REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: CC628/2005

DATE: 25 July 2006

In the matter between:

THE STATE

VS

FANUEL SITAKENI MASIYA

JUDGMENT

RANCHOD, AJ

BACKGROUND

[1] The accused, a 44 year old male, was initially brought before the magistrate's court at Sabie but the matter was transferred to the regional court at Graskop where he was tried on a charge of rape in that on or about 16 March, 2004 at or near Sabie he wrongfully and unlawfully had sexual intercourse with one T L M a 9 year old girl without her consent.

[2] At the trial the accused was represented by an attorney from the Nelspruit Justice Centre. On 11 July, 2005 the accused was convicted of rape. In terms of section 52(1) of the Criminal Law Amendment Act 105 of 1997, (the Act) the proceedings were thereupon stopped and the accused was committed to the High Court for purpose of sentence.

[3] In terms of section 52(3) of the Act, this court must first determine whether the conviction is in order before imposing sentence.

[4] The accused was convicted in effect on the evidence of a single witness, the complainant, aged approximately 10 years old at the time of the trial.

[5] There was a second witness (Grace) who testified for the state but the learned regional magistrate, correctly in my view, disregarded her evidence as it was mostly hearsay.

[6] The complainant was examined by a medical practitioner at the Sabie hospital. The findings of the medical practitioner are recorded in the so-called form J88 marked exhibit "B" in the court *a quo*. Although the rape was alleged to have taken place on 16 March, 2004, the complainant was medically examined one week later, on 23 March 2004. The findings, in essence, of the medical doctor were that the complainant's hymen was not intact and that the perineum and anus were normal "with good tone". Under "clinical findings" the doctor states "alleged sexual assault with anal penetration only on 16/3/2004. Had

multiple baths after that". The form J88 was handed up with the consent of the defence and the contents were not disputed.

[7] The state then closed its case.

[8] The accused closed his case without giving or calling any evidence.

[9] At that stage, the facts before the learned magistrate, if accepted, could have founded a conviction of indecent assault as a competent verdict to the charge of rape. In fact, the state sought a conviction for indecent assault. The defence likewise contended for such a conviction if the accused were to be found guilty. However, the magistrate, typifying the common law definition of rape as unconstitutional, proceeded to convict the accused of rape.

[10] The magistrate has delivered a detailed and well motivated judgment giving reasons why he convicted the accused of rape. In view of the importance of his reasons for his judgment and to avoid unnecessarily repeating aspects of his judgment in mine, I attach it to this judgment as an annexure. I will revert later to the question whether the magistrate was correct in purporting to extend the definition of rape to include anal penetration. In his well reasoned judgment, the magistrate held, briefly, as follows:

1. The archaic common law definition of rape (and the concomitant penal provisions following upon a conviction of the offence of rape provided for

in Act 105 of 1997) discriminates arbitrarily against all (males and females, children and adults) with reference to which kind of sexual penetration is to be regarded as most serious; such discrimination is illogical, unjust, irrational and unconstitutional and negates rights to values of human dignity, equality and freedom (section 7(2) of the Constitution).

2. Where necessary the court, even a lower court, is mandated to develop the common law in terms of section 8(3) of the Bill of Rights to give effect to victim's and society's rights and interests and to limit rights of accused;

3. In terms of section 39 of the Bill of Rights, the court has a duty in interpreting the Bill of Rights to promote the constitutional values and, when developing the common law, to promote constitutional objectives.

4. The court may encroach on the terrain of Parliament as lawmaker given parliament's unreasonable delay in promulgating adequate laws, ie the new Sexual Offences Bill of 2003, in order to provide society with the fullest protection that the Constitution and the law can give.

5. Developing the common law *in casu* will impact on the accused's right not to be convicted of an offence that did not exist at the time of the commission of the deed (vide section 35(3)(1) of the Bill of Rights) and especially the right to benefit from the lesser of two punishments (vide

section 35(3)(n) of the Bill of Rights). These rights may, *in casu*, be limited for the following reasons:

5.1 Non-consensual anal penetration constitutes an offence in any event;

5.2 Anal penetration is manifestly immoral and unjust;

5.3 Retroactive (more severe) punishment could reasonably have been foreseen and will not offend the principle against *ex post facto* "prohibition";

5.4 Developing the definition of rape to include anal penetration of males and females will not be contrary to foreign or international law, will not be arbitrary but will avoid future discrimination and is therefore in the interest of justice;

5.5 The rights of victims and of society are weightier than that of the accused not to be convicted (and punished) of a more serious offence;

5.6 The limitation will have the purpose of protecting society if offenders are appropriately convicted and punished with the concomitant deterrent effect;

5.7 A less restrictive means would have been for Parliament to address the lacuna with an appropriate law but it has been dragging its feet;

5.8 It will become a law of general application if endorsed by the High Court and this will be possible since the matter is referred to the High Court for purposes of imposition of the minimum sentence in terms of Act 105 of 1997.

6. The magistrate accordingly ordered that the common law definition of rape be and is extended to include acts of non-consensual sexual penetration of the male sexual organ into the vagina or the anus of another person, male or female. The accused was as a result convicted of rape and the matter was referred to the High Court for sentence.

7. In the course of his judgment the magistrate, dealing with the requirement of his order having to be of general application, also referred to the fact that the National Prosecuting Authority could issue instructions to prosecutors to frame charges along the lines of the ordered development. The magistrate's judgment is, of course, not binding on other courts.

[11] When the matter came before me I asked for an *amicus curiae* to be appointed to assist this court in dealing with the constitutional issues raised by the magistrate's judgment. I am indebted to Mr Geach, SC for appearing as

amicus curiae and for dealing not only with the constitutional issues but also with the merits of the case. I also express my appreciation for the extremely well researched heads of argument presented by Ms Meintjes, SC and Ms Bukau for the state and by Mr Geach, as well as by Mr Bauer, who appeared in this court on behalf of the accused on instructions from the Legal Aid Board. Mr Lebala and Mr Bezuidenhout appeared for the Minister of Justice later on in the proceedings.

[12] From the evidence led in the court *a quo* it was apparent that the complainant had made her first report of the incident to her mother. Her mother had refused to testify. When the complainant reported it to her mother, her mother became upset at her for now causing "problems" between her and the accused, who was a drinking partner of both the complainant's mother and father.

[13] All the parties agreed that it would be prudent to call the complainant's mother to testify and also to obtain confirmation of the complainant's age. It was also agreed that a medical expert be called regarding the anal injuries suffered by the complainant. The policeman who took down the complainant's statement was also called in view of the inconsistencies between what the complainant allegedly reported to him and the evidence she gave in the court *a quo*.

[14] All of them duly testified before this court as well as the complainant. I turn then to the merits of the case.

THE MERITS OF THE CASE

[15] Both Mr Geach and Mr Bauer argued that the state did not prove its case beyond reasonable doubt. The complainant made a statement to the police in which it is alleged that she was penetrated both anally and vaginally on one occasion. In her evidence in the court *a quo* she said she was penetrated anally only on one occasion. In this court, she testified that the penetration was both anal and vaginal on different occasions and that they occurred in 2003 and not, as she testified in the regional court, in 2004.

[16] Mr Bauer argued that whilst one may be tempted to accept these differences in the complainant's versions as inconsistencies rather than material discrepancies, the cautionary rule had to be applied to the version of the complainant.

[17] The complainant, at this stage 11 years of age (born on 27 November 1994 – vide exhibit E) again testified through an intermediary, Ms Salome Moshibidu Ngobeni in this court.

[18] The complainant confirmed the evidence previously given by Grace in the court *a quo*, namely that at the stage of the incident she was not living with her

mother; she did, however, stay for some time with her mother's uncle, Nduna Mashego; she then went to stay with Grace whom she also told: They thereafter went to the police and she was then taken for a medical examination.

[19] She also repeated the evidence previously given, namely, that she made a report to her mother about what had happened to her (ie "... that that person was molesting me ..."). Her mother, however, did not listen to her, but said that the complainant was causing a quarrel/problems between her (the mother) and the person (the accused) who drank liquor with her.

[20] In cross-examination she said she told the policeman everything; that Tshisampama inserted his penis in her anus and vagina; the story she told the policeman was the same as that told to the court *a quo*; she did tell Grace she was previously raped by Tshisampama because she had a good relationship with her and she told the court *a quo* that she was raped; one "rape" occurred not long ago, she did not count the time, it was a long period of time before a second "rape"; "it" was anal she told Grace after the first time.

[21] In re-examination she said she was raped anally on two occasions and also once vaginally; first anally, then again anally and in between, long ago in 2003, vaginally; she told her mother and Grace every time.

[22] Upon questions by the court she said all instances occurred in 2003 whereas in the court *a quo* the evidence was that the "rape" for which the accused was charged occurred in 2004.

[23] The victim responded to all of the questions posed in a candid fashion. Her demeanour from within the witness room certainly impressed as that of a young, innocent and truthful child. She was consistent in her allegation that she was penetrated by the accused even though her evidence is, on the face of it, contradictory:

> In the statement to the police she said she was forced to accompany the accused and was penetrated anally and thereafter "the second time" vaginally.
>
> In the regional court she said she accompanied the accused voluntarily and was penetrated only in the anal "hole".
>
> In the High Court she said she was penetrated twice anally and once vaginally.

[24] Two experts, Dr S M Grabe and Ms L'Marie Coetzer were called by the state to testify in this court.

[25] According to Myers J R B, *Legal Issues in Child Abuse and Neglect* (1992) Sage Publishers, California at 136-139, expert evidence can be utilized fruitfully to explain discrepancies and contradictions in children's evidence.

[26] In *S v S* 1995(1) SACR 50 (ZS) at 60b it was said:

> "A rational decision as to the credibility of a witness (especially a child witness) can be arrived at only in the light of a proper analysis by means of testing it against likely shortcomings in such evidence in the manner suggested by Spencer and Flin (op cit). To reach an intelligent conclusion in such an analysis it is necessary to apply, as they do, a certain amount of psychology and to be aware of recent advances in that discipline. This will undoubtedly mean an increase in the workload of judicial officers and the machinery of justice generally, but ways must be sought of accommodating this, as it is the price to be paid for professionally administering justice in an increasingly complex society." (My emphasis.)

[27] In *R v L* (DO) 18 CRR (2d) 257 SCC (1993) at 276-7:

> "A fair trial must encompass a recognition of society's interests ... One must recognise that the rules of evidence have not been constitutionalized into unalterable principles of fundamental justice. Neither should they be interpreted in a restrictive manner which may essentially defeat their purpose of seeking truth and justice. In the case at hand, in the

determination of what is fair, one must bear in mind the rights and capabilities of children. As McLACHLIN, J recognised in *R v W* (R) [1992] 2 SCR 122 at 133: 'It may be wrong to apply adult tests for credibility to the evidence of children'. WILSON, J expressed a similar view in *R v B* (G) [1990] 2 SCR 30 at 54-55, in reference to the appeal judge's treatment of the child witness's evidence: '... it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standards on them as it does on adults ... In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying'."

[28] So also *R v H* (T304/95)13 CRNZ 648, at 653:

"Evidence if given by an adult may have had a deficiency so grave as to require rejection of it as incredible ... may in the case of a child be explicable as due to the limitation of a child's immaturity rather than lack of rationality."

[29] Finally, in *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 778I-779C, with reference to testimony regarding failure to report a sexual assault at the first available opportunity:

> "It would be unwise and it would be irresponsible for myself as a judicial officer, who is lacking in special knowledge and skill, to attempt to draw inferences from facts which have been established by evidence, without welcoming the opportunity to learn and to receive guidance from an expert who is better qualified than myself to draw the inferences I am required myself to draw."

[30] It is, of course, in the final analysis, for the court to evaluate the evidence, including that of the experts and thereafter express its own view.

[31] Ms L'Marie Coetzer, a Principle (Hoof) Social Worker qualified as such with a BA (SOC Sc) in 1991 and an MA (SOC Sc) in 1998. She has obtained numerous further post graduate certificates for, *inter alia*, assessment of sexual abuse and clinical assessment of children. She says she specializes in the following (per her report);

> "1.1 die dinamiek van seksuele misbruik by kinders;
>
> 1.2 die ontwikkelingsvlak van kinders;
>
> 1.3 tipiese gedragspatrone en response van kinders;

1.4 die kind se vermoë om effektief in die forensiese konteks te kommunikeer met inagneming van:

1.4.1 die kind se taalontwikkeling; en

1.4.2 die invloed wat die dinamiek van seksuele misbruik op die kwaliteit van die kind se getuienis kan hê."

[32] In my view, she adequately qualifies as an expert and is in a position to assist this court in evaluating the evidence, more particularly the apparent contradictions in the complainant's evidence. She adequately explains the discrepancies and inconsistencies with reference to the dynamics involved when a child is sexually molested as well as the developmental level and linguistic capabilities of the child. Ms Coetzer's report forms part of the record as exhibit "F". The report was handed up by the state with the consent of the defence. Mr Bauer however, submitted that not much weight could be attached to the report as Ms Coetzer did not interview the complainant. I am not persuaded by that argument. Ms Coetzer speaks with reference to children generally of the age of the complainant and then analyses and comments upon a number of questions put to the complainant in both the court *a quo* and this court, as well as on the statement the complainant made to the police. For these reasons also, the argument that her evidence constituted hearsay cannot be accepted.

[33] She then motivates her conclusions, as I understand them to be, that the complainant, being a vulnerable child, was exploited by the accused. As is to be expected from a child her age, she fabricated in the statement by saying she was

forcefully taken to the accused's home in an attempt to shy away from her own inertness due to feelings of guilt and/or fear. She is truthful with reference to more incidents having occurred given her reference to the "white stuff", which she would not have seen had she been penetrated only from behind and her reference to not having been penetrated fully and further the fact that children would rather tell less than exaggerate. She probably spoke of another incident when referring to the vaginal penetration in the police statement since she referred to this as "the second time", probably also interweaving and or incorporating the incidents and this was not further explored by the investigating officer, he simply accepting that she was referring to one and the same occasion. She referred to only the anal rape in the regional court due to the way the questions were framed and more specifically because the word *hole* was used, the anus being the only place she experiences as a hole. She again referred to the vaginal penetration in the High Court due to the appropriate terminology used which she clearly understood, though dates and times were too difficult to provide. She was consistent in implicating the accused in all of the incidences of sexual penetration.

[34] As regards the contradictions between the complainant's statement to the police and the evidence she gave in both courts, both Mr Geach and Mr Bauer argued that, these left the state's case in shambles and the conviction ought to be set aside.

[35] In *S v M* 1998 (1) SACR 47 (O) the court addressed this aspect at 51f-52d as follows:

> "... ' ... Kritiek op haar geloofwaardigheid word veral gegrond op weersprekings en beweerde weersprekings soos tussen haar getuienis in die hof en 'n verklaring wat sy afgelê het op 7 Julie 1995 aan adjudant-offisier Mynhardt. As algemene opmerking wil ons daarop wys dat Kgampepe se verklaring ... nie haar oorspronklike woorde is nie; dit is vertaal en so ook is haar getuienis in die hof deur middel van 'n tolk afgelê. Misverstande en klemverskuiwings by vertalings en oortolkings is bekend en is dit ook geïllustreer in hierdie hof toe daar wel 'n misverstand ten aansien van 'n sekere woord tussen die tolk en die getuie ontstaan het, en behoort om daardie rede alle gewaande weersprekings aan die hand van die omstandighede oorweeg te word. [Vergelyk S v Mpopo 1978 (2) SA op 424 (A).]'. Deurlesing van bws C toon ook en opvallend so dat die notuleerder daarvan in sommige opsigte eie inisiatief gebruik het. As enkele voorbeeld dien paragraaf 2 van bws C. Dit is tog onwaarskynlik dat Kgampepe spontaan van beskuldigde as 'Elias Buthi Mokoena, alias Mzabane' sou praat. Onses insiens kan die meeste sogenaamde wersprekings juis gewyt word aan die notuleerder van die verklaring se gebruikmaking van 'n diskresie om Kgampepe se mededelings in, vir hom, aanvaarbare Afrikaans neer te skryf ..."

Also, in *S v Mlumbi en 'n Ander* 1991 (1) SACR 235 (A) at 248a-c it was held:

"Die afwesigheid uit haar polisieverklaring van die bewering dat eerste appellant 'n vuurwapen op haar gerig het, is nie 'n bewys dat haar getuienis daaromtrent onwaar is nie. Haar reaksie toe sy dit agter gekom het dui op die teendeel. Polisieverklarings is dikwels onvolledig, soms selfs ten aansien van belangrike feite. Die omstandighede waaronder en die besondere persoon aan wie so 'n verklaring gemaak was, is dikwels vir die onvolledigheid van sulke verklarings verantwoordelik. Dié aspekte was nie ondersoek nie."

[36] In *S v Mafaladiso* 2003 (1) SACR 583 (HHA), where there were material differences between a witness's evidence and a prior statement it was held at 593e-594h:

"Die juridiese benaderingswyse tot weersprekings tussen twee getuies en weersprekings tussen die weergawes van een en dieselfde getuie (soos, onder andere, tussen sy of haar *viva voce* getuienis en vorige verklaring) is, in beginsel (indien nie in graad nie) identies. Die doel is immers in geen geval om te bewys welke van die weergawes die korrekte een is nie, maar om oortuiging te bring dat die getuie kan fouteer, hetsy weens 'n defektiewe rekolleksie of weens oneerlikheid (sien *Wigmore* a w para 1017). In die geval van self-weerspreking, in die besonder, word tereg deur *Wigmore* (t a p para 1018) gesê:

> '(a) Since, in the words of Chief Baron Gilbert (§ 1017 *supra*), it is "the repugnancy of his evidence" that discredits him, obviously the prior self-contradiction is not used *assertively*; i e we are not asked to believe his prior statement as testimony, and we do not have to choose between the two (as we do choose in the case of ordinary contradictions by other witnesses). We simply set the two against each other, perceive that both cannot be correct, and immediately conclude that he has erred in one or the other – but without determining which one. It is the repugnancy and inconsistency that demonstrates his error, and not the superior credibility of the prior statement. Thus, we do not necessarily accept his former statement as replacing his present one.'

Wigmore se benadering t a p is onderskryf in *S v Oosthuizen* 1982 (3) SA 571 (T) deur Nicholas, R op 576A-577B, wat op sy beurt deur hierdie Hof in *S v Mkohle* 1990 (1) SASV 95 (A) op 98f-g goedgekeur is.

Die blote feit dat daar self-weersprekings voor hande is, moet deur 'n hof met omsigtigheid benader word. Eerstens moet nougeset vasgestel word wat die getuie werklik bedoel het om op elke geleentheid te sê, ten einde te bepaal of daar 'n weerspreking voor hande is en wat die presiese omvang daarvan is. In hierdie verband moet die feite-beoordelaar in ag neem dat 'n vorige verklaring nie by wyse van kruisverhoor afgeneem is nie, dat daar taal- en kultuurverskille tussen die getuie en die opskrif-

steller mag wees wat die korrektheid van wat presies bedoel is in die weg staan, en dat die verklaarder selde of ooit deur 'n polisiebeampte gevra word om in detail sy of haar verklaring te verduidelik. Die eerste sin in para 8 van die klaagster se verklaring is 'n duidelike geval waar 'n meer nougesette benaderingswyse aan die kant van die afnemer van die verklaring die gewraakte sin sou opgeklaar en verhelder het of anders bewoord het. (Sien oor die gevare van vertaalde getuienis en myns insiens, *a fortiori*, polisieverklarings, *R v Gumede* 1949 (3) SA 749 (A) op 757 *in fine*.)

Tweedens moet dit steeds voor oë gehou word dat nie elke fout deur 'n getuie en nie elke weerspreking of afwyking die getuie se geloofwaardigheid aantas nie (sien *S v Mkohle* 1990 (1) SASV 95 (A) op 98f-g). Nie-wesenlike afwykings is nie noodwendig relevant nie. (Sien *S v Bruiners en 'n Ander* 1998 (2) SASV 432 (SOK) op 437g ev.)

Derdens moet die weersprekende weergawes steeds oorweeg en ge-evalueer word op 'n holistiese basis. Die omstandighede waaronder die weergawes gemaak is, die bewese redes vir die weersprekings, die werklike effek van die weersprekings ten aansien van die getuie se betroubaarheid of geloofwaardigheid, en die vraag of die getuie voldoende geleentheid gehad het om die weersprekings te verduidelik – en die kwaliteit van dié verduidelikings – en die samehang van die weersprekings met die res van die getuie se getuienis moet onder andere in ag geneem

en opgeweeg word. (Sien *S v Mkohle* (*supra* op 98f-g); sien ook *R v Gumede* (*supra* op 756-8 *in medio*); *S v Jochems* 1991 (12) SASV 208 (A) op 211f-j; *S v Bruiners en 'n Ander* (*supra* op 437i-438a).)

Ten slotte word die eindtaak van die Verhoorregter, nl om die gewig van die vorige verklaring teen dié van die *viva voce* getuienis op te weeg, ook in hierdie soort gevalle tereg soos volg in *S v Sauls and Others* 1981 (3) SA 172 (A) op 180F saamgevat:

> 'The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.'

(Sien ook S v Kgoloko 1991 (2) SASV 203 () op 207d-e.)"

[37] Constable Yusumvu Samuel Makamu, stationed at the SAPS: Child Protection Unit (CPU) in Nelspruit, testified that he was the investigating officer in this matter and described the sequence of the events to the court. Grace reported the case to constable Zitha at the police station in Sabie on 22 March 2004 and alleged that the victim was anally raped. On the same date the victim was taken to the district surgeon, who conducted a medical examination and completed form J88 noting only that the hymen is not intact (exhibit "B"). A crime

incident report was compiled on 23 March 2004. The case docket was thereafter referred to the CPU.

[38] On 24 March 2004 Constable Makamu took the nine year old victim's statement. Only after she had told him the whole story in SeSwazi or Swazi, did he then start to write it down in English. He thereafter read the statement back to her, in the presence of Grace, first in English and then interpreting from English to Seswathi, and she confirmed the contents thereof. She first mentioned the anal rape and thereafter the vaginal rape.

[39] He also testified that the victim's mother was a drunkard ("a drinking type of a person") and that he personally observed her to be definitely in a drunken state, heavily under the influence of liquor on a certain Friday when he had to approach the mother on instructions of the state advocate. The alcohol abuse appears to him to have affected her mentally: She was reluctant to attend court and insulted and swore at Grace. She also accused Grace of having stolen the complainant from her. Ever since the matter was reported to the police in March 2004, the victim was staying with Grace.

[40] During cross-examination he said that the events described by the victim all took place on one date. He wrote down everything she said in the A4 statement. When the contents of the statement was read back to the complainant, Grace also confirmed the correctness thereof.

[41] This witness's evidence contributes to a better understanding of the sequence of events: An anal rape was reported, a medical examination was conducted which led to the suspicion that the child was also penetrated vaginally and confirmation of this was obtained when the child's statement was taken. In my view he was a truthful and honest witness despite the imperfect manner the statement was probably obtained from the victim. As is also elaborated upon by Ms Coetzer in her report, the probabilities are that he asked her regards a vaginal penetration which he interpreted as having occurred at the same time.

[42] The biological mother of the victim, testified in this court that the victim was staying with Grace, the child's aunt who was also her neighbour, since the year 2003. Her aunt became ill and she had to go to Bushbuckridge to assist her. She therefore left her two children (one of which was the victim) with her neighbours. Only upon her return after an absence of but 3 days (in which time the victim had stayed also with Nduna Mashego and with Grace and the rape had been reported) she was informed that the victim had been raped and was staying with Grace.

[43] Later during her evidence she admitted that Grace was not a relative of theirs, but was distantly related; "we are so used to each other or one another, we regard ourselves as family". She first tried to evade answering the question and eventually could not provide any reason for the victim staying with Grace. She knew Nduna Mashego. He was Grace's uncle. He was, however, not the person in whose care she left her two children. Why the victim would have

stayed with Nduna and then with Grace, had she been properly taken care of, remains a mystery.

[44] She denied that she had an alcohol problem and gave contradictory answers: They only drink everyday, during the day, occasionally, twice a week, from say 1-3 o'clock, she herself only drank two canned fruit bottles (20-30 cm in height) of beer at a time; she only drank with two females, namely Ezzie and Edice and not with the accused, whom she has seen walking in the streets only and has heard is called Tshipampama. Her daughter lies if she testified he is a drinking partner of hers and her husband, though they do have a male drinking partner by the name of Mr Mathebula.

[45] She disputed the fact that she was reluctant to attend court and denied that she was drunk on the day when the investigating officer visited her premises.

[46] She first failed to answer the question and then denied that the complainant had reported the rape incidents to her. It was only reported during the same time frame when they (Grace and the victim) approached her for money for transport. The matter had by then already been reported to the police. She denied that the complainant had reported the incidents to her prior to that stage.

[47] The complainant testified that the accused calls her parents by the names of Melisha and Colby. When the witness was questioned about this, she was

very vague and contradictory. She denied and eventually admitted that she was indeed also known by some elderly people as Melisha, but denied the fact that her husband, Colbert Zimpe, was also known as Colby.

[48] She even experienced problems recalling the complainant's date of birth.

[49] The mother of the victim proved herself to be untrustworthy. Her demeanour as a witness did not impress. She was vague, contradicted herself, evaded answering questions and was clearly fabricating as regards her drinking habits and drinking friends in an attempt to steer clear from any inference that she is indeed the bad mother as depicted by the victim, the investigating officer and Grace. In my view, the accused was indeed known to her and the rape was indeed reported to her but she regarded her drinking relationship with the accused as more important than the welfare of her child. Her evidence is rejected out of hand.

[50] Dr Grabe qualified as an medical doctor in 1977 and also obtained a diploma in tropical medicine. In 1996 she underwent training in the United States of America regarding sexually abused children. She has examined between 400-500 sexually abused children. She also provides training to other medical practitioners and is a part-time staff member of the University of Pretoria.

[51] Dr Grabe's testimony was that it is common not to find injuries to the anus after anal penetration, in fact they are scarce. Such injuries as there are, are

usually superficial and heal very quickly, often at the rate of one millimetre in 24 hours. She said it would therefore not be strange to find no injuries after 72 hours. The reasons are that the anal tissue can stretch considerably. Deeper injuries would require surgery, which can leave scars but these occur in a very small minority of cases. For these reasons, Dr Grabe was of the view that it would have served no purpose to examine the complainant with a colposcope to ascertain whether injuries could still be observed. Not only was the lapse of time (almost two years) significant, but also because no injuries were observed during the first examination shortly after the incident. In any event, the instrument was expensive and to her knowledge there were only three of them in the country. Mr Bauer argued that Dr Grabe's reasons for not examining the complainant with a colposcope cannot be accepted and referred to a Dr Katrin Muller whose article "Sexual Assault and Child Abuse" was attached to his supplemented heads of argument. Dr Muller was not called to testify or confirm her conclusions in court. I will therefore not deal with this aspect any further for the purposes of this judgment.

[52] I am of the view, taking into account the evidence led in the court *a quo* as well as in this court, that the accused was guilty of anally penetrating the complainant.

[53] The question then is whether the learned magistrate was correct in finding the accused guilty of rape by extending the common law definition of rape to include anal penetration of a male or female. Ms Meintjes, in her extremely

comprehensive heads of argument, which I have referred to extensively for purposes of this judgment, essentially submits that the magistrate's judgment is correct and ought to be confirmed.

[54] Mr Bauer submitted that the magistrate embarked on judicial activism which offends the principles contained in the Bill of Rights chapter in the Constitution. He submits that section 173 of the Constitution does not permit a magistrate's court, which is a creature of statute, to develop the common law. Also, section 172(2)(b) of the Constitution explicitly refers to legislation or statutes but is silent on the common law. A further submission by Mr Bauer is that courts have struck down legislation, read down, read in but have never legislated. The magistrate, he said, was intruding in the legislative domain of parliament and more so, at a time when Parliament was in fact addressing the issue of anal rape in the Criminal Law (Sexual Offences) Amendment Bill, 2003 which is yet to be passed into law.

[55] The question of the power of lower courts to develop the common law might be somewhat irrelevant *in casu* since the High Court is now seized with the matter and is compelled to (itself) consider the question whether on the facts of the case the conviction of rape should be upheld given its own inherent powers and obligation regarding the development of the common law in terms of section 173 of the Constitution, read with sections 8 and 39.

[56] In *Carmichele v Minister of Safety and Security* 2001 (4) SA 938CC at 955A it was held:

> "(T)he courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights. We should add, too, that this duty upon judges arises in respect both of the civil and criminal law, whether or not the parties in any particular case request the court to develop the common law under section 39(2)." (Own emphasis.)

And in paragraph 39 the court held that this is not a purely discretionary obligation but a general one where the common law is deficient in promoting the section 39(2) objectives. The new constitutional dispensation, the court held, has "brought into operation in one fell swoop a completely new and different set of legal norms" (p 954G), even though the judiciary is not the major engine for law reform and should confine itself to incremental changes (at 954E-F).

THE MAGISTRATE'S COURT ACT NO 32 OF 1944 AND THE CONSTITUTION

[57] Section 9 of the Magistrate's Court Act, dealing with the appointment of judicial officers, provides in section (2)(a) for the compulsory taking of the oath, in terms of which presiding officers undertake to "uphold and protect the Constitution and the human rights entrenched in it" and to "administer justice to all persons alike without fear favour or prejudice, in accordance with the

Constitution and the law" (Afrikaans" "die reg") (see too schedule 2 of the Constitution).

[58] Section 110 of the Magistrate's Court Act provides that a magistrate is not competent to pronounce on the validity of any law (Afrikaans text" "enige wet") or conduct of the president and shall decide the matter on the assumption that such law (Afrikaans text: "wet") or conduct is valid. Evidence may, however, be produced regarding the alleged invalidity.

RELEVANT PROVISIONS IN THE CONSTITUTION

[59] Section 8 (the Bill of Rights binds the judiciary and applies to all law);

Section 9(1) (in interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom and may consider foreign but must consider international law);

Section 39(2) (in interpreting legislation and developing the common law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights);

Section 165 ('The courts' are subject only to the Constitution and the law which they must apply); section 166 ('The courts' include a magistrate's court);

Section 170 (magistrate's courts may decide any matter determined by an Act of Parliament but may not enquire into or rule on the constitutionality of any legislation);

Section 172(1) (when deciding a constitutional matter within its power, a court must declare that any law or conduct inconsistent, to the extent it is inconsistent, with the Constitution is invalid and may make any order that is just and equitable including one limiting its retrospectivity or suspending the declaration of invalidity to allow the competent authority to correct the defect);

Section 172(2) (The Supreme Court of Appeal or High Court may decide on the constitutionality of an Act of Parliament and if ordered to be invalid, this is only of effect if confirmed by the Constitutional Court);

Section 173 (The Constitutional Court, Supreme Court of Appeal and the High Courts have the inherent power to develop the common law taking into account the interests of justice).

[60] From these provisions it would appear that magistrates courts are not explicitly excluded from enquiring into the validity of the common law: A magistrate's court is bound by the Constitution to apply the Bill of Rights and must interpret all laws in a manner promoting the Bill of Rights. It must in a similar fashion apply the common law but, in this latter instance, may also enquiry into the constitutional validity of any rule of common law. If, in so doing, the effect results in invalidity of a common law rule or principle, then it must allow for the competent authority to correct the defect, which will be the High Court, having inherent power to develop the common law to bring it in line with the Constitutional imperatives and, so, to correct the defect. If the High Court is not in a position to correct the defect by developing the common law, even if by way of making an order that is just an equitable, then, it is presumed, the High Court will, again depending on what is fair and equitable, have the power to either simply declare the common law rule/principle invalid (if no *lacuna* will be created thereby) or make an order suspending the operation of the declaration of invalidity pending legislative intervention. Since the constitutional remedy has to be of universal application, the matter may also be referred to the Supreme Court of Appeal as the (ultimate) competent authority in matters of common law development and precedent. The Constitutional court has not yet pronounced on this issue, it having been left it open in Carmichel (supra) 962 ftnt 56:

> "It is unnecessary for purposes of this case to consider the position of the magistrate's and other courts."

The problem is that no referral procedure exists other than in a minimum sentence matter, whereby the regional court refers a matter to the High Court which then has to determine whether the conviction is in accordance with justice.

THE EFFECT/CONSEQUENCES OF HOLDING PENETRATION PER ANNUM TO CONSTITUTE BUT INDECENT ASSAULT AND NOT RAPE

[61] Indecent assault is a competent verdict on a charge of rape and is thus historically and hierarchically viewed a lesser crime (*vide* section 261 of the Criminal Procedure Act; *R v Socout Ally* 1907 TS 336 where at 338 INNES, CJ held: "After all, rape is only the most aggravated form of indecent assault") with the necessary consequence that all matters of anal penetration, whether of a male, a female or a child, is viewed less serious than (female/vaginal-) rape. As a result, any form of anal rape, constituting but the lesser crime of indecent assault, is sentenced far more leniently even though it is a common law crime with a maximum sentence of life imprisonment possible. The prescribed minimum sentences provisions in Act 105/97 serve to confirm this view.

[62] As was the position *in casu*, victims are subjected to a degrading examination, at length and in detail, to establish exactly which orifice was penetrated for the sole purpose of establishing what form of indecent assault was committed (the most aggravated one being rape) and this again for the sole purpose of the correct application of the minimum sentences act. In those instances where the victim, due to ignorance because of youthfulness or mental

defect is unable to convey what orifice exactly was penetrated, the accused will receive the benefit of the doubt and of a lighter sentence (see, too, the criticism levelled in this regard by J M T Labuschagne *Die Penetrasie Vereiste by Verkragting Heroorweeg* SALJ (1991) page 148).

[63] A real distinction exists (in law) even when an accused, bent on carnal intercourse irrespective of what orifice is penetrated, happens fortuitously to penetrate the anal orifice, being in such close proximity to the vaginal one.

[64] In *S v Pieters* 1987 (3) SA 717A the accused was convicted of rape and a death sentence was imposed. An appeal to the Appellate Division was dismissed. Noteworthy was the argument advanced on behalf of the accused (at page 721):

> "Rape is an atrocious non-fatal crime against the person. Many non-fatal atrocious acts against the person of another are conceivable, eg emasculation, maiming, blinding, anal 'rape'. All would in our law be subsumed under the crimes of assault with intent to do grievous bodily harm or indecent assault or sodomy, none of which carry the death penalty. This despite the fact that in many cases the traumatic and lasting consequence for the victim would be worse than in the case of rape. The death penalty for rape is therefore an anomaly." (My emphasis.)

[65] In *S v M* 1990 (1) SACR 456 N the accused was convicted of indecent assault, having thrust his penis in the mouth of a woman of twenty and having had anal intercourse with her. On appeal, the sentence of (but) 18 months' imprisonment was increased to 6 years. In the course of his judgment DIDCOTT, J held:

> "it is unnecessary to decide whether, as a matter of law, what the appellant did amounted to rape and whether he could have been charged with rape, because he was not charged with it. It is not clear to us on the authorities at which we have looked cursorily whether to have anal intercourse with a woman without her consent amounts to the crime of rape. We do not have to decide that question. As I say, the charge was not rape. But it was quite as bad as many rapes that come before this court. I do not think it would have been a significantly worse case, or indeed a worst case at all, had the appellant raped the complainant in the ordinary sense by having vaginal intercourse with her instead of anal intercourse, once each was without her consent and against her will. In argument his counsel conceded that the proper sentence in this case was the sort of sentence that would be passed for a rape in similar circumstances. ... there was nothing at all which could excuse or extenuate his ... subjecting her to the gross humiliation and indignity of these appalling acts of indecency ....". (My emphasis.)

In casu, the accused was not only charged with rape but also convicted thereof.

[66] *S v P* 2000 (2) SA 656 SCA: The accused, having sodomised a boy-child of four repeatedly over a period of some few months, was convicted of sodomy and sentenced to 10 years' imprisonment. Having held the constitutional court's judgment in the *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1999 (1) SA 6 CC; 1998 (2) SACR 556] not to have affected the conviction, the sentence, too, was confirmed, the court holding that:

> "The rights of children are all too frequently and brutally trampled over in our society. Abuse of children is sadly an all too common phenomenon. Those guilty of violating the innocence of children must face the wrath of the courts. Section 28(1)(e) of the Constitution ... guarantees the rights of the child to, *inter alia*, be 'protected from maltreatment, neglect, abuse and degradation'. Furthermore, in terms of our Constitutional mandate to consider international law (see ss 231, 232, 233 and 234 of the Constitution), the United Nations Convention on the Rights of the Child, 1989, places an obligation on the Republic to eradicate violence against children.
>
> In the present case, the horror of the offence of male rape is aggravated when committed against an innocent, defenceless minor child who reposed nothing but trust and love in his grandfather. The appellant violated that love and abused that position of trust. The sentence imposed

by the trial court of ten year's imprisonment was thus appropriate." (My emphasis.) (at page 660D-G).

[67] *Director of Public Prosecutions v Tshabalala*, unreported, case No A1955/03 (TPD) delivered on 7 February 2005: The accused, having sodomised a boy-child of six, was convicted of indecent assault and sentenced to 3 years imprisonment. On appeal, the sentence was increased to 15 years, JORDAAN, J holding that rape had in fact been committed; that the harm caused, whether male or female, does not differ, neither the moral blameworthiness of the perpetrator; that the legislative provisions of Act 105/97 creating such difference in sentencing have no right to exist (het geen bestaansreg nie) and are not understood; and, that it is high time the legislature takes steps in this regard. (Had this been a vaginal rape, the minimum sentence applicable would have been life imprisonment.) (My emphasis.)

[68] These cases illustrate that the High Courts already regard anal rape as (serious as) rape proper and are of the view that a distinction is not warranted.

THE ROLE OF SENTENCE

[69] The seriousness with which an offence is regarded is, of course, reflected in the sentence that is imposed: The two cannot be separated. In quite a number of cases the interests of the victim has come to the fore as a fourth element to be duly considered in the sentencing phase, the courts holding that the so-called

'triad' relfects a somewhat outmoded view of punishment in that it omits to take account of the specific interests of the victim. [Vide *S v Blaauw* 2001(2) SACR 255 C at 257d-e; *S v Isaacs* 2002(1) SACR 176C at 178a-d and 179a; *S v F* 1992(2) SACR 13A at 18g-19c; *Attorney General Eastern Cape v D* 1997(1) SACR 473(OK) at 177c-478b; *S v van Wyk* 2000(1) SACR 45C at 47i-48a; *S v Swartz and Another* 1999(2) SACR 380C at 388a-b (adding "In this way our constitutional State can be fairly protected")].

[70] In *R v Millbury; R v Morgan; R v Lackenby* [2003] 2 All ER939 ([2002] EWCA Crim 2891) the court of appeal granted leave to appeal in three matters in dealing with an advice forwarded to it by the Sentencing Advisory Panel, seeking a revision of the sentencing practice for offences of rape. In its guideline judgment, the court agreed with the proposed (new) sentencing guidelines, necessitated *inter alia* by the development of the definition of rape to include marital rape and the recognition of male rape as an offence by section 142 of the 1994 Act. Of import is its agreement with, and adoption of, the proposal that:

> "the same guidelines should apply in principle to male and female rape, with factors relevant to only one gender (such as pregnancy resulting from the rape of a woman) taken into account on a case to case basis." (par 10)

And the proposal that

"the new guidelines 'should make it clear that there is no inherent distinction for sentencing purposes, between anal and vaginal rape' and that 'where a victim is raped both vaginally and anally by the offender this would be treated as repeated rape' (for the purposes of the higher starting point to which we will refer later)." (par 10) (My emphasis.)

[71] There is undisputedly a strong case to be made out that the definition of rape is archaic and based on social values which are no longer valid. The common law limitation to vaginal penetration has become anachronistic and offensive. The Constitutional (and international) imperatives of the due protection of all children, whether male or female, the due protection of the female child, the equal upholding by the law of the dignity and respect of all persons, male and females, are negated. It is unfairly discriminatory with reference to the offender, the victim and the type of deeds (anal and vaginal penetration) that constitute in equally severe ways an attack on the personal (sexual) integrity and *dignitas* of the victims concerned. It results in inadequate protection and discriminatory sentencing.

[72] The infringed rights of the victim *in casu* and also that of future potential victims of anal rape protected in the Bill of Rights (BOR) are the following:

(i) The right to Equality (section 9: Everyone is equal before the law and has the right to equal protection and benefit of the law; the state may not unfairly discriminate against anyone on grounds of

inter alia gender and sexual orientation). It is fully expounded upon in *National Coalition for Gay and Lesbian Equality v Minister of Justice (supra).*

(ii) The right to Human Dignity (section 10: Everyone has inherent dignity and the right to have their dignity respected and protected).

(iii) The right to Freedom and Security of the Person [section 12(1): This includes freedom from all forms of violence].

(iv) The right to Bodily and Psychological Integrity [section 12(2), which includes security in and control over their body).

(v) The right to Privacy (section 14) to a somewhat lesser extent.

By limiting the serious offence of rape to penile penetration of the vagina only cannot be held to promote equality of a previously disadvantaged group being females and to thus pass the section 36 limitation test: It is not a reasonable and justifiable limitation in an open and democratic society based on human dignity, equality and freedom.

LEGALITY PRINCIPLES AND THE RIGHTS OF THE ACCUSED

[73] I am of the view that the legality principles are, *in casu*, not applicable and irrelevant and need not be considered as a possible obstacle to the extension/development of the definition of rape, since no new crime is created. The unlawful deed the accused committed is simply given another name, such name constituting a more serious form of indecent assault. The accused knew very well that he was acting unlawfully. It has never been a requirement that an accused should know, at the time of the commission of an unlawful deed, whether it is a common law or statutory offence, or what the legal/official terminology is in naming it. Furthermore, the accused was in fact charged with rape. Section 35(3)(I) of the BOR is clear in this regard: The accused has a right not to be convicted for an act or omission that was not an offence at the time it was committed. An accused need also not be aware at the time of the commission of the offence what precise sentence may be imposed and, *in casu*, the possibility of a life sentence, prior to him being prosecuted in the regional court, existed irrespective of whether the deed committed is held to be rape or indecent assault.

[74] As regards the sentence to be imposed, this, in my view, ought to be dealt with similarly to the situation where a sentence is statutorily increased. The legislature is not prevented from making such law and need not even legislate that the increased sentencing option will not be applicable to crimes committed prior to the enactment since this is a well embedded principle of our common law, now also a human right in terms of section 35(n) of the BOR: The accused has a right to the benefit of the least severe prescribed sentence if same has been

changed since the date of the commission of the offence up to the sentencing stage. It is thus not a consideration to be given any weight in the decision whether the definition of rape is to be extended or not. It need only be dealt with once the conviction of rape is held to be sound and confirmed. The court, in deciding on an appropriate sentence, may hold that the minimum sentence provisions contained in Act 105/1997 cannot find application in view of this principle.

[75] I am of the view that for the reasons stated by the magistrate and those given in this judgment the common law ought to be developed by extending the definition of rape.

[76] It falls to be added that the state filed a notice in terms of Rules 16A and 10A of the Supreme Court Act 59 of 1959 regarding a Constitutional issue being raised and joinder of the Minister of Justice and Constitutional Development respectively. As a result, Advocates S M Lebala and P T Bezuidenhout appeared on behalf of the Minister. In essence their submissions were that a magistrate's court can develop the common law provided that the development promotes the spirit, purport and objects of the Bill of Rights. Counsel for the Minister cited section 39 of the Constitution in support of their submissions but argued that *in casu* the Regional Court Judgment should not be confirmed given the imminent passing of the Sexual Offences Bill.

[77] It was also submitted that when the proposed Sexual Offences Bill is passed into law this judgment will in any event become academic. However counsel for the Minister were unable to give any clear indication of when the bill would be made law, even though it has been before Parliament since 2003, but, they said; it is enjoying priority status.

[78] Until the bill is passed into law, this judgment will not, in my view, be of academic interest only. It is of relevance to the victim in this case and indeed to others, be they male or female, who are victims of non-consensual penetration per anum.

[79] Counsel for the Minister also submitted that if regard is had to the wording of section 172(2)(a) of the Constitution this court is not required to refer the finding relating to the definition of rape (being a common law offence) to the Constitutional court for confirmation as it does not relate to the constitutional validity of an act of Parliament. I agree.

[80] However, certain provisions of Act 105 of 1997 and its schedules and section 261(1)(e) and (f) and (2)(c) of the Criminal Procedure Act 51 of 1977 and the schedules to the latter Act relating to bail provisions, where the provisions are gender specific are inconsistent with the Constitution and are invalid to the extent of such inconsistency.

[81] The said provisions require a "reading in" of gender neutrality wherever they are gender specific. "Reading in" will not encroach unconstitutionally on the terrain of Parliament and, in my view, is permissible as it is an appropriate remedy to give full effect to the extended or developed definition of rape. See *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (*supra*) at 38A-39H; *National Director of Public Prosecutions and Another v Mohamed and Others* 2002(4) SACR 196 (CC) at 209 par 33; *S v Manamela and Another (Minister of Justice intervening)* 2000 (3) SA 1 (CC).

THE ORDER

The following order is made:

1. The common law definition of rape is declared to be unconstitutional as it currently stands, for the reasons given by the learned Magistrate in his judgment and for the further reasons set out in this judgment.

2. The definition of rape is extended to include acts of non-consensual sexual penetration of the male penis into the vagina or the anus of another person.

3. The provisions of Act 105 of 1997 and its schedules and Section 261(1)(e) and (f) and (2)(c) of the Criminal Procedure Act 51 of 1977 and the schedules to the latter Act relating to bail provisions are declared to be

invalid and are inconsistent with the Constitution to the extent that they are gender specific.

4. Where the provisions referred to in (3) above are gender specific there be a reading in of "person" wherever reference is made to a specific gender.

5. The proceedings in the Court *a quo* are determined to be in accordance with justice in terms of the provisions of Section 52 of Act 105/1997.

6. Sentencing of the accused is postponed until the Constitutional Court has made a determination on the order of Constitutional invalidity referred to in (3) of this order.

7. The Registrar of this Court shall, within 15 days of date of this order, lodge a copy of this order with the Registrar of the Constitutional Court.

RANCHOD, AJ
ACTING JUDGE OF THE HIGH COURT

/yv

HEARD ON:	17, 18 Nov 2005; 13 Feb 2006; 27 Feb 2006; 21 April 2006; 26 Mei 2006.
FOR THE STATE:	ADV H M MEINTJES, SC and ADV S C BUKAU
INSTRUCTED BY:	DIRECTOR OF PUBLIC PROSECUTIONS, TVL
FOR THE THIRD PARTY:	ADV S M LEBALA AND ADV P T BEZUIDENHOUT
INSTRUCTED BY:	THE STATE ATTORNEY: PRETORIA
FOR ACCUSED:	ADV B P GEACH , SC (*amicus curiae*) and ADV J R BAUER
INSTRUCTED BY:	LEGAL AID BOARD
DATE OF JUDGMENT:	25 JULY 2006