IN THE KWAZULU-NATAL HIGH COURT OF SOUTH AFRICA PIETERMARITZBURG

CASE NO. 11224/11

In the matter between:

STEVEN McGREGOR APPLICANT

and

THE REGIONAL MAGISTRATE
Ms B. ASMAL N.O. FIRST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS KZN SECOND RESPONDENT

JUDGMENT Delivered on 03 April 2012

SWAIN J

[1] Before me is an application to review the decision of the first respondent, refusing an application by the applicant, for a permanent stay of the prosecution, in which the applicant is charged with the crime of rape and in the alternative, with the crime of contravening Section 18 of the Sexual Offences Act No. 23 of 1957, it being alleged that the applicant unlawfully administered a drug to the complainant, with intent to stupefy or overpower her, so as to enable him to have unlawful carnal intercourse with her.

[2] The present application finds its origin in the alternative count faced by the applicant, who claims a failure by the second respondent, to supply the applicant with specified information, relevant to the second respondent's *onus* to prove the chain of evidence, pertaining to the handling and custody of a blood sample taken from the complainant. Such evidence is of course vital, if the second respondent is to prove the presence of the specified drug, in the blood stream of the complainant, at the relevant time.

[3] The applicant complains that in the absence of this information, he is compelled to proceed to trial under circumstances where he could never be fully prepared, nor in a proper position to challenge and adduce evidence therein.

[4] The applicant alleges that the first respondent in reaching the conclusion that she did, misdirected herself in a number of respects, and that the proceedings were "tainted by gross irregularities".

[5] Before dealing with these allegations it is apposite to remind oneself that these are review proceedings, where the applicant bears the *onus* of showing that the first respondent "did not properly apply his (her) mind to the question before him (her) or that he (she) acted irregularly in coming to the conclusion which he (she) reached".

Naidoo v National Director of Public Prosecutions
[2003] 54 All SA 380 (c) at 389 a

[6] The applicant would have to show that the first respondent's decision was so unreasonable, as to indicate that she did not properly apply her mind to the matter. I find it unnecessary to deal with each of the respects in which it is alleged, that the first respondent misdirected herself, because I am satisfied that considered individually, or cumulatively, they do not justify any such finding. This is more particularly so, in the light of the view I take on the merits of the application, which I will deal with below.

[7] As regards the issue that the proceedings were tainted by gross irregularities, the applicant's complaint is that the first respondent allowed Advocate Zulu, to argue the matter on the strength of two affidavits deposed to by himself and filed in the matter. The fact that Advocate Zulu deposed to two affidavits on behalf of the second respondent, in opposing the application and then proceeded to argue the matter on behalf of the second respondent, although clearly undesirable and inappropriate, does not in my view, constitute an irregularity in the proceedings of sufficient magnitude, to set aside the decision of the first respondent. Nowhere does the applicant allege what prejudice he has suffered as a result of this complaint.

[8] Turning to the merits of the application. It is of course clear

that this Court will not interfere in incomplete criminal proceedings in a court below, unless the case is a "rare" one "where grave injustice might otherwise result or where justice might not by other means be attained ……"

Wahlhaus & others v Additional Magistrate Johannesburg & another
1959 (3) SA 113 (A) at 120 a - b

[9] In the context of an application for a permanent stay of a prosecution, the injustice to be established is that of "irreparable or insurmountable trial prejudice"

Bothma v Els
2010 (1) SACR 184 CC at 211 para 68

Sanderson v The Attorney General Eastern Cape
1998 (2) SA 38 CC at para 39

[10] Irreparability in this context relates to "insurmountable damage" caused "to the fairness and integrity of a possible trial".

Bothma at para 68

"Put another way, to say that the trial has been irreparably prejudiced is to accept that there is no way in which the fairness of the trial could be sustained"

Bothma at para 68

[11] A permanent stay of prosecution

"is far-reaching and will seldom be warranted in the absence of significant prejudice to the accused".

McCarthy v Additional Magistrate Johannnesburg
2000 (2) SACR 542 SCA at 556 para 44

[12] The accused must show "definite and not speculative prejudice".

Zannar v Director of Public Prosecutions Johannesburg
2006 (2) SACR 45 (SCA) at pg 52 para 16

Everything will depend upon the circumstances and all the relevant factors have to be weighed on a case-by-case basis.

Bothma para 77

It would be "ill-advised" for a Court hearing an application such as the present "to rehearse scenarios" of possible trial-related prejudice, the applicant might suffer.

Bothma para 82

[13] In the absence of evidence to show that the applicant will suffer

grave, definite, trial-related prejudice, it will be up to the trial court to ensure that the applicant will receive a fair trial.

Bothma para 82

and to decide whether the applicant suffers from "any actual trial-related prejudice".

Naidoo at page 389 c

in the light of "the full evidential and factual context" within which such prejudice is alleged to arise.

Naidoo at page 389 c

[14] Having outlined what I conceive to be the correct approach to applications of the present kind, I turn to consider the grievances of the applicant.

[15] The applicant complains that with regard to three reports compiled by Drs. Bower and Partners, a private firm of consulting pathologists, setting out their findings with regard to blood apparently emanating from the complainant, the reports do not clarify the following issues:

[15.1] Which person(s) received the blood sample.

[15.2] Which person(s) broke the seal of the blood sample.

[15.3] The qualification(s) of the person(s) performing such analysis of the blood sample.

[15.4] The scientific process or methodology used in the analysis of the blood sample.

[15.5] Whether or not and how such sample may have been re-sealed.

[15.6] The steps taken with respect to the proper preservation of such sample.

[16] A further complaint was that the information supplied by the second respondent to deal with these issues, "serve only to cloud the matter further".

[17] What is immediately apparent is that the applicant has a recognised alternative remedy to a stay of the present prosecution, namely a *mandamus* directed to the first respondent, that she order the second respondent to furnish the information to the applicant.

Naidoo at page 392 i – j

If the second respondent does not supply the information to the applicant, it would have to justify any refusal, or failure to do so. It is not for the second respondent to decide what is relevant and what is not, as far as the applicant's case goes.

S v Rowand
2009 (2) SACR 450 (W) at 455 g

[18] In any event, I am not persuaded that a lack of the evidence requested shows that the applicant will suffer grave, definite, trial-related prejudice. Mr. Scheltema S C, who appeared for the applicant, submitted in his heads of argument, that because of the inadequacy in the chain of custody evidence, the applicant is not in a position to properly and timeously prepare his defence and the prosecution is unfairly favoured by the fact that it has the resources, to readily access the relevant information. In my view, the answer to this is the following:

[18.1] As pointed out above, the applicant has the alternative remedy of a *mandamus .*

[18.2] If such an application does not achieve the desired result for whatever reason, the second respondent will bear the *onus* of proving the chain of custody with regard to any blood sample. If the second respondent fails to achieve this, it may have the consequence that it is unable to prove that the blood upon which the

relevant analysis was carried out, was the blood of the complainant, and that the results of the analysis are accurate and reliable. Such a result can only enure to the benefit of the applicant, save that the applicant would be deprived of positively showing the absence of the specified drug in the blood stream of the complainant, which may be of relevance to the credibility of the complainant. Due weight may have to be given by the trial court to such an eventuality and any difficulty it may have caused the applicant in presenting his evidence.

Bothma para 82

[18.3] I do not regard the lack of the evidence requested as a serious impediment to the applicant's preparations for trial. The applicant would be able, even in the absence of the evidence, to obtain expert advice on the scientific process, or methodology necessary to analyse a blood sample to detect the drug in question in a reliable manner, as well as the necessary qualifications of the individual carrying out such a test. In addition, expert evidence could be obtained as to the proper steps to be taken to preserve the blood sample, as well as the correct manner in which to seal the sample. Again, any prejudice experienced by the applicant in this regard during the course of the trial, would have to be assessed by the trial court, as and when it may arise within the context of the evidence led at the time.

[18.4] A further complaint of Mr. Scheltema S C, was that the applicant would not be in a position to properly plead to the charges, in the absence of the requested evidence. I disagree. From the

statements of the applicant and the complainant, made to the Police it is apparent that the defence of the applicant is that the complainant consented to having sex with the applicant and initiated sexual intimacy. The sexual intercourse according to the applicant was "most definitely with the consent and active participation of the complainant". The version of the complainant however, is that after the applicant had given her coffee, she felt instantly tired and thereafter described disparate images of having sex with the applicant and then waking up in the applicant's bed the following morning. The complainant stated that she did not give permission to the applicant to sexually abuse her. On these disparate versions of events the plea of the applicant to both counts must be that of not guilty. In respect of Count 1, any plea explanation would be one of consensual sexual intercourse and in respect of Count 2, a denial of the administration of any drug to the complainant. Any further prejudice complained of by the applicant, would have to be dealt with by the trial court.

[19] Mr. Scheltema S C also submitted that the applicant has been subjected to an abuse of process, over a period of several years by the second respondent. The inability of the second respondent over several years, to properly and adequately respond to the applicant's request for information, is deplorable. If the second respondent is unable to provide the requested evidence and prove that the tests were done upon a blood sample of the complainant and that the results are accurate and reliable, it seems on the evidence before me, incomprehensible why the second respondent persists in

advancing the alternative charge to Count 1, with the result that the trial has been delayed for several years. There may of course be additional evidence, to which I am not privy, which explains the attitude of the second respondent.

[20] Due weight being given to the applicant's complaint that he has been subjected to several years of an abuse of process, of central significance in a case such as the present, is the nature of the alleged offence, being that of rape.

"The less grave the breach of the law, the less fair it will be to require the accused to bear the consequences of the delay. The more serious the offence, the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial".

Bothma para 77

The order I make is the following:

The application is refused.

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K. SWAIN J *Appearances /*

Appearances:

For the Applicant	**:**	Mr. G. P. Scheltema S C
Instructed by	**:**	Jacques Botha & Associates Durban C/o Chetty, Asmall & Maharaj Pietermaritzburg
For the 2nd Respondent:		Mr. I. Cooke
Instructed by	**:**	Director of Public Prosecutions
Date of hearing	**:**	16 March 2012
Date of Judgment	**:**	03 April 2012