CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 54/06

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| FANUEL SITAKENI MASIYA | Applicant |
| versus | |
| DIRECTOR OF PUBLIC PROSECUTIONS (PRETORIA) | First Respondent |
| MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT | Second Respondent |
| and | |
| CENTRE FOR APPLIED LEGAL STUDIES | First Amicus Curiae |
| TSHWARANANG LEGAL ADVOCACY CENTRE | Second Amicus Curiae |

Heard on : 9 November 2006

Decided on : 10 May 2007

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JUDGMENT

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NKABINDE J:

[1] This case is about the constitutional validity of the common law definition of rape to the extent that it excludes anal penetration and is gender-specific. The case concerns the manner in which the definition of rape has been understood, developed and interpreted in South African law. The definition has been debated by the courts,

Legislature and civil society over the years. Essentially, this matter comes before this Court on two bases. First, confirmation proceedings in terms of section 172(2)(a)[1] of the Constitution. Second, an application for leave to appeal[2] against the whole of the judgment and order of the Pretoria High Court[3] in which that Court confirmed the applicant's conviction by the Regional Court.[4]

[2] The full terms of the order against which leave to appeal is sought read as follows:

> "1. The common law definition of rape is declared to be unconstitutional as it currently stands, for the reasons given by the learned Magistrate in his judgment and for the further reasons set out in this judgment.
> 2. The definition of rape is extended to include acts of non-consensual sexual penetration of the male penis into the vagina or anus of another person.
> 3. The provisions of Act 105 of 1997 and its schedules and Section 261(1)(e) and (f) and (2)(c) of the Criminal Procedure Act 51 of 1977 and the schedules to the latter Act relating to bail provisions are declared to be invalid and are inconsistent with the Constitution to the extent that they are gender specific.

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[1] Section 172(2)(a) provides:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

See also section 167(5) of the Constitution which provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

[2] In terms of section 172(2)(d) of the Constitution. The section reads:

> "Any person . . . with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

[3] *S v Masiya* 2006 (11) BCLR 1377 (T); 2006 (2) SACR 357 (T).

[4] *S v Masiya* case no SHG 94/04 11 July 2005, unreported.

4. Where the provisions referred to in (3) above are gender specific there be a reading in of 'person' wherever reference is made to a specific gender.
5. The proceedings in the Court *a quo* are determined to be in accordance with justice in terms of the provisions of Section 52 of Act 105/1997.
6. Sentencing of the accused is postponed until the Constitutional Court has made a determination on the order of Constitutional invalidity referred to in (3) of this order."

[3] As apparent from paragraphs 1 and 3 of the order, the declarations of invalidity relate to whether the definition of rape is constitutionally invalid and whether the specified provisions of the Criminal Procedure Act 1977 (the CPA)[5] and of the Criminal Law Amendment Act 1997 (the Act)[6] and their relevant Schedules are inconsistent with the Constitution to the extent that they are gender-specific.

[4] The applicant, Mr Masiya, is an awaiting-sentence prisoner. The first respondent is the Director of Public Prosecutions (DPP). The second respondent is the Minister of Justice and Constitutional Development (Minister). She has been joined as a party to the proceedings by reason of her being the national executive authority responsible for the administration of justice. The first and second amici curiae, the Centre for Applied Legal Studies and Tshwaranang Legal Advocacy Centre (amici), respectively, have been admitted to assist the Court.

*Background*

[5] Act 51 of 1977.

[6] Act 105 of 1997.

[5] The facts appear from the judgment of the High Court. I restate only the relevant facts to make the discussion in this judgment comprehensible.

[6] Mr Masiya, 44 years of age, was initially brought before the District Court at Sabie on a charge of rape. The state alleged that on or about 16 March 2004 at or near Sabie he wrongfully and unlawfully had sexual intercourse with a nine-year old girl (the complainant), without her consent. The case was transferred to the Regional Court at Graskop where he was tried on that charge. At the trial Mr Masiya, represented by an attorney from the Nelspruit Justice Centre, pleaded not guilty. He elected to remain silent and did not advance a statement explaining his plea. The evidence established that the complainant was penetrated anally.

[7] Mr Masiya neither gave evidence nor called witnesses to testify. The state applied that he be convicted of indecent assault, a competent verdict on a charge of rape.[7] The defence contended that if Mr Masiya were to be found guilty he should be convicted of indecent assault.

[8] The Regional Court, of its own accord, considered whether the common law needed to be developed. The defence contended that Magistrates' Courts do not have the power to pronounce on the constitutionality of a rule of the common law. The

[7] Section 261 of the CPA provides:

> "(1) If the evidence on a charge of rape or attempted rape does not prove the offence of rape or, as the case may be, attempted rape, but—
> . . .
> (b) the offence of indecent assault;
> . . .
> the accused may be found guilty of the offence so proved."

Regional Court remarked that the court, "albeit a creature of statute, has jurisdiction in terms of the Constitution to judge the constitutionality of a legal principle under common law and, if necessary to develop the principle so that it conforms with the constitutional values enshrined in our Constitution".[8] The Court remarked that there is nothing in the Constitution or other legislation that precludes it from enquiring into or ruling on the constitutionality of a rule of the common law and developing it where necessary. It pointed out that sections 8(3)[9] and 39(2)[10] of the Constitution speak, respectively, of "a court" and "every court, tribunal or forum".

[9] The Regional Court remarked further that—

> "[I]n terms of the existing common law definitions of crime, the non-consensual anal penetration of a girl (or a boy) amounts only to the (lesser) common law crime of indecent assault, and not rape, because only non-consensual vaginal sexual intercourse is regarded as rape. One's initial feelings of righteousness would however immediately rebel against such thought. Why must the unconsensual sexual penetration of a girl (or a boy) *per anum* be regarded as less injurious, less humiliating and less serious than the unconsensual sexual penetration of a girl *per vaginam*? The distinction appears on face value to be irrational and totally senseless, because the anal orifice is no less private, no less subject to injury and abuse, and its sexual penetration no less humiliating than the vaginal orifice. It therefore appears

[8] Above n 4 at para 43.

[9] Section 8(3) provides:

> "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
> (a) in order to give effect to a right in the Bill of Rights, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
> (b) may develop rules of common law to limit the right, provided that the limitation is in accordance with section 36(1)."

[10] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

> that the common law definition of rape is not only archaic, but irrational and amounts to arbitrary discrimination with reference to which kind of sexual penetration is to be regarded as the most serious, and then only in respect of women."[11] (Footnote omitted.)

[10] The Regional Court held that the definition should be developed to promote constitutional objectives, and that courts may develop the current definition of rape given Parliament's lengthy delay in promulgating the Criminal Law (Sexual Offences) Amendment Bill of 2003 (the 2003 Bill)[12] so as to afford society the full protection of the Constitution. The Court held that although the development would impact on Mr Masiya's fair trial rights in terms of section 35(3)(n)[13] of the Constitution those fair trial rights could be limited on the basis that—

(a) non-consensual anal penetration already constitutes an offence, namely indecent assault, and is manifestly immoral and unjust;

(b) retroactive punishment could have been foreseen by Mr Masiya;

(c) such development will be consistent with foreign law;

(d) the rights of society are weightier than those of Mr Masiya not to be convicted of and sentenced to a more serious offence;

(e) less restrictive means to achieve the purpose sought to be achieved by the extension of the definition of rape would have been for Parliament to address the lacuna with an appropriate law, but Parliament has dragged its feet; and

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[11] Above n 4 at para 17.

[12] Bill B50-2003.

[13] Section 35(3)(n) provides:

> "Every accused person has a right to a fair trial, which includes the right—
> . . .
> to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing".

(f) the developed definition would become law of general application if endorsed by the High Court upon referral.

[11] The Regional Court thus extended the definition of rape to include—

> ". . . acts of non-consensual sexual penetration of the male sexual organ into the vagina or anus of another person".[14]

It expressly refrained from ruling on whether non-consensual oral penetration should constitute the crime of rape as that was not an issue in the proceedings. Having convicted Mr Masiya of rape in terms of the extended definition, the Regional Court stopped the proceedings and committed him to the High Court in terms of section 52[15] of the Act for the purpose of sentence.

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[14] Above n 4 at para 45.

[15] Section 52 of the Act provides:

> "(1) If a regional court, following on—
> (a) a plea of guilty; or
> (b) a plea of not guilty,
> has convicted an accused of an offence referred to in—
> (i) Part I of Schedule 2; or
> (ii) Part II, III or IV of Schedule 2 and the court is of the opinion that the offence concerned merits punishment in excess of the jurisdiction of a regional court in terms of section 51 (2),
> the court shall stop the proceedings and commit the accused for sentence as contemplated in section 51 (1) or (2), as the case may be, by a High Court having jurisdiction.
> (2) (a) Where an accused is committed under subsection (1) (a) for sentence by a High Court, the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court, and the plea of guilty and any admission by the accused shall stand unless the accused satisfies the Court that such plea or such admission was incorrectly recorded.
> (b) Unless the High Court in question—
> (i) is satisfied that a plea of guilty or an admission by the accused which is material to his or her guilt was incorrectly recorded; or
> (ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence,
> the Court shall make a formal finding of guilty and sentence the accused as contemplated in section 51 (1) or (2), as the case may be.
> (c) If the Court—

[12] Section 52(1)(b)(i) of the Act enjoins the Regional Court, when finding an accused guilty of certain serious crimes including rape where the victim is under the age of 16 years,[16] to refer the matter to the High Court having jurisdiction for purposes

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(i) is satisfied that a plea of guilty or any admission by the accused which is material to his or her guilt was incorrectly recorded; or

(ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence or that he or she has no valid defence to the charge,

the Court shall enter a plea of not guilty and proceed with the trial as a summary trial in that Court: Provided that any admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

(d) The provisions of section 112 (3) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), shall apply with reference to the proceedings under this subsection.

(3) (a) Where an accused is committed under subsection (1) (b) for sentence by a High Court, the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court.

(b) The High Court shall, after considering the record of the proceedings in the regional court, sentence the accused as contemplated in section 51 (1) or (2), as the case may be, and the judgment of the regional court shall stand for this purpose and be sufficient for the High Court to pass such sentence: Provided that if the judge is of the opinion that the proceedings are not in accordance with justice or doubt exists whether the proceedings are in accordance with justice, he or she shall, without sentencing the accused, obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused.

. . . .

(d) The Court in question may at any sitting thereof hear any evidence and for that purpose summon any person to appear to give evidence or to produce any document or other article.

(e) Such Court, whether or not it has heard evidence and after it has obtained and considered a statement referred to in paragraph (b), may—

(i) confirm the conviction and thereupon impose a sentence as contemplated in section 51 (1) or (2), as the case may be;

(ii) alter the conviction to a conviction of another offence referred to in Schedule 2 and thereupon impose a sentence as contemplated in section 51 (1) or (2), as the case may be;

(iii) alter the conviction to a conviction of an offence other than an offence referred to in Schedule 2 and thereupon impose the sentence the Court may deem fit;

(iv) set aside the conviction;

(v) remit the case to the regional court with instruction to deal with any matter in such manner as the High Court may deem fit; or

(vi) make any such order in regard to any matter or thing connected with such person or the proceedings in regard to such person as the High Court deems likely to promote the ends of justice."

[16] Part I of Schedule 2 states:

"Rape—

. . .

(b) where the victim—

of confirmation of conviction and sentencing. The High Court had to consider whether, on the facts of the case, the conviction of rape should be upheld and, given its inherent powers and obligations regarding the development of the common law, whether the common law definition of rape should be developed.[17] The matter was postponed for further evidence by the High Court in terms of section 52(3)(d) of the Act.

[13] All the parties agreed that the complainant's mother, who had refused to testify before the Regional Court and to whom the first report had been made, should testify about the report and confirm the complainant's age. It was also agreed that certain medical experts, the police who took the complainant's statement and the complainant herself, should testify. All these witnesses did testify. The evidence is summarised in the judgment of the High Court. Accordingly, it is not necessary to repeat it. It suffices to state that the High Court was satisfied that Mr Masiya had anally penetrated the complainant. It made the order which is the subject matter of these confirmation and appeal proceedings.

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(i) is a girl under the age of 16 years;
(ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or
(iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act, 1973 (Act No. 18 of 1973)"

. . . ."

[17] Above n 3 at para 55.

[14] The High Court, relying on certain provisions of the Constitution – sections 8(1),[18] 39(2),[19] 10,[20] 170,[21] 172(1)[22] and (2)(a)[23] as well as section 173[24] of the Constitution – with reference to the power of the Magistrates' Courts to pronounce on the constitutionality of the common law, remarked—

> "[I]t would appear that magistrates' courts are not explicitly excluded from enquiring into the validity of the common law: A magistrate's court is bound by the Constitution to apply the Bill of Rights and must interpret all laws in a manner promoting the Bill of Rights. It must in a similar fashion apply the common law but, in this latter instance, may also [make an enquiry] into the constitutional validity of any rule of common law. If, in so doing, the effect results in invalidity of a common-law rule or principle, then it must allow for the competent authority to correct the defect, which will be the High Court, having inherent power to develop the common law to bring it in line with the Constitutional imperatives and, so, to correct the defect."[25]

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[18] Section 8(1) provides that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

[19] Above n 10.

[20] Below n 31.

[21] Section 170 provides:

> "Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President."

[22] Section 172(1) provides:

> "When deciding a constitutional matter within its power, a court—
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable, including—
>  (i) an order limiting the retrospective effect of the declaration of invalidity; and
>  (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[23] Above n 1.

[24] Section 173 provides:

> "The Constitutional Court, Supreme Court of Appeal and High Court have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[25] Above n 3 at para 60.

[15] Regarding the need to extend the definition of rape, the High Court found that indecent assault attracts more lenient sentences than rape. This distinction in sentencing, the Court said, results in "inadequate protection and discriminatory sentencing."[26] On the question of legality the Court held that the principles are not applicable and need not be considered as an obstacle to the extension of the definition of rape since no new crime is created. As a prelude to the order set out in paragraph 2 above, the High Court said—

> "[T]he unlawful deed the accused committed is simply given another name . . . . The accused knew very well that he was acting unlawfully. It has never been a requirement that an accused should know, at the time of the commission of an unlawful deed, whether it is a common law or statutory offence, or what the legal/official terminology is in naming it."[27]

The Court then referred the declaration of invalidity set out in paragraph 3 of the order to this Court for confirmation. The imposition of sentence was postponed pending the determination of the matter.

*Jurisdictional matter*

[16] Section 172(2)(a) requires this Court to consider applications for confirmation of declarations of invalidity by the High Court.[28] A declaration of constitutional invalidity raises a constitutional matter which in the ordinary course must be considered by this Court. In this case, as indicated earlier, the High Court made an order of constitutional invalidity which must be considered by this Court. That

[26] Id at para 71.

[27] Id at para 73.

[28] Above n 1.

declaration was dependent on the question whether the common law had been correctly developed by the High Court. It follows therefore that this Court has to consider both the confirmation proceedings and whether to grant leave to appeal on the other issues.

[17] The amici however contended that the application for leave to appeal should be dismissed on the basis that it would not be in the interests of justice to grant leave without this Court having first had the benefit of the views of the Supreme Court of Appeal on the question of the development of the common law. Ordinarily, constitutional matters involving the development of the common law should first be taken to the Supreme Court of Appeal before they reach this Court because of the breadth of its jurisdiction and its expertise in the common law.[29] During argument the amici acknowledged that it would be impractical to require Mr Masiya to prosecute his appeal first in the Supreme Court of Appeal[30] while the confirmation proceedings have to be considered by this Court.

[18] The issues raised in this matter involve the protection of the rights to dignity,[31] equality,[32] freedom and security of the person,[33] and children's rights[34] as well as Mr

[29] See *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 33. See also *Fourie and Another v Minister of Home Affairs and Another* 2003 (5) SA 301 (CC); 2003 (10) BCLR 1092 (CC) at para 12.

[30] As the ultimate competent authority in matters of common-law development and precedent where constitutional matters are not raised.

[31] Section 10 provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected."

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

[33] Section 12 provides:

Masiya's fair trial rights.[35] As will appear later in this judgment, the case raises constitutional issues of considerable public importance. Prospects of success, albeit not decisive in every case, are an important factor to be considered.[36] I conclude therefore that it is in the interests of justice for the application for leave to appeal to be granted.

*Issues*

[19] The primary questions to be considered relate to—

(a) whether the current definition of rape is inconsistent with the Constitution and whether the definition needs to be developed;

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"(1) Everyone has the right to freedom and security of person, which includes the right—
(a) not to be deprived of freedom arbitrarily or without just cause;
. . .
(c) to be free from all forms of violence from either the public or private sources;
. . ..
(2) Everyone has the right to bodily and psychological integrity, which includes the right—
. . .
(b) to security in and control over their body".

[34] Section 28(1)(d) provides:

"Every child has the right—
. . .
to be protected from . . . abuse or degradation."

[35] Section 35(3) provides:

"Every accused person has a right to a fair trial, which includes the right—
. . .
(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
. . .
(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing".

[36] *National Police Service Union and Others v Minister of Safety and Security and Others* 2000 (4) SA 1110 (CC); 2001 (8) BCLR 775 (CC) at para 5; *Ingledew v Financial Services Board: In re Financial Services Board v Van der Merwe and Another* 2003 (4) SA 584 (CC); 2003 (8) BCLR 825 (CC) at para 31; *S v Boesak* 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

(b) whether Mr Masiya is liable to be convicted in terms of the developed definition;

(c) whether the declaration of invalidity of the relevant statutory provisions should be confirmed;

(d) whether the merits of the criminal conviction should be dealt with by this Court; and

(e) appropriate relief.

*Constitutionality of the definition*

[20] It is useful to examine the historical perspective of the criminalisation of rape so as to determine its developmental direction. The word rape originates from the Latin words *raptus*, *rapio*, and *rapina* – respectively meaning "tearing off, rending away, carrying off, abduction, rape, plundering"; "to seize, snatch, tear way, to plunder a place, to hurry along a person or thing"; and "robbery, pillage, booty plunder".[37] As such, *raptus*[38] in Roman law was generally understood as an offence consisting of the violent "carrying away" of women and is better translated as "abduction".[39] The crime of rape in Roman law was based on a prohibition of unchaste behaviour. Punishment of non-consensual sexual intercourse protected the interests of the society in penalising unchaste behaviour, rather than the interests of the survivor.

[37] See *Simpson Cassell's New Compact Latin-English English-Latin Dictionary* (Cassel & Company Ltd, London 1963) 189-190.

[38] *S v Ncanywa* 1992 (2) SA (Ck) at 185E-G citing De Wet and Swanepoel *Strafreg* 3 ed (Butterworths, Durban 1975) 242 and Voet *Commentarius ad Pandectas* 48.6.4, Van der Keessel *Praelectiones ad Jus Criminale* (1809) 46.6.7 (Beinart and Van Warmelo's translation (1972) 883). Voet and Van der Keessel treated rape as a species of public violence (*vis publicae*).

[39] See Hiemstra and Conin *Trilingual Legal Dictionary* 2 ed (Juta, Cape Town 1986).

[21] In this period, patriarchal societies criminalised rape to protect property rights of men over women.[40] The patriarchal structure of families subjected women entirely to the guardianship of their husbands and gave men a civil right not only over their spouses' property, but also over their persons.[41] Roman-Dutch law placed force at the centre of the definition with the concomitant requirement of "hue and cry" to indicate a woman's lack of consent.[42] Submission to intercourse through fear, duress, fraud or deceit as well as intercourse with an unconscious or mentally impaired woman did not constitute rape but a lesser offence of *stuprum*.[43]

[22] In English law the focus originally was on the use of force to overcome a woman's resistance. By the mid-eighteenth century force was no longer required for the conduct to constitute rape and the scope of the definition was increased to include cases of fraud or deception. This latter definition was adopted in South Africa.[44]

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[40] Kaganas and Murray "Rape in Marriage – Conjugal Rights or Criminal Wrong?" 1983 *Acta Juridica* 125 at 126.

[41] Id.

[42] In terms of South African law, violence is not an element of the crime of rape.

[43] *Ncanywa* above n 38 at 185G-I. *Stuprum violentum*, translated as meaning "rape" by Hiemstra and Conin above n 39, was distinguished as a form of seduction against the will of a woman. It was regarded as closely related to violent *raptus* and punished as such. It would seem that the Roman-Dutch authorities treated the *actus reus* of rape as a form of *stuprum* being one of a whole group of offences based on illicit sexual intercourse. *Stuprum* was regarded as seduction or coition with women of certain classes but married women and prostitutes were excluded. See also Burchell and Milton *Principles of Criminal Law* 3 ed (Juta, Cape Town 2000) 702.

[44] Burchell and Milton above n 43 at 703.

[23] In indigenous law[45] rape was restrictively defined. Generally, the law stresses the responsibility of a group rather than of the individual. For instance in Pedi law, in rape cases women must be assisted by their fathers or husbands and compensation accrues not to the survivor but to her household under the guardianship of the husband or the father.[46] The law excluded cases of sodomy and marital rape. In some communities intercourse with a prepubescent girl-child was also excluded from the definition. These acts often merely constituted assault or "unnatural sexuality".[47]

[24] It is evident from the history of the law of rape that the object of the criminalisation of rape was to protect the economic interests of the father, husband or guardian of the female survivor of rape, to perpetuate stereotypes, male dominance and power and to refer to females as objects.

[25] With the advent of our constitutional dispensation based on democratic values of human dignity, equality and freedom, the social foundation of these rules has disappeared. Although the great majority of females, for the most part in rural South Africa, remain trapped in cultural patterns of sex-based hierarchy, there is and has been a gradual movement towards recognition of a female as the survivor of rape rather than other antiquated interests or societal morals being at the core of the

[45] The Constitution recognises customary law and enjoins the courts, in section 211(3) to ". . . apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

[46] Mönnig *The Pedi* (JL van Schaik Limited, Pretoria 1967) 320 suggests that a woman would have an action for rape if assisted by her husband. Even though one cannot assume that all the systems of indigenous law in South Africa are uniform, seduction, according to Seymour, is the primary offence dealing with sexual violence. Seymour *Native Law in South Africa* (Juta and Co. Limited, Cape Town and Johannesburg 1960) 228.

[47] Myburgh and Prinsloo *Indigenous Public Law in KwaNdebele* (JL van Schaik (Pty) Ltd, Pretoria 1985) 101–102.

definition.[48] The focus is on the breach of "a more specific right such as the right to bodily integrity"[49] and security of the person and the right to be protected from degradation and abuse. The crime of rape should therefore be seen in that context.

*The current law of rape*

[26] In our law, rape is understood as the non-consensual penetration of a vagina by a penis. The generally accepted definition of rape, according to Heath J in *Ncanywa*,[50] is "the (a) intentional (b) unlawful (c) sexual intercourse with a woman (d) without her consent." Heath J remarked that "[t]he element of unlawfulness is based essentially on the absence of consent."[51] The four elements in the definition of rape were echoed by Van der Merwe J in *S v Zuma*[52] in which the absence of *mens rea* was relevant.[53] Burchell and Milton state that the definition of rape is the "the intentional unlawful sexual intercourse with a woman without her consent."[54] Snyman prefers this definition: "Rape consists in a male having unlawful and intentional sexual

[48] Milton "Re-defining the crime of rape: The Law Commission's proposals" (1999) 12 *SACJ* 364 at 366.

[49] See *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35. Some protagonists of women's rights however argue that the focus on the woman only as the victim of rape still perpetuate patriarchal interests in controlling a woman's sexuality. It is not necessary to consider that argument for the purpose of the present case.

[50] Above n 38.

[51] Id at 186A-B. See also *R v K* 1958 (3) SA 420 (A) at 423B-C and the remarks by Wessels CJ regarding the element of consent in *R v Mosago and Another* 1934 AD 32 at 34.

[52] 2006 (7) BCLR 790 (W) at 828E.

[53] Id at 828F-G. The Court stated that

> "[t]he element of intention is vital because rape can only be committed intentionally. A principle of our criminal justice system is expressed in the maxim *actus non facit reum nisi mens sit rea* – the act is not wrongful unless the mind is guilty."

[54] Above n 43 at 699 and 705.

intercourse with a female without her consent."[55] Both share an understanding of "sexual intercourse" as the "penetration of the woman's vagina by the male penis".[56]

[27] The definitions presuppose non-consensual sexual penetration of a vagina by a penis. The definition of rape is not unconstitutional in so far as it criminalises conduct that is clearly morally and socially unacceptable. In this regard it is different from the common law crime of sodomy which was declared unconstitutional by this Court[57] because it subjected people to criminal penalties for conduct which could not constitute a crime in our constitutional order. There is nothing in the current definition of rape to suggest that it is fatally flawed in a similar manner. The current definition of rape criminalises unacceptable social conduct that is in violation of constitutional rights. It ensures that the constitutional right to be free from all forms of violence, whether public or private,[58] as well as the right to dignity[59] and equality[60] are protected. Invalidating the definition because it is under-inclusive is to throw the baby out with the bath water. What is required then is for the definition to be extended instead of being eliminated so as to promote the spirit, purport and objects of the Bill of Rights.

[55] Snyman *Criminal Law* 4 ed (Butterworths, Durban 2002) 445.

[56] Id at 446. See also Burchell and Milton above n 43 at 706.

[57] *National Coalition for Gay and Lesbian Equality v The Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

[58] Above n 33.

[59] Above n 31.

[60] Above n 32.

[28] Moreover the current law of rape has been affected by statutory developments in recent decades. In 1993 the rule that a husband could not rape his wife, the so-called marital rape exemption, was abolished;[61] and the presumption that a boy is incapable of committing rape was abolished in 1987.[62] There have also been changes to the law of evidence relating to sexual offences.[63] These changes reflect our society's changing understanding of rape. Due in no small part of the work of women's rights activists, there is wider acceptance that rape is criminal because it affects the dignity and personal integrity of women. The evolution of our understanding of rape has gone hand in hand with women's agitation for the recognition of their legal personhood and right to equal protection. To this end, women in South Africa and the rest of the world have mobilised against the patriarchal assumption that underlay the traditional definition of rape. They have focused attention on the unique violence visited upon women. Much of this activism focused on creating support systems for women, such as rape crisis centres and abuse shelters; and also on the process whereby rape is investigated and prosecuted. It is now widely accepted that sexual violence and rape not only offends the privacy and dignity of women but also reflects the unequal power relations between men and women in our society.

[29] The facts of the present case deal with penetration of the anus of a young girl. The issue before us then is whether the current definition of rape needs to be

[61] Section 5 of the Prevention of Family Violence Act 133 of 1993.

[62] Section 1 of the Law of Evidence and the Criminal Procedure Act Amendment Act 103 of 1987.

[63] Abolition of the cautionary rule. See *S v Jackson* 1998 (1) SACR 470 (SCA) at para 476E-F.

developed to include anal penetration within its scope. The facts do not require us to consider whether or not the definition should be extended to include non-consensual penetration of the male anus by a penis. Strong arguments were presented to us to the effect that gender-specificity in relation to rape reflected patriarchal stereotypes inconsistent with the Constitution. This Court[64] has stressed that it is not desirable that a case should be dealt with on the basis of what the facts might be rather than what they are.

[30] It can hardly be said that non-consensual anal penetration of males is less degrading, humiliating and traumatic and, to borrow the phrase by Brownmiller, "a lesser violation of the personal private inner space, a lesser injury to mind, spirit and sense of self."[65] That this is so does not mean that it is unconstitutional to have a definition of rape which is gender-specific. Focusing on anal penetration of females should not be seen as being disrespectful to male bodily integrity or insensitive to the trauma suffered by male victims of anal violation, especially boys of the age of the complainant in this case. Extending the definition to include non-consensual penetration of the anus of the male by a penis may need to be done in a case where the facts require such a development. It needs to be said that it is not constitutionally impermissible to develop the common law of rape in this incremental way. This Court has stated that in a constitutional democracy such as ours the Legislature and not the courts has the major responsibility for law reform and the delicate balance

[64] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 81.

[65] Albertyn et al "Women's Freedom and Security of the Person" in Albertyn and Bonthuys *Gender, Justice and Equality* (Juta, Cape Town 1996) Chapter 9 at 26 quoting Brownmiller *Against Our Will: Men, Women and Rape* (1975) at 378.

between courts' functions and powers on one hand and those of the Legislature on the other should be recognised and respected.[66] The terrains of the courts and Legislature, Chaskalson P said in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*,[67] should be kept separate even though they may overlap. The issue of male rape is therefore a matter that will no doubt be dealt with in an appropriate fashion either by the Legislature or the courts when the circumstances make it appropriate and necessary to do so.

[31] 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.[68] The latter role is one of checks and balances on the power provided for in our Constitution, whereby courts are empowered to ensure that legislative provisions are constitutionally compliant. The development of the common law on the other hand is a power that has always vested in our courts. It is exercised in an incremental fashion as the facts of each case require. This incremental manner has not changed, but the Constitution in section 39(2) provides a paramount substantive consideration relevant to determining whether the common law requires development in any particular case. This does not detract from the constitutional recognition, as indicated above, that it is the Legislature that has the major responsibility for law reform. Courts must be astute to avoid the

[66] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 61.

[67] 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 183.

[68] Cases in which this Court has decided on the validity of legislative provisions and therefore been at liberty to provide relief beyond the facts of the case include: *Mabaso v Law Society, Northern Provinces and Another* 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) and *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC).

appropriation of the Legislature's role in law reform when developing the common law. The greater power given to the courts to test legislation against the Constitution should not encourage them to adopt a method of common-law development which is closer to codification than incremental, fact-driven development.

[32] Accordingly, I conclude that the definition is not inconsistent with the Constitution but needs to be adapted appropriately. The question remains whether the facts of this case require that the definition be developed so as to include anal penetration of a female.

*Development of the common law*

[33] The question of development of the common law was comprehensively discussed by Ackermann and Goldstone JJ in *Carmichele*[69] in which the duty of courts that is derived from sections 7, 8(1), 39(2) and 173 of the Constitution was stressed. The Court sounded a reminder to judges when developing the common law to "be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary."[70] The Court repeated with approval the remarks of Iacobucci J in *R v Salituro*,[71]—

> "Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . . In a

[69] Above n 64.

[70] Id at para 36.

[71] (1992) 8 CRR (2d) 173; [1991] 3 SCR 654, as cited by Kentridge AJ in *Du Plessis* above n 66.

> constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."[72]

The Court however said that "courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights . . . whether or not the parties in any particular case request the Court to develop the common law under s 39(2)."[73] Where there is deviation from the spirit, purport and objects of the Bill of Rights, courts are obliged to develop the common law by removing the deviation.[74]

[34] The High Court emphasised the alleged inequality and discrimination engendered by the definition and the resultant inadequate and discriminatory sentences.[75] In oral argument counsel for Mr Masiya argued against the development only if the developed definition of rape were to apply to him. The DPP and amici substantially supported the judgment of the High Court and argued that the definition perpetuates gender inequality and promotes discrimination. The DPP further contended that the definition perpetuates leniency in sentencing.

[72] *Carmichele* above n 64 at para 36 citing *Du Plessis* above n 66 at para 61.

[73] Id.

[74] On the development of the common law see *S v Thebus and Another* 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at paras 28-31.

[75] Above n 3 at para 71.

[35] The Minister opposed the development. She relied on the decision of this Court in *S v Mhlungu and Others*[76] that the Regional Court should have decided the guilt or otherwise of Mr Masiya on the facts and without considering the constitutional issue of developing the definition of rape. That might well have been the proper way to deal with the matter. However, the failure to do so is, in the circumstances of this case, of no consequence. When the matter was referred to the High Court in terms of section 52 of the Act, that Court had to determine whether the conviction was in accordance with justice before considering an appropriate sentence. The Court called for further evidence and confirmed the conviction. Strictly speaking, it is that finding, among others, and not the finding by the Regional Court, against which leave to appeal is sought.

[36] The amici, likewise, contended that apart from the gendered nature of the origins of the definition, the elements of the crime of rape perpetuate gender stereotypes and discrimination because they are suggestive of the fact that only males can commit the crime and only females can be raped. They argued that once it is recognised that the primary motive for rape is not sexual lust but the desire to gain power or control over another person, with sex being the violent means by which the power is exercised, the rationale for maintaining the gender distinction falls away. That might be so. However, for the reasons given above, it would not be appropriate for this Court to engage with these questions. In this respect there are three important

[76] 1995 (3) SA 867 (CC); 1995 (7) BCLR (CC) 793; 1995 (2) SACR (CC) 277 at para 59 in which Kentridge AJ stated that "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

considerations that favour restraint on the part of this Court. The first is that what is at issue is extending the definition of crime, something a Court should do only in exceptional circumstances.[77] The second is that the development would entail statutory amendments and necessitate law reform. The third is that, historically, rape has been and continues to be a crime of which females are its systematic target. It is the most reprehensible form of sexual assault constituting as it does a humiliating, degrading and brutal invasion of the dignity and the person of the survivor.[78] It is not simply an act of sexual gratification, but one of physical domination. It is an extreme and flagrant form of manifesting male supremacy over females.

[37] The Declaration on the Elimination of Violence against Women[79] specifically enjoins member States to pursue policies to eliminate violence against women. Non-consensual anal penetration of women and young girls such as the complainant in this case constitutes a form of violence against them equal in intensity and impact to that of non-consensual vaginal penetration. The object of the criminalisation of this act is to protect the dignity, sexual autonomy and privacy of women and young girls as being generally the most vulnerable group in line with the values enshrined in the Bill of Rights – a cornerstone of our democracy.

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[77] See in this regard *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as* Amici Curiae*)* 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) at para 45. The remarks are echoed by Snyman above n 55 at 48: "[a] court is not free to extend the definition or field of application of a common-law crime by means of a wide interpretation of the requirements for the crime."

[78] See *S v Chapman* 1997 (3) SA 341 (A) at 344I-345B. This Court has said in *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) at para 12 that rape, like domestic violence, is "systemic, pervasive and overwhelmingly gender-specific . . . [and] reflects and reinforces patriarchal domination, and does so in a particularly brutal form.".

[79] United Nations General Assembly Resolution 48/104 of 1993, 20 December 1993.

[38] The extended definition would protect the dignity of survivors, especially young girls who may not be able to differentiate between the different types of penetration. The evidence of Dr Grabe, an expert witness who testified in the High Court, that the complainant referred to a "hole" thinking that the anus is the only place she experiences as a "hole", clearly illustrates this point. Women and girls would be afforded increased protection by the extended definition. One of the social contexts of rape is the alarming high incidences of HIV-infection. Anal penetration also results in the spread of HIV.

[39] The consequences caused by non-consensual anal penetration might be different to those caused by non-consensual penetration of the vagina but the trauma associated with the former is just as humiliating, degrading and physically hurtful as that associated with the latter. The inclusion of penetration of the anus of a female by a penis in the definition will increase the extent to which the traditionally vulnerable and disadvantaged group will be protected by and benefit from the law. Adopting this approach would therefore harmonise the common law with the spirit, purport and objects of the Bill of Rights.

[40] One of the important considerations arising out of the question whether to develop the current definition relates to the appropriate weight that ought to be given to the 2003 Bill[80] which is a work in progress.

[80] Above n 12.

*The 2003 Bill*

[41] The definition of rape has been subject to law reform initiatives in many other Commonwealth countries, such as the United Kingdom, Canada and Australia.[81] In South Africa the reform started in 1996 when the South African Law Reform Commission (SALRC),[82] conducted an investigation into sexual offences relating to children.[83] That report was followed by a request from the Minister that the Commission investigate sexual offences more broadly. The first draft of the 2003 Bill was tabled before Parliament in 2003.[84] This Bill was revised and tabled for the second time before Parliament in October 2006 (revised Bill).[85] The definition of rape proposed by the SALRC replaces the concept of sexual intercourse – penetration of a vagina by a penis – with that of sexual penetration which includes penetration of both

[81] For instance, in the United Kingdom, the Criminal Justice and Public Order Act 1994 acknowledged that a man could be a victim of rape and the definition of the *actus reus* was amended to cover vaginal or anal intercourse against a woman or another man without his or her consent. In 2003, a complete overhaul of the rape legislation resulted in the Sexual Offences Act 2003 which defines the *actus reus* of rape as penile penetration of the vagina, anus, or mouth of another person without his or her consent.

In Canada, historically rape was defined in the Criminal Code of Canada as when a male has sexual intercourse with a female who is not his wife without her consent, or when her consent is exhorted by threat or fear of bodily harm, by impersonating her husband or by false and fraudulent representations as to the nature of the act. In 1983, the offences of rape and indecent assault were conflated and redefined as sexual assaults. The offences are gender-neutral and a consent provision applies to all sexual and non-sexual types of assaults. "Sexual assault" was defined by the Supreme Court of Canada as "an assault . . . which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated." *R v Chase* [1987] 2 SCR 293 at para 11. The test to be applied in determining whether the impugned conduct has the requisite sexual natures is an objective one — viewed in the light of all circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?

In Australia, much like in the United Kingdom, the definition of rape has evolved significantly over the past couple of decades. Oral, vaginal and anal intercourses are all deemed by the Crimes Act to be sexual intercourse.

[82] Formerly referred to as the South African Law Commission.

[83] South African Law Commission *Project 108: Sexual Offences Against Children* Issue Paper 10 (1997); *Project 107: Sexual Offences: The Substantive Law* Discussion Paper 85 (1999); *Project 107: Process and Procedure* Discussion Paper 102 (2002), *Project 107: Sexual Offences Report* (2002).

[84] Above n 12.

[85] Dated 10 October 2006.

the vagina and the anus by the penis. Clause 2(1) of the 2003 Bill defines rape as follows:

> "A person who unlawfully and intentionally commits an act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape."

The approach in the 2003 Bill was not followed in the 2006 revised Bill. In the 2003 Bill two broad categories are proposed: rape and sexual assault, each with its own definition. In the revised Bill rape is defined in clause 3 as follows: "[a]ny person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape."

[42] Chapters 1 and 2 of the revised Bill are of particular significance. Chapter 1 contains definitions of "sexual penetration" and "sexual violation" and Chapter 2 is headed "Sexual Offences". Chapter 2 deals in part 1 with rape and the competent verdict for compelled rape and in part 2 with sexual assault and compelled sexual assault. The revised Bill adopts a gender-neutral approach to both offences.

[43] Having had the benefit of the drafts, the report by the SALRC and the public comments such as those by the Women's Legal Centre, this Court has noted the concerns expressed by the broader community in the course of the law reform process and the developmental perspective of the Legislature regarding sexual offences. At the hearing a concern was raised with counsel for the Minister regarding the delay in

the promulgation of the 2003 Bill. Counsel was however unable to explain to the Court the reason for that delay.

[44] The prevalence of sexual violence in our society is deeply troubling. The extension of the definition of rape to include anal penetration will not only yield advantages to the survivor but will also express the abhorrence with which our society regards these pervasive but outrageous acts. This Court, while not unmindful of the fact that the 2003 Bill is before Parliament, cannot delay, defer or refuse to deal with an extension of the definition when the facts before it demand such an extension and when it is clearly in the public interest to do so. Any further delay in or suspension of the extension of the current definition will constitute an injustice upon survivors of non-consensual anal penetration such as the nine-year-old complainant in this case. That result cannot and should not be countenanced. The fact that the 2003 Bill is before Parliament, as the Minister contended, should not thwart the extension of the current definition of rape in these exceptional circumstances and when the interests of justice so demand.

[45] I conclude therefore that the extension of the common law definition of rape to include non-consensual anal penetration of females will be in the interests of justice and will have, as its aim, the proper realisation by the public of the principles, ideals and values underlying the Constitution. Accepting that the element of unlawfulness is based essentially on the absence of consent,[86] the definition should therefore be

[86] *Ncanywa* above n 38 at 186A.

extended to include intentional penetration of the female anus by a penis without consent.

[46] The question of extending the definition so as to include acts of non-consensual anal penetration of a penis into the anus of a male person is left open for future consideration where the facts might call for its resolution. The question then remains whether the extended definition should apply to Mr Masiya.

*Retrospective application of the definition*

[47] Essentially, the question is whether the conviction of rape is in accordance with justice even though the definition of rape did not include non-consensual anal penetration at the time the crime was committed. The High Court held that the principle of legality has no application in this case since no new crime is created. It held that Mr Masiya knew he was acting unlawfully when he assaulted the complainant and that it has never been a requirement that an accused person should know, at the time of the commission of the crime, whether it is a common-law or statutory crime or what its legal definition is. Mr Masiya contended that the extended definition should not apply to him as the application would constitute a violation of his rights in terms of section 35(3)(l) of the Constitution.

[48] The ordinary principle of common law is that when a rule is developed it applies to all cases, not only those which arise after the judgment in which the law has been developed has been handed down. As Kentridge AJ observed in *Du Plessis*:[87]

> "In our Courts a judgment which brings about a radical alteration in the common law as previously understood proceeds upon the legal fiction that the new rule has not been made by the Court but merely 'found', as if it had always been inherent in the law. Nor do our Courts distinguish between cases which have arisen before, and those which arise after, the new rule has been announced. For this reason it is sometimes said that 'Judge-made law' is retrospective in its operation. In all this our Courts have followed the practice of the English Courts. . . . [I]t may nonetheless be said that there is no rule of positive law which would forbid our Supreme Court from departing from that practice."

[49] Indeed, as Kentridge AJ pointed out, members of the Judicial Committee of the House of Lords in the United Kingdom have accepted that it may be appropriate when the interests of justice require for a new rule of law developed by the courts to operate prospectively only.[88]

[50] *R v Governor of Brockhill Prison, ex parte Evans*[89] was a matter involving the unlawful detention of a prisoner. The governor had sentenced the prisoner on the basis of an interpretation of a statute which had originally been supported by the courts but which had subsequently been held to be wrong. It was clear that the governor was blameless but the sentence raised questions as to whether the new

[87] Above n 66 at para 65.

[88] Id, citing *Jones v Secretary of State for Social Services; Hudson v Secretary of State for Social Services* [1972] AC 944 (HL) at 1015 (per Lord Diplock) and 1026 (per Lord Simon). See also the later decision of *R v Governor of Brockhill Prison, Ex parte Evans (No 2)* [2001] 2 AC 19 (HL(E)).

[89] Id.

interpretation of the statute should apply prospectively only. The majority of the Law Lords held that on the facts of that case it was not appropriate for the interpretation to apply prospectively only, but all also accepted that the development of a rule might in appropriate circumstances apply prospectively. Lord Slynn of Hadley reasoned that—

> ". . . there may be decisions in which it would be desirable, and in no way unjust, that the effect of judicial rulings should be prospective or limited to certain claimants."[90]

[51] Under our constitutional order, of course, the remedy of prospective overruling of a law that is inconsistent with the Constitution is permitted by the terms of section 172(1)(b) of the Constitution.[91] In this case, we are not dealing with the Court's remedial powers under section 172 as no order of constitutional invalidity has been made. The question is whether when developing the common law it is possible to do so prospectively only. In my view, it is. In this case, if the definition of rape were to be developed retrospectively it would offend the constitutional principle of legality as I have demonstrated above. On the other hand, if we were to accept that the principle of legality is a bar to the development of the common law, the courts could never develop the common law of crimes at all. In my view, such a conclusion would undermine the principles of our Constitution which require the courts to ensure that the common law is infused with the spirit, purport and objects of the Constitution.[92] The impasse can be avoided by accepting that in these circumstances it is appropriate to develop the law prospectively only. I accept that it is only in rare cases that it will

[90] Id at 26. See also Lord Steyn at 29, Lord Hope at 35-37 and Lord Hobhouse at 47-48. See also *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 (HL(E)).

[91] Above n 22.

[92] Section 39(2) of the Constitution.

be appropriate to develop the common law with prospective effect only, as the Law Lords suggested in the *Brockhill Prison* decision. However, in my view this is one of those cases where fairness to an accused requires that the development not apply to him, but only to those cases which arise after judgment in this matter has been handed down.

[52] One of the central tenets underlying the common-law understanding of legality is that of foreseeability – that the rules of criminal law are clear and precise so that an individual may easily behave in a manner that avoids committing crimes.[93] In this regard, the amici referred to the decision of the European Court of Human Rights in *SW v United Kingdom*[94] where the Court held—

> "However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances . . . provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen".

[93] Snyman above n 55 at 41.

[94] *SW v United Kingdom; CR v United Kingdom* (1995) 21 EHRR 363 at para 36/34 at 399. The applicant in *SW*, a United Kingdom citizen, was charged and convicted with the offence of raping his wife. His conviction was confirmed by the House of Lords. He subsequently referred a complaint to the European Commission of Human Rights, where he complained that in breach of Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms he was convicted in respect of conduct which at the relevant time did not constitute an offence, breaching the principle of legality. The case was ultimately decided upon by the European Court of Human Rights in favour of the United Kingdom, unanimously holding that there had been no violation of Article 7(1) of the Convention.

The factual circumstances in *CR* concerned a case of marital rape, where the wife had left the husband and had returned to her parents' home. The husband forced his way into the home, assaulted and attempted to have sexual intercourse with her against her will. He was charged with attempted rape and assault occasioning actual bodily harm. He pleaded guilty and subsequently unsuccessfully appealed to the House of Lords. The applicant then referred a complaint to the European Commission of Human Rights. The European Court of Human Rights decided this case similarly to *SW*.

The Court used the element of foreseeability and Article 17 of the Convention,[95] which is intended to exclude the abuse of any specific rights safeguarded by the Convention for any of the purposes set out in the Article, to find that the accused's conviction of the rape of his wife was not an infringement of the principle of legality as contained in Article 7(1) of the Convention.[96] The Court, in coming to their decision, emphasised the distinction between reinterpretation and clarification of the common law and the creation of a new common-law offence. It appears that the Court found the surprise element entailed by the retroactive application of the common law to be an unacceptable feature in this case.

[53] The European Commission of Human Rights, in *CR v United Kingdom*,[97] relied heavily on the submission that there was ambiguity as to whether the marital immunity of rape was law and said—

> "In the present case, the trial judge, when rejecting the applicant's submission that marital immunity applied, doubted the extent to which it could ever have been permissible under the common law for a husband to beat his wife into having sexual intercourse with him.
>
> . . .

[95] Article 17 states:

> "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

[96] Article 7(1) states:

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

[97] Above n 94.

> [T]he Commission considers that by November 1989 there was significant doubt as to the validity of the alleged marital immunity for rape. As stated by the Court of Appeal in the applicant's case, lip service had been paid to the alleged general rule while the courts at the same time increased the number of exceptions. That there was uncertainty as to the width of the exceptions is apparent from the Law Commission Working Paper examining the question.
>
> . . .
>
> While there was no express authority for the proposition that an implied agreement of separation between husband or wife or unilateral withdrawal of consent by the wife would bring a case outside the marital immunity, the Commission takes the view that in the present case where the applicant's wife had withdrawn from cohabitation and there was *de facto* separation with the expressed intention of both to seek a divorce, there was a basis on which it could be anticipated that the courts could hold that the notional consent of the wife was no longer to be implied. . . . [T]he Commission considers that this adaptation in the application of the offence of rape was reasonably foreseeable to an applicant with appropriate legal advice."[98]

[54] Section 35(3)(l)[99] of the Constitution confirms a long-standing principle of the common law that provides that accused persons may not be convicted of offences where the conduct for which they are charged did not constitute an offence at the time it was committed. Although at first blush this provision might not seem to be implicated by finding Mr Masiya guilty of rape in this case, because the act he committed did constitute an offence both under national law and international law at the time he committed it, in my view, the jurisprudence of this Court would suggest otherwise.

[55] In the first case in which the Court addressed section 35(3)(l) and its counterpart in respect of sentence, section 35(3)(n), *Veldman v Director of Public*

[98] Id at paras 58-60.

[99] Above n 35.

*Prosecutions,*[100] the Court held that the principle of legality is central to the rule of law under our Constitution. That case concerned the question of whether, where the sentencing jurisdiction of a court had been increased after an accused had pleaded, the accused could be sentenced in terms of the increased jurisdiction. The Court held it could not. The Court observed that once an accused has pleaded, the constitutionally enshrined principle of legality requires that the sentencing jurisdiction of a court cannot be varied to the detriment of the accused, even where it was clear that the increased sentence was a permissible sentence for the charge involved. The Court held that—

> "[t]o retrospectively apply a new law, such as section 92(1)(a), during the course of the trial, and thereby to expose an accused person to a more severe sentence, undermines the rule of law and violates an accused person's right to a fair trial under section 35(3) of the Constitution."[101]

[56] The strong view of legality adopted in *Veldman* suggests that it would be unfair to convict Mr Masiya of an offence in circumstances where the conduct in question did not constitute the offence at the time of the commission. I conclude so despite the fact that his conduct is a crime that evokes exceptionally strong emotions from many quarters of society. However, a development that is necessary to clarify the law should not be to the detriment of the accused person concerned unless he was aware of the nature of the criminality of his act. In this case, it can hardly be said that Mr Masiya was indeed aware, foresaw or ought reasonably to have foreseen that his act

[100] 2006 (2) SACR 319 (CC).

[101] Id at para 37.

might constitute rape as the magistrate appears to suggest.[102] The parameters of the trial were known to all parties before the Court and the trial was prosecuted, pleaded and defended on those bases. It follows therefore that he cannot and should not bear adverse consequences of the ambiguity created by the law as at the time of conviction.

[57] The evidence adduced at the trial established that Mr Masiya was guilty of indecent assault. To convict him of rape would be in violation of his right as envisaged in section 35(3)(l) of the Constitution. I conclude therefore that the developed definition should not apply to Mr Masiya.

[58] The next question that calls for consideration is whether the declaration of invalidity referred to this Court in terms of section 172(2)(a)[103] should be confirmed.

*Should the declaration of invalidity be confirmed?*

[59] I have indicated that the key to the developmental direction of the common law definition of the crime of rape lies in the facts of this case – the alleged rape of a nine-year-old girl. In deciding whether to develop the definition the Court was obliged to confine itself to the facts of the case. It follows therefore that the Court cannot confirm the declaration of invalidity to the extent that it is based on conclusions relating to the gender-neutral nature of the crime, an issue that does not arise on the facts of this case.

[102] See above para 10.

[103] Above n 1.

[60] The relevant declaration of invalidity concerns statutory provisions in the Act and the CPA as well as their respective Schedules to the extent that they are gender-specific. Having decided to extend the definition of rape to include anal penetration of both males and females, the High Court in consequence made an order reading the word "person" into the statutory provisions wherever reference is made to a specific gender.

[61] I have concluded that the definition of rape should be extended so as to include anal penetration of a female, but that the question of non-consensual penetration of the penis into the anus of another male should be left open. That being so, there is no need for this Court to address the declaration of invalidity of the statutory provisions made by the High Court.

[62] In conclusion, I decline to confirm the declarations of invalidity in paragraph 3 of the order.

*Merits*

[63] Mr Masiya has challenged the decision of the Regional Court mostly on various factual grounds and urged this Court to consider the merits of the conviction. In effect, Mr Masiya is seeking leave to appeal to this Court on the merits of his conviction. Even if it could be said that in this regard his application raises a constitutional issue, which is unlikely given this Court's judgment in *S v Boesak*,[104] it

[104] Above n 36 at para 23.

is not in the interests of justice to grant him leave to appeal directly to this Court on this issue. Mr Masiya has still not been sentenced and once he has been, he will have the right to seek leave to appeal to the appropriate court in the ordinary way. In that sense, his application for leave to appeal on the merits is premature. Accordingly, the application for leave to appeal on the merits of his conviction should be refused.

[64] I must dispose of one further matter before I deal with the relief. That relates to the question whether the Magistrates' Courts have the power to develop the common law.

*Magistrates' power to develop the common law in respect of crimes*

[65] It is necessary to consider whether Magistrates' Courts have the power to develop the common law to bring it in line with the Constitution. The High Court held that the Magistrates' Court is not explicitly excluded from pronouncing upon the constitutional validity of crimes at common law. It is necessary to consider the constitutional jurisdiction of these courts as this Court has so far not considered this question.[105]

[66] Section 8(3) of the Constitution obliges a court when applying the provisions of the Bill of Rights, if necessary, to develop rules of the common law to limit the rights, provided the limitation is in accordance with section 36 of the Constitution. Section 39(2) places a positive duty on every court to promote the spirit, purport and objects

[105] See *Carmichele* above n 64.

of the Bill of Rights when developing the common law.[106] In terms of section 166[107] of the Constitution courts in our judicial system include the Magistrates' Courts. However, section 173 explicitly empowers only the Constitutional Court, the Supreme Court of Appeal and the High Courts to develop the common law, taking into account interests of justice. The Magistrates' Courts are excluded.

[67] The powers of the Magistrates' Courts are regulated by the Magistrates' Court Act 1944.[108] Section 110 of this Act prevents magistrates from pronouncing on the validity of any law. It provides as follows:

> "(1) A court shall not be competent to pronounce on the validity of *any law* or conduct of the President.
>
> (2) If in any proceedings before a court it is alleged that—
>
> (a) any law or any conduct of the President is invalid on the ground of its inconsistency with a provision of the Constitution; or
>
> (b) any law is invalid on any ground other than its constitutionality,
>
> the court *shall decide the matter on the assumption that such law or conduct is valid*: Provided that the party which alleges that a law or conduct of the President is invalid, may adduce evidence regarding the invalidity of the law or conduct in question." (Emphasis added.)

[106] Id at para 34.

[107] Section 166 states that:

> "The courts are—
> (a) the Constitutional Court;
> (b) the Supreme Court of Appeal;
> (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
> (d) the Magistrates' Courts; and
> (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts."

[108] Act 32 of 1944 as amended by the Magistrates' Courts Second Amendment Act 80 of 1997.

[68] The wording of section 110 shows that the Magistrates' Courts are under an attenuated duty in relation to the development of the common law. They are however bound to give effect to the constitutional rights as all other courts are bound to do in terms of section 8(1) of the Constitution. Magistrates presiding over criminal trials must, for instance, ensure that the proceedings are conducted in conformity with the Constitution, particularly the fair-trial rights of the accused.

[69] Although Magistrates' Courts are at the heart of the application of the common law on a daily basis and, in most instances, courts of first instance in criminal cases, there are legitimate reasons why they are not included under section 173 and why their powers are attenuated. Magistrates are constrained in their ability to develop crimes at common law by virtue of the doctrine of precedent. Their pronouncements on the validity of common-law criminal principles would create a fragmented and possibly incoherent legal order. An effective operation of the development of common-law criminal principles depends on the maintenance of a unified and coherent legal system, a system maintained through the recognised doctrine of *stare decisis*[109] which is aimed at avoiding uncertainty and confusion, protecting vested rights and legitimate expectations of individuals, and upholding the dignity of the judicial system.[110] Moreover, and contrary to the view held by the magistrate in his judgment,[111] there does not seem to be any constitutional or legislative mandate for all cases in which a

[109] An abbreviation of a Latin maxim, *stare decisis et non quieta movere*, which means that one stands by decisions and does not disturb settled points.

[110] See Ex *Parte Minister of Safety and Security and Others: In re: S v Walters and Another* 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC).

[111] Above n 4.

magistrate might see fit to develop the common law in line with the Constitution to be referred to higher courts for confirmation. Such a referral might mitigate the disadvantageous factors discussed above. The suggestion by the High Court that magistrates are empowered to vary the elements of crimes in the light of the Constitution was, to my mind, incorrect.

*Relief*

[70] Section 172(1)(b)[112] of the Constitution confers a discretion on this Court to make any order that is just and equitable. Having found that the common-law definition of rape is not constitutionally invalid but merely falls short of the spirit, purport and objects of the Bill of Rights, the declaration of invalidity of the definition of rape should therefore be set aside and replaced with an appropriate order. As set out earlier, the development is limited to an inclusion of non-consensual penetration of the male penis into the anus of a female person in the definition.[113] For the reasons set out above, I decline to confirm the declaration of constitutional invalidity of the statutory provisions and the relevant Schedules of the Act and the CPA. The declaration of invalidity should therefore be set aside. It follows that the orders in paragraphs 3 and 4 of the High Court order[114] should also be set aside.

[71] Having found that the developed definition cannot apply to Mr Masiya, it cannot therefore, on the facts before us, be said that his conviction is in accordance

[112] Above n 22.

[113] Above para 45.

[114] Above para 2.

with justice. The conviction of rape should, on the facts, be replaced with a conviction of indecent assault. The order of the High Court in paragraph 5 cannot therefore stand. The appeal against the conviction of rape should therefore be upheld.

[72] Having substituted the conviction of rape with that of indecent assault, it is necessary to remit the matter to the Regional Court to impose appropriate punishment. It needs be said that the offence of indecent assault is egregious. Mr Masiya assaulted a nine-year old child. The offence arouses public indignation. The Regional Court is obliged, when considering an appropriate punishment, to apply its mind to the nature and gravity of the offence of which Mr Masiya has been convicted and not merely look at the legal definition thereof. The fact that he has been convicted of indecent assault does not automatically mean that the sentence to be imposed upon him should be more lenient than if he had been convicted of rape.

[73] The assistance the Court has received from all counsel in this matter is appreciated.

*Order*

[74] In the result, the following order is made:

1. The application for leave to appeal against the declarations of invalidity and the order and judgment of the High Court confirming the conviction of Mr Masiya of rape is granted.

2. The application for leave to appeal against the conviction on the merits is dismissed.
3. The order of the High Court is set aside in its entirety.
4. The order of the Regional Court referring the criminal proceedings to the High Court for purposes of sentence in terms of section 52(1)(b)(i) of the Criminal Law Amendment Act 105 of 1997, is set aside.
5. The common-law definition of rape is extended to include acts of non-consensual penetration of a penis into the anus of a female.
6. The development of the common law referred to in paragraph 5 above shall be applicable only to conduct which takes place after the date of judgment in this matter.
7. The conviction of Mr Masiya by the Regional Court of rape is set aside and replaced with a conviction of indecent assault.
8. The case is remitted to the Regional Court for Mr Masiya to be sentenced in the light of this judgment.

Moseneke DCJ, Kondile AJ, Madala J, Mokgoro J, O'Regan J, Van der Westhuizen J, van Heerden AJ and Yacoob J concur in the judgment of Nkabinde J.

LANGA CJ:

*Introduction*

[75] I have had the opportunity of reading and reflecting on the judgment of Nkabinde J. I agree with her that the definition falls short of the spirit, purport and objects enshrined in the Bill of Rights. I associate myself particularly with her eloquent exposition of the patriarchal origin of the definition as well as for placing it in the particular context of South Africa today. I also agree with her findings on legality and the role of the Magistrates' Courts. However, I believe that the development she proposes must be taken further so that it includes the anal rape of men.

[76] Before I address that point, I would like to add that, while there is force to Nkabinde J's view that the definition of rape does not directly violate the Constitution, I prefer not to express an opinion on the matter, as, on the approach I take, it is unnecessary to do so.

*What is wrong with the common law*

[77] In order to determine how the common law should be developed, it is necessary to determine precisely what is wrong with the current position. To my mind the problem is not about males and females; it is about altering our understanding of why rape is prohibited. There are two elements to this: first that rape is about dignity and power and second, that anal rape is equivalent to vaginal rape.

[78] As expressed in the judgment of Nkabinde J, the historical reason why rape was criminalised was to protect the proprietary rights of men in women. However, over

the years the courts have gradually focused less on the proprietary interests and more on the sexual nature of the crime. Today rape is recognised as being less about sex and more about the expression of power through degradation and the concurrent violation of the victim's dignity, bodily integrity and privacy. In the words of the International Criminal Tribunal for Rwanda[1] the "essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion."[2]

[79] Coupled with this approach to rape is the recognition that anal penetration is as severe an attack on a person's dignity, bodily integrity and privacy as vaginal penetration. There is a line of case law[3] that equates "the gross humiliation and indignity"[4] of anal rape and vaginal rape. To use the words of Nkabinde J:

> "It can hardly be said that non-consensual anal penetration of males is less degrading, humiliating and traumatic and, to borrow the phrase by Brownmiller, 'a lesser violation of the personal private inner space, a lesser injury to mind, spirit and sense of self.'"[5] (Footnote omitted.)

[80] Nkabinde J's decision to extend the definition of rape is based on precisely these two imperatives. My only point of disagreement is that I find that the

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[1] *The Prosecutor v Alfred Musema* Case No ICTR-96-13-A (27 January 2000).

[2] Id at para 226. See also *The Prosecutor v Jean-Paul Akayesu* Case No ICTR-96-4-T (2 September 1998); (1998) 37 ILM 1401 at para 597.

[3] *Director of Public Prosecutions v Tshabalala* Case No A1955/04 (TPD) 7 February 2005, unreported as referred to in *S v Masiya* 2006 (11) BCLR 1377 (T); 2006 (2) SACR 357 (T) at para 67; *S v Pieters* 1987 (3) SA 717 (A) at 721F-H; *S v M (2)* 1990 (1) SACR 456 (N) at 457-458.

[4] *M* above n 3 at 458b.

[5] Nkabinde J above at para 30.

inescapable conclusion of these imperatives is that the anal penetration of a male should be treated in the same manner as that of a female. In my view, to do otherwise fails to give full effect to the constitutional values of dignity, equality and freedom: dignity through recognition of a violation; equality through equal recognition of that violation; and freedom as rape negates not only dignity, but bodily autonomy. All these concerns apply equally to men and women and necessitate a definition that is gender-neutral concerning victims.

[81] Nkabinde J gives three reasons why this Court should not extend the definition to male survivors in this particular case. First, courts should be wary to extend the reach of crimes. Second, women remain the primary victims of rape which entails that rape remains, and must be identified as, an exercise of male supremacy. Third, she holds that this Court should restrict itself to the facts before it, namely the anal penetration of a female. To tread beyond this would exceed the judiciary's limited constitutional role. While there is much to be said for these concerns, I remain unconvinced that in this case such restraint is warranted.

*Extending the reach of crimes*

[82] As was noted in *S v Jordan*,[6] courts should not lightly criminalise conduct that was not previously criminal. But, as is clear from the majority's extension of the definition to female anal penetration, that concern should not prevent courts from

[6] *S v Jordan and Others (Sex Worker Education and Advocacy Task Force and Others as* Amici Curiae*)* 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) at para 45.

giving effect to the rights and values of the Constitution. The only difference between my judgment and that of the majority is what those rights and values demand.

[83] In addition, this is not truly an extension. Non-consensual anal penetration of men already constitutes the criminal offence of indecent assault. There is no question, as there may have been in *Jordan*, of criminalisation or decriminalisation; the act was already, and will remain criminalised. This judgment simply re-categorises it.

*Women as the primary target of rape*

[84] Women have always been and remain the primary target of rape. That is not a fact that this Court can or should ignore. Nor can we deny that male domination of women is an underlying cause of rape. But to my mind that does not mean that men must be excluded from the definition. Firstly, as was noted above, this case goes to the very reason for the existence of rape as a crime. To the extent that Nkabinde J concludes that the "object of the criminalisation of [rape] is to protect the dignity, sexual autonomy and privacy of *women and young girls as being generally the most vulnerable group*",[7] I part ways. To my mind the criminalisation of rape is about protecting the "dignity, sexual autonomy and privacy" of all people, irrespective of their sex or gender. When considering the boundaries of the definition of rape, the ICTY held that "[t]he essence of the whole corpus of . . . human rights law lies in the

[7] At para 37. (Emphasis added.)

protection of the human dignity of every person, whatever his or her gender."[8] I agree.

[85] Secondly, there is no reason to believe that including men in the definition will in any way decrease the protection afforded to women. Indeed, limiting the definition to female survivors might well entrench the vulnerable position of women in society by perpetuating the stereotype that women are vulnerable, which in turn enforces the dangerous cycle of abuse and degradation that has historically led to placing women in this intolerable position. The unintended effect is to enforce the subordinate social position of women which informed the very patriarchy we are committed to uproot. The social reality of women cannot be ignored, but we should be wary not to worsen it.

[86] Thirdly, the groups of men who are most often the survivors of rape, young boys, prisoners and homosexuals, are, like women, also vulnerable groups in our society. Moreover, they, and most other male victims, are raped precisely because of the gendered nature of the crime. They are dominated in the same manner and for the same reason that women are dominated; because of a need for male gender-supremacy. That they lack a vagina does not make the crime of male rape any less gender-based. The gendered basis of rape, rightly identified by Nkabinde J, requires that male victims are given equal rather than lesser protection.

[8] *Prosecutor v Anto Furundzija* Case No IT-95-17/1-T (10 December 1998); (1999) 38 ILM 317 at para 183.

[87] Finally, the extension to male survivors is in line with both recent foreign experience, as Nkabinde J notes,[9] and international criminal and humanitarian law. The International Criminal Tribunal for Rwanda[10] (ICTR) and the International Criminal Tribunal for the Former Yugoslavia[11] (ICTY) have both defined rape as including male anal penetration. The Elements of Crimes of the International Criminal Court (ICC)[12] also include male anal penetration under the definition of rape.[13] Indeed, these international bodies have extended the definition of rape far beyond what is suggested in this judgment.[14]

[88] For all these reasons I do not believe that limiting the extension of rape to the anal penetration of women is in line with the spirit, purport and objects of the Bill of Rights.

*Judicial restrain and the separation of powers*

[9] Nkabinde J above at n 71.

[10] *Akayesu* above n 2 at para 598; *Musema* above n 1 at paras 225-226; *The Prosecutor v Laurent Semanza* Case No ICTR-97-20-T (15 May 2003) at paras 344-345.

[11] *Prosecutor v Dragoljub Kunarac Radomir Kovac and Zoran Vukovic* Case Nos IT-96-23 and IT-96-23/1-A (12 June 2002) at paras 127-128.

[12] Adopted by the Assembly of States Parties, 1st session New York (3-10 September 2002) ICC-ASP/1/3. The Elements of Crimes were adopted by the state parties to the ICC Statute and will assist the ICC in interpreting the crimes created by statute.

[13] The elements both of the crime against humanity of rape (art 7(1)(g)) and the war crime of rape in both international (art 8(2)(b)(xxii)) and non-international (art 8(2)(e)(vi)) armed conflicts include:

> "The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body." (Footnote omitted.)

[14] The ICTY, ICTR and ICC include oral penetration by a sexual organ and vaginal or anal penetration by any object in their understandings of rape. See nn 10,11 and 13 above.

[89] There can be no doubt that the separation of powers is a vital principle of democracy and that undue judicial activism threatens the separation of powers. However, in this case the separation of powers does not seem relevant for a number of reasons.

[90] Firstly, although the particular survivor in this case was a female, the case is not about the sex of the victim but about gender and how we understand rape. Extending the definition to male survivors therefore goes no further than is absolutely necessary to cure the defect I have found in the common law. Even if this may be a slight departure from the facts of the case, it is not unusual for this Court to give orders, either when developing the common law[15] or determining the validity of statutes,[16] that go beyond the exact facts but are necessitated by the underlying constitutional principles involved.

[91] Secondly, while it has only limited relevance, the original Criminal Law (Sexual Offences) Amendment Bill[17] and the Revised Bill[18] currently before the Legislature are also neutral as to the victim of the crime. In addition, nothing prevents

[15] See *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others as Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Another* 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) (Court developed the common law to allow for both male and female homosexuals to marry although the only parties before it were female).

[16] See, for example, *S v Shinga; S v O'Connell and Others* CCT 56/06 and CCT 80/06, as yet unreported judgment of 8 March 2007 (the Court invalidated provisions relating to the provision of the record in criminal appeals clearly not at issue on the facts of the case); *Mabaso v Law Society, Northern Provinces and Others* 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) (although applicant was from Bophuthatswana, the Court read in words to cure discrimination against attorneys from all former homelands); *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC) (the Court invalidated the whole of a provision requiring that summons be issued within six months of the cause of action arising and that the Defence Force be given one month's notice even though the applicant only failed to comply with the second requirement).

[17] B 50-2003 s 2(1).

[18] Dated 10 October 2006 s 3 read with the definition of "sexual penetration" in s 1.

the Legislature from enacting a new definition of rape subsequent to this extension.[19] Any infringement on the terrain of the Legislature is thus minimal.

[92] Finally, I can see no reason why the general principle of our law that constitutional remedies should give relief not only to the particular litigant but to all those similarly situated,[20] should not apply equally to the development of the common law. The development a court selects must give relief to all those who find themselves in a similar position. In my mind, a boy who is raped under the same circumstances as the survivor in this case is in the same position and is entitled to the same relief. That cannot happen unless the definition is extended to include male anal penetration.

[93] It follows that I would confirm the decision of the High Court to develop of the common-law definition of rape to include the non-consensual sexual penetration of the male penis into the vagina or anus of another person.

Sachs J concurs in the judgment of Langa CJ.

[19] See, for example, *J and Another v Director General, Department of Home Affairs, and Others* 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC) at para 26.

[20] See, for example, *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as* Amicus Curiae*)* 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 77; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) at para 74; *S v Bhulwana, S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

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| For the Applicant: | Advocate PJJ De Jager and Advocate J Bauer instructed by the Legal Aid Board. |
| For the First Respondent: | Advocate HM Meintjies and Advocate S Bakua instructed by the National Director of Public Prosecutions. |
| For the Second Respondent: | Advocate N Cassim SC, Advocate SM Lebala and Advocate PT Bezuidenhout instructed by the State Attorney, Pretoria. |
| For the Amici Curiae: | Advocate K Pillay instructed by the Legal Resources Centre. |