



CONSTITUTIONAL COURT OF SOUTH AFRICA

Bothma v Els and Others

**CCT 21/09
[2009] ZACC 27**

Date of Judgment: 8 October 2009

MEDIA SUMMARY

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

In 2007, Mrs Bothma instituted a private prosecution, charging that 39 years before, when she had been a 13 year old schoolgirl, Mr Els, a wealthy family friend much older than herself, had taken her by car to his farm and raped her. She alleged further that a similar pattern of sexual abuse had continued for more than two years. Mr Els vigorously denied the charge. He applied to the Northern Cape High Court in Kimberley (the High Court) in March this year for an order permanently staying the private prosecution. The High Court issued the stay, holding that the unreasonable delay, for which it regarded Mrs Bothma as being fully culpable, would result in irreparable trial prejudice to Mr Els and deny him his constitutional right to a fair trial. Mrs Bothma applied to this Court for leave to appeal to have this decision set aside.

Writing for a unanimous Court, Sachs J held that the High Court had paid insufficient attention to the specific nature of the alleged offence and the manner in which Mrs Bothma claimed the trauma had contributed towards the subsequent delay. These were issues that should have been left for the trial court to determine. Any prejudice that Mr Els might suffer because of the delay would not have been insurmountable and his right to a fair trial would be protected by the presumption of innocence. Accordingly, it could not be said in advance that the regional court hearing the matter would be prevented by the delay from ensuring that he had a fair trial.

Sachs J noted that this was a poignant case with dark edges of tragedy. If Mrs Bothma's story was true, then she had spent her life as a deeply wounded person living with the consequences of her victimisation, only now in her late middle age being able to seek vindication and redress. If her story was not true, then an innocent man approaching his eightieth year had found himself wreathed in a cloud of possible disgrace, facing the agony of having to defend himself in public against grievously false accusations. At this stage the Court did not know if her story was true or not. Accordingly, she should not be stopped from giving her account to enable the regional court to decide.

The appeal therefore succeeds, and the decision of the High Court staying the prosecution is set aside.

