CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 109/10
[2011] ZACC 22

In the matter between:

THE STATE	First Applicant
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Applicant
and	
ACTING REGIONAL MAGISTRATE, BOKSBURG: MR PHILLIP VENTER	First Respondent
LUCAS VAN DER MERWE	Second Respondent

Heard on : 12 May 2011

Decided on : 14 June 2011

JUDGMENT

MTHIYANE AJ:

Introduction

[1] This case concerns a declaration of constitutional invalidity of section 69 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act[1] (Act) by the South Gauteng High Court, Johannesburg (High Court).[2] The order has been referred to this Court for confirmation in terms of section 172(2)(a) of the Constitution.[3] More particularly, the case concerns the interpretation of statutory provisions that purport to repeal common law crimes, to replace them with statutory crimes, and to regulate the transition.

[2] The Act was passed, according to its long title, to "comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute" by, amongst other things, "repealing the common law offence of rape and replacing it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender".[4] This was necessary because pre-existing common law and statutory law did "not deal adequately, effectively and in a non-discriminatory manner" with the commission of sexual offences,

[1] 32 of 2007.

[2] *S v Acting Regional Magistrate, Boksburg and Another* 2011 (4) BCLR 443 (GSJ); 2011 (1) SACR 256 (GSJ); [2011] 2 All SA 452 (GSJ) (Mokgoatlheng J and Badenhorst AJ) (High Court judgment).

[3] Section 172(2)(a) of the Constitution 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."

[4] Long title of the Act.

and hence failed "to provide adequate and effective protection to the victims of sexual offences thereby exacerbating their plight through secondary victimisation and traumatisation".[5]

[3] The Act now seeks to codify the crime of rape as the unlawful and intentional commission by any person of an act of sexual penetration with any other person, without the latter's consent.[6] The definition of rape has thus been considerably broadened to include the sexual penetration of a male, anal and oral penetration, as well as penetration with objects other than a penis, none of which were included under the common law.[7]

[4] Section 68(1)(b) of the Act repeals the common law crime of rape, among other offences, with the result that rape committed after the commencement of the Act is punishable under the Act and not under the common law.[8] The Act entered into force on

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[5] Preamble to the Act.

[6] Section 3 of the Act reads as follows:

> "Any 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."

Section 1 of the Act defines "sexual penetration" to include—

> "any act which causes penetration to any extent whatsoever by—
>
> (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
>
> (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
>
> (c) the genital organs of an animal, into or beyond the mouth of another person".

[7] See for example Burchell *Principles of Criminal Law* (3 ed) (Juta, Cape Town 2005) at 705-6, where common law rape is defined as the "intentional unlawful sexual intercourse with a woman without her consent", and sexual intercourse is defined as "penetration of the woman's vagina by the male's penis."

[8] Section 68(1)(b) reads as follows:

16 December 2007.[9] Section 69 contains certain transitional provisions, which keep the common law in force for the purposes of the disposal of any investigation, prosecution or other criminal proceedings instituted in relation to conduct committed prior to the commencement of the Act which would have constituted one of the common law crimes repealed by section 68.[10]

[5] This case concerns the interpretation and interaction of these provisions, but before turning to the questions that this raises, it will be useful to trace the procedural history of the matter.

In the Magistrates' Court

[6] In February 2009, a criminal complaint of rape was laid against the second respondent, Mr van der Merwe (accused person). In July 2009, he was arrested and, in September 2009, he was brought before the first respondent in the Regional Magistrates' Court, Boksburg (Magistrates' Court) and charged with the crime of rape in contravention of section 3 of the Act. The State alleged that the accused person had, in September 2005, unlawfully and intentionally committed an act of sexual penetration

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"The common law relating to the—

. . .

(b) crimes of rape, indecent assault, incest, bestiality and violation of a corpse, insofar as it relates to the commission of a sexual act with a corpse,

is hereby repealed."

[9] Section 72(1) of the Act.

[10] The text of section 69 is quoted in full at [14] below.

with the complainant by inserting his penis into her vagina without her consent. The complainant is Ms M, a girl who was three years old at the time of the alleged rape, and six years old at the time the charge was laid.

[7] The accused person objected to the charge, contending that it did not disclose an offence.[11] He argued, firstly, that he could not be charged with contravening section 3, because the Act only came into force on 16 December 2007 (over two years after the alleged rape was committed). The second contention was that he could not be charged with common law rape either, because that crime no longer existed, having been repealed by the Act, almost two years before he was charged. The accused person contended that the transitional provisions in section 69 kept the common law in operation only in respect of prosecutions instituted and investigations initiated before the commencement of the Act, and not in this case, where the criminal complaint was reported only after the commencement.

[8] The Magistrates' Court upheld the objection, holding that section 69 creates a *lacuna*, in that it does not provide for prosecution in circumstances where the alleged crime was committed before the Act came into force but the investigation was initiated

[11] Section 85(1)(c) of the Criminal Procedure Act 51 of 1977 provides:

> "An accused [person] may, before pleading to the charge under section 106, object to the charge on the ground—
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> . . .
>
> (c) that the charge does not disclose an offence".

after that date. The Court considered that it was precluded from pronouncing on the validity of any law, by section 110 of the Magistrates' Courts Act,[12] and therefore remanded the matter to enable the State to approach the High Court.

In the High Court

[9] Under section 310(2) of the Criminal Procedure Act,[13] the State appealed to the High Court against the ruling. It contended that the objection should not have been upheld, for two reasons. Firstly, "rape (whether in common law or statutory law) was at all relevant times a crime under both national and international law" and was thus chargeable under the Act in conformity with section 35(3)(l) of the Constitution.[14] The

[12] Section 110 of the Magistrates' Courts Act 33 of 1944 provides:

> "(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 grounds 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."

[13] Section 310 provides in relevant part:

> "(1) When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order made under section 85(2), the attorney-general or, if a body or a person other than the attorney-general or his representative, was the prosecutor in the proceedings, then such other prosecutor may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law.
>
> (2) When such case has been stated, the attorney-general or other prosecutor, as the case may be, may appeal from the decision to the provincial or local division having jurisdiction."

[14] Section 35(3)(l) provides:

> "Every accused person has a right to a fair trial, which includes the right—
>
> . . .

second reason advanced was that section 69 did not apply in the circumstances of this case and thus did not need to be scrutinised for constitutional validity.

[10] However, the High Court held that the Magistrates' Court had correctly upheld the objection,[15] since section 69 precludes prosecution and punishment of common law rape committed before the commencement of the Act but only reported afterwards.[16] The Court held that this resulted in a violation of the rights in sections 12(1)(c) and (e),[17] 12(2)(b)[18] and 28(1)(d)[19] of the Constitution, and rendered section 69 unconstitutional.[20] The High Court reasoned as follows:

(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".

[15] High Court judgment at para 12.

[16] Id at para 18.

[17] Section 12(1)(c) and (e) provides:

"Everyone has the right to freedom and security of the person, which includes the right—

. . .

(c) to be free from all forms of violence from either public or private sources;

. . .

(e) not to be treated . . . in a cruel, inhuman or degrading way."

[18] Section 12(2)(b) provides:

"Everyone has the right to bodily and psychological integrity, which includes the right—

. . .

(b) to security in and control over their body".

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

"Every child has the right—

. . .

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

[20] High Court judgment at paras 17-8.

> "The facts under consideration in this appeal expose a material flaw in the wording of the transitional provisions of [the Act], which render them to be unconstitutional. The unintended, but absurd, consequence of an entirely unnecessary limitation in the wording of those provisions is that sex crimes which were punished in terms of the common law, have become immune from prosecution depending on whether they were reported, or the investigation thereof commenced, after the Act came into force. Where the investigation was not instituted by the date when the Act became effective, namely 16 December 2007, the violence, cruel, inhuman and degrading treatment which victims of such offences suffered at the hands of the perpetrators, would escape prosecution."[21]

[11] Consequently, the High Court dismissed the appeal, declared section 69 unconstitutional, and ordered the severance from the section of those words that it found to preclude the prosecution of common law crimes committed before the commencement of the Act but reported or investigated afterwards.[22]

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[21] Id at para 2.

[22] Id at para 24. The order provides in relevant part:

> "1. The appeal against the ruling by the acting regional Magistrate, Boksburg on 4 June 2010 when he upheld the objection against the charge sheet, is dismissed.
>
> 2. The words underlined in the following quotation of section 69 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the Act'), are declared to be inconsistent with the Constitution and with the objectives of the Act and are thus to be deleted therefrom:
>
> '69. Transitional provisions
>
> (1) All criminal proceedings relating to the common law crimes referred to in section 68(1)(b) <u>which were instituted prior to the commencement of this Act</u> and which are not concluded before the commencement of this Act must be continued and concluded in all respects as if this Act had not been passed.
>
> (2) An investigation or prosecution or other legal proceedings in respect of conduct which would have constituted one of the common law crimes referred to in section 68(l)(b) <u>which was initiated before the commencement of this Act</u> may be concluded, instituted and continued as if this Act had not been passed.
>
> (3) Despite the repeal or amendment of any provision of any law by this Act, such provision, for purposes of the disposal of any investigation, prosecution or any criminal or legal proceedings

In this Court

[12] The Registrar of the High Court referred the order of constitutional invalidity for confirmation by this Court.[23] This Court made an order joining the Minister for Justice and Constitutional Development (Minister) as a party to these proceedings.[24] This was necessary because he is the Minister responsible for the administration of the Act.[25] The Court also issued directions requiring written submissions.[26]

[13] The State and the Minister both oppose confirmation of the order of constitutional invalidity, contending that section 69 of the Act was intended, and should be interpreted, to regulate only those cases that were already in the justice system at the time the Act came into force, and not those cases that had yet to enter the system. The accused person supports the confirmation. He contends that the section cannot reasonably be interpreted

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contemplated in subsection (1) and (2), remains in force as if such provision had not been repealed or amended.'

3. The orders in paragraph 2 above will only come into effect from the moment when such order is confirmed by the Constitutional Court.

4. This judgment and Orders are referred to the Constitutional Court for consideration and, if deemed appropriate, confirmed in terms of section 172 of the Constitution."

[23] See above n 3.

[24] Order dated 16 February 2011.

[25] Section 1(1) of the Act defines "Minister" as "the cabinet member responsible for the administration of justice".

[26] The directions dated 1 February 2011 required written argument to include submissions on the following issues:

"(a) whether the impugned sections are reasonably capable of a construction that renders them consistent with the Constitution and, if so, whether that construction should be adopted; and

(b) if this Court were to hold that the impugned provision is inconsistent with the Constitution and that the order of severance granted by the High Court is appropriate, whether it is in the interests of justice for that order to apply retrospectively."

as being consistent with the Constitution. The explicit inclusion of initiated investigations and instituted prosecutions in the category of cases to be dealt with in terms of the common law necessarily implied, so the argument ran, the exclusion of as yet unreported or uninvestigated cases from that category, relying on the maxim 'the express inclusion of the one implies the exclusion of the other'.[27]

The impugned provisions

[14] It is helpful to set out section 69 in full, as this case turns on the proper interpretation of its provisions:

> "(1) All criminal proceedings relating to the common law crimes referred to in section 68(1)(b) which were instituted prior to the commencement of this Act and which are not concluded before the commencement of this Act must be continued and concluded in all respects as if this Act had not been passed.
>
> (2) An investigation or prosecution or other legal proceedings in respect of conduct which would have constituted one of the common law crimes referred to in section 68(1)(b) which was initiated before the commencement of this Act may be concluded, instituted and continued as if this Act had not been passed.
>
> (3) Despite the repeal or amendment of any provision of any law by this Act, such provision, for purposes of the disposal of any investigation, prosecution or any criminal or legal proceedings contemplated in subsection (1) or (2), remains in force as if such provision had not been repealed or amended."

[27] *Expressio unius est exclusio alterius*.

Issues for determination by this Court

[15] The High Court held section 69 to be inconsistent with the Constitution on the basis that it precludes the prosecution of common law rape committed before the commencement of the Act but reported or investigated only afterwards. Accordingly, the essential question that demands determination by this Court is whether section 69 does indeed have that effect. Answering this question requires us to consider the interaction and interpretation of sections 68 and 69 of the Act in order to ascertain whether they have the combined effect of repealing the common law crime of rape retrospectively.

Do sections 68 and 69 retrospectively repeal the common law crime of rape?

[16] Section 68(1)(b) of the Act provides that the common law relating to the crime of rape "is hereby repealed."[28] This section does not specify that the crime is repealed retrospectively. If it did, that would result in the extinction of criminal liability incurred before the commencement of the Act. However, in our common law there is a presumption against retrospectivity. It is presumed that a statute does not operate retrospectively, unless a contrary intention is indicated, either expressly or by clear implication.[29] This presumption is consistent with the fair trial provisions of the Constitution,[30] and was approved by this Court in *Veldman*.[31]

[28] See above n 8.

[29] See 25(1) *LAWSA* (first reissue) at 344-7 (para 329); *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA) at paras 31-2; *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) at 884A-B; *R v Sillas* 1959 (4) SA 305 (A) at 309H-310A; *Bareki NO and Another v Gencor Ltd and Others* 2006 (1) SA 432 (T) at 438J-439E; *S v Koukoulas* 1970 (2) SA 477 (T) at 479H; and *Curtis v Johannesburg Municipality* 1906 TS 308 at 311.

[30] See section 35(3)(l) of the Constitution, quoted in full above n 14.

[17] There is nothing express or implied in section 68 to the effect that the common law crime of rape is repealed retrospectively. The question remains whether the impugned provisions, namely those of section 69, have that effect.

[18] In *Du Toit*,[32] this Court observed that the presumption against retrospectivity "stems from the belief that at some point the State, the parties and third parties are entitled to rely on a common understanding".[33] It is significant that section 69, on its face, makes no mention at all of crimes committed before the commencement of the Act but only reported or investigated thereafter. Its immediate meaning, therefore, should surely be that those cases are not at all affected by its terms.

[19] The threshold question is whether section 69 was enacted to cover the entire field of prosecutions for common law rape. It clearly was not. Given its plain meaning, the section does not apply to prosecutions not yet instituted. Those prosecutions are not

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[31] *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* [2005] ZACC 22; 2007 (3) SA 210 (CC); 2007 (9) BCLR 929 (CC) at paras 26-7. See also *Van Vuren v Minister for Correctional Services and Others* [2010] ZACC 17; 2010 (12) BCLR 1233 (CC) at para 52; and *S v Mhlungu and Others* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at paras 37-8.

[32] *Du Toit v Minister for Safety and Security and Another* [2009] ZACC 22; 2009 (6) SA 128 (CC); 2009 (12) BCLR 1171 (CC).

[33] Id at fn 23. This Court cited *Wijesuriya v Amit* [1965] 3 All ER 701 at 703B, where the Privy Council held:

> "It must be shown that the enacting words clearly cover the case to which it is sought to apply them. The court will no doubt prefer an interpretation which gives effect to the [provision], rather than one which denies it any efficacy, but it will not strain the language used, nor will it rewrite or adapt it to cover cases other than those to which it clearly applies."

A similar approach has been adopted in *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 (SCA) and *Bell v Voorsitter van die Rasklassifikasieraad en Andere* 1968 (2) SA 678 (A) at 683E-F.

precluded. The presumption that the statute did not amend the prior position more than necessary is therefore preserved.[34] Accordingly, it was not necessary to interpret and ultimately to invalidate section 69.

[20] It is clear from the face and context of section 69 that it does not *confer* prosecutorial power on the State in respect of common law crimes, but rather *confirms* it. It would therefore be inappropriate to interpret it as a provision that could *curtail* the State's prosecutorial power, which is sourced elsewhere: in the National Prosecuting Authority Act[35] and, ultimately, the Constitution.[36]

[21] Moreover, in the face of a presumption that common law rape committed before the commencement of the Act remained a crime capable of prosecution by the State, it is inconceivable that section 69 could convey a contrary intention. The purpose is made manifest throughout the statute, particularly in its long title, its preamble, and its objects.[37] The Act proclaims its purpose "to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide", and "to introduce

[34] See 25(1) *LAWSA* (first reissue) at 341-4 (para 328); *Law Society of the Cape of Good Hope v C* 1986 (1) SA 616 (A) at 639E; *Bills of Costs (Pty) Ltd and Another v The Registrar, Cape, NO and Another* 1979 (3) SA 925 (A) at 942D-E; *Dhanabakium v Subramanian and Another* 1943 AD 160 at 167; *Skyway Management Ltd v Telkom Suid-Afrika Bpk* 2001 (2) SA 780 (T) at 784H-I; *Kaplan v Incorporated Law Society, Transvaal* 1981 (2) SA 762 (T) at 770D-F; *Rand Bank Bpk v Regering van die Republiek van Suid-Afrika en Andere* 1974 (4) SA 764 (T) at 767D-F; *Casserley v Stubbs* 1916 TPD 310 at 312; and *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 823.

[35] 32 of 1998 at section 20.

[36] Section 179(2) of the Constitution.

[37] The objects are set out in section 2 of the Act.

measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act", by "criminalising all forms of sexual abuse or exploitation".[38]

[22] In the light of these objects stated within the four corners of the Act itself, it is impossible to interpret the provisions to render any sexual offences incapable of prosecution. In *New Clicks*,[39] this Court approved the rule laid down in *Venter v R*,[40] that a court may depart from the clear language of a statute where it—

> "would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account".[41]

In this case, given that the clear language does not lead to absurdity, there was no reason for the High Court to depart from the plain meaning of section 69. Accordingly, section 69 is incapable of disclosing a contrary purpose. The presumption against retrospectivity must therefore prevail.

[23] Our Constitution sets its face firmly against all violence, and in particular sexual violence against vulnerable children, women and men. Given this, and the Act's emphasis on dignity, protection against violence against the person, and in particular the

[38] Section 2(b) of the Act.

[39] *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at para 232.

[40] 1907 TS 910.

[41] Id at 915.

protection of women and children, it is inconceivable that the provision could exonerate and immunise from prosecution acts that violated these interests. It follows that the High Court's declaration of constitutional invalidity cannot be confirmed, and that the accused person could and should have been charged under the common law.

Order

[24] The following order is made:

1. The order of constitutional invalidity of section 69 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, granted by the South Gauteng High Court, Johannesburg, in Case No A11/2010 on 3 December 2010, is not confirmed.
2. It is declared that section 69 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 does not preclude the investigation, prosecution or punishment of the common law offence of rape committed before 16 December 2007.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Van der Westhuizen J and Yacoob J concur in the judgment of Mthiyane AJ.

For the First Applicant:	Adv CE Britz instructed by the Director of Public Prosecutions.
For the Second Applicant:	Adv P Nkutha instructed by the State Attorney.
For the Second Respondent:	Adv S Budlender, Adv M Miller and Adv W Karam instructed by Legal Aid South Africa.