IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO : CC 7/07

AND CC 192/07

REPORTABLE **DATE: 12/05/2008**

In the matter between:

THE STATE

V

AARON MOKOENA

and

THE STATE

V

ALBERT PHASWANE

JUDGMENT ON THE CONSTITUTIONAL ISSUES

INTRODUCTION

1. On the 15th August 2007, the Court *mero motu* raised several constitutional issues relating to the position of children involved in criminal trials either as complainant witnesses or victims of violent crimes, or as witnesses in criminal trials.

2. The two matters had been enrolled for sentence in terms of section 52 of Act 105 of 1997 for confirmation or otherwise by the High Court of the accused's convictions in two different Regional Courts, and, if the convictions were to be confirmed, for the imposition of sentence.

3. Constitutional issues arose in both matters. In the case of Mr Mokoena (case No 7/07), the facts were the following:

    a) The accused was charged in the Regional Court sitting at Bethal with the rape of an eleven year old child;
    b) The offence was alleged to have taken place some time during 2005;
    c) According to the charge sheet, the accused appeared for the first time in the magistrate's or district court on the 13th January 2006;
    d) The matter was postponed to the 19th January 2006, thereafter to the 3rd February 2006, apparently in the regional court, and then to the 19th April 2006 for trial. The child complainant testified upon this day. The matter was further postponed to the 19th May 2006, thereafter to the 7th July 2006, when the accused was convicted;
    e) Although there is no record thereof in the transcript of the proceedings supplied to the High Court, the child was examined by a medical practitioner on the 15th September 2005. From her evidence it would appear that this occurred several days after the

alleged rape;

f) From an assessment by a social worker of the child for the purposes of applying for the appointment of an intermediary, it appears that the charge had been laid, and the accused had been arrested, prior to the 11th October 2005 already. This fact is not apparent from the record either in the district court or the regional court;

g) It is not apparent from the record how often the matter was postponed before it was referred to the regional court, nor is it noted whether the child complainant was required to attend court on the postponement dates;

h) At the commencement of the proceedings in the regional court, the prosecution applied for the appointment of an intermediary, which request was granted without objection by the defence;

i) The complainant, although assisted by an intermediary, had trouble to explain the concept of rape, which clearly was used by the doctor and her mother after the latter had found out about the fact that a neighbour had allegedly had intercourse with the complainant;

j) While the complainant was testifying, the court sat in camera, but when her mother was called as a report witness, the court advised that it was no longer sitting behind closed doors and allowed the public access to the court room;

k) It is not noted on the record whether the complainant remained in attendance in the courtroom after completing her testimony;

l) There is no note on the record whether the child complainant was accompanied by a parent or guardian, and, if so, who that person was. Even on the assumption that the grandmother was the responsible guardian on the date of the trial, there is no annotation to that effect the grandmother would have been – or should have

been – requested to leave the courtroom while the complainant was testifying;

m) The question of publication of the proceedings and the consequent identification of the complainant was never raised by any of the parties or the trial court;
n) No reasons were supplied by the trial court for this ruling;
o) The trial record was delivered to the High Court in an unsatisfactory state after the accused was convicted on the 7th July 2006;
p) On the 29th May 2007, the accused was released on bail when his matter came before the High Court on Circuit and the matter was postponed to Pretoria on the 13th August 2007;
q) The High Court directed certain questions to the trial magistrate, i.a. relating to the fact that the public was allowed into the court after the child had finished her testimony;
r) The trial magistrate was further requested to correct the record;
s) After the matter was again postponed to the 15th October 2007, the High Court has still not received an answer to its questions.

4. The following facts apply to the case of Mr Phaswane:

a) The accused was charged in the regional court sitting at Pretoria North with the rape of a 13 year old girl; the younger sister of the woman he was living with as husband and wife;
b) The offence was alleged to have been committed on the 29th January 2005;
c) The accused appeared in the Magistrate's Court for the first time, according to the charge sheet, on the 10th March 2005;
d) He applied for bail on the 17th March 2005, which application was refused;

e) After a further remand to the 13th April 2005, the matter was transferred to the regional court on the 29th April 2005;

f) The date of his first appearance in the regional court was set for the 20th May 2005;

g) Further appearances in the regional court followed on the 3rd June 2005; the 23rd June 2005; the 21st July 2008, the 4th August 2005; the 30th September 2005, the 25th October 2005, on which date the matter was postponed to the 3rd March 2006, apparently the first date that was open for a preferential trial date.

h) It is not recorded how often the 13-year old complainant was required to be at court during the entire year 2005. The record is silent in regard to the question whether she or a parent or guardian was warned to be present at court or not.

i) The trial did commence on the 3rd March 2006. The complainant was present. There was no suggestion that any consideration had been, or was given at any stage, to the question whether she should be allowed to testify through an intermediary. The impression is created that there was no intermediary available at the Pretoria North regional court, so that the court, the prosecution and the defence regarded it as useless to investigate whether a thirteen year old might be in need of such assistance.

j) The child was called to the witness stand. She had no clear grasp of what an oath was, but was articulate about the difference between truth and falsehood. She was required to affirm that her evidence would be the truth, the whole truth and nothing but the truth.

k) The child struggled during the course of her evidence on the first trial day. She spoke very softly and was repeatedly requested to raise her voice. She had to explain intimate detail such as having

her first experience of menstruation – it may in fact have been the case that she was bleeding because of the intercourse to which she was allegedly subjected – and found it very difficult to convey her experiences. She used terminology such as “sleeping with another person”, but did not know the concept of “having sex”.

l) She referred to a condom, but it appeared later that she could not describe it and did not know what it was, but had overheard the doctor saying that the accused must have used a condom.

m) The interpreter intervened on more than one occasion to place on record that, i.a. “I do understand what the state wants to elicit from this witness, it is just that the Prosecutor does not have proper words which can be cut down to the level of the understanding of this. All the questions, the words that come, I saw a pitch high. The state does not have proper words which are curtailed to the level of the understanding of this, and I do understand what she is saying but I am just afraid to say what she did not say, because I end up testifying.”

n) The witness had clearly heard of rape, but had no articulated understanding of the concept.

o) At the end of the first trial day, the complainant’s evidence in chief had not been finalized. The matter was remanded to the 25th April 2008.

p) The record does not indicate that the child’s parent or guardian accompanied her to court, although it is recorded on the first trial date that the court sat in camera.

q) On the second trial date the child had to be requested to speak up again.

r) She appears to have been excused after the second trial date although there s no annotation thereof on the record;

s) After the child's grandmother had testified as a report witness, the case was postponed to the 7th June 2006 for the evidence of the doctor who examined the child, apparently on the 30th January 2006.

t) Once his evidence had been completed, a further date was arranged for 21st July 2006 and after the parties had closed their respective cases, further postponements followed to allow another doctor to be called by the court. The accused was convicted on the 22nd September 2006.

u) The matter was then allocated a date on the High Court's roll on the 15th August 2007.

5. The two matters were consolidated for the purposes of the hearing of the constitutional issues identified by the court.

6. Both matters were decided by the respective regional courts when the Criminal Law Amendment Act 105 of 1997 still provided in section 52(1) that the High Court had to impose sentence upon an accused convicted in the regional court of a crime for which a minimum sentence of life imprisonment is prescribed by section 51 of the Act read with Part 1 of Schedule 2 thereto.

7. Rape of a girl child under the age of 16 is such a crime.

8. The Criminal Law Amendment Act further decreed at that stage that, if the High Court was not satisfied that the conviction in the regional court was correct, it had to proceed with the charge in a summary trial, or deal with it as prescribed in section 52 (3) in a procedure akin to a review.

9. Act 105 of 1997 has been amended since argument in these proceedings was concluded, by abolishing the provision that a person convicted of a crime that attracts a minimum sentence of life imprisonment by a regional court has to be referred to the High Court for sentence, and increasing the jurisdiction of the regional court by granting it the power to impose life imprisonment itself.

10. In terms of section 6 of the Criminal Law (Sentencing) Amendment Act of 2007, matters that have been decided by the regional court under the old dispensation in which an accused was committed for sentence by a High Court must be referred back to the regional court if the matter has not been heard by the High upon date of promulgation (31st December 2007) of the act. If the matter has already been heard by the High Court, it must be disposed of as if the Act had not been placed on the statute book.

11. Apart from any prejudice arising for the accused and the complainants in the two specific matters presently under consideration by their specific circumstances, it would be inappropriate to deal any further with Act 105 of 1997. It is clear that substantial delays occurred in both matters in the Magistrate's and the regional court between the date of the accused's first appearance and the date of the first hearing in the High Court.

THE ORDER

1. The court is entitled to raise a constitutional issue *mero motu*: see *Potgieter v Lid van die Uitvoerende Raad: Gesondheid, Provinsiale Regering, Gauteng en Andere,* 2001 (11) BCLR 1175 (CC).

2. The issues that were identified by the court were the following:

:"*1. Whether, generally speaking, the present provisions of the Criminal Procedure Act 51 of 1977 that require child victims and child witnesses to testify –*

a) under oath or affirmation or warning to speak the truth in court, albeit through an intermediary, without compulsory assistance by a counselor or similar advisor:

b) according to the rules of an adversary procedure

are compatible with the Constitution, which requires in section 28(2) thereof that the interests of children shall be paramount under any circumstances. The rules of evidence governing the adversary procedure are in many ways premised upon confrontation of the witness by the accused and his legal advisor. The constitutional compatibility of applying this procedure to child witnesses and child victims of violent crimes, especially sexual offences, is questionable and may not be in the best interests of the child;

3. *Whether, in particular, the provisions (of sections 52(2) and 52(3)(d) and (e)) of the Criminal law Amendment Act 105 of 1997 are compatible with the provisions of section 28(2) of the Constitution:*

a) *If the High Court does not confirm the conviction of an accused in the regional court of a crime of violence or a sexual offence perpetrated upon a child, the child victim may or must be required to testify again in the further proceedings that are decreed by this Act. This may constitute another traumatic event for the child victim or child witness and may be regarded as unconstitutional because of its failure to comply with section 28(2) of the Constitution.*

b) Even if the conviction is confirmed, the attendance of the child victim is usually required at the sentence proceedings.

The court therefore calls for submissions from the affected parties or interested parties that may be admitted as amici curiae on this question.

Submissions should deal with the present procedures that may be in place to protect child victims and other child witnesses in the criminal process, their adequacy in the adversarial process, the effect of the present procedures upon child witnesses; the alternatives that may be available or any adaptation of present procedures that ought to be brought about to create a constitutionally compatible procedure to protect the interests of child victims. Submissions should deal specifically with the separate sections of the Criminal Procedure Act that affect child victims and child witnesses, such as sections 153, 154, 158, 161, 164, 165, 166, 167, 170A, 186, 191A, 192 and 194, examine their constitutional compatibility and potential amendment, adaptation or reinterpretation to adapt them to constitutional imperatives, if necessary."

4. Notice of the order was given to the Ministers of Justice and Constitutional Development; National Education; Safety and Security, Social Development, Correctional Services and Health; the Commissioner of the South African Police Services; The Child Law Centre of the University of Pretoria; the Centre for the Study of Violence and Reconciliation; The Tshwaranang Legal Advocacy Centre; People Opposed to Women Abuse; The Association of Regional Magistrates of South Africa; The Child Welfare Society; the National Council of Traditional Leaders; the National Council of Religious Leaders in South Africa; BEE Court Wise; The Child Witness Research and Training Institute, Grahamstown; the Human Rights Commission; Molo Shongololo and the Open Society Foundation.

5. The order was given on the 15th August 2007. It was intended to commence with argument on the 15th October 2007, but because of the time required for the preparation of the comprehensive submissions that were received the argument

could only commence during November 2007 and did not conclude before the 3rd December 2007.

6. Submissions were received from virtually all the above institutions and offices.

7. The court is indebted to the various parties and *amici* for their comprehensive research and thorough submissions that were made to the court. I am deeply grateful for their assistance.

8. I regret that the finalization of this judgment has taken much longer than intended. Several factors contributed to the delay, some of which were beyond my control. I apologize to the accused, the parties and the complainants for the discomfort caused by the failure to complete the task at an earlier date.

THE RELEVANCE OF THE CONSTITUTIONAL QUESTIONS RAISED BY THE COURT TO THE ISSUES IN THE TWO TRIALS

1. Before a court can decide a constitutional issue, it must be clear that the particular constitutional question must arise from the facts of the case, as underlined in *Minister of Safety and Security v Van Niekerk* 2008 (1) SACR 56 (CC) paragraphs 10 and 17.

2. When analyzing the facts of the two matters under discussion, the original order of this court may have been framed too widely because some of the sections referred to in the order are not connected to the facts of the cases as set out above. The court was assisted by a number of the submissions made by the parties to separate those that were relevant from those that were not.

3. Particular issues that arose in the two matters consolidated for purposes of these proceedings include the following:

a) The compellability of the child to testify, either with or without the assistance of an intermediary;
b) The child witnesses' entitlement to the services of an intermediary;
c) The child witnesses and complainant's entitlement to testify in *camera;*
d) The child witnesses entitlement to testify via an electronic device or close circuit television;
e) The need for the child witness to be admonished to speak the truth;
f) The competence of the child to testify if it does not understand the concept of telling the truth;
g) Whether, therefore, sections 153, 158, 164 and 170A are constitutionally compatible in their present form;
h) Whether the present availability of intermediaries and electronic devices to enable a child to testify otherwise than in the presence of the alleged perpetrator is constitutionally compatible;
i) Whether a child witness or victim is entitled to the presence of a support person;
j) The constitutional implications of systemic delays affecting the child witness or the child victim;
k) How the existing deficiencies in the process should be addressed.

4. The sections of the Criminal Procedure Act that had to be considered were therefore sections 153, 158, 164 (read with sections 162 and 163, 192 and 206), and section 170A as amended.

5. The further sections referred to in the order proved to be uncontroversial within the factual framework of the two cases under consideration.

DECIDING THE CONSTITUTIONAL ISSUES BEFORE THE FACTUAL QUESTIONS ARISING IN THE TWO MATTERS

1. In D*e Kock and others v Van Rooyen* 2005 (1) SA 1 (SCA), Cameron JA, speaking on behalf of the unanimous Court, underlined that, as a matter of general principle, constitutional issues should not be addressed prior to the decision of factual issues or matters of law without any constitutional implications, unless such decision is necessary for a proper assessment of the non-constitutional issues at stake.

2. The parties and *amici* were agreed that the constitutional matters needed to be decided before the questions of the correctness of the convictions could be addressed.

3. There are several aspects of the evidence given by the complainants, and the manner and fashion in which such evidence was given, that needed to be addressed before a final decision on the correctness of the convictions could be pronounced. As counsel for the accused may still wish to deal with some of these in addition to the heads filed on behalf of the accused and the argument presented on their behalf, they are referred to only cursorily:

    a) Whether evidence that was given in a fashion that might be regarded as unconstitutional should be received;
    b) Whether the lengthy postponements had a telling effect upon the children's evidence;

c) Whether the conduct of the proceedings was constitutionally appropriate and, if not, what remedy there might be – i.e. should the matter be remitted to the regional magistrate with an instruction to re-hear the evidence of the complainant in the Phaswane matter through an intermediary?

d) If not, could the evidence pass muster if it was held that it was tainted by unconstitutionality?

4. There may be further issues that the defence may wish to raise at the continuation of the sentencing proceedings.

5. In addition, the issues that were addressed are of relevance to most, if not all matters in which child victims and child witnesses are involved and it is therefore in the public interest and the interest of justice that they be dealt with: *AD & DD v DW & Others; The Centre for Child Law (Amicus Curiae) and the Department of Social Development (Intervening Party)* 2008 BCLR 359 (CC), par [20] and [21].

6. It was for these reasons that the constitutional issues were dealt with first.

THE ABSENCE OF A CURATOR *AD LITEM*

1. Ordinarily, a court should appoint a curator *ad litem* where children's interests are at stake and a risk of an injustice being done to them might arise during the proceedings. See: *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) at 201G to 202B.

2. In the present instance, all the *amici* and the parties had the interests of the children involved in the two matters under discussion at heart. There was nothing more that a curator could have added to the research and arguments that were placed before the court.

3. It was therefore unnecessary to appoint a curator.

THE CHILD IN SOUTH AFRICAN LAW

1. The Constitution 108 of 1996 defines a child as a person under the age of 18 years. (Section 28(3).)

2. Section 28, dealing with the rights of the child, clearly differentiates between rights that accrue especially to children and the fundamental rights that exist for the benefit of every person, including children, with the exception of the right to vote and to seek public office, which is expressly reserved for "*adult citizens"* in section 19 (3) (a) and (b).

3. The rights specifically reserved for children are set out in section 28 (1) of the Constitution, which reads:
"*Every child has the right*

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment , neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that –

(i) are inappropriate for a person of that child's age; or

(ii) place at risk that child's well-being, education physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a matter of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate time, and has the right to be

(i) kept separately from detained persons over the age of 18 years;

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result, and

(i) not to be used directly in armed conflict, and to be protected in armed conflict."

4. Kruger, *The Protection of Children's rights in the South African Constitution: Reflections on the first decade* in 2007 THRHR 239 emphasizes that some of the fundamental rights contained in the Bill of Rights that are not repeated in section 28(2) are particularly important for children and identifies the right to equality; the right to dignity; the right to bodily and psychological integrity; and the rights to individual autonomy encapsulated in the rights to privacy, freedom of religion, freedom of expression and freedom of association as the most important of these.

5. The critical provision setting children's rights apart from other fundamental rights, and thereby creating the only instance of precedence of one fundamental right above others, is section 28(2) of the Constitution, which unequivocally declares that:

"The child's best interests are of paramount importance in every matter

concerning the child."

6. The Constitution thereby imports and gives content to the Republic's ratification and adoption of the principal international instruments protecting the interests of children. These include the United Nations Convention on the Rights of the Child, passed in 1989 and ratified by South Africa in 1995; the Hague Convention on the Civil Aspects of International Child Abduction; made part of the South African municipal law by The Hague Convention on the Civil Aspects of Child Adoption Act 72 of 1996. This act was repealed by the Children's Act 38 of 2005 and re-enacted in Chapter 17 thereof. The same Act incorporates the Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption of 1993 in Chapter 16.

7. On the 1st July 2007, the first portions of the Children's Act 38 of 2005 came into operation.

8. This Act is expressly aimed at recognizing children's right in practice. Its long title and preamble read as follows:

The long title

"To give effect to certain rights of children as contained in the Constitution; to set out principles relating to the care and protection of children; to define parental responsibilities and rights; to make further provision regarding children's courts; to provide for the issuing of contribution orders; to make new provision for the adoption of children; to provide for inter-country adoption; to give effect to the Hague Convention on Inter-country Adoption; to prohibit child abduction and to give effect to the Hague Convention on International Child Abduction; to provide for surrogate motherhood; to create new offences relating to children; and to

provide for matters connected therewith."

The Preamble

*"**WHEREAS** the Constitution establishes a society based upon democratic values, social justice and fundamental human rights and seeks to improve the quality of life of all citizens and to free the potential of each person;*

***AND WHEREAS** every child has the rights set out in section 28 of the Constitution;*

***AND WHEREAS** the State must respect, protect, promote and fulfil those rights;*
***AND WHEREAS** protection of children's rights leads to a corresponding improvement in the lives of other sections in the community because it is neither desirable nor possible to protect children's rights in isolation from their families and communities;*

***AND WHEREAS** the United Nations has in the Universal Declaration of Human Rights proclaimed that children are entitled to special care and assistance;*

***AND WHEREAS** the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child, in the United Nations Declaration on the Rights of the Child, in the Convention on the Rights of the Child and in the African Charter on the Rights and Welfare of the Child and recognized in the Universal Declaration of Human Rights and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children;*

AND WHEREAS *it is necessary to effect changes to existing laws relating to children in order to afford them the necessary protection and assistance so that they can fully assume their responsibilities within the community as well as that the child, for the full and harmonious development of his or her personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding… "*

9. The Children's Act is part of a number of statutory instruments that have been enacted in the recent past that evidence an increasing awareness and concern on the part of the Legislature of the need to ensure that children are protected against the increasing atmosphere of violence and alienation that engulfs our society.

10. Another Act that introduces a whole range of new offences aimed at protecting children from violence and pornography is the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 0f 2007, to which further reference will be made below.

11. Of particular significance for the matters to be discussed in this judgment is section 42(8) of the Children's Act, which emphasizes that the proceedings of the children's courts should be held in a locality that should be specifically adapted to put children at ease and should be conducive to an informal conduct of proceedings.

12. Our courts recognize the special interests of children because of their uniqueness and vulnerability. As Sachs J in *M v S (Centre for Child Law Amicus Curiae)* 2007 (12) BCLR 1312 (CC) points out, the Constitutional Court has repeatedly emphasized that section 28(2), read with section 28(1), establishes children's rights that are not a mere guideline, but are rights that the courts are

obliged to enforce: *par 14*, referring to *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC); 2003(2) SACR 445 (CC) at paras 54-5; *Sonderup v Tonderelli and Another* 2001 (1) SA 1171 (CC) and *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC), 2000 (7) BCLR 713 (CC) at para 17.

13. In paras [17] to [20], Sachs J with respect, defines in ringing tones the duty resting upon our courts to enforce children's rights:

"*[17] Regard accordingly has to be paid to the import of the principles of the CRC* (United Nations Convention on the Rights of the Child) *as they inform the provisions of section 28 ….The four great principles of the CRC which have become international currency, and as such guide all policy in South Africa in relation to children, are said to be survival, development, protection and participation. What unites these principles, and lies at the heart of section 28, I believe, is the right of the child to be a child and to enjoy special care.*

[18] Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.

{19} Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world

of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.

[20] No constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neigbourhood environments. What the law can do is create conditions to protect children from abuse and maximize opportunities for them to lead productive and happy lives. Thus, even if the State cannot itself repair disrupted family life, it can create positive conditions for repair to take place, and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril. It follows that section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk…."

See further: *Minister of Welfare and Population Development v Fitzpatrick and others* 2000 (3) SA 422 (CC) at para {17].

THE CHILD VICTIM AND THE CHILD WITNESS IN THE CRIMINAL PROCESS

1. Children are vulnerable – the younger, the more so.

2. This is especially true when a child is the complainant or a witness in a criminal trial.

3. Not only have our courts expressly recognized this fact as empirically established, it is also supported by a veritable welter of scientific research and study, much of which was made available to the court by the South African

Professional Society on the Abuse of Children (SAPSAC).

4. A constitutional injunction is powerless to protect a child from being victimized and traumatized by criminal activity. All the more should it be incumbent upon the criminal law and criminal procedure and upon the courts, their functionaries and practitioners who regulate its procedure and apply its principles to " …*protect children from abuse and (to) maximize opportunities for them to lead productive and happy lives….(and to) … create positive conditions for repair to take place."*

5. At the very least the criminal procedure and the courts should administer the criminal justice system in such a fashion that children who are caught up in its workings are protected from further trauma and are treated with proper respect for their dignity and their unique status as vulnerable young human beings.

6. It is a sad fact that there is much that is left to be desired in the present state of our criminal justice system and that in many instances, neither the courts nor their supporting institutions succeed in giving due recognition to the paramountcy of children's interests.

7. In the first instance, the incidence of child rape and sexual assault upon minors has reached horrific proportions; See: H. Conradie and D.T. Tanfa: *Adjudication of child victims of rape and indecent assault in Gauteng"* ; Child Abuse Research in South Africa, 2005, 6(2), 3-18 and further.

8. Secondly, there is an exceptionally low conviction rate in matters of this nature; *ibid;*

9. Thirdly, as was underlined in argument, the child is an alien in the courtroom. It is a historical fact that our entire legal system was designed by adults for adults, including courts and court procedure. (See, *inter alia,* the trilogy of articles by Anet E. Louw: *Die bevoegdheid van kinders as getuies;* Child Abuse Research in South Africa 5(2)) Court proceedings are, in colonial tradition, accompanied by pomp and circumstance, unusual clothing, robes and formalistic language that would come across as stilted, artificial, magniloquent and bombastic in any other setting.

10. The need to cater for children as witnesses and victims in the criminal justice system was only realized long after the trappings of court procedure had become rituals and forensic language had become so ingrained that many lawyers find it difficult to express their thoughts in plain language when going about their business.

11. The adults in court find it difficult and often impossible to converse with children that are forced by traumatic events to enter their world. This adds to the alienation children experience in the unusual surroundings.

12. Children are by their very nature ill-equipped to deal with a confrontational and adversarial setting in which adults dictate the subject matter, the nature and the style of the conversation.

13. In this connection, counsel for the Centre for Child Law and Child Line pointed out correctly that the cross-examiner uses not only confrontational language, but also terminology that makes perfect sense to the presiding officer, but more often than not makes none whatsoever to the child. The cross-examiner aims to communicate certain messages to the court and often, if not always, falls back upon legalese that is second nature to all

lawyers in the courtroom, but is in this context truly conspiratorial against the laity represented by the minor. Just how ingrained in formalism and archaic expressions lawyers are as a species emerges from studies of forensic communication such as Evans: *The Language of Advocacy,* Blackstone Press 1998. The resultant alienation of the child in this process is unfair and not in the interests of justice. In *K v Regional Magistrate,* 1996 (1) SACR 434 E; Melunsky, J writing on behalf of an unanimous Full Bench found that the ordinary procedures of the Criminal Justice System are inadequate to meet the needs and requirements of the child witness. The court highlighted the deleterious effect that a cross-examiner applying the trial tactics honed in litigation with recalcitrant adults to a child witness would have upon the victim of a sexual assault: "…*the incidence of crimes involving young persons as victims, particularly crimes involving sexual abuse and assault, has risen significantly in recent years….in cases of sexual assault and rape the fear of investigation and trial seriously impedes the combating of these crimes; that child witnesses experience significant difficulties in dealing with the adversarial environment of a court room, that a young person may experience difficulty in fully comprehending the language of legal proceedings and the role of the various participants; and that the adversarial procedure involves confrontation and extensive cross-examination. There is also an affidavit from Karen Mueller who is presently engaged in research into the question of the ability of young persons to give evidence in an accusatorial environment. She explains and illustrates that the communication ability of the child and the context in which the questions are asked may distort the meaning attached to the child's language. She says that in cases of criminal prosecutions for sexual offences the language problem becomes more acute because 'it is overlaid by a range of emotional stresses and fears which flow from the traumatic events about which the child is called to testify…..In the first instance, the victim is*

required to relate in open court in graphic detail the abusive acts perpetrated upon them.(sic) This occurs in the presence of the alleged perpetrator. Thereafter the victim of the abuse is subjected to intensive, and at times protracted and aggressive, cross-examination by the accused or his legal representative… This further serves to emphasize the isolation and vulnerability of the witness in the circumstances. Secondary victimization may, consequently be as traumatic and as damaging to the emotional and psychological well-being as the original victimization was."

14. The problem is exacerbated when the child and the lawyer do not share the same mother tongue. The desperation of the child witness at not being able to communicate the full measure of the horrific experience she had to undergo is painfully evident from the record in the Phaswane matter.

15. It is indubitably in the interests of justice that any court should follow the child's evidence properly. The failure to comprehend the child's message cannot lie on the part of the minor – the child has no choice in the manner of his or her communication. The fault must, by definition, be that of the court and the lawyers.

16. The difficulty to understand a child properly may have contributed in no small measure to the development of the cautionary rule to which children's evidence was subjected in the past. Although no longer applicable – See *Director of Public Prosecutions v S* 2000 (2) SA 711 (T) - the need to treat a child's evidence with caution is still emphasized in our law.

17. It follows logically that the circumspection with which the reliability of the child's evidence must be regarded is directly proportionate to the amount of pressure, fear, aggression and rejection that a child may experience during

the court proceedings.

18. The Legislature has, over the years, introduced amendments to statute law and criminal procedure to ameliorate, if not to eradicate, the aspects of the criminal process that tended to expose the child to secondary trauma and emotional pain.

19. Some of these measures and practices need to be examined in respect of their constitutional compatibility in the light of the facts of the two matters under discussion.

SECTION 170A OF THE CRIMINAL PROCEDURE ACT

1. The Legislature introduced section 170A into the Criminal Procedure Act in 1991 in response to increased demands that vulnerable witnesses should be shielded from the rigours of cross-examination and confrontation with their alleged attackers. At the time, the inclusion of this section was regarded as exceptionally progressive in comparison to many other jurisdictions.

2. The original section 170A was amended in 2001 and thereafter read as follows:

'***Evidence through intermediaries.-***

(i) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he or she testifies at such

proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.

2) (a) No examination, cross-examination or re-examination of any witness in respect of whom the court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through the intermediary;

(b) The intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness.

(3) If a court appoints an intermediary under subsection (1), the court may direct that the relevant witness shall give his or her evidence at any place – (a) which is informally arranged to set that witness at ease;

(b) which is so situated that any person whose presence may upset that witness, is outside the sight and hearing of that witness; and

(c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.

(4)(a) The Minister may by notice in the Gazette *determine the persons or the category or class of persons who are competent to be appointed as intermediaries.*

(b) An intermediary who is not in the full-time employment of the State shall be paid such traveling and subsistence and other allowances in respect by the services rendered by him or her as the Minister, with the concurrence of the Minister of Finance, may determine.

(5)(a) No oath, affirmation or admonition which has been administered through an intermediary in terms of section 165 shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary in terms of a regulation referred to in subsection 4(a), at the time when such oath, affirmation or admonition was administered or such evidence was presented.

(b) If in any proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but, at the time of such appointment, was not qualified to be appointed as an intermediary in terms of a regulation referred to in subsection 4(a), the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, with due regard to –

(i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;

(ii) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and

(iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.

(6)(a) Subsection (5) does not prevent the prosecution from presenting anew any evidence which was presented through an intermediary referred to in that

subsection.

(b) The provisions of subsection (5) shall also be applicable in respect of all cases where an intermediary referred to in that subsection has been appointed, and in respect of which, at the time of the commencement of that subsection-

(i)the trial court;

(ii)the court considering an appeal or review,

has not delivered judgment."

3. The original introduction of section 170A was accompanied by misgivings that the accused might be unfairly prejudiced if evidence was given through a third party to protect a vulnerable witness. It was feared that cross-examination, in particular, might be hampered if it had to be conducted through an intermediary.

4. *K v Regional Magistrate*, *supra,* represented an unsuccessful constitutional challenge to the introduction of the section, the Court holding that the restrictions that the section might place upon the accused' right to a public trial and to untrammeled cross-examination were justifiable and did not render the trial unfair. The court was of the view that, properly balanced, the limitations that had to be placed upon these rights were rational and justifiable when the protection of vulnerable witnesses required the use of an intermediary or the giving of evidence from a shielded locality.

5. *S v Stefaans* 1999 (1) SACR 182 (C), recognized that the giving of evidence is invariably a stressful experience: "*It is undoubtedly so, as the Court (in K's matter, supra) pointed out, that the giving of evidence, particularly in cases involving sexual complaints, exposed complainants to further trauma possibly as severe as the trauma*

caused by the crime." (p187 f-g). There were, however, still misgivings about the potential harm the fair trial rights of the accused might suffer. At 187 and further, these concerns were addressed by laying down some general principles that ought to taken into consideration before invoking section 170A. Mitchell AJ listed reduced effectiveness of cross-examination; limitation of the right to confront an accuser; and the greater ease that the use of an intermediary might afford an accuser to lie as the principal risks, particularly for an undefended accused whose rights would have to be guarded by he presiding officer. The court endorsed the test that only "undue" stress that was likely to be caused to younger and emotionally more immature witnesses by having to testify justified the invocation of the intermediary's services.

6. In *S v Maqaba* 2005 (2) SACR 489 (W) Satchwell J emphasized that the justifiable concern not to subject a minor witness to any secondary trauma arising from cross-examination does not include the right to shield the witness from any cross-examination at all, in particular not to prevent the witness being confronted with a previous inconsistent statement. The court underlined that the introduction of section 170A supplements the court's common law duty to control cross-examination that is offensive, overly aggressive or unduly prolix.

7. When these proceedings commenced, the court identified section 170A as one of the provisions in Act 51 of 1977 that needed to be revisited to consider whether they fully complied with the constitutional imperative to protect children's rights in the criminal trial. While argument was presented, the Criminal Law (Sexual Offences and Related Matters) Amendment Bill was published. It was promulgated

upon the 16th December 2007, with the exception of Chapter 5, which came into operation on the 21st March 2008, and Chapter 6, due to take effect on 16th June 2008.

8. Together with the Children's Act, it represents a further step on the part of the Legislature to provide more effective recognition and protection of children and other vulnerable persons.

9. Section 170A was amended by Act 32 of 2007.

10. Argument was therefore directed at the new wording of this section as well as the amendments to other sections of the Criminal Procedure Act dealt with in this judgment.

11. Section 170A (1) was amended by the addition of the words

*"Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the **biological or mental** age of eighteen years to undue mental stress and suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as intermediary in order to enable such witness to give his or her evidence through that intermediary…"*

12. The new subsection (7) contemplates that the court might refuse to appoint an intermediary even in the case of a very young child victim about to be called as a complainant witness:

"*The court shall provide reasons for refusing any application or request by the public prosecutor for the appointment of an intermediary in respect of a child complainant below the age of 14 years, immediately upon refusal and such reasons shall be entered into the record of the proceedings."*

13. The section clearly accepts the fact that testifying as a complainant in a criminal trial is stressful as point of departure. It would otherwise be unnecessary to make reference to *"**undue** mental stress and suffering"*. That a child thrust into the strange, unfamiliar and often daunting surroundings of a court room would experience at least as much stress and mental suffering as an adult unaccustomed to the experience of relating an often disputed fact in the face of a seemingly hostile cross-examiner and a more or less distant bench must therefore be virtually indisputable.

14. Section 28 of the Constitution demands that a child should be exposed to as little stress and mental anguish as possible, particularly in the case of a child witness of whatever age who has been the victim of a sexual attack. More often than not, the child witness is testifying under compulsion and enters the witness stand under great apprehension.

15. It is therefore difficult to fathom why the Legislature should have seen fit to demand that the child victim should be exposed to "***undue***" stress and suffering before the services of an intermediary **may** be considered. This threshold provision places a limitation upon the best interests of the child that is neither rational nor justifiable when weighed up against the legitimate concerns of the accused, the court and the public interest. The child is entitled as of right to a procedure that eliminates as much as possible of the anguish that accompanies the necessity of having to relive the horror of abuse, violation, rape, assault or deprivation that the child experienced when he or she became a victim or witness. To demand an extraordinary measure of stress or anguish before the assistance of an intermediary can be

called upon clearly discriminates against the child and is constitutionally untenable.

16. This approach also infringes upon the child victim's right to equal treatment, to dignity and to a fair trial.

17. The new subsection (7) goes even further in allowing a court to refuse the appointment of an intermediary to a child complainant under the age of 14, evidently even in those instances where an intermediary is available. It is difficult to imagine a case where the interests of justice would not best be served by the appointment of an intermediary to a child victim of such tender age, nor is it easy to imagine grounds upon which such a request might be dismissed – always provided that an intermediary is available at all.

18. These considerations must inexorably lead to the conclusion that the present wording of subsections 170A(1) and (7) is unconstitutional because it is with section 28(2) of the Constitution.

19. The section is further objectionable because it does not cater for children who may not be victims, but have observed criminal conduct that has led to their being called as witnesses. There is no reasonable or rational ground upon which it could be argued that a witness will not be traumatized by becoming involved in the proceedings if the protection of section 170A and other provisions to shield the child from hurt, stress, embarrassment and emotional pain do not apply to him or her as well. Provisions in the Criminal Procedure Act that shield child victims must therefore be interpreted as though they related to child witnesses as well.

20. Section 170A (1) should therefore read as suggested in par 1 of the order made at the end of this judgment.

21. By the same reasoning, subsection (7) should be declared unconstitutional.

22. In some of the submissions made during argument, particularly by the National Prosecuting Authority, it was suggested that the demand for the compulsory provision of intermediaries should be restricted to child victims under the age of fourteen years. Provision of intermediaries for older witnesses and victims should be made on the basis of an established need on the part of the victim or witness older than fourteen.

23. Although such an approach might at first blush appear attractive in the light of the huge systemic challenges that our Criminal Justice System experiences, it is unacceptable because it creates an arbitrary distinction between child victims on the basis of biological age that is inherently discriminatory. It is a well-known fact that children develop mentally and physically at different rates of progress and that their cognitive abilities differ widely from individual to individual. Some fourteen year-old victims may be much better equipped emotionally or mentally to deal with the horror of a sexual assault than some seventeen year-old children in a comparable position. In principle, child victim's and child witnesses' rights are best served by the appointment of an intermediary, which must therefore be the constitutional norm from which the court should only depart if there are good reasons for doing so.

24. In this context, it is important to remember that the role of the intermediary includes the function to ensure that question that are put to a child witness by any of the parties are translated into terminology and imagery that a child is able to understand – *K v Regional Magistrate and Others*, *supra* at 445.

25. *K* was decided twelve years ago. If present circumstances in the criminal justice system are assessed dispassionately, it is clear that hardly anything has changed on the ground to protect child victims from secondary victimization in what appears to be an ever-increasing spiral of violence against young people.

26. It is a sad fact that that the majority of our courts do not have access to the services of intermediaries or to electronic devices to allow a vulnerable witness to testify outside the courtroom. Only about 14% of all criminal courts in South Africa – according to the submissions by the National Prosecuting Authority in these proceedings – have access to these services.

27. This is a systemic challenge that must be overcome as soon as possible. The chronic lack of capacity and resources may well have been the reason for the present approach to make the services of intermediaries available on a selective basis only. A court can obviously not ignore the practical challenges facing the Executive in the provision of essential services – see: *Minister of Health and Others v Treatment Action Campaign and others (No 2)* 2002 (5) SA 721 (CC) – but it cannot countenance an institutionalization of conditions that do not comply with constitutional imperatives and fail to honour

fundamental rights of vulnerable members of society.

28. In spite of the court's order of constitutional invalidity, the reality will for some time still be that many courts will remain under-resourced and will not have access to the services of an intermediary, unless the relevant trial is postponed to obtain the services of such a person, with resultant delays that may not be in the interests of justice. Non-availability of an intermediary within a reasonable time may be regarded as a cogent reason, depending upon circumstance, not to appoint one at all.

29. Chapter 7 of Act 32 of 2007 provides for a National Policy Framework that must be developed and adopted by the Minister of Justice after consultation with the cabinet members responsible for safety and security, correctional services, social development and health and the National Director of Public Prosecutions. This framework must ensure a uniform and co-ordinated approach by all Government departments and institutions that are involved with matters relating to sexual offences. According to section 62 (1) (c) of the Act, the policy framework must enhance "…the delivery of service as envisaged in this Act by the development of a plan for the progressive realization of services for victims of sexual offences within available resources."

30. It is imperative that this framework must include the speedy roll-out of the services of intermediaries to child witnesses that have to testify in respect of sexual offences – although these services should not be restricted to child victims of sexual offences only.

31. The existence of the structure to develop this Policy Framework does

> enable the court, however, to go further than to issue a mere declaratory order of constitutional invalidity, but also to consider a *mandamus* along the lines suggested in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) par [96] p 401. Such a provision would constitute an appropriate remedy as envisaged by section 38 of the Constitution and will be included in the court's order.

32. I should underline that counsel for the Department of Justice and Constitutional Development, the Minister of National Education and the Minister of Social Development agreed that section 170A was unconstitutional in its present form because of its failure to properly protect children's interests. He adopted the proposal of counsel for the Centre for Child Law and Child Line that section 170A should be amended by deleting the reference to children under the age of fourteen and to retain the provision that renders the appointment of an intermediary subject to the application of the prosecution.

33. For the reasons set out above, I am of the view, with respect to eminent counsel, that this proposal does not go far enough to protect and ensure equal treatment of child witnesses.

34. Counsel further suggested the introduction of a provision that the intermediary should have the power and the duty to bring the circumstance to the court's attention if and when a child witness was fatigued or stressed, did not understand a question or required a recess. This suggestion is clearly in the best interests of the child and of justice and should be adopted as a practical measure to be included into the envisaged framework, in which specific duties of intermediaries might be defined. It should not require an amendment of the section.

35. By reason of the fact that the court dealt in these proceedings with issues affecting child victims and child witnesses only, the position of persons under the mental age of eighteen was not considered at all.

SECTION 153 OF THE CRIMINAL PROCEDURE ACT

1. It is one of the basic tenets of criminal justice that a trial should be held in public. This principle is enshrined in the Constitution in section 35 (3) (c) and is of indisputable importance to ensure the public's trust in the independence and functioning of the courts – see *S v Du Toit en Andere* 2005 (1) SACR 47 (T).

2. On the other hand, vulnerable witnesses must be protected from public exposure, either because disclosure of their identity may endanger their life or limb or because the sense of embarrassment and discomfort at having to testify before an audience, particularly concerning traumatic and sexually sensitive events, may expose the witness to emotional and psychological harm.

3. The need to protect such witnesses, without whom the criminal process could not function, may in exceptional cases allow the court to exclude the public, or certain members or categories of the public from attending; see *S v Staggie and Another* 2003 (1) SACR 232 (C).

4. Section 153 of the Criminal Procedure Act determines the circumstances under which the court can order that criminal proceedings shall not take place in open court. While subsection (1) deals with the interests of State security, good order and public morals

or the administration of justice, subsection (2) protects the identity of witnesses whose lives or families might be threatened by disclosure of their identity.

5. Subsection 3, recently amended by Act 32 of 2007, reads as follows: "*(3) In criminal proceedings relating to a charge that the accused committed or attempted to commit –*

(a) any sexual offence as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, towards or in connection with any other person;

(b) any act for the purpose of furthering the commission of a sexual offence as contemplated in the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 towards or in connection with any other person; or

(c) extortion or any statutory offence of demanding from any other person some advantage which was not due and by inspiring fear in the mind of such other person, compelling him to render such advantage,

the court before which such proceedings are pending may at the request of such other person or, if he is a minor, at the request of his parent or guardian, direct that any person whose presence is not necessary at the proceedings or any person or class of persons mentioned in the request, shall not be present at the proceedings: Provided that the judgment shall be delivered and sentence shall be passed in open court if the court is of the opinion that the identity of the other person concerned would not be revealed thereby."

6. It should be noted at this juncture that subsection 4 of this section decrees that in criminal proceedings against an accused who is under

the age of eighteen years, the court "shall" sit in *camera,* subject to the court's power to allow the presence of any person who is either necessary for the proceedings or whose presence is allowed by the court.

7. Subsection 3, on the other hand, allows the court to exclude members of the public to protect the interest of a minor complainant or child witness only at the request of the minor's parent or guardian. The use of the "may" in this subsection clearly vests the court with a discretion to either allow or refuse such request. The determining factor in deciding whether such a request ought to be granted or not will be the interests of justice, but it is clear that the court might be of the view that the mere fact that the complainant is a minor would not in itself justify the exclusion of the public from the proceedings.

8. Quite apart from this fact the subsection makes the exclusion dependant upon a request by or on behalf of the party whose interests might be adversely affected by the attendance of the public. As the facts in the Mokoena matter demonstrate, the court is neither obliged to draw the parent's or guardian's attention to the potential protection that might be available for the minor concerned if a request were directed to the court to sit in *camera* even after the child's evidence has been concluded; nor to consult the parties before an order declaring the trial to be in *camera* is rescinded.

9. This differentiation, particularly in the case of sexual offences, appears to be lacking in rational justification and therefore discriminates unfairly between a child accused and child victims and child witnesses.

10. This reasoning applies in equal measure to subsection 153 (5), which vests the court with the discretion ("may") to direct that the proceedings should proceed in *camera* if a child witness is called to the witness stand, again subject to the court's power to allow the presence of those persons who are either necessary for the proceedings or are allowed by the court to remain in the forum. There is no rational yardstick by which a differentiation between this subsection and subsection (3) on the one hand, and subsection 4 on the other, could be justified. Whether a child witness has been subpoenaed in terms of subsection (5) and is required to attend court because he or she is a complainant or witness as intended by subsection (3) in respect of a sexual offence, the protection against having to appear in open court with all the possible attendant stress and potentially negative or embarrassing publicity should be the same as that which the child accused enjoys.

11. What has been said above regarding the position of child victims and child witnesses in the criminal trial applies in equal measure in regard to this section of the Act.

12. The two subsections as presently formulated are therefore unconstitutional. In the case of subsection (5) the word "may" should be struck out and "must" should be read in to replace it. In respect of subsection (3), the word "must" should be read in after the words "..*at the request of such other person or, if he is a minor,* ***must direct;*** while the words "..*at the request of his parent or guardian..*" should be regarded as having been deleted.

13. It should be noted that the Ministers of Justice and Constitutional Development, National Education and Social Development agree with

the proposed remedy suggested for subsection 5, conceding that it is unconstitutional in its present form.

14. An amendment of the two subsections contemplated in this judgment would be in line with the provisions of section 154 (3), which prohibits the publication of any identifying particulars of a child involved in criminal proceedings other than in the manner and fashion that may have been authorized by the trial court.

15. The sanctions against transgressing the provisions of section 154 (3) have been strengthened by increasing the penalties that could be imposed upon, and by applying the provisions of section 300 of the Criminal Procedure Act to offenders found guilty of transgressing this section in favour of a person who was prejudiced by the failure to obey the prohibition of publication.

SECTION 158 OF THE CRIMINAL PROCEDURE ACT

1. This section allows the Court to order that a vulnerable witness or accused may testify by way of an electronic device such as a closed circuit television camera.

2. In terms of the section, the court can make such an order on its own initiative or at the request of the prosecutor, the witness or the accused.

3. The power of the court to make such an order is expressly limited by the ready availability of the necessary resources and equipment.

4. The court may furthermore only make such an order if it appears to the court

that such an order would prevent unreasonable delay, save costs, be convenient, be in the interests of the security of the State or of public safety or in the interests of justice or public safety; or would prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

5. A witness may still be questioned by the prosecutor and the accused and both must be able to observe the witness while the latter answers.

6. This section has been amended by Act 32 of 2007 by the addition of subsection (5), which compels the court to provide reasons for any refusal of an application to allow a child complainant below the age of 14 years to testify by means of electronic media or closed circuit television.

7. For the reasons that have been set out above in the discussion of sections 170A and 153, it is difficult to understand why the Legislature should have decided to discriminate between children under the age of fourteen and those above that age.

8. Children are obviously under pressure if they have to testify as complainants and there is no apparent rational basis for suggesting that the hurt, trauma and stress experienced by a thirteen year old who has to face an alleged attacker or rapist is in any way less than that suffered by a seventeen year old.

9. It is in any event regrettable that there are many courts in which the electronic facilities to lessen the burden that having to testify is placing upon the shoulders of these children, do not exist at all. This is an issue that will have to be addressed in the policy guidelines to be developed by the Minister and her committee.

10. But while there may be an explanation – not an excuse – for the absence of the necessary facilities and qualified staff, there is no reason why the court should not be obliged to consider the use of electronic media and close circuit television for all children in all cases where these aids do exist.

11. If an application by the prosecutor to make use of the facilities for a witness is refused, reasons should be provided as matter of course – on record and for the child witnesses and victims of all ages.

12. Section 158 (5) is in its present form irrational and discriminatory and therefore unconstitutional.

13. There might be a case to be made out that the new subsection (5) should not be limited to child complainants only, but should by the same token of equal treatment for all witnesses be applicable to the position of all witnesses under the age of eighteen.

14. The Centre for Child Law and the Ministers agree that the subsection should apply to all children under the age of eighteen who are complainants. For the reasons suggested above, the provisions should also apply to all child witnesses.

15. An application of this nature ought to be made as a matter of course if a child complainant or witness is called if the necessary equipment is available.

SECTION 164(1) OF THE CRIMINAL PROCEDURE ACT

1. Section 162 of the Criminal Procedure Act 51 of 1977 decrees that a witness shall testify under oath, subject to the exceptions provided for in sections 163 and 164 of the Act.

2. Section 163 allows the Court to receive the evidence of a person who has moral or religious objections to the taking of the oath, or the oath in the form prescribed in section 162 ("*I swear that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God")*; or who does not regard the oath as binding upon his conscience, under a solemn affirmation that the witness shall speak the truth, the whole truth and nothing but the truth.

3. Subsection 164(1) enables the court to hear the evidence of someone who does not understand the nature or the importance of the oath or a solemn affirmation, without such witness having to swear or to give a solemn undertaking. The court must, however, still admonish such a person to speak the truth.

4. Until the recent amendment of the section by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, the subsection qualified the option of receiving evidence in this manner by providing that the failure to understand the oath or affirmation must be ascribed to "… *ignorance arising from youth, defective education or other cause".* It further demanded that the witness be warned to speak "*the truth, the whole truth and nothing but the truth".*

5. In its amended version the subsection now reads:

"Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without

taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.

6. The parties were generally agreed that this last-mentioned proviso retained in the amended version is unacceptable and unconstitutional because it prevents a child that is unable to distinguish the concepts of truth and falsehood from testifying. A witness unable to understand the difference between truth and falsehood is incompetent to testify and the admission of such a witness' evidence has been held to fundamentally irregular and a failure of justice *pre se*: *S v V* 1998 (2) SACR 651 (C); *Henderson v S* [1997] 1 All SA 594 (C); *S v N* 1996 (2) SACR 225 (C).

7. In *S v V, supra,* Rose-Innes J held that: "*The court must enquire and satisfy itself whether the child understands the oath and understands what it means to speak the truth….If the child does not, it cannot be admonished under s 164, it is an incompetent witness, whose evidence is inadmissible"*.

8. In *S v B* 2003 (1) SACR 52 (SCA), it was held, however, that a formal enquiry into a witness' ability to understand the oath or affirmation is unnecessary and that the court may, after forming the opinion that the witness does not possess the necessary understanding, admonish the witness to tell the truth. A formal enquiry would be desirable, but is no prerequisite before the decision can be made to merely warn a witness to tell the truth. Evidence received without a determination that the witness is unable to understand the formal requirements is inadmissible. (par 14).

9. Revelas J, pronounced in *S v Gallant* 2008 (1) SACR 196 (E) that a failure to make a finding that the witness was unable to understand an oath or admonition rendered the evidence given other than in terms of section 162 inadmissible.

10. Subsection 164 (1), even in its amended form, does not take into account that a witness who, for whatever reason, may not be able to understand or to verbalize an understanding of the abstract intellectual concepts of truth or falsehood, may nonetheless be perfectly able to convey the experience that has led to the witness becoming involved in the criminal trial.

11. By the very nature of things, such a witness would more often than not be a young child, who could explain with the help of devices such as anatomical dolls whatever harm might have befallen him or her, without knowing what the word “truth “ means.

12. The amendment of the section as introduced by Act 32 of 2007 removes only the words following upon the first part of the admonishing formula: “*The truth,* ***the whole truth and nothing but the truth.***” A strong argument could be made out that the amendment has in fact changed very little, if anything at all. Semantically – and certainly morally and spiritually – the unqualified word “truth” includes both the whole truth and the concept that the truth is unadulterated by other facts.

13. It is obviously in the interests of justice and in the interest of the paramountcy of children’s rights to remove as many obstacles as

possible that might prevent a child's evidence from being received.

14. While the *amici* appeared to agree that the provision that prevents children who cannot convey an appreciation of the abstract concepts of truth and falsehood to the court is in conflict with the Constitution because it fails to protect the paramountcy of children's interests, they differed in their approach to the way in which the unconstitutionality should be remedied. The Centre for Child Law and Child Line propose a rather extensive reading in into section 164 and also section 192.

15. The Ministers of Justice and Constitutional Development, of National Education and of Social Development argue, on the other hand, that the question of the formal competence of a child witness is an issue that should be resolved by an amendment and development of the common law. The argument is developed as follows:

    (i) Section 192 of the Criminal Procedure Act regulates the "formal competence" of witnesses; ("Every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings');

    (ii) Section 206 decrees that the law as it stood on the 30th May 1961 shall apply in respect of any issue regarding competence, compellability or privilege of witnesses in a criminal trial shall apply in those instances where the Criminal Procedure Act does not contain an express provision;

    (iii) Act 51 of 1977 does not contain a comprehensive determination of all circumstances under which witnesses would be held to be incompetent;

    (iv) The formal competence of child witnesses is therefore regulated

by the common law;

(v) In order to properly protect the paramountcy of children's rights, the common law must be developed;

(vi) Consequently, it is suggested that the common law should be declared to be unconstitutional as it does not admit the evidence of children who cannot differentiate between truth and falsity even though they can understand questions put to them and answer them in an intelligible fashion;

(vii) The proviso to section 164 is struck out;

(viii) A child is therefore declared to be competent to give evidence if he or she is able to understand questions put to the child and is able to give an intelligible answer thereto.

16.) The remedy proposed by the ministers suggests a corrective measure that is less invasive.

17.) Upon critical examination however, it should be sufficient to merely declare the proviso unconstitutional.

18.) The court **may** then allow evidence without the admonition of those witnesses who are competent even though they do not understand the concept of truth or falsehood.

19.) The impediment against accepting the evidence of a child unable to explain the difference between truth and falsehood, but still competent to testify, is thereby removed, while the constitutional imperative of according paramountcy to the rights of the child is complied with.

THE CONSTITUTIONAL IMPERATIVE OF A SPEEDY TRIAL

1. "The law's delay" is, as in Hamlet's day, a significant challenge to our criminal justice system.

2. The overcrowding of all criminal courts is endemic, in spite of determined efforts by the responsible authorities to reduce the backlog. The prejudice that is caused to all parties involved is indisputable, but it affects children by far the most.

3. The Constitutional Court pronounced in *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) at par 35 already that systemic challenges would not for all time be allowed to be regarded as exculpatory. That matter concerned the interests of an accused, a deputy head of a primary school, prominent in church and entertainment circles, who was accused of sexual offences allegedly committed against two girls attending his school. It was obvious that he suffered a great deal of social prejudice such as social opprobrium, suspicion among his friends in the church and the entertainment business, pressure at the school and emotional stress and discomfort.

4. The argument was advanced upon his behalf that his trial had not commenced within a reasonable time (the case was dealt with under section 25(3)(a) of the Interim Constitution, which differs little, if at all, from the similar provision in the Constitution, section 35(3)(d): "…*to have their trial begin and conclude without unreasonable delay.*") In considering what would amount to an unreasonable delay the reasons the prosecution advances for the delay must be balanced against the interest of the accused to have a speedy trial.

5. In this balancing process the prejudice suffered by the accused is the first important consideration. The more invasive this prejudice, i.e. pe-trial incarceration, serious social or occupational disruption and the likelihood of prejudice to the accused's defence, the more the state should see to it that the trial is expedited.

6. The nature of the trial must be considered next. The complexity of the charges and the inherent delay in bringing these to trial, taking into account the nature of the evidence, the need to unravel complex issues and consult expert witnesses etc. must be placed in the scales.

7. The third consideration is the so-called systemic delay caused by a lack of resources that hamper the police investigation or the prosecution's ability to commence the proceedings.

8. Bearing in mind all the above factors, the court must then decide whether a delay has been unreasonable or not.

9. The systemic brake upon the speedy conclusion of criminal trials has become much worse during the decade since Kriegler, J wrote: '*"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…(I)n principle…(courts) should not allow claims of systemic delay to render the right nugatory……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…."

10. 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.

11. 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 finalized. Whenever a child is involved as a victim or witness, such child is by virtue of the clear-cut provisions of section 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.

12. Because of the inherent vulnerability of a child in the criminal process, the creation of specialist courts for the prosecution of offences of a sexual nature alleged against child victims might be desirable. As the submission of the NPA has shown, however, there appears to be significant systemic resistance by the magistracy against the creation of a specialist court. If cases of a sexual nature are to be tried by "ordinary" courts, it is essential that sensitivity and specialist knowledge of the way in which children's rights should be respected and enforced in the criminal trial are imparted to judicial officers, prosecutors and practitioners, police officers and other court staff involved in these matters.

13. The same holds good for the investigative phase of each charge that is investigated.

14. The National Policy Framework must make provision for the prioritization of trials of this nature; so must the national instructions and directives of the police and the Director of Public Prosecutions that have to be issued and published in terms of section 66 of Act 32 of 2007.

15. Counsel for SAPSAC urged that a *mandamus* ought to be granted to ensure that the systemic shortcomings in the system are addressed.

16. The authorities are certainly aware of the fact that he present state of affairs cannot be allowed to continue. The policy directives and national instructions appear to be the vehicle through which existing shortcomings should be addressed. A *mandamus* – coupled with an order to report to the court in twelve months time on whatever progress has been made – should not be regarded as unduly invasive under the circumstances, nor should it create the impression that the court is transgressing upon the terrain of the Executive. The court must, after all, be seriously concerned about its own ability to ensure the integrity of its procedures and its ability to create an atmosphere that is not dangerous or repugnant to child witnesses and victims.

THE SHORTAGE OF TRAINED INTERMEDIARIES

1. The chronic shortage of suitably qualified intermediaries is a serious obstacle hampering the realization of the child witnesses'

rights.

2. The provision of qualified intermediaries should form part of the policy directives.

3. Serious consideration should be given to the involvement of Non-Governmental Organizations in this process, such as some of the *amici* who participated in the presentation of argument in this matter.

4. Subsection (4) of section 170A clearly envisages the appointment of intermediaries who are not employed in the public service in any event.

THE PRESENCE OF A SUPPORT PERSON DURING THE TRIAL

1. It was argued that provision should be made for the provision of a support person to child victims and child witnesses who needed support in the alien surroundings of the court setting.

2. Although the extension of support of this nature to the child concerned would almost always be desirable – provided that such person would be acceptable to the child concerned and would play no part in the trial at all other than figuratively or literally holding the child's hand – I hesitate to embark upon this as yet uncharted course.

3. Apart from the chronic shortages that already exist in the numbers of child psychologists, correctional and probation officers as well as intermediaries, which

would be exacerbated if another functionary were to be introduced into the court setting, too little evidence was placed before the court to enable it to properly define the role of such a person for the purposes of this judgment.

4. If a child were to require the informal assistance of a family member or friend, the existing provisions of the Criminal Procedure Act are wide enough to accommodate that possibility in terms of the provisions of section 153. The presiding officer could always allow the presence of a confidante if requested to authorize his or her presence.

THE RIGHTS OF THE ACCUSED

1. Counsel for the accused raised justifiable concerns about the impact that the extended protection of the child victim's and witness' rights might have upon the fair trial rights of the accused, in particular the right to a public trial and the right to cross-examination.

2. It was further suggested that the emphasis upon the right to shield the alleged victim from further harm might undermine the presumption of innocence to which the accused is entitled under all and any circumstances.

3. The accused is in terms of section 35(3)(i) of the Constitution entitled to "*adduce and challenge"* evidence. This should include the right to face his or her accuser and to test the averments against him or her, which could only be done through proper cross-examination.

4. Counsel quite correctly and properly emphasized that the services of an intermediary and the possibility of adducing evidence through an electronic device could diminish the flexibility and spontaneity of cross-examination, blunting the cut-and-thrust of the exchanges between defence counsel and the complainant if the intermediary was entitled to convey "the import" of the questions asked only to the child witness.

5. Persuasive as this consideration is, it was pointed out in *K v Regional Magistrate* and *S v Staggie and Another, supra* already that the accused's entitlement to cross-examination is no absolute right, as was underlined in *S v Ndhlovu and others* 2002(2) SACR 325 (SCA).

6. The mere fact that a child victim or witness is granted the protection he or she is entitled to, does not eliminate the accused's right to a fair trial. If cross-examination is in any way limited as a result of the fact that an intermediary was requested to assist a child, the court will weigh up the evidence in the context of the fact that the accused' ability to challenge this evidence was hampered by a measure that represents a reasonable limitation of the right to cross-examine.

7. The same holds good for the limitation an accused's right to confront a complainant might be subjected to if the complainant is allowed to testify through an electric device from outside the courtroom.

8. The concern that an accused will suffer an irreparable infringement of his fair trial rights is therefore unwarranted.

THE ADOPTION OF THE ECOSOC GUIDELINES

1. Counsel for the NPA submitted that the court should hold that the Ecosoc guidelines should be adopted as a guide to the most appropriate way child victims and child witnesses should be dealt with in criminal trials in our courts.

2. The guidelines developed by the Economic and Social Council of the United Nations represent a very thoroughly prepared set of principles that it would certainly not be inappropriate to recommend to the Minister for consideration in the development of the policy framework.

3. Such recommendation need not be made by the court as part of its order – as an international instrument of best practice, it will certainly be brought to the attention of the persons tasked with the development of the policy framework.

4. It might be argued that they have already been introduced to municipal law as a result of the fact that they were developed by an agency of the United Nations as part of the protection of children that is decreed by the various international instruments and conventions referred to earlier in this judgment.

THE ORDER

It is ordered:

1. Section 170A(1) of the Criminal Procedure Act 51 of 1977 ("the Act") is declared to be unconstitutional in that it grants a discretion to the trial court to appoint or not to appoint an intermediary when a child witness is to be called in a criminal trial. The section should read as follows:

"*Subject to subsection (4)*, w*henever criminal proceedings are pending before any court in which any witness under the biological or mental age of eighteen years is to testify, the court shall appoint a competent person as an intermediary*

for each witness under the biological age of eighteen years in order to enable such witness to give his or her evidence through that intermediary as contemplated in this section, unless there are cogent reasons not to appoint such intermediary, in which event the court shall place such reasons on record before the commencement of the proceedings; and the court may appoint a competent person for a witness under the mental age of eighteen years in order to give his or her evidence through that intermediary"

2. Subsection 170A (7) of the Act is declared unconstitutional for the reasons set out in this judgment.

3. Subsection (3) of section 153 of the Act is declared to be unconstitutional for the reasons set out in this judgment. The word *"must"* should be read in after the words "..*if he is a minor*" while the words "*at the request of his parent or guardian"* should be regarded as *pro non scripto.*

4. Subsection (5) of section 153 of the Act is declared to be unconstitutional for the reasons set out in this judgment. The word *"may"* should be read as "*must" .*

5. Subsection (5) of section 158 of the Act is declared to be unconstitutional for the reasons set out in the judgment. The words *'below the age of 14 years"* should be regarded as *pro non scripto* and the word *"complainant"* should be read as "*witness"* .

6. The proviso to section 164 (1) of the Act is declared to be invalid and unconstitutional for the reasons set out in this judgment.

7. Paragraphs 1. to and including 6. of this order are suspended pending the decision of the Honourable Constitutional Court in terms of section 172 (2)(a) of the Constitution.

8. It is declared that criminal trials in which children are involved as complainants or witnesses must, in terms of section 28(2) of the Constitution, be given as much priority in the investigative and prosecution phases as the available resources permit;

9. It is declared that children who appear as complainants or witnesses in criminal trials have the right, in terms of section 28 (2) of the Constitution, to be assisted by an intermediary and to make use of electronic devices such as closed circuit television while giving evidence to the extent that available resources permit;

10. It is declared that children who are involved as complainants and witnesses in criminal trials are entitled to have these trials conducted by presiding offices, prosecutors, court staff and other participants who have adequate expertise to deal with children as such witnesses or complainants;

11. It is noted that the Criminal Justice System faces critical systemic challenges;

12. The Minister of Justice is ordered to refer the matters addressed in paragraphs 8, 9 and 10 above to the Inter-Sectoral Committee responsible for the development of the National Policy Framework with the instruction to address the systemic shortcomings as part of such framework, where possible with the co-operation of such NGOs as are

willing and able to assist the Committee;

13. The National Commissioner of the South African Police Services and the Director of Public Prosecutions are ordered to consider the matters addressed in paragraphs 8, 9 and 10 above as part of their directives to be issued in terms of section 66 of Act 32 of 2007 in order to eliminate existing shortcomings, where possible with the co-operation of NGOs willing and able to assist the Commissioner and the Director;

14. The Minister, the National Commissioner of the South African Police Services and the Director of Public Prosecutions are ordered to report to the court one year from the date of this order and inform the court and the parties and *amici* of the progress made in addressing existing backlogs;

15. The parties and the *amici* are given leave to approach the court within thirty days after receipt of such reports with a request to raise further issues with the court, should such be necessary;

16. This matter is referred to the Honourable Constitutional Court.

Dated at Pretoria on this 12th May 2008

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E. Bertelsmann

Judge of the High Court