CONSTITUTIONAL COURT OF SOUTH AFRICA

The State and Another v The Acting Regional Magistrate, Boksburg and Another

Case No: CCT 109/10

Hearing date: 12 May 2011

MEDIA SUMMARY

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Thursday 12 May 2011 the Constitutional Court will hear argument in respect of the confirmation of an order of constitutional invalidity by the South Gauteng High Court, Johannesburg (High Court). The High Court declared certain words of section 69 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (the Act) unconstitutional and invalid, because they have the practical consequence that certain common law sexual offences, committed prior to the commencement of the Act but only reported or investigated thereafter, would no longer be criminally punishable. It ordered the severance of those words from the Act.

Mr M (the accused) was charged of rape in the Regional Magistrates' Court, Boksburg in terms of section 3 of the Act. He is alleged to have unlawfully and intentionally committed an act of sexual penetration with Ms S M (the complainant), a female then aged three years. The accused objected to the charge on the grounds that: (a) it did not disclose an offence; (b) he could not be charged under the Act, because the Act only entered into force in December 2007; (c) he had the right, not to be convicted for conduct that was not an offence at the time it was committed; (d) he could not be charged with common law rape because that crime had been repealed under the Act and (e) the transitional provisions in section 69 of the Act did not provide for the prosecution of common law rape in circumstances where the crime was allegedly committed before the commencement of the Act but reported only after the commencement of the Act.

The Magistrates' Court upheld the objection, finding that section 69 of the Act creates a *lacuna* in the law because it does not provide for the prosecution of sexual offences

in certain circumstances. The Magistrates' Court considered that it is precluded from pronouncing on the validity of any law, by section 110 of the Magistrates' Courts Act 33 of 1944, and remanded the matter to enable the State to approach the High Court.

The High Court held that there was a material flaw in the wording of the transitional provisions of the Act, which made certain sexual offences immune from prosecution depending on whether they were reported after the Act came into force, and that this violated the rights to freedom and security of persons and children's rights. The High Court declared section 69 of the Act unconstitutional.

In the Constitutional Court, the State and the Minister for Justice and Constitutional Development oppose confirmation of the order of constitutional invalidity, contending that section 69 of the Act is capable of being interpreted in a manner that is consistent with the Constitution. The accused argues that confirmation of the Court's order is necessary to provide clarity and guidance to magistrates, prosecutors and legal representatives, who have to apply the Act on a regular basis. Yet, he proposes an alternative severance to that adopted by the High Court.