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

THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO 469/2007

In the matter between

W.N. **Appellant**

and

THE STATE **Respondent**

Coram: **Cameron, Maya et Cachalia JJA**

Heard: **19 FEBRUARY 2008**

Delivered: **28 MARCH 2008**

Summary: Sentence – appeal against effective sentence of six years' imprisonment imposed on 17 year-old boy on conviction of rape of fellow pupil – correctional supervision not appropriate in the circumstances – majority finding custodial sentence under s 276(1)(*i*) of Act 51 of 1977 appropriate – appeal allowed – order in para [46].

Neutral citation: This judgment may be referred to as *N. v The State*

(469/2007) [2008] ZASCA 30 (28 March 2008)

JUDGMENT

MAYA JA /

MAYA JA:

[1] The appellant was convicted of rape in the Regional Court, East London (Mr IJC Kitching) and sentenced to undergo ten years' imprisonment of which four years were conditionally suspended. An appeal against both the conviction and sentence was dismissed by the Grahamstown High Court (Froneman J, Mathee AJ concurring). With the leave of that court he appeals further but only against sentence.

[2] The essence of the appellant's attack on the sentence in this court is that the magistrate's rejection of correctional supervision without a full investigation of the practical circumstances relating to such possible option was a vitiating, material misdirection and that the sentence is so excessive that it induces a sense of shock.

[3] The events giving rise to the charge are these. The appellant and the complainant, both aged 17 years, attended the same high school and were friends. They lived in the same neighbourhood, about 300m apart, and occasionally walked together from school. Sometimes the appellant visited the complainant at her home where she lived with her mother and a younger sister.

The complainant had previously suffered serious psychological problems seemingly arising from her parents' divorce and her mother's liaison with another man. She had even attempted suicide and consequently received treatment for depression, a fact which she had confided in the appellant.

[4] The appellant, on the other hand, was a highly popular and confident pupil held in high esteem for his prowess at sport and hard work at his studies by teachers and fellow scholars alike at his school. His mother had, in 2003, left the country to pursue a nursing career in the United Kingdom leaving the appellant and his siblings in their father's care. A decision was, thereafter, taken to relocate the entire family to the United Kingdom. The appellant's father had recently joined his wife there, leaving the children with their grandfather, to follow in due course, when the rape occurred.

[5] Shortly before 20h00 during the evening of 5 July 2004, the complainant was visiting a girlfriend's home when she received a message from the appellant on her cellular phone asking her to come to his house as he 'needed to talk'. Against the advice of her friend and her mother, who did not consider it safe to go out so late, she went to see him. Her mother had relented but requested her to return home by 22h00. It is during that visit that the appellant assaulted the complainant into submission and raped her in his room despite her protestations. Thereafter he drove her home in his parents' motor vehicle. Afraid to disclose her ordeal to her mother for fear of censure, the complainant merely called out to her that she was home. She washed her bloodied underwear and pants. The appellant sent her another message telling her that she should not get excited as there was nothing in it for her and that he did it to make her happy. Overwhelmed by these events, she cut her wrist with a razor and took an

overdose of pills but, fortunately, suffered no serious harm.

[6] She reported the incident to her friend on the following morning. She was distraught and, at the friend's urging, she told her mother that afternoon that she had been raped. A subsequent medical examination revealed that in addition to neck bruises, her hymen was freshly torn and that she had sustained injuries to her genital organs which were consistent with forced penetration. The matter was reported to the police and the appellant was then arrested.

[7] Upon his conviction, two pre-sentence reports were obtained in respect of the appellant from a probation officer and a correctional officer. Both social workers reported that the appellant showed no remorse for his action as he denied guilt. In the correctional officer's opinion, the appellant seemed to have no 'insight into the extent of harm he has inflicted on the victim' and she concluded that he would not benefit from correctional supervision. According to the probation officer's report the appellant refused to cooperate with her stating that 'he has already informed the court [and] refused to repeat the same thing'. Her recommendation was that a sentence of imprisonment would be appropriate because of the seriousness of the crime but that the appellant could be 'referred to correctional supervision for assessment' if the court was so minded.

[8] The magistrate rejected the option of correctional supervision and the suspended sentence requested by the appellant's representative. He concluded that a term of direct imprisonment, which would have been higher than the one he imposed but for the appellant's young age, was the only suitable sentence in the circumstances.

[9] The basis of the appeal against this conclusion in the court below was that the magistrate erred in accepting the recommendations against correctional supervision in the pre-sentence reports which were premised on the appellant's refusal to admit his guilt even after conviction. Whilst the contention found favour with the court below, the court nonetheless found that the magistrate had given 'proper, serious and anxious consideration' to the appellant's personal circumstances and held that there were present in the matter, other factors which justified the sentence imposed by the magistrate, including the possibility of the appellant continuing to live in close proximity to the complainant which would be intolerable to her, the seriousness of the offence, the appellant's lack of remorse and the apparent lack of suitable persons to oversee a correctional supervision program in view of his family's relocation.

[10] In this court, it was contended that the reasons cited by the court below for upholding the magistrate's decision did not warrant the rejection of correctional supervision, particularly as the practicalities of such a sentence were never investigated, and that the sentence imposed by the magistrate was, in any event, excessive. It was further argued that the magistrate had materially misdirected himself in the exercise of his sentencing discretion by concluding, first, that the social workers found the appellant to be an unsuitable candidate for correctional supervision when the correctional officer had, in fact, not ruled out the possibility of an exploration of this option and then blindly following that recommendation without exercising his own discretion by considering whether or not the option of correctional supervision was viable. It was urged upon us that any custodial sentence would be inappropriate and that only correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977 (the Act) would be the suitable sentence for the appellant.

[11] The well-established test for interference with a sentence on appeal was restated by this court in *S v Malgas*[1] where Marais JA said:

'A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh … However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial court … when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'.

[12] It should be said at the outset that although the magistrate clearly gave due consideration to the findings set out in the pre-sentence reports relating to the appellant's personal circumstances, he misconceived the import of the probation officer's recommendation. Whilst the probation officer obviously had misgivings about the appellant's attitude towards the offence, she nevertheless did not reject correctional supervision as a sentencing option. Furthermore, as the court below pointed out, the magistrate's seemingly unquestioning reliance on a negative recommendation in the reports based on the appellant's persistent denial of his guilt was another misdirection on his part. I would add that the reference by the court below to the absence of the appellant's family from the country (and hence a lack of supervision) as a further reason for doubting the propriety of a non-custodial sentence was, in my view, wrong. Evidence showed that he had been left in the care of family friends and his grandfather and

[1] 2001 (2) SA 1222 (SCA) para 12.

remained close with his family despite the distance.

[13] That said, however, it must be borne in mind that an error committed by a court in determining or applying the facts for assessing the appropriate sentence does not necessarily spell the end of the enquiry. A mere misdirection is not by itself sufficient to entitle the appeal court to interfere; it must be of such a nature, degree or seriousness that it shows directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably such as to vitiate its decision on sentence.[2] Assuming, without deciding, that the misdirections are not of a vitiating nature when proper regard is had to all the relevant factors, it must nonetheless be considered whether the sentence was appropriate in the circumstances of the case.

[14] The submissions advanced on the appellant's behalf for a non-custodial punishment were based on a principle prescribed by various relevant international instruments dealing with the administration of child justice[3] and the provisions of s 28(1)(g) of the Constitution[4] which a court sentencing a child is enjoined to consider in addition to the traditional aims and elements of sentencing. Further to these legal instruments is the Child Justice Bill on juvenile justice drafted by the South African Law Commission Project Committee on Juvenile Justice (Project 106).[5]

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[2] *S v Pillay* 1977 (4) SA 531 (A) at 535E-G; *S v Siebert* 1998 (1) SACR 554 (A).

[3] The United Nations *Convention on the Rights of the Child* (1989) ratified by South Africa on 16 July 1995; The United Nations *Guidelines for the Prevention of Juvenile Delinquency* (1990) (The Riyadh Guidelines); The United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* (1985) (The Beijing Rules); The United Nations *Rules for the Protection of Juveniles Deprived of their Liberty* (1990) and the *African Charter on the Rights and Welfare of the Child* ratified by South Africa on 7 January 2000.

[4] In terms of s 28(1)(g) '[e]very child has the right not to be detained except as a measure of last resort, in which case … the child may be detained only for the shortest appropriate period of time'.

[5] This Bill was released in the National Assembly in August 2000 and its explanatory summary published in Government Gazette No 23728 of 8 August 2002. Its recommendations have not yet been adopted by Parliament.

[15] The fundamental principle in these instruments is that a child[6] offender should not be deprived of his or her liberty except as a measure of last resort, for the shortest appropriate period[7] and where detention is unavoidable, it must be individualised with the focus on the child's rehabilitation. In addition to these guiding standards, the sentencing court must take into account the child's best interests in accordance with s 28(2) of the Constitution.[8] Notably, regardless of the requirement of limited use of deprivation of liberty, the trite principle of proportionality, which is now required by the Constitution itself, namely that the sentence imposed must fit the nature and seriousness of the offence of which the accused was found guilty and must be fair to both the offender and society, is also applicable to child offenders.[9]

[16] In *DPP, KwaZulu-Natal v P*[10] this court, determining an appropriate sentence in respect of a 12 year-old girl convicted of murdering her grandmother, highlighted the fact that the Constitution and the international instruments do envisage imprisonment of children who have been convicted of serious and violent offences. Mthiyane JA said:

'It must be remembered that the Constitution and the international instruments do not forbid incarceration of children in certain circumstances. All that it requires is that the 'child be detained only for the shortest period of time' and that the child be 'kept separately from detained persons over the age of 18 years'. It is not inconceivable that some of the courts may be confronted with cases which require detention. It happened in the United Kingdom not so

[6] A 'child' is defined in s 28(3) of the Constitution as 'a person under the age of 18 years'.
[7] What 'the shortest possible period' can be decided only on a case by case basis having regard to the requirement of an individualised, tailor-made sentence for each offender.
[8] Section 28(2) of the Constitution decrees that '[a] child's best interests are of paramount importance in every matter concerning the child.'
[9] See *S v Kwalase* 2000 (2) SACR 135 (C) at 139e-f; *S v Brandt* 2006 (1) SACR 311 (SCA); *DPP, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA) para 16.
[10] 2006 (1) SACR 243 (SCA) para 19.

long ago in the case of *R v Secretary of State for the Home Department, Ex Parte Venables; R v Secretary of State for the Home Department, Ex Parte Thompson* [1997] 3 All ER 97 (HL) where two boys aged ten were convicted of the murder of a two-year-old boy in appalling circumstances [and] they were sentenced to ten years.'

[17] With that background in mind, I must determine what an appropriate sentence is, in this particular case of rape, for an industrious 17 year-old youth with a clean record, raised in a stable, religious and relatively privileged family environment.

[18] Precisely what does correctional supervision entail and is it an appropriate sentence in the circumstances of this case? Section 1 of the Act defines this form of sentencing as 'a community-based punishment' which has been interpreted to mean a form of punishment executed within the community and in co-operation with and/or to the benefit of the community.[11] It encompasses a wide range of measures executed within the community such as house arrest, community service, monitoring, rehabilitation programmes etc.[12] Its value lies mainly in that it is lighter than direct imprisonment and offers an offender an opportunity of remaining within the community without the negative influences of prison whilst serving a substantial punishment. These features render it especially useful in the case of child offenders as it emphasizes the rehabilitation of the offender and allows for an individualised punishment.

[19] Section 276A sets out the procedure to be followed by a court imposing

[11]SS Terblanche *A Guide to Sentencing in South Africa* 2 ed p 281.
[12]*S v R* 1993 (1) SACR 209 (A) at 220h.

correctional supervision. The relevant provisions thereof read:

'(1) Punishment shall only be imposed under section 276(1)(*h*) –

(a) after a report of a probation officer or a correctional official has been placed before the court; and

(b) for a fixed period not exceeding three years…

(2) Punishment shall only be imposed under section 276(1)(*i*) –

(a) if the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not exceeding five years; and

(b) for a fixed period not exceeding five years.

(3) …

(4) …'.

[20] Correctional supervision under s 276(1)(*h*) is, therefore, an appropriate sentencing alternative in cases where direct imprisonment of more than three years is not necessary.[13] In *S v Ingram*[14] this court said:

'As correctional supervision under s 276(1)(*h*) can … only be imposed for a period not exceeding three years, it is not a sentence that readily lends itself to the very serious category of crimes (which would normally call for higher sentences) and should therefore not be too lightly imposed in such cases.'

[21] The more stringent option in terms s 276(1)(*i*) provides for imprisonment from which the prisoner can be released on correctional supervision by the Commissioner or parole board without the court's further involvement. As

[13] See, for example, *S v Nel* 1995 (2) SACR 362 (W) at 366H per Streicher J.
[14] 1995 (1) SACR 1 (A) at p 9e-f.

regards its nature and effect, the comments of this court in *S v Scheepers*,[15] dealing with sentence in a matter involving two counts of theft of R130 and R1 000, are apposite. This court said:

'[Section] 276(1)(*i*) … permits the discretionary conversion of the prison sentence into correctional supervision. The particular advantage of s 276(1)(*i*) should always be in the foreground when the sentencer considers that a custodial sentence is essential, but *the nature of the offence suggests that an extended period of incarceration is inappropriate*. In such cases, s 276(1)(*i*) achieves the object of a sentence unavoidably entailing imprisonment, but mitigates it substantially by creating the prospect of early release on appropriate conditions under a correctional supervision programme.' (Emphasis added.)

[22] It must be pointed out that in that case the trial court did not consider the nature of the offence to warrant imprisonment; the custodial sentence was necessitated by the accused's previous convictions.

[23] Despite the apparent advantages, it has often been cautioned by the courts that the imposition of correctional supervision should be exercised with care, to maintain its credibility,[16] and certainly not where the crime is too serious. In *S v Blank*[17] E M Grosskopf JA stated:

'The Legislature set limits of three and five years respectively in the case of sentences [of correctional supervision] under paras (*h*) and (*i*). These cut-off points are significant. They give an idea of the seriousness of the crimes for which these sentencing options would be appropriate. But in the same way as the Appellate Division emphasised in *Van Vuuren's* case [1992 (1) SACR 127 (A)] that the options constituted by those paragraphs should be used in appropriate cases, so a court should not be seduced by the availability of these new options to

[15] 2006 (1) SACR 72 (SCA) paras 9-10.
[16] See *S v Sinden* 1995 (2) SACR 704 (A) at 708c-i*; S v Farmer* 2001 (2) SACR 103 (SCA) para 11; *S v Schutte* 1995 (1) SACR 344 (C).
[17] 1995 (1) SACR 62 (A) at p 76d-e.

impose a sentence which would be unbalanced and inappropriate when proper regard is had to the (often competing) purposes of judicial punishment. In serious crimes, including crimes of the nature considered in *Van Vuuren's* case [theft of money], imprisonment also falls to be considered as an option and the more serious the crimes, the greater the possibility that imprisonment will be the only suitable sentence.'[18]

[24] Expressing the same views in a case involving the offences of murder, attempted murder and public violence, *S v Ningi*[19] Scott JA held:

'The question is, therefore, whether in all the circumstances a sentence of correctional supervision would be appropriate. It is unnecessary to repeat what has been said before of the advantages of correctional supervision. They are well known. What I think must be acknowledged, however, is that insofar as a first offender in particular is concerned and leaving aside for the moment the practicalities of administering a non-custodial sentence, whether correctional supervision as opposed to direct imprisonment is to be imposed must depend ultimately on the seriousness of the offence and the particular circumstances in which it was committed. This is so because, whatever its advantages, correctional supervision remains a lighter sentence than direct imprisonment. Any contention to the contrary I think would be unrealistic.'

[25] There are serious aggravating features present in the matter, which must be weighed against the factors favourable to the appellant. As regards the effect of the rape on the complainant who was a virgin at the material time, her drastic reaction – the attempt to kill herself, her relapse into depression, her inability to sleep and fear to sleep alone, the nightmares and the consequent fear of males – dispenses with the need to articulate the devastation wreaked by the excruciating rape she described, perpetrated by a trusted friend and confidant upon her.

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[18] See also *S v Volkwyn* 1995 (1) SACR 286 (A) at 289d-e; SS Terblanche *A Guide to Sentencing in South Africa* 2 ed pp 290-291.
[19] 2000 (2) SACR 511 (A) para 8.

[26] Although lack of remorse may not be taken as an aggravating factor, the appellant's conduct and attitude towards the incident and the proceedings that followed must certainly be considered in determining a proper sentence. It begins with the message he sent to the complainant after the rape which, in the circumstances, can only mean that he believed that he had somehow done her a favour. He did not stop at his ill-conceived attempt to escape criminal liability by denying any wrongdoing, but persistently exhibited an arrogant and unrepentant attitude which pervades the record and which his own counsel was constrained to concede – in the manner he responded to questioning during the trial, his blatant disdain for the pre-sentence investigation evidenced by his refusal to cooperate with the probation officer and his boorish conduct towards the complainant who testified, without challenge, that a few days before sentencing in the trial the appellant and his friends whistled and pointed at her in the street.

[27] To my mind, this shows clearly that the enormity of his deplorable deed and its horrible effect on the complainant simply never dawned on the appellant. It is, in my view, an extremely disturbing feature which inexorably draws one to question the mindset towards sexual violence in the home, the community and indeed the greater society from which the appellant comes.

[28] In addition to these aggravating factors is the nature of rape. In *S v Chapman*[20] this court described the offence as follows:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal

[20] 1997 (2) SACR 3 (SCA) at 5a-e.

invasion of the privacy, the dignity and the person of the victim. The rights to dignity, to privacy and the integrity of every person are basic to the ethos of the Constitution and to any defensible civilisation.'

Women in this country are entitled to the protection of these rights … The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.'

[29] In *S v Swart*[21] Nugent JA qualified these comments by observing that the court no doubt did not intend to suggest that the quality of mercy, an intrinsic element of civilised justice, should be altogether overlooked, but rather meant to emphasise that retribution and deterrence will come to the fore (and that the rehabilitation of the offender will play a smaller role) in relation to such serious crimes.[22] I agree with this qualification.

[30] Bearing in mind that a sentence does more than deal with a particular offender in respect of the crime of which he has been convicted – it constitutes a message to the society in which the offence occurred[23] – the interests of society must thus also be taken into account. The sense of outrage justifiably roused by the offence of rape in the right thinking members of a South African society in which sexual violence is so endemic and hardly shows any sign of abating, must, in my view, be a critical factor in the imposition of a suitable sentence here.

[31] Having said that, it is well to bear in mind that too harsh a punishment serves neither the interests of justice nor those of society. Neither does one that is too lenient. Courts should therefore strive for a proper balance that has due

[21] 2004 (2) SACR 370 (SCA) at para 17.
[22]See also *R v Karg* 1961 (1) SA 231 (A) at 236A-C; *S v Williams* 1995 (3) SA 632 (CC) para 87; *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at p 519d-e.
[23]*S v Sinden* supra at 709b-c.

regard to all the objects of sentencing. A proper balance of those objects in this case informs me that the interests of society – these include the interests of the complainant, herself a child when violently introduced into womanhood by the appellant, which very nearly ended her life, who must now pick up the pieces and contend with the adverse and obviously long-term psychological and emotional consequences of the rape – and the nature and gravity of the offence demand that the elements of retribution and deterrence must take precedence over the appellant's interests, including his young age. An extended custodial sentence is, without doubt, the only appropriate punishment.

[32] As to the suitability of correctional supervision, it appears clearly from the authorities dealing with correctional supervision set out above, regardless of the fact that none of them dealt with the offence of rape committed by a child offender,[24] that correctional supervision is woefully inadequate in this case. It lacks the appropriate punitive impact demanded by the gravity of the offence and does not carry the requisite strong deterrent message to other would-be rapists in the community that rape is repugnant and shall be severely punished no matter who commits it. This, in my judgement, includes the option under 276(1)(i) which, as indicated above, although also aimed at serious crimes, excludes very serious crimes, which rape is, by its limit in duration.[25]

[33] I am satisfied, taking all relevant considerations into account, that whilst

[24]In *Kwalase*, the High Court substituted a sentence of twelve months' correctional supervision under (i) for one of three years' imprisonment with 18 months thereof conditionally suspended imposed by a magistrate on a boy aged 15 years, 11 months with a previous conviction of housebreaking and theft, who expressed remorse and pleaded guilty to the offence of robbery of goods which were immediately recovered by the police. In *Brandt* this court substituted a sentence of 18 years' imprisonment for life imprisonment imposed on a young offender for the murder of an elderly woman he had committed at the age of 17 years, seven months. In *DPP, KZN v P* – the facts are discussed at para [16] – this court expressed a strong view contrary to that of the High Court, which had imposed a sentence of 36 months' correctional supervision under (*h*), that the murder warranted a prison term for the 14 year-old girl but because it was too late to impose it in the circumstances of the case, substituted the sentence imposed by the High Court with a conditionally suspended seven year-term of imprisonment and 36 months' correctional supervision under (*h*).

[25] According to SS Terblanche *A Guide to Sentencing in South Africa* 2 ed pp 252-253, this form of sentencing is appropriate where correctional supervision is considered insufficient punishment, but imprisonment of longer than five years is unnecessary.

undoubtedly a robust punishment, the effective sentence of six years' imprisonment imposed by the magistrate is fitting in the circumstances of the case and will not deny the appellant the possibility of rehabilitation. The appeal should, therefore, fail.

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MML MAYA

JUDGE OF APPEAL

CAMERON JA:

[34] My colleague Maya JA has set out the facts and her reasoning with fair-mindedness and care, for which I am grateful to her. Only after hesitation do I differ from her conclusion that the appeal against the six-year effective sentence must fail.

[35] As Maya JA indicates (para 12), there are cognisable errors in the regional magistrate's approach to sentencing the appellant. Principal is that he thought both pre-sentence reports shut the door on correctional supervision, when only one did. This attenuation of the options he conceived as available to him in my view entitled the high court to intervene, should it have been minded to; and now entitle this court to do so. But the high court considered despite the magistrate's mistake that six years' imprisonment was right for what the appellant did, and Maya JA agrees. With deference to the care with which my colleagues in each instance have come to that conclusion, I cannot share their view.

[36] The appellant's crime was horrible. Maya JA's exposition (paras 25ff) if anything grants him the benefit of understatement. He preyed on his school-

friend, a vulnerable young girl with a history of instability, who had drawn close to him and looked to him for the respect and support she was entitled to seek in friendship. Instead, he took by force from her ultimate sexual intimacy after she refused to grant it. He did so in a wilful act of domination and bodily intrusion that left her physically bruised and psychically shaken. And some of his actions afterwards displayed a bare arrogance that makes it hard to warm to him as a sentencing subject.

[37] But that it is hard to say anything in his favour does not mean that there is nothing. His crime was unplanned. It seems to have stemmed from a terrible, but impulsive, error of judgment. The magistrate rightly observed in his judgment:

'Here I can state that your initial intentions perhaps were not to rape this young girl, but to create an opportunity in your room where you could make some romantic advances to her, … to test the air so to speak. But alas, to your disappointment and surprise, she was totally unprepared and unwilling …'

And in the High Court Froneman J said:

'[W]hat appears to have been a budding and sensitive friendship went awfully awry during the evening of 5 July 2004'.

[38] And then, connected intricately with the 'awful awryness' and impulsivity of the crime, there is his youth. Three months before the rape, on 5 April 2004, he turned seventeen. Constitutionally, he was still a child.[26] What does this mean for sentence? Youth gives us no warrant to sentimentalise him or any other child. He was a fit and able young man, with the capacities of choice, who had earned the admiration of his peers and teachers through his achievements at school, but who on this occasion grossly violated another.

[26] Bill of Rights s 28(3): a child 'means a person under the age of 18 years'.

[39] But the clear constitutional injunction is that we must weigh in the mix the fact that he was only seventeen. Prison must therefore be a 'last resort'.[27] This bears not only on whether we choose prison as a sentencing option, but on the sort of prison sentence we impose, if we must. So if there is a legitimate option other than prison, we must choose it; but if prison is unavoidable its form and duration should also be tempered. Every day he spends in prison should be because there is no alternative.

[40] Together with the magistrate, the judges in the High Court and Maya JA, I do not think that prison can be avoided. We were urged to send the matter back for the regional court to impose correctional supervision under s 276(1)(h) of the Criminal Procedure Act, 51 of 1977 (the Act). That would avoid prison altogether, and place the appellant (on good behaviour and under the threat of a suspended sentence) on a supervised community-related work scheme. I do not think we can. Every rape sentence sends a public message. This option would be so soft that its message would be misunderstood. It would enable the courts' seriousness in seeking to punish and deter rapes to be called into question.

[41] To this extent, the appellant must bear the brand and carry the burden of these times, in which rape is a mass circumstance – more than 50 000 were reported in 2004/5, the year of his crime (over 7 000 in the Eastern Cape).[28] The face of public policy, from the executive, the legislature and the courts, must be set unmistakably against its perpetration. Even for a child offender over 16 but not yet 18, where this court has held that the sentencing court 'starts with a clean slate', it must nevertheless take into account the weighting effect[29] of the

[27] Bill of Rights s 28(1)(g): every child has the right 'not to be detained except as a measure of last resort'.
[28] Statistics for April 2004 to March 2005 accessed on 26 March 2008 from http://www.saps.gov.za/statistics/reports/crimestats/2005/crime_stats.htm.
[29] *S v B* 2006 (1) SACR 311 (SCA) para 11, per Ponnan AJA for the court.

statutorily prescribed minimum sentences (ten years for rape by a first offender).[30] Pure correctional supervision cannot be.

[42] A prison sentence is therefore unavoidable. But what sort of prison sentence? Maya JA considers that six years, while robust, is fitting. I respectfully disagree. To me, that sentence disregards the youthfulness of the appellant when he committed the crime. It treats him too much like the adult he was not when he raped his victim. It may set him up for ruin, while foreclosing the possibility, embodied in his youth, that he will still benefit from resocialisation and re-education.[31] It fails to individualise the sentence with the emphasis on preparing him, as a child offender, for his return to society.[32] I would rephrase that: for his first entry into society, for a seventeen year old schoolboy in grade 11 has hardly entered society.

[43] In my respectful view, a five-year prison sentence imposed under s 276(1)(i) of the Act comes closer to doing justice.[33] It ensures that the appellant goes to jail. But the term he serves is variable, depending on his behaviour. He is incarcerated for a minimum one-sixth of the time imposed (ten months). Thereafter, he becomes eligible for the Commissioner of Correctional Services to place him out on correctional supervision. If his arrogant behaviour continues, he risks forfeiting that option, and serving his entire sentence. The sentence takes the matter out of the hands of the courts, and places it in his, and in the Commissioner's.

[44] Is this too soft? I cannot say No with any assurance. But I am less unsure that it may be too soft than I am sure that an undifferentiated sentence of direct imprisonment is too harsh. And if we are to risk erring at all, the

[30] Criminal Law Amendment Act 105 of 1997 s 51(2)(b), read with Part III of Schedule 2.
[31] *S v B* 2006 (1) SACR 311 (SCA) para 15.
[32] *S v B* 2006 (1) SACR 311 (SCA) para 19.
[33] Compare *S v Scheepers* 2006 (1) SACR 72 (SCA).

Constitution requires us to err by recognising the possibility of promise that may still flower from his youth, rather than fixing on the destruction that was immanent in his crime.

[45] It is true that if the rape had been committed just nine months later, the appellant would have been eighteen, and would not have had the benefit of any extra mercy. But it is at least equally true that if he had been just nine months older, he might not have made the awful error that led to his crime. That is the premise on which the Constitution differentiates him from older offenders. We distinguish child offenders from adults because we recognise that their crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error and to impulse. We recognise that imposing full moral responsibility for a misdeed might be too harsh. In that we allow them some leeway of hope and possibility. That is not maudlin or sentimental, but necessary if we are to have any belief in our future.

[46] In my view the appeal must succeed. The judgment of the High Court is set aside and in its place substituted an order allowing the appeal against the magistrate's sentence, and in its stead imposing the following sentence:

> 'Five years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act, 51 of 1977.'

E CAMERON
JUDGE OF APPEAL

CONCUR:

CACHALIA JA