CG CASE NUMBER: 658/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

G.S. Appellant

and

THE STATE Respondent

CORAM: NESTADT, VAN DEN HEEVER JJA et NICHOLAS AJA

HEARD ON: 19 SEPTEMBER 1994

DELIVERED ON: 8 NOVEMBER 1994

J U D G M E N T

VAN DEN HEEVER JA

I have read the judgment of Nicholas AJA but disagree, with respect, that the magistrate misdirected himself or that the sentence imposed, (namely 3 years' imprisonment in terms of sec 276(1)(i) of Act 51 of 1977, plus a further two years' imprisonment conditionally

suspended) is inappropriate. Two versions were tendered to the trial court of the events underlying the charges brought against appellant. Complainant alleged that she was raped on two occasions by her father, and that she resisted by struggling and screaming. She was afraid to tell her mother or grandmother, and his conduct came to light months later when she was questioned by her sister (apparently on her mother's instructions) as to why she was so withdrawn and wan. Appellant's version, put to L. by his attorney in cross-examination and preferred by appellant in evidence, was that it was she who seduced him and sought intercourse, which they indulged in at her instigation on a number of occasions - at least six times, according to him; and that he put a stop to this when he

discovered that she was prostituting herself since she began demanding money from him because of her favours.

The magistrate's reasons for judgment are perhaps not elegant, but are in my view charitable towards appellant in acquitting him of rape on the basis of a defence that was not explicitly raised on appellant's behalf. Although the magistrate found L. generally to be a good witness, moreover corroborated by her mother, and appellant a poor one, he found her evidence of the physical resistance she offered to be exaggerated; so that the reasonable possibility existed that appellant may not have appreciated that she was an unwilling party to his activities. It follows that he found that the state had not established beyond reasonable doubt that appellant (who was under the influence of liquor on the first occasion to which she testified) had the requisite mens rea for rape. His finding that appellant was a poor witness, and his rejection of appellant's tale of seduction by his daughter, are amply justified by the record. On his own evidence it is clear that he made the first sexual advance towards

her. The evidence elicited from his wife by his attorney in cross-examination corroborated complainant in material respects. The picture of appellant that emerged, is one of a self-centred bully who imposes his will by force on the family he maintains inadequately when obedience is not forthcoming voluntarily.

I list the more important facts which have a bearing on the question of sentence.

I have already mentioned that appellant corrupted his daughter, not she him. Although his attorney put it to complainant in cross-examination that she started being provocative and exposing her breasts to her father (which she vehemently denied) his own evidence did not support this. In the cramped quarters where privacy was impossible, all the members of the family were accustomed to washing themselves without benefit of that privilege. His evidence in chief reads:

> "MNR WEBER: Hoe het dit gebeur dat u en L. gemeenskap gehad het? --- Dit was in die tyd, as ek in die aande by die huis kom, dan maak sy vir my gewoonlik tee

> want ek kry nooit gewoonlik my vrou by die huis as ek by die huis kom in elk geval nie. Dan net sy altyd my kos voorgesit, my tee gebring. Nes ek klaar geëet net dan gaan lê ek op die bed, dan bring sy my tee. Soos ek gesê het, my vrou was maar altyd, gewoonlik nooit by die huis nie en toe het sy een aand begin was, verstaan, en dit is toe net daar, soos hulle sê, die japon aangetrek en wat sy onder aangehad het kan ek nie weet nie want hier was net so 'n knopie hier en verder hier was alles oop. So het ek dit maar laat aangaan, verstaan. En so het dit die volgende keer weer gebeur, verstaan en toe het dit op 'n stadium gebeur, soos 'n man nou maar gewoonlik is, jy sien hier is die besigheid voor jou en toe het ek op 'n stadium aan haar bors gevat en so, verstaan."

Even had her conduct been intentionally provocative, this could not excuse such reaction on the part of a father.

There is no suggestion in the record of any "genuine affection on the part of (appellant) rather than the intention to use the girl simply as an outlet for his sexual inclinations" (Attorney General's Reference (No 1 of 1989), [1989] 3 AER 571, 576 c-d). His own turn of phrase is that "ek haar maar net gebruik [het]".

L. was a virgin, and her first experience of intercourse, with her father, was no tender episode.

Appellant conceded that he disapproved of complainant's having any male friends. "Daar kan niemand gekom bet nie en hy dreig hulle", according to Mrs S..

Appellant is a heavy drinker and also smoked dagga. His wife says "(A)s hy gedrink is is hy bale vatterig, hy vat en klou aan almal". L. testified "My sister's friends that used to come there, he used to interfere with them, like touch their private parts or whatever. And mommy just told them, 'take your friends out of here'. Even my friends as well. They were too scared to come in there".

According to both mother and daughter, appellant was accustomed to beating his wife and children. He tried to make light of this. Under cross-examination he had given a vague and rambling account of alleged episodes where his daughter invaded his bed seeking sex - "ek sal nou eers weer moet nadink. Dit sal moes gebeur het... Man dit kan 'n sterk

moontlikheid wees ... Dit moet maar net sy gewees het ..." He then clutched happily at the straw offered him by the prosecutor, that possibly his consumption of liquor accounted for his poor memory of these events:

> "... Korrek? — Daar is 'n sterk moontlikheid. So u kan selfs nie eers met haar stry as sy sê, 'My pa het 'n bietjie hardhandig gewerk met my?' ---Ag nee, daai ou slaan stohetjie. Man, om eeilik met jou te wees, kyk dit is my dogter wat ek die liefste voor gewees het, om eerlik te wees. Daar sit my vrou, sy kan dit vir jou sê is dit so of is dit nie so nie. Sy het gewerk hier onder in Claremont of hier in Wynberg het sy gewerk. Ek het nooit geweet waar presies sy werk nie. Ek weet net sy het gewerk as 'n verkoopsdame in 'n skoenewinkel. Dit is omtrent al. Toe kom sy een aand vreeslik laat daar aan. Ek dink dit was oor tien ..." (My emphasis.)

And then the prosecutor interrupted the appellant, (who was so concerned about his daughter that he did not even know where she worked) in his tale of the "slaan storietjie". He brooked, and so expected, no opposition from his womenfolk. His wife said "Ek het vir horn gevra, dan lag hy,

want hy slaan vir ons as - ". When he was confronted with the allegation that he had raped L., he challenged them to go to the police. When they did, he threatened complainant with violence and "toe het hy begin te wil slaan aan ons, toe draai ons terug. ... hy het aan ons begin slaan". So they turned back and the police were contacted by telephone.

Appellant's evidence as to L.'s moral turpitude in not only seducing him but trying to turn her success to financial advantage, is as poor as the rest of it; but is very revealing as to both the manner of man he is, and the total absence of remorse on his part. Appellant's attorney had put it to complainant in cross-examination that she had asked appellant for R50 to enable her to go to the doctor. She replied

> "I am not denying that but I never asked for the doctor. He told me I must ask it for his boss, that he can take it and he can drink it out and he used to smoke buttons like the people say.
> But now just a minute. Are you then admitting that you did ask him for R50? --- Yes, but he told me to ask him. He told me to phone the work".

Her version, that he had put her up to getting an advance from his employer for his own purposes, not hers, has the ring of truth where the record hardly shows her capable of thinking up a story like this on the spur of the moment. Moreover he volunteered a revealing concession in cross-examination. In chief he said that he put a stop to her coming to his bed where

> "ek maar net vir haar gebruik (net) ... Want sy het - op 'n stadium bel sy na my werk toe, toe vra sy geld. Toe gee ek - toe bel sy, toe sê ek, 'Wel, ek sal vir jou die geld kry'. Toe kry ek vir haar die R50-00. Toe vra ek, 'Wat wil jy maak daarmee?' Toe sê sy sy wil dokter toe gaan. Toe sê ek goed, toe bring ek vir haar die geld, daar is die geld. Maar natuurlik het die ma nie gesien ek gee vir haar die geld nie, verstaan. En sy is dokter toe. Of sy ooit dokter toe gegaan het, ek sal nie weet nie. Ek het nie weer gevra nie. En toe het sy weer op 'n stadium ook vir my gebel. Toe sê ek nee. Dit is nou al hier van November af tot daai tyd. Toe voel ek nee, nee, nee hierdie juffroutjie soek nou geld en of sy nou dink ek doen dit nou - ek gaan nou net geld gee. Of sy nou dink ek betaal nou, soos dit, toe het ek sommer net die ding gestop".

Under cross-examination this collapsed to fit in far better with the

version she had given when cross-examined. Pressed as to the reason she gave for asking him for money on the alleged second occasion, he could not remember.

> "En u besluit toe nou sommer nee, u gaan nou nie meer geld gee nie. — Nee reg.
> U moet darem ten minste se wat die rede was, hoekom het sy gesê sy wil geld he? — Man ons sal sê dit was op 'n naweek. Dit was 'n Donderdag. Datums kan ek nie so mooi onthou nie, maar ek dink dit was 'n Donderdag. Was dit nog in hierdie jaar? — En toe het ek geweet ek gaan die naweek, daai naweek gaan ek Mitchell's Plain toe en ek het myself geld nodig".

I disagree that L. should be faulted for "freely exposing her body to view". Her father was neither a good provider nor a good example and spent money that may have eased the accommodation problems of the family on liquor and drugs. To suggest that she lacked modesty under the circumstances in which she of necessity lived is both unrealistic and unkind. In any event appellant did not suggest that it was seeing his daughter's body that led him to sin. His version was that she

actively sought intercourse by coming into his bed and arousing him.

So too I cannot agree that there is no evidence that L. suffered harm as a result of her experience. Appellant himself confirms that she was withdrawn: "Nee, sy het haar net vreeslik begin - sy net die netnou gesê sy het haai eenkant gehou. Sy het nie veel gepraat nie". That was in December. In January things were worse, and he suspected that she was pregnant. The fact that appellant did not share a bed with his wife, or rather she with him, was prima facie due to his own habit of getting drunk at night. His drinking problem is a factor to be considered, but hardly a mitigating factor; and a stint in prison may have as good a prospect as any, of "curing" this. According to the social worker from whom a welfare report was obtained at the request of the defence, appellant had - according to him - given up dagga at the time of the trial. There was no suggestion that he had given up liquor. She told the court that "die gevangenis beskik oor 'n behandelingsprogram vir alkoholiste en die

beskuldigde kan by die behandelingsprogram ingeskakel word". His employer, who gave evidence in mitigation of sentence, attempted to assist him by stating that if appellant were to be discharged "sal ek een of twee of drie mense moet afbetaal ... hy is betroubaar ... Ek kan my werkswinkel los by horn, hy sal na alles kyk". However he was honest enough to admit that appellant drank a good deal though not during working hours, felt a bit ill or was sometimes still under the influence on Mondays but was nevertheless capable of working under supervision:

> "As die beskuldigde onder die invloed van drank is op Maandagoggend, sal u u besigheid in sy verantwoordelikheid los? --- Mevrou, ek myself werk fisies saam met Greg en ek is altyd langs horn om vir horn te wys waar hy verkeerd gaan. So hy is nie so dronk dat hy nie kan werk nie."

Appellant's counsel in argument referred us to a number of reported cases dealing with offences of a sexual nature, in each of which the court appeared to have dealt with the relevant accused more gently than appellant was dealt with here. He stressed that in S v D 1989 (4)

SA 709 (T) a sentence of 12 months' imprisonment was set aside where a stepfather had been convicted of having indecently assaulted his two little step-daughters.

Comparison with other cases - in which the facts are never exactly the same as those in the matter presently before court - is often a pointless exercise. I would stress that in S v D, supra, (in which the conviction in any event was not in respect of incest) the sentence was set aside because it had been imposed without proper inquiry, not because it was necessarily inappropriate or excessive (see p 716 I).

In a case of incest such as we have here it would in my view ordinarily be both inadequate and inappropriate to impose a wholly suspended sentence, or one of correctional supervision in terms of sec 276(1)(h) of Act 51 of 1977. The offence itself is a serious one and directed against and affecting the family unit. In our case any attempt to keep the family intact would merely extend appellant's opportunity to repeat his conduct (which of course also constitutes adultery) which, it

goes without saying, could not be effectively monitored. It would penalize complainant, who is not prepared to share what family home there is with appellant any longer. There is nothing to suggest that appellant, who showed no remorse, is motivated to alter his ways which he regards as only mildly wrong, if wrong at all, since he attempts to shift all the moral blame onto complainant.

I confess to no surprise that in South Africa reported judgments on incest are few, and old. The reason is not that incest between consanguines has become acceptable to society since the days when "bloedschande, tusschen ouders en kinderen bedreven, te meermaalen met den dood gestraft (was)" (V.d. Linden 2.7.8) although clearly punishment for crimes generally is not what it used to be. It is an offence almost impossible to prevent save by attempts at deterrence; difficult to discover, and even more difficult to prosecute successfully, for a number of reasons. Where it occurs between a father and his own child, as here, it constitutes an abuse of power - whether physical, financial or

emotional - and a betrayal of trust.

The English case reported in [1989] 3 AER and referred to by my colleague and earlier herein, quotes (on p 573) the Wolfenden Committee's report as identifying the function of the criminal law in the field of sexual offences, as being -

> "To preserve public order and decency, to protect the citizen from what is offensive and injurious and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced or in a state of special physical, official or economic dependence."

A recognition of the need for the court to have a compassionate understanding for human frailty does not in my view extend to instances where the selfish exploit or corrupt the weak, since deterrence of others of like mind is more often than not the best weapon of the law, though still a poor one, to safeguard potential future victims.

The appeal is dismissed.

L VAN DEN HEEVER JA

Concur:

NESTADT JA)

J U D G M E N T

NICHOLAS AJA:

This is an appeal against sentence. The appellant, G.S., was charged in the regional court sitting at Wynberg Cape on two counts of raping his 17-year old daughter, L.S., in December 1991 and January 1992. He pleaded not guilty but in a statement made in terms of s 115 of the Criminal Procedure Act 51 of 1977 he admitted having had sexual intercourse with L. on a few occasions during

November 1991. He was found guilty on two counts of incest, which in terms of s 261(1)(d) of the Act is a competent verdict on a charge of rape. Taking the two counts as one for the purposes of

sentence, the magistrate sentenced him in terms of s. 277(1) (i) of Act 51 of 1977 to 3 years imprisonment, and in addition to 2 years imprisonment suspended for 5 years on condition that he was not again convicted of rape or incest committed during the period of suspension . S.'s appeal to the Cape Provincial Division against the sentence was dismissed, but he was granted leave to appeal further to this court.

The facts may be briefly summarized. At the end of 1991 S. was staying with his wife and 4 of his 5 children (L., another daughter aged 14, and 2 sons aged 11 and 3 respectively) in Mitchell's Plain. They lived in two rooms in the backyard of a home belonging to Mrs S.'s mother: a garage, in which they all slept, and a small room which was used as a kitchen and eating place. There was no bathroom;

they all did their ablutions in the garage.

Giving evidence for the State, L. said that the first occasion on which her father had sexual intercourse with her was on a Saturday evening in November 1991. She had been washing herself. Her father and small brother, who were also in the room, were apparently asleep. When she had finished washing, she dried herself and wrapped a towel around her. S. got up from where he had been lying and pulled her on to her mother's bed and took off the towel. She resisted and kicked at him. She screamed, but he put his hand over her mouth. He forcibly had intercourse with her. When he had finished he said that if she told her mother, he would just do it again.

The second occasion was on an evening at the end of January

1992. S. had sent his wife to buy him cigarettes. L. was busy washing up in the kitchen. He called to her to make him some tea. When she took the tea to him he pulled her onto what she called a sleeping chair. He pulled her clothes off and he did what he had done before.

It was not until March 1992 (when apparently it was suspected that she might be pregnant), that L. told her mother what had happened to her. She said she had been afraid to tell her mother -

> "I did not actually know how to tell my mother, because my mother is a person ... if you tell her something, it is almost like you are telling a lie."

Under cross-examination she denied that intercourse took place

with her consent. She said that it did not bother her that she washed herself in her father's presence -

> "No, I mean he is my father. What would he do wrong? I mean, my sisters and brothers wash, everybody in front of him, even my mother. ... I mean usually I bathe myself in front of everybody. ... I am used to undressing myself in front of" him, dressing myself, ironing. I mean I used to walk like that. That was my normal thing ... - all of us used to do."

In his evidence S. said,

> "Ek ontken dat ek haar verkrag net, maar wel ek het gemeenskap met haar gehad. ... Dit was op 'n paar geleenthede ... tussen November en Januarie."

He said that over a period she behaved provocatively towards him. One

night she lay down next to him. She had nothing on. She caressed him and lay on top of him. He said,

> "En toe het ek maar net vir haar gebruik en daama is sy toe daar weg."

This happened on about 6 occasions between November and January.

The magistrate's judgment was brief. He said:

> "Weens die tydfaktor, gaan die Hof nie volledige redes gee nie. Volledige redes kan gegee word indien dit nodig is, net kort en kragtig. Of die Staat se relaas nou korrek is en of die beskuldigde se relaas korrek is, hy is skuldig aan bloedskande op sy dogter. Die klaagster sê beskuldigde het haar verkrag. Sy was 'n goeie getuie gewees. Die moeder kom en sover soos [sy] moontlik kan ondersteun sy haar. Beskuldigde daarenteen het nou vir die Hof kom vertel dat die dogter van horn, het horn verkrag, hy het haar nie verkrag nie. Hy was duidelik 'n swak getuie

gewees maar dit sal nie help om daarop in te gaan nie, want natuurlik is dit bloedskande op sy dogter. Hy word skuldig bevind aan twee aanklagte van bloedskande."

It is apparent from these remarks that although the magistrate favoured the evidence of L. over that of the accused, he did not make a finding that her version was true and that of the accused was false: he said in effect that whichever version was correct, the accused was guilty of incest.

Little guidance in regard to the appropriate sentence for incest is provided by South African reported cases or text books. De Wet en Swanepoel, Strafreg 4th ed, p 282, state only -

> "Die straf berus in die diskresie van die hof, en ons howe straf gewoonlik nie so swaar nie."

The learned authors cite three cases in support, but only one of them S v M 1968(2) SA 617 (T)) is of a fairly recent vintage. There the accused had been found guilty on appeal of incest with his adoptive daughter. He was sentenced to 3 months imprisonment conditionally suspended. *

Marais J said in his judgment at 621 F-G.

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> "Dit bly natuurlik 'n oortreding wat sterk morele afkeur sal geniet en verdien. Die beskuldigde is 46 jaar oud, staan in 'n vertrouens-patriargale posisie teenoor die klaagster, wat maar 16 jaar oud was, en hy behoort dus sy verantwoordelikheid beter te besef het as om horn in so 'n situasie en in so 'n verhouding te begewe. Desnietemin, gesien al die omstandighede wat nou te voorskyn gekom het, is ons van mening dat 'n opgeskorte vonnis reg sal laat geskied in hierdie geval."

Reference may however usefully be made to the English case of Attorney

General's Reference (No 1 of 1989) [1989] 3 All ER 571 (CA), in which the judgment was given on a reference for review of a sentence of 3 years imprisonment imposed for incest committed by a father on a daughter on the ground that it was unduly lenient. Lord Lane CJ said that the question of the appropriate sentence for incest "always presents the sentencing judge with formidable problems" (at 573 g). He observed: (at 574)

> "... [It] is stating the obvious to say that the gravity of the offence of incest varies greatly according, primarily, to the age of the victim and the related matter, namely the degree of coercion or corruption."

He distinguished three classes of case:

"At one end of the scale is incest committed by a father with a daughter in her late teens or older who is a willing participant and indeed may be the instigator of the offences. In such a case the court usually need do little more than

mark the fact that there has been a breach of the law and little, if anything, is required in the way of punishment."

Other classes were cases where the girl has achieved the age of 13, and those involving girls under the age of 13.

Lord Lane CJ then proceeded (at 575 f) to make suggestions as a broad guide to the level of sentences in various categories of the crime of incest. For present purposes only the first category is relevant -

"(1) Where the girl is over Jo"

Generally speaking a range from three years' imprisonment down to a nominal penalty will be appropriate

depending, in particular, on the one hand on whether force was used, and

> on the degree of harm, if any, to the girl, and on the other the desirability, where it exists, of keeping family disruption to a minimum. The older the girl the greater the possibility that she may have been willing or even the instigating party to the liaison, a factor which will be reflected in the sentence. In other words, the lower the degree of corruption, the lower the penalty."

I do not think that the range of sentences mentioned by Lord Lane CJ are necessarily appropriate in South Africa, but the considerations mentioned in this passage are in my opinion matters to which the sentencer should properly have regard.

On the question whether force was used in the present case, the magistrate said when sentencing the accused,

> "Daar was sekere redes voor waarom die Hof u net skuldig

> bevind aan bloedskande, maar dit was baie na aan verkragting."

(My emphasis) The magistrate did not disclose the "sekere redes", and it is impossible to ascertain from the judgment why the magistrate considered the offences were "baie na aan verkragting." Absent a finding that L.'s version was true and the accused's version was false, there was no basis for such an opinion.

The magistrate's written reasons for judgment, furnished after the notice of appeal was filed, did not clarify the matter. He said,

> "Aangesien hierdie 'n appel teen die vonnis is gaan die hof nie volledige redes vir uitspraak geen nie. In ex tempore redes het die hof daarop gewys dat die klaagster 'n goeie getuie was en dat haar moeder haar steun en dat appellant 'n swak getuie was maar het nogtans appellant aan

> bloedskande en nie verkragting skuldig bevind nie. Dit was geensins 'n geval dat die hof appellant se weergawe as redelik moontlik aanvaar het nie. Hoewel appellant nie met die verweer gekom het nie, wil dit blyk dat in die omstandighede waaronder hulle gelewe het, die vrees wat sy duidelik vir haar vader het, dat sy bale minder weerstand gebied het as wat sy voorgee en dat appellant wel kon gemeen het sy stem toe. Die waarheid lê dus tussen die twee weergawes voor die hof wat in beide gevalle die appellant nog steeds skuldig aan bloedskande maar nie aan verkragting is nie."

It is difficult to see how the truth can lie between two irreconcilably conflicting stones. Nor does the magistrate say what he found the truth to be. In these circumstances it seems to me that the magistrate misdirected himself when he said that the case was very close

to rape. In the result he did not exercise a proper discretion in imposing the sentence which he did. Consequently this court is entitled to interfere.

The question of what is an appropriate sentence in this case must be approached on the basis that it was not proved that intercourse took place without L."s consent, and that it is reasonably possible that S. did not use force to effect his purpose. L. was 17 years old. She was accustomed to behave without modesty in the family context, freely exposing her body to view. There is a reasonable possibility that she was not an unwilling party. There is no evidence that as a result of her experience L. suffered any harm, either physically or psychologically.

The magistrate said in his judgment on sentence:

> "Bloedskande is nie net 'n baie ernstige misdaad nie, maar is ook 'n niters laakbare misdaad."

Nevertheless a court should still, in the words of Holmes JA, have a compassionate understanding for human frailty. The fact that the conditions under which the S. family lived created a breeding ground for sexual irregularities (the promiscuous sleeping and bathing arrangements, and the stimulus provided by a nubile young girl who was wont to display herself before a 37-year old man, who, it appears, did not share a bed with his wife), should not be ignored. His wife said in evidence, "As hy gedrink is, is hy vatterig. Hy vat en klou aan almal!" There are personal factors which are mitigating. At the age of 37

he had no previous convictions. He had a steady employment record, and at the time of the trial occupied a responsible position: his employer regarded him as an honest and responsible employee.

The magistrate did not impose correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977, because he considered that such a sentence would be too light. He added:

> "... verder is daar die volgende:
>
> (i) Appellant speel nie heeltemal oop kaarte en aanvaar voile verantwoordelikheid nie. Hy probeer dinge in die beste lig vir homself stel. (ii) Hy net vermoedelik 'n drank probleem. Die beste is dus dat die gevangenisowerheid 'n tyd het om

hom behoorlik te kan evalueer en dan op daardie voorwaardes los te laat as om hom direk los te laat en bul dan moontlik nie die korrekte benadering by sy korrektiewe toesig toepas nie. In die geval van appellant is artikel 276(1)(i) meer gepas om 'n beter persoon aan die samelewing terug te gee as artikel 276(1)(h) wet 51/1977." My judgment in the case of Davids v The State which is also delivered today discusses the question whether a sentence of correctional supervision may be appropriate in a case of a sexual offence involving a child. In my view such a sentence may be appropriate in the circumstances of the present case. It does not seem to me that on the facts as they appear from the record S.'s removal from the

community is imperatively called for in this case. It is so, that the factor of the desirability of imposing a sentence which would avoid family disruption does not seem to arise in this case. The family has already been disrupted. It appears from the evidence of the mother that since March 1992, when his offence was disclosed, S. went to live with his mother. L. has said that if her father were allowed back into the house, she would leave it. On the other hand the family could be severely disadvantaged if by his imprisonment they were deprived of the support which would be provided by S. if he continued to work. I do not think that the first factor mentioned by the magistrate (namely, that S. was not open with the court) militates against the imposition of correctional supervision. And his drinking problem would

not be helped by imprisonment. It is more likely that S. could be assisted if he were placed under correctional supervision. In terms of s 84(1) of the Correctional Supervision Act 8 of 1959.

> "84. - (1) Every probationer shall be subject to such monitoring, community service, house arrest, placement in employment, performance of service, payment of compensation to the victim and rehabilitation or other programmes as may be determined by the court or the Commissioner or prescribed by or under this Act, and to any such other form of treatment, control or supervision, including supervision by a probation officer, as the Commissioner may determine after consultation with the social welfare authority concerned in order to realize the objects of correctional supervision."

In terms of s 276 A(1) of the Criminal Procedure Act punishment

shall only be imposed under s 276(1)(h) after a report of a probation officer or a correctional official has been placed before the court. What is contemplated is a report dealing inter alia specifically with the question whether the imposition of correctional supervision is appropriate. No such report is so far available. Moreover the | magistrate's sentence was imposed in September 1992 and in the two years which have since passed the whole picture may have changed. In my view therefore the following order should be made:

1. The appeal is upheld.

2. The sentence imposed by the magistrate is set aside.

3. The matter is referred back to the magistrate to impose sentence afresh after considering a report submitted in terms

of s 276 A(l)(a) of the Criminal Procedure Act and any further evidence relevant to sentence which may be received

by the trial court.

HC NICHOLAS

JUDGE OF APPEAL