THE WESTERN CAPE HIGH COURT

CASE NO: A683/09

In the matter between

ZOLA GODI **Appellant**

and

THE STATE **Respondent**

For the Appellant
Adv. P.J. Burgers

For the Respondent
Adv. S. Raphels

IN THE HIGH COURT OF SOUTH AFRICA REPORTABLE

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A683/09

In the matter between:

ZOLA GODI Appellant

and

THE STATE Respondent

Judgment handed down on 31 May 2011

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1. On 18 March 2008 the appellant was convicted in the Mossel Bay Regional Court on a charge of the rape of a minor which took place in January 2001. The State relied upon the provisions of section 51(2) as well as schedule 2 to the Criminal Law Amendment Act, 105 of 1997, which provides for the imposition of minimum sentences ("the Minimum Sentence Act") and the appellant was sentenced to 15 years imprisonment on 20 March 2008. The appellant applied for leave to appeal his conviction and sentence, which leave was refused. The appellant thereafter petitioned this court successfully.

2. In both the application for leave to appeal and in the petition, but not before us, reliance was placed upon an infringement of the appellant's right to a

speedy trial. The factual basis for this submission requires to be addressed nonetheless as I would be remiss in my duties was I not to comment on the inordinate delays which occurred during the trial.

3. The appellant was arrested on 29 January 2001 on a charge of rape. The complainant, born on 28 April 1992, underwent a medical examination on 1 February 2001. At a date unknown to us the trial commenced in the regional court and, subsequently thereto, this court set those proceedings aside, apparently due to a problem with the translator, and the matter was remitted to the regional court for trial. We do not have a copy of the record or the order granted by this court.

4. The first appearance after the remittal to the regional court was on 21 June 2003. The trial only commenced on 26 March 2007, when the appellant pleaded, that is nearly four years after the matter was first called after it had been remitted, and more than six years after the events themselves had taken place. It then also took a further year to complete the trial. Judgment was delivered on 18 March 2008 and sentencing took place two days later, on 20 March 2008.

5. The following needs to be said about these postponements – on ten occasions the State requested a postponement, variously because the complainant's presence at court had not been secured, an intermediary was not available, an interpreter had not been arranged, or because the prosecutor would not be available for the duration of the trial. There were three occasions on which the appellant failed to appear. On two occasions

the appellant requested a postponement. On eight occasions the legal representative of the accused requested a postponement, either to obtain legal aid, or because he had just been briefed, or because the appellant was advised to obtain legal representation.

6. It is the duty of the presiding officer to assume primary responsibility for ensuring that this constitutional right to a speedy trial is protected in the day-to-day functioning of their courts.[1] On at least five occasions the presiding magistrate had noted that this would be a final postponement and on at least one occasion he had warned that warrants would be issued for anyone who did not arrive on time. So for instance he stated on 23 May 2005:

> *'Die staat sowel as die verdediging dui dus vir die hof aan dat mev. Erasmus die volgende prokureur sal wees. Reëlings is met haar getref en dat die hof dit kan merk as 'n voorkeursaak. Die hof gaan vandag egter 'n uitsondering maak as gevolg van die feit dat dit 'n minderjarige kind hier betrokke is en dit 'n absolute finale uitstel maak en ook 'n voorkeursaak maak. Meneer, die saak teen u word uitgestel na die 27ste Julie. Dit is 'n finale uitstel. Dit is 'n voorkeursaak. U borg word dan net weer verleng."*
>
> (my emphasis, but no doubt also emphasised by the learned magistrate)

7. No one heeded the admonishments by the presiding magistrate.

8. It would be patently clear from the above summary that the appellant contributed as much to the delay in bringing the matter to conclusion as did

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[1] See *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) (1998 (1) SACR 227; 1997 (12) BCLR 1675) at paragraph [37]

the prosecution. It follows, in my view, that Mr Burgers, who appeared for the appellant, was well advised not to have persisted in the point taken in the application for leave to appeal and the petition to this court.[2]

9. That, however, does not undo the injustice of what had taken place here. The right to a speedy trial is a right which not only accrues to the accused; it is also of importance to the complainant and the witnesses – and the more so where the complainant is, as in this case, a minor suffering a disability. The complainant, as appears from psychological evaluation, is mildly retarded and she found herself living with her grandmother who, so it appears, is an alcoholic, and who left her to her own devices. The evidence and the report by the psychologist, Ms Hetta van Niekerk, underlines the additional trauma and anxiety that the complainant had suffered in being brought to court and then not to testifying.

10. In *Sanderson v Attorney-General, Eastern Cape*[3] Kriegler J held that the right to a speedy trial seeks to protect three interests. First, the right to security of a person is protected by seeking to minimise the anxiety, concern and stigma of exposure to criminal proceedings. Second, the right to liberty is protected by seeking to minimise exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. Third, the right to a fair trail is protected by attempting to ensure that proceedings take place while the evidence is available and fresh. The right to a speedy trial thus protects both trial and non-trial related interests.

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[2] See *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) (1998 (1) SACR 227; 1997 (12) BCLR 1675) at paragraph [33]

[3] *Supra* footnote 2

11. The first and the third interests clearly also impact upon the complainant, particularly in a rape case. The anxiety, concern and stigma which attaches to being a witness as a complainant in a rape trial is well known and well documented. It is also confirmed by what the psychologist testified to in the instant case. The complainant was unnecessarily and for a prolonged period of time exposed to the anxiety and concern of having to testify. She was also called upon to testify at a particularly difficult stage in her own development as an adolescent. Had the trial been concluded speedily, she need not have suffered those indignations at a stage when she was facilitating between the worlds of child and adult.

12. In *S v Moekoena*[4] Bertelsmann J commented as follows on *Sanderson*

> *"[157] The systemic brake upon the speedy conclusion of criminal trials has become much worse during the decade since Kriegler J wrote.*[5]
>
> > *"Under this heading I would place resource limitations that hamper the effectiveness of police investigation or the prosecution of a case, and delay caused by court congestion. Systemic delays are probably more excusable than cases of individual dereliction of duty. Nevertheless, there must come a time when systemic causes can no longer be regarded as exculpatory. The Bill of Rights is not a set of (aspirational) directive principles of State policy - it is intended the State should make whatever arrangements are necessary to avoid rights violations. One has to accept that we have not yet reached that stage. Even if one does accept that systemic factors justify delay, as one must at the present, they can only do so for a certain time. In principle (courts) should not allow claims of systemic delay to render the right nugatory.*

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[4] 2008 (5) 578 (T)
[5] *Sanderson* at para [35] – [37]

> *Delay cannot be allowed to debase the presumption of innocence, and become in itself a form of extra-curial punishment. A person's time has a profound value, and it should not become the plaything of the State or of society.*
>
> *The point should not be overlooked that it is by no means only the accused who has a legitimate interest in a trial commencing and concluding reasonably expeditiously. Since time immemorial it has been an established principle that the public interest is served by bringing litigation to finality. There are individuals with a very special interest in seeing the end of a criminal case. Conscientious judicial officers, prosecutors and investigating officers are therefore always mindful of the interests of witnesses, especially complainants, in bringing a case to finality.**

[158] These considerations were expressed in the context of an accused's (unsuccessful) argument that there had been an unreasonable delay in bringing the charges against him to trial. Given the vulnerable position of a child, his or her right to be treated with due recognition of the paramountcy of his or her interests can only be enforced if the matter he or she is involved in is given as much priority on the court roll as possible. A child may forget facts more readily than an adult, but will not escape the stress that is caused by the uncertainty surrounding the pending trial and the fact that the child victim is often obliged to attend a number of court dates only to have the matter postponed again. This adds to the child's trauma.

[159] There is no justification for this additional burden of heartache and frustration that is routinely heaped upon child victims and witnesses in this fashion. The Constitution guarantees the accused a fair trial that must be concluded without unreasonable delay. However much an accused's rights may be prejudiced by the tiresome pace at which criminal trials in which serious charges are brought against them are dragged through our courts, and whatever excuse may be offered for the manner in which the fair trial rights of the

accused are infringed, the paramountcy of children's rights demands that they are not forced to join the throng of those who have to wait for months or years before their case is finalised. Whenever a child is involved as a victim or witness, such child is by virtue of the clear-cut provisions of s 28(2) entitled to have his or her case given priority at every stage of the investigation and of the prosecution. Trials in which children are involved as victims and witnesses must be concluded as soon as possible."
(my emphasis)

13. We do not know what occurred during the first trial, how many postponements there were and whether she had testified or not. If there were postponements, as there very well may have been, and if she did testify, as she probably did, it will all only add to the aggravation of the injury that she has suffered.

14. The third interest was equally disregarded. Again, as Bertelsmann J had stated in *S v Mbokhani*[6] at paragraph [54]:

"If a child victim of a sexual assault is to testify in the alleged rapist's subsequent trial, her or his interests can only be accorded their rightful paramountcy if all parties involved co-operate to ensure that the trial is finalised as soon as humanely possible. Children's memories are notoriously compromised by the passage of time; victims in the complainant's position may be exposed to undue influences and threats and the trauma of repeated postponements may compromise the child's subsequent testimony to the extent that the rapist must go free because the evidence provided by the child is no longer of the standard that would justify a conviction. Trials in

[6] 2009 (1) SACR 533 (TPD)

which children are to testify either as victims or as eye witnesses must be given priority in all courts and at all times – not to do so is an infringement of the Constitution's section 28(2):

> *'A child's best interests are of paramount importance in every matter concerning the child.'"*

15. In my view special care should have been taken of the complainant, in particular, by the prosecution. This unfortunately did not happen. She was forced to come back to court and to relive, at a very crucial time in her own development as a young woman, about a series of terrible events she by then should have put well behind her.

16. The appellant worked and lived in a tuck shop close to the house where the complainant and her grandmother stayed. The complainant was clear in her recollection of events so many years later. The alleged rapes took place on Fridays, when her grandmother was not around. She could recall that the appellant had on the first occasion invited her into his room and told her to undress. The following occasion was when he asked her to wash the dishes. He gave her money which led to her grandmother giving her a hiding. With so much money at school the next day the school principal also became involved.

17. Mr Burgers submitted that the evidence by the youthful complainant six years after the event, was unreliable, contained contradictions and did not establish the offence the appellant was charged with. He also submitted that the learned magistrate had misdirected himself in relying upon the

psychologist's report and evidence that the complainant was telling the truth and not capable of lying about the rape.

18. An educational psychologist, Ms Hester van Niekerk, evaluated the complainant, M, on 4 May 2005 when she was 15 years old. Amongst other sources she had regard to a trauma report prepared by the welfare worker, Ms N Hewu, dated 26 March 2001, as well as a letter by the educational psychologist, Ms Maryka Nigel, addressed to the St Mary's Children Home dated 2 June 2005. These latter two documents did not form part of her written report and are also not included in the record. It appears that Ms Hewu had reported, on 26 March 2001 that *"there were objective symptoms of traumatisation possibly as a result of sexual molestation in the form of enurese, sleep disturbances, ..."*.

19. Mr Burgers submitted that the references to these documents, without their being introduced in evidence, falls foul of the principles pertaining to the admissibility of expert evidence set out by Satchwell J in Holtzhausen v Roodt 1997 (4) SA 766 (W). He also pointed out that the ruminations by Ms van Niekerk, regarding the veracity of the version of the complainant, and the evaluation that she was a reliable witness, usurped the functions of the court, and was therefore inadmissible.

20. Two points need to be made – first is that the garnering of hearsay evidence and the incorporation thereof in her report and evidence was permissible (*Lomadawn Investments (Pty) Ltd v Minister van Landbou* 1977 (3) SA 618 (D) at 626A-627D; *Davey v Minister of Agriculture* 1979 (1) SA 466 (N) at

475F-477F), but not as proof of the truth thereof (Davey, *supra*, at 475H-476H).

21. In *Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC) Davis J said the following

> *"In Zeffertt, Paizes & Skeen The South African Law of Evidence at 330, the learned authors, citing the English judgment of National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer') [1993] 2 Lloyd's Rep 68 at 81, set out the duties of an expert witness thus:*
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> *'1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*
>
> *2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise . . . An expert witness should never assume the role of an advocate.*
>
> *3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.*
>
> *4. An expert witness should make it clear when a particular question or issue falls outside his expertise.*
>
> *5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.'*

In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess."

22. Ms van Niekerk had indeed consulted with Ms Nigel, as one would have expected, and recorded that Ms Nigel served as confirmation for the conclusions drawn in her own report. She was extensively cross-examined on the results of the tests administered by Ms Nigel and the conclusions the witness drew therefrom. An important feature was the drawing made by the complainant – Ms van Niekerk had access to the drawing and furnished her own interpretation thereof. Ms Hewu's observations were confirmed by what Ms van Niekerk had established. In my view, the expert witness was obliged to have regard to both the reports.

23. In *Coopers (SA) Ltd v Deutsche Schädlingsbekämpfung Mbh* 1976 (3) SA 352 (A), Wessels JA held at 370F-H:

"In the ultimate result, it is the court's duty to construe the specification and on the merits to draw inferences from the facts established by the evidence. See Gentiruco's case,[7] supra, at

[7] *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A)

pp.616D-618G. There are, however, cases where the court is, by reason of a lack of special knowledge and skill, not sufficiently informed to enable it to undertake the task of drawing properly reasoned inferences from the facts established by the evidence. In such cases, subject to the observations in the Gentiruco case, loc. cit., the evidence of expert witnesses may be received because, by reason of their special knowledge and skill, they are better qualified to draw inferences than the trial of fact. There are some subjects upon which the court is usually quite incapable of performing an opinion unassisted, and others upon which it could come to some sort of independent conclusion, but the help of an expert would be useful (see, Hoffman, SA Law of Evidence, 2nd edition, page 78). For an example of evidence held to be admissible because it 'could be of great assistance to the court' in drawing the inference it was required to draw, see R v Vilbro and Another 1957 (3) SA 223 (AD) at page 228G-H. If a party intends calling a witness to give expert evidence of the kind discussed above, he is required to furnish the other party with 'a summary' of such a witness's 'opinions and his reasons therefor'."

24. The fact that the expert drew inferences, also as to veracity and truthfulness, does not by itself make the evidence inadmissible – a court is bound to itself examine the facts – which may include the expert opinion of the witness – and to draw its own conclusions. This, in my view, is what the learned magistrate did.

25. Ms van Niekerk gave important evidence with the regard to the perception of events by the complainant, both at the time they took place as well – and the fact that she may conflate events – as at the time when she testified. In my view this evidence was important and the learned magistrate had proper

regard thereto. He was at all times mindful of the circumspection with which he was required to approach the testimony of the complainant.

26. It seems to me that there are a number of facts set out in the report and adduced in evidence by the psychologist to sustain not only the conclusion that the complainant was a competent witness, but also that she was truthful with regard to the rape itself. Moreover, there is sufficient factual material in the complainant's own evidence to sustain the conclusion that she was speaking the truth. Her evidence is consistent and corroborated by the evidence of her grandmother, the medical evidence and, importantly, the evidence of the appellant himself. The appellant in his evidence testified that the complainant had pointed him out as the rapist, as both she and her grandmother had testified she had done, and had identified the room in which the rape had occurred – without being prompted – which he testified she had done, and that it was indeed his room. He could give no explanation as to why she had pointed out that room and, in addition, that the room was not yet in existence when, on his version, she had done some washing up. On his version, that was the only contact he had with the complainant until the confrontation, a month later, when she pointed him out. On his version she could not have known about the room as it had not yet been constructed.

27. In the premises I am satisfied that a proper case had been made out and that the learned magistrate correctly concluded that the rape had been proved beyond reasonable doubt.

Sentence

28. Part 1 of schedule 2 to the Minimum Sentence Act provides that in the case of rape, where the victim is a person under the age of 16 years or is a person who is mentally disabled then, in terms of section 51(1) of the Minimum Sentence Act, a person who is convicted shall be imprisoned for life.

29. It is not in dispute that section 51(1) of the Minimum Sentence Act found application. The appellant, however, was charged under section 51(2) which provides for a maximum sentence of 15 years imprisonment.

30. The learned magistrate did not impose a life sentence, but a sentence of 15 years imprisonment. In arriving at that finding that there were substantial and compelling circumstances, the learned magistrate found that, having regard to the age of the appellant, 28years, the fact that he was, for sentencing purposes, a first offender and that he has been in custody for a two and a half years constituted substantial and compelling circumstances not to impose a sentence of imprisonment for life.

31. In *S v Banda* 1991 (2) SA 352 (B) Friedman J, with regard to the interests of the community, said the following:

> *"The Court fulfils an important function in applying the law in the community. It has a duty to maintain law and order. The court operates in society and its decisions have an impact on individuals in the ordinary circumstances of daily life. It covers all possible ground. There is no sphere of life it does not include. The Court must by its*

decisions, and the imposition of sentence, promote respect for the law, and in doing so must reflect the seriousness of the offence, and provide just punishment for the offender while taking into account the personal circumstances of the offender." (At 356D-F)

32. In *S v M (centre for child law as amicus curiae)* 2008 (3) SA 232 (CC) Sachs J stated as follows:

> *"[10] Sentencing is innately controversial.[8] However, all the parties to this matter agreed that the classic Zinn[9] triad is the paradigm from which to proceed when embarking on 'the lonely and onerous task'"[10] of passing sentence. According to the triad the nature of the crime, the personal circumstances of the criminal and the interests of the community are the relevant factors determinative of an appropriate sentence.[11] In Banda Friedman J explained that:*

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[8] *South African Law Commission Report on a new sentencing framework project 82 (November 2000) at paragraph 1.1. The report explains at paragraph 1.2 that individual decisions are announced to a critical public who analysed them against a variety of expectations. They not only ask whether the sentence expressed public condonation of the crime adequately and protected the public against future crimes by the reform and incapacitation of offenders and by the deterrence of both the individual offender and other potential offenders, but also whether the sentences are just in the sense that similar sentences are being imposed for offences that are of equal seriousness or heinousness. In addition there is a growing expectation that the sentence must be restorative, in the sense both of compensating the individual who suffered as the result of a crime and of repairing the social fabric that criminal conduct damages. All these concerns are inevitably particularly prominent amongst victims of crime, who have a special interest in the offences that they themselves have suffered. Since January 2003 what was previously known as the South African Law Commission (the SALC) has been called the South African Law Reform Commission. Because the publications by the Commission referred to in this judgment were brought out before its name was changed, I use the former designation.*

[9] *In S v Zinn 1969 (2) SA 537 (A) at 540G-H the Appellate Division formulated the triadic sentencing formula as follows: "What has to be considered is the triad consisting of the crime, the offender and the interests of society. The Zinn triad has subsequently become the mantra when pronouncing sentence, but courts have been criticised for invoking it perfunctorily as an invocation. Nevertheless, the triad still retains its status as the sentencing north star (see, for example, S v Malgas 2001 (2) SA 1222 (SCA); (2001 (1) SACR 469; [2001] 3 All SA 220) at 232A (SA) where the triad once again received the Supreme Court of Appeal's imprimatur).*

[10] *Malgas above note 2 at 125H (SA) quoting Hogarth "sentencing as a human process" University of Toronto Press, Toronto 1971 at 5.*

[11] *"Thus, placing over emphasis on the nature of the crime at the expense of the personal circumstances of the offender was regarded in Zinn (above note X(ex?) at 540F-G as a misdirection, rendering the sentence susceptible to being set aside by a court of appeal. This*

> *'The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counter balance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern.*[12]

"And, as Mthiyane JA pointed out in *P*,[13] in the assessment of an appropriate sentence the court is also required to have regard to the main purpose of punishment, namely, its deterrent, preventative, reformative and retributive aspects. To this the quality of mercy, as distinct from mere sympathy for the offender, had to be added. Finally, he observed, it was necessary to take account of the fact that the traditional aims of punishment had been transformed by the

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court has also held in S v Dodo 2001 (3) SA 382 (CC); (2001 (1) SACR 594; 2001 (5) BCLR 423) at paragraph 38 that if carried to disproportionate extremes, it would amount to disregard of the interests of the convicted person since it '... is to ignore, if not to deny, that which lies at the very heart of human dignity'. It has been suggested that the triad is incomplete because it leaves the victim out of the equation (S v Isaacs 2002 (1) SACR 176 (C) at 178B-C). This issue is not before us, and need not be further entertained. Linked to this is the need to reconfigure the sentencing process in appropriate cases in keeping with the principles of restorative justice (SALC Report on a new sentencing framework above note 1 at 24-5), a matter which is considered below at paras [64] and [71].

12 S v Banda and Others 1991 (2) SA 352 (V) at 355A-C.

13 "*Director of Public Prosecutions, KwaZulu-Natal v P 2006 (3) SA 515 (SCA); (2006 (1) SACR 243; [2006] 1 All SA 446) at para 13. P, a 12 year old girl, had paid two men to suffocate and then slit the throat of her grandmother, with whom she lived, after she had drugged her. For this act she had furnished the murderers with articles from the deceased's house and offered herself sexually to them. The trial court had imposed a correctional-supervision order, and the State had appealed to the Supreme Court of Appeal. After emphasising the significance of the United Nations Convention on the Rights of the Child (the CRC) and section 28 of the Constitution, the Supreme Court of Appeal partially upheld the appeal, concluding that correctional supervision on its own was not severe enough. It held that a sentence of 7 years imprisonment, entirely suspended on condition of P's compliance with a rigorous regime of correctional supervision, was more appropriate. In P it was held at paragraph 19 that the Constitution and the international instruments did not forbid incarceration of children in certain circumstances, but merely required that the child be detained only for the shortest period of time' and that the child be 'kept separately from detained persons over the age of 18 years'. The Supreme Court of Appeal noted that it was not inconceivable that some of the courts may be confronted with cases which required detention."*

Constitution.[14] *It is this last observation that lies at the centre of this case."*

33. In *S v Fatyi* 2001 (1) SACR 485 (SCA) the Supreme Court of Appeal upheld the imposition of the minimum sentence of 10 years imprisonment for indecently assaulting a 6 year old girl. The appellant was a first offender, a 51 year old taxi driver, had a stable employment record, was married with children and supported an extended family. Melunsky AJA (as he then was) weighed up the facts of the commission of the offence and the resultant psychological and emotional trauma which the complainant suffered, although not of a permanent nature, against the appellant's personal circumstances. He found that he was not satisfied that there was any justification for departing from the minimum sentence prescribed by the statute.

34. In *S v Swartz and Another* 1999 (2) SACR 380 (C) Davis J pointed out that rape is a cancer within our society:

> *"This epidemic is reflective of the kind of society which our past has shaped and which must be transformed in order for South Africa to become a truly open and democratic society based on freedom, dignity and equality"* (at 385d-e).

35. In considering sentence the learned magistrate referred to the prevalence of rape. He did so with reference to *S v Jansen* 1999 (2) SA 368 (C) at 378g:

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[14] id at *paragraph* 13.

"Rape of a child is an appalling and perverse abuse of male power. It strikes a blow at the very core of our claim to be a civilised society. ... The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflect the societal censure.

....

It is utterly terrifying that we live in a society where children cannot play in the streets in any safety; where children are unable to grow up in the kind of climate which they should be able to demand in any decent society, namely in freedom and without fear. In short, our children must be able to develop their lives in an atmosphere which behoves any society which aspires to be an open and democratic one based on freedom, dignity and equality, the very touchstones of our Constitution" (at 379b).

36. In the case before Davis J, the complainant was 9 years old, the accused who had a clean record, was convicted of a crime which lies at the borderline of the classification of rape. Davis J sentenced him to 18 years imprisonment.

37. In S v G 2004 (2) SACR 296 (W) Borchers J was concerned with the sentence after a conviction of the rape of a 10 year old girl. The accused was 32 years old and a first offender. He showed no remorse. Borchers J found that mitigating was the fact that the accused was a first offender, that the violence employed was not excessive and that the accused had been in custody for almost two years. Having regard to the fact that, in the case before Borchers J, the rape was not of the most serious manifestations of the crime and that the sentence of life imprisonment would be

disproportionate to the gravity of the offence and therefore unjust, she found that sentence of life imprisonment would for this reason not be imposed,but instead 18 years imprisonment was imposed. In aggravation of the sentence regard was had to the fact that the complainant was a young sexually immature child:

> *"There is general outrage in South Africa at the moment over child abuse, and the prevalence thereof and the damage done by such crimes to society justifies that outcry. People are being exhorted to adopt the motto, 'your child is my child'. All that this amounts to is that the public knows that its children are vulnerable and often cannot be protected for every moment of their lives. Decent people recognise these facts and help and protect children. They do not harm them, as the accused had done"* (300h-301b);
>
> and that *"the complainant has suffered and is still suffering psychological harm and emotional pain as a result of the rape and so is her mother and immediate family;"*
>
> and that *"she was raped in the safety of her own home and that the accused was unrepentant."*

38. Eighteen years imprisonment was imposed by Borchers J.

39. In S v Sikhipha 2006 (2) SACR 439 (SCA) the appellant was convicted of raping a 13 year old girl. Lewis JA concluded at paragraph [19]

> *The sentence of life imprisonment required by the Legislature is the most serious that can be imposed. It effectively denies the appellant the possibility of rehabilitation. Moreover, the mitigating factors are not speculative or flimsy. In my view, life imprisonment is not a just*

sentence for the appellant. However, a lengthy sentence of imprisonment is warranted. I consider that a period of 20 years' imprisonment will be sending a message to the community that rape, and especially the rape of a young girl, will be visited with severe punishment. It will send a strong deterrent message."

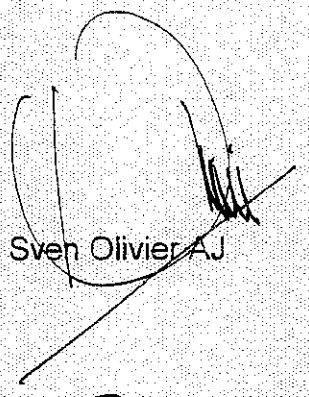
40. The learned magistrate had, correctly in my view found that there were substantial and compelling circumstances present, and he had not erred in this regard. I am not satisfied that sentence of fifteen years imprisonment imposed is at all discordant with a sentence which would otherwise – that is but for the minimum sentence legislation – have been imposed.

41. The magistrate has given proper consideration to the fact that the appellant was a first offender, that he had been in custody for two and a half years, that he was 23 years old, was not well educated and was forced, by virtue of his poor background to start working at a young age. There are no grounds to interfere with the sentence. I associate myself with the sentiments expressed by Borchers J in *S v G* and the sentence of 18 years there imposed; with Davis J in *S v Jansen* and the sentence of 18 years there imposed, and, finally, with what Lewis JA concluded in *S v Sikhipha* and the 20 years imprisonment there imposed. In the circumstances I am not satisfied that the learned magistrate had imposed a sentence which is susceptible to interference by this court.

42. In the premises I would confirm the conviction and the sentence of 15 years imprisonment.

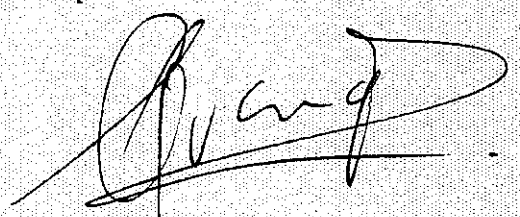
43. In the result I would therefore make the following order:

The conviction and sentence of 15 years imprisonment is confirmed. The appeal against conviction and sentence is dismissed.



Sven Olivier AJ

I agree.



A le Grange J