

REPORTABLE

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A11/2010

DATE: 03/12/2010

In the matter between:

THE STATE

Appellant

and

THE ACTING REGIONAL MAGISTRATE

BOKSBURG, MR PHILLIP VENTER

1st Respondent

LUCAS VAN DER MERWE

2nd Respondent

JUDGMENT

MOKGOATLHENG J ET BADENHORST AJ:

(1) This is an appeal against a ruling by the Acting Regional Magistrate of Boksburg upholding an objection by the second respondent ("the accused") that the charge preferred against him did not disclose an offence.

(2) The facts under consideration in this appeal expose a material flaw in the wording of the transitional provisions of the **Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007** ("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.

(3) The second respondent was arraigned in the regional court sitting at Boksburg with rape in contravention of **section 3 of the Sexual Offences and Related Matters Act 32 of 2007 (Act 37 of 2007)**. It was alleged that on or upon or about 7 September 2005 and at Angelo Squatter Camp in Boksburg he unlawfully and intentionally committed an act of sexual penetration with the complainant S M a 3 year-old minor without her consent.

(4) The second respondent's counsel in terms of the provisions of section **85 (1) (c) of Act 51 of 2007** raised an objection to the charge prior to it being put to the second respondent.

(5) The objection was premised on the fact that the charge sheet did not disclose an offence in that **Act 32 of 2007** only came into operation on 16 December 2007. It was alleged that the offence was committed on 7 September 2005, that consequently, it

followed the second respondent's counsel submitted, that his client could not be charged with an offence which was not an offence at the time of its alleged commission. Counsel also submitted that the State could also not charge the second respondent with the common law crime of rape as this had been repealed by **section 68 (1) (b) of Act 32 of 2007**.

(6) The objection was exhaustively argued by all parties. The provisions of **section 68 (1) (b) of Act 32 of 2007** (which had the effect of repealing certain common law crimes including common law rape) and of **section 69** the (transitional provisions) were addressed at some length. After having heard argument, the Learned Magistrate upheld the objection, but specifically declined to make an order in terms of **section 85 (2)** which would have led to a possible amendment of the charge sheet or the quashing of the charge,

(7) The Learned Magistrate,declined to make such order because it would have involved a decision on the constitutionality of section 69, a process which he had no jurisdiction to entertain. In terms of **section 110 (1) of the Magistrates' Courts Act 32 of 1944** a Magistrate's Court is not competent to pronounce on the validity of any law.

(8) The Learned Magistrate stated that it was in the interest of justice that section 69 be evaluated by a Court empowered to rule on its validity. On 4 June 2010 he handed down the following order-

"(1) The objection by the defence in terms of section 95 (1)(c) of Act 51 of 1977 is sustained.

(2) In view of the above stated reasons the court is unable to make any order in terms of **section 85 (2) (a) of Act 51 of 1977**.

(3) It is in the interest of justice that the transitional provisions of **section 69 of Act 32 of 2007** are evaluated by a court empowered to rule on its validity. The state is granted the relief they seek in their alternative prayer. The case is therefore to be remanded for them to, approach the appropriate forum."

(9) For purposes of elucidation it is apposite to have recourse to the relevant provisions governing the basis of the objection. Sections 85 reads as follows:

"85 Objection to charge

(1) An accused may, before pleading to the charge under section 106, object to the charge on the ground-

(a) that the charge does not comply with the provisions of this Act relating to the essentials of a charge;

(b) that the charge does not set out an essential element relevant offence;

(c) that the charge does not disclose an offence;

(d) that the charge does not contain sufficient particulars of any matter alleged in the charge;

Provided that such an objection may not be raised to a charge when he is required in

terms of section 119 or 122A to plead thereto in the magistrate's court; or

(e) that the accused is not correctly named or described in the charge;

Provided that the accused shall give reasonable notice to the prosecution of his intention to object to the charge and shall state the ground upon which he bases his objection: Provided further that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

(2) (a) If the court decides that an objection under subsection (1) is well-founded, the court shall make such order relating to the amendment of the charge or the delivery of particulars as it may deem fit.

(b) Where the prosecution fails to comply under paragraph (a), the court may quash the charge."

SECTION 68

(10) **Section 68** provides as follows:

68 Repeal and amendment of laws

(1) The common law relating to the-

(a) irrebuttable presumption that a female person under the age of 12 years is incapable of consenting to sexual intercourse; and

(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.

(2) The laws specified in the Schedule are repealed or amended to the extent indicated in the third column of that Schedule.

(11) It is the duty of this Court, subject to confirmation by the Constitutional Court, to remedy the patent flaws in the Act, thus to render it compatible with the values enshrined in the Constitution and to achieve the legislature's stated objective.

(12) Since the alleged offence was committed on 7 September 2005, prior to the commencement of the Act, and reported to the Police on 3 February 2009, that is a date after the date of commencement of the Act we agree with the Court-a-quo that the accused should not have been charged with statutory rape in terms of section 3 of the Act. At the time when the offence was allegedly committed, the Act was not in existence. The Learned Regional Magistrate correctly upheld the objection taken before the accused pleaded to the charge. The accused can and should be charged with common law rape.

(13) The dilemma which confronted the Learned Magistrate, and which requires attention, is the patent deficiency caused by the inclusion in **section 69 of the Act** of the following words (which we have underlined):

"69 Transitional 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."

(14) The crime referred to in **section 68 (1)(b) of the Act** are the common law 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.

(15) The absurd limiting effect of the words which we have identified above is that where, as in this case, no investigation or prosecution or other legal proceedings had been initiated before the date of commencement of the Act, i.e. 16 December 2007, no criminal proceedings, investigation or prosecution can be concluded, instituted or continued, despite the fact that the alleged conduct plainly constituted the common law crime of rape at the time of the commission thereof.

(16) It is clear from the preamble to the Act that such a state of affairs could never have

been intended by the Legislature - we refer to the following examples:

"WHEREAS the commission of sexual offences in the Republic is of grave concern, as it has a particularly disadvantageous impact on vulnerable persons, the society as a whole and the economy;

WHEREAS women and children, being particularly vulnerable, are more likely to become victims of sexual offences, including participating in adult prostitution and sexual exploitation of children;...."

(17) We are guided, first and foremost, by the **Bill of Rights in the Constitution of the Republic of South Africa, Act 108 of 1996**, which provides in section 12 that:

"(1) 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.

(2) Everyone has the right to bodily and psychological integrity,

which includes the right -

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

and section 28, which provides in relation to children that:

(1) Every child has the right-

...

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

(18) These rights which are enshrined in the Constitution and which are intended to be protected and upheld by the Act, would be violated if section 69 of the Act remains unamended. The practical consequence of the section would be that a common law crime of rape (for example) committed prior to the commencement of the Act but only reported or investigated thereafter, would no longer be punishable in terms of the criminal justice system. Such an abhorrent result could not have been intended by the Legislature and is in conflict with the Constitution.

(19) The Constitutional Court considered the remedy of so-called "reading in" in **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC)** at paragraphs [74-76], where the following is stated:

"[74] The severance of words from a statutory provision and reading words into the provision are closely related to the remedial powers of the Court. In deciding whether words should be severed from a provision or whether words should be read into one, a Court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and, secondly, that the result achieved would interfere with the laws adopted by the Legislature as little as possible. In our society where the statute books still contain many provisions enacted by a Parliament not concerned with the protection of human rights, the first consideration will in those cases often weigh more heavily than the second.

[75] In deciding to read words into a statute, a Court should also bear in mind that it will not be appropriate to read words in, unless in so doing a Court can define with sufficient

precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a Court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even where the remedy of reading in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion, it will be necessary to consider the relative size of the group which the reading in would add to the group already enjoying the benefits. Where reading in would, by expanding the group of persons protected, sustain a policy of long standing or one that is constitutionally encouraged, it should be preferred to one removing the protection completely.

[76] It should also be borne in mind that whether the remedy a Court grants is one striking down, wholly or in part; or reading into or extending the text, its choice is not final. Legislatures are able, within constitutional limits, to amend the remedy, whether by re-enacting equal benefits, further extending benefits, reducing them, amending them, 'fine-tuning' them or abolishing them. Thus they can exercise final control over the nature and extent of the benefits."

(20) We are of the view that severance of the words which we have underlined in the quotation of section 69 above, will render it possible for the required criminal proceedings, investigations or prosecutions or other legal proceeding in respect of common law crimes committed prior to the commencement of the Act, but only reported thereafter, to proceed in terms of the law, and that such severance is consistent with the Constitution and its fundamental values and that the result achieved will not interfere with the intention of the Legislature in terms of the Act.

(21) In coming to this decision, we have decided, on a constitutional matter within the power of this Court and in terms of section 172 (2) (a) our decision will only take effect upon confirmation thereof by the Constitutional Court.

(22) We have been advised that the accused has been released on warning and that protection is in place to safeguard the minor child (complainant) pending the resolution of this matter. We require all those safeguard to remain in force at all times pending the decision of the Constitutional Court.

(23) Counsel who appeared for the accused argued *in limine* that the ruling by the learned regional Magistrate was not a final order and was thus not appealable on the authority of **Wahlhous v Additional Magistrate, Johannesburg 1959 (3) SA 513 (A) and Zweni v Minister of Law and Order 1993 (1) SA 523(A)**. We do not agree with this submission. The upholding of the objection against the charge sheet is an order which has final effect and which is appealable. The preliminary objection is thus dismissed.

(24) In the result we make the following orders: .

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, No. 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)** 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) 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**.

5. The order issued by the Regional Magistrates' Court of Boksburg against the accused (the second respondent) in order to protect and safeguard the minor child (complainant) in this matter will remain of full force and effect pending the final determination of this matter by the Constitutional Court.

Dated at Johannesburg on the 3rd December 2010.

MOKGOATLHENG J

BADENHORST AJ

JUDGE OF THE HIGH COURT

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 17TH November 2010

DATE OF JUDGMENT: 3rd December 2010

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