



IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

The Director of Public Prosecutions, Transvaal v the Minister of Justice and Constitutional Development and Others (the Centre for Child Law; Childline South Africa, Resources aimed at the Prevention of Child Abuse and Neglect, Operation Bobbi Bear, Children First, People Opposing Women Abuse and The Cape Mental Health Society as amici curiae)

**CCT 36/08
[2009] ZACC 8**

Judgment Date: 1 April 2009

MEDIA SUMMARY

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

Today the Constitutional Court handed down judgment in a matter in which the Director of Public Prosecutions sought confirmation of orders of constitutional invalidity made by the North Gauteng High Court, Pretoria, in relation to certain provisions of the Criminal Procedure Act 51 of 1977 (the CPA). They deal with the testimony of child victims and child witnesses in sexual offence cases.

The constitutional validity of these provisions was raised by the High Court on its own initiative. The High Court then declared a number of sections to be unconstitutional. Broadly, the sections deal with the discretion of a court to appoint intermediaries to assist children in testifying; children giving evidence in open court; the requirement that courts give reasons for the refusal to allow a child complainant below the age of 14 years to give evidence in closed or non-public proceedings, and the requirement that courts admonish children to speak the truth, so that their evidence is admissible, if they are found not to understand the nature and import of taking an oath or affirmation.

The High Court went on to set out steps to be taken by courts in criminal proceedings in which children are involved, as well as the steps to be taken by government to address the systemic shortcomings and the existing backlog in criminal proceedings involving children.

The matter had come before the High Court for confirmation of the convictions and sentencing in two regional magistrates' courts of Messers Phaswane and Mokoena for the rape of a 13 year old and an 11 year old girl, respectively. Ngcobo J, writing for the majority of the Court, held that a High Court is entitled to raise of its own accord a constitutional issue, if the issue stemmed from the facts of the case, and a decision on the constitutional issue was necessary to decide the case. With regard to Mr Mokoena, the constitutional issues raised by the Court did not arise on the facts. In the case of Mr Phaswane, the only issue that the High Court could have validly raised on the facts was the constitutional validity of sections dealing with the provision of intermediaries.

Nevertheless, it was in the interests of justice for this Court to consider the constitutional validity of all the provisions declared unconstitutional by the High Court. The question was whether the provisions were compatible with section 28(2) of the Constitution which requires that in all matters concerning a child, a child's best interests should be paramount.

In relation to the requirement of an intermediary, he held that a child complainant who relates in open court in graphic detail the abusive acts perpetrated upon him or her, in the presence of the alleged perpetrator, will in most cases experience undue stress or suffering. This experience will be exacerbated when the child is subjected to intensive and at times protracted and aggressive cross-examination by the alleged perpetrator or legal representative. Cumulatively, these experiences will often be as traumatic and as damaging to the emotional and psychological well-being of the child complainant as the original abusive act was.

Yet properly interpreted and applied, there was nothing to prevent all of the provisions from being applied in a manner that properly protected the interests of the child. The problem lay not with the terms of the provisions, but with the lack of means to ensure proper implementation. To deal with these inadequacies, the High Court had made declaratory, supervisory and mandatory orders. It had not been entitled to do so.

Nevertheless, there was evidence of great insufficiency in the regional courts of intermediaries as well as of facilities to protect child witnesses. He accordingly ordered the Department of Justice and Constitutional Development to provide the Court with a report setting out the following:

- (a) A list of Regional Courts indicating how many intermediaries each Regional Court requires to meet its needs and how many intermediaries each Regional Court has.
- (b) If the Regional Courts do not have the number of intermediaries required to meet their needs, the steps which are being taken to ensure that each Regional Court has the number of intermediaries necessary to meet its needs.

- (c) A list of Regional Courts indicating which of them has the following facilities contemplated in section 170A(3) of the CPA:
- i. separate rooms from which children may testify;
 - ii. closed circuit television facilities; and
 - iii. one-way mirrors.
- (d) To the extent that there are Regional Courts that do not have all the facilities in (c) above, the steps which are being taken to provide these facilities to these Regional Courts.

Skweyiya J wrote a separate judgment concurring in the order made by Ngcobo J, but not agreeing with all the reasoning. He concurred in the reasoning of Ngcobo J with respect to the furnishing of intermediaries. However, in respect of the other sections declared unconstitutional by the High Court, he held that the interests of justice would be better served by refusing to confirm the declarations of invalidity. In confirmation proceedings, where invalidated provisions are irrelevant to the facts of an underlying case, this Court has a discretion to consider the constitutionality of such provisions. The exercise of this discretion is governed by the interests of justice, and in this case, he would hold that certain considerations cautioned the Court not to conduct a substantive evaluation of the improperly raised provisions. For these reasons alone, and not for the substantive reasons given by Ngcobo J, he would not confirm the declarations of invalidity. Nevertheless, the amici had raised serious concerns affecting the rights of children, and Skweyiya J concurred in the order made by Ngcobo J to deal with these concerns.