



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**FROM** The Registrar, Supreme Court of Appeal  
**DATE** 09 March 2016  
**STATUS** Immediate

***Please note that the media summary is for the benefit of the media and does not form part of the judgment.***

***Van der Bank v The State (245/15) [2015] ZASCA 10 (09 March 2016)***

#### **MEDIA STATEMENT**

Today, the Supreme Court of Appeal (SCA) dismissed an appeal by the appellant against an order of the Gauteng Division, Pretoria which confirmed the appellant's conviction of rape and indecent assault and the resulting sentence of 12 years' imprisonment (four years conditionally suspended for five years).

At the time of the commission of the offences, the complainant was a girl, biologically aged 16 years, but was mentally aged eight years old. Her mental age had not increased materially by the time of the trial. The appellant's defence was that the complainant had consented to engaging in the sexual acts in question.

During the course of the trial, the complainant had testified through an intermediary, purportedly in terms of s 170A of the Criminal Procedure Act 51 of 1977 (the Act), which caters for evidence to be given by witnesses below the age of 18. However, at the time that she testified, the complainant's biological age was 19. Subsequent to the conviction of the appellant, s 170A was amended to provide that the section applied to witnesses whose biological *or mental* age is below 18. Upon petition, the SCA granted the appellant special leave to appeal against his conviction and sentence on the limited ground viz whether the complainant's evidence was inadmissible as it was in conflict with s 170A of the Act as it existed at the time that she gave evidence.

Nevertheless, after reviewing the evidence as a whole, the SCA concluded that it was not necessary to consider the correct interpretation of s 170A in its un-amended form, as the conviction of the appellant had to stand even if the evidence of the complainant was excluded. This was clear as the

appellant had admitted that he had engaged in the sexual acts in question with the complainant, and his only defence was consent, which could not stand in light of the evidence of psychiatric experts who testified that the complainant was incapable of giving the required consent, and that any ordinary person would be able to tell that she was mentally challenged. In addition, the appellant knew the complainant's mother and had discussed her mental condition. He must have known and therefore did know as much.

Accordingly the SCA dismissed the appeal on the facts, and found it unnecessary to consider the correct interpretation of s 170A as it applied prior to the aforementioned amendment.

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