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

REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF OF SOUTH AFRICA

APPEAL

REPORTABLE

Case number: 470/2007

In the matter between:

IZAK ANDREAS GELDENHUYS Appellant

and

THE STATE Respondent

CORAM: STREICHER, CAMERON, NUGENT, VAN HEERDEN JJA and KGOMO AJA

HEARD: 26 FEBRUARY 2008

DELIVERED: 31 MARCH 2008

Summary: Sexual Offences Act 23 of 1957 – constitutional validity of ss 14(1)(b) and 14(3)(b) of Act – distinction drawn between heterosexual and same-sex sexual activities by setting legal age of consent at 16 and 19 years, respectively, held to be unconstitutional – severance and reading-in so far as to make legal age of consent in respect of both heterosexual and same-sex sexual acts 16 years – qualified retrospectivity of the order of constitutional invalidity – appeal against conviction on six counts relating to same-sex sexual acts with boy over the age of 16 years but under the age of 19 years set aside, subject to confirmation by Constitutional Court of order of constitutional invalidity – appeal against convictions on four counts in respect of sexual acts at times when boy in question under the age of 16 years dismissed.

Neutral citation: This judgment may be cited as *Geldenhuys v The State* (470/2007) [2008] ZASCA 47 (31 March 2008)

JUDGMENT

VAN HEERDEN JA

Introduction

[1] During 2004, the appellant was charged, in the Regional Court held at Pretoria, with 13 counts of indecent assault. The complainant in respect of each of the first 11 counts was L B, born on 29 June 1983, while counts 12 and 13 related to A, L's younger brother by approximately seven years. The State withdrew count 5 on the first day of the trial and the appellant pleaded not guilty to all the remaining charges, his defence being a complete denial. On 9 February 2005, the appellant was found guilty of ten counts of contravening s 14(1)(b) of the Sexual Offences Act 23 of 1957 (the Act), viz the commission of indecent or immoral acts with L (the complainant), a boy under the age of 19 years at the relevant times. The regional magistrate, Mr Travers, acquitted the appellant on the two counts relating to the younger brother. On 8 July 2005, the appellant was sentenced to imprisonment of one year each on six of the ten counts and, on the remaining four counts, to imprisonment of 15 months each, the total term of imprisonment thus being 11 years.

[2] With the leave of the Regional Court, the appellant appealed to the Pretoria High Court against both conviction and sentence. On 21 November 2006, his appeal against conviction was dismissed (Hartzenberg J, Poswa J concurring), but his effective sentence was reduced to 7 years' imprisonment. The High Court granted leave to appeal to this Court against both conviction and sentence, but the appellant does not persist before us with his appeal against sentence.

[3] In heads of argument filed in the Pretoria High Court, the appellant raised a constitutional issue *in limine.* By way of a new ground of appeal, counsel for the appellant argued that, to the extent that s 14(1)(b) of the Act criminalises sexual intercourse and other sexual acts of one person with another where the latter (whether a girl or a boy) is 12 years or older and capable of forming an intention ("wilsvermoënd"), and who participates voluntarily in such sexual acts, the section constitutes unfair discrimination on the grounds of, inter alia, gender and/or sexual orientation in contravention of s 9(3) of the Constitution and is accordingly invalid. In

support of this argument, counsel contended that the South African common law recognises that a girl of 12 years or older, with the capacity to form an intention, can legally consent to sexual intercourse and that if she does so, her sexual partner is not guilty of rape. According to counsel, a 'necessary implication' of s 9(3) of the Constitution in this context is that boys of 12 years and older must have the same capacity to consent to sexual acts. Moreover, so the argument continued, to categorise voluntary sexual intercourse or any other sexual act by a girl or boy of older than 12 years, who has the capacity to form an intention, as 'immoral' or 'indecent' (the terms used in s 14(1)(b) of the Act) also constitutes unfair discrimination against such girls and boys in that they are not free to take their own decisions in regard to sexual activity. Further, as s 14(1)(b) criminalises the conduct of any person who engages in voluntary sexual intercourse or any other voluntary sexual act with such a girl or a boy, the section must of necessity constitute indirect discrimination against the former persons and is, for that reason also, constitutionally invalid.

[4] Although these constitutional arguments were trenchantly rejected by the Pretoria High Court, the appellant persisted with this ground of appeal before us and substantially (if not exactly) the same arguments were repeated in the heads of argument filed on behalf of the appellant in this Court. In view hereof, more than two months prior to the hearing of this appeal, this Court afforded the Minister of Justice and Constitutional Development, as the minister of state concerned with the administration of the Act, an opportunity to intervene in the appeal. The attention of the Minister was specifically drawn to a further question - arising from the constitutional issues raised by the appellant – as to whether the distinction drawn in s 14 of the Act, relating to the so-called 'legal age of consent' for sexual acts between persons of the opposite sex, on the one hand, and such acts between persons of the same sex, on the other, is constitutional. This question was also brought to the attention of both parties. Both the parties, as well as the Minister – if she decided to intervene – were requested to file heads of argument dealing with the constitutional validity of s 14 and indicating whether, in their view, evidence may assist this Court in arriving at a conclusion. In addition, notice of the proceedings was given to the *amici curiae* in *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC), namely Doctors for Life International, its legal representative (Mr JJ Smyth QC) in his personal capacity and

the Marriage Alliance of South Africa, as well as to the Lesbian and Gay Equality Project. The Minister subsequently intervened in this appeal and heads of argument dealing with the constitutional points were filed on her behalf, as also on behalf of both parties.

Appeal against convictions on counts 1-4

[5] According to the charge sheet, read together with the two sets of further particulars supplied by the State in terms of s 87 of the Criminal Procedure Act 51 of 1977, the dates on which and the places where the relevant different acts in respect of the four charges were allegedly committed were as follows: Count 1 – during January to April 1998, in an Elwierda tour bus at the Eastgate Airport, approximately 7 kilometres outside Hoedspruit, Mphumalanga; count 2 – during January to April 1998, in a room at the Casa Da Sol Hotel in Mphumalanga; count 3 – also during January to April 1998, in the appellant's car in the parking lot of the Corpus Christi Church in Elardus Park, Pretoria; count 4 – during October to November 1998, in the complainant's bedroom at his family home in Mirage Street, Elardus Park, Pretoria. As the complainant was born on 29 June 1983, he was 14 years old at the time of the acts allegedly committed in respect of the first three counts and 15 years old in respect of the act forming the basis of the fourth count. According to the charge sheet for each of the four counts, the appellant had indecently assaulted the complainant by masturbating him and enticing him to masturbate the appellant.

[6] It was common cause that, during 1997, the appellant – a qualified dentist who had been suspended from practice for three years (commencing in 1996) as a result of his conviction in 1991 on four counts of 'indecency' involving children – was employed by Elwierda, a tour bus company, as one of its drivers. In approximately July 1997, the complainant's mother (Mrs B) met the appellant while she was travelling on an evangelical tour, in an Elwierda bus, to Mozambique. After that, he became close friends with the family, often visiting their home. According to the complainant and Mrs B, the appellant slept over at their home quite frequently, usually in the youngest son's (A's) room where there were bunkbeds.

[7] The appellant was generous to the children, and to the complainant in particular, bringing them sweets and other gifts. The whole family was fond of the appellant, as he was of them. At that stage, the family was experiencing serious financial problems and the appellant lent not insubstantial sums of money to both Mr and Mrs B for various purposes. When he resumed practising as a dentist in Randfontein in December 1998, the appellant rendered dental services free of charge to one of Mrs B's friends, who was a single mother with three dependants. With the knowledge and approval of the parents, he sometimes took the complainant or A or both of them on various outings.

[8] The complainant testified that the indecent acts to which the appellant subjected him started at the end of 1997, when the complainant was 14 years old and in standard six. As far as count 1 is concerned, the complainant's evidence was that, some time during the period January to April 1998, the appellant had to drive a tour bus very late one night to Hoedspruit to pick up a tour group at the Eastgate Airport. The complainant accompanied him. They arrived at their destination in the early hours of the morning and, while they were waiting for the tour group to arrive, the appellant came to sit next to the complainant in the bus and once again started to touch his private parts on top of his trousers. The appellant then put his hand under the complainant's underpants and masturbated him. He then pulled open the zip of his own trousers, took out his penis, placed the complainant's hand on it and performed a masturbating action, with his hand over the complainant's. At some stage the complainant took his hand away but the appellant simply replaced it and the masturbation continued. This stopped when the tour group arrived and the appellant then drove the tour bus as the group was taken on a short tour through Mpumalanga.

[9] The events forming the basis of count 2 allegedly happened that same night. Because of some defect in the tour bus, the appellant and the complainant had to spend the night with the tour group at the Casa da Sol Hotel in Mpumalanga, while waiting for another bus to be sent. According to the complainant, he and the appellant had to share a room with a double bed, where appellant once again started fondling the complainant, putting his hand into the complainant's underpants and masturbating him. Thereafter, he placed the complainant's hand on his penis, and with his hand over

the complainant's hand, performed a masturbating action. This carried on until one of them ejaculated – according to the complainant, this was how it always ended.

[10] After this incident, the appellant gave the complainant money of between R50 and R200. The gifts of money had in fact started before the 'masturbation and everything' began. In his examination-in-chief, the complainant made the unsolicited comment, referring to the mutual masturbation, that 'it is a nice feeling, with that I am not going to quarrel'. Nevertheless, he felt heartsore and disturbed by what had happened. He was scared to tell his parents because he did not know how they would react and felt that they might be disappointed in him. His relationship with his parents at that stage was such that they did not really talk about sex and like matters, so he kept these things to himself. He found it much easier to talk to his friends about such matters. He stated that he was scared to say no to the appellant because he (the appellant) might then do something more serious to him. The complainant also expressed his belief that the main reason why he was not able to tell his parents about what was happening was the fact that the appellant gave him gifts of money after these incidents. He enjoyed being spoiled by the appellant, but this spoiling also made him feel that he was the guilty party. Under cross-examination, he conceded that he could have stopped these incidents at the outset, had he wanted to do so. Although he did not really know why he had not done so, this had all happened at a time when the family was suffering financially and he believed that the reason why he had kept quiet about it all was the money with which the appellant had 'bribed' him.

[11] As regards count 3, the complainant testified that during the period between January and April 1998, the appellant was teaching the complainant to drive at the parking area of the Corpus Christi Church in Elardus Park. The complainant was sitting in the driver's seat of the appellant's vehicle, with the appellant on the passenger's side, when the latter started to rub the complainant's trousers, so that he got an erection. The appellant then once again put his hand inside the complainant's underpants and masturbated him. There then followed the usual mutual masturbation, which ended when one of them ejaculated. They swapped seats and then returned to the complainant's parental home. According to the complainant, after the incident in the parking area of the church, the mutual masturbation happened frequently in the appellant's dental surgery, and also when they were going somewhere together. It was

always initiated by the appellant and, after each incident, the appellant gave money to the complainant and continued to spoil him.

[12] In respect of count 4, the complainant was studying at home for his end-of-year standard 7 examinations in October or November 1998. The appellant arrived at the house when only the complainant and the domestic worker were there. The appellant and the complainant socialised for a while and then started to play a game of chess in the complainant's bedroom. During the game, the appellant came to sit next to the complainant, he then put his hand into the complainant's pants and masturbated him. Once again the mutual masturbation ensued until the complainant ejaculated. While this was happening, the domestic worker was busy with tasks in and outside the house.

[13] There were several other instances of mutual masturbation thereafter which eventually graduated to full anal penetration on more than one occasion. By that stage though, the complainant had already turned 16. In the light of the conclusion that I have reached on the constitutional challenge to s14(1)(b) of the Act, those allegations need not detain us any further.

[14] The last sexual 'encounter' between the two of them occurred, according to the complainant, in September 2001, when the appellant accompanied the complainant and the latter's brother A to the Aardklop Festival in Potchefstroom. They spent the whole day at the festival, returning to the appellant's flat in Randfontein, where they spent the night. It would appear that this encounter at the appellant's flat was the proverbial 'last straw' for the complainant and, according to him, he decided that he did not want that to ever happen again. From then on, he deliberately avoided the appellant, seeing to it that he was not at home when the appellant visited or that he went to bed early on the evenings when the appellant slept over at his home. Under cross-examination, it was put to the complainant that, after this 'final' incident which had allegedly occurred in September 2001, the complainant went out for a meal with the appellant at least twice during the course of the year 2002. The complainant readily conceded that they had in fact had a meal together in that year, but he could not remember another such occasion. The complainant also acknowledged that he might have spent a night at the appellant's flat some time

during 2002, when he went to meet the appellant's parents there. On this occasion, which might (or might not) have happened in 2002 (the complainant could not remember the year of the visit), he slept in the sitting room of the appellant's flat, without anything untoward occurring.

[15] Although the complainant felt unable to tell his parents about what was happening between the appellant and himself, he did tell his best friend, J, in April 1998, about the incidents of mutual masturbation that had taken place up to that time. He asked J not to tell his (the complainant's) parents because he did not know how they would react. That much was confirmed by J, who was also called by the State as a witness. The complainant also testified that, after he had told J about what was happening between himself and the appellant, he also told approximately seven of his girl friends about it during the period May 1998 to the end of 1999, and about another eight of his girl friends after he had started his studies at the Technikon in 2002. He recalled that, while he was still at school, he had told J's twin sister and a girl called N, and later, one of his Technikon friends. He could not remember the names of the other girls whom he had told about the incidents. He reiterated that he found it much easier to talk to his friends about these matters than to his parents and that, although several of his friends had encouraged him to tell his parents, he had not done so because he was scared how they might react.

[16] The complainant told no one in his family about the incidents between him and the appellant before January 2003. The B family had spent the December 2002/January 2003 holidays near Wilderness in the Cape. They then celebrated the New Year by spending New Year's Eve and the first few days of 2003 in Somerset West at the home of Mrs B's cousin, H, and his partner of 18 years' standing. When the family returned home by car, the complainant stayed on with H and his partner for a few days, before flying back to Pretoria on 6 January 2003. On the evening before his departure, he had told H, with whom he had developed a good and close relationship, about everything that had happened between himself and the appellant. He testified that he had not specifically chosen this moment to tell them about what he had experienced - 'it just happened' and he had felt ready to share this with them. Having told them, he felt much better about it. He asked them not to tell his parents but, according to the complainant, they had ultimately decided to do so in order to

prevent the same thing happening with his younger brother. H, who was also called as a State witness, confirmed the essential features of the appellant's evidence.

[17] H had in the meanwhile discussed the matter with his partner and they had decided that they had no choice but to notify the complainant's parents, as they were concerned about the complainant's younger brother. Thus, some three or four days after the complainant's return to Pretoria, H telephoned the complainant's father and told him what the complainant had imparted. Under cross-examination, H testified that he was somewhat troubled by the father's reaction. Although he had expected a major outburst, the complainant's father, although shocked and 'a bit upset', had remained quite calm and had simply said that he would discuss this with Mrs B. According to H, he was fully aware of the dangers of HIV and, when the complainant had told him that no condoms had been used by the appellant, he had told the complainant to take proper precautions 'in the future'. He testified that he had requested the complainant's parents to report the matter to the police immediately and to take the complainant to see a doctor.

[18] Some while after H had told Mr B what the complainant had conveyed to him, he (H) telephoned Mrs B to find out how she was. Mrs B told him that the appellant was at that moment visiting in their home. As soon as he heard this, H told her to request the appellant to leave the premises at once. He then telephoned the complainant on the latter's mobile phone and told him to remove his younger brother, A, from the house and to go for a drive. After he had done this, he telephoned Mrs B again. She then had a 'major outburst', becoming quite hysterical and screaming uncontrollably. H tried to calm her down and told her that he would immediately fly up to Pretoria to assist and support the family. This he then did.

[19] When H contacted the complainant on the latter's mobile phone, the complainant questioned H and heard for the first time that his parents knew 'the whole story'. He then followed H's instructions and drove with A to his friend J's house, leaving the appellant behind at the B home. He and A had only been away for about 15 minutes when H again telephoned the complainant on his mobile phone and told him to return home at once as his mother needed him. When he got home, he went into his mother's bedroom to find her lying on her bed and crying

uncontrollably. His mother then hugged A to her and the complainant realised that A had also been molested by the appellant. The complainant then also started crying because he thought that it was all his fault. It was after this that he decided to lay charges against the appellant, so as to prevent the same thing happening to other children.

[20] At the end of his examination-in-chief, the complainant explained how his life had been influenced by what had happened between him and the appellant. From time to time thereafter, he started to 'wonder' about himself (referring, no doubt, to his sexual orientation). There were times when he saw a 'guy' and said to himself that the 'guy' was sexy. The 'last thing he wanted to be was gay' and he had to fight this struggle taking place inside him. When he went to public toilets and encountered other men who were older than he, he felt very uncomfortable and scared because he did not know which of them did 'such things'. He did not want to be alone in a public toilet with such a man and hence always went into the cubicle to urinate, locking the door behind him.

[21] Mrs B, the complainant's mother, who was at that stage working as a nurse and was frequently on night duty, confirmed in her testimony that the appellant had become a close family friend. According to her, sometimes, if there were other guests in the house, the appellant, the complainant and A all slept in A's bedroom, A and the appellant each on a bunk bed and the complainant on the floor. She testified that the whole family was very fond of the appellant. Despite what had happened, they still loved him; indeed she felt sorry for him. She also confirmed that their financial position was bad at that time and the appellant often gave the children gifts that they could not afford to give them and that he was generous to the family. She saw nothing sinister in the fact that he frequently visited them and slept over at their home and also saw nothing untoward in him spending time alone with her children. She could not understand why her children had not told her about the molestation by the appellant. According to Mrs B she knew that, during the course of 2002, the appellant was the accused in a criminal trial involving the molestation of a child in his dental surgery. When she asked him about this, he told her that he was not guilty and that the parents simply wanted to make money out of him. Her response was to ask him not to do anything of the kind to her own children, whereupon he assured her that he would not.

Little did she know that her children had already been molested by him. When Mr B was informed by H about the complainant's revelations, she and Mr B had decided that, should the appellant return to their home, Mr B would speak to him 'in a Christian manner to sort the matter out.' However, when A told her, on the morning of Sunday 19 January 2003, that the appellant was coming to visit them that afternoon, she realised that she could no longer permit him to be in their home. She called A to her and, telling him that she would never reproach him, asked him whether the appellant had 'messed with him'. A replied that the appellant had 'played with his penis' and she then realised that 'everything' was true.

[22] According to Mrs B, after the complainant and A had left the house that afternoon, she had asked the appellant how he could have molested her two sons when the whole family loved him and cared about him. The appellant turned deathly pale and kept repeating that he was sorry. She informed him that he must go and that she did not want to see him ever again. He kept on saying that he was sorry and then left the house. She still felt heartsore and did not understand how he could have done such a thing. She reiterated that she felt sorry for him.

[23] Mrs B testified that it was a psychologist who had reported the matter to the police. Both children had been taken to see this psychologist approximately a week after her confrontation with the appellant. They had two sessions with him. He then said that they must first 'get through the court case' before continuing with the sessions. After the boys had testified, both of them had immediately been taken back to the psychologist.

[24] After the complainant's parents had become aware of what had happened, the matter was reported to the police and the complainant was medically examined by a Dr Winn on 15 February 2003. The complainant had informed Dr Winn that he had been sodomised by a person known to him three times during the year 1999 to 2000. All the findings flowing from the doctor's examination of the complainant showed signs of anal penetration. During his anal examination of the complainant, he had found an old abrasion and an old scar on the skin surrounding the anus; fissures and cracks along the circumference of the anus; thickening and folding of the anal orifice; inversion of the anal canal and swelling around the rim of the anus. The skin

surrounding the anus was also red and painful to his touch. All these symptoms were in his view probably due to repeated anal penetration. The redness and pain, as well as some of the other injuries, could have been caused by chronic constipation, but his findings favoured penetration of the anus with a sexual organ.

[25] Under cross-examination, Dr Winn stated that fissures and cracks which he had found along the circumference of the anus were approximately one to one and half years old. He also stated that the funnelling which he had found was one of the signs of chronic anal penetration. He expressed the view that his findings indicated more than three or four anal penetrations; all the signs pointed to 'habitual' or frequent penetration, perhaps on a monthly or even on a daily basis. He was however, unable to say definitively that his findings indicated chronic anal penetration as there could possibly have been another cause for the symptoms found, such as internal or external haemorrhoids. However, the combination of all his findings pointed in the direction of repeated anal penetration, certainly more than three incidents thereof.

[26] The appellant testified in his own defence and denied all the allegations of wrongdoing against him. He stated that he was diagnosed as having Romano Ward syndrome when he was in standard one at school. This syndrome is a genetic deviation of the main nerve of the heart, creating the risk of instant death in the event of any emotional arousal (such as anger or excitement) which makes the heart beat faster. He did reasonably well at school and then went on to obtain his dental degree at the University of Pretoria. In May 1980, he began practising as a dentist in Balfour in the Eastern Transvaal. However, in 1990, five charges of indecent assault were laid against him. One was withdrawn, but he pleaded guilty to the other four charges and was convicted on these charges in 1991. On two of the charges, taken together, he was sentenced to three years' imprisonment, suspended for five years on certain conditions, one of which was that he had to undergo psychotherapeutic treatment with a registered psychologist for a period of 18 months. On the other two charges, also taken together, he was sentenced to 2000 hours of periodical imprisonment.

[27] In consequence of these convictions, the appellant was suspended from practising as a dentist in 1993. He appealed against the suspension, but the appeal failed and the suspension took effect in May 1996. The appellant then started

working for the Elwierda tour bus company as a bus driver. It was on one of the bus tours that he met Mrs B in 1997. He thereafter met the rest of the B family and quickly became a close family friend. According to the appellant, shortly after he had met the B family, he told the oldest son, F, then in matric, about his previous convictions. He thereafter told Mrs B about this as well. They were supportive and did not reject him and he remained friends with the whole family. When cross-examined about how it had come about that he told F about his previous convictions, the appellant replied that he had 'simply felt that the family should know'.

[28] According to the appellant, he had never slept over at the B family home in 1997. He had terminated his employment at Elwierda in January 1998 and had gone straight to his parents' home in Warden, staying with them until the end of November 1998. He testified that he did not visit the B family home during 1998, apart from one brief visit in August or September, when he was in Pretoria for a sitting of the medical council. He had definitely not visited the B family on other occasions in 1998, as the engine of his motor vehicle packed up at the beginning of January of that year and he did not have transport.

[29] He started practising as a dentist again, in Randfontein, on 1 December 1998 and in February 1999 moved into a flat close to his practice. He moved to another flat in Mimosa Street in Randfontein at the beginning of May 1999, which was where the B boys had slept over upon returning from their outing with him to the Aardklop festival in Potchefstroom.

[30] The appellant testified further that he had started visiting the B family again from about February 1999. He slept over at the B home in Pretoria only four times during the course of 1999, as far as he could remember, and twice during the course of 2000 (in April and in May). When he stayed the night at the B home, he usually slept in A's bedroom, where there were bunkbeds, and sometimes A slept in the room with him. According to the appellant, Mr and Mrs B had borrowed relatively large sums of money from him, the first such loan (in an amount of R2500) being made to Mr B in 1997, allegedly for a mortgage bond repayment and policies which had to be paid. Mr B had repaid this loan after the appellant started practising again. Mr B had asked the appellant for a second loan in 1997, but the appellant could not afford it. Both F, as

well Mrs B, had also borrowed money from the appellant. The B's daughter, H, had twice written to him asking him for a 'donation', once for her glass work and once for a pair of shoes. He had also purchased an outfit for her. A had asked him for money to go on a cricket tour, as well as for 'presents' which he (the appellant) could not afford, such as a tennis racket and a mobile telephone. Under cross-examination, the appellant stated that he had at no stage felt that he was being abused, and that the requests for money and for free dental services had not influenced his friendship with the family.

[31] The appellant confirmed that he had received psychological treatment after his 1991 convictions on charges of child molestation, and that this was a condition of suspension of his sentence because he had tendencies towards paedophilia. Under cross-examination, the appellant alleged that this psychological treatment had 'helped' him. When asked why, if that were so, he was convicted on a similar charge in 2002, the appellant's response was that he had pleaded not guilty in the 'second case'.

[32] According to the appellant, the complainant had told him that he had had a sexual relationship with one of his school friends (a boy) for approximately four years. As far as he could remember, the complainant had made this revelation to him in the first quarter of 2000. In response to a question posed by counsel for the State, the appellant said that his attitude to sexual matters was on the conservative side and that he had been somewhat shocked and taken aback when the complainant had told him of this relationship. His reaction was to tell the complainant that it was wrong and that he must never do such a thing again. He however could not remember the precise circumstances of this conversation between himself and the complainant, although he knew that it had taken place at the B home.

[33] Regarding the confrontation between Mrs B and himself in January 2003, the appellant testified that he was visiting the B family on a Sunday afternoon after A had telephoned him that morning. After the complainant and A left, telling him that they were going somewhere by car, Mrs B entered the lounge where the appellant was reading the newspaper and asked him to leave their home. She alleged that the appellant had molested the complainant and A. He left the house.

[34] Under cross-examination, he testified that he had felt ‘somewhat shocked’ when Mrs B had made these accusations against him. He had not, however, then told her about the complainant’s alleged homosexual relationship or about an incident that had allegedly happened in the first quarter of 2002 – about which he had testified in his examination-in-chief – during which he (the appellant) had woken up to find A trying to open the zip of his trousers. According to the appellant, A had accompanied him to visit the T family and, at the T family home, the appellant had taken two painkillers because of a headache and had gone to lie down in one of the bedrooms. When he woke up, A was tampering with the zip of his trousers. He (the appellant) took A to task about this, told him that he must never do it again and took him back home.

[35] The reason given by the appellant for his failure to mention either of these things to Mrs B when she accused him of having molested her sons, was that he did not want to get into an argument with her, impliedly because of his medical condition. The appellant conceded that, in view of his previous convictions, he had to be very careful in his relationships with children and that if his version of the boys’ conduct, particularly A’s behaviour, were true, this could have placed him in a very difficult and dangerous position. He reiterated, however, that he had rebuked A for his behaviour and that the latter had never again behaved in such a manner. He insisted that the incidents of sexual activity about which the complainant and A had testified had never happened and that both boys had been lying to the court. He had been very good to the B family and had no idea why they would lay such charges against him.

[36] The appellant admitted that, before this confrontation between himself and Mrs B in 2003, he had again been charged with a sexual offence, committed in Randfontein, the allegation being that he had indecently assaulted a minor child on 2 November 2000. He was convicted on this charge and sentenced on 21 November 2002. According to the appellant, he had told Mrs B about the pending matter in November 2000, long before it had been finalised. He had pleaded not guilty to the charge, but had nevertheless been convicted and sentenced to a fine of R20 000 or five years’ imprisonment, plus a further five year’s imprisonment suspended for five years on certain conditions, including community service. The appellant testified that there had been no change in his relationship with Mrs B or in her attitude to him as a

result of this criminal trial and that he had informed her of the outcome of the trial in November 2002.

[37] During his examination–in-chief, the appellant admitted that he had been in the complainant's company on the various different occasions during which the alleged sexual activity referred to in counts 1 to 4 had actually occurred, although not all during the time periods referred to by the complainant. So, for example, in respect of the first two counts, the appellant testified that, at the end of December 1997, after Christmas, he had indeed been accompanied by the complainant on a late night bus journey to the Eastgate Airport to pick up an overseas tour group. Mr B was allegedly worried about the appellant's being able to stay awake should he undertake the late-night drive alone, and had therefore suggested that the complainant accompany him to keep him awake. Apart from the incident of mutual masturbation in the bus while they were waiting for the tour group to arrive, about which the complainant had testified, and which the appellant denied, the appellant's account of the journey and what had happened the following day largely tallied with the complainant's version.

[38] The appellant agreed that, because of a defect with the bus, he and the appellant unexpectedly had to spend the night at the Casa da Sol Hotel in Mphumalanga while they were waiting for a new bus to be sent out by the tour company. According to the appellant, however, the hotel room which he and the complainant had to share did not contain a double bed, but only two single beds and a sofa which could be converted into a bed. He, the complainant and another bus driver employed by Elwierda, by the name of Bernard Docco, shared the room, he and the complainant each sleeping on a single bed and Bernard on the sofa-bed. He alleged that he had made enquiries about the whereabouts of Mr Docco, but that he been informed that Mr Docco was now in the United States of America. The appellant also alleged that the person who had driven the replacement bus to the hotel, arriving in the early hours of the morning, had also used the bathroom facilities in the hotel bedroom in which he, the complainant and Mr Docco were sleeping. He could not, however, remember whether this person had also slept in the room. He denied that there had been any mutual masturbation between himself and the appellant that night.

[39] As regards the third count, the appellant agreed that he had started to teach the complainant to drive at the latter's request, and that the complainant had practised driving with him once or twice in the beginning of December 1997. This had taken place in the parking area of the Corpus Christi Church, as the complainant had testified. However, he and the complainant had never been alone on any such occasion; on the contrary, A and, as far as he could remember, also the complainant's sister (H) had been with them and no mutual masturbation had taken place between him and the complainant in the car. The driving lessons could not have taken place in the period from January to April 1998 – as the complainant had testified – as he (the appellant) had resigned from Elwierda in early January 1998 and had immediately gone to his parental home in Warden, where he had stayed until November 1998. He had helped out at Elwierda on a free-lance basis from mid-September to late October 1998 and had certainly not visited the complainant's family in October or November of that year. He testified that he could not therefore, have visited the complainant at the latter's home during the complainant's study 'leave' in October or November 1998 and indulged in mutual masturbation with the complainant in the complainant's bedroom as the latter had testified.

[40] The appellant testified that he had indeed taken the complainant and A to the Aardklop festival in Potchefstroom in September or early October 2001. They had spent a day at the festival and, on their return to Randfontein, the boys had spent the night at his apartment, sleeping in his spare room while he spent the night in his own bedroom. The appellant denied the complainant's allegations that, during the period January to March 2001, he (the appellant) had engaged in sessions of mutual masturbation with the complainant or that he had anally penetrated the complainant on the diverse occasions testified to by the latter. Here again, in the light of my approach to the constitutional challenge and its impact upon the remaining unlawful acts allegedly perpetrated by the appellant after the complainant had turned 16, and my assessment of the veracity of the appellant's version, it is not necessary to deal in any greater detail with rest of the appellant's evidence.

Assessment of evidence

[41] Counsel for the appellant contended that neither the regional magistrate, nor the high court, attached sufficient weight to the contradictions and improbabilities in, and the unreliable nature of certain aspects of, the evidence of the complaint and other State witnesses. Moreover, it was submitted, both the regional magistrate and the high court erred by not finding that there was insufficient corroboration of the complainant's evidence in respect of the alleged sexual incidents. According to counsel, the evidence of the appellant should not have been rejected as not being reasonably possibly true. Finally, counsel repeated – and elaborated upon in considerable detail – the argument which he had advanced before the regional magistrate and the High Court, namely that the complainant was conspiring with the rest of his family to incriminate the appellant falsely, in order to conceal from the outside world his homosexual orientation and, possibly, the identity of his homosexual partner.

[42] I do not find any of these arguments convincing. As Hartzenberg J pointed in his judgment, there were indeed contradictions in the complainant's evidence and that of some of the other State witnesses. On the whole, however, the complainant remained consistent although he was testifying about events some of which occurred more than five years before the commencement of the trial. It is true that the complainant's evidence that the appellant had penetrated him anally only three times and that he had never been involved in a homosexual relationship with any other person, cannot really be reconciled with Dr Winn's evidence that all the findings which emerged from his anal examination of the complainant pointed to repeated ('chronic') anal penetration. However, it was also clear from the complainant's evidence that, in his view, considerable stigma attached to being inclined to same-sex sexual activity. There are many possible reasons why the complainant might not have wanted to disclose the fact of a possible homosexual relationship with another person occurring at the same time as the occurrence of the sexual acts between himself and the appellant, or of such a homosexual relationship occurring after these events. In this regard, the reasoning of Hartzenberg J in the High Court is compelling-

'That superficially speaking his [the complainant's] evidence and that of Dr Winn cannot be reconciled, is clear. The magistrate was clearly aware of it because he pointed out that the medical examination was done eighteen months after the last incident of anal penetration by the appellant. There are a number of possibilities. He may have had a homosexual relationship with someone else after his last encounter with the appellant. He may even have had such a relationship during the same time although

one would have expected his family to have been aware of it. He may have had more such incidents with the appellant, but if I understand the evidence of Dr Louw correctly, he may have subconsciously dissociated himself from them or Dr Winn may have exaggerated his clinical findings.'

[43] It is true that the complainant's evidence was not above criticism. However, the regional magistrate was clearly aware of the areas of criticism and nevertheless accepted his evidence. This evidence was corroborated in number of important respects. In particular, the appellant's conduct when initially confronted by Mrs B, when (according to her evidence) the appellant went deathly pale and repeatedly said that he was sorry, is reconcilable only with the truth of the complainant's evidence and not with the appellant's evidence. It must also be remembered that most of the occasions on which the sexual incidents between the complainant and the appellant allegedly happened, are common cause. The appellant himself conceded that he and the complainant were together on those occasions. It was common cause that the appellant was very friendly with all the B children and, in particular, with the complainant, and that he took the latter on outings and spoiled him with gifts.

[44] On the other hand, there are many aspects of the appellant's evidence which to my mind, are most unconvincing. So, for example, the appellant's version of how he had reacted when initially confronted by Mrs B on January 2003, namely that he had simply said that he was not aware of the events in question and that they had not happened is extremely unlikely. Not only did the appellant, on his version of events, not ask Mrs B any questions about the allegations against him or express any shock or outrage about these allegations, but he also did not tell her that A had on one occasion 'fiddled' with the zip of his trousers and that the complainant had informed him of a four-year long homosexual relationship with a school friend, involving anal sex. His ostensible reason for not doing any of these things was that he did not want to get into a conflict with her. So he simply left the house as she had requested him to do. I find this very difficult to believe.

[45] The 'conspiracy theory' advanced by counsel for the appellant does not ring true. In the words of Hartzenberg J:

'The argument on behalf of the appellant entails that the complainant *falsely* told the uncle [H] about the appellant's conduct, and on top of it asked the uncle not to inform his parents, in the hope that he would tell them. According to the argument he must have done that to protect someone who was anyway not suspected of anything by anybody. It is much more likely that he told the uncle the truth.

Moreover, the whole B family, except possibly A, was clearly sympathetic towards the appellant and did not create the impression of trying to have an innocent man convicted.'

[46] Faced with the competing versions of the complainant and the appellant, the regional magistrate, and thereafter the High Court, concluded that the appellant's version, when viewed against the totality of the evidence adduced, as well as against the inherent probabilities, was false. Each of these courts correctly adopted a holistic approach to the evidence and I am not persuaded that either court misdirected itself on the evidence before it, nor that its conclusion was wrong.

[47] It follows from the above that the appellant's appeal against his convictions on the first four counts must fail.

Application in terms of s 322(1)(b) of the Criminal Procedure Act 51 of 1977

[48] Before this Court, the respondent applied for an amendment, in terms of s 322(1)(b) of the Criminal Procedure Act 51 of 1977, of the appellant's convictions on ten counts of contravening s 14(1)(b) of Act 23 of 1957 to 10 convictions of indecent assault and also, should this application be successful, for an increase in the sentences imposed on the appellant by the regional court and confirmed by the high court. The gist of the argument advanced by counsel for the state was that, right from the start, the power relationship between the appellant and the complainant was totally unequal because of the complainant's age in relation to that of the appellant (who was nearly 28 years older than the complainant) and the relationship of friendship and trust that existed between the appellant and the B family. With reference to each count, counsel attempted to illustrate that, although the complainant may have appeared to have consented to the sexual act in question, this was not voluntary consent. Counsel relied in this regard on the evidence of the clinical psychologist who had treated both the complainant and A after Mr and Mrs B had become aware of what had happened. The psychologist testified that a child who becomes sexually involved with an adult in this manner is traumatised and, from the outset, is in the position of a victim. As such, the child is paralysed and one of the common reactions is that the child 'disassociates' and places an emotional distance between himself or herself and the adult. Where the adult follows a pattern of 'spoiling' the child by, for example, taking the child on

outings and giving the child presents and money, there is a gradual process of conditioning and manipulation.

[49] The problem we have in this case is that it is clear from the record that the regional magistrate adopted a *prima facie* view, at an early stage of the trial, that the complainant had been a willing participant in all the various sexual interludes between him and the appellant, to which view the prosecutor appears to have assented. Thus, during the examination-in-chief of the complainant, the following exchanges took place between the regional magistrate and the complainant:

'Die lank en die kort van die storie is jy het basies altyd die goed toegelaat en saamgespeel nie waar nie? – 'Ek het dit toegelaat maar . . .

'En jy het ook saamgespeel want jy het ook vir hom gemasturbeer as dit nodig is? – Later ja maar dit was altyd ook net eerste van sy kant af ek het . . . nooit begin nie.'

'En as ek jou reg verstaan het jy op geen stadium vir hom gesê wat blyk dat jy dit nie wil doen nie?' – 'Ja ek het dit nooit vir hom gesê nie.'

After the examination-in-chief of the complainant had been completed, the regional magistrate remarked:

'Op die stadium soos ek die omstandighede nou lees tensy ek anders oortuig kan word, wil dit vir my voorkom of die seun basies saamgespeel het en toegestem het.'

[50] On appeal to the Pretoria High Court, Hartzenberg J commented as follows on the attitude adopted by the regional magistrate in this regard:

'In fairness to the magistrate the answer to the argument [that the magistrate was wrong not to have found the appellant guilty of indecent assault on the complainant] is that the incidents occurred over a period of four years and that the complainant was an intelligent and well-developed lad. The appellant certainly was justified to think that the complainant was a willing participant. That was exactly the attitude of the magistrate expressed at an early stage of the trial. In the result this question was not really investigated. There is therefore no foundation upon the evidence, to find that the magistrate was wrong and that the appellant was guilty of indecent assault.'

[51] Before us, counsel for the respondent relied on *R v Taylor* 1927 CPD 16 as support for his argument that, in a case of indecent assault, the *onus* of proving consent rests upon the accused. This is clearly not correct, as was pointed out by Munnik J in *S v D* 1963 (3) SA 263 (EC) at 266B-D:

'Although absence of consent is not part of the definition of the crime of [indecent] assault as is the case in rape, the definition as quoted in G*ardener & Lansdown* includes an averment of "unlawfulness". The State must, therefore, prove that the act complained of was unlawful . . .

Since the act complained in the present case was not *malum in se* and is only unlawful because of the complainant's lack of consent, prove of unlawfulness necessarily involved proof of absence of consent. It seems to me therefore that the *onus* of proving absence of consent rested upon the State.'

(See also *S v M* 2006 (1) SA 135 (SCA) paras 68 and 284-285; and generally JRL Milton *South African Criminal Law and Procedure* Vol II *Common-law Crimes* 3 ed (1996) p 476.)

[52] It is therefore clear that, in this case, the *onus* rested on the State to prove absence of consent by adducing sufficient evidence to negative the reasonable possibility that the complainant consented to the sexual acts in question. From the evidence as a whole, I agree with the regional magistrate and the High Court that the State did not discharge its *onus* of proof in this regard.

[53] Although it may perhaps be unfortunate that, because of the *prima facie* view expressed by the magistrate early in the trial, the question of consent was not really investigated, this does not affect my conclusion. As was pointed out by Nugent JA in *S v M*, supra, para 277:

'The process of examination and cross-examination in a court of law is on occasions a blunt instrument for revealing the truth, and that is particularly so where, as in this case, the evidence concerns matters that might be emotionally and psychologically complex and nuanced. But then it is common for the full truth not to emerge in the course of a criminal trial, which has the limited function of determining whether there is sufficient and adequate evidence to establish beyond reasonable doubt that the accused person committed an offence. In the absence of such proof in relation to each element of the offence the accused person is entitled to be acquitted albeit that the full truth might not have emerged. That applies no matter the nature of the offence.'

Constitutional validity of s 14(1)(b) of Act 23 of 1957

[54] I turn now to deal with the constitutional challenge to s 14(1)(b) of the Act. The relevant provisions of s 14 (headed 'Sexual offences with youths'), read as follows –

(1) Any male person who –

(a) has or attempts to have unlawful carnal intercourse with a girl under the age of 16 years; or

(b) commits or attempts to commit with such a girl or with a boy under the age of 19 years an immoral or indecent act; or

(c) solicits or entices such a girl or boy to the commission of an immoral or indecent act,

shall be guilty of an offence.

(2) . . .

(3) Any female who –

(a) has or attempts to have unlawful carnal intercourse with a boy under the age of 16 years; or

(b) commits or attempts to commit with such a boy or with a girl under the age of 19 years an immoral or indecent act; or

(c) solicits or entices such a boy or girl to the commission of an immoral or indecent act;

shall be guilty of an offence.'

'Unlawful carnal intercourse' is defined in s 1 of the Act as meaning 'carnal intercourse otherwise than between husband and wife'.

The prescribed penalty for an offence referred to in ss 14(1) or 14(3) is imprisonment for a period not exceeding 6 months, with or without a fine not exceeding R12 000 in addition to such imprisonment (s 22(f) of the Act).

[55] It may be noted that, in terms of s 68(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, read with the Schedule to such Act, the whole of s 14 of the Sexual Offences Act is repealed. Moreover, in terms of s 68(1)(a), '[t]he common law relating to - (a) the irrebuttable presumption that a female person under the age of 12 years is incapable of consenting to sexual intercourse' is also repealed. With the exception of Chapters 5 and 6 thereof, Act 32 of 2007 (the 2007 Act) came into operation on 16 December 2007 (see s 72(1)).

[56] Part 1 of Chapter 3 of the 2007 Act, headed 'Consensual sexual acts with certain children' replaces the provisions of s 14 of the Sexual Offences Act of 1957. Part 1 comprises ss 15 and 16, which sections read as follows:

'**Acts of consensual sexual penetration with certain children (statutory rape)**

15(1) A person ("A") who commits an act of sexual penetration with a child ("B") is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual penetration with a child.

(2)(a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the National Director of Public Prosecutions if both A and B were children at the time of the alleged commission of the offence: Provided that, in the event that the National Director of Public Prosecutions authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1).

(b) The National Director of Public Prosecutions may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.

Acts of consensual sexual violation with certain children (statutory sexual assault)

16 (1) A person ("A") who commits an act of sexual violation with a child ("B") is, despite the consent of B to the commission of such an act, guilty of the offence of having committed an act of consensual sexual violation with a child.
(2)(a) The institution of a prosecution for an offence referred to in subsection (1) must be authorised in writing by the relevant Director of Public Prosecutions if both A and B were children at the time of the alleged commission of the offence: Provided that, in the event that the Director of Public Prosecutions concerned authorises the institution of a prosecution, both A and B must be charged with contravening subsection (1).
(b) The Director of Public Prosecutions concerned may not delegate his or her power to decide whether a prosecution in terms of this section should be instituted or not.'

In terms of s 1(1) of the 2007 Act, 'child' means –
'(a) a person under the age of 18 years; or
(b) *with reference to sections 15 and 16, a person 12 years or older but under the age of 16 years.'*
(Emphasis added)

The definitions of 'sexual penetration' and 'sexual violation' in s 1(1) of the 2007 Act are very detailed and it is not necessary, for the purposes of this case, to reproduce them. Suffice it to say that 'sexual penetration' includes both vaginal and anal penetration by, inter alia, the male genital organ, while 'sexual violation' includes all the other 'immoral' or 'indecent' acts which the appellant is alleged to have committed with the complainant in this case.
I will return to the relevance of these provisions of the 2007 Act later.

[57] The constitutional arguments advanced by counsel for the appellant can be disposed of briefly. While it may be true that the cognitive development of a boy or a girl of the age of 12 years may in certain cases be such that the child might be regarded as competent to make rational and informed decisions concerning his or her sexual activity with other persons, this does not mean that the legislature *necessarily* acted unconstitutionally by setting, in s 14 of the 1957 Act, what counsel dubs an 'arbitrary age of (legal) consent' above the age of 12 years for all children. (Indeed, counsel conceded that the 'unisex' age limit of 12 years championed by him is also arbitrary, as also is the legislative setting of most age limits, such as the age of 18 years as that at which a person is eligible to vote or to obtain a driver's licence, for example.)

[58] It must be remembered that the State is both constitutionally and internationally obliged to protect its children from all forms of abuse. Section 28(1)(d) of the Constitution guarantees the right of every child 'to be protected from maltreatment, neglect, abuse or degradation,' while s 28(2) provides that 'a child's best interests are of paramount importance in every matter concerning the child'.

[59] In relation to sexual exploitation and abuse of children, article 34 of the United Nations Convention on the Rights of the Child (1989), which South Africa ratified on 16 June 1995, is of particular importance. It reads as follows:

'States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent;

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative of use of children in prostitution or other unlawful sexual practices;

(c) The exploitive use of children in pornographic performances and materials.'

The content of this prohibition on the sexual exploitation and sexual abuse of children is substantially duplicated in article 17 of the African Charter on the Rights and Welfare of the Child (1990), ratified by South Africa on 7 January 2000.

[60] These constitutional and international obligations have been incorporated in the Children's Act 38 of 2005, certain sections of which came into operation on 1 July 2007. Two of the sections already in operation echo the abovementioned provisions of the Constitution and of the international instruments referred to. So, s 9 of the Children's Act provides that 'in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance must be applied.' Section 7 of the Act gives further content and scope to the 'best interests of the child standard'. Particularly important in the present context are paragraphs (h) and (l) of s 7(1) in terms of which –

'(1) Whenever a provision of this Act requires the best interest of the child's standard to be applied, the following factors must be taken into consideration where relevant, namely –

. . .

(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;

(l) the need to protect the child from any physical or psychological harm that may be caused by –

(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or

(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment, violence or harmful behaviour towards another person'.

[61] Counsel for the appellant also contended that, by way of international comparison, there are 'many examples' of European countries which set lower age limits for legal consent, to both same-sex and heterosexual sexual acts, than those stipulated in s 14(1)(b) of the Act. He also pointed out that there are 'many examples' of European countries which have eliminated any previous distinction that existed in such countries between same-sex and heterosexual legal ages of consent. While the latter contention is certainly true of both European countries and other countries in the world, the former contention is not entirely correct. As far as I have been able to ascertain, there are very few countries where the legal age of consent for heterosexual sexual activity is lower than 14 years, while by far the majority of countries set the legal age of consent in this regard at 15 or 16 years, or even older. The age of consent for sexual acts is uniform for homosexuals and heterosexuals in the majority of countries outside South Africa. It would appear that most countries have set this uniform age at 16 years, whilst there are some who have set it at 18 years and an isolated few at between 13 and 15 years.[1]

[62] There is a world-wide and growing awareness of the particular vulnerability of children and of the fact that child abuse, including sexual exploitation of children, is a serious and ever-escalating problem. In South Africa, unfortunately, the extent of this problem is truly appalling. Some of the (alarming) statistics and of the factors that contribute to and exacerbate this problem have been highlighted by the South African Law Reform Commission.[2]

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[1]See **htpp://www.ageofconsent.com/ageofconsent.htm**, accessed 4 March 2008 and also **http://www.avert.org/aofconsent.htm**, accessed on 4 March 2008). Both these websites contain very useful and comprehensive tables listing the ages, in most countries of the world, at which people of various sexual persuasions (heterosexual, gay and lesbian) can legally consent to voluntary vaginal and anal intercourse, as also to other sexual activities. The table from the latter website, headed 'Worldwide ages of consent', is annexed to the respondent's supplementary heads of argument. This website notes that, in many countries, the legal age of consent is higher when one partner is in a position of trust with regard to the other, or one partner takes advantage of the other's immaturity (see for example, s 3(1) of the United Kingdom Sexual Offences (Amendment) Act of 2000, s 153(1) of the Canadian Criminal Code and Article 207(b) of the Austrian Criminal Code, as introduced in 2002). It is also noted that the average legal age of consent across the world for heterosexual, gay and lesbian persons is 16 years.

[63] To my mind, it is clear that the establishment of a legal age of consent to sexual activities – a chronological age which is a line separating 'valid' and 'invalid' consent – is perfectly in line with South Africa's constitutional and international obligations. The State has a duty to protect children against sexual exploitation and the consequences thereof where such children have not reached an age at which, in the majority of cases, the child in question will have the requisite cognitive development and intellectual maturity to fully understand and appreciate the nature and consequences of sexual activities and to be able to give an informed consent to such activities. I therefore do not accept the argument that s 14(1)(b) of the Sexual Offences Act is unconstitutional in that it sets the general legal age of consent by either boys or girls to sexual intercourse and other sexual activities at higher than 12 years, even though there may be individual cases where the boy or girl in question might be capable of forming an intention and participating voluntarily in such sexual acts.

[64] This brings me to the further constitutional question which this Court specifically drew to the attention of the parties and of the Minister before the hearing, namely whether the distinction drawn in s 14 of the Act between heterosexual and same-sex sexual activities by setting the legal age of consent at 16 and 19 years, respectively, is inconsistent with the Constitution. On the face of it, the same-sex/heterosexual legal age of consent distinction drawn in s 14 of the Act does unfairly discriminate against persons on the grounds of their sexual orientation, even when viewed in the light of the State's constitutional and international obligations to protect young people against, inter alia, sexual exploitation.

[65] It was for this reason that we invited both parties and the Minister to address us on the constitutional question and to indicate whether evidence may assist this court in arriving at a conclusion. So too, notice of the proceedings was given to

[2]See Issue Paper, Project 108 *Sexual Offences against Children* (31 May 1997) Chapter 3. An interesting perspective, by South African children themselves, on the protection of children against sexual exploitation and abuse can be found in Children's Rights Project (1998-1999) *Report on Children's Rights: 'They should listen to our side of the story'* (a publication of the Community Law Centre, University of the Western Cape) part H.

Doctors for Life International, its legal representative in his personal capacity, the Marriage Alliance of South Africa and the Lesbian and Gay Equality Project.

[66] None of the non-governmental organisations who were notified of this appeal applied to intervene as *amicus curiae*. Moreover, counsel for the appellant, for the respondent and for the Minister all agreed that this distinction *does* constitute discrimination on the grounds of sexual orientation and/or age in terms of s 9(3) of the Constitution, which discrimination is in terms of s 9(5) deemed to be unfair unless the contrary is established. Counsel for the respondent expressed one qualification, to the effect that any unconstitutionality flowing from the distinction between same-sex and heterosexual acts in s 14 of the Act should be 'cured' by raising the age of consent to heterosexual acts from 16 years to 19 years and thus eliminating the distinction, or by setting the legal age of consent for both same-sex and heterosexual acts at the age of 18 years (the new age of majority as from 1 July 2007 in terms of s 7 of the Children's Act 38 of 2005). This would, however, create a criminal offence which did not hitherto exist, in a situation where a Parliamentary choice of a uniform age of 16 years has already been made in the 2007 Act. In the alternative, counsel contended that s 14(1)(b) of the 1957 Act should remain unchanged so as not to diminish the protection of children in respect of the period prior to the promulgation of the 2007 Act.

[67] It is clear that the broader governmental purpose underlying s 14 of the 1957 Act was the legitimate one of protecting children against potentially exploitative sexual conduct, a purpose in line with s 28 of the Constitution. However, in the 14 years since the advent of a constitutional democracy in this country in 1994, South African courts, including the Constitutional Court, have repeatedly recognised that gays and lesbians are in 'certain respects in a uniquely vulnerable position as far as legal protection and the exercise of political power are concerned' (see Edwin Cameron 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 *SALJ* 450 at 456). To be faithful to the guarantees contained in the Bill of rights, however '[s]exual orientation is – or should be – a matter of indifference morally and constitutionally. There is thus no basis which can be countenanced before the law for treating homosexual men and woman differently' (per Ackermann J in *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 25).

[68] As pointed out above, no justification in terms of s 36(1) of the Constitution was proffered by any of the parties or relevant non-governmental organisations for maintaining the age differential in s 14 of the Act, which age differential on the face of it discriminates unfairly on the grounds of sexual orientation. On the contrary, as already pointed out, the representative of the Minister responsible for the administration of the Act effectively conceded that there *is* no such justification. On what we have before us, this concession appears to be correct.

[69] Here at home, the legislature would similarly appear to have come to the same conclusion that there is no justification for the age differentiation in s 14 of the Sexual Offences Act of 1957. This section has been repealed with effect from 16 December 2007 and replaced by ss 15 and 16 of the 2007 Act, which sections set a uniform age of consent of 16 years for both same-sex and heterosexual sexual acts (see para 8 above). The promulgation of the 2007 Act was the culmination of a lengthy process of research and consultation by the South African Law Reform Commission, which process commenced in 1996. The initial investigation concerned only sexual offences by and against children and, in May 1997, an Issue Paper on *Sexual Offences against Children* was published for general information and comment. Hereafter, the scope of the investigation was expanded to include sexual offences against adults and a general overhaul of the criminal justice system in relation to sexual offences. Parliament has thus already spoken by making an unequivocal choice of a uniform age of consent – a choice made after years of research, consultation and public debate. Parliament opted to achieve the legitimate governmental purpose of protecting children in a manner that did not at the same time discriminate against homosexual and gay persons. In my view, it would take a great deal to convince any court that this choice is constitutionally invalid. This, in turn, lends much weight to my conclusion that ss 14(1) and 14(3) of the 1957 Act are indeed constitutionally invalid to the extent that these sections distinguish between same-sex and heterosexual sexual acts by setting different legal ages of consent to such acts. It follows that, in terms of s 172(1)(a) of the Constitution, we must declare these sections to be invalid to the extent of their inconsistency with the Constitution.

The appropriate remedy

[70] In terms of s 172(1)(b) of the Constitution, a court which has declared a statutory provision to be unconstitutional and hence invalid may make any order that is just and equitable, including 'an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[71] In a case such as the present, where a statutory provision creating a criminal offence is declared to be constitutionally invalid, the 'general principle' that 'an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity' is particularly important (see *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) para 32). Furthermore, the order must be formulated in such a way that the interests of good government are properly taken into account. In the words of Ackermann J in *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 94:

'The interests of good government will always be an important consideration in deciding whether a proposed order under the 1996 Constitution is ''just and equitable'' for justice and equity must also be evaluated from the perspective of the State and the broad interests of society generally.'

[72] An order of constitutional invalidity which is retrospective without any qualification could easily have undesirable consequences that would seriously disrupt the criminal justice system. As in the *National Coalition for Gay & Lesbian Equality v Minister of Justice* case (supra), the least disruptive way of giving relief to persons in respect of past convictions for contraventions of ss 4(1)(b) and ss 14(3)(b) of the Sexual Offences Act is, in my view, through the established court structures:

'On the strength of the order of constitutional invalidity, such persons could note an appeal against their convictions . . . where the period for noting such appeal has not yet expired or, where it has, could bring an application for condonation of the late noting of an appeal or the late application for leave to appeal to a Court of competent jurisdiction. In this way effective judicial control can be exercised. Although this might result in cases having to be reopened, it will in all probability not cause dislocation of the administration of justice of any moment.' (Para 97)

[73] It must also be borne in mind that, with effect from 16 December 2007, s 14 of the Sexual Offences Act has been repealed in its entirety by the 2007 Act. Sections 15 and 16 of the new Act now regulate the conduct that was previously regulated by ss 14(1) and 14(3) of the 1957 Act. These sections set a uniform age of consent of 16 years for both same-sex and heterosexual acts. Counsel for the Minister thus

contended, in my view correctly, that it would make no sense simply to declare ss 14(1)(b) and 14(3)(b) of the 1957 Act to be constitutionally invalid and to leave it to the legislature to deal with the consequences of such an order – the legislature *has* already done so.

[74] To my mind, 'appropriate relief' in the present case (see s 38 of the Constitution) lies in a combination of the severance of words and the reading in of other words into the relevant statutory provisions. As was pointed out by the Constitutional Court in *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) paras 74-75:

'[74] The severance of words from a statutory provision and reading words into the provision are closely related remedial powers of the Court. In deciding whether words should be severed from a provision or whether words should be read into one, a Court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and, secondly, that the result achieved would interfere with the laws adopted by the Legislature as little as possible. . .

[75] In deciding to read words into a statute, a Court should also bear in mind that it will not be appropriate to read words in, unless in so doing a Court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a Court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution.'

[75] The remedial solution in this case lies in a severance of the words 'under the age of 19 years' after the words 'a boy' in s 14(1)(b) of the 1957 Act and the reading-in of the words 'under the age of 16 years' in its stead. So too, in respect of s 14(3)(b) of the 1957 Act, the words 'under the age of 19 years', after the words 'a girl' must be severed from that section, to be replaced by the words 'under the age of 16 years'. After the severance and reading-in, ss 14(1)(b) and 14(3)(b) would read as follows:

'(1) Any male person who –

. . .

(b) commits or attempts to commit with such a girl or with boy under the age of 16 years an immoral or indecent act; or

. . .

shall be guilty of an offence.

(3) Any female who –

. . .

(b) commits or attempt to commit with such a boy or with a girl under the age of 16 years; or

. . .
shall be guilty of an offence.'

[76] It is clear that a pre-existing provision of a law which is unconstitutional became invalid at the moment the Constitution took effect. This is the effect of the supremacy clause of the Constitution (s 2), in terms of which the Constitution is the supreme law of the Republic and all law or conduct inconsistent with it is invalid. Item 2(1) of Schedule 6 to the Constitution provides that all law that was in force when the Constitution took effect, continues in force until amended or repealed, but only to the extent that it is consistent with the Constitution. In accordance with the doctrine known as 'objective constitutional invalidity',[3] a Court making a declaration of invalidity simply declares invalid what has already been invalidated by the Constitution. As indicated above, however, the operation of the doctrine of objective constitutional invalidity is subject to the possibility that the court making the declaration of invalidity may, in the interests of justice and equity, limit the retrospective effect of such declaration in terms of s 172(1)(b)(1) of the Constitution.

[77] By virtue of s 172(2)(a) of the Constitution, the orders of constitutional invalidity to be made by this Court will have no force unless and until they are confirmed by the Constitutional Court. Should this confirmation occur, then the appellant's convictions on the last 6 counts (viz counts 6-11) will effectively cease to exist. Thus, although this Court should make an order setting these convictions aside, this order will be subject to the confirmation by the Constitutional Court of our order of constitutional invalidity.

Sentence

[78] As I have already indicated, although the High Court granted the appellant leave to appeal against both conviction and sentence, counsel for the appellant did not persist with the appeal against sentence before us. The sentence of imprisonment for a period of one year imposed by the regional magistrate, and confirmed by the High Court, in respect of each of the first four convictions therefore stands.

[3]See *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) paras 27-28; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 84; *Gory v Kolver NO* 2007 (4) SA 97 (CC) para 39.

[79] It appears from the record that the appellant has been in prison since 3 December 2003, as he was not granted bail pending his trial or pending his appeals. On 8 July 2005, the regional court sentenced him to an effective period of 11 years' imprisonment. Thereafter, on 21 November 2006, the appellant's effective sentence was reduced by the High Court to seven years' imprisonment. This means that, at the time we heard this appeal, the appellant had served more than two years and seven months of his seven year sentence. If the Constitutional Court confirms the order of constitutional invalidity to be made by this Court, then the appellant's convictions on the last six counts will be set aside and only the sentences imposed in respect of the first four counts (four years in total) will stand. This being so, this is an appropriate case in which we should exercise our power in terms of s 172(2)(b) of the Constitution by granting temporary relief to the appellant, pending the decision of the Constitutional Court. It would seem that the best way to do this would be to make an order suspending the sentence imposed on the appellant in respect of counts 6 to 11 until such time as the Constitutional Court has decided whether or not to confirm our orders of constitutional invalidity. The effect of this is that, pending the decision by the Constitutional Court in this regard, the appellant's effective sentence must be regarded for all relevant purposes as being four years' imprisonment.

Order

[80] In the circumstances, the following order is made:

1.1 It is declared that, with effect from 27 April 1994, ss 14(1)(b) and 14(3)(b) of the Sexual Offences Act 23 of 1957 are inconsistent with the Constitution and hence invalid to the extent that these sections differentiate between heterosexual and same-sex sexual activities by setting the legal age of consent at 16 and 19 years, respectively.

1.2 It is declared that, with effect from 27 April 1994, s 14(1)(b) of Act 23 of 1957 is to be read as though the words 'under the age of 19 years' after the words 'a boy' have been replaced with the words 'under the age of 16 years'.

1.3 It is declared that, with effect from 27 April 1994, s 14(3)(b) of Act 23 of 1957 is to be read as though the words ‘ under the age of 19 years’ after the words ‘ a girl’ have been replaced with the words ‘under the age of 16 years’.

1.4 In terms of s 172(1)(b) of the Constitution, it is ordered that the orders in paragraphs 1.1, 1.2 and 1.3 shall not invalidate any conviction for a contravention of s 14(1)(b) or 14(3)(b) of Act 23 of 1957 unless an appeal from or a review of the relevant judgment is pending, or the time of noting an appeal from that judgment has not yet expired, or condonation for the late noting of an appeal or late filing of an application for leave to appeal is granted by a court of competent jurisdiction.

2. These orders, insofar as they declare provisions of Act 23 of 1957 to be invalid, are referred to the Constitutional Court for confirmation in terms of s172(2)(a) of the Constitution.

3. The appeal in respect of the appellant’s convictions on counts 1, 2, 3 and 4 fails.

4. Subject to the confirmation by the Constitutional Court of the orders of constitutional invalidity set out in paragraph 1 above the appeal in respect of the appellant’s convictions on counts 6, 7, 8, 9, 10 and 11 succeeds and those convictions are set aside.

5. In terms of s 172(2)(b), the sentences imposed on the appellant in respect of counts 6, 7, 8, 9, 10 and 11 are suspended pending the decision by the Constitutional Court in respect of the confirmation of the orders of constitutional invalidity.

6. The registrar of this Court is directed to:

6.1 forward a copy of this judgment, together with the record, to the Registrar of the Constitutional Court

6.2 serve a copy of this judgment on the Department of Correctional Services and on the head of the prison in which the appellant is currently incarcerated.

BJ VAN HEERDEN JA

CONCUR:

STREICHER JA
CAMERON JA
NUGENT JW
KGOMO AJA