Editorial note: Certain information has been redacted from this judgment in compliance with the law.

Case No 80/96

IN THE SUPREME COURT OF APPEAL

In the matter between:

CRAIG KENNETH THOMSON APPELLANT

And

THE STATE RESPONDENT

BEFORE: EMGROSSKOPF, SCHUTZ JJAand STREICHER AJA

DATE HEARD : 17 FEBRUARY 1997

DATE DELIVERED: 10 MARCH 1997

JUDGMENT

STREICHER. AJA:

I have had the benefit of reading the judgment, to which

I shall refer as the main judgment, prepared by my brother Schutz JA. For the reasons that follow, I am unable to agree with the conclusion reached by him.

The appellant, a first offender, at the age of 23, committed a revolting crime. The details of the crime are fully described in the main judgment and need not be repeated. There can be no doubt that the crime committed by the appellant warranted a very severe sentence and that the only appropriate sentence was one of long term imprisonment.

The trial judge was of the view that the imprisonment should be for life. In imposing this sentence she was clearly influenced by her finding that the psychiatrists Teggin and Jedaar, and the psychologist, Lay, were of the view that the appellant would repeat his conduct and that given a similar situation it was probable

that he would act in the same way. I agree with the statement in the main judgment that the trial judge misdirected herself in this regard and that we are therefore at large as far as sentence is concerned.

Teggin, Jedaar and Lay diagnosed a mixed personality disorder which according to Teggin showed features of, inter alia, a borderline personality disorder. They did not diagnose a full blown borderline personality disorder. Teggin was of the view that no matter how long the appellant was imprisoned he would remain a danger after release. That view was however predicated on the assumption that he would not receive treatment in prison. Lay was not prepared to speculate as to whether the appellant would again commit a crime like this. Jedaar testified that there was a risk of future violent behaviour on the part of the appellant and that he, to a

certain extent, fitted the profile of a dangerous individual.

The trial judge was also influenced by the evidence that even if the appellant were to receive treatment the prognosis was poor. Although the prognosis is poor it is not hopeless. According to Teggin the borderline and narcissistic personality disorders are amenable to treatment by therapy. Due to the mixed nature of the personality disorder of the appellant he was, however, not able to give an opinion as to whether the appellant was amenable to treatment. He also said that some of the personality disorders abated with age. Lay thought that it would be difficult to establish a meaningful therapeutic relationship with the appellant and was sceptical about the appellant's prognosis. However, asked whether the appellant could be helped he stated:

> "It would be difficult and even then we cannot be certain whether there will be any benefits, I can say one thing, with these types of individuals we usually find that as they mature,

> they tend to what we call mellow, usually after the age of 30 we find their behaviour becomes a little less disruptive, the extremities of their behaviour tends to quieten down a little bit, so just with the maturing process there might be some improvements."

Jedaar was also of the view that the prognosis was poor and stated that significant changes could not be guaranteed. He did however think it would be doing a disservice to the appellant not to try treatment.

This evidence justified a finding that there was a possibility that the appellant could, after he had served a term of imprisonment, commit a similar bizarre crime but not that it was probable that he would do so. Moreover, on the evidence there is a possibility that the appellant's condition may, either as a result of treatment, or as a result of his greater maturity improve to such an extent that the appellant no longer constitutes a danger to other

persons. The trial judge recognized this possibility in that she, when imposing the sentence of life imprisonment, directed the Department of Correctional Services to ensure that the appellant got adequate psychological and psychiatric treatment and stated that she took comfort in the fact, that in terms of section 64 of the Correctional Services Act, 1959 he might be released in the future and that the release could be made conditional upon the appellant receiving continuing psychiatric treatment.

In my view the trial judge misdirected herself in taking comfort in the fact that the appellant may in future be released in terms of the Correctional Services Act, 1959.

A sentence of life imprisonment authorises the state to keep the person sentenced in prison for the rest of his life. Unless this result is considered to be appropriate, life

imprisonment is not

appropriate and should not be imposed. The fact that the judge sought comfort in the fact that the appellant could in future be released in terms of the Correctional Services Act, 1959 is in my view an indication that she thought that life imprisonment could prove not to have been the appropriate punishment.

The crime itself, although very serious, does not warrant the imposition of life imprisonment. It is not contended in the judgment of the trial court or the main judgment that it does. As is apparent from the main judgment the appellant does however, on the evidence, represent a danger to the physical and mental well-being of other persons and may even after an extended period of imprisonment represent such a danger. In these circumstances life imprisonment may have been the only appropriate sentence, if

there was no alternative. Section 286A and B of the Criminal Procedure Act, 1977

may however provide sun alternative. Section 286A makes provision for the declaration of a person as a dangerous criminal if the court is satisfied that such person represents a danger to the physical or mental well-being of other persons. As stated in the main judgment the Court has a discretion to set the procedure in motion after conviction, either mere motu or in response to an allegation that the accused is a dangerous criminal. Section 286B provides for the imposition of imprisonment for an indefinite period upon a person who has been declared a dangerous criminal. In terms of the latter section the court should direct that such person be brought before the court on the expiration of a period determined by it. When such person is brought before the court in terms of the direction his sentence is reconsidered by the court. Upon reconsideration the court may extend the sentence of

imprisonment for an indefinite period and

determine another date in the future for the person to be brought before the court for the reconsideration of his sentence, convert the sentence into correctional supervision or release the person on such conditions as it deems fit. This procedure and punishment are ideally suited to a case such as the present one where the crime itself is not so serious as to warrant a sentence of life imprisonment, where the convicted person represents a danger to the physical and mental well-being of other persons sufficiently serious to warrant his detention for an indefinite period and where there is a possibility that his condition may improve to such an extent that that would no longer be the case. Should the condition of the person imprisoned in terms of these sections not improve he will remain in prison. Should his condition improve sufficiently for him no longer to represent a danger to the

physical or mental well-being of other persons he will be released.

The trial court had a discretion to utilize section 286A and, on the evidence should have considered doing so. Any doubt that there may have been in this regard has been dispelled by the further evidence allowed by the trial judge after sentence had been passed. Borchardt, the head psychologist of the Department of Correctional Services, testified that he considered the appellant to be a positive case for psychotherapy and that he did not find it difficult to establish a good psychotherapeutic relationship with him. According to Borchardt the appellant developed some insight into his condition, showed some empathy for the victim, to a certain extent owned his own behaviour and showed a certain level of motivation to improve his condition. Borchardt stated furthermore that repetitive aggressive behaviour was expected to start at the age of 17 to 19 and pointed out that the

appellant had not committed any serious

aggressive acts of sexual intercourse before, whereas rapists were most prominent between the ages of 17 and 25. He testified that the appellant was well-behaved in prison and expressed the view that the punishment served as a deterrent. Jedaar's evidence was to the effect that if Borchardt's evidence were to be accepted there were many favourable signs. Borchardt is an independent person. Apart from the fact that some allowance has to be made for a propensity to look for positive signs in dealing with patients and for the fact that his period of observation was relatively short, there is no reason not to accept his evidence. Jedaar was nevertheless still guarded in his prognosis and so was Lay. Lay did however state that there was a strong possibility that the punishment appellant received would militate against him repeating the crime he had committed.

In the main judgment it is said that, on the face of it, a

resort to sections 286A and B might well have been appropriate to appellant's case but that this court should not interfere with the sentence imposed by the trial judge and refer the matter back because:

1. The trial court had a discretion. The trial judge may have considered the matter and may have regarded it as inappropriate. If the matter were to be referred back the sections may nevertheless not be utilized as the discretion is that of the trial judge.

2. Litigation must have an end. It is not in the interest of the administration of justice that the trial be started up yet again.

3. It is not known why the defence did not seek to resort to the sections. There may have been a deliberate decision not to do so. No attempt has been made to present evidence motivating

a referral back.

I shall deal with each of these reasons in turn: 1. In my view it is apparent from the trial judge's reasoning referred to above that she did not consider utilizing the sections. Her remarks indicate that she thought there should at least be a possibility that the appellant be released from prison should his future condition justify such release. Section 286A and B could have been utilised for that purpose. If the trial judge was alive to that possibility she would, in my view, have considered utilising the sections. She was not alive to that possibility and as a result misdirected herself in finding comfort in the fact that the appellant could in future be released in terms of the Correctional Services Act, 1959. It is true that the discretion to utilise S 286A is that of the trial

judge. But, by failing to consider the possibility of utilising section 286A and if necessary section 286B, which, on the evidence, seemed to be appropriate, the trial judge failed to exercise a proper discretion in regard to sentence.

2. In my view it is in the interests of justice and of the appellant that the matter be referred back to the trial court with a direction that the trial court should consider acting in terms of section 286A and thereafter impose an appropriate sentence. The administration of justice can only benefit from the correction of what was probably an oversight on the part of the trial court.

3. Counsel who appeared for the appellant in the appeal and in the hearing when further evidence was led after sentence, stated that he had not considered the provisions of section

286A and B. Counsel who appeared for the appellant at the trial tried to make out a case that imprisonment was not an appropriate punishment. He should have known better. Those probably were the reasons for the defence's failure to seek to resort to the sections at the triad and before this court. In my view those reasons in no way militate against referring the matter back to the trial court. Motivation for doing so appears from the evidence that has already been led.

I would therefore set the sentence aside and refer the matter back to the trial court with a direction that the trial judge should consider acting in terms of section 286A of the Criminal Procedure Act, 1977 and thereafter impose the appropriate sentence.

P E STREICHER

ACTING JUDGE OF APPEAL

E M GROSSKOPF JA – Concurs

IN THE SUPREME COURT OF APPEAL

CASE NO. 80/96

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RESPONDENT

BEFORE : EMGROSSKOPF, SCHUTZJJA and

STRETCHER AJA

HEARD : 17 FEBRUARY 1997

DELIVERED : 10 MARCH 1997

SCHUTZ JA

JUDGMENT

SCHUTZ JA:

The appellant, Craig Thomson, pleaded guilty to and was convicted of rape and indecent assault on a 15 year old girl, D.F., on 8 July 1993. Both charges arose out of the same series of events at Milnerton Beach, during which the appellant grossly abused the complainant over a period of four or five hours, ending at about 06.00 h. The appellant was sentenced to life imprisonment, the two convictions being taken together for purposes of sentence. In imposing life imprisonment rather than some lesser but still heavy sentence of imprisonment, Traverso J placed decisive emphasis upon evidence that

there was little prospect of the appellant's being cured of his affliction, mixed personality disorder, and that upon release from prison he would be a danger to the public.

Leave to appeal against sentence was granted by the trial Judge, who also heard extensive post-sentence evidence, which forms part of the record now before us.

Before proceeding to the psychiatric and psychological evidence led at length both before and after sentence, it is desirable to describe briefly the events that took place during the dark hours of the morning of 8 July. The version that I set out is that of the complainant. Her evidence was accepted and that of the appellant rejected in so far as it differed from hers. A basic reason why his evidence had to be rejected

was that it failed to account for the brutal injuries that the complainant suffered at his hands. On appeal there was no attempt to rely on his version.

She was a 15 year old virgin, small for her age. The Judge described her as a quietly spoken girl who gave evidence in a barely audible voice. By contrast the appellant was 23 years old, tall and strong.

After midnight she heard a knock on her window, where she found a friend, Martin, and his brother's girl friend. They induced her to join them. She pulled a top over her pyjamas and put on tackles. Outside she found one Phillip and the appellant in his car. He was a stranger to her. Phillip was taken to Martin's parent's flat as he was drunk. Arrived

there, Martin's father signalled that Martin had to remain at home. Only she and the appellant were left in his car. He set forth in the direction of her home but after a time turned off towards the beach. She asked him if he was not going to take her home, but he said he was first going to drink some brandy and coke. She requested him to take her home first, but he refused, saying he would take about ten minutes to have his drink. He continued on his way and she became frightened, as he was a stranger. Arrived at the beach he took two swigs of brandy and coke from a bottle. He leaned over and tried to kiss her, but she turned her head away and got out of the car. She started walking but he followed her in the car. She broke into a run. He drew level, opened the door and said he would take her home. She got in and he drove off slowly.

Upon her request that he go a little faster, he started swerving and playing the fool with the car at a fast speed. She told him to stop and when he did she tried to get out again. He grabbed her arm and pulled her back, so that she hit her head on the handbrake. Upon which she bit his hand. He hit her head, ordered her to bring her foot in and threatened that if she tried to escape again he would drive over her and then reverse back over her. She complied. He drove back to the beach. After another swig from the bottle he put down the 6ont seat and kissed her. When she averted her head he threatened to hit her. After that she allowed him to kiss her, whereupon he stripped off her top and started fondling her breasts. Fearing that he would hurt her, she did not say or do anything. Upon her affirmative reply to his question whether she was

a virgin, he said "What a pity!" Her pants came next and when they hooked on her shoe he made her take them off. "And then he took his pants off and he raped me" proceeded her account, penetrating her vagina. Next he put his penis in her anus. She moved in her seat because she was being hurt and he kept telling her to move down. He again raped her in the vagina and the anus, without having an orgasm.

Then he produced what she called a pipe. This metal object was produced in evidence. It is 52 cm long, 3 cm in diameter and weighs over five kg. According to the appellant, some time before he had turned it into the shape of a cannon or culverin preparatory to mounting it. However, it was now brought into use in its unfinished form. He told her to shut her eyes and put it into her hands in order to feel how heavy

it was. She described it as having "like bumps." By this I think she meant the raised rings or bands around the barrel, particularly at the muzzle end, as is depicted on photograph 6. This object he tried to twist into her vagina, and when he failed he tried again. After that he thrust it into her anus. After a while he desisted because he couldn't get it in. He then raped her again. Next he took a razor from the cubby hole, stuck the handle up her vagina and after extracting it started shaving her pubic hairs. This hurt, so he required her to shave herself. At some stage he forced her to have oral sex with him, and he then had oral sex with her. After this he raped her again. Wishing to deflect him and not wishing to be hurt anymore, she said that she was tired. He lay back with her on top of him. She did not sleep and when she moved he held

her tighter. Later he became active again. Yet again he raped her. She complained that she was being hurt but he carried on. After a time he withdrew, masturbated himself, ejaculated on her stomach and gave her a piece of newspaper to wipe herself.

These bizarre and almost never ending events were now drawing to a close. He put his trousers on. Her pet duck, which had been abducted from her house just before Martin knocked at her window, was retrieved from the floor of the car. The appellant drove her home. His parting word was "Bye". She got out of the car and walked. Her mother said she was in a state of shock, she was shaking a lot. All in all she had been raped four or five times.

There would be no difficulty in finding the appellant. He

was

arrested that evening.

The hurt which she suffered was both physical and psychological. The district surgeon said that her injuries showed that she had been savagely raped and sodomised. After 20 years experience it was, he said, one of the worst cases he had seen in a child of her age. Of her genitalia he said that they looked as if she had been kicked. The photographs bear that out. There were massive haematomas of the labia majora on both sides. The hymen was freshly torn. The vagina exhibited a 1½ cm fresh tear. There was also a tear of the anus.

The psychological damage has been more lasting. The clinical psychologist, Mrs Strydom, gave the following prognosis about a year after the rape:

> "The psychological damage caused by the rape was so devastating that it is impossible to say at this stage whether D. will ever recover enough to lead a reasonably normal life.
>
> One thing is clear: irrespective of how well D. learns to cope with the trauma, the horrendous psychological scars will remain with her forever."

Underlying this prognosis there is evidence of the complainant's constant thinking back to the incident, of uncertainty and apprehension, of shame and fear, difficulty in concentration, a marked drop in school marks, anger, difficulty in forming trusting relationships, and anxiety towards males.

What sort of man is it who did things like this? There is a plethora of evidence on the subject.

At the trial the appellant was defended pro deo by

Mr van Niekerk. He was at least the fourth counsel to be engaged. This state of affairs seems to have resulted from the appellant's mother's constant intrusions (or attempts to assist). She also seemed to have laid down the law as to medical advisers. The medical staff at Valkenberg Hospital found her to be an aggressive and disruptive personality. Mr van Niekerk, presumably tried to the limit, instructed that neither she nor appellant's father should attend the trial, and that is what happened.

Three professional witnesses gave evidence on the appellant's mental state: dr Teggin, a psychiatrist in private practice for the defence; and dr Jedaar, a psychiatrist, and mr Lay, a clinical psychologist and qualified social worker, for the State. The latter two gentlemen were part of a team who observed the appellant for two successive periods in April

and May 1994 at Valkenberg Hospital, after the Court had referred him for observation before his trial. There was a great measure of agreement between the three experts, both as to diagnosis and as to prognosis. The prognosis was black.

A condensed description of his behaviour at the hospital is to be found in mr Lay's report:

> "His general behaviour in the unit is noteworthy. He displayed a marked sense of entitlement, demanding special privileges and preferential treatment from the moment he arrived. He appeared to anger and alienate the majority of staff who dealt with him. He was seen to be aggressive towards certain patients. After a short stay in a medium-secure ward, at the request of the nursing staff, he was moved back to a maximum-secure ward as they anticipated his inciting other patients and being generally problematic. At the core of Mr Thomson's difficulties, it is believed, lies an extremely poor self-esteem and fragile sense of self. Much of his behaviour could be understood when regarded

an extremely poor self-esteem and fragile sense of self. Much of his behaviour could be understood when regarded as extreme defensiveness against feelings of rejection and worthlessness. Mr Thomson's arrogance and haughtiness is understood to be compensatory behaviour for feelings of worthlessness .

Mr Thomson appears to have a 'paranoid cast' to his personality organization. At times this appears to border on the delusional. He describes himself as a 'loner' who craves acceptance by others, but is unable to have sustained relationships. He is constantly wary, anticipating rejection and deception, and appears hypersensitive to perceived slights and criticisms. Again this factor is understood to relate to his feelings of extreme emotional vulnerability. In order to avert anticipated rejection, he defends through haughtiness, isolation and ongoing attempts to undermine others, thereby gaining the upper-hand. His seeming indifference regarding the assessment procedure is believed to be feigned indifference to deal with his marked anxiety regarding the outcome of the case."

The appellant was found to be not suffering from a mental disease,

was not certifiable. His intelligence was a little above average.

The diagnosis of the Valkenberg team was "Personality Disordered (mixed type with pronounced Narcissistic traits)." Dr Teggin agreed with this diagnosis and expanded upon it, saying that there were features of at least four personality disorders, first a paranoid personality disorder, secondly an anti-social personality disorder (psychopathy), thirdly a narcissistic personality disorder, and borderline personality disorder (the border-line being between normality and psychosis). Dr Jedaar said that the initial diagnosis had been one of psychopathy, but that this had been dropped, as all the criteria for it were not present. The ultimate diagnosis had been, as already stated, mixed personality disorder. In dr Jedaar's view he had features of the antisocial type (psychopathy), of the

borderline type ("which is probably the strongest"), as well as of the narcissistic type.

The Diagnostic and Statistical Manual ("DSM4") is in general use in South Africa as providing guidelines for diagnosis and professional communication. It sets out the diagnostic criteria for borderline personality disorder as follows:

> "A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following:

1) frantic efforts to avoid real or imagined abandonment. Note: Do not include suicidal or self-mutilating behaviour covered in Criterion 5.
2) a pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of idealization and devaluation
3) identity disturbance: markedly and persistently unstable self-image or sense of self

4) impulsivity in at least two areas that are potentially self-damaging (e.g., spending, sex, substance abuse, reckless driving, binge eating). Note: Do not include suicidal or self-mutilating behaviour covered in Criterion 5.

5) recurrent suicidal behaviour, gestures, or threats, or self-mutilating behaviour

6) affective instability due to a marked reactivity of mood (e.g., intense episodic dysphoria, irritability, or anxiety usually lasting a few hours and only rarely more than a few days)

7) chronic feeling of emptiness

8) inappropriate, intense anger or difficulty controlling anger (e.g., frequent displays of temper, constant anger, recurrent physical fights)

9) transient, stress-related paranoid ideation or severe dissociative symptoms"

Dr Teggin remarked that persons with a borderline personality disorder (further in this judgment "bpd") often act in bizarre ways, often impulsively attempt suicide, and are often aggressive by nature. The

appellant's conduct on the night was bizarre. On his own admission he had attempted suicide four times, twice seriously and twice manipulatively. Whether the appellant was aggressive by nature was a matter for some debate and I shall leave it over for the moment.

There was agreement among the experts that personality disorders tend to be difficult to treat, and bpd particularly so. Whether the appellant was in or out of gaol the prospects were poor, incarceration being marginally worse in this regard. Dr Jedaar referred to the acronym SEMI, used in assessing prognosis. S stands for social support system, E for emotional maturity, M for motivation and I for insight and intelligence. On each of the four the appellant fell short, so that the prognosis for him was poor or very poor (in the jargon of psychiatry

the prognosis was "guarded").

As might have been expected, all three experts placed emphasis upon remorse: in the full sense of deep regret and repentance. The first step towards this condition for the appellant was insight - insight into the awful thing that he had done to the complainant. The experts found his insight to be woefully absent. Consistently with the pressures of his disorder, he tended to blame the complainant, or at least everybody but himself, for what had happened. His extraordinary conduct in finally taking the complainant home as if nothing had happened is underlined by this passage in his evidence in Court:

> "Did you have any idea that you will be arrested at that stage? I felt I had done wrong, but I didn't feel I had actually raped, her, no. So I didn't feel I would be arrested."

To this may be added Jedaar's evidence:

> "[S]o there was complete lack of insight and remorse for his own behaviour. In other words he did not take responsibility for his behaviour. He immediately went on to add that I have been a productive member of society who employs others and therefore do no; deserve the treatment fo be incarcerated in an institution for this length of period of time, and was very indignant in fact at this incarceration of Valkenberg hospital for the period of 30 days, in other words, to quote him 'I've paid my dues'. How about the remorse for the victim? He says that all the inconsistencies that are contained in your reports that you've submitted to me at that stage and his account indicated that this was a fabrication and that this person , and should prove in a court of law that he actully raped Aer. In other words again a complete lack of empathy for the suffering and pain of the victim at that stage as well as the remorse for his behaviour" (own emphasis).

Although there was some small improvement, all three experts were cautious to attach much weight to it. He was seen to be serving his

own interests and attempting to manipulate the medicals rather than as advancing in insight.

The trial Judge, who had the opportunity also to observe him, said this on the subject of remorse:

> "The accused expressed deep remorse for his deeds. He was however, in my view, paying mere lip-service. He gave his evidence in an arrogant manner and at times became aggressive towards Mrs Teunissen, who appeared for the State. He went to extreme lengths to exaggerate his state of intoxication and the amount of liquor consumed. By the same token he went to extreme lengths to play down the violence which he had used during this savage attack."

Given what has gone before, it comes as no surprise that two of the experts are of the view that the appellant at large would present a potential threat to the public. Dr Teggin said:

> "If we were to view it from just one aspect, that is

the protection of society, viewed from that aspect alone the question that hasn't been put to me yet, but I would expect that I would probably be asked under cross-examination, is do I consider the accused would re-offend in a similar manner, and the answer to that question would have to be yes if similar circumstances, in similar circumstances given his personality disorder, one could expect bizarre or aggressive behaviour. I believe that if one views this situation purely from society's point of view, no matter how long the accused is in prison, I believe that he would remain a dangerr after being released " (own emphasis).

Dr Jedaar had the following to say in answer to state counsel's question:

"We've heard from my colleagues and my conviction that you're really alluding to is is this man a danger to himself or to society? I'm in no position to actually say that in other words I cannot predict as you well know that psychiatrists are probably at predicting dangerousness, however all I can comment on is is he at risk of repetitive aggressive behaviour, the risk I think also sort of needs some sort of defining. The one thing that if we look at

profiles of so-called dangerous individuals or people at risk of future violence, he does fit to a certain extent that profile, what is the profile. Usually a young individual, young male, with personality disorder together with substance abuse and then as we've heard now, that of no remorse for his actions. However if we were to examine further the one thing is first of all to examine the nature of the present offence, was there any violence associated in the present offence and here I peruse the records and heard from my colleagues, the district surgeon and the gynaecologist who were unanimous that there was a certain amount of excessive force and violence used in the actual rape and indecent assault and of course the whole act of impulsivity in the action itself, but then to make use of available resources during the course of the evening also indicated a goal-directed behaviour during that evening. So the collousness of the actions itself indicates that this man is potentially dangerous. The next thing that all of the authorities comment on is is there a longitudinal pattern of either aggressive or violent behaviour and as it's not only my observation but that of my colleagues in the past, has indicated that there have been acts of aggression throughout his development. Earlier in childhood we heard of issues like attention deficit with hyperactivity, in other words again

behavioural difficulties in childhood, we heard of impulsive aggressive acts against the self, in other words we heard of the para-suicide attempts in other words the overdoses, which are acts of aggression as well. We heard of rather impulsive activities as a young man in other words we heard of his behavioural difficulties in work areas, behavioural difficulties in the army, behavioural difficulties with relationships in the community, and so all in all again acts of aggression of a longitudinal oasis. So given then those factors, yes it influences his risk of repeat behaviour, to add to that we have then the influence of substances and that is again as we've heard of alcohol, more particularly but also that of dagga and methaqualone or Mandrax as it's commonly known. If we accept and it is by his claim or report that he has stopped the abuse of dagga and methaqualone, we can dismiss the effect of that, but alcohol as a disinhibitor or in other words an exaggeration of an already underlying aggressive personality would actually aggravate then his aggressive impulses. Again as we've heard, as I said before remorse being a very critical factor in assessing the risk M'Lady and we accept that not only by my observation but that of my colleagues that he lacks adequate remorse, I think he is at risk of future violent behaviour and that should be considered"(own emphasis).

Mr Lay was less inclined to commit himself:

> "You heard that the Court's main concern, which is a very prominent aspect to think about when you send this person, is the question of rehabilitation, do you want to make any comments on that? ... Mr Thomson's problem is essentially one of personality, personality is an incredibly complex concept, it's not changing one minor factor of a person's life or one minor behaviour, I think the chances are that he will always have difficulties in his life, whether he'll do something like this again I can't begin to speculate on I think it's likely that he will continue to have difficult relationships, probably have difficulties working under people, difficulties with authority figures."

In S v Nyhwagi 1988 (3) SA 118 (A) this Court held that where leave to appeal has been granted and in addition further evidence has been allowed, it may sometimes be convenient to first consider the original evidence, and if that consideration does not lead to the appeal

succeeding, then to proceed to a consideration of the further evidence. That seems to me to be the convenient procedure in this case.

On appeal it was argued that the Court below had misdirected itself in placing too little emphasis on the individual and his possible rehabilitation after treatment, and had focused excessively on the need to remove him from society. I do not agree.

The Judge below gave full consideration to the history and personal circumstances of the appellant. He is indeed, to borrow a phrase, one who has travelled in the guards van of life. The Judge referred to the fact that he had had a miserable childhood and had grown up in a home where there was conflict, alcohol abuse and at times violence; as also to the fact that his mother

herself appears to suffer from

a severe personality disorder. The Judge also substantially accepted his version of what had happened to him on the day before the rape. He had been expelled from his work under acrimonious circumstances. His employer had threatened to assault him and refused to give him his tools. He had had to resort to the police in order to get his tools back. He was unhappy. Some time later he went to the residence of his former girl friend, Tanya Mudge. It had been she who had ended their affair, but he had remained deeply in love with her. He invited her out but she refused, with what Lay was later to describe as a very light excuse, that she had to wash her hair. He felt humiliated and rejected and went drinking with acquaintances. This led on to his appearance at the complainant's house after midnight in the company of others, as already

described.

Whilst accepting that he had been drinking, the Court declined to accept that he was as much under the influence as he claimed, and rightly so, particularly having regard to the detailed account that he gave of his doings and movements. The Judge did, however, allow that alcohol did tend to disinhibit resistance to an already underlying aggressive streak. She also took into account that he was a first offender. Further, that his army service was terminated after a finding of drug abuse and what was perceived as psychopathic behaviour. It was while he was in the army that the four suicide attempts already referred to took place.

I do not find it necessary to repeat everything that the Judge below

said. It suffices to say that she had full regard to the mitigating features in the case.

In considering the aggravating circumstances she referred to the callous and violent nature of the offences, the damage that they had caused and the appellant's lack of remorse. All these things emerge clearly from the facts set out earlier.

There had to be a severe sentence. What tipped the scales towards life imprisonment was the interests of the community. The Judge rightly said that those interests should never be over-emphasised, but also that they cannot be ignored. The evidence was that there was very little hope of rehabilitation and the community was entitled to protection against persons such as the appellant. In those circumstances a life sentence was

the only appropriate sentence.

Mr Saner, for the appellant, contended that the trial Judge had misdirected herself as to the unanimity of view of the three experts in the following passage:

> "In considering an appropriate sentence, I cannot ignore the unanimous view of both the psychiatrists and the psychologist, that you are a danger unto yourself and to society. I cannot ignore the fact that they perceive you as a person who will repeat your conduct, and that given a similar situation, it is probable that you will act in the same way. I cannot ignore the evidence that even if you should get treatment, the prognosis is extremely poor."

The statement that there was agreement as to the poor prognosis, even with treatment, is, I think, a fair reflection of the evidence. But it is not correct that Lay is to be included among the number who are said to have stated that the appellant is a

danger to

society or that it is probable that he will repeat his conduct, given a similar situation. He did not take an opposite view but said that he could not express an opinion. As far as Teggin and Jedaar are concerned it is correct that they were of the view that the appellant is a danger to society. But it was an exaggeration to say that they expressly stated that it is probable that he will repeat his conduct, given similar circumstances. Accordingly a distinct measure of misdirection has been established.

We are therefore at large as far as sentence is concerned. In deciding what the appropriate sentence is I shall confine myself to the weight to be attached to the public interest as I do not consider that the judgment a quo is open to criticism in any other respect.

I accept the evidence of Teggin and Jedaar that the appellant is a

danger to society. There is ample evidence to support that conclusion. The brutal and protracted attack upon a defenceless girl speaks for itself. The lack of remorse, associated as it is with an almost total lack of insight into the feelings of others is baleful. Particularly striking, to my mind, is the casual manner in which the appellant eventually returned the complainant home as if nothing had happened or was going to happen, and his attempts at Valkenberg to shift the blame from himself to her. To say that he is a danger is not to say that he will necessarily repeat his conduct or even that it is probable that he will do so. To my mind the danger of repetititon is real. It was argued that it is very unlikely that the circumstances preceding the attack will be repeated. That may be. But what is not improbable is that he will again be presented with real

or imagined abandonment, which, on the evidence, may lead a person with borderline personality disorder to frantic and impulsive action (including violence) in order somehow to avoid this state. To this must be added that the prognosis is poor, so that his bpd is likely to remain with the appellant.

On the other hand, the evidence is that the adverse manifestations of bpd tend to abate with age. Also, the appellant may have learned something from his incarceration in Valkenberg and in prison. These facts may ameliorate the danger to the public but they do not have the effect, in my opinion, of altering the situation, that the danger is real.

The interests of the public have to be weighed against all the other factors, which I need not set out again. This does not necessarily entail

that a sentence should always be somewhere in the middle. If it were otherwise there would never be room for a life sentence. Having weighed all the factors I consider that the seriousness of the offence that may be repeated and the real danger that it will be are of preponderating weight so that the appropriate sentence is life imprisonment. Accordingly, if regard be had only to the evidence led at the trial, the appeal should fail.

The question then is whether the post-sentence evidence heard by the trial Judge affects that conclusion. No further findings were made by her on this evidence and we do not know whether it would have altered her original views.

Before entering upon this additional evidence I would make some

comments about whether it should have been allowed at all. The defence was allowed to call mr Collis, a clinical psychologist, and Major Borchardt, head psychologist at Pollsmoor prison. Thereafter the State recalled dr Jedaar and mr Lay.

Mr Collis made an affidavit in support of the application to lead further evidence. The thrust of it was that the experts at the trial had misdiagnosed the appellant's condition. In truth it was not bpd but something called attention deficit hyperactivity disorder (hereinafter "adhd"). He had diagnosed this state as far back as 1990 and the appellant had responded positively to the drug treatment which he had prescribed and which been administered for a month or two. The beauty of this diagnosis was that it much increased the prospects of successful

treatment and therefore of rehabilitation. Mr Collis also said that he had established a good and trusting relationship with the appellant in 1990. The three earlier experts had all stressed how difficult it was to establish such a relationship with him, which relationship was the foundation for successful psychotherapy. It also appeared that the appellant's attorneys had obtained a report from Collis but that for reasons unknown to him he had not been called as a witness.

Borchardt's supporting affidavit reflected that he had been counselling the appellant for about six months in gaol, that his insight was improving, that there were signs of remorse and that he was a good psychotherapeutic subject with a good prognosis. His diagnosis was bpd with narcissistic traits with a possible histrionic element (thus

substantially agreeing with the three experts and disagreeing with Collis's diagnosis of adhd). Both Collis and Borchardt appeared to proceed from the premise that the three experts had diagnosed psychopathy, which was not the case.

The appellant's parents made a joint affidavit saying that their absence from the trial was not the result of disinterest, but of Mr van Niekerk's insistence that it was in the best interest of the appellant that they neither attend the trial nor give evidence.

In R v Carr 1949 (2) SA 693 (A) at 699 Greenberg JA said:

> "[I]t must be emphasised that the inadequate presentation of the defence case at the trial will only in the rarest instances be remediable by the adduction of further evidence at the appeal stage. However serious the consequences may be to the party concerned of a refusal to permit such evidence to be led the due administration of justice would be greatly

prejudiced if such permission were lightly granted."

This passage was cited with approval by Hoexter JA in S v Louw 1990(3) SA 116 (A) at 123 H-I That learned judge went on to point out that before further evidence would be allowed on appeal, certain initial requirements had to be satisfied, the very first of which was that some explanation must be offered which the Court regards as reasonably sufficient to account for the fact that the evidence in question was not given at the trial (at 123 J - 124 A).

In Deintje v Gratus &Gratus 1929 AD 1 at 6 de Villiers ACJ adopted the rule which had earlier been enunciated by Lord Chelmsford:

> "It is an invariable rule in all the Courts, and one focused on the clearest principles of reason and justice that if evidence which either was in the possession of the parties at the time of a trial, or

by proper diligence might have been

> obtained, is either not produced or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial."

That passage was approved in Staatspresident en 'n Ander v Lefuo 1990 (2) SA 679 (A) at 691 H-I.

In Simpson v Selfmed Medical Scheme and Anoter 1995 (3) SA 816 (A) at 825 A-B Hoexter JA reaffirmed that a Court will be particularly chary of granting an application to produce fresh evidence where the evidence sought to be brought forward involves points contested and decided upon at the trial.

In considering the application to lead further evidence the Judge below referred to the requirements set out in S v de Jager 1965 (2) SA 612 (A) at 613 C-D (reasonably sufficient explanation why the evidence

was not led before, prima facie likelihood of its truth and material relevance to the outcome of the trial) and expressed the view that each had been met. In so holding she conceded that she was "perhaps stretch[ing] the guidelines somewhat." Her reason for doing so was that there was before her a young man whose life lay in tatters, and if she did not allow his application "there may well be a terrible miscarriage of justice." I respect the sentiment even though I do not think that the criteria have been met in both cases.

The admission of Borchardt's evidence was opposed by the State on the ground that it related to events that occurred after sentence had been passed. The general, if not necessarily invariable, rule is that an appeal court decides whether a judgment appealed from is right or wrong

according to the facts in existence at the time it was given and not according to new circumstances which came into existent afterwards: Goodrich v Botha and others 1954 (2) SA 540 (A) at 546 A. This is true also where sentence is concerned: R v Hobson 1953 (4) SA 464 (A). But new evidence that casts light on facts that did exist at the time of judgment may fall into a different class:R v Verster 1952 (2) SA 231 (A) at 236 A-B. One of the issues before the Court a quo was the reformability of the appellant and it is arguable that that part of Borchardt's evidence that deals with that issue is admissible. Whether a court should allow further evidence of this kind, in the exercise of its discretion, raises questions of policy. The trial Judge justified the calling of Borchardt by saying that none of the three experts had had the

opportunity of treating the appellant and seeing how he responded to counselling and therapy. The implications of this reasoning are far- reaching. Carried to its conclusion it would mean that in every similar case, up to the point that the appeal has been finally disposed of, it would be possible to present the court of appeal with a commentary on how the prisoner is faring and progressing in gaol. This is not our procedure, and there would be no end to it if it were. The prognosis must be established at the trial, and if more time is needed to establish it, the Court should be requested to grant time. For these reasons I doubt the correctness of the decision to allow Borchardt's evidence.

The case of Collis is much simpler. That part of his evidence which dealt with the Appellant's amenability to and reaction to treatment

was available at the trial. A decision was taken not to call him. It seems to me that the remarks of Greenberg JA in Carr's case are directly apposite. The trial Judge recognized that Collis' evidence had been available, but justified his being called after the trial, because, "this is an extraordinary case." This is no doubt a reference to the "exceptional case" envisaged by S 316 (3) of the Criminal Procedure Act 51 of 1977 ("the Act") or the "rarest case" envisaged by Greenberg JA I do not agree with the view expressed.

The other important part of Collis's evidence, if it were to be given, was that relating to his contrasted diagnosis - of adhd. That evidence also was available, as adhd had been diagnosed in 1990. Again, the evidence was not led. Instead the defence led an expert who

gave quite a different diagnosis, which accorded with that of the State experts. The matter of adhd was not canvassed with them. Had it been, as we know from Jedaar's later evidence, the diagnosis would have been contested. The Valkenberg team specifically looked for adhd but found it not to be present. Again, I do not think that the circumstances were so exceptional as to allow the fundamental issues in the trial - what was wrong with the appellant and what was his prognosis - to be tried de novo. So that in my opinion the defence should not have been allowed to call Collis.

Be all that as it may, the evidence of Collis and Borchardt, as also the further evidence of Jedaar and Lay, is before us. In terms of s 316 (4) of the Act it is deemed to be evidence taken or admitted at the trial.

That does not make it any less vulnerable to challenge than evidence led during the trial. Like that evidence, whatever the trial judge has decided, if it is inadmissible it is inadmissible and if it is irrelevant it is irrelevant. I am prepared to assume that it was admissible and that it was relevant. That leaves over the question of weight. What does the additional evidence amount to?

We have no finding by the trial Judge as to what sort of witness Collis was. Being driven to the record, I am not impressed by him. Apart from evasion and signs of bias, he seemed to be unable to accept that the appellants' version had been rejected and that he had to express his opinion in the stark light of the complainant's evidence. Thus, for instance, his claim that the appellant was now showing remorse was

premised upon the appellant's assertion that he was not aware that she objected to what he was doing to her, and that he had not used assertion or force! Moreover, according to Collis, it was not the appellant's intention to harm her. That would not have been consistent with his temperament, which is not violent! During his evidence the appellant had sought to explain his conduct as being part of a "game" - pushing the complainant to see how far she would let him go. "The motive here" said Collis "was not to harm or injure, but was rather, as he put it himself, a game, simply a challenge. But I don't think he was irresponsible outside of the occasion of the crime." It is difficult to take this at all seriously. Yet it is developed further into the two moods theory. On the night of the rape the appellant was not in his gentle

mood, so that he did what he did. But when he is in his gentle mood he shows empathy. And when he is not, what then? An so on.

Basic to Collis's prognosis is his adhd diagnosis. According to him there is "no need" to see the appellant's symptoms as adding up to bpd. He would "prefer" not to interpret them in that way. From a therapist's point of view and that of his clients that may be so. Adhd is treatable by means of drugs and therapy and the prognosis is fairly good. Although he does not use the word it is clear that Jedaar sees a diagnosis of adhd in an adult as being frequently a "soft" one. It is a more welcome diagnosis, and is, in his view over-diagnosed, even abused as a diagnosis. In the appellant's case he disagrees with Collis and stands by his original diagnosis. So does Lay. At Valkenberg they looked out

for adhd and found it not to be present. As they stressed, the appellant is an adult, and in the case of an adult bpd was the most appropriate diagnosis.

Collis ventured that the Valkenberg interviews were not best designed to bring out the inward goodness in the appellant. The person under observation is not under treatment with drugs, and he may find the atmosphere threatening, so that his gentler side is not displayed. If this be so then it seems that much of the procedure for referral for observation is pointless.

He was cross-examined in detail as to whether the criteria for bdp were not in fact present. Without going into detail I may say that he came off a bad second.

He placed stress on the fact that the appellant has, so he says, developed a trustful relationship with himself and two prison psychologists. He was cross-examined, again at some length, to show how, in many instances, the appellant had been dishonest with him and had indeed manipulated him. He resisted the cross-examination valiantly but not effectively.

At the end he was unable to explain the crime consistently with his diagnosis. He conceded as much. Nonetheless he was not prepared to accept Lay's theory, in terms of which Lay claimed to explain it consistently with a diagnosis of bpd. Lay's theory in short is, that after all the rejection and humiliation which he had suffered on the previous day, his conduct towards the complainant was a reprisal aimed at

restoring his battered ego. To my mind this accords well with a classic behaviour pattern of a bpd sufferer and the facts of the case.

Collis was of the view that the appellant would not re-offend and was not a danger to the public. This view was based on his diagnosis of adhd, which I do not accept to be the correct diagnosis.

Much to be preferred is the evidence of Jedaar and Lay. Their prognosis remains "guarded". They are of the opinion that there is no genuine remorse, and that apparent improvements in insight are most probably the product of manipulation. They stand by their original diagnosis and prognosis.

As far as Borchardt is concerned, they consider that there is no evidence of real personality change, and that in any event

the period of

observation is too short to arrive at a reliable conclusion as to such change. They suspect that much, at least, of the apparent improvement is due to manipulation by the appellant, something he had admitted to practising in the past. His motive to manipulate and to feign insight and remorse is a strong one. I accept their evidence. Borchardt's evidence, on the other hand, does not impress me, mainly because of his readiness to seize on hopeful signs without sufficient attentiveness to negative factors. To quote his own words "I tend to look at my patient as though he is a favourable candidate for psychotherapy and as though he will improve . . .". Admirable no doubt from a therapist's point of view, but to be treated with caution when the interests of the appellant and of the public are weighed against each other. Nor does he seem to attach

sufficient importance to the fact that the appellant does not always tell his therapists the truth.

In the result, I do not think that the further evidence advances the appellant's case to any significant degree.

During argument in this Court one of its members raised the question whether, because of the existence of the issue as to the appellant's reformability, s 286 A of the Act should not have been utilized. The section, which came into force on 1 November, 1993, sets out a procedure which may culminate in a court declaring an accused "a dangerous criminal." The court has a discretion to set the procedure in motion after conviction, either mero mofw or in response to an allegation that the accused is a dangerous criminal. In terms of s 286 B, once an

accused has been subjected to such a declaration he is sentenced to imprisonment for an indefinite period. At the same time the court orders that he be brought before it again after a stated period. Upon his reappearance the court has a wide discretion: to impose sentence in the usual way, to impose a further indefinite period of imprisonment, to convert the sentence to correctional supervision or release the prisoner, either conditionally or unconditionally.

The procedure was designed for persons suffering from psychopathy and related disorders. On the face of it a resort to these two sections might well have been appropriate to appellant's case. But the matter has not been explored in the Court below. Neither of the parties asked for it. The learned Judge may have considered it and may have

regarded it as inappropriate. We do not know. If we were to refer the matter back for the application of the sections to be considered, there is no knowing whether they will be utilized, as the discretion is that of the trial Judge.

The potential advantage which the sections confer on an accused is that instead of his sentence being finally determined (as far as the courts are concerned) he has the prospect that after serving the initial period there may be some amelioration of his sentence. He may even gain his release. It seems to me that before these advantages were to be gained, absent an iniative by the Court, they had to be asked for by the defence. Litigation must have an end. I do not consider that it is in the interests of the administration of justice that the trial be started up yet

again. Moreover, we do not know why the defence did not seek to resort to the sections. For all we know there was a deliberate decision not to do do. The way that Teggin's evidence was presented suggests that the defence was hoping to escape gaol altogether. We simply do not know. No attempt has been made to present evidence motivating a referral back. Indeed, as I have said, the matter was raised for the first time by a member of this Court. The absence of motivation is a further reason why I consider that we should not refer the matter back to the trial Court to consider the application of S 286 A.

I would dismiss the appeal.

W P SCHUTZ

JUDGE OF APPEAL