Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Case number 258/04

Reportable

In the matter between:

LAURIE JOHN FRASER **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: ZULMAN, FARLAM et VAN HEERDEN JJA

HEARD: 24 FEBRUARY 2005

DELIVERED: 31 MARCH 2005

SUMMARY: Criminal Procedure – sentence - conspiracy to commit kidnapping – sentence of four years imprisonment set aside and replaced by severe fine plus period of sentence suspended for four years on condition that similar offences not be committed and community service performed – substituted sentence sufficiently severe to send out suitable message to those minded to commit similar offences and to deter the appellant from committing such offences in the future.

JUDGMENT

FARLAM JA

[1] The appellant in this matter was convicted in the magistrates' court for the regional division of Johannesburg on a charge of contravening s 18(2)*(a)* of the Riotous Assemblies Act 17 of 1956 by conspiring with other persons to commit or to procure the commission of the kidnapping of T.F.. He was sentenced to 4 years imprisonment. His appeal against his conviction and sentence was dismissed by Goldblatt J (with whom Boruchowitz J concurred), sitting in the Johannesburg High Court. He now appeals to this court, with leave from the court *a quo*, against the sentence imposed upon him.

[2] The appellant is the natural father of T.F., who was born on [date] 1995. (In what follows I shall refer to him as 'the child'.) On 23 February 1996 the child was adopted by Dr B.F. and his wife Mrs F., in terms of an adoption order granted by the Commissioner of Child Welfare, Pretoria North. Prior to the child's birth, at a time after she had terminated the relationship between her and the appellant, the child's mother, Ms Adriana Naude, had already decided to give up her as yet unborn child for adoption.

[3] The appellant, who did not accept the mother's decision in this regard, brought an application in the Witwatersrand Local Division for an interdict to prevent the child, once born, from being handed over for adoption and an order that the child be handed over to him. This application was dismissed with costs: see *Fraser v Naude and Others* 1997 (2) SA 82 (W). After the child was born and the adoption order was granted the appellant brought a further unsuccessful application in the Witwatersrand Local Division, this time seeking disclosure of the identities of the adoptive parents.

[4] On 11 March 1996 the appellant brought a review application before Preiss J in the Transvaal Provincial Division, seeking, *inter alia*, an order reviewing and setting aside the order for the adoption of the child. This application was successful: see *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 218 (T). The question as to whether s 18(4*)(d)* of the Child Care Act 74 of 1983 was inconsistent with the interim Constitution and therefore invalid insofar as it dispensed with a father's consent for the adoption of a child born out of wedlock was referred to the Constitutional Court for determination. On 5 February 1997 the Constitutional Court held that s 18(4)*(d)* of the Child Care Act 74 of 1983 was inconsistent with the interim Constitution and therefore invalid to the extent that it dispensed with the father's consent for the adoption of a child born out of wedlock in all circumstances, but suspended this declaration of unconstitutionality for two years to enable Parliament to correct the defect in s 18(4)*(d)*, which was to remain in force pending its correction by Parliament or the expiry of the two year period. In the result the appellant's challenge to the constitutionality of s 18(4)*(d)* failed as far as his own case was concerned. The Constitutional Court's judgment is reported as *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC).

[5] The following year this Court overturned the judgment of the Transvaal Provincial Division setting aside the adoption order: see *Naude and Another v Fraser* 1998 (4) SA 539 (SCA).

[6] Ten days after the judgment of the Constitutional Court was handed down the child was kidnapped in Malawi, in which his adoptive parents were temporarily resident as missionaries and to which they had taken him shortly after the adoption order. Three days after the child was kidnapped he was recovered and was taken to a police station.

[7] Normally where a person conspires with another to commit a crime and the crime in question is committed then the conspirator is liable for the crime itself and should be so charged: see Burchell, *South African Criminal Law and Procedure* volume 1 *General Principles of Criminal Law* 3ed p 367 and *cf R v Milne and Erleigh* (7) 1951 (1) SA 791 (A) at 823G. In the present case, however, it was not possible for the State to charge the appellant with the crime of kidnapping because the kidnapping occurred in Malawi. The conspiracy in respect of which the appellant was convicted occurred in the regional division of Johannesburg and the crime which formed the subject of the conspiracy was to be committed in part in South Africa because it was part of the conspiracy that the child, having been kidnapped in Malawi, was to be handed over to the appellant in Johannesburg. The appellant's contention that the conspiracy which took place in this matter did not amount to a contravention of s 18(2)(a) of Act 17 of 1956 because the principal offence was to be committed outside South Africa (cf *S v Basson* 2000 (1) SACR 1 (T)) was rejected both by the trial court and the court *a quo* because it was proved by the State that the child was to be brought to this country after he was kidnapped.

[8**]** It was accordingly competent for the prosecution to charge the appellant with a conspiracy in contravention of s 18(2)(a) of the Act and for him to be convicted thereof. It has to be borne in mind, however, when one comes to sentence that that is the offence for which he is to be punished. The court cannot punish him for the actual kidnapping because that is an offence over which the courts of this country have no jurisdiction and it is an offence moreover in respect of which he was not charged. The circumstances of the kidnapping may

be relevant in order to throw light on the nature of the offence which formed the subject matter of the conspiracy but the court must be on its guard not to punish the appellant for an offence in respect of which he was not, and could not be, charged in this country.

[9] According to the evidence of Brian Nkhata, one of the appellant's co-conspirators, who kidnapped the child in Malawi and who gave evidence for the State (which was accepted by the trial court), he met the appellant on at least three occasions and spoke to him on at least two occasions on the telephone. At their first meeting, which appears to have taken place near the end of September 1996, he, another State witness, Austin Nkhata, a relative of his, and one Charles Mwandira, the second accused at the trial, met with the appellant. The appellant requested the witness to go to Malawi to ascertain where Dr and Mrs F. and the child were staying. He told the witness that he loved his child, that Dr F. had him and that he wanted him back. He promised the three of them a reward for 'retrieving', as it was put, his child but stressed that they must not carry guns and that there was to be no violence and no looting.

[10] Some time after this discussion the witness went to Malawi. While he was there he met Mwandira, Austin Nkhata and the first accused at the trial, Jennifer Uys, a woman in her mid-twenties with whom the appellant was living at the time. After they went to the Funnells' house, they realized it would be difficult to get hold of the child because there were two security guards and what was described as a vicious dog. They decided to abandon the operation. Austin Nkhata, Ms Jennifer Uys and Charles Mwandira then returned to South Africa.

[11] After a while, in January 1997, Brian Nkhata also returned to South Africa. After he had been informed by Charles Mwandira that the appellant still wanted what was described as 'the deal' to go on, he telephoned the appellant, whereupon he and Charles Mwandira had a meeting with the appellant and Jennifer Uys at a shopping centre. The appellant asked him and Charles

Mwandira whether they were going to go through with the deal he had told them about and they agreed. He also said that, if they failed, he would himself go to fetch the child, adding that he would do anything to get his child. The witness stated that he was then instructed by the appellant to go to Malawi. The next day Jennifer Uys and the appellant brought him R1 500, which it had been agreed was the cost of the journey to Malawi. After this the witness went to Malawi, it having been arranged that the appellant, Jennifer Uys and Charles Mwandira would follow in the middle of the week. While he was in Malawi the witness telephoned the appellant and told him that they should not come that week but the appellant did not want to postpone anything. Shortly thereafter he met up with Jennifer Uys and Charles Mwandira who told him, incorrectly as it turned out, that the appellant was also in Malawi. After two fruitless visits to the Funnells' home, Jennifer Uys and Charles Mwandira returned to South Africa. The witness stayed behind in Malawi and succeeded, with the help of two others, in kidnapping the child. Some time later (according to Dr F., who also testified, it was three days later), the child was returned.

[12] The witness also stated that the understanding with the appellant was that the child would be brought to South Africa and that the appellant had said that he wanted to bring the child up himself. He said that he received in all R1 450 from the appellant, R1 000 on the first occasion and R450 on the second, and that he had wanted R15 000 for the kidnapping, the agreement with the appellant being that money was to be paid over after the kidnapping had taken place. Under cross-examination he conceded that the appellant had been serious about his instruction that no-one should be harmed.

[13] The second State witness, Austin Nkhata, whose evidence was also accepted by the trial court, described several meetings with the appellant from about August to November 1996, some of them attended by the previous witness. According to him the appellant told him he was willing to pay two persons R20 000 to carry out the kidnapping, initially R15 000 and later R5 000,

and that he would also give them a motor car. According to the witness the child was to be taken to Mozambique, from where, presumably, he was to be brought to South Africa. The appellant had said that he wanted the child before January, and that they would be accompanied by Jennifer Uys. He had stressed that weapons must not be used and that they must take good care of Jennifer Uys and the child. He then related how he went to Malawi, where he met the previous witness, and described how they went to the Funnells' house but were unable to take the child. After that he returned to South Africa and was not involved in the conspiracy thereafter. He said that at a certain stage the appellant gave him R200 and that he received a further R100 from Jennifer Uys after he returned to South Africa.

[14] According to another State witness, Captain Strauss, the investigating officer, he ascertained that Jennifer Uys and Charles Mwandira went to Malawi in November 1996 and again from 6 to 9 February 1997. The appellant was also away from South Africa from 6 to 9 February but he only went as far as Harare.

[15] As appears from the summary I have given of the evidence of Brian and Austin Nkhata, no definite arrangements appear to have been made, at least after Jennifer Uys returned to South Africa, as to where the child was to be kept in Malawi or as to how the child was to be kept safe while en route to this country.

[16] In his judgment on sentence the magistrate said, correctly, that the offence in respect of which the appellant was convicted was a very serious one: indeed he went so far as to say that the appellant and his co-accused had conspired to commit a heinous crime. He pointed out that the kidnapping which was to have been committed was very carefully planned, although he referred also to the lack of any definite arrangements as to where the child would be kept during the trip to South Africa or to ensure that the child would be safe during that period. In this regard the magistrate said that the appellant 'probably placed all his confidence in Brian Nkhata to see to the safety of the child and Jennifer Uys.'

The magistrate continued: ‘He entrusted the safety of the child to a man whom he had only met on a few occasions.’

[17] The magistrate also referred to the misery the kidnapping would have caused to the Funnells, not knowing where the child was or what had happened to him, especially in a foreign country, where they were temporarily employed. The magistrate also took into account the fact that kidnapping is, as he put it, ‘becoming more prevalent nowadays.’

[18] The magistrate then set out the personal circumstances of the appellant, that he was 32 years of age, unmarried, self-employed and a first offender. He recorded that it was not clear what his income was. In his judgment on conviction the magistrate stated that the appellant had a bachelor’s degree in commerce and that he had been employed by an international auditing company. According to the judgment of the Constitutional Court, which was handed in at the trial, the appellant is described as ‘a system developer employed in the computer industry’.

[19] Dealing with the interests of society the magistrate said:

‘Society is subjected to an overwhelming amount of crime. The impression is that the crime situation in this country is out of hand. More and more people in all sectors of the community are involved in serious offences. There is a tendency of lawlessness. The accused are not the exception. The disrespect shown towards law and order, justice and the rights of other people, cannot be tolerated. It is the court’s duty to protect the interests of society.’

[20] In discussing the involvement of the appellant in the conspiracy the magistrate stated that the appellant’s attorney had correctly conceded that he was the principal offender. He took into account that it appeared that the appellant had, as he put it, used both of his co-accused and the two Nkhatas. He continued:

‘[The appellant] showed great interest in his child. Now after all, he has lost his child, one can sympathise with him in this regard. But it does not make his conduct less serious. All the witnesses in mitigation sympathised with accused 3. It can be understood. Some of them had the same problems. It was argued that no violence was involved. This argument does not hold water. Kidnapping by the nature of it implies violence. The degree of violence naturally differs from case to case. In this case they planned a serious offence, a kidnapping in a foreign country.

The next question which was posed by [the appellant's attorney] is the question whether they [the three accused] posed any danger to society. That is only one of the factors which must be considered. Punishment must fit the criminal, the crime and also society. Then the motive. Whatever [the appellant's] motives were, to plan such a serious offence where his biological child was involved, planning to subject the child to the care of persons whom he knew for a short period, is a very serious offence and is viewed in a very serious light. The motive he had cannot have that much influence on his blameworthiness. The fact that it was his biological child cuts both ways, in favour of him and against him. A person prepared to have his biological child kidnapped in such a manner committed a serious offence, and his sincerity about the wellbeing of that child can be questioned. [The appellant's attorney] referred to our rotten society. It is the court's duty to send a message out that criminal behaviour will not be tolerated, to try and do something about the rotten society. Society might not need to be protected against the accused, but one of the purposes of sentence is also to have a deterrent effect. A message must be sent out that crime, especially serious offences, will not be tolerated.'

[21] The magistrate came to the conclusion that a term of imprisonment would be the only appropriate sentence in the case of all three accused before him. He sentenced the first and second accused (Jennifer Uys and Charles Mwandira) each to two years' imprisonment and, as indicated above, imposed a sentence of four years' imprisonment on the appellant. Because the second accused had been in custody for over two years his sentence was suspended. In the case of the first accused and the appellant, said the magistrate, 'a suspended sentence will not have the necessary deterrent effect on others with the same ideas as the accused.'

[22] In his judgment in the Johannesburg High Court, Goldblatt J dealt with the appellant's motive as follows:

'The motive behind the appellant's criminal behaviour never clearly emerged during the trial and one can only guess and speculate as to what went on in his mind. The most probable motive seems to be the belief expressed by him in his plea explanation at the trial that in view of the fact that Preiss J had set aside the adoption order, he as father of the child, was legally entitled to take the child into his custody. He may very well have believed that if the child was brought to him, the Funnells would have had no right to take the child out of the country pending a new adoption hearing. He may also have believed that if the *status quo* was that he had custody of the child, this would weigh in his favour at an adoption hearing.'

[23] Goldblatt J found that the sentence imposed was not shockingly inappropriate and that the magistrate did not misdirect himself in any way. He continued:

'I see no reason to interfere with the sentence imposed. As correctly pointed out by the court *a quo* the offence of which the appellant was convicted is a very serious one and could have caused great pain and harm to the

adoptive parents who had already brought T. up for two years and to T. who would have found himself in a strange and unknown environment. Further, the kidnapping was a flagrant disregard of the South African judicial system in that in the hearing before Preiss J, which took place shortly before the alleged conspiracy, the parties had agreed that custody of T. would remain with the Funnells pending an appeal.'

[24] While I agree that the offence in respect of which the appellant was convicted was very serious, that it could have caused great harm and pain to the adoptive parents and the child and that it was, as was put by Goldblatt J, 'a flagrant disregard of the South African judicial system', I am unable to agree that the magistrate did not misdirect himself. I do not think that every kidnapping is necessarily a violent offence and point out that the appellant stressed to both the Nkhatas that no violence was to be used and that no-one was to be harmed.

[25] I am also of the opinion that, reprehensible though the appellant's crime may be, the fact that he has clearly acted out of concern for his own child and was actuated by a very real desire to bring him up himself must have some mitigating effect when one comes to weigh up his moral blameworthiness, misguided though his actions have been. Many of the kidnapping cases which come before the courts and to which the magistrate alluded when he said that kidnapping is becoming more prevalent nowadays are cases where the motive for the kidnapping is to extract a ransom from the parents or other family members of the child kidnapped. Others involve the taking of a child out of the custody of those entitled to it in order to enable the kidnapper to rape, or commit other indecent acts against, the child kidnapped. This case differs markedly from cases of that sort. In the circumstances this court is, by reason of the magistrate's misdirections, at large to consider afresh what sentence should be imposed in respect of the appellant.

[26] As I have said, I agree that the offence of which the appellant was convicted was serious. I am also of the view that a message must be sent out indicating that offences of this kind cannot and will not be tolerated. I do not think, however, that such a message will only go out if an unsuspended sentence

of imprisonment is imposed. In my view a large fine, coupled with a suspended sentence having as one of the conditions of suspension the requirement that the appellant perform an appropriate form of community service, will also send out such a message. A further condition of suspension to the effect that the appellant not be convicted of kidnapping or other specified offences during the period of suspension [contempt of any court order relating to his child or any conspiracy, attempt or incitement to commit such kidnapping or contempt of court in respect of which a sentence of imprisonment without the option of a fine is imposed] will have the effect of deterring the appellant from committing further offences flowing from his obsessive desire to have custody of his child despite decisions of the courts to the contrary. In addition, every time he performs community service he will perforce be reminded of his offence and the necessity to refrain from similar conduct in the future.

[27] At the hearing of the appeal the counsel for the appellant and the State were requested to endeavour to agree on appropriate conditions of suspension should the court be minded to replace the sentence imposed by the trial court by a period of imprisonment suspended, *inter alia*, on condition that the appellant perform appropriate community service. They have agreed on conditions of suspension which they suggest should be incorporated in the sentence to be substituted for the sentence imposed by the trial court. I am grateful to them for their suggestions and have utilised these in the sentence set out below, which is also based on the sentence framed by this Court in *S v Van Vuuren* 1992 (1) SACR 127 (A).

[28] The following order is made:

1. The appeal against the sentence imposed on the appellant is allowed.

2. The sentence imposed by the trial court is set aside and replaced by the following:

‘Accused no 3 is sentenced to a fine of R10 000, plus four years’ imprisonment, which imprisonment is suspended for a period of 4 years on the following conditions:-

(a) Accused no 3 is not during the said period convicted of kidnapping or contempt of any court order relating to his child or any attempt, conspiracy or incitement to commit such kidnapping or contempt of court, in respect of which a sentence of imprisonment is imposed without the option of a fine.

(b) Accused no 3 shall without remuneration render 416 hours community service in terms of Section 297(1)*(a)(cc)* of Act 51 of 1977 in the manner set out below:

(i) The community service shall be served in the casualty department of the Knysna Provincial Hospital;

(ii) The duties of Accused no 3 shall be the rendering of porter services in the casualty department or in other wards as directed from time to time by the sister in charge of the casualty department.

(iii) The said community service shall be carried out every Saturday between the hours of 14h00 and 18h00.

(iv) For the purposes of carrying out the said community service accused no 3 shall report every Saturday afternoon at 14h00 to the sister in charge of the casualty department at Knysna Provincial Hospital.

(v) Accused no 3 shall first report for duty as aforesaid at 14h00 on Saturday 9 April 2005 and shall thereafter regularly and punctually report for such service at 14h00 on each succeeding Saturday, unless exempted therefrom in terms of the written permission of the [matron of the hospital] sister in charge of the casualty department of the hospital, granted on the grounds of sickness or compelling necessity.

3. The Social Worker, Community Corrections, Knysna shall report to the Clerk of the Court, Johannesburg at Private Bag X1, Johannesburg, 2000 on a six monthly basis until the said community service is completed.

…….

IG FARLAM

JUDGE OF APPEAL

CONCUR:

ZULMAN JA

VAN HEERDEN JA