THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 32/07

REPORTABLE

In the matter between:

ALWYN CAROLUS **Appellant**

and

THE STATE **Respondent**

BEFORE: **NAVSA, VAN HEERDEN JJA and MHLANTLA AJA**

HEARD: **18 FEBRUARY 2008**

DELIVERED: **20 MARCH 2008**

SUMMARY: Indecent assault – appellant raising alibi defence – Held complainant had positively identified the crime scene and the appellant as the perpetrator of the offence and consequently that the appellant was guilty of indecent assault – sentence of 8 years' imprisonment appropriate.

NEUTRAL CITATION: This judgment may be referred to as *Carolus v The State* (32/07) [2008] ZASCA 14 (20 MARCH 2008)

JUDGMENT

MHLANTLA AJA

MHLANTLA AJA :

[1] The appellant was convicted by the Regional Court for the Division of the Eastern Cape held in Port Elizabeth, on a charge of indecent assault involving an eight year old boy. He was sentenced to a period of eight years' imprisonment. An appeal against both conviction and sentence was dismissed by the Grahamstown High Court (Froneman J, Schoeman J concurring) which, however, granted him leave to pursue the current appeal.

[2] It is unchallenged that the complainant was indecently assaulted. The issue in this appeal is whether the state succeeded in proving the identity of the man who indecently assaulted him. Important in this regard, is the question of whether the State correctly established the place where the incident occurred. In respect of sentence the issue is whether such sentence is excessive and induces a sense of shock.

[3] The incident is alleged to have occurred on 11 December 1997. The trial only commenced some four years and three months later, in March 2002. The appellant was convicted and sentenced on 28 September 2004. The appeal in the court below was finalised in February 2006, whilst this appeal was heard on 18 February 2008. I will in due course deal with these delays in greater detail

[4] It is prudent at this stage to briefly set out the facts and circumstances which led to the conviction of the appellant.

[5] At his trial, the appellant pleaded not guilty and denied all the allegations against him. Five witnesses testified on behalf of the state. These were the complainant (hereinafter referred to as A), his mother, Mrs I D, Mr Flippie Kiewiets, who is a police officer and A's neighbour, Inspector Jerome Botha, the arresting police officer, and finally Dr Theron, a medical practitioner, who at the relevant time performed the duties of a district surgeon. The appellant testified and called a witness, his housemate, Mr Marvin Matthee.

[6] The evidence adduced on behalf of the state was as follows. According to A, the incident occurred between 14h00 and 15h00. He was on his way to visit his aunt, after having been sent there by his mother, when the appellant took hold of him and dragged him into the appellant's house. A did not know the address of the house but described it in some detail. He stated that the colour of the exterior walls was green and the front door was brown. There was an intercom next to the front door and there were two large trees in front of the house. The previous owners had used the house as a tuck shop which he patronised and had also often visited to play with the children who stayed there. The backyard of that house is across the street and is clearly visible from the front of A's home Earlier that day, A had seen the appellant on the back stoep of that house consuming alcoholic beverages with his friends. A further stated that a church was subsequently built next to that house and he drew a plan depicting the location of the appellant's house in relation to his own home.

[7] A had been forced inside the appellant's house, where the latter pulled down his own trousers as well as A's He thereafter indecently assaulted A by penetrating his anus with his penis whilst they were on the sofa. A subsequently managed to flee from the house through an open window whilst the appellant was in another room.

[8] A ran home Mr Kiewiets testified that he saw A running down the street crying. A was visibly distressed and immediately made a brief report to his mother about his experience. He took his mother and Mr Kiewiets to the house where the incident had occurred. Mrs D and Mr Kiewiets knocked on the door but no-one responded. That night A pointed out the house to Inspector Botha, the arresting officer. He was thereafter taken to the hospital where he was examined by Dr Theron. He noted some fresh tears in A's anus which according to him were consistent with recent penetration Dr Theron testified that A told him that he had been sodomised that afternoon by a man known to him.

[9] The appellant was subsequently arrested at his house by Inspector Botha shortly after midnight on 12 December 1997 upon the description provided by A. The description included not only the location of the crime scene, but also the physical appearance and type of clothing worn by the assailant. According to Inspector Botha, A had informed him that the assailant was balding, dark in complexion and had a 'beard' on his upper lip, clearly meaning a moustache. Furthermore, that he wore a green tracksuit pant and a white T-shirt. It must be noted that Inspector Botha in his statement indicated that A had reported to him that the appellant wore a grey top. A denied this. Inspector Botha arranged that A be brought to the police station to identify the suspect. A spontaneously

identified the appellant as his assailant by his facial features and clothing before Inspector Botha could ask him.

[10] I turn to deal with the evidence adduced on behalf of the appellant. The appellant denied committing the offence. He raised an alibi defence. According to him, he and his wife were at the time estranged and she was living at her parental home in Selsoniville. On the day in question he left his house at about 13h00 to fetch his family. On his way there he met Mr Marvin Matthee (Marvin) who, as stated earlier, was his housemate and who is related to his wife He drank some beers with Marvin and someone called Shobaine whilst waiting for his wife. He eventually met his wife who, however, declined to go with him because it was too cold for the baby. He was on his way to his mother's house when he met someone called Boetie at the taxi rank. He shared a bottle of beer with Boetie whilst waiting for a taxi. He spent some time with his mother He also visited a friend's home where he watched soccer on TV. He returned home very late that night and was arrested upon his arrival. He was adamant that A was mistaken about his identity. He suggested that someone he knew as Raymond, who resided in the same street as he and who also fitted the description given by A could be the perpetrator.

[11] Marvin's testimony more or less mirrored the appellant's version. It was clear when he was testifying that, at the relevant time, he was not in possession of a watch and his references to time were all estimates. He, however denied any involvement in the earlier drinking incident at the appellant's house during the morning of 11 December. He returned to the appellant's house at about 20h00 and there found the police who interrogated him. He realised that the police were in fact looking for the appellant.

[12] Marvin did not go to the police at any time after he learnt of the reason for the appellant's arrest to inform them that the appellant could not have committed the offence, because at the relevant time they had been elsewhere in each other's presence.

[13] The regional magistrate found A, who was a single witness in respect of the events that occurred inside the house, an honest and credible witness. She was cautious in evaluating his evidence and sought corroboration elsewhere She found that the contradictions and discrepancies between the state witnesses were not material in nature and did not detract from the veracity of A's evidence. She rejected the appellant's version as not reasonably possibly true. The court below accepted the magistrate's findings as correct and accordingly confirmed the conviction.

[14] Counsel for the appellant contended that the state had failed to prove that the appellant was indeed the perpetrator. It was further argued that the court below erred in accepting the identification of the appellant by A who contradicted himself Counsel also contended that the identification contained various other irregularities.

[15] Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. There is no formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and consider its merits and demerits and, having done so, should decide whether it is satisfied that the truth has been told despite the shortcomings or defects or

contradictions in the evidence[1]

[16] A is also a child. In *Director of Public Prosecutions v S*,[2] the court came to the conclusion that:

'It does not follow that a court should not apply the cautionary rules at all or seek corroboration of a complainant's evidence. In certain cases caution, in the form of corroboration, may not be necessary. In others a court may be unable to rely solely upon the evidence of a single witness. This is so whether the witness is an adult or a child.'

[17] It will be recalled that identity is the primary issue in this case. Our courts have repeatedly stated that evidence of identification must be approached by the courts with caution. In *S v Mthetwa*,[3] the court said:

"Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested"

[18] There can of course be no conviction unless the court is satisfied that the prosecution has proved the guilt of the accused beyond reasonable doubt.

[19] Turning to the facts of this case, it is common cause that A's identification of the appellant in the police station occurred after he had been informed of the appellant's arrest. Counsel for the state conceded, in my view properly, that not much weight can be attached to this identification. It took place under strange circumstances, where the rules

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1 *S v Sauls* 1981 (3) SA 172 (A) at 180E-G. See also Schwikkard and Van Der Merwe: *Principles of evidence* 2ed (2000) p 519 and authorities cited therein.

2 2000 (2) SA 711 (T) at 716 B-D.See also *Schwikkard* pp 518 and 519: "Each case must be considered on its merits and this might involve a finding on whether the evidence of the child witness concerned is such that it can for purposes of a conviction safely be relied upon."

3 1972 (3) SA 766 (A) at 768

relating to the conduct of an identification parade were certainly not adhered to. The entire process took place in a police cell after A had been informed about the arrest of the appellant.

[20] In my view, the investigation of this case was conducted in a slovenly manner. There are clearly defined rules on how to conduct identification parades. The investigating officer disregarded these rules. It is imperative that the police should strive to fulfil their duties with competence, diligence and efficiency. Failure to do so may affect the rights of the accused as well as the administration of justice.

[21] That, however, was not the primary issue. The crucial elements were, in my view, whether A pointed out the scene of the crime and the perpetrator.

[22] Counsel for the appellant submitted that A was confused and that no reliance can be placed on his testimony. This submission cannot, in my view, prevail. It is evident that, despite being traumatised, A was not confused about the location of the house which he pointed out to his mother and to the police, nor was he equivocal about the identity of the perpetrator His description of the house cannot be faulted as it, in fact, fits in with the accused's version. A even described the type of furniture which was in the lounge where the crime was committed Mr Kiewiets and Mrs D confirmed the description of the house as pointed out to them by A immediately after the incident. This description was confirmed as correct by the appellant who also conceded that the house on the sketch plan drawn by A and exhibited in court was his house. A, it will be recalled, had visited that house repeatedly in the past.

[23] In so far as the identity of the perpetrator is concerned, there can be no doubt that the description of the appellant and of his clothing must have been given by A prior to the appellant's arrest as he otherwise could not have been a suspect. Furthermore, how would Mrs D, Mr Kiewiets and the police have known about his identity. It is common cause that Marvin had earlier encountered the police at the appellant's house, which was locked. The police asked him if he lived there and he replied in the affirmative. They could have arrested Marvin if they had no description of the actual perpetrator. It is quite evident that Marvin did not fit that description Even Marvin testified that he realised that the police were looking for the appellant when they met him.

[24] A's description of the perpetrator fits in with the appellant's appearance. He is balding, dark in complexion and has a moustache, although A referred to it as a "beard". He wore a green tracksuit pant and a white T-shirt. It is common cause that the white T-shirt was underneath a grey top when the appellant was arrested.

[25] In my view it would be a remarkable co-incidence if A was mistaken about the identity of the appellant. The latter himself testified that he was the only person who was in possession of the keys to the house. Marvin was unable to enter the house because it had been locked and the appellant was the only person who controlled entry into the house.

[26] Counsel for the appellant argued that the fact that A did not notice the appellant's skin condition ─ the appellant suffered from psoriasis ─ was indicative of the fact that the appellant could not have been the perpetrator

[27] This argument, in my view, is without merit and is rejected. Firstly, the doctor's medical report which was submitted on behalf of the appellant was made several years after the incident. The extent of this condition in December 1997 was not established. Second Marvin testified that the appellant only periodically suffered from this sickness. Be that as it may, it must be borne in mind that this was a fleeting incident. The perpetrator was wearing his shirt and had his trousers up to his knees. A was traumatised. He was himself busy dressing and also seeking an opportunity to escape from that house. In my view the conditions were not conducive to minutely observe the appellant's body.

[28] The alibi defence on behalf of the appellant was not satisfactory. Marvin was not convincing and was selective in his recall of events. The appellant's version appears to have been retold by Marvin, whose estimate of times was clearly expedient.

[29] More importantly the alibi defence was never put to A or to his mother by the appellant's legal representative. Significantly, none of the other witnesses refered to in para [10] above presented themselves to the police to protest the appellant's innocence as one would have expected them to, nor did they testify in court.

[30] It is equally strange that the existence of Raymond was never brought to the attention of the police. The appellant apparently heard about Raymond's existence shortly after his release on bail on 24 December 1997; yet the police were never told about this. Neither, apparently, was the appellant's legal representative informed of Raymond's existence which came up for the first time when the appellant

testified. The similarity between the appellant and Raymond was never put to A or any other state witness for comment. In my view the appellant would certainly have conveyed this crucial information to the police if Raymond really existed.

[31] I am satisfied that the magistrate, as found by the court below, had properly assessed the evidence. She correctly found that the contradictions referred to were not material and did not render the veracity of the state's version suspect. She was well aware of the dangers inherent in the evidence of A as well as the need to exercise caution. She looked for safeguards as guarantees against mistaken identification and properly assessed all the evidence placed before her. Accordingly the appeal against conviction must fail.

[32] There are disturbing features of this case that we are constrained to address. In addition to the flagrant disregard of the rules relating to the identification of suspects, no crime kits were available at the hospital to enable Dr Theron to take a sample for DNA analysis. It is imperative in sexual assault cases, especially those involving children, that DNA tests be conducted. Such tests cannot be performed if crime kits are not provided The failure to provide such kits will no doubt impact negatively on our criminal justice system. Fortunately in this matter such negative outcome has been avoided by the brave and satisfactory evidence of A as corroborated by other witnesses.

[33] The most disconcerting aspect relates to the delays in the commencement and finalisation of this matter indicated above. Counsel for the state was unable to furnish any explanation She invited comment

by the court in this regard to ensure that law enforcement agencies and persons involved in the administration of justice act appropriately. As I have indicated earlier, the trial commenced some four years and three months after the commission of the offence. A was by then 13 years old and was called upon to recall events that had occurred in 1997. Further it has taken more than ten years to finalise this case. Fortunately the appellant has been out on bail save for a period of three months after his conviction. This case has, however, been hanging over his head for a very long period.

[34] There is no ostensible reason for the delays. In certain instances the matter was postponed at the request of the state or the defence Be that as it may, this state of affairs is unacceptable and is cause for grave concern. In my view an investigation must be conducted by the relevant authorities to establish the root cause of these delays and to determine how a situation of this nature can be avoided in future. It is hoped that these shortcomings will receive their prompt and proper attention. To that end we intend directing the Registrar of this court to serve a copy of this judgment on the Minister of Justice and Constitutional Development, the Minister of Police and also on the National Director of Public Prosecutions for their attention.

[35] I turn now to consider the appeal against sentence. Counsel for the appellant submitted that the magistrate had failed to take into account all mitigating circumstances and in the result imposed a sentence that was excessive. In this regard counsel submitted that the appellant is a first offender, a school teacher and sole provider for his family; that he has already been punished as he was dismissed as a result of the conviction; that he has suffered a considerable amount of stress during the trial as a

result of the delays caused in finalising the matter and, lastly, that A has not suffered any permanent psychological injuries and has been able to continue with his studies.

[36] I do not agree with these submissions. The offence of indecent assault is very serious and in this case the complainant was a young boy of eight years of age. Assaults of this nature are now defined as rape in terms of s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. The prescribed sentence in respect of a rape involving a child under the age of 16 years is set out in s 51 of the Criminal Law Amendment Act 105 of 1997. The appellant can count himself fortunate that the provisions of Act 32 of 2007 do not apply in his case since the offence was committed in 1997. Assaults of the kind perpetrated against A are the most invasive of assaults. This was a degrading, humiliating and traumatic experience for A. In my view, the fact that the appellant is a father and a school teacher can be regarded as an aggravating factor. The community expects people like the appellant to protect the children.

[37] The appellant is not the only person to have been affected by these delays A and his family also had to wait for a period of more than ten years for the final outcome of this case. The court recognises that the trial should have been conducted in an expeditious manner. Counsel for the appellant referred us to the decision of *S v Stephen* 1994 (2) SACR 163 (W) where the accused had been in custody for six months awaiting trial and the court held that a period of imprisonment whilst awaiting trial was the equivalent of a sentence of twice the length. In my view the facts of that case can be distinguished from the facts in this appeal because the appellant has been out on bail pending the finalisation of the matter

throughout these delays, save for a period of three months after his conviction.

[38] In my view, the magistrate took all the relevant factors into account when considering sentence. The sentence imposed is commensurate with the seriousness of the crime, the circumstances of the appellant, as well as the interests of society In the result there is no basis for this court to interfere. It follows therefore that the appeal against sentence also fails.

[39] The Registrar of this court is directed to serve copies of this judgment on the Minister of Justice and Constitutional Development, the Minister of Police and on the National Director of Public Prosecutions.

[40] In the result the following order is made:

(a) The appeal against conviction and sentence is dismissed.

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N Z MHLANTLA
ACTING JUDGE OF APPEAL

CONCUR:) **NAVSA JA**
) **VAN HEERDEN JA**