THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO: 409/06

Reportable

In the matter between

MARK CORNICK	**First Appellant**
LEONARD KINNEAR	**Second Appellant**
and	
THE STATE	**Respondent**

Coram**:** **LEWIS, PONNAN JJA, THERON AJA**
Heard: 2 MARCH 2007
Delivered: 20 MARCH 2007

Summary: *Appeals against convictions and sentences for rapes committed 19 years before charges were laid by complainant dismissed. Complainant's evidence proved guilt of appellants beyond reasonable doubt. Sentences confirmed.*

Neutral citation: This case may be cited as *CORNICK & KINNEAR v THE STATE* [2007] SCA 14 (RSA)

JUDGMENT

LEWIS JA

[1] This appeal is against the convictions and sentences imposed on the two appellants, Mr Mark Cornick and Mr Leonard Kinnear for rape. Both pleaded not guilty to two counts of rape. Cornick was convicted on both charges and Kinnear on one. They were sentenced to five and four years' imprisonment respectively.

[2] The case is an unusual one, for the rapes for which the appellants were convicted occurred in 1983 some 19 years before the complainant, Mrs B VN (to whom I shall refer as B), laid charges against them. B was then a child of 14 and the appellants some four years older. B did not tell her parents or her grandparents (with whom she was staying at the time) of the rapes at all. She told no one but a couple of friends and even then she did not tell them much. She kept quiet about the incident until, in 2002, she fortuitously met Cornick at his sister's home. By then she was married and had a child. She had not told her husband that she had been raped until the evening she met Cornick. The meeting revived memories of her ordeal, such that she became hysterical and had to tell her husband what had happened. It was then that she laid the charges and that Cornick and Kinnear were arrested, charged in the Wynberg Regional Court, Cape Town, convicted and sentenced. Their appeal to a full bench of the Cape High Court (Mitchell and Potgieter AJJ) was dismissed. It is with the leave of that court that this further appeal lies.

[3] The evidence of B, accepted as credible by the regional magistrate, was in essence this. Her parents had divorced when she was very young and her mother had moved away from the area in which they had lived in Cape Town, to Parow. For a year she had lived with her paternal grandparents, in Kenwyn, seeing her father on a regular basis. She had continued to attend primary school in the Kenwyn area. She went to live with her mother some time in 1981. But she regularly visited her grandparents and stayed with them over school

holidays. Her mother then remarried and she and her husband had built a house in Parow. Not long after they had moved in to their new home in 1982, B went to spend the December and January school holidays in Kenwyn with her grandparents.

[4] One Tuesday evening in January 1983 (B was certain of the time period because it was after her mother had moved into the new house and at the start of her Standard 8 school year) she was invited to spend the night with a former primary school friend, LM. While L, her mother, B and a third girl whom B did not know, were watching an episode of the television show ‘Dallas’ five youths arrived at the house. B knew three of them, Cornick, Kinnear and Michael Kinnear. She had met them previously at the home of a friend, L Albertyn. The other two youths were the older brother of Cornick, Raymond, and Clive, neither of whom B had met before. Michael was apparently L’s boyfriend.

[5] When the episode of Dallas was finished L’s mother went to bed. The girls and the five youths went to L’s bedroom since L was concerned that the noise they were making would disturb her mother. Unbeknown to B, after they went in the bedroom door was locked. L and the other girl became sexually intimate with Michael and Clive respectively as soon as they were in the room. B went to sit on the bed where she was supposed to sleep.

[6] Cornick came over to the bed, pushed her down so that she lay flat on the bed and began to kiss her. He pushed his tongue into her mouth. She was so naive, she maintained, that she did not even know that she was being kissed. Cornick also forced his hand under her blouse and when she tried to resist him he became aggressive. He then took hold of both her hands with one of his, holding her hands above her head, and with his free hand forcibly removed her jeans and pants. She objected and called out to the others to help her, but they ignored her. Cornick overcame her resistance and raped her. When he was finished his brother Raymond also raped her, and when she screamed he held a knife to her throat and threatened to hurt her. She was then raped by Kinnear, and a second time each by Cornick and his brother Raymond. All three of them lay on the bed with her at the same time.

[7] She kept pleading for help and weeping but the other people in the room continued to ignore her. When she was raped a second time by Raymond Cornick she became hysterical. The pain was searing. She no longer cared that there was a knife held to her throat. Her crying alerted L's mother, who knocked on the door and asked about the noise. The men dressed hastily and L opened a window for them to leave the room. She then unlocked the door. Her mother stood at the door and did not come into the room. L spoke for B when asked what the trouble was. She said B wanted to go home. The mother replied that it was too late at night for her to leave and that she could go only in the morning. B had no opportunity to say anything and in any event was in too distressed a state to speak. The mother went away, having apparently accepted the explanation. B said that the mother was an alcoholic but did not claim that she was drunk at the time.

[8] L told B to wash herself. She was bleeding and her clothes and the bedlinen were stained. After washing B lay on the bed, sleepless, until morning when she went back to her grandparents' home. She said not a word to them about her ordeal. She had been ignorant about sex and felt embarrassed, humiliated and ashamed at what had been done to her.

[9] That afternoon she was sent by her grandparents to the local shop to buy something for them. There she encountered Cornick who told her that if she ever said anything about the incident to anyone he would tell her grandparents what she had done. Not only did this frighten her, but it also reinforced her fear that she had done something wrong. While she felt abused and traumatized, she did not realize that she had been raped. She felt demeaned and humiliated and did not understand that she was in no way to blame.

[10] The result was that she threw away her bloodstained jeans and pants, lying to her mother later as to what had happened to them. And she remained almost completely silent about her ordeal for some 19 years. She did tell two friends some of what had happened soon afterwards: she spoke to a girl named YD over the phone, and had seen and spoken to ZA. I shall return to the evidence of the conversation with Z.

[11] B's distress was such that she decided to return to her mother's home in Parow prematurely. She phoned her mother and asked to be fetched to return home earlier than planned. Her mother confirmed when testifying that this had happened, and that B had explained her wish to return early on the basis that her friends were not around and that she was lonely.

[12] B did not tell her mother about the rapes. She felt unable to do so. She and her mother did not have a close relationship and she had effectively been brought up by her grandparents since she was about four. She had never been told about sex by her mother, nor about female physiology. Indeed she knew nothing of menstruation until she began her periods. She said that she did not realize, until her mid-twenties, that she had been raped. She attempted to bury the ordeal in the back of her mind, though she said that she had become even more withdrawn a child than she had been before.

[13] In due course B matriculated, and enlisted in the army. Subsequently she joined the department of correctional services and worked in various capacities, ultimately as a prison warder in a men's prison. She married Mr A VN and they have one child, also named B. She did not tell VN that she had been raped. She pretended, when they married, that she was a virgin. In court she said that in doing this she had 'lived a lie'.

[14] When working as a prison warder B suffered from depression. She had difficulties with her superiors, and found it unpleasant to deal with rapists in the prison. She consulted a psychiatrist and eventually confided in him that she had been raped as a child. But she still told no one else. She was eventually medically 'boarded' as a result of her depression.

[15] In February 2002 B went to pick up her daughter who had been visiting a friend. She encountered Cornick for the first time since January 1983, and recognized him immediately. Although shaken she managed to speak to the mother of her daughter's friend, and discovered that she was Cornick's sister. She also spoke to the father of the friend about building a carport, before leaving the house with her daughter.

[16] By the time she reached home she was hysterical as memories of her ordeal in 1983 came flooding back to her. She had to explain her state to her husband, and told him about the rapes in 1983. He was supportive and empathetic. He took her to a police station and they tried to lay a charge. But the officers on duty were unsympathetic and uncooperative. They left without laying a charge and the following day, a Monday, B was hospitalized because of the emotional distress she was feeling as a result of the encounter with Cornick.

[17] When she was discharged she ascertained where Cornick lived and his phone number. How she ascertained it is disputed and I shall return to the issue when considering her credibility. B, in the presence of her husband then phoned Cornick, who immediately knew who she was. She testified that she had asked him whether he knew that he had raped her. He responded that he did not deny it, but that it had happened years ago. When she told him that she was going to lay a charge, he asked why she had not done it at the time. Her husband corroborated this exchange.

[18] Shortly after the telephone conversation with Cornick, B was phoned by his sister, the mother of her daughter's friend, who verbally abused her and threatened her. B nonetheless then laid a charge against the appellants.

[19] Three other witnesses testified for the State: B's mother, Mrs A D, Mrs L Brown (formerly Albertyn), and B's husband, Mr A VN. Mrs D could add very little and her evidence was not regarded as completely reliable by the trial court. But she did confirm that B had asked to be fetched earlier than arranged from her grandparents' home in January 1983, and that B was a quiet, withdrawn child. She was hazy on where B had gone to school and when, but she was adamant about the period when B had returned early from her grandparents' home. She testified that L had spent a weekend with B in Parow, and that she had not liked L. She told B that L was not an appropriate friend and that B should end the friendship.

[20] L confirmed that B had told her that she had been hurt by Raymond Cornick, and that Mark Cornick had been present, but could not recall mention of Kinnear. She acknowledged that at the time of their conversation her chief

reaction to what B had said was anger with B for going to L M's house. L, L said, had a 'bad reputation', and she had warned B not to go there. She said that the appellants were friends of hers and that she found it difficult to believe that they had raped B. However, she also admitted that as a young teenager she too had been naive about sexual matters and might not have comprehended what B was telling her.

[21] A VN confirmed that B had not told him of the multiple rapes until February 2002 when she returned home from fetching her daughter. He slapped her to stop her hysteria. Subsequently he heard the telephone conversation between her and Cornick, and confirmed what was said. He also overheard the abusive and threatening call from Cornick's sister.

[22] The appellants testified in their own defence. They are cousins, and for some time Cornick had lived in the Kinnear home. The cousins, including Michael Kinnear, were good friends. Both denied that they had ever raped B. Yet both acknowledged that they had known her as a child in Kenwyn, and had met her at L's home. Both recalled an evening when they had gone to L M's home and met B there. They said that Michael, L's then boyfriend, had been with them as had Gary. (It is not clear whether Gary is the same person to whom B referred as Clive.) But they denied that Raymond Cornick, or a third girl, had been present. They claimed simply to have sat in L's bedroom and chatted. They both said that they had left L's house by the front door, as they had come in, thus denying that they had climbed out of a window. And they insisted that this had happened earlier than 1983: they did not go out in the evenings during the week, they said, because they were supposed to study for school exams. But they did not explain why this would be so during a school holiday, which it was in January 1983. They also claimed that they had met B several times at L's house after they had encountered her at L's home one evening. This accords neither with B's evidence that she did not see them again after January 1983, nor with L's evidence that she had not seen B since that time.

[23] The regional court, as I have said, found that B was an entirely credible witness. Mindful of the fact that B was a single witness to the rapes, the

regional magistrate looked for corroboration in the evidence of D and L, and examined the evidence of B herself carefully, finding no inconsistencies. It is worth setting out in full her description of B as a witness.

'The complainant to my mind, clearly testified about a very traumatic experience.

The evidence that she gave, the nature thereof and the charge is not only of a traumatic experience, but it was quite clear that talking about it, even 20 years later, made it no easier for the complainant. The Court adjourned on numerous occasions. The complainant was crying, sobbing in court and I cannot agree with the defence's contention that this was antics or a show.

In fact it never appeared rehearsed or anything but genuine anguish. She was honest about her own feelings of shame, embarrassment, feelings of having done something wrong herself, feelings that at the end of the day fits in with what the court would expect of a child at that stage, given her circumstances and that she was the victim of rape.

She was completely honest about the fact that she lied to her grandparents and her mom as to why she wanted to cut her holiday short. She was honest about it that she destroyed the evidence, if one could call it that, the blood on her clothing. She was honest that she never told her husband about this, that she pretended her virginity. She was honest to say I probably would never have laid the charges if I did not run into accused 1 and all the memories came flooding back.'

. . .

'The Court also finds the complainant to be a credible witness. There were no inconsistencies in the complainant's version, but more importantly no improbabilities.'

[24] The appeal court considered this evaluation to be correct. Mitchell AJ said that he was mindful that a trial court may have the advantage of seeing and hearing the witnesses in court, but that it is nonetheless the duty of an appeal court to consider the record of the proceedings in order to ascertain whether the credibility findings are supported by the evidence or by the probabilities. A credibility finding may well be held to be wrong.[1] An examination of the record persuaded the appeal court that the trial court had not erred in its assessment of B's evidence.

[25] The appellants argue, however, that the regional court misdirected itself in several respects. First, they contend that the learned magistrate made

[1] *R v Dhlumayo* 1948 (2) SA 677 (A); *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621(A) at 623H-624A); *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5 and *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 (5) SA 339 (SCA) para 14 .

findings of fact that are inconsistent with the evidence. So, for example, she did not take into account the conflict between the evidence of B, that she had encountered L once after she had left Kenwyn, and that of L who said that after January 1983 she had not seen B again, until the trial. The conflict does not relate to the facts in issue and is in my view immaterial.

[26] Secondly, L's evidence was that B, when she told her of the incident, had mentioned only Raymond Cornick and not Mark Cornick as an assailant, although B had mentioned his presence. She had not mentioned Kinnear to L, according to the appellants, although B testified that she had. As the learned regional magistrate found, these discrepancies are insignificant in context. Both B and L were testifying about a conversation held some 20 years previously. Moreover, L said that she could not remember mention of Kinnear: she did not deny that mention was made of him. L admitted that she had not fully comprehended what B was telling her at the time. She admitted also that her reaction to what was said was one of anger towards B for not heeding her advice about L. It is thus not surprising that there are some inconsistencies in the recounting of the conversation. This was the view too of the court below, and I consider that the regional court did not misdirect itself on these questions of fact. It correctly regarded L's evidence as corroborative at least of the fact that B had been sexually assaulted by Raymond Cornick in January 1983.

[27] Another misdirection argued for by the appellants is that B, when giving evidence on her reaction to seeing Cornick in 2002, said that she told her husband that she had seen her 'rapist'. VN, on the other hand, testified that she said she had seen her 'rapists'. The trial court did not take this inconsistency into account. This complaint cannot be afforded any weight in the light of the uncontested evidence of B that she had seen only Cornick, and had telephoned only him.

[28] The appellants argue further that the trial court misdirected itself when it found that L's evidence corroborated that of B when the latter said that L had a bad reputation. In fact B did not use those words. But she did testify that L had warned her not to go to L's house. It is reasonable to assume that B knew of L's

view of L. In the context of the evidence the complaint is trivial and the finding certainly does not amount to a misdirection.

[29] The appellants contend that the trial court misdirected itself in finding that B's mother corroborated her evidence that B would not, after January 2003, visit her grandparents on her own. B, however, testified that she had visited them after school on occasions, taking the train to Kenwyn. This is indeed an incorrect finding of fact, but again, it is of no significance and is explicable by the 20 years that had lapsed between 1983 and the trial. B would probably have had a better recollection than did her mother, and the error is of no relevance to the events at issue.

[30] There is only one respect in which I consider that B's evidence was puzzling: this is her account of how she ascertained the telephone number of Cornick. She testified that she had gone to a public phone and phoned the directories enquiry number, 1023. She had been given both his telephone number and his address. Much was made of this by the appellants' attorney in the trial court. Why use a public phone when she had a phone at home? And why say that she was also given Cornick's address when such information is not given on the enquiries line? No good explanation for this was proffered. She also testified that she had asked Cornick's niece, her daughter's friend, for the address. But why do that when she already had it? The court below considered that these implausible features were of a minor nature and did not impact on B's credible account of the rapes. That is correct.

[31] Finally, and most importantly, the appellants argue that B's version is improbable. They contend that it was not possible for B to have been so inexperienced and naive as not to know about sex or not to realize (until in her mid-twenties) that she had been raped. The story that she was raped in the presence of her 'friends' without their intervening was also improbable, as was the conduct of L's mother in taking no note of an apparently hysterical girl.

[32] Yet B gave plausible explanations for all these apparent anomalies. She had been brought up by elderly and conservative grandparents. They had never discussed matters of an intimate nature. She had a distant relationship with her

mother who had also not spoken to her ever about sex or physiology. She had never had a boyfriend. It seems to me quite likely that in these circumstances she did not realize what was happening to her when three youths took turns forcibly to have sexual intercourse with her, despite her pleas and protestations. She knew that she was being hurt, but she did not appreciate that she was being raped. It does not seem to me improbable that a young woman who has tried to bury memories of a traumatic event for many years would not appreciate until her mid-twenties, at a time when discussion and publicity about rape had become common, the full extent of what had happened only later.

[33] The argument that it was improbable that none of B's friends came to her rescue if her version were true is equally not convincing. It was B's view that she had been 'set up' by her so-called friend, L. Indeed L confirmed that B told her that L had instigated the attack on B, encouraged the youths, and urged them on. She did not know any of the youths, although she had encountered three of them at L's house previously, and she did not know the third girl. They were not friends and they ignored her pleas. When L's mother knocked on the door L had first let the men escape through the window and only then opened the door. It may be hard to understand the motives of the others given the vile manner in which they behaved, but that does not make B's account of their conduct improbable. They were on her version complicit in their friends' conduct.

[34] B's account of L's mother's behaviour is also said to be improbable. Why would a mother who saw a hysterical girl, bleeding and in a state of semi-undress, take no action? B's explanation is entirely plausible. M Meyer stood at the door of L's bedroom. The bed on which B sat was at the far end of the room. When she wanted to speak out L kept her quiet by saying that B wanted to go home. In any event, B was unable to speak because of her hysterical state. There appears to be no reason why the mother would not accept such an explanation. And it is likely that, standing at the door, she did not see the blood that B said was on her clothing and the bedlinen. Moreover, why would B fabricate the appearance of L's mother and her failure to speak out when this might weigh against her?

[35] The appellants argue also that it is improbable, if the rapes occurred, that B would not have told her grandparents or her mother about the rapes. They point out also that she gave various answers about why she had not laid charges: that she could not tell anyone, that she did not know where the appellants lived and that she did not know that she had been raped. However, none of these is inconsistent with the others. In my view, B's explanation is credible. She did not appreciate the magnitude of what had happened to her. She did not realize that she had been raped. She knew only that something terrible had happened to her, and felt in some way responsible, complicit. She had let it happen and was therefore ashamed. The threat by Cornick the following day exacerbated her feelings of shame and humiliation. She was not in a position to discuss personal matters with her elderly and very conservative grandparents. She also felt she could not tell her mother. Sex was not openly spoken about in the community in which she lived. Rapes were not reported and discussed daily by the media as they are now. The only people in whom she could confide were friends, and she had spoken to two of them, though she had not been explicit. The trial court and the court below accepted these explanations, as do I. In my view it is highly likely that a young girl who goes to sleep over at the home of a person against whom she had been warned, both by a friend and her own mother, and then spends time in a locked bedroom with five youths whom she barely knows, would believe that she was at fault. In her naive mind B had done wrong. The situation was partly of her own making. She would clearly then not want to relate her ordeal to her mother or to her conservative, strict grandparents.

[36] Related to the misdirections alleged is the appellants' complaint that the regional magistrate did not heed the cautionary rule. Counsel for the appellants concedes that there is no longer a special cautionary rule relating to sexual offences. In *S v J*[2] this court held that when evaluating the evidence of an alleged victim in rape or sexual assault cases a court need do no more than exercise the caution that is necessary when there is only one witness to the offence alleged. But he argues that the trial court did not take into account sufficiently that, because she was a single witness, B's account had to be treated with particular care, especially in light of her history of depression. She

[2] 1998 (2) SA 984 (SCA).

is argued to fit the 'psychological profile' of the complainant in *S v F*[3] who was disbelieved. I fail to see any analogy, for in that case the appellant admitted to sexual intercourse with the complainant but claimed it was consensual. It is in any event a decision that precedes that of this court in *S v J*[4] and the finding was made on the basis that the trial court had not heeded the cautionary rule specific to sexual offences. The point that is sought to be made is that because B suffered from bouts of depression (the extent of which was not established), she 'deviated' from the norm such that her evidence should be treated with additional caution. This submission is made without any factual basis and thus must be rejected.

[37] In my view the trial court was very careful in assessing the evidence. The regional magistrate expressly stated that it was incumbent on her to approach B's evidence with caution. It is for this reason that she sought to find corroboration in the evidence of other witnesses, such as L and VN. She also found some of the evidence of the appellants to be corroborative: thus, for example, they confirmed that Michael was L's boyfriend; that they had spent an evening at L's house when B was present and that they had met B at L's house previously. As the court below found, the regional magistrate exercised all the caution that was required.

[38] There is additional reason for rejecting the argument that B's version was a fabrication. She was, as the trial court found, frank about having lied to her mother about her stained clothes and the reason for her early return to Parow, and to her husband about being a virgin. She was also frank about her failure to say anything to Mrs M when she came to find out about the noise in L's room. And, most significantly, she did not implicate Kinnear in a second rape. If her version were a fabrication, why invent the appearance of Mrs M, and why not say that Kinnear too had raped her a second time? I consider that these are features of a genuine and credible account of the appellants' conduct.

[39] It remains to consider whether the appellants' versions, weighed against B's credible account, were reasonably possibly true. They both denied guilt. They both claimed that on the one evening when they had met B at L's home

[3] 1989 (3) SA 847 (A).
[4] See also *S v M* 2006 (1) SACR 135 para 272.

they had done nothing more than chat to L and B. But neither could explain why B, 19 years after the alleged rapes, had laid a charge against them. It was put to B that L and her mother would deny her version. Yet neither was called. Nor were Michael and Gary called although they were at court when the trial commenced and the attorney appearing for the appellants put to B that they would testify that nothing had happened and that her account was a complete fabrication. Yet they did not, in the end, testify. At the close of the defence case the attorney representing the appellants said only that other witnesses were not available. Of course it is not for the appellants to establish their innocence. And acceptance of the State's evidence does not in itself establish the guilt of an accused.[5] But there was a case for them to meet.

[40] Kinnear's evidence as to his arrest is also of note. He testified that he had received a telephone call from Cornick who had been arrested and asked him to come to the police station where he was being held. Kinnear did not ask why Cornick had been arrested: he simply drove to the station to 'hand himself over'. Why do that if he did not know that he too would be arrested and what the probable charges were? Moreover, when questioned by the regional magistrate, Kinnear's version of why he had gone to the police station and what he had said was entirely different.

[41] The trial court was not impressed by the appellants. Their version of events was scanty and they could not explain the improbability of B fabricating a complex story about their raping her some 19 years after the offences were committed. Accepting that the evidence of B was credible and consistent, and corroborated in several respects, the appellant's conflicting version, unsupported by any evidence but their own, cannot stand. In *S v Van der Meyden*[6] Nugent J said

'It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is "completely acceptable and unshaken". [The quotation is from *S v Munyai*,[7] a case the learned judge said was to be regarded with circumspection.] The passage seems to suggest that the evidence is to be separated into compartments, and the "defence case" examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable

[5] *S v Van Aswegen* 2001 (2) SACR 97 (SCA).
[6] 1999 (1) SACR 447 (W) at 449f-450a, cited and approved in *S v Van Aswegen* at 101a-f.
[7] 1986 (4) SA 712 (V).

possibility, failing which the accused is entitled to be acquitted. If that is what was meant , it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence. . . .
The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent.'

[42] This is a case where the State evidence is so convincing that it excludes the possibility that the appellants are innocent 'no matter that [their] evidence might suggest the contrary when viewed in isolation'.[8] I consider that the State proved the appellants' guilt beyond reasonable doubt.

[43] I turn then to the appeals against the sentences imposed. B gave evidence in aggravation of sentence, repeating her testimony about the anguish that she had suffered during and after the rapes, and the way in which her life had been detrimentally affected. In cases such as these a heavy sentence is warranted. At the time of the rapes the jurisdiction of the regional court was limited to the imposition of a maximum term of imprisonment of ten years.

[44] Sentencing in this matter is particularly difficult given that the appellants were charged 19 years after they had committed the offences and convicted more than a year later. Evidence was led, and reports handed in by a correctional supervision officer, and by a clinical psychologist, which showed that both appellants have led apparently exemplary lives since 1983. Both men were 39 at the time of sentencing. They both have stable jobs, a regular income, wives and children. They are regarded as decent people by the communities in which they live.

[45] The trial court did take these factors into account in imposing sentence. It also had regard to the fact that the appellants were only 18 at the time they raped B. But the regional magistrate considered that correctional supervision in terms of s 276A(1) of the Criminal Procedure Act 51 of 1977 was not appropriate despite the recommendation of the correctional supervision officer. She considered that the punishment of the appellants should send a serious

[8] *S v Van der Meyden* above at 449d-e.

message to the public about the horror of rape. She regarded it as aggravating that the appellants showed no remorse; that they had taken advantage of a girl whom they knew, and that Cornick had threatened her the day after he had brutalized her. They had both raped her despite her pleas, her suffering, her weeping. They took turns in participating in this savage conduct. In the words of the regional magistrate, they were ‘cruel, callous and contemptible’. Their savagery had an impact on the life of B which cannot be undone. The serious nature of the crime thus persuaded the trial court that correctional supervision was not an appropriate sentence for either of the appellants.

[46] In the absence of any misdirection on the part of the trial court an appeal court should not interfere with the sentence imposed. In any event, in my view, sentences of five years’ imprisonment for Cornick (who raped B twice) and four years’ imprisonment for Kinnear, are entirely appropriate. While there is some cogency in the argument that men who have for twenty years led decent lives should not be sent to prison, I consider that the extreme cruelty of their behaviour warrants more than correctional supervision. Only direct imprisonment is sufficiently serious to constitute a deterrent and retributive sentence.

[47] The appeals of both appellants against both convictions and sentences are dismissed.

C H Lewis
Judge of Appeal

Concur: Ponnan JA and Theron AJA