CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 261/18

In the matter between:

CENTRE FOR CHILD LAW	First Applicant
KL	Second Applicant
CHILDLINE SOUTH AFRICA	Third Applicant
NATIONAL INSTITUTE FOR CRIME PREVENTION AND THE REINTEGRATION OF OFFENDERS	Fourth Applicant
MEDIA MONITORING AFRICA TRUST	Fifth Applicant
and	
MEDIA 24 LIMITED	First Respondent
INDEPENDENT NEWSPAPERS (PTY) LIMITED	Second Respondent
TIMES MEDIA GROUP LIMITED	Third Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fourth Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fifth Respondent

Neutral citation: *Centre for Child Law and Others v Media 24 Limited and Others* [2019] ZACC 46

Coram:	Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J
Judgments:	Mhlantla J (majority): [1] to [128] Cameron J and Froneman J (partial dissent): [129] to [141] Jafta J (partial dissent): [142] to [186]
Heard on:	7 May 2019
Decided on:	4 December 2019
Summary:	Criminal Procedure Act — section 154(3) — identity of child victims — ongoing identity protection — competing constitutional rights — equality — best interests of the child — privacy and dignity — restorative justice — stigmatisation and agency —freedom of expression — open justice Order of declaration of invalidity granted and suspended for 24 months — interim reading-in granted

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ORDER

On appeal from and in an application for the confirmation of the order of the Supreme Court of Appeal, the following order is made:

1. The declaration by the Supreme Court of Appeal that section 154(3) of the Criminal Procedure Act 51 of 1977 is constitutionally invalid to the extent that it does not protect the identity of children as victims of crimes in criminal proceedings is confirmed.
2. Leave to appeal is granted against the part of the order of the Supreme Court of Appeal that dismissed an appeal challenging the constitutionality of section 154(3) of the Criminal Procedure Act on the issue of ongoing protection.
3. The appeal is upheld.

4. Section 154(3) of the Criminal Procedure Act is declared constitutionally invalid to the extent that the protection that children receive in terms thereof does not extend beyond their reaching the age of 18 years.

5. The declaration of constitutional invalidity is suspended for 24 months to afford Parliament an opportunity to correct the defect giving rise to the constitutional invalidity.

6. Pending Parliament's remedying of the aforesaid defects, section 154(3) of the Criminal Procedure Act is to read as follows:

> "No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused person under the age of eighteen years or of a witness *or of a victim* at or in criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorise the publication of so much 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 person.
>
> *(3A) An accused person, a witness or victim referred to in subsection 3 does not forfeit the protections afforded by that subsection upon reaching the age of eighteen years but may consent to the publication of their identity after reaching the age of eighteen years, or if consent is refused their identity may be published at the discretion of a competent court.*"

7. In the event that Parliament does not remedy the constitutional defects within 24 months of this order, paragraph 6 of the order shall continue to apply.

8. Each party is to pay its own costs.

JUDGMENT

MHLANTLA J (Mogoeng CJ, Khampepe J, Ledwaba AJ, Madlanga J, Nicholls AJ and Theron J concurring)

Introduction

[1] "Stories matter. Many stories matter. Stories have been used to dispossess and to malign. But stories can also be used to empower, and to humanise. Stories can break the dignity of people. But stories can also repair that broken dignity."[1] This case is about real life stories, in particular, about children. It is about the way in which these are told, who decides when this should be done, and the numerous effects of storytelling.

[2] This application arises from an order of the Supreme Court of Appeal.[2] Section 154(3) of the Criminal Procedure Act[3] (CPA) was declared constitutionally invalid to the extent that the provision does not protect the identity of child *victims*[4] of crimes in criminal proceedings. The Supreme Court of Appeal also dismissed an appeal against an order that section 154(3) is constitutionally valid; even though it

[1] Chimamanda Ngozi Adichie "The Danger of a Single Story" TEDGlobal (2009).

[2] *Centre for Child Law v Media 24 Ltd* [2018] ZASCA 140; 2018 (2) SACR 696 (SCA) (Supreme Court of Appeal judgment).

[3] 51 of 1977. Section 154(3) provides:

> "No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorise the publication of so much 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."

[4] This judgment uses the terms "child victims" and "child survivors" interchangeably. Both these terms can be used to identify children who have been the subject of crime. However, this Court is cognisant of the different connotations and implications that the words "victim" or "survivor" have for those who have experienced some of the most challenging affronts to their dignity and bodily integrity. This Court acknowledges that there are different contexts and different experiences which lead to different responses. This Court by no means seeks to impose a definition, identity or response on children who have experienced crime.

does not confer ongoing anonymity protection to child accused, survivors and witnesses once they turn 18 years of age.[5] The matter comes before us for confirmation of the order of constitutional invalidity. There is also an application to cross-appeal against the declaration of invalidity and one for leave to appeal against the order dismissing an application for ongoing protection.

[3] At the heart of this application are two central issues. The first concerns the scope of protection provided by section 154(3) to the anonymity of child victims in criminal proceedings. The impugned section expressly provides anonymity protections for child accused or witnesses in criminal proceedings, which prevents the publication of any information that discloses the identity of children falling into these classes. These protections may only be lifted with the permission of a court, on a case-by-case basis, if it is just and equitable to do so. However, the protection does not extend to child victims. The second issue concerns ongoing protection, and whether the protection afforded by section 154(3) should extend into adulthood for child accused, witnesses and victims.

[4] These two issues raise a tension that will require a delicate balancing act between various constitutional rights and interests. On the one hand, the best interests of children[6] and their rights to dignity,[7] equality,[8] privacy[9] and on the other hand, the right to freedom of expression[10] and the principle of open justice.[11]

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[5] For purposes of this judgment, "child participants" to criminal proceedings are understood to include children who are accused of committing offences, children who are witnesses at criminal proceedings and children who are victims of crime, including child complainants and child victims who are unconfirmed witnesses or not called as witnesses. The term child participant will be used when referring to all three classes of children. However, this judgment notes that these are distinct classes of children, and where necessary the distinction will be emphasised. In addition, "child accused" will be used interchangeably with "children who are in conflict with the law".

[6] Section 28(2) of the Constitution states that "[a] child's best interests are of paramount importance in every matter concerning the child."

[7] Section 10 of the Constitution states that "[e]veryone has inherent dignity and the right to have their dignity respected and protected."

[8] Section 9(1) of the Constitution states that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law."

[9] Section 14 of the Constitution states:

Background

[5] The second applicant, a female individual who was given the pseudonym "KL", was kidnapped when she was a two-day old baby and has since been the subject of an ongoing media furore. Seventeen years later, in February 2015, KL was "found" by her biological parents after she befriended her biological sister by chance whilst attending the same high school. When suspicions were raised about their striking physical resemblance, KL's biological parents made investigative enquiries. Upon receiving confirmation that KL was the missing child, KL was informed that the woman she had known as her mother had in fact abducted her. As a result, she was removed from that woman's care.

[6] The woman was criminally charged and prosecuted. KL was a potential, but unconfirmed, witness in that prosecution. However, before the commencement of the criminal proceedings, KL was to turn 18 in April 2015. As a result, KL was faced

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"Everyone has the right to privacy, which includes the right not to have—

(a) their person or home searched;

(b) their property searched;

(c) their possessions seized; or

(d) the privacy of their communications infringed."

[10] Section 16 of the Constitution states that:

"(1) Everyone has the right to freedom of expression, which includes—

(a) freedom of the press and other media;

(b) freedom to receive or impart information or ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to—

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[11] In *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In re: Masetlha v President of the Republic of South Africa* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) (*Masetlha*) at para 39, this Court explained that open justice encompasses freedom of expression and the right to a public trial. It requires that justice be done in an open and transparent manner.

with the prospect that section 154(3) of the CPA might not operate to protect her anonymity as a child witness, both for the reasons that she was an unconfirmed witness and that she would not be a child witness by the time of the proceedings.

[7] On 26 February 2015, the story broke that KL, or "Zephany Nurse", had been found. It attracted intense media attention, with nearly every major print, broadcast and internet media organisations in the country reporting on it. KL was concerned by the media scrutiny and that her personal information, including her image, the name she grew up with, and her birth date, would be published. Through a social worker, KL was referred to the first applicant, the Centre for Child Law, which agreed to provide her with legal support. The Centre for Child Law wrote to all major media houses seeking an undertaking that they would not reveal KL's identity. That undertaking was not provided, prompting the applicants to launch an urgent application.

Litigation history

High Court

[8] The Centre for Child Law, along with KL and other applicants, launched a two-part application in the High Court, Gauteng Division, Pretoria (High Court). Part A related to an interim order prohibiting the publication of any information which revealed or may reveal the identity of KL and interdicting Media 24, Independent Newspapers and the Times Media Group (the media respondents), from publishing any information which revealed or may reveal the identity of KL. On 21 April 2015, Bertelsmann J granted the applicants an interim interdict to that effect.

[9] In Part B, the applicants sought a declaration that section 154(3), when properly interpreted, applied to protect the anonymity of child victims of crimes, in addition to child witnesses and child accused. The applicants also sought a declaration that the protection afforded by section 154(3) did not cease to apply when a child victim, accused or witness turned 18. In the alternative to this declaratory

relief, the applicants sought to have section 154(3) declared constitutionally invalid to the extent that it fails to confer protection to child victims, and that it ceases to apply when a child accused, witness or victim turns 18.

[10] Notably, the fourth respondent, the Minister of Justice and Correctional Services (Minister), and the fifth respondent, the National Director of Public Prosecutions (NDPP), agreed with the applicants' proposed interpretation of section 154(3) and elected to abide the decision of the Court. The Minister contended that a wide interpretation of section 154(3) ought to be ascribed to it as the Legislature did not intend for child victims to be excluded from the protection of section 154(3). The Minister also submitted that child accused, victims or witnesses would suffer prejudice if the anonymity protection were removed once they turned 18.

[11] The media respondents opposed both the applicants' proposed interpretations of section 154(3) and the constitutional challenges, arguing that non-compliance with the section carries a criminal sanction. According to the media respondents, there ought to be a presumption in favour of individual liberty. The language and purpose of the section is to protect children who participate in criminal proceedings, and only protects child accused or witnesses during criminal proceedings while they are under 18. According to the media respondents, the declaratory relief sought by the applicants fails to strike a balance between the constitutional rights in issue.

[12] The High Court held that a purposive approach to the interpretation of section 154(3) meant that the provision could be read to extend anonymity protection to child victims, but in criminal proceedings only.[12] In any event, the High Court held that the best interests of the child principle permissibly limits both the right to freedom of expression and the principle of open justice. On the issue of ongoing protection, it held that section 154(3) should not be interpreted to provide open-ended anonymity protection for child accused, witnesses and victims even when they become adults.

[12] *Centre for Child Law v Media 24 Ltd* [2017] ZAGPPHC 313 (High Court judgment).

The High Court reasoned that such an interpretation would infringe the rights of other parties and would stifle the ability of adults to freely express their experiences. Further, it held that such an interpretation would be inconsistent with the purpose of the provision, which was limited to protecting children – and only children.

[13] Following this, the applicants appealed to the Supreme Court of Appeal against that part of the High Court order dismissing the application for ongoing protection. The media respondents cross-appealed on the first question, whether section 154(3) could be read to apply to child victims.

Supreme Court of Appeal

Majority judgment

[14] The majority judgment held that section 154(3) was constitutionally invalid to the extent that it does not protect the anonymity of child victims.[13] The majority held that the complete lack of protection for victims is irrational and in breach of section 9(1) of the Constitution. It held that the denial of equal protection to child victims could not be justified, and that limiting the media's rights by way of protecting child victims would be reasonable and justifiable. Consequently, section 154(3) was declared constitutionally invalid and Parliament was given 24 months to remedy the defect. An interim reading-in was made to section 154(3).[14]

[15] In respect of the proposed ongoing protection, the majority held that it was overbroad and imbalanced; and that it would unjustifiably limit the open justice principle and the right of the media to impart information. The majority, while sympathetic to the applicants' objectives, took the view that such an amendment was a task more appropriately left to the Legislature. The majority thus dismissed the appeal in respect of the ongoing protection application and took the view that the Minister,

[13] Per Swain JA with Maya P and Van Der Merwe JA concurring.

[14] The order of the Supreme Court of Appeal further referred the order of constitutional invalidity to this Court for confirmation.

who had supported the challenge, was willing and able to take steps towards legislative reform with regard to that issue.

Minority judgment

[16] The minority rejected the media respondents' arguments that sufficient protections already exist in law for child victims.[15] The minority agreed with the majority that section 154(3) is unconstitutional for failing to protect child victims. However, its conclusion was based on an analysis of section 28(2) of the Constitution and stated that section 154(3) falls short of what is constitutionally required to protect child victims.

[17] On the question of ongoing protection, the minority held that section 154(3) did not meet what was constitutionally required to protect children. It noted that there was some precedent, in other areas of law, for protections to be afforded to children extending into adulthood. The minority held that there was a necessary logic in extending the protection of child victims into adulthood, as the very fact of victimhood does not change due to the effluxion of time. The minority held that a default position that allowed for the media to intrude into a person's victimhood as a child would violate that person's constitutional rights to dignity and privacy. It also found that it would be unacceptable for victims to have to bear the onus of obtaining an interdict against disclosure of their identity, particularly where the media would be better placed to approach a court to seek disclosure. Extending the protection of the provision to include child victims who reach adulthood would not entail any serious sacrifice of the right to freedom of expression or the principle of open justice. The minority reasoned that ongoing protection should also be afforded to child accused and witnesses. While the minority acknowledged that there may be practical challenges, and that not every situation would call for non-publication of identities, it would have upheld the appeal and dismissed the cross-appeal.

[15] Per Willis JA and concurred in by Mocumie JA.

In this Court

Issues

[18] The main issues are:

(a) Whether section 154(3) of the CPA prevents the media from disclosing the identity of children who are victims of crimes but have not yet testified or been called to testify in criminal proceedings? If not, is this constitutionally valid?

(b) Whether the anonymity protection provided by section 154(3) to child accused, witnesses and (based on the answer to the above) victims ceases to operate once the child turns 18? If so, is this constitutionally valid?

Jurisdiction and leave to appeal

[19] From the outset, I must consider the preliminary issues. Namely, whether this Court has jurisdiction and if leave to appeal should be granted. With regard to the confirmation application, pursuant to section 172(2)(a), supported by section 167(5) of the Constitution, this Court must make the final decision and confirm any order of constitutional invalidity made by the Supreme Court of Appeal or the High Court before that order has any force, as well as declare any law inconsistent with the Constitution invalid to the extent of its inconsistency. To this end, this Court must pronounce on the confirmation application and in the process consider the application to cross-appeal the declaration of invalidity.

[20] Whether the application for ongoing protection employs this Court's jurisdiction requires further analysis. It is accepted that the jurisdiction of this Court is engaged when a matter involves a "nuanced and sensitive approach" to balancing the rights of the media against the rights to dignity and privacy,[16] and in this case the

[16] In *NM v Smith* [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) at para 31 this Court held:

> "The dispute before us is clearly worthy of constitutional adjudication and it is in the interests of justice that the matter be heard by this Court since it involves a nuanced and sensitive

best interests of children. This matter evidently concerns constitutional issues and the requisite balancing of constitutional rights; it accordingly engages this Court's jurisdiction.

[21] Whether it is in the interests of justice to grant leave to appeal depends on the facts of each case.[17] Regard must be had to all the relevant factors. This matter engages with competing constitutional rights and interests that implicate the general public. The importance of the issues raised coupled with the public interest in determining those issues,[18] shows that a decision of this Court is called for.[19] The matter has been ventilated at both the High Court and Supreme Court of Appeal, with the latter being divided on the issues. This gives us the benefit of the lower courts' considerations. The presence of reasonable prospects of success weighs in favour of granting leave to appeal. Therefore, leave to appeal should be granted granted.

Merits

Confirmation application

Legislative framework

[22] It is apposite at this stage to begin with the relevant legislative framework. The CPA prohibits the publication of certain identifying information relating to persons involved in criminal proceedings. This is set out in section 154(3) which provides:

> "No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen

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approach to balancing the interests of the media, in advocating freedom of expression, privacy and dignity of the applicants."

[17] *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) at para 39.

[18] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at paras 3-4 and *Islamic Unity Convention v Independent Broadcasting Authority* [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR (CC) 433 at para 15.

[19] In July 2019, KL applied to the High Court to have her identification ban lifted. KL explained that she was in a fundamentally different position to when the interim order interdicting the publication of information that would reveal her identity was granted. A month later, the High Court ordered that KL can reveal her identity. This development does not change the matter at hand. The legal challenges must still be resolved.

> years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorise the publication of so much 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."

[23] Section 154(5) of the CPA creates a criminal offence in relation to contraventions of section 154(3), with a corresponding criminal penalty.[20]

[24] The contention here arises from the fact that while child accused and witnesses are given anonymity protection by the provision, child victims in criminal proceedings are not. The applicants submit that the current legislative framework does not provide effective alternative protection for this class of children. They argue that the common law options are not accessible, affordable or viable for many children and their families in South Africa. Accordingly, it is unrealistic and inconsistent with the Constitution to place the onus and risk on the most vulnerable members of society – child victims – by requiring them to launch an application for interdictory relief against media houses if they wish to protect their identities. Further, the other provisions of the CPA and the Child Justice Act[21] (CJA) do not provide adequate protection. Self-regulation through the voluntary Press Code is also not a proper substitute for appropriate statutory protection.

[25] The media respondents rely on the CPA to illustrate that there are sufficient anonymity protections available to child victims.[22] Beyond the CPA, they rely on

[20] For purposes of this discussion the relevant parts of section 154(5) of the CPA provides that a person who publishes information in contravention of section 154 is liable to a fine or to imprisonment. See the full text of section 154(5) below at [119].

[21] 75 of 2008.

[22] Section 153(1) of the CPA affords a wide discretion to judicial officers to order that a hearing be held in camera. Section 153(2) of the CPA seeks to protect the identity of witnesses who testify in proceedings. Section 153(5) of the CPA permits a court, where necessary, to receive testimony from a child witness with no other persons, other than their parent, guardian or person *in loco parentis* (assuming legal responsibility in the place of a parent) present. Section 154(1) points to the courts' powers to order that no information about proceedings behind closed doors be published, and section 170A(1) allows child witnesses to give evidence through intermediaries to prevent undue mental stress or suffering.

section 63(5) of the CJA, which provides that all proceedings in a child justice court must be held in camera and offers wider protection than a publication ban when the accused is a child.[23] Finally, the media respondents rely on the constitutional obligations of prosecutors and criminal courts to consider *mero motu* (of their own accord) the application of sections 153(3) and 170A of the CPA to child victims and witnesses, and to thereby consider whether an anonymity order is required to protect the best interests of any non-participant child victim.[24]

[26] The immediate question that arises is: whether there is a lacuna in the anonymity protection provided for by section 154(3) (or other legislation) to child victims in criminal proceedings?

[27] On the basis of the text, the impugned provision does not explicitly contemplate or extend to child victims who are not called as witnesses. Further, the examples put forward by the media respondents are flawed in a number of respects. First, they conflate the conduct of proceedings in camera with the effect of non-publication orders. Second, they fail to acknowledge the remaining gaps, given that the CJA provisions only apply to child accused in child justice courts, and that section 153(3) of the CPA does not apply to any proceedings where offences other than sexual offences and extortion are being prosecuted. Third, the constitutional obligation upon prosecutors and courts to consider *mero motu* anonymity orders for child victims is an insufficient safeguard.

[28] Therefore, there is indeed a lacuna in the law as it pertains to protecting the identity of child victims in criminal proceedings. There is limited available recourse for child victims to seek anonymity protection. In this matter, KL was left with no

[23] Section 63(5) of the CJA provides:

> "No person may be present at any sitting of a child justice court, unless his or her presence is necessary in connection with the proceedings of the child justice court or the presiding officer has granted him or her permission to be present."

[24] *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC) (*DPP Transvaal*) at para 144.

choice but to approach the courts to seek an interdict against disclosure of her identity by the media. The next question is, whether this lacuna is unconstitutional.

Does section 154(3) limit constitutional rights?

Equality

[29] The applicants argued that the lacuna created by the lack of victim protection in section 154(3) is unconstitutional as it infringes the right to equality, in section 9(1) of the Constitution. They submitted that it does not offer equal protection and benefit of the law because it irrationally excludes child victims but protects child accused and witnesses. The media respondents submitted that the applicants had failed to prove the infringement, and it does not follow that since the law protects children who participate in criminal proceedings, it must also protect child victims who do not participate in the proceedings.

[30] It is particularly apt in this matter to note that on a plain reading of section 154(3), it fails to offer equal protection and benefit of the law to child victims. This Court has previously outlined the relevant inquiries to be made where the validity of an impugned provision in respect of section 9 of the Constitution is challenged.[25] In *Harksen*, this Court said—

> "the first enquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of section [9(1)] . . . there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of section [9(1)]."[26]

[25] *Phaahla v Minister of Justice and Correctional Services* [2019] ZACC 18; 2019 (2) SACR 88 (CC); 2019 (7) BCLR 795 (CC) at paras 46-8; *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at paras 43 and 45; and *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 26.

[26] *Harksen* id at para 43.

[31] On the first leg, it has already been established that the protection offered by section 154(3) only extends, in the context of criminal proceedings, to child accused and child witnesses – not to child victims. It is therefore clear that section 154(3) differentiates between categories of people (or rather classes of children), by not affording the same anonymity protection to child victims who are not called as witnesses as it does to victims who are called as witnesses.

[32] The second leg concerns the question whether the differentiation is rationally connected to a legitimate government purpose. In *Prinsloo*, this Court expounded that the State is expected to act in a rational manner where a "mere differentiation" arises.[27] Further, it has been held that the rationality inquiry is not to be directed to whether there are better means of achieving the object of the differentiation but, rather, should focus solely on whether the differentiation is arbitrary or not rationally connected to a legitimate government purpose.[28]

[33] While there may be multiple purposes inherent in section 154(3), the dominant purpose of the provision is child protection. Participants who are under 18 have been singled out for special anonymity protection on the basis that children participating in criminal proceedings are in a vulnerable position. Although child accused and witnesses may be active child participants in criminal proceedings by default, child victims are also necessarily participants, active or inactive, by being part of the conduct of criminal proceedings at each stage and experience a particular type of vulnerability. This particular type of vulnerability also warrants protection, and this is in line with the protective purpose of the impugned provision.

[34] The notion that child victims are deserving of protection is not novel. In *Saxena* the Indian Supreme Court gave effect to the legislative scheme regarding the

[27] *Prinsloo* above n 25 at para 25, where the Court held that the State "should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State."

[28] *Phaahla* above n 25 at para 48 and *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] ZACC 18; 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC) at para 17.

non-disclosure of the identity of a child victim, explaining that it was clear that the intention of the Indian Legislature was to ensure that child victims should not be identifiable, so they "do not face hostile discrimination or harassment in the future".[29] In India the Kerala High Court captured the import of anonymity protection for child victims of sexual violence when it held that they are—

> "intended to ensure that the victim is not exposed to further agony by the consequent social victimisation or ostracism pursuant to the disclosure of [their] identity. It is clear that, it is indeed to protect [them] from psychological and sociological torture or mental agony".[30]

[35] Any protection against identification afforded to child accused or witnesses in the context of criminal proceedings is therefore also relevant to child victims, including those not called as witnesses. The exclusion of child victims does not appear to serve any legitimate government purpose, which the Minister and NDPP in this matter have conceded. I therefore agree with the majority of the Supreme Court of Appeal that section 154(3) does not offer equal protection and benefit of the law, and the arbitrary differentiation between classes of children gives rise to a breach of the right to equality.

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[29] *Nipun Saxena vs Union of India* [2012] 565 WP (C) (*Saxena*) at para 11.

[30] *Aju Varghese v The State of Kerala* [2017] 5247 MC at para 8. See further the Indian Protection of Children from Sexual Offences Act 32 of 2012, which makes specific provision for the anonymity protection of child victims. Section 23(2) prohibits the publication of any identifying information of a child, unless a competent court is of the opinion that disclosure is in the interest of the child. Section 74(1) of the Indian Juvenile Justice (Care and Protection of Children) Act 2 of 2016 also prohibits the disclosure of the identity of children who are in conflict with the law, are in need of care and protection, are victims or witness of a crime or are involved in any such matter. The inclusion of child victims in such anonymity protection can also been found elsewhere. Section 111(1) of the Canadian Youth Criminal Justice Act of 2002 provides that the identity of a child who has been a victim of an offence committed or alleged to have been committed by a young person, cannot be published. In New Zealand, section 438(3) of the Oranga Tamariki Act 24 of 1989 (formerly the Children's and Young People's Well-being Act) provides that all children involved in criminal proceedings in the Youth Courts receive automatic protection of their identities. In Australia in New South Wales, section 15(A) of the Children (Criminal Proceedings) Act 55 of 1987 expressly provides extensive protection of anonymity for all children involved in criminal proceedings. See further United Nations Office on Drugs and Crime *Handbook for Professionals and Policymakers on Justice in Matters involving Child Victims and Witnesses of Crime* (December 2009) (UN Handbook) at 59 which gives guidance by providing that the privacy of a child victim or witness shall be protected as a matter of primary importance.

Other implicated rights

[36] While the above conclusion is dispositive of the enquiry to establish an infringement for the purposes of the confirmation application, I deem it necessary to consider the question whether section 154(3) infringes other constitutional rights including the best interests of children and the rights to privacy and dignity. This is in contrast to the third judgment.

The best interests of children

[37] The best interests of the child principle enshrined in section 28(2) of the Constitution is a right in and of itself [31] and has been described as the "benchmark for the treatment and protection of children".[32]

[38] The applicants submit that the various forms of harm suffered by child victims in criminal proceedings when they are identified by the media warrant the need for the anonymity protections. The media respondents assert that the inclusion of child victims is too generalised; what is harmful to all children may not be harmful to one child in a specific instance. They contend that regard must be given to what is in the best interests of children in their individual circumstances, rather than at large.[33] Consequently, protections ought to be adjudicated on a case-by-case basis rather than a blanket approach declaring the section unconstitutional.

[31] *DPP Transvaal* above n 24 at para 72. This is also internationally recognised in Article 3(1) of the Convention on the Rights of the Child, 2 September 1990 and Article 4(1) of the African Charter on the Rights and Welfare of the Child, 29 November 1999, both of which South Africa has ratified, and captures the significance of the best interests of the child as a "primary consideration" in "all actions" concerning children.

[32] *DPP Transvaal* id at para 73.

[33] In *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) (*S v M*), this Court held at para 24:

> "A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned."

[39] The expert evidence provided by the applicants offers useful insights into the harm caused to child victims. Dr Del Fabbro, a clinical psychologist, states that children who have experienced trauma lose their trust in the world and feel they have lost control. According to Dr Del Fabbro, anonymity gives survivors control over their experience; it gives them control over how others learn about their experience. The threat or likelihood of exposure in the media greatly amplifies anxiety, trauma and reluctance to report crimes to authorities. These findings are echoed by Ms Van Niekerk, a qualified social worker, who also finds that the majority of victims of child abuse find disclosure challenging.

[40] It has been recognised that placing child victims at risk of having their identity disclosed subjects them to the risk of psychological harm. The United Nations Children's Fund has found that child survivors are "not only affected by the abuse itself, but may also be further traumatised by the disclosure or its consequences".[34] The release of information in the media about child victims can endanger a child's safety, can cause shame and humiliation and can aggravate secondary victimisation.[35] The Canadian Supreme Court in *AB v Bragg* held that:

> "Studies have confirmed that allowing the names of child victims and other identifying information to appear in the media can exacerbate trauma, complicate recovery, discourage future disclosures, and inhibit cooperation with authorities."[36]

[41] Child victims are vulnerable to harm if they are publicly identified – section 154(3) in particular seeks to protect children from this harm. Those that have fallen victim to crime are no less deserving than those who have witnessed crime or those who are in conflict with the law. It cannot be said that it is in the best interests of a child, for a child who is the victim of a crime to suffer the harms outlined above.

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[34] UNICEF Innocenti Research Centre *Child Safety Online Global Challenges and Strategies* (December 2011) (UNICEF Report) at 13.

[35] UN Handbook above n 30 at 59.

[36] *AB v Bragg Communications Inc* [2012] SCR 567 (*AB v Bragg*) at para 26.

Publicity around child victimisation and the harms associated with it do not accord with section 28(2) of the Constitution.

[42] Further to this, it is neither reasonable nor practical for child victims to bear the onus of approaching courts for an interdict against publication. This is particularly so where media companies have the financial resources and the capacity to bear that onus, and are, in any event, in most instances, the instigating parties of the publication.

[43] The lacuna in section 154(3) runs contrary to the best interests of children. It therefore follows that the lack of protection afforded to child victims in section 154(3) also infringes section 28(2) of the Constitution.

Rights to privacy and dignity

[44] The law protects the privacy and dignity of child witnesses and accused. The right to privacy, through our constitutional order, serves to foster human dignity.[37]

[45] This Court's approach to the right to privacy under the interim Constitution in *Bernstein* proffers an extensive interpretation of the right. There, this Court articulated the scope of the right to privacy in terms of legitimate expectations.[38] It considered the right to privacy across a continuum,[39] whereby the expectation of

[37] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 27.

[38] In *Bernstein v Bester N.N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 75 this Court explained that a legitimate expectation of privacy comprises of a subjective expectation of privacy that is objectively reasonable. See further *National Media Ltd v Jooste* [1996] ZASCA 24; 1996 (3) SA 262 (SCA) at 271F-H where Harms J found that the "right to privacy encompasses the competence to determine the destiny of private facts. The individual concerned is entitled to dictate the ambit of disclosure". Harms J went on to find that he was "of the view that a person is entitled to decide when and under what conditions private facts may be made public".

[39] *Bernstein* id at para 67:

> "The relevance of such an integrated approach to the interpretation of the right to privacy is that this process of creating context cannot be confined to any one sphere, and specifically not to an abstract individualistic approach. The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is

privacy is considered reasonable in the "inner sanctum of a person" or the "truly personal realm" but the reasonableness of the expectation gradually erodes in the context of "communal relations and activities".[40] In other words, "the more a person inter-relates with the world, the more the right to privacy becomes attenuated".[41]

[46] In this matter, whether one has a legitimate expectation of privacy is more complex, it is a hybrid scenario. On the one hand, being a child victim is a part of one's "inner sanctum of a person" as this fact is in the "truly personal realm". On the other hand, there are "conflicting rights of the community" whether the anonymity of child victims in criminal proceedings impacts upon the principle of open justice and freedom of expression.

[47] Yet, this Court has noted—

> "the right [to privacy], however, does not relate solely to the individual within [their] intimate space. Ackermann J did not state in the above passage that when we move beyond this established 'intimate core', we no longer retain a right to privacy in the social capacities in which we act. . . . Wherever a person has the ability to decide what [they wish] to disclose to the public and the expectation that such a decision will be respected is reasonable, the right to privacy will come into play."[42]

[48] What we can take from this is that although the anonymity of child victims may operate in both the personal and communal spheres, it does not fully diminish the right

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> only the inner sanctum of a person, such as [their] family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."

[40] Id.

[41] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) (*Hyundai Motors*) at para 15.

[42] Id at para 16.

to privacy in this context. Rather, it boils down to whether there is a legitimate expectation of privacy. Indeed, it may be more likely when operating in the personal sphere, but this is not determinative. This is because the scope of the right to privacy also touches on forming one's own autonomous identity and one's experiences as a victim is closely linked to one's identity.[43] Protecting the anonymity of child victims, even though it blurs the lines between personal and communal interests, goes to the heart of one's identity and an expectation of privacy is considered reasonable in this context.

[49] The analysis of the right to privacy is even more pressing when dealing with children. This is for two reasons. The first hinges on the importance of identity – a child's self-identity is still forming and is dependent on the approval of others.[44] The second relies on the Canadian jurisprudence of *Toronto Star Newspaper Ltd*, which emphasises that the "protection of the privacy of young persons fosters respect for dignity, personal integrity and autonomy".[45]

[50] Finally, the right to dignity in section 10, while related to the right to privacy in section 14, is also infringed. In *De Reuck*, this Court held that "constitutional rights are mutually interrelated and interdependent and form a single constitutional value system."[46] The rights of children and their dignity and privacy are inherently intertwined, as each child has their own "individual dignity, special needs and interests".[47] To not have control over how some of the most traumatic and intimate

[43] *Bernstein* above n 38 at para 65, notes that the scope of the right to privacy is closely related to the concept of identity, and cites Forst "How (Not) to Speak about Identity: The Concept of the Person in a Theory of Justice" (1992) 18 *Philosophy and Social Criticism* 293 at 303 which states: "Rights, like the right to privacy are not based on a notion of the unencumbered self, but on a notion of what is necessary to have an identity of one's own, an autonomous identity."

[44] Jones, Finkelhor and Beckwith "Protecting Victims' Identities in Press Coverage of Child Victimisation" (2010) 11 *Journalism* 347 at 349. See further Deblinger and Runyon "Understanding and Treating Feelings of Shame of Children Who Have Experienced Maltreatment" (2005) 10 *Child Maltreatment* 364 at 365.

[45] *Toronto Star Newspaper Ltd v Ontario* [2012] ONCJ 27 at paras 40 and 44.

[46] *De Reuck* above n 18 at para 55.

[47] *DPP Transvaal* above n 24 at para 123. See further *S v M* above n 33 at para 18.

moments of a child's life are shared with the public strikes at the very core of the child's dignity.

Conclusion on infringement

[51] By excluding child victims in criminal proceedings from its protection, section 154(3) limits the right to equality, the best interests of children as well as their rights to privacy and dignity. It is now necessary to consider whether the limitations of those rights are reasonable and justifiable.

Is the limitation of the rights reasonable and justifiable?

[52] The applicants contend that the media is able to exercise its rights by reporting fully and accurately on events without disclosing the identities of child victims. A less restrictive means to achieve the purpose of the limitations would be to protect the anonymity of child victims by default, and allow courts to lift the protection where that would be in the public interest. In support of this, the applicants relied on *Johncom* in which this Court held, in the context of divorce proceedings, that it would be permissible to prohibit the disclosure of the identity of the parties and of the children.[48]

[53] On the other hand, the media respondents contend that a case-by-case consideration of anonymity protection, which already exists, is the only permissible approach. They argue the proposed default protection would be constitutionally untenable in that it would unjustifiably limit the right to freedom of expression and the principle of open justice, and because the Court is ordinarily not permitted to create or extend the statutory offence contained in section 154(5).

[54] I have already established that the differentiation between child victims, accused and witnesses does not afford equal protection and benefit of the law. The

[48] *Johncom Media Investments Ltd v M* [2009] ZACC 5; 2009 (4) SA 7 (CC); 2009 (8) BCLR 751 (CC) (*Johncom*) at paras 30 and 42.

differentiation is contrary to the very purpose of the impugned provision, which seeks to protect children. Absent a rational relationship, the limitation does not pass the lowest threshold of constitutional scrutiny.[49] The limitation of rights arising from that circumstance cannot be said to be reasonable or justifiable in terms of section 36.[50]

[55] Further, the limitation of the best interests of children and their rights to dignity and privacy is not reasonable and justifiable when regard is had to the factors listed in section 36 of the Constitution.[51] In relation to the nature of the limited rights, it is important to note that the paramountcy of the best interests of the child principle is well-established in the jurisprudence of this Court.[52] It is necessary to give sufficient weight to that right when balancing it against the other rights. The nature and extent of the limitation of this right is also substantial, given the significant harms to which children are exposed.

[56] If the promotion of open justice and freedom of expression is taken to be the purpose of the limitation, I accept the importance of that purpose given that those

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[49] See *Rahube v Rahube* [2018] ZACC 42; 2019 (2) SA 54 (CC); 2019 (1) BCLR 125 (CC) at para 44.

[50] *Phaahla* above n 25 at para 53.

[51] Section 36 of the Constitution reads:

> "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose.
>
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[52] *J v National Director of Public Prosecutions* [2014] ZACC 13; 2014 (2) SACR 1 (CC); 2014 (7) BCLR 764 (CC) at para 35. See also *Centre for Child Law v Minister of Justice and Constitutional Development* [2009] ZACC 18; 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) (*Law*) at para 29; *S v M* above n 33 at para 42; and *Minister of Welfare and Population Development v Fitzpatrick* [2000] ZACC 6; 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at para 17.

principles are essential to a free and fair democracy.[53] However, the applicants' argument that the media would not be prevented from fully and accurately reporting if it were not permitted to disclose a victim's identity is particularly compelling. Indeed, section 154(3) as it stands does encroach on media freedom and the principal of open justice – the inclusion of victims only marginally expands this encroachment.

[57] There are also less restrictive means to achieve the same purpose. The promotion of freedom of expression and open justice can still be exercised in a meaningful sense. When balancing the right to freedom of expression against dignity and privacy, this Court in *Johncom* held that prohibiting the publication of the identity of the parties and of the children in divorce proceedings would constitute a less restrictive means.[54]

[58] Other jurisdictions have also found that there are less restrictive means to achieve the purpose. In *Canadian Newspapers Co*, the Supreme Court of Canada held that under certain circumstances prohibiting the disclosure of identifying content represented only minimal harm to the media's rights.[55] In *AB v Bragg* the Canadian Supreme Court held that the rights to freedom of the media and the principle of open justice would prevail if the media, in that case, would publish non-identifying content.[56] The Indian Supreme Court in *Saxena*, in acknowledging the importance of reporting rape and sexual offences in the media, emphasised that the media can still fulfil this important duty without disclosing the name and identity of the child victim.[57]

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[53] These principles will be expanded on in paras [91] to [100].

[54] *Johncom* above n 48 at para 30.

[55] *Canadian Newspapers Co v Canada (Attorney General)* [1988] 2 SCR 122 at 123-4. The Canadian Supreme Court dealt with a provision that was only applicable to sexual offences cases, and only imposes a restriction on publication of facts disclosing the victim's identity where the complainant or prosecutor requests the order or the court considers it necessary. This differs to the issues before us, however, there is still value in noting that other jurisdictions, which place significant value on freedom of the press, acknowledge that the limits imposed on the media's rights are minimal in certain instances of anonymity protection.

[56] *AB v Bragg* above n 36 at para 30.

[57] *Saxena* above n 29 at para 32.

[59] The limitation is therefore not saved by section 36 of the Constitution. In the result, section 154(3) is declared constitutionally invalid to the extent that it does not protect the identity of child victims in criminal proceedings. The rights at play in respect of child victims demand default protection, with the possibility of such protection being lifted by courts upon application on a case-by-case basis. Accordingly, the application to cross-appeal is dismissed.

[60] On remedy, Parliament will have 24 months to cure the defect, in the interim section 154(3) is to read as follows:

> "No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused person under the age of eighteen years or of a witness *or of a victim* at or in criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorise the publication of so much 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 person."

Ongoing protection application

[61] The protection offered by section 154(3) presently terminates upon the child participant reaching 18, it does not provide ongoing protection. The questions for this Court are: Does the failure to provide ongoing protection render section 154(3) unconstitutional? Should the default position be one of ongoing protection where such protection may be lifted by consent, or if consent is refused, through a court order? Or one of case-by-case protection determined by the courts upon application? This is a challenging and complex issue, and brings to the fore an array of competing interests. It divided the Supreme Court of Appeal and it is on this issue that this Court diverges.

Have any rights been infringed?

[62] The current construction of section 154(3) implicates various rights, to varying degrees, of child victims, witnesses and accused. In particular, it implicates the rights

to dignity and privacy which are intricately interwoven with the paramountcy of the best interests of children. The applicants submit that the absence of ongoing protection in section 154(3) infringes the principle of the best interests of the child. The life-long consequences of children's actions or experiences are also the genuine concerns of section 28(2), even if those consequences are only felt, or extend, during adulthood. Relying on expert evidence, the applicants argue that the threat of exposure creates harm to children. They argue that this Court has supported the principle of ongoing protection, and has found that "consequences for the criminal conduct of a child that extend into adulthood . . . do implicate children's rights".[58]

[63] The media respondents submit that there is no basis to allow for indefinite protection as the Constitution neither requires nor permits that position. They advance a string of arguments against ongoing protection, and contend that section 28(2) does not require adults to be indefinitely protected from any harm associated with their experiences as children.

[64] The recognition of the innate vulnerability of children is rooted in our Constitution, and protecting children forms an integral part of ensuring the paramountcy of their best interests. This Court has underscored the importance of the development of a child,[59] and the need to protect them and their distinctive status as vulnerable young human beings.[60] It is not necessary for this Court to consider, as argued by the applicants, whether section 28(2) can offer the principle of extended ongoing protection into adulthood. It is sufficient and directly applicable to consider whether the lack of ongoing protection infringes the best interests of the child principle when the victims, witnesses and accused are *still children*.

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[58] *J* above n 52 at para 43.

[59] Id at para 36, where this Court held that the notion of the best interests of the child "encapsulate[s] the idea that the child is a developing being, capable of change and in need of appropriate nurturing to enable [them] to determine [themselves] to the fullest extent and to develop [their] moral compass". See further *S v M* above n 33 at para 19, where this Court held that children "learn as they grow how they should conduct themselves and make choices in the wide and moral world of adulthood".

[60] *S v Mokoena* 2008 (5) SA 578 (T) at para 50.

[65] Section 154(3) serves the purpose of protecting child participants in criminal proceedings against the deleterious effects of the publication of their involvement. This purpose accords with an interpretation of section 154(3) that promotes the spirit, purport and objects of the Bill of Rights, as required by section 39(2) of the Constitution. This constitutional canon of statutory interpretation is mandatory.[61] If section 154(3) is to be construed purposively and constitutionally, it is apparent that this section must be understood to secure the best interests of children involved in criminal proceedings and protect their privacy and dignity.

[66] The Legislature enacted section 154(3) to *protect* children. In doing so, the Legislature acknowledged that there are legitimate harms caused by the public identification of child participants in criminal proceedings. Section 154(3) would run contrary to its purpose if the section caused children to experience harm as a result of the anticipated disclosure of their identity. Within the criminal justice system, children should be protected and should not be exposed to harsh circumstances that have adverse effects on their development.[62] The harms caused by identification to which child participants are exposed to – while still being children – directly impacts their rights as children. These rights are sought to be protected by section 154(3). If the threat of identification causes such harm, the protective function of the section becomes nugatory and futile. If that harm is caused, the section is rendered contrary to its purpose.

[67] It is the best interests of the child principle (as applicable to children) coalesced with the rights to dignity and privacy that warrants ongoing protection. I have had the benefit of reading the third judgment penned by my brother Jafta J. He is correct in that the principle of paramountcy of the interests of a child are only conferred on

[61] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at para 49; *Fraser v ABSA Bank Ltd* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 43; and *Hyundai Motor*s above n 41 at para 21.

[62] *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) at para 1.

children, but the point I make is more nuanced – it is because of the harm that occurs to children whilst they are still children that section 28 is invoked. Here, we disagree.

[68] As the experts note, the anticipation of identification harms children. This impacts all three classes of children, but in various ways. The experts show that the risk of identification into adulthood can undermine the long-term healing process of victims, witnesses and accused and lead to re-traumatisation and hinder rehabilitation. Ms Van Niekerk takes the view that the lack of ongoing protection is harmful both for the victims concerned and for children in conflict with the law. She explains that the threat of disclosure can severely compromise the rehabilitation process. According to Ms Smit, from the National Institute for Crime Prevention and the Reintegration of Offenders, public identification can cause severe psychological and emotional harm to a child in conflict with the law. Ms Smit explains that trauma has an impact on identity development. The risk of media exposure after turning 18 increases the potential of re-offending and can diminish a child's ability to reintegrate. Dr Del Fabbro explains that this fear can manifest in a number of ways: it may prevent a child from wanting to reintegrate into their community; it may have the pervasive effect of discouraging reporting, participating and co-operating with criminal procedures; and it may warp a child's sense of trust.

[69] A further concern is that of the "ticking-clock effect" – the potential of identification upon turning 18 may cause a child accused to plead guilty or curtail the length of a trial in other ways, or inhibit a child's participation in the trial.[63] This can impact the content and quality of a child's testimony which can in turn impact the trial. Ms Smit notes that a child's ability to participate in criminal proceedings can be affected if their identity may be revealed by the media, which can impair their ability to speak and participate freely in a trial, and this is exacerbated if the child knows that the media may identify them after they turn 18. She adds that children need to feel

[63] The "ticking-clock effect" encapsulates how the fear of disclosure places unfair pressure on litigants to complete trials quickly. A focus on efficiency at the expense of effectiveness may be problematic and the fear of identification can disrupt or change a child's participation in the hearing.

safe when they are testifying, and if they know that their identity will be disclosed when they turn 18, they may feel it superfluous to participate in the process because they will be labelled in a particular way by the public. The "ticking-clock effect" can also negatively impact child victims. KL had to rush to court on an urgent basis for fear of disclosure after turning 18.

[70] It is not in the best interests of a child, who has already been exposed to the harsh realities of life, to live in fear that their identity and involvement can be exposed once they turn 18. Nor is it in their best interests that the integrity of the criminal justice system is potentially compromised. This Court was clear in *S v M* that "foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma".[64]

[71] If the status quo causes harm to children by exposing them to the criminal justice system, in whatever shape or form, it appears to fail to protect those who are genuinely in need of its protection. It is correct, not all children suffer the same harm and not all children will need ongoing protection. The default position of ongoing protection is to ensure that the best interests of some of the most vulnerable members of our society are given the protection they are entitled to. If the section fails to afford this, the protection would be rendered hollow.

[72] But it is not only the best interests of children that have been infringed. The rights to privacy and dignity are also relevant here. Their scope and application are equally applicable when considering ongoing protection.[65] As noted above, the rights of children and their dignity and privacy are interlinked. If children know that the protection of section 154(3) will fall away after they turn 18 it may hamper their ability to form their own autonomous identity, infringing their right to privacy. It is

[64] *S v M* above n 33 at para 19.

[65] See discussion above on privacy and dignity at [44] to [50].

worth reiterating that when it comes to dignity it is imperative to understand that every child has their own intrinsic worth as a human being.

[73] Beyond the harms caused to children in relation to privacy and dignity, there are similar harms experienced after turning 18. Being a child victim, accused or witness can become part of your identity, and that part of your identity can persist into adulthood. Traumatic events that occurred during childhood can still impact one's sense of self, which is in the truly personal realm. All this is to say that dignity and privacy, for both children and adults, are negatively impacted without a default position of ongoing protection.

Broader considerations

[74] There are broader considerations, some of which were raised by the parties in written and oral argument. These include the need to facilitate restorative justice, engage with stigma and consider the import of agency. They link to how the lack of ongoing protection infringes the intertwined rights of the best interests of the child, privacy and dignity, and how these infringements practically manifest and concretise.

Restorative justice

[75] The respondents raised a concern that the ongoing protection would be overbroad since it would apply equally to all child accused, victims and witnesses notwithstanding that the competing justifications for ongoing protection differ considerably for all three classes. I agree. There are different justifications that underpin the protection afforded to child victims, witnesses and accused but ongoing protection is still warranted for all classes.

[76] When it comes to a child in the criminal justice system, a restorative justice approach is optimal for all three classes.[66] But a restorative justice approach is of particular importance when considering a child in conflict with the law. In this sense, a key justification for ongoing protection is to give effect to restorative justice. This Court's jurisprudence has proffered the importance of, and indeed applied restorative justice approaches.[67] In *Dikoko,* albeit in a different context, restorative justice was linked to dignity and ubuntu, which is particularly relevant in the context of child justice.[68] In *Baloyi* this Court opted for restorative justice instead of retributive justice.[69] In *Van Vuren*, this Court noted that the rehabilitation and reconciliation processes of the offender underpin restorative justice but must be balanced against the

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[66] In *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at paras 114-5, Sachs J's concurrence notes that the elements of restorative justice are encounter, reparation, reintegration and participation. The CJA defines restorative justice to mean—

> "an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation".

[67] See for instance *Dikoko* id at paras 69 and 114 and *S v M* above n 33 at para 62. See further *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amicus Curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) (Cameron J and Froneman J dissenting) at para 197; *Van Vuren v Minister of Correctional Services* [2010] ZACC 17; 2012 (1) SACR 103 (CC); 2010 (12) BCLR 1233 (CC) at para 51; and *S v Baloyi* [1999] ZACC 19; 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) at fn 44. See further the analysis by Madise *Rehabilitation in Retrograde: Preventing the Publication* of *Children's Names after the Age of 18* (LLM thesis, University of Pretoria, 2018) at 34.

[68] In *Dikoko* id at paras 114 Sachs J states:

> "Ubuntu/botho is highly consonant with rapidly evolving international notions of restorative justice. Deeply rooted in our society, it links up with world-wide striving to develop restorative systems of justice based on reparative rather than purely punitive principles. The key elements of restorative justice have been identified as encounter, reparation, reintegration and participation. Encounter (dialogue) enables the victims and offenders to talk about the hurt caused and how the parties are to get on in future. Reparation focuses on repairing the harm that has been done rather than on doling out punishment. Reintegration into the community depends upon the achievement of mutual respect for and mutual commitment to one another. And participation presupposes a less formal encounter between the parties that allows other people close to them to participate. These concepts harmonise well with processes well-known to traditional forms of dispute resolution in our country, processes that have long been, and continue to be, underpinned by the philosophy of ubuntu/botho."

See further *Van Vuren* id. Restorative justice approaches have had a trickle-down effect to lower courts, see for instance *S v Maluleke* 2008 (1) SACR 49 (T) and *S v Saayman* 2008 (1) SACR 393 (E).

[69] This in Court in *Baloyi* above n 67 at fn 44 quotes Minow "Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice" (1998) 32 *New England Law Review* 967 at 969-70 which explains that:

> "Under restorative justice, repairing relationships between offenders and victims and within the community take precedence over law enforcement. Forgiveness and reconciliation are central aspirations. Also elevated are the goals of healing individuals, human relationships, and even entire societies."

rights of the community – including the right to be protected against crime.[70] Given that we are dealing with *child* accused in a country where crime is rampant but so too the recidivism rate,[71] this Court must do all it can to help utilise restorative justice for child accused in order to curb the vicious cycle of crime. We must not be quick to ignore the "moral malleability or reformability of the child offender".[72]

[77] Restorative justice is understood to be both "backward-looking" as it deals with the "aftermath of the offence", and "forward-looking", since it takes into account the implications for the future.[73] Restorative justice encourages rehabilitation and reintegration. These worthy objectives may assist in holding child accused responsible but restoring them to "the status of a moral being who can make and act on choices"; it is necessary for us to understand that "a restorative justice approach can be a catalyst to create possibilities for a crime-free life for the offender, and by doing that create a safer environment for all".[74] Ms Smit and Ms Van Niekerk hold the view that identification and the threat of identification can undermine the rehabilitation and reintegration of a child in conflict with the law. In this, trauma and stigmatisation (which will be expanded on in due course) are significant barriers to a child accused's successful reintegration and rehabilitation.

[78] If, on the one hand, the lack of ongoing protection could risk a child accused reoffending and hamper rehabilitation and reintegration but, on the other hand, ongoing protection for a child accused can give effect to the worthy objectives of restorative justice, then this Court ought to tilt the scales in favour of the latter.

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[70] *Van Vuren* above n 67 at para 51.

[71] *Maluleke* above n 68 at para 33 where the High Court held that "restorative justice, properly considered and applied, may make a significant contribution to combating recidivism by encouraging offenders to take responsibility for their actions and assist the process of their ultimate integration into society thereby."

[72] *J* above n 52 at para 36.

[73] See Skelton "Tapping Indigenous Knowledge: Traditional Conflict Resolution, Restorative Justice and the Denunciation of Crime in South Africa" (2007) 1 *Acta Juridica* 228 at 234 and Skelton and Batley "Restorative Justice: A Contemporary South African Review" (2008) 3 *Acta Criminologica* 37 at 47.

[74] Skelton and Batley id at 48-9.

Stigma and Agency

[79] A concern was raised that by providing ongoing protection, the Court may be unduly perpetuating the stigma that attaches to victimhood, criminality and participation in the criminal process.[75] Stigma is a complex and contentious issue with tensions between protecting those who wish to remain anonymous whilst challenging the pervasive stigma attached to child accused, witnesses or survivors.[76]

[80] In respect of child victims, publicity around child victimisation heightens a child's risk of experiencing shame and stigma.[77] Stigma, while largely influenced by external factors, is an internalised struggle and the consequences are deeply personal. But stigma is not equivalent to shame. Stigma attaches to people when their shame is publically known, and to some extent, defines them in the eyes of society. When it comes to child survivors, they experience anticipatory stigma, which instils a belief that they are "blameworthy and lesser".[78] Dr Del Fabbro explains that a "child may lose incentive to rehabilitate" if that child anticipates that they will always be identified by the traumatic event. Stigma can also cause a child to refrain from disclosing their experience to their support structures.[79]

[75] This approach has been advanced by scholars that advocate for the naming of accused, witnesses and even victims in order to dispel the stigma attached to participating in crimes. See Jones, Finkelhor and Beckwith above n 44 at 360.

[76] Stigma is understood as the negative associations of a person's experience that contribute to feelings of guilt, shame, brokenness and low self-image. See Finkelhor and Browne "The Traumatic Impact of Child Sexual Abuse: A Conceptualisation" (1985) 55 *American Journal of Orthopsychiatry* 530 at 532-3 and Kennedy and Prock "'I Still Feel Like I Am Not Normal': A Review of the Role of Stigma and Stigmatisation Among Female Survivors of Child Sexual Abuse, Sexual Assault, and Intimate Partner Violence" (2018) 19 *Trauma, Violence and Abuse* 512.

[77] Jones, Finkelhor and Beckwith above n 44 at 349 explain how in many ways a child's self-identity is dependent upon the approval of others and so the disclosure of child victims can cause these children to be targets of bullying, exclusion and further victimisation.

[78] Kennedy and Prock above n 76 at 513-4 and Jones, Finkelhor and Beckwith id. Also see Deblinger and Runyon above n 44 at 365.

[79] See Kennedy and Prock id. See further *AB v Bragg* above n 36 at para 26.

[81] In relation to children in conflict with the law, this Court has indicated that stigmatisation of children as criminals ought to be avoided.[80] The expert evidence notes that "stigmatisation is antithetical to effective rehabilitation and reintegration". Dr Del Fabbro underscores that any shame felt "should be channelled usefully into their understanding of the effect of their behaviour on others. For this to happen, shame can be expressed in processes that aim to achieve the reintegration of the child back into society." When it comes to child accused, accountability and shame should be reintegrative rather than stigmatising. Once the child offender turns 18 and is identified, this could be considered a form of stigmatisation known as "disintegrative shaming", which fails to reconcile the relationship between the accused and the community, and labels them as a potential repeat offender.[81] This is in contrast to "reintegrative shaming" which aims to strengthen the relationship and ties between the accused and the community.[82] In the context of child accused, "reintegrative shaming" is more appropriate and consistent with a restorative justice approach. Since restorative justice is a long-term process, it requires ongoing protection.

[82] The words of child accused who have felt the benefits of remaining anonymous carry much weight. X was able to reintegrate into society and was able to heal as she felt she could "live a new life in which people won't judge [her]". P said:

> "Even though I am not a child anymore, I still need the protection of not being identified by the media. If I am identified, all of my hard work at building a new life and becoming part of normal society again will be destroyed. In the eyes of the

[80] In *J* above n 52 at para 44, this Court stated:

> "Child offenders who have served their sentences will remain tarred with the sanction of exclusion from areas of life and livelihood that may be formative of their personal dignity, family life, and abilities to pursue a living. An important factor in realising the reformative aims of child justice is for child offenders to be afforded an appropriate opportunity to be reintegrated into society."

[81] *Saayman* above n 68 at 400D-F. See further Braithwaite *Crime, Shame and Reintegration* (Cambridge University Press, New York 1989).

[82] Braithwaite id.

> world, I will not be seen for who I am, but will always be seen as nothing more than a criminal in other people's eyes."[83]

[83] I have had the benefit of reading the judgment prepared by my brothers, Cameron J and Froneman J (the second judgment). I agree with them. There *should* be no shame in surviving or witnessing a crime. But unfortunately, society at large has in many ways betrayed those who have survived or witnessed violence, be it sexual, physical or psychological. Social contexts have shaped how survivors judge themselves and how they are judged by others. While I appreciate that crafting further protection and anonymisation may feed into the unwarranted stigma of victimhood that currently invades social thought, I am more compelled to see this step as providing an opportunity for child survivors to exercise agency and take ownership of their experience. This Court should do all it can to avoid propagating stigmas, but it should respond to the current needs of society instead of applying only a normative approach to shame and stigma. In any event, if we accept the pervasiveness of stigma and how it operates in our society, then it is doubtful that merely publishing identifying information would have the direct result of reducing or eliminating stigma.

[84] Furthermore the promotion of agency, through this judgment, could empower those who face the harsh wrath of unwarranted stigmas. Autonomy underscores the very notion of human rights and positive freedom.[84] The minority in *AB* emphasised that the "value recognises the inherent worth of our capacity to assess our own socially-rooted situations, and make decisions on this basis."[85] We should not ascribe

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[83] P and X were both child offenders, convicted of very serious offences. Despite widespread media coverage of both cases, neither P nor X were named by the media.

[84] In *AB v Minister of Social Development* [2016] ZACC 43; 2017 (3) SA 570 (CC); 2017 (3) BCLR 267 (CC) at para 51, the minority held that autonomy is a "necessary, but socially embedded, part of the value of freedom". See also *NM* above n 16 at para 145-6. See further Sen "Well-being and Freedom: The Dewey Lectures" (1985) *The Journal of Philosophy* 169 at 217-8 and Raz "Freedom and Politics" in his *The Morality of Freedom* (Clarendon Press, Oxford 1986).

[85] *AB* id at para 52. This Court has acknowledged the centrality of agency in development and fulfilling one's potential, see further *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (4) BCLR 1 (CC) at para 49 where this Court held that:

> "Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each human being is

if, how, or when a person should be prepared to share their experiences with the public; they should control the narrative of whether the most intimate details of their lives are exposed to society. Ongoing protection as the default position – not the blanket rule – should enable child survivors, even when they become adults, to consider how best to counteract stigma and whether publicity is a worthy means to do so.

[85] More generally, this Court has grappled with its role in terms of addressing stigma and the notion of agency. The varying discussions in *NM* that consider the stigma around HIV/AIDS are useful. Madala J, writing for the majority, insisted that there is nothing shameful about HIV/AIDS, it is "the social construction and stigma associated with the disease make fear, ignorance and discrimination the key pillars that continue to hinder progress in its prevention and treatment".[86] Of significance, he said "[i]t is, however, an affront to the infected person's dignity for another person to disclose details about that other person's HIV status or any other private medical information without [their] consent".[87] Langa CJ, in his partial dissent, cautioned that "being HIV positive does not in itself impair a person's dignity and that courts must be careful not to stigmatise the disease".[88] In her dissent, O'Regan J said:

> "It needs to be said clearly that the stigma attached to those living with HIV/AIDS is inconsistent with the constitutional value of human dignity. Disclosing that a person is living with HIV/AIDS cannot therefore be an infringement of dignity on the grounds that members of the community may improperly think less of them because they are suffering from this frightening illness. It does undermine their dignity to the extent that it denies those living with HIV/AIDS the right to determine to whom and

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> uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop [their] unique talents optimally."

[86] *NM* above n 16 at para 48.

[87] Id.

[88] Id at para 92.

> when their illness should be disclosed, which is itself an aspect of the right to privacy."[89]

[86] While the Court decided *NM* over a decade ago, I am of the view that agency and autonomy are still indispensable, perhaps more so now. In the age of social media, the immediate and far-reaching dissemination of information means that disclosure and the *choice* to disclose, if and when a person is ready to do so, is of practical significance. However, a default position against anonymity seems to only further stigmatise and oppress those who live at those same intersecting axes of discrimination that often brought them into contact with a crime either as accused, victims or witnesses in the first place.[90] In effect, those equipped with the necessary resources may be in a better position to weather the intense scrutiny that our modern day, 24-hour media cycle shines upon them. Imbuing individuals with the autonomy (and fundamentally, the power) to decide for themselves when the world may attribute their name to some event in their past is to empower individuals who are systematically marginalised. KL's story illustrates the need for a default position and the power of agency.

[87] In my view, default ongoing protection is a valuable means to create a more meaningful engagement with agency, enabling personal choice and giving effect to restorative justice. Ongoing protection as the default position accounts for adequate protection as well as evolving capacities, and fosters conditions that allow children to maximise opportunities and lead happy and productive lives.[91] A child who has experienced trauma, be it as a victim, a witness or an accused, should not, as a result of turning 18, have their story and identity exposed without their consent or necessary

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[89] Id at para 139.

[90] See further the model of stigma developed by Solanke *Discrimination as Stigma: A Theory of Antidiscrimination Law* (Hart Publishing, Oxford 2017) at 37, which connects psychological practices with social conditions. In this model, stigma exists as a characteristic without inherent or self-created meaning, which society deems as having negative connotations. In a rigid social power regime, this disempowers those who are stigmatised. By recalibrating this social regime and levelling the asymmetric power relations at play, we may start to lessen the effect of the stigmatisation.

[91] *S v M* above n 33 at paras 19-20.

judicial oversight. In sum, by limiting a person's agency and autonomy, a lack of ongoing protection infringes the rights of dignity, privacy and the best interests of the child.

Justification analysis

[88] The next question is whether the limitation of these rights by section 154(3) is justifiable.

[89] The respondents contend that the extended ban on publication would require publishers to obtain permission from the courts before disclosing the relevant information. This, they argue, would infringe the open justice principle and their right to freedom of expression. In addition, the proposed ongoing protection is ostensibly overbroad and fails to strike an appropriate balance between the rights and interests involved. On this point, there is a much greater public interest in knowing the names of persons convicted of serious crimes than of those who are merely suspected or charged.

[90] I apply a limitations analysis that asks whether the absence of ongoing protection in section 154(3) unjustifiably limits the best interests of children and their rights to privacy and dignity, where the purpose of the limitation is to advance freedom of expression and open justice.[92]

Importance and purpose of the limitation

[91] The limitation imposed serves the principle of open justice and the constitutionally enshrined right to freedom of expression.

[92] This is in line with the application before us. This differs to the majority of the Supreme Court of Appeal above n 2 that conducted a different limitations analysis. The majority at paras 19 and 23-7 considered the potential limitation to the media's right to impart information caused by extending anonymity protections.

[92] The starting point is the principle of open justice, which is an incident of the values of openness, accountability and the rule of law as well as participatory democracy.[93] This Court in *Masetlha* adequately captured the essence of open justice as "a cluster or, if you will, umbrella of related constitutional rights which include, in particular, freedom of expression and the right to a public trial, and which may be termed the right to open justice".[94]

[93] The principle of open justice is given rich expression by our courts.[95] Symbolically and practically, the physical space of our own courtroom, which encourages public access and has the ever important media box with the media watching over us, allowing hearings to be transmitted to the nation, is also a testament to the importance of open justice.

[94] I endorse the principle of open justice and appreciate its importance in ensuring that justice is transparent and that it promotes the accountability of courts and the administration of justice. Open justice contributes towards the retention of public confidence in the Judiciary and it lies at the heart of the oft-quoted principle "that justice should both be done and manifestly seen to be done".[96] It is recognised by international law[97] and in foreign jurisdictions.[98]

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[93] See *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 28. See further Former Deputy Chief Justice Moseneke "The Media, Courts and Technology: Remarks in the Media Coverage of the Oscar Pistorius Trial and Open Justice" (2015).

[94] *Masetlha* above n 11 at para 39.

[95] Id. See further *Shinga v The State (Society of Advocates, Pietermaritzburg Bar, as Amicus Curiae); O'Connell v The State* [2007] ZACC 3; 2007 (4) SA 611 (CC); 2007 (5) BCLR 474 (CC) at para 26 and *City of Cape Town v South African National Roads Authority* [2015] ZASCA 58; 2015 (3) SA 386 (SCA) at paras 16-22.

[96] *R v Sussex Justices, Ex parte McCarthy* [1923] All ER 233 (KB) at 234.

[97] Article 14(1) of the International Covenant on Civil and Political Rights, 16 December 1966, which South Africa has ratified, states that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

[98] Some examples from the United Kingdom, Australia and Canada include: *R (Guardian News and Media Ltd) v Westminster Magistrate's Court* [2013] QB 618; *R v Legal Aid Board, Ex parte Kaim Todner (a firm)* [1999] QB 966; *Hogan v Hinch* [2011] 243 CLR 506; and *Attorney General (Nova Scotia) v MacIntyre* [1982] 1 SCR 175.

[95] The Supreme Court of Appeal notes the importance of the media's "vital watchdog role in respect of the court process".[99] The Supreme Court of Appeal has recently held:

> "It is thus important to emphasise that giving effect to the principle of open justice and its underlying aims now means more than merely keeping the courtroom doors open. It means that court proceedings must where possible be meaningfully accessible to any member of the public who wishes to be timeously and accurately apprised of such proceedings."[100]

[96] There is an interrelated aspect of this principle that requires further interrogation, the distinction between what is in the public interest and what is merely interesting to the public.

[97] The principle of open justice serves the public interest. It protects accused persons and those who participate in legal proceedings. How courts treat those involved is an essential component of the proper administration of justice, ensuring that those who enter the criminal justice system are treated with due respect and that due process is followed.

[98] Relying on foreign law, the media respondents emphasise that the interests of individuals involved in criminal proceedings may have to yield to the open justice principle and the important function it serves. Here, it is apposite to quote Lord Atkinson in *Scott v Scott*:

> "The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but

[99] *Van Breda v Media 24 Limited; National Director of Public Prosecutions v Media 24 Limited* [2017] ZASCA 97; 2017 (2) SACR 491 (SCA) at para 47.

[100] Id at para 46.

> all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect."[101]

[99] The media respondents have overlooked the nuances of the principle. It is trite that the principle should not be unduly curbed. However, as Lady Hale of the Supreme Court of the United Kingdom explains, extra-curially, there are different considerations for cases involving children, which—

> "are different from ordinary civil or criminal proceedings. Their very object is to further the best interests of the child. Those best interests should not be put at risk by unnecessary public intrusion into their private and family lives."[102]

[100] I do not wish to deny the importance of public interest in respect of open justice, but I underscore the distinction between public interest and what is interesting to the public.[103] There is indeed a difference between the two; the former is attached to a legitimate and genuine interest, one founded on fact and one that contributes towards the public's constitutional right to be informed. Public interest can still be served and protected without revealing the names and identities of child participants in criminal proceedings. Media Monitoring Africa's submissions in the High Court on this aspect are most useful:

> "In reporting on children, what is necessary to consider is both the public interest and in the best interests of the child. In this regard it is helpful to distinguish between the public interest and what is of interest to the public. Merely because the public might be curious to know the child's identity does not make it appropriate for the media to satisfy this curiosity. Even in cases where the story is in the public interest, like the

[101] *Scott v Scott* [1913] All ER 22 (HL) at 23D.

[102] Lady Hale "Openness and Privacy in Family Proceedings" (Sir Nicholas Wall Memorial Lecture, Greys Inn London, 10 May 2018) at 4.

[103] See *Financial Mail (Pty) Ltd v SAGE Holdings Ltd* [1993] ZASCA 3; 1993 (2) SA 451 (A) at 464A-C; *National Media Limited v Bogoshi* [1998] ZASCA 94; 1998 4 SA 1196 (SCA) at 1212J; and *Heroldt v Willis* 2013 (2) SA 530 (GSJ) at para 27. While these cases relate to defamation, they highlight the important distinction between what is in the public interest to make known and what is of interest to the public.

> Eugene Terreblanche murder trial, reporting must still be sensitive to the interests of the child. The story may be in the public interest, but it does not follow disclosing that the identity of the child involved is in the public interest."

The nature and extent of the limitation

[101] Denying child participants ongoing protection does not appear to serve the promotion of freedom of expression and open justice in a way that justifies the infringement of the rights. I have discussed the best interests of children, their dignity and privacy, as well the importance of restorative justice, stigma and agency and it is clear that the limitation is grave. However, there are two further points that require attention under this leg: (a) the ongoing harm and (b) the unfair burden.

[102] A child's vulnerability and their need for protection do not abruptly disappear when they turn 18. I am aware that the Legislature has imposed a distinction between minors and majors. I appreciate that there is "no intrinsic magic in the age of 18, except that in many contexts it has been accepted as marking the transition from childhood to adulthood".[104] However, as Dr Del Fabbro explains "psychological factors that underpin the prohibition on identifying minors involved in crime as accused, witnesses or victims do not lose their relevance once those individuals turn 18". In *J*, this Court acknowledged that the "consequences of registration will, for the most part, only be felt as an adult".[105] On this point, there appears to be harrowing consequences flowing from the limitation.

[103] If ongoing protection is not the default, an unfair burden is placed on child participants who have recently reached 18. They would be required to rush to court, possibly on an urgent basis as in this case, seeking relief prohibiting the publication of any information which reveals or may reveal their identity. This requires time, effort and resources. This harsh reality is compounded by the fact that there is limited legal

[104] *Centre for Child Law* above n 52 at para 39.

[105] *J* above n 52 at para 43.

aid for civil litigation in South Africa. Moreover, as the applicants point out, one would need to know in advance that a particular media house or media group is intending to publish one's details. Beyond this, the litigation to prevent publication may inadvertently expose one to publicity or media attention. A just and fair response should rather place this burden on the media houses and groups.

[104] I acknowledge that ongoing protection results in a curtailment of the principle of open justice and freedom of expression, but it is of minimal harm, and must be juxtaposed to the serious harm and impact on all classes of child participants. Foreign courts that have embedded the principle of open justice and free press acknowledged that:

> "While freedom of the press is nonetheless an important value in our democratic society which should not be hampered lightly, it must be recognised that it has limits imposed by [prohibiting identity disclosure] on the media's rights are *minimal*. . . Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public."[106]

[105] If we adopt this approach, we accept that not disclosing the identity of child participants beyond the age of 18 constitutes a minimal incursion of the principle of open justice and freedom of expression.

Relationship between the limitation and its purpose

[106] This enquiry entails determining whether the limitation is rationally connected to, or reasonably capable of achieving the purpose of freedom of expression and open justice.[107] Is it necessary for freedom of expression and open justice to identify the child participant? I answer this in the negative; it is not a particularly effective means

[106] *Canadian Newspapers Co* above n 55 at 133. Furthermore, the identity of a victim in the context of criminal matters has been described as only a "sliver of information" in *FN (Re)* [2000] 1 SCR 880 at para 12.

[107] On this leg of the limitations analysis, see *Mlungwana v S* [2018] ZACC 45; 2019 (1) SACR 429 (CC); 2019 (1) BCLR 88 (CC) at para 92.

of achieving the purpose. As mentioned above, the harm imposed on freedom of expression and open justice is minimal. The stories can still be told, the public will remain informed. The identity of the child participant is not essential for advancing freedom of expression and open justice. This accords with the approach of this Court in *NM* where, in a different context, the Court explained that the use of pseudonyms would not have reduced the authenticity of the book.[108]

Less restrictive means

[107] A default position of ongoing protection neither disregards the principle of open justice nor prevents the media from accurately reporting on a matter. There are three points to make on this leg: (a) the story can still be told; (b) the protection is not necessarily permanent; and (c) this is not a novel approach to the issue.

[108] As explained above, the public will still be informed and will be in a position to assess whether justice is being properly administered. The stories of child participants in criminal proceedings will still be published; it is only their identity that is protected. Sometimes, disclosing the identity of the individual often serves to satisfy the curiosity of the public. There may be a temptation to feed public titillation with scandalous and sordid details, but there are also stories of consequence and impact which concern the public that ought to be reported. The introduction of the default position neither diminishes the right of the public to be informed, nor reduces the ability of the media to report. This is a subtle intrusion into the domain of freedom of expression and open justice.[109]

[109] It is important to emphasise that these protections are the default position – not a blanket ban – which can be departed from through the exercise of agency in the form of consent or if consent is refused, through permission by a competent court. The

[108] *NM* above n 16 at para 46.

[109] This accords with this Court's finding in *J* above n 52 at para 51, where it held that "[w]hile the limitation promotes legitimate and constitutionally sound aims, there exist accessible and direct means to achieve the purpose, that are less restrictive to the child [participants'] rights".

default position does not create a permanent, lifelong prohibition on identity publication.

[110] The respondents argued that there is no uniform approach in foreign statutes. While this may be so, it is helpful to seek guidance from foreign jurisdictions.[110] This does not mean that we must necessarily adopt what others do and that we can only adopt an approach if it is uniformly applied in foreign jurisdictions. We turn to foreign law to learn, to gauge what options are available elsewhere, and to consider if they would work in South Africa's unique context.[111]

[111] For instance, the legal position in Australia, Canada and the United Kingdom provides support for this position. In New South Wales, the names of children must not be published in a way that connects them with the criminal proceedings if they were involved as a child, child offender, witness or sibling of a victim in the criminal offence, subject to certain exceptions.[112] In Canada, the focus is on agency. Young offenders may, after reaching 18, publish or cause to be published information that would identify them. Victims and witnesses are protected from the publication of their identity after 18, but may also, after reaching 18 allow for the publication of identifying information.[113] Most notably in 2015, England and Wales introduced section 45A into the Youth Justice and Criminal Evidence Act. This amendment enables courts to grant an order restricting the reporting of criminal proceedings for the lifetime of a witness or a victim under 18.[114] This section gives the criminal courts a power to grant life-long anonymity protection to victims and witnesses under 18.

[110] Section 39(1) of the Constitution.

[111] *Mwelase v Director-General for the Department of Rural Development and Land Reform* [2019] ZACC 30; 2019 (11) BCLR 1358 (CC) at para 56.

[112] Section 15A(1) of the New South Wales the Children (Criminal Proceedings) above n 30. See sections 15B-F for list of exceptions.

[113] Sections 110 and 111 of the Youth Criminal Justice Act 2002 above n 30.

[114] Youth Justice and Criminal Evidence Act 1999.

Conclusion on justification analysis

[112] The limitations arising from a failure to provide ongoing protection are not justified. The purpose of freedom of expression and open justice is compelling, but when it comes to the balancing of these competing rights, the best interests of children, the right to dignity and privacy outweigh the subtle impediment to the principle of open justice. The serious harms caused to child participants, outweigh the minimal harm to open justice. The granting of the default ongoing protection will not present a severe incursion into media freedom.

[113] It follows that ongoing protection must be afforded to child victims, witnesses and accused. Therefore, the appeal on this issue must be upheld.

Remedy

[114] In respect of remedy, the applicants seek a declaration that section 154(3) is unconstitutional to the extent that it does not provide ongoing protection. They submit that the order of invalidity should be suspended for 24 months in order to give Parliament time to remedy the defect. During the period of suspension, the applicants propose an interim reading to ensure that there is protection for those who need it.

[115] However, concerns were raised about the extension of a crime and an intrusion into the realm of the Legislature, with the media respondents arguing that ongoing protection amounts to judicial overreach, as it fails to appreciate the legislatively designed adult-child distinction. I address each of these in turn and approach the remedy with "necessary trepidation".[115]

[116] I am conscious of the arguments that the proposed reading-in to cure the ongoing protection defect would extend the statutory offence in section 154(5). The media respondents explained that extension of the publication ban under

[115] *Mwelase* above n 111 at para 53.

section 154(3) creates an additional problem. They argued that since a breach of section 154(3) is a criminal offence, extending its scope results in the extension of a crime. In this instance, the media respondents contended that the applicants seek to extend a crime generally, which is not in line with the exceptional circumstances bar set by this Court. The media respondents pointed to *Jordan* to caution that a court must be especially loath to extend a crime where the social problem at issue is a complex one that may be met with a range of potential legislative responses.[116]

[117] This principle was affirmed in *Masiya*,[117] where this Court held that there were exceptional circumstances which demanded that the definition of rape be extended. To extend the definition, this Court relied on its powers in terms of section 172(1)(b) of the Constitution and examined the constitutionality of the definition of rape, our current legal framework and the inadequacies therein.

[118] The cases above related to common law crimes and extensions thereof. The matter before us deals with a statute. I thus rely on the dictates of the interests of justice to determine the appropriateness of the remedy.

[119] Through the limitation analysis conducted above, it is clear that section 154(3) infringes a set of interconnected rights. The section fails to adequately and appropriately protect some of the most vulnerable members of society. The crime that is being extended is detailed in section 154(5) which provides:

> "Any person who publishes any information in contravention of this section or contrary to any direction or authority under this section or who in any manner whatever reveals the identity of a witness in contravention of a direction under section 153(2), shall be guilty of an offence and liable on conviction to a fine or to

[116] In *S v Jordan* [2002] ZACC 22; 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) at para 45, the minority judgment by O'Regan J and Sachs J held that "extending the definition of a crime, even to avoid what may otherwise constitute unfair discrimination, is something that a court should only do, if ever, in exceptional circumstances."

[117] *Masiya v Director of Public Prosecutions, Pretoria* (*Centre for Applied Legal Studies, Amici Curiae*) [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC) at para 36.

> imprisonment for a period not exceeding three years or to both such fine and such imprisonment if the person in respect of whom the publication or revelation of identity was done, is over the age of 18 years, and if such person is under the age of 18 years, to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment."

[120] From this, it can be gleaned that once the declaration of invalidity is suspended and the interim reading-in is granted, the above section would operate to criminalise the publication of any information in contravention of the amended section 154(3). The interim reading-in may, however, be amended by Parliament. This cannot be equated to an extension of a common law crime as contemplated in *Masiya.* There, this Court held that the constitutional role of the courts in the development of the common law must be distinguished from their other role in considering whether legislative provisions are consistent with the Constitution.[118] The latter role is one of checks and balances on the power provided for in our Constitution, whereby courts are empowered to test legislation against the Constitution. When fulfilling this role, a court is empowered to provide relief beyond the facts of the case.[119]

[121] Lastly, the related issue of separation of powers arises. I am mindful of the "vital limits on judicial authority".[120] I am also sensitive to the need to refrain from undue interference with the functional independence of other branches of government.[121] However, I am comforted by the stance taken by the Minister and the NDPP who have supported the applicants' proposed interpretation on the question of ongoing protection. As noted above, the Minister stated that the protection of section 154(3) "should be extended even in adulthood". The Minister explained that "the protection should be limited only to the incident that occurred when the child was still

[118] Id at para 31.

[119] Id.

[120] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at paras 37-8.

[121] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at para 92.

under 18". Ultimately, the Minister noted "there is no reason why child victims, accused persons or witnesses should forfeit the protection afforded to them in section 154(3) when they reach the age of 18".

[122] I accept that the Minister's stance does not overcome all the concerns of judicial overreach, but it is a factor that can be taken into account. I agree with the Supreme Court of Appeal's minority finding on this point, "the court may be less circumspect about the possibility of judicial overreach than might otherwise be the case, pending Parliament's consideration of the matter".[122]

[123] Being "acutely aware of the perils of trying to do too much", I find the interim nature of the remedy to be appropriate in the circumstances, especially when it impacts some of the most vulnerable and marginalised in our society.[123] In *National Coalition* this Court provided some indication of the balance to be struck between the need to afford appropriate interim relief with the need to respect the separation of powers and, in particular, the role of the Legislature as the institution constitutionally entrusted with the task of enacting legislation.[124] This Court in *NL* held that a declaration of invalidity coupled with an interim reading-in does not intrude unduly into the domain of Parliament, and can be just and equitable.[125]

[124] Here, support from the Minister paired with a suspended declaration of invalidity and an interim reading-in as a remedy cannot be considered to unduly encroach into the legislative domain. The interim reading-in envisaged in this matter pays due respect to the doctrine of separation of powers by allowing Parliament to conduct the thorough process of consideration and constitutionally required consultation to properly cure the constitutional defect as it sees fit. The interim

[122] Supreme Court of Appeal judgment above n 2 at para 102.

[123] *Mwelase* above n 111 at para 53.

[124] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999] ZACC 17; 2000 (2) SA 1 (CC) 2000 (1) BCLR 39 (CC) (*National Coalition*) at para 66.

[125] *NL v Estate Late Frankel* [2018] ZACC 16; 2018 (2) SACR 283 (CC); 2018 (8) BCLR 921 (CC) at para 73.

reading-in would not specifically prescribe what the legislation must look like and, as pointed out by the minority of the Supreme Court of Appeal, Parliament would be at liberty to receive representations before passing appropriate legislation. The consent based approached coupled with an option involving judicial oversight is the least intrusive option. It gives effect to agency, but also caters for justice and equity.

[125] This remedy seeks to find the balance between protecting children, promoting agency and ensuring freedom of expression and open justice are not unduly curbed. Practically, this default position would entail: either a former child participant, who is over 18 consenting to the publication of their identity; or, if consent is refused, a media house approaching a competent court seeking to lift the identity publication ban. The court can then make a determination in the interests of justice. This differs from the current position which expects a child to pre-emptively approach a court to prevent publication. The default position takes into account the uneven power dynamics and opens an avenue for those who are ready to share their story, to do so. The ability to consent empowers individuals, allowing them to exercise their agency.

[126] I propose a declaration of invalidity that will be suspended for 24 months and an interim reading-in. This would entail reading into section 154, a provisional section 154 that reads: "(3A) An accused person, witness or victim referred to in subsection 3 does not forfeit the protections afforded by that subsection upon reaching the age of eighteen years but may consent to the publication of their identity after reaching the age of eighteen years, or if consent is refused their identity may be published at the discretion of a competent court."

Costs

[127] Although in the ordinary course of proceedings, costs follow the result, each party agreed to be responsible for their own costs and I thus order accordingly.

Order

[128] The following order is made:

1. The declaration by the Supreme Court of Appeal that section 154(3) of the Criminal Procedure Act 51 of 1977 is constitutionally invalid to the extent that it does not protect the identity of children as victims of crimes in criminal proceedings is confirmed.
2. Leave to appeal is granted against the part of the order of the Supreme Court of Appeal that dismissed an appeal challenging the constitutionality of section 154(3) of the Criminal Procedure Act on the issue of ongoing protection.
3. The appeal is upheld.
4. Section 154(3) of the Criminal Procedure Act is declared constitutionally invalid to the extent that the protection that children receive in terms thereof does not extend beyond their reaching the age of 18 years.
5. The declaration of constitutional invalidity is suspended for 24 months to afford Parliament an opportunity to correct the defect giving rise to the constitutional invalidity.
6. Pending Parliament's remedying of the aforesaid defects, section 154(3) of the Criminal Procedure Act is to read as follows:

   "No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused person under the age of eighteen years or of a witness *or of a victim* at or in criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorise the publication of so much 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 person.

   (3A) An accused person, a witness or victim referred to in subsection 3 does not forfeit the protections afforded by that subsection upon reaching the age of eighteen years but may consent to the publication of their identity after reaching the age of eighteen years, or if consent is

refused their identity may be published at the discretion of a competent court."

7. In the event that Parliament does not remedy the aforesaid constitutional defects within 24 months of this order, paragraph 6 of the order shall continue to apply.
8. Each party is to pay its own costs.

CAMERON J and FRONEMAN J:

[129] Despite the media houses' opposition,[126] we agree with our colleague Mhlantla J, for the reasons she gives (first judgment), that section 154(3) of the CPA is constitutionally invalid in protecting only child accused and child witnesses from publicity arising from criminal proceedings, but not child victims of crime. In this, the first judgment upholds the substance of the reasoning and conclusions of both the High Court and the Supreme Court of Appeal. But the first judgment then does more. On a further issue, it overrules both those courts. It declares the provision constitutionally invalid also because it covers only children – those under 18[127] – but fails to provide ongoing protection after the child becomes an adult.

[130] This further finding, in our respectful view, is neither necessary nor desirable. We would embrace the amendments the first judgment makes to the order the Supreme Court of Appeal granted, but otherwise dismiss the appeal.

[131] The difference is narrow. And the competing considerations are closely matched. It lies in what the default position should be when a child accused, witness

[126] The first, second and third respondents, Media 24, Independent Newspapers and Times Media Group, represent the largest print media institutions in South Africa.

[127] Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child", while section 28(3) provides that "[i]n this section 'child' means a person under the age of 18 years".

or victim, shielded until then from the harsh light of publicity, turns 18. Should the protection from publicity afforded to the child endure indefinitely, even into adulthood, subject to the (former) child's consent to being identified? Or should the protection end when the child attains 18, subject to a court expressly extending the protection? In our view the latter is the correct conclusion. We endorse the reasoning of the majority in the Supreme Court of Appeal and of the High Court, which would have afforded only childhood default protection.

[132] We differ from the first judgment principally on the basis of two intertwined considerations. The first is our right to know what is happening in our world. That is an elementary right that springs from our sensate intelligent complexity as humans. We should be able to know, because knowledge affords options, invites challenges and empowers our human capacities.[128] Governmental power should not be exercised to leave us in ignorance,[129] for that infringes the dignity afforded to our condition as humans.

[133] The second is an axiom that springs from the first. It is the principle of open justice. This requires that when justice is administered in our name, we should know what is done in our name. Secret court proceedings, unnamed witnesses, shrouded documents: these are anathema to the judicial process.[130] Apartheid taught us hard lessons in not compromising the elements of legal process, among which naming witnesses and accused are key.[131]

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[128] Klaaren and Penfold "Access to Information" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (2014) at 3 observe that "[a]nother rationale, self-actualisation, argues that access to information about oneself is necessary in order to gain self-knowledge and indeed to constitute oneself ". See also Currie and De Waal *Bill of Rights Handbook* 6 ed (Juta, Cape Town 2018) at 692, who state that "[c]laims of a right to freedom of information are usually based on the idea that people are entitled to request access to information in the possession of the state that has an impact on them".

[129] Klaaren and Penfold id discuss the historical context and the importance of open access given our apartheid past "[which] was characterised by extreme levels of government secrecy in which vital decisions were taken behind closed doors on the basis of documents to which the public (including persons whose rights or interests were detrimentally affected by the relevant decisions) could not have access".

[130] See the powerful affirmation of open justice by Ackermann J in *S v Leepile* (1) 1986 (2) SA 333 (W).

[131] See Brickhill "Introduction: The Past, Present and Promise of Public Interest Litigation in South Africa" in Brickhill (ed) *Public Interest Litigation in South Africa* (Juta, Cape Town 2018) at 15, discussing the courts as

[134] Neither principle is infrangible. To both there are exceptions. Grand principles, commonplace exceptions. The question here, in a difficult, borderline, case, is which way to tip the scales, when there are good arguments both ways. For, or against, knowing? For, or against, openness? Despite the substantial arguments both the first judgment, and the dissent in the Supreme Court of Appeal, marshal, we would tip in the favour of knowing, in the favour of open justice.

[135] This approach is strengthened when one considers that though the plain principle, enshrined in the CPA, is that criminal proceedings must take place in open court,[132] every court in which the trial of an accused on criminal charges takes place has wide power to order anonymity protection.[133] In addition, courts, both criminal and civil, have inherent power to protect all witnesses and may issue orders proscribing identification of those who appear before them.[134] To these considerations must be added the common law and constitutional privacy protections that everyone enjoys[135] which the courts also extend where needed or sought. And it is hardly necessary to note that the Legislature remains free, if reversal of default identification after adulthood is the position, to introduce additional statutory protections.

"sites of struggle in which some significant victories were secured". See further Abel *Politics By Other Means – Law in the Struggle against Apartheid 1980-1994* (Routledge, New York 1995).

[132] Section 152.

[133] Section 153(2) provides as follows:

> "If it appears to any court at criminal proceedings that there is a likelihood that harm might result to any person, other than an accused, if he testifies at such proceedings, the court may direct—
>
> (a) that such person shall testify behind closed doors and that no person shall be present when such evidence is given unless his presence is necessary in connection with such proceedings or is authorised by the court;
>
> (b) that the identity of such person shall not be revealed or that it shall not be revealed for a period specified by the court."

[134] See for instance *S v Ntoae* 2000 (1) SACR 17 (W); *S v Baleka* (2) 1986 (4) SA 200 (T); *S v Pastoors* 1986 (4) SA 222 (W); and *S v Madlavu* 1978 (4) SA 218 (E).

[135] See *National Media Ltd* above n 38 at 270-1.

[136] There is however a particular reason for eschewing default anonymity in our country. The first judgment acknowledges it.[136] It is stigma, that social branding of condemnation, denunciation, ostracism and judgment we place upon the brow of the rejected other. Stigma, with its closely allied internalised collaborator, shame – the ignominy experienced internally of bearing a social marking of rejection – afflicts us in our HIV status, our sexual orientation, our cross-border migrant status, our race.

[137] There should be no shame in being a victim of a crime. No shame in being witness to a crime. By contrast there is shame in having perpetrated a crime, and the stigma society attaches to it may have to be justly borne. That may depend on how close the perpetrator was to adulthood at the time. But should we countenance a general rule, banning dissemination of identity and identifying details once victim, witness and perpetrator have turned 18, requiring judicial order to reverse it? That seems to us to place the balance wrongly.

[138] Our society is heavily freighted with shame. That is most obvious in the epidemic of HIV, with which some eight million people in our country live.[137] HIV is now readily managed by medical means. Yet the epidemic is notoriously one of silence. Silence, stigma[138] and shame. This Court, no doubt unwittingly, may have contributed to that silence in *NM* by ruling in favour of namelessness[139] at the very time the medical means of managing HIV were becoming widely available.

[139] Langa CJ and O'Regan J, two members of the minority in *NM*, which the first judgment quotes,[140] cautioned against empowering stigma. One member of the

[136] First judgment at [79] to [87].

[137] Statistics South Africa *Mid-Year Population Estimates 2019* (Statistical Release P0302, 2019) at 6.

[138] In setting the face of this Court against unfair discrimination in HIV/AIDS, Ngcobo J in *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 28 rightly emphasised the stigma wrongly associated with HIV/AIDS.

[139] *NM* above n 16. Contrast *Jansen van Vuuren N.O. v Kruger* [1993] ZASCA 145; 1993 (4) SA 842 (A) in the context of doctor-patient privilege.

[140] First judgment at [85], quoting Langa CJ at para 92 and O'Regan J at para 139 in *NM* id.

majority, by contrast, suggested that the task of privacy law in the HIV epidemic was to "provide balm for the traumatised dignity of people living in the harshest of social conditions and afflicted with the most serious of ailments".[141] This seemingly patronising assertion did not aid the task of counteracting ostracism and stigma.

[140] We should use state power to limit knowledge with caution. Justifying indefinite anonymisation in the case of adults who were, when children, witnesses to or victims of or accused of crimes points our hard-won process protections in an untoward direction.

[141] Where the scales are so evenly balanced, where a judicial decree can, either way, remedy the wrong that the default position may wreak, we should rather take the risk of erring in the cause of openness and knowledge, and against stigma and shame. We would, subject to the amendments the first judgment suggests to the order of the Supreme Court of Appeal, grant leave to appeal, but dismiss the appeal.

JAFTA J:

[142] I have had the pleasure of reading the comprehensive judgment by my colleague Mhlantla J (first judgment) and the joint judgment by my colleagues Cameron J and Froneman J (second judgment). I also agree that section 154(3) of the CPA is invalid for being inconsistent with section 9(1) of the Constitution,[142] to the extent that it differentiates child victims from child accused and witnesses in affording protection against publicity. I agree that this differentiation serves no legitimate government purpose and there is no justification for it.

[141] Id at para 201 per Sachs J.

[142] Section 9(1) of the Constitution provides:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

[143] For this reason I support the declaration of invalidity and the reading-in of the words "or of a victim" into section 154(3) so as to cure the defect. However I am unable to support the conclusion that the same provision also violates the privacy and dignity rights of children and the right guaranteed by section 28(2) of the Constitution. As the facts fully set out in the first judgment show, the source of the complaint is not what the section seeks to achieve or its implementation. The complaint was against the conduct of the media in threatening to publish KL's identity upon her turning 18 years old. The media did not source the right to publish from section 154.

[144] The fact that they relied on the prohibition falling away when KL turned 18 years old did not relate to a violation of a child victim's rights to dignity or privacy or the best interests of a child. It will be recalled that with regard to children, persons under 18 years of age, the provision prohibits publication of their identity except where the publication is authorised by a court. This means that the media is not permitted to publish the identity of children who are involved in criminal matters whether as accused persons or witnesses.

[145] Therefore the purpose of section 154 is to protect persons below 18 years of age from publicity. However, the protection afforded by the provision is limited to matters in respect of which criminal proceedings are pending before courts. If there are no criminal proceedings initiated, the protection is not triggered.

[146] A reading of section 154(3) does not lead to a meaning that is inconsistent with sections 10, 14 or 28(2) of the Constitution. Consequently, it cannot be said that the language used in the text of the impugned provision is inconsistent with any of the rights entrenched by those sections of the Constitution. Nor can it be claimed that the enforcement of section 154(3) results in a breach of those rights.

[147] But the differentiation between child accused and witnesses on the one hand, and child victims on the other, stems directly from the language of the impugned

section. This is why the inconsistency between it and section 9(1) of the Constitution was plainly established. For that inconsistency to be complete, there is no need for an actual publication of the prohibited information.

[148] In our constitutional design, where power is devolved among the three arms of government, the Judiciary may invalidate laws passed by Parliament only if those laws are inconsistent with the Constitution. And the declaration of invalidity has to be limited to the extent of the inconsistency. Moreover, the assessment that a statute is inconsistent with the Constitution is done with reference to its object and effect. In *Zondi* the test was formulated in these terms:

> "The purpose and effect of a statute are relevant in determining its constitutionality. A statute can be held to be invalid either because its purpose or its effect is inconsistent with the Constitution. If a statute has a purpose that violates the Constitution, it must be held to be invalid regardless of its actual effects. The effect of legislation is relevant to show that although the statute is facially neutral, its effect is unconstitutional."[143]

[149] Applying that standard here reveals that it cannot be said that the purpose of section 154(3) is inconsistent with any provision of the Constitution. With regard to its effect, it is only the differentiation between child victims who are not protected and the child accused and witnesses who are protected which is clearly inconsistent with the Constitution. It is difficult to appreciate how the implementation of section 154(3) could be said to have the effect of violating privacy, dignity or the best interests of a child. This is because the purpose of the section is to protect children. Therefore its enforcement cannot harm the children whose rights and interests it was enacted to protect.

[143] *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 90.

[150] As was observed in *Zondi*, the effect of a statute is linked to its purpose. There Ngcobo J said:

> "Of course purpose and effect are interrelated. The object that the Legislature seeks to achieve inspires statutes and this object is realised through the impact produced by the implementation of the statute. Thus purpose and effect, respectively in the sense of the legislative object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity. And in constitutional adjudication the assessment of the object of a statute ensures that the aims and objectives of a statute are consistent with the Bill of Rights in the Constitution."[144]

[151] Here this means that section 154(3) cannot be taken as having an impact which contradicts its purpose. In fact, the way it is framed coupled with its language make it impossible for the section to have an impact that is at variance with the protection of children who are active participants in criminal proceedings.

[152] Accordingly with regard to persons under 18 years of age, I hold that the only constitutional objection against section 154(3) that has substance is the one relating to differentiation that is inconsistent with section 9(1) of the Constitution.

Ongoing protection

[153] The first judgment holds that section 154(3) does not only limit the rights of persons under the age of 18 years but that it also limits unjustifiably the right to ensure that the best interests of children are paramount and the rights to dignity and privacy of persons who are 18 years old or older.[145] To reinforce this conclusion, the first judgment calls in aid what it describes as broader considerations which include restorative justice, engaging with stigma and the import of agency. Having concluded that the impugned provision limits those rights, the first judgment proceeds to a

[144] Id at para 91.

[145] First judgment at [72] and [73].

justification analysis and holds that the limitation of each right of persons who are 18 years old and older is not justified and concludes that section 154(3) is invalid to the extent that it fails to afford persons of those ages ongoing protection.

[154] In the process of the justification analysis, the first judgment weighs the freedom of expression right and the principle of open justice against the rights to dignity, privacy and the best interests of children.[146] The second judgment holds that the right of the general public to know what is happening in the world and the principle of open justice tip the scales in favour of publication of the identity of 18 year olds and older persons.[147] The second judgment does not express an opinion on whether the impugned provision limits the rights referred to in the first judgment.

[155] In a number of cases this Court has laid down the standard for determining whether an Act of Parliament is valid.[148] In *Coetzee* the test was formulated in these words:

> "This Court has laid down that, ordinarily, one adopts a two-stage approach for determining the constitutionality of alleged violations of rights in chapter 3 of the Constitution. The first stage is an enquiry whether the disputed legislation or other governmental action limits rights in chapter 3 of the Constitution. If so, the second stage calls for a decision whether the limitation can be justified in terms of section 33(1) of the Constitution."[149]

[156] If during the first stage it is not established that the impugned legislation limits a right in the Bill of Rights the challenge to the validity of the legislation in question

[146] Id at [88] to [113].

[147] Second judgment at [132] to [134].

[148] *S v Williams* [1995] ZACC 6; 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) and *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC).

[149] *Coetzee* id at para 9.

must fail. The justification analysis stage may be reached only if a limitation has been established.[150]

[157] The inquiry into the validity of a statute where the challenge is based on the Bill of Rights entails the interpretation of the impugned provision and the section of the Bill of Rights relied on by the challenger. The Bill of Rights is construed to determine the content and scope of the right put up as a yard stick against which the impugned provision is tested. Whereas the impugned provision is interpreted to determine its purpose and whether its implementation so as to attain that purpose is inconsistent with the constitutional right in question. If it is, then a limitation would have been established.

[158] Notably this process of interpretation does not involve evidence other than of the kind that establishes context.[151] Evidential material is vital to a justification analysis.

[159] It is prudent to begin the inquiry with the determination of rights that may competently be invoked in challenging the validity of section 154(3) on behalf of those who are 18 years old or older. It cannot be disputed that the rights to dignity and privacy are applicable. After all these rights are available to everyone, regardless of their age. But the right relating to the best interests, like all rights entrenched in section 28 of the Constitution, is conferred on children only. This plainly means that an adult person cannot claim that his or her right in section 28 has been breached.

Section 28 rights

[160] Section 28 of the Constitution provides:

[150] *Williams* above n 148 at para 54 and *Ferreira* above n 85 at para 44.

[151] *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35; 2019 JDR 1753 (CC); 2019 (11) BCLR 1403 (CC) at paras 54 and 77; *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at para 78; and *Natal Joint Municipality Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

"(1) Every child has the right—

(a) to a name and a nationality from birth;

(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;

(c) to basic nutrition, shelter, basic health care services and social services;

(d) to be protected from maltreatment, neglect, abuse or degradation;

(e) to be protected from exploitative labour practices;

(f) not to be required or permitted to perform work or provide services that;

(i) are inappropriate for a person of that child's age; or

(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;

(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years."

[161] As the heading of the section suggests, the provision deals with children's rights. Its opening words are "every child has the right" and the provision proceeds to tabulate the specific rights which it says every child has. More importantly section 28(3) defines the word "child". In the context of section 28 a child is a person under

the age of 18 years. Textually this means that the bearers of rights contained in the section are persons below the age of 18 years.

[162] Following section 28 of the Constitution, the Children's Act[152] defines a child as a person under the age of 18 years and goes on to declare that a child becomes an adult person upon reaching the age of 18 years.[153] This demonstrates that section 154(3) is consonant with the Constitution and the Children's Act in so far as it draws a distinction between children and adults. Moreover, the Children's Act was passed to give effect to section 28 of the Constitution.

[163] Therefore it is not permissible to extend children's rights to persons who are not children as defined in section 28. It matters not that at the level of fact persons who are 18 years old or older experience trauma from crimes which were committed whilst they were children and that the publication of their identity by the media would result in the harm similar to the one suffered by those who were below 18 years. That is beside the point. The real issue is whether there is any legal basis for extending the rights which the Constitution restricts to persons under 18 years to persons above that age. An interpretation of section 28 indicates that there is none.

[164] While the first judgment agrees that the best interests of the child right is conferred only on children whom the section itself describes as persons under the age of 18 years, that judgment holds that it applies the right to "the victims, witnesses and accused" who "are still children"[154]. The first judgment then proceeds to consider what is described as broader considerations and concludes—

[152] 38 of 2005.

[153] Id at section 17 provides that "A child, whether male or female, becomes a major upon reaching the age of 18 years."

[154] First judgment at [64].

> "by limiting a person's agency and autonomy, a lack of ongoing protection infringes the rights of dignity, privacy and the best interests of the child."[155]

[165] I have a number of difficulties with these statements which are at the heart of the conclusion that by omitting to extend the prohibition and make it applicable even after a child has turned 18 years old, section 154(3) infringes the rights to dignity, privacy and the best interests of a child. First, paragraph 64 of the first judgment appears to be contradictory. It defines the issue to be determined as "whether the lack of ongoing protection infringes the best interests of the child principle when the victims, witnesses and accused are still children." The difficulty with this is that the so-called ongoing protection does not apply to children whilst they are children. There is simply no need to apply it because before turning 18 years of age, children enjoy all the rights conferred by section 28 of the Constitution.

[166] Over and above that, section 154(3) in its present form protects children against publication, except those who are victims not involved in the criminal proceedings. Therefore, it cannot be said that the section infringes the best interests of the child in respect of child witnesses and accused whom it expressly protects. Second, the analysis on the ongoing protection relates to persons who have turned 18 years or older. It is aimed at providing protection when the present section 154(3) protection ceases to apply because the persons to whom it was granted in their childhood have become adults.

[167] Third, I also have difficulty with the conclusion that the lack of ongoing protection limits a person's agency and autonomy. I do not appreciate how this happens. Does it mean that the values of agency and autonomy may not be exercised without the ongoing protection in question? It seems to me that an individual is free to exercise his or her autonomy in the absence of ongoing protection because logically

[155] Id at [87].

there is no hindrance to the exercise of that autonomy. The same should apply to agency.

[168] Finally, the conclusion that "the rights like dignity, privacy and the best interests of the child" are infringed is difficult to appreciate in the context of the ongoing protection. This is because the complaint is that section 154(3) omits to protect children when they turn 18 years of age, hence the fear that the media were going to publish KL's identity on her turning 18. Otherwise before that she had been adequately protected by the section. Consequently, the omission suggests that there is a void in the section which should not have been there. My difficulty is that a void is not capable of limiting any of the rights we are concerned with here. They are not the sort of rights whose enjoyment depends on the existence of legislation that creates conditions which must exist before these rights may be exercised. Like, for example, the right to vote enshrined in section 19 of the Constitution.

[169] Moreover, the complaint here was not that Parliament has failed to pass legislation the Constitution requires it to pass. A claim for legislative invalidity based on an omission may succeed if there was an obligation on Parliament to enact legislation and there is a failure on the part of Parliament to do so or the legislation passed is inadequate in that it does not enable the right-holder to exercise the relevant right fully.

[170] *My Vote Counts NPC*[156] is an example of a case where legislation passed by Parliament was found to fall short of discharging the obligation as it was established that the legislation concerned did not enable the right-holder to exercise the relevant right in certain circumstances. The present is not such a case.

[156] *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC).

[171] Accordingly with regard to ongoing protection, I hold that section 28(2) of the Constitution cannot be invoked as the benchmark against which the impugned provision may be tested.

The right to dignity

[172] Section 10 of the Constitution provides:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

[173] Apart from recognising the dignity of every person, the section protects dignity and confers the right to have that dignity respected. The latter right limits the reach of the right to freedom of expression which is guaranteed by section 16 of the Constitution,[157] which includes the right of the media to publish information. The right to publish information may not be used to justify the breach of the right to dignity. This is because in our constitutional design no right is ranked higher than others.

[174] It is significant to note that the drafters of our Constitution considered that the terms of section 10 are adequate for protecting dignity. They did not see the need to reinforce the protection of dignity with legislation. If there was such a need, they would have obliged Parliament to pass legislation to give effect to the right. This does not suggest that Parliament may not pass legislation that promotes dignity. But the point is that there is no obligation flowing from the Constitution for legislation to be passed.

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[157] Section 16(1) of the Constitution provides:

> "Everyone has the right to freedom of expression, which includes—
>
> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information or ideas;
>
> (c) freedom of artistic creativity; and
>
> (d) academic freedom and freedom of scientific research."

Right to privacy

[175] The Constitution guarantees the right to privacy for everyone. Section 14 provides:

> "Everyone has the right to privacy, which includes the right not to have—
>
> (a) their person or home searched;
>
> (b) their property searched;
>
> (c) their possessions seized; or
>
> (d) the privacy of their communications infringed."

[176] The section protects people from intrusion into their personal space, regardless of whether the space is intimate or not. The right to privacy operates both in the personal and communal spaces, albeit in varying degrees. While it may not be gainsaid that disclosure of the identity of a person who was involved in crime whether as a perpetrator, victim or witness may impact on their right to privacy, the issue is whether the impugned provision in its terms limits the right to privacy. This may be determined with reference to the content and scope of section 154(3).

Section 154(3) of the CPA

[177] The section reads:

> "No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorize the publication of so much 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."

[178] The provision consists of two parts of a single sentence. The first contains a prohibition against publication of information that reveals at criminal proceedings the identity of child accused or witnesses who are below the age of 18 years. But this

provision is subject to the proviso in the second sentence. This proviso authorises the judicial officer who presides over the relevant proceedings to permit publication of such information if in the presiding officer's opinion it is just and equitable to publish the information concerned in the interest of a particular person.

[179] When the proviso is discounted, what remains of the impugned provision is the prohibition against publication. It is difficult to appreciate how section 154(3) limits the right to privacy when all it does is prohibit the publication of information. Instead, the section protects privacy by forbidding publication of information of children involved in criminal proceedings. There is nothing in the prohibition itself which limits privacy and its implementation may not lead to that limitation.

Narrow scope

[180] With regard to the so-called ongoing protection, the complaint is not directed at the terms of the section. The real complaint is that the scope of the prohibition is narrow. It does not extend the existing protection to persons who have reached the age of 18 years or older.

[181] As the CPA preceded the Constitution, it was not enacted to give effect to rights in the Bill of Rights. And we do not know why the protection was limited to persons below the age of 18 years. However, what we know is that when it comes to children's rights and interests, the Constitution limits their application to persons under the age of 18 years. Similarly, section 154(3) limits the prohibition to persons who are below 18 years. Consequently, there is nothing constitutionally objectionable in the scope of the prohibition concerned.

[182] But this is not to suggest that there is no need to continue the protection once a child turns 18 years of age. The evidence on record here demonstrates the need to do so. However, facts cannot justify an extension of the application of a statute beyond its limits. Nor can they constitute a ground for striking down legislation passed by Parliament. The limitation of the right to dignity, privacy and the best interests of a

child relied on in the first judgment is not grounded in the wording of section 154(3) or its effect.

[183] That being the case, it is not competent for this Court to declare the provision invalid. In a case like this, absent a limitation of a right in the Bill of Rights, an inconsistency with the Constitution cannot come into existence. And without that inconsistency, the Court lacks the authority to pull down legislation. The Constitution mandates courts to strike down legislation only if the legislation concerned is inconsistent with the Constitution.

[184] The absence of a limitation here makes it unnecessary to embark upon a justification analysis. The balancing exercise undertaken in the second judgment does not arise.

[185] The need identified in this matter for extending the scope of protection afforded by section 154(3) must be referred to Parliament which is eminently competent to legislate on it. Parliament is the right institution to pursue the law reform needed. It may also consider providing protection where there are no criminal proceedings pending in a court of law. As the law presently stands no protection is afforded where criminal proceedings are not initiated.

[186] For these reasons I would confirm the declaration by the Supreme Court of Appeal that section 154(3) is inconsistent with section 9(1) of the Constitution and as a result is invalid. Like the second judgment, I would grant leave but dismiss the appeal.

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