THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 643/09

In the matter between:

RENIER OPPERMAN **First Appellant**
DIRK JOHANNES OPPERMAN **Second Appellant**

and

THE STATE **Respondent**

Neutral citation: **Opperman v The State (643/09) [2010] ZASCA 83 (31 May 2010)**

Coram: **Lewis, Heher, Leach JJA, Griesel and Majiedt AJJA**

Heard: **5 May 2010**

Delivered: **31 May 2010**

Summary: **Criminal procedure – sentence – rape and indecent assault – young children – influence on sentence of low intelligence and lack of insight of accused.**

ORDER

On appeal from: North Gauteng High Court (Circuit Local Division for the Western Circuit District, Motimele AJ sitting as court of first instance).
The appeal is dismissed.

JUDGMENT

MAJIEDT AJA dissenting (Griesel AJA concurring with Majiedt AJA):

[1] The sexual abuse of children is a widespread social ill in our country. This fact was recognised by this court some fifteen years ago in *S v D.*[1] Statistics for 2007/8 show that a staggering 44.4 percent of all rapes and 52 percent of all indecent assaults were perpetrated against children.[2] It was estimated in 2005 that between 400 000 and 500 000 children are sexually abused each year.[3] Anecdotal data suggests that a vicious cycle is discernible in such cases where the sexually abused victim of today is likely to become tomorrow's sexual abuser. Sexual abuse within a family context appears to be on the increase, judging by cases reported in the law reports and from other sources.[4] All three of these aforementioned phenomena feature prominently in the present matter.

[2] The appellants, twin brothers, were convicted in a regional court of two counts of indecent assault and rape. The two victims are the appellants' nephew and niece, ie their sister's son and daughter. The children were six and three years old respectively at the time of the commencement of the commission of the

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[1] *S v D* 1995 (1) SACR 259 (A) at 261c-d.
[2] South African Police Service website: http:/www.saps.gov.za/statistics/reports/crimestats/2008/docs/introduction 2008; (Accessed on 20 May 2010).
[3] Jacobs M, Shung-King M and Smith C, South African Child Gauge(2005): Children's Institute, University of Cape Town.
[4] Leoschut, L and Burton, P, 2006 – 'How rich the rewards: Results of the 2005 National Youth Victimisation Survey'. Centre for Justice and Crime Prevention Cape Town (2006) at 62.

offences and the appellants were in their late twenties.[5] The indecent assault charges were in respect of both the boy and the girl and the rape charge relates to the girl.

[3] The regional magistrate imposed sentence after conviction, but the sentences were set aside by the high court because the regional magistrate did not have the requisite sentencing jurisdiction in the matter.[6] The court below (Motimele AJ sitting as court of first instance in the North Gauteng High Court, Circuit Local Division for the Western Circuit Division) thereafter imposed sentence as follows on the appellants:

(a) the first appellant was sentenced to six years' imprisonment for each indecent assault count and to 25 years' imprisonment for rape; and

(b) the second appellant was sentenced to six years' imprisonment on each count of indecent assault and 20 years' imprisonment on the rape count.

In both instances the sentences were ordered to run concurrently so that the first appellant was effectively sentenced to 25 years' imprisonment and the second appellant effectively to 20 years' imprisonment. The present appeal, with leave of the court below, is directed against sentence only and, in essence, it relates to the sentence on the rape conviction.

[4] The factual matrix underlying the conviction, briefly, was that the appellants, who are of low intellect, lived on a plot together with their sister (the complainants' mother), the two complainants and the appellants' parents. I interpose briefly to observe that the extent of the appellants' low intellect and its impact on the moral reprehensibility of their crimes is one of the central issues in this appeal. Over the period of 2000 to 2001 the appellants perpetrated various acts of indecent assault on both complainants by:

(a) showing pornographic material to the boy;

(b) rubbing their exposed private parts against his;

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[5] The charges were formulated in the charge sheet to the effect that the rape and indecent assaults had allegedly been perpetrated over a period from 2000 to 2001. The regional magistrate found this to be the case, ie, that the appellants had over a period ranging from 2000 to 2001 on diverse occasions committed the offences which they had been charged with.

[6] The matter was finalised prior to the amendment of the Criminal Law Amendment Act 105 of 1997, in terms of which regional courts are now clothed with the requisite sentencing jurisdiction in cases such as the present one.

(c) stimulating the boy's penis with their hands; and
(d) licking the girl's private parts.
Both appellants were also found to have penetrated the girl vaginally with their penises during that same period. A highly unsatisfactory feature is that neither the evidence nor the judgment contains any detail as to when exactly and on how many different occasions the indecent assaults and rape had been committed.

[5] During cross-examination of the complainants it was suggested to them that they had in fact been engaged in improper sexual conduct with each other. Both of them rejected this suggestion.[7] The girl also rejected the startling suggestion made to her during cross-examination that she had in fact seduced and enticed the first appellant into committing these improper acts with her. The girl did, however, admit in the course of testifying in examination-in-chief and under cross-examination that she had also been sexually abused prior to and subsequent to the present incidents by two other persons, namely one Louwtjie and 'oom Nico'.

[6] The regional magistrate rejected the versions advanced by the appellants in their testimony in the defence case as false. Those versions consisted largely of exculpatory explanations as well as allegations against the two complainants along the lines put in cross-examination on their behalf, alluded to above.

[7] A social worker, Ms Bruwer, compiled pre-sentence reports in respect of both appellants. These reports were handed in by agreement at the sentencing stage and Ms Bruwer confirmed the contents of the reports in oral evidence. She was not cross-examined at all by the defence. The contents of the reports were not challenged at all at the trial or during the proceedings before us. The veracity of the allegations in the reports, including material hearsay allegations, are therefore not in issue for present purposes. The probative value of unchallenged hearsay allegations during sentencing proceedings bears consideration, which I will discuss in due course.

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[7] Both complainants gave their testimony through an intermediary in terms of s 170A of the Criminal Procedure Act 51 of 1977.

[8] The following relevant facts pertaining to the appellants' personal circumstances can be gleaned from the reports:

(a) The appellants were 29 years old at the time of sentence, which was imposed on 17 September 2002 (it will be recalled that the offences were found to have been committed over a period from 2000 to 2001).

(b) The appellants were first offenders.[8]

(c) The appellants attended special schools; the first appellant completed grade nine and the second appellant grade ten. They had unstable employment records and were employed at various places for relatively short periods of time. These frequent employment changes were apparently caused by their parents' frequent relocation. Significantly the second appellant at one stage conducted his own electrical business and the first appellant was employed there.

(d) The appellants conveyed to Ms Bruwer that they were themselves indecently assaulted by family members during their childhood and teenage years. When their parents became aware of this, counselling was arranged for the appellants. At that time it became known that the parents themselves had in turn been child victims of sexual abuse by older persons.

(e) Ms Bruwer expressed the view that, notwithstanding their limited intellectual capacity, both appellants had sufficient insight to distinguish between acceptable and unacceptable conduct.

[9] In her reports Ms Bruwer recorded that, while she did not have personal contact with the victims due to their young age, a psychiatric report (which does not form part of the record) indicates that the offences have impacted as follows on the victims:

(a) In the case of the girl, she experiences emotions of rejection and inferiority. She exhibits a strong need for affection and acceptance, which may in itself leave her vulnerable to further molestation. Her father reported that she behaves improperly by sitting on the laps of strange men and by kissing them. She masturbates frequently and has a fear of being alone and of sleeping alone.

(b) The boy understands that he has been abused, but regards himself as having been naughty due to what has occurred. He lacks confidence in adults, by

[8] Although Ms Bruwer alluded in her report to a previous conviction for fraud committed in 1995 by the second appellant, the appellants were treated as first offenders in the court below and this was accepted as correct by both counsel in their heads of argument in this court.

virtue of him having been abused by two persons who are well known to him. He is guilt ridden for failing to protect his younger sister and consequently has very low self-esteem. He was indecently assaulted in an ostensibly safe environment by people whom he was supposed to trust – this may lead to feelings of insecurity and lack of trust. He performs poorly at school.

[10] The failure to hand in the psychiatric report and to lead the evidence of the author thereof concerning the impact of the offences on the complainants during the sentencing proceedings is disconcerting and ought to be strongly deprecated. It constitutes important evidence to assist the sentencing court in arriving at an appropriate sentence providing, as it does, some insight into the short term effects of the appellants' crimes.[9]

[11] This leads me to a consideration of the probative value of the hearsay allegations in that report which had been subsumed into Ms Bruwer's reports. As stated, these reports were received as evidence by the regional magistrate by consent of the State and the defence. Moreover, the contents of the reports were admitted as correct. In *S v Olivier*[10] this court undertook a general discussion of the probative value of facts admitted by agreement during the sentencing stage. Briefly stated, material factual averments ought generally to be proved on oath during the sentencing stage.[11] Where the factual basis of a pre-sentence report or an opinion or recommendation contained therein is disputed in a material respect, the author of the report is required to testify on oath.[12] In the absence of a pertinent challenge thereto and sans any controverting evidence, facts unequivocally admitted by a party become proved facts.[13] This holds true too, in my view, for hearsay allegations embodied in such admitted facts. As a consequence, the impact of the offences on the complainants formed part of the proved facts during the sentencing stage in this matter. It is well to remind oneself of the wide powers of a sentencing court in receiving such evidence on

[9] In recent years, the impact of crime, particularly violent crime, on victims, has assumed an important role in sentencing considerations. This is manifested, inter alia, by the development of a Victims' Charter by the Department of Justice and Constitutional Development.
[10] *Olivier v The State* (318/09) [2010] ZASCA 48.
[11] *Olivier v The State* para 7 and cases cited there.
[12] *S v R* 1993 (1) SA 476 (A) at 492E.
[13] *Gordon v Tarnow* 1947 (3) SA 525 (A) at 531. P J Schwikkard & S E van der Merwe, *Principles of the Law of Evidence* 3 ed (2009) para 26.5.5.

sentence as it thinks fit in terms of s 274(1) of the Criminal Procedure Act, 51 of 1977.[14]

[12] The court below correctly approached the matter as one in which the minimum sentence stipulated in s 51 read with Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Act) did not find application. This is so by reason of the fact that the appellants had not been alerted to those provisions in the charge sheet and at the commencement of their trial.[15] In its assessment of a suitable sentence, the court below had regard to the various aggravating factors, namely the fact that rape had been perpetrated on a young and innocent child, that the offences had been perpetrated over a protracted period, the prevalence of the offence and the fact that the offences amounted to a betrayal of trust, having been committed in a family environment where the complainants were supposed to look up to the appellants for protection. The learned judge regarded the first appellant as the ringleader and imposed a heavier sentence on him than on his brother, the second appellant. He expressed the view that 'It might well be that the accused are not rocket scientists. They may not be your A+ students at school and indeed may not be very bright, but they are capable of functioning normally and appreciating the consequences and the seriousness of their actions'.

[13] The limited powers of an appellate court in respect of sentence are well known and need not be restated. Counsel for the appellants relied on two misdirections by the court below. She submitted that the court below materially misdirected itself, firstly, by having insufficient regard to the appellants' personal circumstances and, secondly, by making the findings referred to in the preceding paragraph. These contentions are devoid of merit. The court below referred to the mitigating personal circumstances of the appellants and took them into account in its judgment, particularly their low level of intellect and the fact that they had themselves been sexually abused by adults during their formative years. In my view the court below did not commit any material misdirections on sentence.

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[14] Cf *S v Giannoulis* 1975 (4) SA 867(A) 874A-B.
[15] Compare: *S v Ndlovu* 2003 (1) SACR 331; 2003 (1) SACR 331; [2003] 1 All SA 66 (SCA) para 12; *S v Mabuza & others* 2009 (2) SACR 435 (SCA) para 10.

[14] I turn now to a consideration of whether the sentence imposed can be said to be excessive to the extent of inducing a sense of shock. As stated, the appeal is in effect directed against the sentence imposed on the appellants for rape. An important point of departure is that as far as the rape conviction is concerned, the severity of the sentence must be judged against the background that the benchmark for a conviction of rape on a girl under the age of 16 years is life imprisonment in terms of the relevant legislation.[16] It matters not, in my view, that life imprisonment was not an obligatory sentence in the present matter by virtue of the fact that the appellants had not been informed of the provisions of the Act, either in the charge sheet or at the trial. This was but a technical defect. The stark reality is that, but for this technical shortcoming, the appellants would have faced a prescribed sentence of life imprisonment on the rape conviction. Any assessment of an appropriate sentence therefore has to be made with full recognition of the legislative benchmark. That is not to say that, if the prosecution had done its work properly in this case, life imprisonment would necessarily have been an appropriate sentence for rape. For the reasons that follow I am of the view that it would not have been and that the sentence imposed by the court below is indeed appropriate.

[15] The moral reprehensibility of rape and society's abhorrence of this rampant scourge are unquestioned.[17] The most cursory scrutiny of our law reports bears testimony to the fact that our courts have, rightly so, visited this offence with severe penalties. This reprehensibility and abhorrence is so much more pronounced in the instances of the rape of very young children as is the case here. The court below correctly took into account the fact that the complainant was an innocent, defenceless and vulnerable victim. She was raped over a prolonged period by her two uncles whom she had trusted. The short term psychological effects of this heinous crime are readily evident from the psychological report incorporated into Ms Bruwer's reports. One can only speculate on the long term effects. It is striking that the rape victim's father had

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[16] *S v Malgas* 2001 (1) SACR 469; 2001 (2) SA 1222; [2001] 3 All SA 220 (SCA) para 25; *S v Sikhipha* 2006 (2) SACR 439 (SCA) para 17.

[17] *S v Vilakazi* (576/07) [2008] ZASCA 87, 2009 (1) SACR 552 (SCA), para 1; *S v Chapman* 1997 (2) SACR 3; 1997 (3) SA 341 at 5 a-d (SACR); 345 A-C (SA).

conveyed to Ms Bruwer that he harbours fear that she and her brother will not recover completely from their ordeal and that in his view his daughter in particular had been severely prejudiced.

[16] The learned judge below was justified, in my view, in regarding the fact that the girl had been raped by her own uncles as an aggravating factor. The notion that rape within a family is less reprehensible than rape outside of it has been firmly dispelled by this Court in *S v Abrahams.*[18] The factors adumbrated by Cameron JA in that case are particularly apposite in the present matter.

[17] The appellants' low intellect is an established fact. Less clear is the extent thereof. Their counsel laid much emphasis on it during argument in this court. I think it is greatly exaggerated. On the evidence before us these two men were in gainful employment at a number of places. The first appellant worked at two furniture companies, a hospital, a general dealer, three security companies, a contractor and, as stated, in the second appellant's electrical business. He appears to have lost his employment rather frequently, due to his parents' frequent relocation. He did not appear to have much difficulty in obtaining new employment in such instances. The second appellant held positions at an enterprise known as AN Quick Stitch, at a hospital, a furniture company, a tractor company, a security company, an engineering concern and at three different cellular phone outlets. He also set up his own steel business, worked as a plumber and, as stated, established his own electrical business where he employed the first appellant. On the available evidence this hardly fits the profile of two young men who were so intellectually challenged that their raping of their young niece over an extended period should invite a measure of leniency. The expert witness, Ms Bruwer's unchallenged evidence contained in her report, was that, notwithstanding the appellants' limited intellectual capacity, they were capable of distinguishing between acceptable and unacceptable conduct. The first appellant’s evidence lends significant credence to this finding. In examination-in-chief he testified as follows:

'Dit was nou begin in die kar, in die kar gewees, en toe sy (the girl complainant) vir my pa-hulle sien, toe klim sy van my skoot af. Toe kom (the boy complainant), toe wil (hy) ook weer begin.

[18] 2002 (1) SACR 116 (SCA) para 23.

Toe sê ek vir hom … nee, toe sê (hy) vir my 'allright' dan sal ons daar by ouma se huis. Toe het ek maar saam gespeel, ek weet dit is verkeerd, ek weet dit was verkeerd.'

The first appellant also acknowledged, when questioned by the regional magistrate, that he knew that it was wrong to fondle the children's private parts and to permit them to fondle his. Ms Bruwer's finding finds further support in the appellants' employment history. A reading of their oral testimony confirms that they are not at the intellectual level of normal men in their late twenties. But they hardly strike me as severely mentally retarded men. The learned judge was fully justified in making the findings that he did on this aspect.

[18] A factor which weighs with me more is the evidence that the appellants themselves had been subjected to sexual abuse during their formative years. Regrettably no evidence was adduced on the effect of this abuse on their sexual development in later life. But, as indicated above, anecdotal information suggests that the young abused become abusers themselves in later life. And there is some suggestion to this effect in Ms Bruwer's report in respect of the impact of the crimes on the complainants. The court below was fully cognisant of this particular factor as is evident from its judgment.

[19] The sentences imposed are indubitably severe. But I do not regard them as shockingly inappropriate – that appellation could conceivably have been justified if life imprisonment had been imposed for the rape. Imprisonment of 25 and 20 years respectively encapsulates the undeniable gravity of the rape of a very young child over a protracted period. Added to this is the appellants' complete lack of remorse. In fact, the first appellant sought to shift the blame for his misdeeds to the young victim, accusing her of seducing and enticing him into indecently assaulting and raping her. This is a further aggravating factor.

[20] Any sentence with a shorter term of imprisonment would to my mind overemphasize the appellants' personal circumstances and underemphasize the seriousness of the rape. There are really only three mitigating factors of note, namely the appellants' limited intellectual capacity, the fact that they are first offenders and their own sexual abuse during their childhood and teenage years.

The sentence imposed by the court below gives recognition to the mitigating factors, without losing sight of the gravity of the offence and its impact on the appellants' nephew and niece, in particular the latter. To elevate the appellants' personal circumstances above that of society in general and these two child victims in particular would not serve the well-established aims of sentencing, including deterrence and retribution.[19] In *S v Vilakazi,* Nugent JA formulated it as follows:

'In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of "flimsy grounds" that *Malgas* said should be avoided.'[20]

[21] In *Vilakazi*[21] this court also pointed to the absence of gradation between a sentence of ten years' imprisonment ordinarily prescribed for rape and life imprisonment prescribed if any of eight aggravating features mentioned in Schedule 2 Part I, read with s 51(1), of the Act is present. This court emphasized that the proportionality of the prescribed sentence must be determined on the circumstances of each particular case.

[22] I have given cautious and anxious consideration to the facts and circumstances of this case, mindful of the caveat issued by Nugent JA in *Vilakazi* that '[c]ustodial sentences are not merely numbers'.[22] What weighs particularly heavily with me is the rape victim's age (between three and five years of age over the period that the rapes were committed). In this regard, I respectfully adopt the approach by Nugent JA in *Vilakazi* in examining where this particular 'complainant's age fits in the range between infancy and 16 (years). . .'[23] On that approach a substantially longer term of imprisonment than the one imposed in *Vilakazi* (15 years) seems to me to be justified in the present instance. The

[19] *S v Lister* 1993 (2) SACR 228 (A) at 232g-h; *S v Salzwedel & others* 1999 (2) SACR 586 (SCA) at 592c-e; 2000 (1) SA 786 (SCA) at 791A-C.
[20] Para 58.
[21] Para 13.
[22] Para 21.
[23] Para 59.

protection of young children plays an important role when it comes to sentencing in matters of this nature.[24]

[23] The court below correctly ameliorated the cumulative effect of the sentence by ordering concurrence of the shorter terms of imprisonment for the indecent assaults with the longer term of imprisonment for the rape. The learned judge was justified in differentiating between the two appellants on sentence – on the first appellant's own evidence he took the lead in committing these offences. I can find no ground warranting interference with the sentence on appeal. I would dismiss the appeal.

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S A MAJIEDT
ACTING JUDGE OF APPEAL

Heher JA (Lewis and Leach JJA concurring):

[24] I have read the judgment of my colleague Majiedt AJA. For the reasons which follow I have arrived at a different conclusion.

[25] This appeal raises difficult questions which are bound to provoke emotional responses unless the interplay of all the facts is carefully analysed and assessed.

[26] There are certain very unsatisfactory features which complicate the case. In one sense they are the natural consequence of reliance on the uncorroborated evidence of young children given a year or more after the event. In another they result from the lax attitude of the prosecution and the trial court.

[27] The appellants were charged with three offences:

1. The rape of the 4 year old girl, A.

[24] *S v McMillan* 2003 (1) SACR 27 (SCA) at 33h-i.

2. Indecent assault on A by touching her private parts and/ or pressing their fingers into her private parts.
3. Indecent assault on the six year old boy, B, by touching his penis ('geslagsdeel') and/or sucking on his penis ('geslagsdeel').

[28] Each offence was alleged to have been committed 'op of omtrent gedurende 2000-2001'. The high court confirmed the convictions without querying their basis and sentenced the appellants as if they had been charged with multiple rapes and acts of indecent assault. While I have some doubt as to the sufficiency of the charge sheet to cover repeated offences,[25] the question was not debated before us and the trial was conducted as an investigation into the conduct of the appellants over the whole period without objection. For the reasons set out below I am of the view that the matter has no material bearing on the sentencing of the appellants. It is thus unnecessary to pursue the enquiry.

[29] The second reservation is that the evidence went far beyond the particulars furnished in the charge sheet. In addition to the acts identified in para 4 of the judgment of Majiedt AJA, B testified that the appellants (or, at least, the first appellant) deliberately masturbated in front of him and that the appellants compelled A to suck his penis. However, no amendment of the charge sheet was applied for. The act alleged in count 3, *viz* that the appellants sucked on B's penis, was not established, although the touching of his private part was. I ignore the additional evidence in assessing the appropriate sentence.

[30] Sentencing is about achieving the right balance (or, in more high-flown terms, proportionality).[26] The elements at play are the crime, the offender and the interests of society or, with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific; even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions. This seems to be a case

[25] See *S v Mponda* 2007 (2) SACR 245 (C).
[26] See particularly *S v Dodo* 2001 (1) SA 594 (CC) paras 35 to 38.

in point. There is ample room for controversy in the combination of psychological problems, sexual assaults and young victims. The cases show a need for great sensitivity on the part of courts towards victims and abusers in such cases. But where the accused's conduct was explicable by psychological defects the consequence has almost always been mitigatory.[27]

[31] The crime was loathsome and despicable: the serious abuse of two very young children in a domestic situation by adult members of the family who should each have protected the victims against the other's predations. The psychological consequences to the victims were bound to be severe even without physical harm. Disgust and outrage are justifiable reactions. A balanced outlook is more difficult to achieve.

[32] The appellants maintained their innocence in whole or in part throughout the trial. They cast blame on the children without any justification. That was an aggravation.

[33] The appellants were adult in body, but it is clear to me that both were anything but mature in mind. In their late twenties, they still lived in the parental home, apparently subsisting on scraps of diverse employment supplemented by disability pensions. How far short they fell in intellect is made clear by the nature of the defence. They testified and, apparently, expected the court to believe, that seriously improper behaviour of a deviant nature was initiated by a four-year old girl and her six-year old brother, that neither of the
appellants was able to resist her temptations and that the two children were actually seen in the act of having or attempting sexual intercourse with each other.

[34] This last seems to me the most telling factor in the assessment of moral blameworthiness. Indeed, even if, properly understood, the charges embraced multiple acts of rape and abuse, my perception of the appropriate punishment would not change. Seriously stunted moral sensibility is not

[27] *S v S* 1977 (3) SA 830 (A); *S v B* 1980 (3) SA 846 (A); *S v O* 2003 (2) SA 141 (C).

quickened by the repetition of conduct which other right-thinking members of society know to be reprehensible or, even, evil. The appellants started with a material deficit. When they gave evidence the gap had not narrowed. Knowledge of the wrongfulness of the appellant's conduct was proved. That was necessary for mens rea. But I am far from satisfied that it was matched by insight into the seriousness of their offence[28] or by an ability to resist the pull of their own lusts, both qualities which one would expect to find in a mature adult possessing even a limited perception of correct social norms.

[35] According to the social welfare reports produced in evidence both appellants were indecently assaulted as children by various adult persons. So were all their siblings. So also both their parents. The mother of the complainants (whom the probation officer consulted) was raped by her own brother. Small wonder that the appellants showed neither remorse nor insight into their offences.

[36] As the magistrate recognised, the environment in which the appellants and the children were obliged to cohabit in close proximity was far from desirable and proved,

[28] Recognised by the trial court as ''n ernstige gebrek aan insig'.

given the appellants' susceptibilities, to be a recipe for disaster.[29] To this must be added the likelihood that, having been abused in youth, they were, in the circumstances, less likely to regard socially deviant conduct as abnormal.

[37] Society demands retribution and, rightly, protection from anti-social elements. But I cannot agree with the magistrate that the two appellants are to be regarded as dangers to society. Their's was essentially a crime arising in a specific domestic context. The probability of repetition must be remote.

[38] Deterrence as an object of sentence in a case of this nature is, in my view, fanciful. Seeking to dissuade potential sexual offenders by increasing the punishment meted out to the appellants seems not only morally opprobrious[30] but also far-fetched in its prospect.

[39] As to the rehabilitation of the appellants, if such be possible, they have already served almost eight years behind bars. Prolonging their detention to twenty years or more would hardly confer an additional benefit to themselves or society.

[40] I cannot ignore that the legislature has set its face against sexual offences in which children are victims with unmistakable disapproval and draconian sanctions. The appropriate sentences must reflect that intention.

[41] Nevertheless, in sentencing, individualization and not collective responsibility for the prevalence of serious crime remains the court's primary focus. While there is no room for misplaced sympathy in dealing with offenders, one should never divorce determination of the appropriate punishment from the quality of the human material nor the reasons for its frailty. Even here mercy can find a place in almost all cases.

[42] Striving as I must to decide how the relevant factors should be

[29] In the words of the magistrate 'die hele dinamiek het homself as 'n teelaarde daargestel vir hierdie tipe van praktyk'.
[30] Cf the remarks of Botha JA in *S v Collett* 1990 (1) SACR 465 (A) at 469i-470i in relation to retribution.

translated into a sentence which meets legitimate societal demands and is not unfair to the appellants, I come to the conclusion that I would have imposed an effective sentence not exceeding 15 years on both appellants. I cannot find sufficient persuasive evidence in the record to justify a distinction between them on the grounds of degree of participation or moral turpitude.

[43] Section 282 of the Criminal Procedure Act 51 of 1977 provides that:

'Whenever any sentence of imprisonment imposed on any person on conviction for an offence is set aside on appeal or review and any sentence of imprisonment or other sentence of imprisonment is thereafter imposed on such person in respect of such offence in place of the sentence of imprisonment imposed on conviction or any other offence which is substituted for that offence on appeal or review, the sentence which was later imposed may, if the court imposing it is satisfied that the person concerned has served any part of the sentence of imprisonment imposed on conviction be antedated by the court to a specified date, *which shall not be earlier than the date on which the sentence of imprisonment imposed on conviction was imposed*, and thereupon the sentence which was later imposed shall be deemed to have been imposed on the date so specified.' (My emphasis.)

[44] The appellants have been continuously held in custody as convicted prisoners since 17 September 2002 when the regional court imposed the initial 'sentence'. That 'sentence' was set aside as invalid on 25 February 2005 (ie 2 years and 5 months into the 'sentence') and replaced by the sentence imposed by the high court. The last-mentioned date is 'the date on which the sentence of imprisonment imposed on conviction was imposed' within the terms of s 282. If 15 years imprisonment was the appropriate sentence then the terms of our order should be adapted to take account of both the statute and the true length of incarceration of the appellants.

[45] In the result:

1. The appeal succeeds.

2. The sentences imposed by the court a quo are set aside and substituted by the following:

'The first and second appellants are sentenced to imprisonment for 12

years and seven months, all counts to be treated as one for the purpose of sentence.'

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J A HEHER
JUDGE OF APPEAL

APPEARANCES:

For appellants: L Augustyn

Instructed by Bloemfontein Justice Centre, Bloemfontein

For respondent: S Scheepers

Instructed by Director of Public Prosecutions, Bloemfontein