

SUMMARY

This matter concerned a minor who was abducted from hospital as an infant and subsequently 'found' when she was 17 years old. Accordingly, she required her anonymity to be protected beyond the point of her being a minor and into her adulthood, given the fact that the ensuing criminal trial that took place had been the subject of great media scrutiny, both in South Africa and abroad, and moreover a book disclosing her identity was to be published.

The court *a quo*, being the Pretoria High Court, granted an order declaring that the protection afforded by section 154(3) of the CPA applied to victims of crime who were under the age of 18 years. It, however, also held that the section does not continue to protect child victims, witnesses and accused after the age of 18 years and dismissed the appellants' alternative constitutional challenges. The court *a quo* thereafter granted the appellants leave to appeal.

Section 154(3) of the CPA provides that no person shall publish in any manner whatsoever any information which reveals or may reveal the identity of an accused under the age of 18 years or of a witness at criminal proceedings who is under the age of 18 years, provided that the presiding judge or judicial officer may authorise the publication of such information as he may deem fit if the publication thereof would in his opinion be just and equitable and in the interest of any particular person. The appellants sought two extensions to the provisions of this section:

- (a) to extend the publication ban to the identification of any child victim of crime and;
- (b) to extend the duration of the ban on the identification of children indefinitely into adulthood.

Two central issues formed part of the dispute at the appeal, namely:

1. whether there should be any limitation of the media's right to impart information concerning the identity of child victims; and children who forfeit the protection of their anonymity on reaching the age of 18 years; and
2. if there is to be a limitation, what is the nature and extent of such limitation, before a court may determine whether anonymity or publicity is in the best interests of a child in a particular case.

In respect of the question of victim extension, the appellants argued that the section gives expression to the State's positive duties to protect children's rights and to secure their best interests in the criminal process and accordingly, when interpreted in light of this protective purpose, the phrase 'witness at criminal proceedings' in the section was reasonably capable of an interpretation that applied to all child victims of crime. Further, there is no basis for thinking that Parliament wanted, or was prepared to allow, such arbitrary treatment of vulnerable child victims. On the other hand, the respondents argued that the proper approach was to consider from the outset the context and the language of the section, in the light of the Constitution. Since the violation of the section carried a criminal sanction, its interpretation had to be informed by the presumption that it ought to be interpreted strictly in favour of individual liberty, accordingly, the language did not include a victim who was not a witness in the criminal proceedings and the purpose of the section is to protect children who participated in criminal proceedings against the disclosure of their identities. In light of the above, the appellant's wider interpretation of the section was incorrect.

The appellants' submissions in respect of the adult extension of the section, was that on a proper interpretation of the section, children who were subject to its protection did not lose this protection when they turned 18, due to the fact that the section had to be interpreted in line with what was described as 'the principle of ongoing protection'. This principle was said to be one in which 'childhood actions or experiences that are felt in adulthood are also the proper concern of section 28(2) of the Constitution'. According to the appellants, an interpretation that ensured ongoing protection, better promoted section 28(2) and protected child victims, witnesses, accused and offenders from the severe harm of identification. The respondents argued that on a proper interpretation of the section it only prohibited publication of the identity of an accused or witness in criminal proceedings, who at the date of publication was under the age of 18 years, due to the fact that there was no legal basis for the so-called 'principle of ongoing protection'.

HELD

In conclusion, the majority, held that the language of the section is unambiguous and the interpretation contended for by the appellants, whether in respect of the victim extension or adult extension, is unduly strained.

The section is an exception to the open justice rule and by virtue of the fact that it carries a criminal sanction, it must be interpreted in favour of individual liberty. This is particularly so where the right to freedom of expression is implicated. The court *a quo* accordingly erred in the interpretation it placed upon the section, in respect of the victim extension. The extension of the anonymity protection for children, whether by way of the victim extension or the adult extension, is in conflict with the rights to freedom of expression and freedom of the press and other media, entrenched in section 16(1)(a) of the Constitution. It is also in conflict with the open justice principle. As such, the central issue in this regard is whether the limitation of the right of the media to impart information, whether in terms of the victim or adult extensions to the section, are reasonable and justifiable in terms of section 36 of the Constitution. This determination is done by balancing competing interests in this regard so as to ascertain whether such limitation is reasonable and justifiable in the circumstances. As such, the nature and extent of the limitation must be observed as well as the proportionality of same (i.e whether the purpose of the proposed limitation may be achieved by less restrictive means).

It is clear that the adult extension severely restricts the right of the media to impart information and infringes the open justice principle. In the absence of any limitation on the nature and extent of the adult extension, the relief sought by the appellants is overbroad and does not strike an appropriate balance between the rights and interests involved. Accordingly, the proposed limitation on the right of the media to impart information is neither reasonable nor justifiable, in terms of section 36 of the Constitution. The constitutional challenge to the provisions of section 154(3) of the CPA on the basis that it is unconstitutional must accordingly fail. Further, the Court unanimously regarded section 154(3) of the CPA as falling short of meeting the constitutionally required standard when it comes to protecting the identity of children who have been the victims of crime. As such, it was held that section 154 (3) of the CPA is constitutionally invalid to the extent that they do not protect the anonymity of children as victims of crimes at criminal proceedings and Parliament was ordered to remedy same within 24 months.

The Majority did sympathise with the objective of the appellants in seeking to protect the anonymity of children as victims, witnesses and offenders of crime, once they reach adulthood. However, it remarked that such an amendment is a task more appropriately left to the Legislature.

The dissenting judgement delivered by Willis JA, found issue with the majority's finding in respect of the protection afforded by section 154(3) not extending into adulthood of child victims. Willis JA

was of the opinion that it is obvious that in addressing this question a balancing of competing interests, the central consideration in this regard, is the question of onus. Thus, the scales must tilt in favour of those who have become adults but were the victims of crime at a time when they were minors. Accordingly, the minority held that when it comes to the disclosure of the identity of childhood victims of crime, logic, common sense and ordinary, everyday morality generate a constitutional imperative that the relevant time, which is determinative of the issue, is the time that the person was a child and not the time from which the child has become an adult.

VALUE

This case emphasises how the contours of our constitutional rights are shaped by the justifiable limitation that the context presents and the law permits. It further illustrates that each constitutional right is subject to reasonable and justifiable limitation.

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