IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: CC47/2016

In the matter between:

THE STATE

and

HOWARD OLIVER **Accused**

Date of judgment: 7 June 2017

JUDGMENT ON SENTENCE

SAVAGE J:

Introduction

[1] On 31 May 2017 this Court convicted the accused, Howard Oliver, on four counts:

1. the murder of the FRANZISKA BLÖCHLIGER on 7 March 2016 by suffocation and manual strangulation;

2. two contraventions of s3 of Act 32 of 2007 in unlawfully and intentionally committing two distinct acts of sexual penetration with 16 year old female FRANZISKA BLÖCHLIGER by penetrating her anus and then her vagina with his penis without her consent (rape); and

3. one count of robbery with aggravating circumstances as defined in s1 of Act 51 1977 with grievous bodily harm inflicted on FRANZISKA BLÖCHLIGER during the commission of the offence in which she was robbed of her Apple iPhone; a gold ring with diamonds; and a set of earphones.

[2] Prior to pleading in this matter the accused acknowledged verbally in court and in his s 115 and s 112(2) signed statements handed up that he had received notice that minimum sentences under s51(1) and s51(2) of Act 105 of 1997 applied to the crimes he committed.

[3] It is apparent from the indictment that notice was given to the accused that in terms of s51(1) of Act 105 of 1997 the provisions of Part 1 of Schedule 2 applied to the count of murder in that the death of the victim was caused by the accused after having committed rape as contemplated in s3 of Act 32 of 2007 and after having committed robbery with aggravating circumstances as defined in s1 of Act 51 of 1977. S51(1) read with Part I of Schedule 2 provides that a minimum sentence of life imprisonment applies to murder either where the death of the victim was caused after having committed rape as

contemplated in s3 of Act 32 of 2007; or after having committed robbery with aggravating circumstances as defined in s1 of Act 51 of 1977. In this case both circumstances existed.

[4] Notice was given to the accused that in terms of s51(1) a minimum sentence of life imprisonment applied to both rape counts, as offences contemplated in s3 of Act 32 of 2007, in that in terms of Part 1 of Schedule 2 the *'victim was raped more than once*' by the accused and that the rape occurred in circumstances in which grievous bodily harm had been inflicted.

[5] In the circumstances of this matter for a minimum sentence to apply to each count of rape on the grounds of there being another rape, the minimum sentence would apply in respect of one count because of the other. This would, in my mind, lead to a duplication insofar as the one count would be considered for purposes of the other in order for a minimum sentence to apply on this basis.

[6] The accused was also given notice that the provisions of section 51(2) and a minimum sentence of 15 years applied to the robbery with aggravating circumstances in that the crime is one mentioned in Part II of Schedule 2 of the Act with grievous bodily harm inflicted on the victim during the commission of the offence.

[7] In *S v Malgas*[1] it was emphasised that s51 has limited but not eliminated the courts' discretion in imposing a minimum sentence. Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment, or another prescribed period of imprisonment,

[1] *S v Malgas* 2001 (1) SACR 469 (SCA) at para 25.

as the sentence that should *ordinarily* and in the absence of weighty justification be imposed so as to elicit a severe, standardised and consistent response from the courts.[2] A court therefore is not given a '*clean slate to inscribe whatever sentence',* minimum sentences are not to be departed from lightly and for flimsy reasons[3] and there must be truly convincing reasons for a different response.[4]

[8] Section 51(3)(a) of Act 105 of 1997 provides that if the Court –

> '…*is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed…it shall enter those circumstances into the record of the proceedings and must thereupon impose such lesser sentence*…'.

[9] The legislature has therefore deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed minimum sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored. Those factors traditionally taken into account in sentencing (whether or not they diminish moral guilt) continue to play a role, with none excluded at the outset from consideration in the sentencing process.[5] The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick of '*substantial and compelling*' and must cumulatively

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[2] At para 25.
[3] *S v PB* 2011 (1) SACR 448 (SCA) paras 9-10
[4] At para 8.
[5] *S v Malgas* 2001 (1) SACR 469 (SCA) at paras 8 and 25.

justify a departure from the standardised response sought.[6] Where such circumstances are found to exist these are to be spelt out and entered on the record by the trial court.[7]

[10] This means that –

> '…*speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded*'.[8]

[11] It follows that if, after considering all relevant sentencing factors, the Court considers that an injustice will be done if the prescribed sentence is imposed or that the prescribed sentence would, as was stated in *S v Dodo,*[9] be disproportionate to the crime, the offender or the legitimate interests of the community, Act 105 of 1997 does not require a court to act inconsistently with the Constitution in imposing such a sentence.

Submissions on sentence

[12] The State sought that this Court find no substantial and compelling circumstances favourable to the accused, who had committed a cruel and horrendous crime, and sought that the minimum sentences of which he had been notified be imposed upon him. Without objection from the defence, a signed letter from the parents of the deceased, who elected not to give further evidence in the matter, was handed up. In it they state that they had been

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[6] Ibid.
[7] See *S v Nkunkuma and Others* [2013] ZASCA 122; 2014 (2) SACR 168 (SCA) (23 September 2013) at para 9.
[8] Ibid.
[9] 2001 (3) SA 382 (CC) at para 40.

asked to try and describe how the loss of Franziska had affected their lives. They wrote that:

> '*A year after her death and we are still struggling with our grief and in shock over her murder. The loss of a child is almost indescribable. There's pain, there's sadness, there's anguish but acceptance is the hardest. To know that your child suffered and needed you, that is devastating. The loss of a child is the most traumatic experience. You lose a piece of yourself that can never be regained…*
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> *We are left with the eternal question of WHY? How could one human being do this to a child?*
>
> *The senseless murder of our beautiful Franziska can never be understood or explained. There can never be any justification for taking a life. Her family and friends are left with the eternal grief and loss.*
>
> *We only hope that the person responsible for this brutal act of violence against an innocent child is NOT ALLOWED to walk free to hurt another person*.'

[13] The accused admitted the SAP69 reflecting his ten previous convictions, seven of which were for the possession of drugs for which he was fined. In 2007 he paid a R100 admission of guilt fine for assault and in 2009 was convicted of robbery and theft, crimes which both took place on 9 June 2008, for which he was sentenced to 12 months imprisonment suspended for 5 years on condition that he was not convicted of possession of stolen property, robbery or attempted robbery during the period of suspension.

[14] The accused elected not to testify, nor was any other oral evidence led on his behalf in mitigation. From the bar it was submitted that his personal circumstances are that he is 28 years old. He has been married to his wife for 5 years with whom he has two young daughters under the age of 5. He completed grade 10 and has worked at Wimpy, as a painter and plasterer and more recently as a farm worker at Klein Constantia where he earned R120 per day and approximately R2400 per month. He and his wife lived with his disabled father, who receives a disability grant, in Westlake Village.

[15] The defence submitted that the accused's personal circumstances, the fact that he was a first offender for purposes of Act 105 of 1997;[10] that he had been in regular employment; had admitted involvement in the robbery shortly after the incident; that he later made admissions during the course of the trial in which he admitted his guilt; and shown remorse for what he has done all provide substantial and compelling circumstances favourable to him. In addition, it was submitted that regard should be had to the fact that he has spent 1 year and 3 months in custody awaiting trial. It was submitted that some regard should be had that the accused was unconscious when she was raped and murdered. Despite his previous convictions, it was argued that a deviation from the prescribed minimum sentence on all counts is warranted although a long period of imprisonment remains appropriate.

[16] Without objection from the State, two letters written by the accused were handed up during the course of argument. In the first undated letter, which appears to have written following his arrest in 2016, the accused asked

[10] *S v Nokomo* 2007 (2) SACR 198 (SCA) at 205h-l; *S v Sikhipha* 2006 (2) SA 439 (SCA) at 445i.

for forgiveness for what he had done, recognising that the deceased's life could not be brought back. He stated in this letter that he did not mean for it to '*turn out this way for the girl to lose her life*' and that his intention '*was only to take the phone*' but that '*I don't know what evil spirit came over me. Everything happened so fast*'. He went on to state that as a parent of two children he could imagine '*if it was my child how I would have felt'* and he asked for a plea bargain.

[17] It was submitted for the accused that in spite of the contents of this first letter, in which he had only admitted somewhat opaquely to the robbery but had not admitted to the violence of it or to the deceased's rape and murder, he was persuaded by fellow inmates in prison not to plead guilty to the latter crimes. In his second letter dated 30 May 2017 the accused wrote that he had ended up in prison '*for the biggest mistakes I've ever made'*, that he was '*truly sorry*' for taking the deceased's life and asked for forgiveness. He recognised that the deceased's family would miss '*those special days, holidays, trips together, birthdays, Christmas's, new year and special occasions'* but sought to be forgiven so that he '*could also start forgiving'* himself and asked for mercy so that he may in due course be a part of the lives of his children and family.

Evaluation

[18] In the exercise of its sentencing discretion, the Court is required to have regard to the seriousness of the crime committed, the interests of the community and the personal circumstances of the offender in order to reach

an appropriate and just sentence.[11] Punishment '*… should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances*'.[12] While its purpose is deterrent, preventative, reformative and retributive,[13] being to make an example of the accused and provide '*a warning to all that are like-minded with him',*[14] a sentence must always be individualised, considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors.[15]

[19] Punishment should not be cruel and inhumane and retribution and revenge do not alone to driving sentencing. Rather, the circumstances of each matter are to dictate which, if any, of the elements of punishment should be given prominence, with '(e)*ach…not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances*.[16]

[20] The Court is required to have regard to the conspectus of the factors before it relevant to sentencing on the basis that the minimum sentencing regime '*creates a legislative standard that weighs upon the exercise of the sentencing court's discretion*'.[17]

[21] Serious crimes, it was recognised in *S v Schwartz,*[18] induce a sense of outrage in society and -

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[11] *S v Zinn* 1969 (2) SA 577 (A).
[12] *S v Rabie* 1975 (4) SA 855 (A)
[13] *A*t 862G-H; *S v Zinn* 1969 (2) SA 577 (A).
[14] In *R v Swanepoel* 1945 AD 444 Davis AJA
[15] *Mudau v S* [2013] ZASCA 56.
[16] *S v Schwartz* 2004 (2) SACR 370 (SCA) at 378c-d.
[17] *S v Abrahams* 2002 (1) SACR 116 (SCA) at para 25.
[18] *Ibid.*

'…will usually require that retribution and deterrence should come to the fore and that rehabilitation of the offender will consequently play a relatively smaller role.'

[22] At the same time in *S v V* it was stated that -[19]

'… *the element of mercy… should not be overlooked …True mercy has nothing in common with soft weakness or maudlin sympathy for the criminal or permissive tolerance. It is an element of justice itself.*"

[23] The accused, having passed grade 10, received no further formal education thereafter. He lived, prior to his arrest and incarceration, in Westlake village, a low-income residential community located at the back of a wealthy shopping centre in the midst of one of this country's most upmarket residential areas. Many of the surrounding wine farms have existed since the late 1600's and early 1700's. These farms rely on farm labour from communities who live on the farms and in this City, including more recently in Westlake Village, the income of many of whose residents reflect the stark disparities in wealth which continue to beleaguer this country. Earning R120 a day on such a farm it is not difficult to understand why it may have been difficult for the accused, with a family, to subsist on his monthly income of R2400 or why he needed a loan to pay crèche fees for his child on the day of the crimes committed by him.

[24] Apart from his family circumstances and obligations, with two young daughters to support, it is apparent from his criminal record with seven prior drug convictions from the age of 17, that the accused, in addition, for more

[19] 1972(3) SA 611 (A) at 614D.

than a decade has had a drug habit to support. This Court accepts that this combination of factors - financial need, drugs and no doubt limited opportunities for financial advancement - creates a tinderbox for crime to thrive.

[25] Furthermore, while his conviction for robbery and theft, with its sentence until 2015 is a prior conviction, the offence committed was not one specified in Act 105 of 1997 and he is therefore for purposes of the Act and its minimum sentencing regime treated as a first offender.[20]

[26] It is so that the accused was in regular employment at the time that the crimes were committed. However, this fact together what his other personal circumstances do not provide strong mitigation for the accused. As a father and husband approaching thirty he cannot rely on any youthfulness on his part to mitigate his crimes, more so when he is the father of two young daughters whom he acknowledges required his protection. What is apparent is that in spite of his drug habit, his relative poverty and his financial stresses he chose not to explain why, having been refused a loan, he acted on his expressed intent to steal the money he needed, or why he did so in the violent and brutal manner that he did, proceeding viciously to rape and murder a young girl in the prime of her life. In the course of argument on sentence Mr Carstens for the accused could provide no explanation as to what had caused the accused to embark on the violent and fatal course of action he did or why the accused had engaged in the extent of grave brutality that he had. When asked by the Court in argument whether the accused had not conducted

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[20] See note 10.

himself in a manner which indicated that he was a danger to society, Mr Carstens was constrained to answer that the accused had.

[27] The accused stated in writing that he expressed remorse for what he had done, relying on an apparent religious awakening in doing so. The existence of remorse, as a '*repentance, an inner sorrow inspired by another's plight or by a feeling of guilt*'[21] or a '*gnawing pain of conscience*' and '*genuine contrition*', is a factual question.[22] Where it exists it may constitute a mitigating factor[23] since a truly remorseful offender is unlikely to commit the crimes again, with the court at liberty to take into account any sorrow or anguish suffered by the accused.[24]

[28] It is to the surrounding actions that the Court must look to determine whether the accused has taken the Court into his confidence and whether he has expressed true and sincere remorse, rather than feelings of self-pity or so as to attempt to secure a lesser punishment for his criminal actions.[25] This is so since before a court can find genuine remorse –

> '…*it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions*.' [26]

[29] It is so that the accused agreed during the police investigation in this matter to point out the scene of the robbery and made certain admissions in

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[21] *S v Martin* 1996 (2) SACR 378 (W) at 383h.
[22] *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 13.
[23] See S v Brand 1998 (1) SACR 296 (C) at 304b; S v Kok
[24] Terblanche A Guide to Sentencing (3rd ed) at 229 and authorities quoted there.
[25] *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 13; *S v Seegers* 1970 (2) SA 506 (A) at 511G; *S v Volkwyn* 1995 (1) SACR 570
[26] *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 13.

doing so, yet denied the violence of the robbery and his rape and murder of the deceased. While he wrote an apparently remorseful letter awaiting trial, this apparent remorse did not cause him to admit his crimes either in the letter or at the commencement of this trial.

[30] It was only midway during the trial that the accused had a change of heart, after fourteen state witnesses had testified and DNA evidence had been made available to him. Given these facts, the only conclusion which can, in my mind, be drawn from this conduct is that when faced with the clear evidence for the State the accused comprehended, opportunistically so, the urgency of admitting his guilt on all counts, distancing himself from the advice he had apparently obtained from inmates in prison, in an attempt to secure a lesser sentence for himself for the crimes he had committed. His belated admission of guilt is therefore no more than a neutral factor, since it has arisen in circumstances in which the accused was faced with glaring evidence against him.[27]

[31] The accused left the deceased alone, murdered in the fynbos bushes of Tokai Forest, and walked home, callously removing her sim card from her iPhone and placing it in his own cellphone with full knowledge of the heinous crimes he had just committed. His conduct was vicious, callous and cruel. As was stated in *S v Matyityi,*[28] there is a chasm between regret and remorse.[29] The apparent remorse the accused now expresses, while he suggests acknowledgement of the gravity of loss caused by his brutal acts, is, I am

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[27] *S v Barnard* 2004 (1) SACR 191 (SCA) at 197; *S v Michele* 2010 (1) SACR 131 (SCA) at para 7; *S v Pieter* 2013 (2) SACR 254 (GNP) at para 39-40; *S v Martin* 1996 (2) SACR 378 (W) at 383g.
[28] [2010] ZASCA 127; 2011 (1) SACR 40 (SCA).
[29] *S v Mokoena* 2009 (20 SACR) 309 (SCA) at para 9.

satisfied, no more than regret on his part given the position in which he now finds himself. No explanation more than the need for money was provided by the accused, when he was in a position to give it. He failed to explain what caused him to commit the brutal and shocking crimes that he did, to explain the appalling extent of the violence meted out or why it was necessary to go any further than simply robbing the 16 year old deceased of her phone and to proceed to murder and rape the deceased.

[32] The crimes committed by the accused are patently of the most heinous and serious. The deceased was a teenaged girl, a child who had her life before her. She was attacked in the middle of a weekday afternoon in a well-used public space while she was alone, out running to get fit, while her mother walked the family dog in the same forest. The accused watched her from between the pine trees of the forest where he waited and planned his attack from the shadows before launching it. In achieving his goal of robbing the deceased of her cellphone he immobilised her with extreme violence during which he fractured the anterior hyoid bone of her neck and, following a struggle, rendered her unconscious. He then dragged her unconscious body through the fynbos bushes and stripped her of her shoes and clothing. In a calculated manner he removed her shoelaces from her shoes and tied first her hands together and then her neck with her own shoelaces. He placed her body in a position which displayed a clear intent to rape her, which he then did both anally and then vaginally causing severe injuries to her. He throttled and suffocated her to the point that she aspirated sand and blood into her lungs and with such violence that asymmetry was caused to the left side of her face. After he had done this the accused left the lifeless body of the child lying in

the bushes, having robbed her of her cellphone, ring and earphones, to be found more than an hour later. It is difficult to contemplate a more brutal and chilling death.

[33] There is nothing mitigating in the fact that the deceased was unconscious when she was raped and then murdered. Society demands that violent crimes of this nature be punished harshly and that a clear message be sent that this is so, particularly in crimes such as this committed against a young teenaged girl who had not even begun her adult life. The Court, in having heard the grief of the parents of the deceased during sentencing proceedings through their letter handed up by agreement, has been placed in a position to understand the tragic, extraordinarily difficult and lifelong consequences for the deceased's family of the accused's heinous crimes. In hearing the victim's parents this Court has been usefully aided with a sense of balance and enhanced proportionality in the manner encouraged in *S v Matyityi*.[30]

[34] It was contended for the accused that regard must be had to the fifteen month period he had spent in custody before sentencing awaiting trial as a factor to be taken into account when considering the presence or absence of substantial and compelling circumstances and imposing a just sentence.[31] Although a factor to be weighed up together with others, this period is in my mind not of such a nature as to compel a finding that it is a factor favourable to the accused in the current circumstances.

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[30] At para 17.
[31] *S v Vilakazi* 2009 (1) SACR 552 (SCA); S v *Dlamini* 2012 (2) SACR 1 (SCA); S v *Radebe and another* 2013 (2) SACR 165 (SCA).

[35] Having had regard, within the context of the applicable minimum sentencing regime, to the objective gravity, nature and seriousness of the crimes committed by the accused, the personal circumstances of the accused, the relevant mitigating and aggravating factors placed before this Court and the interests of society, I am not persuaded that it has been shown that substantial and compelling circumstances exist in this matter warranting a departure from the minimum sentences prescribed. There are no convincing reasons, in my mind, to justify a departure from such minimum sentences, which the legislature has enacted to ensure a severe standardised response to exactly the sorts of crimes committed in this matter given their continued prevalence in our society. This was the gravest and most serious of crimes and there is no basis on which to justify an overemphasis in this matter of the interests of the accused at the expense of the public interest.[32]

[36] I have no sense of unease that an injustice will be done if the prescribed sentences are imposed on the accused or that the prescribed sentences would be a disproportionate response to the crimes committed by him. It is incumbent on this Court, as was stated in *S v Chapman*,[33] to send a clear message to the accused and to others like him that we are determined to protect the life, equality, dignity, freedom and bodily integrity[34] of all women and children in this country in whichever communities they live, and that no mercy is to be shown to those who seek to invade or diminish those rights. The appalling crimes committed by the accused deserve harsh punishment

[32] *S v Matyityi* (*op cit*) at para 36.
[33] [1997] ZASCA 45; 1997 (2) SACR 3 (SCA) at 5e.

[34] Sections 9, 10, 11, 12(2) and 28 of the Constitution of the Republic of South Africa, 1996.

not only given their prevalence in our society, but also in this case because they were perpetrated against a young and defenceless teenaged girl. Cognisance must be taken by this Court of the consequences of the crime, not only for society as a whole, but for its individual members, particularly the family of the deceased, whose tragic loss is permanent.

[37] For these reasons the view I take of the matter is that it is both just and proportionate to the crime, the accused and the interests of society that the accused be sentenced to the minimum sentence of life imprisonment for the murder of the deceased.

[38] Given that the minimum sentence applies in circumstances where two counts of rape are committed, I consider it appropriate in the circumstances of the matter that the two rapes be considered together for the purposes of sentence. Doing so, I find it to be just and proportionate to the crimes committed that the prescribed minimum sentence of life imprisonment be imposed on the accused for the rape of the deceased given that the accused raped her twice.

[39] Turning to the accused's conviction for robbery with aggravating circumstances, while it is so that he had no prior conviction for an offence prescribed in Schedule 2 of Act 105 of 1997, the violence with which the robbery was committed with a fracture caused to the deceased's hyoid bone during the attack leads me to find that, in the absence of substantial and compelling circumstances, the minimum sentence prescribed in Part 2 of Schedule 2, being 15 years imprisonment, is manifestly fair insofar as it is both just and proportionate to the crime, the accused and the interests of society.

[40] This Court stands firm against the continued abuse of women and children in our society. Women and children must be able to make use of public spaces safely in all communities across our country without the risk and fear of attack, bodily violation or even loss of life. The accused conducted himself with a flagrant disregard for the deceased's right to do so and for her constitutionally enshrined rights to life, dignity, bodily integrity and her rights as a child. The gravity of his conduct and the unfathomable level of violence perpetrated by him on the deceased as a child, more so when he is a married father of his own two young daughters, must be punished harshly in circumstances in which I am satisfied that he has through his conduct shown himself to be a danger to society and to the women and children in it.

[41] No court can return a child to a parent or a sister to a sibling but in passing this sentence it is the sincere hope of this Court that there is in it some measure of justice for Franziska and her family.

Order

[42] For these reasons it is ordered that:

1. In respect of **COUNTS 1 AND 2** (rape), considered together for purposes of sentencing, the accused is sentenced to **LIFE IMPRISONMENT** in terms of section 51(1) read with Part 1 of Schedule 2 of Act 105 of 1997.
2. In respect of **COUNT 3** (robbery with aggravating circumstances), the accused is sentenced to **FIFTEEN (15) YEARS IMPRISONMENT** in terms of section 51(2) read with Part 2 of Schedule 2 of Act 105 of 1997.

3. In respect of **COUNT 4** (murder), the accused is sentenced to **LIFE IMPRISONMENT** in terms of section 51(1) read with Part 1 of Schedule 2 of Act 105 of 1997.

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SAVAGE J

Appearances:

For State: Mr L Badenhorst

For Accused: Mr K Klopper and thereafter Mr H Carstens

Instructed by Legal Aid