IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A746/10

In the matter between:

LUKAS LE ROUX Appellant

and

THE STATE Respondent

JUDGMENT HANDED DOWN ON SEPTEMBER 2011

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1. The appellant was charged in the Oudtshoorn Regional Court on two counts of rape. The first count was a charge of rape under the common law wherein it was alleged that the appellant raped the complainant, D, on (or between) 2003 and 2007. D was then between the ages of 6 and 10 years. The second charge of rape was framed in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, (the Sexual Offences Act) and alleged that the appellant raped D during 2008. D was then 10 years old.

2. The Sexual Offences Act came into operation on 16 December 2007. Section 68 "repealed" the common law relating to, *inter alia,* the common law crime of rape. The codification and repeal does not affect

the prosecution of the the common crime of rape committed before the date of the commencement of the Sexual Offences Act but only reported or investigated afterwards (*S and Another v Acting Regional Magistrate, Boksburg: Venter and Another* [2011] ZACC 22; CCT 109/10; 2011 (2) SACR 274 (CC) (14 June 2011).

3. In respect of both counts the State relied upon the provisions of sections 51 and 52 as well as schedule 2 to the Criminal Law Amendment Act, 105 of 1997, (the Minimum Sentence Act) which provides for the imposition of a life sentence in respect of the rape of a minor.

4. The learned magistrate convicted the appellant on both counts and sentenced him to 10 years imprisonment in respect of the first count, and 15 years imprisonment in respect of the second count. An effective sentence of 25 years imprisonment.

5. It is not in dispute that section 51(1) of the Minimum Sentence Act found application and that the appellant was properly warned of its application at the commencement of the proceedings.

6. The appellant appeals against both the convictions and sentences.

7. The evidence of D was adduced with the assistance of an intermediary as contemplated by section 170A of the Criminal Procedure Act. D testified that the appellant and her late mother were in a relationship

and living together before her mother passed away late in 2008. To all intents and purposes the appellant was her stepfather. She testified that the appellant had initially molested her by improperly touching her. He thereafter raped her for the first time whilst they were still living at Kloof Avenue, Nepin, Oudtshoorn. Her recollection of that rape was clear and vivid. It is clear from her evidence that she was thereafter raped on innumerable occasions. She never raised the alarm as the appellant had threatened to kill her should she do so. She also testified that the appellant assaulted her at the same time when he would assault her mother. They later moved to Weyers Avenue (the charge sheet, however, still refers to Kloof Street).

8. She testified that her mother trusted the appellant and despite the fact that she had conveyed that she did not wish to be left alone with the appellant, her mother did not question her about this.

9. In cross-examination D testified that when her mother fell ill she spent approximately three months in bed. During this period the appellant raped D in the kitchen. It is clear from the evidence that her mother must have died in November 2008 as D was taken to the doctor by her aunt two weeks after she attended the funeral. At this stage she was living with her aunt and had developed a bladder infection. Her aunt questioned her about the infection and she eventually came out with the truth, namely that the appellant had been raping her. She was

examined under general anaesthetic which confirmed that there were tears to her hymen, which were consistent with sexual intercourse.

10. The evidence of D was confirmed by the evidence of her aunt, the medical evidence contained in the J88, the evidence of Dr Genis and, in respect of non-contentious issues, by that of the appellant and his mother.

11. I pause to point out that the evidence of Dr Genis was, of course, hearsay evidence, as he, though present, did not do the examination. He merely noted what the examiner, Dr Laubscher, conveyed to him. There is no explanation as to why Dr Laubscher was not called. The appellant, however, did not seriously challenge any of the evidence of Dr Genis.

12. The learned magistrate, first referred to S v J 1998 (2) SA 984 (SCA) where Olivier JA held that:

> *"In my view, the cautionary rule in sexual assault cases is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the State to prove the guilt of an accused beyond reasonable doubt – no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule"*

(at 109E-G) and see also *Masija v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, amici curiae)* 2007 (5) SA 30 (CC) at paragraph [28] (45E-G))."

13. The learned magistrate also referred to *S v V* 2000 (1) SACR 453 (SCA) at para 2, where Zulman JA pointed out that:

> *"In view of the nature of the charges and the ages of the complainants it is well to remind oneself at the outset that, whilst there is no statutory requirement that a child's evidence must be corroborated, it has long been accepted that the evidence of young children should be treated with caution (R v Manda 1951 (3) SA 158 (A) at 163C, Woji v Santam Insurance Co Ltd 1981 (1) SA 120 (A) at 128B-D); and that the evidence in a particular case involving sexual misconduct may call for a cautionary approach (S v J 1998 (2) SA 984 (SCA) at 109B). For reasons which will presently emerge the present case is plainly one which calls for caution."*

14. Mr Theunissen argued before us that the words used by D to describe the genitalia were not those one would expect a child to use. This aspect had not been pursued in cross-examination in the court below and we are left to speculate on this issue. We did enquire from counsel whether there were any guidelines in place regarding the manner in which witnesses such as D are consulted and prepared for trial. We were informed that there were no such guidelines. It seems to us that, particularly with vulnerable witnesses, such as D, where use is made of an intermediary, that there is more scope for the contamination, albeit inadvertently, of the evidence of such a witness. As was remarked by F Schutte in a paper "*Child Witnesses in the Criminal Justice System in*

South Africa, an overview of proposals for reform", it is uncertain whether an intermediary should be allowed to meet the child before trial in order for the child to become familiar with her, to gain the child's confidence, and to put the child at ease. This obviously will lead to allegations that the witness has been prepared.

15. South Africa was the first country to have introduced intermediaries to assist vulnerable witnesses. It would appear, however, that there are no guidelines, at least so we were informed, nor could we find any, as to how such assistance may be given. The English Court of Appeal, in *R v. Momodou* [2005] 2 All ER 571, gave some guidance as follows:

> *"61. There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness. (See Richardson [1971] CAR 244; Arif, unreported, 22nd June 1993; Skinner [1994] 99 CAR 212; and Shaw [2002] EWCA Crim 3004.) The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the*

facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.

62. This principle does not preclude pre-trial arrangements to familiarise witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such

experience can also be provided by out of court familiarisation techniques. The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness's own uncontaminated evidence. Equally, the principle does not prohibit training of expert and similar witnesses in, for example, the technique of giving comprehensive evidence of a specialist kind to a jury, both during evidence-in-chief and in cross-examination, and, another example, developing the ability to resist the inevitable pressure of going further in evidence than matters covered by the witnesses' specific expertise. The critical feature of training of this kind is that it should not be arranged in the context of nor related to any forthcoming trial, and it can therefore have no impact whatever on it."

16. In *Momodou* the court went on to indicate the procedure that should be followed if witness familiarisation takes place:

> *"64. This familiarisation process should normally be supervised or conducted by a solicitor or barrister, or someone who is responsible to a solicitor or barrister with experience of the criminal justice process, and preferably by an organisation accredited for the purpose by the Bar Council and Law Society. None of those involved should have any personal knowledge of the matters in issue. Records should be maintained of all those present and the identity of those responsible for the familiarisation process, whenever it takes place. The programme should be retained, together with all the written material (or appropriate copies) used during the familiarisation sessions. None of the material should bear any similarity whatever to the issues in the criminal proceedings to be attended by the witnesses, and*

nothing in it should play on or trigger the witness's recollection of events….

65. All documents used in the process should be retained, and if relevant to prosecution witnesses, handed to the Crown Prosecution Service as a matter of course, and in relation to defence witnesses, produced to the court. None should be destroyed. It should be a matter of professional obligation for barristers and solicitors involved in these processes, or indeed the trial itself, to see that this guidance is followed."

17. We would suggest that the National Directorate of Public Prosecutions give consideration to setting guidelines as to how intermediaries, investigating officers and prosecutors are to assist vulnerable witnesses so as to ensure that there is no risk of witnesses being trained, rather than familiarised, or of their evidence being contaminated. We point out that valuable assistance and guidance may be found in this regard in the "Guidelines on Justice Matters involving Child Victims and Witnesses of Crime" developed by the Economic and Social Council of the United Nations, which was referred to in *DPP v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC at [78].

18. To the extent that there might have been reason to argue that the complainant's evidence had been contaminated to an extent any such contamination could, in any event, not have been at the instance of the intermediary. She had testified that she had no prior involvement in the case, and did not know D.

19. The learned magistrate gave careful consideration to the appellant's version, enquired whether the complainant, D, had a motive to falsely implicate him, whether her aunt similarly had such a motive, as well as the cicumstances under which the complainant, D, related the rapes to her aunt. He found confirmation of her complaints in the medical evidence. He correctly, in my view, came to the conclusion that he could not find that D's evidence was either untruthful or a recent fabrication.

20. The evidence, in my view, established beyond doubt that the appellant had raped D over a period of time, which time period covered both the period before 16 December 2007 when the common law crime of rape was applicable, and the period thereafter when section 3 of Sexual Offences Act found application. As a result of the codification of the crime, the appellant was charged with a contravention of the common law crime of rape, as well as a contravention of section 3 of the Act, on diverse occasions. Put differently to have charged him separately under both the common law for rape and under the Sexual Offences Act, may, in the circumstances, have amounted to a splitting of charges. There is, however, a more substantial problem.

21. The charge sheet in respect of the first count, common law rape, alleged a single rape, and beyond stating that the rape had occurred between 2003 and 2007, did not further particularise the offence.

22. Though no objection was raised to the charge sheet it would seem to me that the fairness of the trial was materially prejudiced by the evidence which was led that he had committed the offence on diverse occasions, in conflict with the charge of a single charge of rape.

23. In *S v Mponda* [2004] 4 All SA 229 (C) at par [8] – [11], Binns-Ward AJ, as he then was, with Yekiso J concurring, dealt with the prejudice which results from such an inadequately formulated charge sheet. It is appropriate to repeat what the Court there held at para [9] – [16] in full:

> *"[9] It is most unsatisfactory that too frequently sufficient care is not paid to the appropriate formulation of the charge sheet, especially in serious cases where the potential sentence faced by the accused person can be of the highest severity, particularly where a multiplicity of counts is involved. Under the sentencing provisions applicable in terms of the Criminal Law Amendment Act 105 of 1997, an offender convicted of rape where the victim has been raped more than once is liable to be sentenced to life imprisonment, while a rapist convicted of a single count of rape faces a prescribed minimum sentence of 15 years.*
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> ...
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> *[11] The slovenly formulation of the charge sheet is potentially prejudicial not only to the accused, but also to the administration of justice.*
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> *[12] It is contrary to the basic concept of a fair trial that an accused person charged with one count of a particular offence is confronted with evidence in respect of a number of incidents and is thereafter sentenced as if he or she had been convicted on multiple counts. Having regard to the lack of legal sophistication by most accused persons and to the regrettably all too frequently discernable lack of experience and limited skills of many of the persons appointed by the legal aid board to represent accused persons in the criminal courts, particularly in the magistrates' courts, the extent of the prejudice identified is*

not avoided by the existence of a right to object to and obtain the exclusion the admission of the prejudicial matter. The current matter demonstrates the point. Neither the presiding magistrate, nor the legal practitioner appointed to represent the appellant gave any indication of being astute to the divergence between the evidence led during the trial in support of numerous counts of rape and the allegation of only a single count in the charge sheet.

[13] An inadequately formulated charge sheet may well, by its failure to inform him or her of the charge with sufficient detail to answer it, infringe an accused person's basic constitutional right to a fair trial. See section 35(3)(a) of the Constitution (Act 108 of 1996) and S v Fielies and another 2004 (4) BCLR 385 (C).

[14] The prejudice to an accused person in the circumstances described is illustrated by magistrate's remarks during sentencing from which it is apparent that notwithstanding the content of the charge sheet the appellant was treated for sentence purposes as having "recurrent[ly]" raped the complainant. This was a material misdirection, to which it would have been necessary to return if the appeal against conviction had failed.

[15] The administration of justice is potentially prejudiced because the allegation of only a single count of rape in a charge sheet, where the evidence supports a multiplicity of counts, means that the properly convicted accused can be sentenced only as a single count offender. As mentioned, this is cause for particular concern in matters where the Legislature has determined that offenders convicted on multiple counts should receive prescribed higher minimum sentences. It is liable to obstruct the achievement of legislative objects in the fight against crime and to bring the criminal justice system into public disrepute.

[16] *A charge sheet must set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed as may be reasonably sufficient to inform the accused of the nature of the charge. See section 84 of the Criminal Procedure Act 51 of 1977 ("the CPA"). If, however, it is intended by the State to adduce evidence that the offence was committed on diverse occasions (each of which it is not practicable to individually specify) during*

a particular period, that much must be expressly alleged in terms of section 94 of the Act."

24. Not only was the evidence led in contradiction to the charge, the appellant was also exposed to a further charge under the Sexual Offences Act. In my view the cumulative effect was that this was, in respect of the first charge, materially prejudicial to the fairness of the trial.

25. The appellant had on the evidence also raped the complainant during the period that her mother was ill in bed – i.e. during August, September and October 2008.

26. In respect of the second count unlike the first, at least a bald reference was made to section 94 of the Criminal Procedure Act. This section provides that:

> *"Where it is alleged that an accused on diverse occasions during any period committed an offence in respect of any particular person, the accused may be charged in one charge with the commission of that offence on diverse occasions during a stated period."*
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> (see Kruger, Hiemstra's Criminal Procedure, Lexis Nexis, issue 3, and *R v Graaff* 1917 CPD 65)

27. I am of the view that it was incumbent upon the prosecution to have formulated the charge with sufficient detail to enable the appellant to have answered thereto. In *Mponda* the Court held that it if it is intended

by the State to adduce evidence that the offence was committed on diverse occasions during a particular period, that must be expressly alleged in terms of section 94 of the Criminal Procedure Act. The prosecution failed to heed what the Court had held on *Mponda*. This is regrettable. It is undesirable that a charge formulated with reference to s 94 of the Criminal Procedure Act, should not in its body expressly reflect the gravamen of the provision – that is expressly allege the commission of the offence on diverse occasions. The section *authorises* the framing of a charge based on the allegation of a commission of an offence on diverse occasions. A bald reference to the section does not sufficiently allege that that is the allegation. A failure to do so constitutes a failure by the State to to comply with both the letter and the spirit of s 35(3)(a) of the Constitution – cf. s 7(2) of the Constitution.

28. Despite its shortcomings, the charge in terms of the Sexual Offences Act, in my view, just passes muster. Accordingly I am of the view that it would have been proper to have convicted the appellant on the charge in terms of section 3 of the Sexual Offences Act of having raped the complainant on diverse occasions. To have also convicted him of common law rape, in terms of the first charge, as set out above, was materially prejudicial to the fairness of the trial.

29. In the premises I would set aside the conviction on count 1 and confirm the conviction in respect of count 2.

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

> *"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.*
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> ....
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> *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).

31. In S v Jansen, the complainant was 9 years old, the accused who had no previous convictions, was convicted of a crime which lies at the borderline of the classification of rape. Davis J sentenced him to 18 years imprisonment.

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.*[1] *However, all the parties to this matter agreed that the classic Zinn*[2] *triad is the paradigm from which to proceed when embarking on 'the lonely and onerous task'*[3] *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.*[4] *In Banda Friedman J explained that:*

> *'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*

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1 *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,*

2 *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).*

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

4 *"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 2 at 540F-G as a misdirection, rendering the sentence susceptible to being set aside by a court of appeal. This 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].*

> *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.*[5]

"And, as Mthiyane JA pointed out in P,[6] *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 Constitution.*[7] *It is this last observation that lies at the centre of this case."*

24. 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*

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

6 "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."*

7 id at *paragraph* 13.

> *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)

25. 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, he had a stable employment record, was married with children and supported an extended family. Melunsky AJA 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.

26. 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).

27. 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. 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); *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; that she was raped in the safety of her own home and that the accused was unrepentant. Eighteen years imprisonment was imposed."*

28. As is noted above, in respect of the conviction on the common law defence of rape, the learned magistrate sentenced the appellant to 10 years imprisonment. In respect of the statutory defence under section 3 of the

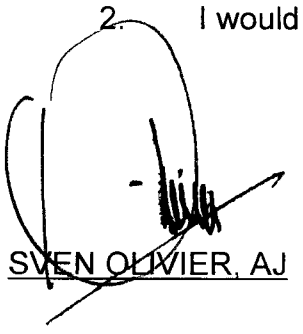
Criminal Law (sexual offences and related matters) Amendment Act, he imposed imprisonment of 15 years. It is not clear to me upon which basis he drew this distinction. If anything, a heavier sentence ought to have been imposed on the rape of the complainant at a younger age. In my view the learned magistrate, with respect, erred in differentiating between the two convictions of rape.

29. Having regard to the sentences imposed in *S v Jansen* and *S v G*, I would, in respect of the rape, impose a sentence of 18 years imprisonment.

30. In the premises I would make the following orders:

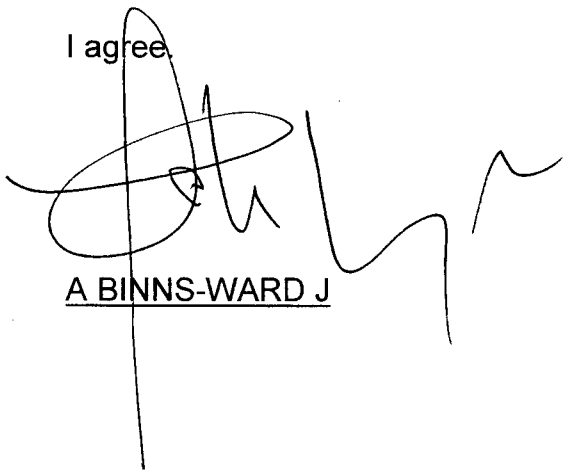
1. I would set aside the conviction on count 1 and confirm the conviction in respect of count 2.

2. I would impose a sentence of 18 years imprisonment.



SVEN OLIVIER, AJ

I agree.



A BINNS-WARD J