, each of which would constitute an independent offence, but only one intent and both acts are necessary to realise this intent. In such a case there is only one offence, because there is one continuous criminal transaction. Alternately it has been held the court must determine this issue by asking whether all the culpable facts in the conduct of the accused can be formulated in one charge. If that is the case, there is only one charge to be formulated In arriving at a conclusion, it is a matter of sound judgment to be applied to the facts.

In my view this is a case where the conduct of the appellant, although it consisted of at least two acts, namely the grabbing hold and taking away of the complainant with force and threats of force which culminated in the indecent assault, were committed with one object in mind, namely to indecently assault the complainant. The detention of the complainant was not for such a period of time as to justifiably be called a separate offence, on the facts of this case. In my view, therefore, an unjustified duplication, as a matter of common sense and sound judgment, occurred in this case. It follows that the appeal against conviction on the charge of kidnapping must be successful and the conviction on that count be set aside.

I turn to the question of sentence. The magistrate imposed the sentences of five years on count 1, that is the kidnapping. This must fall away. The sentence of 10 years imprisonment imposed in respect of the second charge of indecent assault, must be considered on its own. There is very little that can be said for the appellant. At the time of the commission of the offence he was 26 years old. At the time of sentence he was already 30 years old.

He had previous convictions which date back to 1995 when he was found guilty of robbery and given a sentence of four months imprisonment, which was suspended for five years. In 1997 he was convicted of the possession of dagga and given a fine of R80,00 or 40 days imprisonment. In 2001 he was again convicted of robbery and sentenced to two years imprisonment of which one year was suspended for five years. He passed Standard 4 at school, is unmarried, but he has a one year old who is supported by him. He also says he supports the mother of the child He has a paralysed hand and receives a disability grant from the state. According to the complainant, however, the paralysis of his hand did not in any way disable him from taking her away, holding her and also using the knife in the other hand.

Turning to the crime, this is a serious crime. The assault on the complainant commenced at the shop where she was about her business with her friends. The appellant, in a brazen way in view of at least the complainant's friends, called her to him and when she did not want to come to him, came across, took hold of her by force, threatened her with a knife and, used the knife on

her, although she only received a minor injury at this stage. He then took her away. All of this he did with the sole purpose to use her as a sex object for his own gratification. He took her to a secluded place, a place frequented by gangsters and he used the knife which he had previously used to inflict a minor wound, to further threaten the appellant during the indecent assault.

The magistrate, in my view, correctly stated that this was a very emotional and traumatic experience for the complainant and that she will have to live with the emotional psychological scars probably for the rest of her life. The complainant's mother testified to the consequences for the complainant in this regard. The magistrate said, correctly in my view, that the appellant humiliated, degraded and dehumanised the young complainant and treated her as an object. He violated her right to dignity and showed no respect for her as an individual. The magistrate correctly stated that the sentence must reflect the community's sense of revulsion and disgust of this type of offence. The appellant, it is quite apparent, has shown no remorse for what he has done.

The sentence imposed, 10 years imprisonment, is a heavy sentence for this offence. However, in my view the magistrate approached the issue of sentence on the indecent assault charge in the correct way. He looked at the appellant, but in a case like this, the interest of the victim and of society is important and although as I have said this is a heavy sentence, in my view this is not a shockingly inappropriate sentence and there is no basis, in my view, for interfering with the sentence imposed by the magistrate. I would, therefore, make the following order:

1. The appeal against the conviction on count 1 i.e. of kidnapping succeeds

2. The conviction and sentence of five years imprisonment

on count 1 are set aside.

3. The appeal against the conviction and sentence on count 2,

indecent assault, is turned down.

4. The conviction on count 2, indecent assault and the sentence of 10 years imprisonment on count 2, are confirmed.

VAN HEERDEN. AJ: I agree.

VAN HEERDEN, AJ

LOUW. J: It is so ordered.

LOUW, J