CONSTITUTIONAL COURT OF SOUTH AFRICA

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

Case No: CCT 109/10
[2011] ZACC 22

Date of Judgment: 14 June 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 Tuesday 14 June 2011 the Constitutional Court handed down a judgment on a referral for confirmation of an order of constitutional invalidity made by the South Gauteng High Court, Johannesburg (High Court).

Mr van der Merwe was charged in the Regional Magistrates' Court, Boksburg, with rape in contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (the Act). He objected to the charge on two grounds. Firstly, he said that he could not be charged under the Act, because it only came into force after the offence was allegedly committed and he could not be convicted for conduct that was not an offence at the time it was committed. Secondly, he argued that he could not be charged with common law rape because that crime had been repealed under the Act and the transitional provisions in section 69 of the Act did not provide for the prosecution of common law rape where it was allegedly committed before the commencement of the Act but reported only afterwards.

The Magistrates' Court upheld the objection 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 committed before the Act commenced not prosecutable, and this violated the rights to freedom and security of persons and children's rights. It declared section 69 Act unconstitutional and ordered the severance of certain words from the section to cure the defect it had found.

In the confirmation proceedings before the Constitutional Court, Mthiyane AJ, writing on behalf of a unanimous Court, held that section 69 could only preclude the prosecution and punishment of common law rape if it repealed that crime retrospectively. According to the presumption against retrospectivity, he found that a statute is presumed not to operate retrospectively unless a contrary intention is indicated, either expressly or by clear implication. Section 69 made no mention at all of crimes committed before the commencement of the Act, and therefore did not apply to those crimes.

Mthiyane AJ held that the purpose of the Act, made manifest in its long title, preamble and objects, was to criminalise all forms of sexual abuse and exploitation, and to maximise the protection afforded to complainants of sexual offences. Therefore, it was impossible to interpret section 69 to render any sexual offences incapable of prosecution and the presumption against retrospectivity had to prevail.

The High Court's order of constitutional invalidity was not confirmed, and it was declared that section 69 did not preclude the investigation, prosecution or punishment of the common law offence of rape committed before the commencement of the Act.