IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case No:8999/2020

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS WESTERN CAPE	**Applicant**
and	
THE REGIONAL MAGISTRATE WYNBERG	**First Respondent**
STEPHANUS PETRUS LATEGAN	**Second Respondent**
JOHANNES RETIEF LATEGAN	**Third Respondent**

JUDGMENT DELIVERED ELECTRONICALLY: WEDNESDAY, 13 OCTOBER 2021

NZIWENI AJ

Introduction

[1] This review application, brought in terms of Rule 53 of the Uniform Court Rules; is primarily concerned with the applicability of sections 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act); to offences that were committed before the law was changed by the Act.

[2] The first and second Respondents are arraigned in the Regional Court, Wynberg, charged with two counts of Indecent Assault. It is the State's contention that the present offences were committed in 1974 until 1980. The Act however, had not yet been enacted into law at the time of the alleged commission of the offences.

[3] The Act only came into force on the 16th of December 2007. Only during April 2018, was the occurrence of the alleged crimes reported to the police, and the investigation ensued. In 2018, the State instituted proceedings against the second and third Respondents. The charge sheet in both counts reflects that the two counts of Indecent Assault preferred against the second and third Respondents, are read together with the provisions of 58, 59 and 60 of the Act (relevant sections).

[4] On 9 December 2019, the matter came before the first Respondent (Regional Court Magistrate) and the charges were put against the second and third Respondents. The defence, acting in terms of section 85 (1) (a) of the Criminal Procedure Act, 51 of 1977 (the CPA), objected to the charge sheet. Of importance to this case, the defence objected to the charge, amongst others, on grounds that the provisions of the relevant sections of the Act are not applicable to the charges of Indecent Assault.

The defence's objection to the application of the relevant sections is premised on two arguments; one is that the provisions of the Act were not applicable at the time of the alleged commission of the offences, and the other is that the Act was not intended to apply retrospectively.

[5] The Regional Court Magistrate upheld the objections of the second and third Respondents. Aggrieved by the decision of the Regional Court Magistrate, the Applicant is now seeking a review and a setting aside of the decision made by the Regional Court Magistrate.

[6] The second and third Respondents are strenuously opposing the review application and have raised a point *in limine*. The point *in limine* is that the Applicant should have proceeded by way of appeal, rather than a review.

[7] Before I deal with the point *in limine* raised on behalf of the second and the third Respondents, it is convenient to deal with the main issue; as it is inextricably linked to the point *in limine*. Thus, the preliminary issue is not deserving of immediate ruling before the merits can be considered.

Parties' Submissions

Applicant's Submissions

[8] The parties agree that the Act does not apply retrospectively. However, the Applicant holds the view that the relevant provisions of the Act are applicable to all sexual offences which were not under police investigation and/or no prosecution had been instituted prior to the 16th of December 2007. It is therefore, the Applicant's contention that as far as the relevant provisions are applicable, they apply retrospectively. It is contended in the heads of arguments of the Applicant that such retrospective application is permissible in terms of the transitional provisions of section 69 of the Act. So the argument continues that it was the intention of the legislature that the provisions of the Act to be applied in the prosecution of all sexual offences,

including common law offences, that were investigated and prosecuted after the commencement thereof.

[9] It is further the contention of the Applicant that the terms of section 69 of the Act, evinces that the legislature intended that the Act should apply to future prosecution of sexual offences, save for those that were already underway.

[10] It is strenuously contended on behalf of the Applicant that the provisions of sections 58, 59, and 60 of the Act regulate procedural aspects of the prosecution of all sexual offences; provided that the investigation and institution of such prosecutions was commenced after 16 December 2007. Furthermore, it is the Applicant's contention that, it is settled principle of our law that the presumption against retrospectivity does not apply to procedural provisions of legislation.

[11] The following is also contended in the heads of arguments of the Applicant:

> "66. Second and third Respondents have a constitutional right to a fair trial and to defend the criminal case against them according to the procedural rules for the conduct of criminal trials which are presently applicable in terms of the Act. The rules for the conduct of criminal prosecutions in respect of sexual offences were reviewed as from 16 December 2007…
>
> 67. Second and third respondents have no right to have their prosecution conducted in accordance with a special procedure contrary to the procedure

prescribed to be applicable by the Act. The appropriate determinant is when the investigation and institution of proceedings against them commenced."

[12] It is further submitted on behalf of the Applicant that the invocation of the relevant provisions of the Act will not impair any existing rights of the second and third Respondents. Therefore, so the argument continues, if the relevant provisions are invoked and applied in the prosecution of the second and third Respondents, their rights to a fair trial remain unimpaired.

[13] The applicant amplifies its argument by stating that; if this Court endorses the decision of the Regional Magistrate; that will have far reaching negative implications for the prosecution in the conduct of the matter involving the second and third Respondents; it will also render the task of the State more problematic in securing convictions and may impact negatively on the interests of justice.

Second and third Respondents submissions

[14] The gravamen of the second and third Respondents' contention is that the relevant provisions of the Act do not apply retrospectively to crimes that are charged under the common law. The second and third Respondents also oppose the relief claimed, based on the submission that the Regional Court Magistrate's order was not irregular, but was procedurally and substantively correct. Thus, the applicant should have appealed the Regional Court Magistrate's order.

[15] As far as section 69 is concerned, it is contended on behalf of the second and third Respondents that the said section only deals with sex-related crimes, allegedly committed, with investigations initiated and instituted before the commencement of the Act. In amplifying their contention, it was also pointed out, on behalf of the second and third Respondents, that the specific inclusion of the matters in section 69, evinces that the legislature never intended for the Act to apply to common law-sex related crimes committed before the commencement of the Act, but only reported and investigated in 2018.

[16] The second and third Respondents contend that there is nothing express or implied in the relevant sections of the Act to the effect that the relevant sections apply to common law crimes retrospectively. It is the contention of the second and third Respondents that there are no provisions in the Act that express or imply that its provisions are applicable to sex-related crimes that fall under the common law. The second and third Respondents also contend that because they are charged with common law offences, the applicant cannot rely on the relevant sections of the Act. Their contention is that the presumption against retrospectivity is based on legal certainty and fairness.

[17] In the heads of arguments on behalf of the second and third Respondents it is acknowledged that the presumption against retrospectivity can be rebutted where a statute deals with procedural matters. It is further advanced on behalf of the second and third Respondents that, the distinction between procedural and substantive

provisions cannot always be decisive in the operation of the presumption against retrospectivity.

[18] It is submitted on behalf of the second and third Respondents that, if the Court finds that the relevant sections are procedural in nature; it is contended that the Act does not only regulate the procedure relating to sex-related offences, but it also deals with substantive provisions that give content to the offences. Therefore, the presumption against retrospectivity is applicable. It was also strongly contended by Mr. Liddell that the relevant sections impair the rights afforded to the second and third Respondents under common law and diminishes the applicant's obligation in respect of its burden to prove the guilt of the second and third Respondents beyond reasonable doubt.

[19] Another contention which was advanced on behalf of the second and third Respondents is that; the applicant failed to refute the contention that the relevant sections do not apply to the common law crimes; by raising a rebuttal against the presumption against retrospectivity. It is submitted on behalf of the second and third Respondents that; for the first time in the heads of arguments, the applicant belatedly argued that the relevant sections operate retrospectively as they are procedural in nature. The second and third Respondents' argument continues that the applicant did not make any factual allegation or outline any contention in its founding or replying affidavits in support thereof.

[20] In paragraphs 39-41 of the answering affidavit, it is averred that an application to strike out will be brought as the allegation contained in paragraph 14 of the founding affidavit contain matters for legal argument. Similarly, in paragraphs 44-46; 52-53; 55-56; 58-59;61-62; 75-76, the second and third respondents indicate their intentions to have the averments contained in paragraphs 17-20; 31;33;35; 37-38; 59-61 of the founding affidavit struck out.

The issues

[21] The issues for determination by this Court are the following:

(a) whether the applicant should have proceeded by way of a review or an appeal.

(b) whether the Regional Court Magistrate was correct in upholding the objection of the defence.

(c) whether the Applicant failed to articulate in its papers, particularly in the founding affidavit as to whether the relevant sections are procedural in nature.

The law

[22] Section 39 (1) of the Constitution provides:

"When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

[23] Section 39 (2) of the Constitution states the following:

> "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 Bill of Rights."

[24] Under the Bill of Rights chapter, in terms of Section 35 (3) (l), the Constitution guarantees an accused person a right to a fair trial, which includes the right 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. Section 35 (3) (n) provides that an accused person has a right to the benefit of the least severe of the prescribed punishment if the prescribed punishments for the offence has been changed between the time that the offence was committed and the time of sentencing.

[25] Sections 35 (3) (l) and (n) espouses the doctrine of legality. In the case of Masiya v Director of Public Prosecutions and others 2007 (5) SA 30 CC, the following was stated:

> "Section 35 (3) (l) 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… The strong view of legality adopted in [the Veldman case] suggests that it would be unfair to convict Mr. Masiya of an offence in the circumstances where the conduct in question did not constitute an offence at the time of the commission. I conclude so despite the fact that his

conduct is a crime that evokes strong emotions from many quarters of the society."

[26] It hardly needs stating that in terms of the common law, a statute enacted after the occurrence of an event does not apply retrospectively, unless otherwise provided. See *S and Another v Acting Regional Court Magistrate, Boksburg, 2011 (2) SACR 274(CC); 2012 (1) BCLR 5 (CC) (14 June 2011)* at par 16. Consequently, it is a well-established principle in our legal system and in other countries that retrospective application of punishments and the substantive provisions of a statute are prohibited.

[27] The right to fair trial is a fundamental right which is guaranteed in the Constitution. Obviously, the prohibition on retrospectivity in criminal matters is pertinent to the right to a fair trial and it seeks to guard against miscarriage of justice through arbitrary prosecution, conviction and penalties.

[28] It must however be emphasized at the outset that there are exceptions to the rule against the prohibition on retrospectivity. It is settled, that retrospective modifications affecting trial procedures would not ordinarily infringe on the prohibition; unless the retrospective application of procedural rule will impair substantive rights.

Section 69; the transitional clause

[29] The provisions of section 69 of the Act are highly germane in this application and during the arguments. Section 69 provides:

"69 Transitional provisions

(1) All criminal proceedings relating to 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."

[30] Gleaning from the above extracts of the transitional provisions of section 69, it becomes evident that the section is silent on legal proceedings, which were instituted and investigated after the commencement of the Act.

[31] Mthiyane AJ, in *Acting Regional Court Magistrate, Boksburg,* supra, at paras 18-19; 21, stated the following:

"[18] 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. (my underlining)

[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." (my underlining)

[21] Moreover, in the face of presumption that the common-law rape committed before the commencement of the Act remained a crime capable of prosecution by the State, it is inconceivable that s 69 could convey a contrary intention. The purpose is made manifest throughout the statute, particularly in its long title, its preamble, and its objects. 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 measures which seek to enable the relevant organs of the State to give full effect to the provisions of this Act', by 'criminalising all forms of sexual abuse or exploitation' ".

[32] The provisions of section 69 clearly state that those cases which were already on the system at the time of the commencement of the Act, must be continued and concluded in all respects as if the Act had not been passed. Therefore, even though there is a new Act in operation, those cases that were already in the system should be prosecuted in terms of the law that prevailed at the time of their commission.

In my view, this means in effect, that the transitional clause, though it is not specifically mentioned, draws a sharp and an intentional distinction between criminal cases pending and those that were not pending at the commencement of the Act.

[33] Back to the instant case, the scenario prevailing in this case is that the parties agree that the statute is not retrospective, however, as already indicated, the Applicant

maintains that, notwithstanding the presumption against retrospectivity, the relevant sections do apply retrospectively.

[34] The critical question, which aptly arises, is which court procedure should then govern the prosecution of the common law offences, that were instituted and investigated after the commencement of the Act? It is significant to note that, the Acting Regional Court Boksburg decision does not specifically deal with this aspect.

[35] As far as the legal procedure applicable to the common law offences, prosecuted or investigated after the commencement of the Act; the submissions of the parties are diametrically opposed and mutually destructive.

[36] As I pointed out previously in this judgment, the second and third Respondents are of the view that there is nothing stemming from the Act that can be transferred to the common law offences that they are currently facing. Mr. Liddell on behalf of the second and third Respondents strongly contended that the Act in its entirety affects substantive rights. According to Mr Liddell, the Act generally envisages "a clear break with the past". Therefore, nothing from the Act can be imported to the past. The Applicant on the other hand is of the view that the relevant sections, due to their nature, can be applied retrospectively. In the heads of arguments on behalf of the Applicant, it was contended that the legislature intended the procedural provisions of the Act to be applied in the prosecution of all sexual offences, including common law offences that were investigated and prosecuted after the commencement thereof.

[37] Because it is possible for a prospective statute to have impact on past events, it is thus germane in the context of the present case, to expand on the nature or purpose of the relevant sections of the Act. I am of the view that for the purposes of this matter, the determination of whether the relevant sections apply retrospectively or not is central. The starting point would be to establish whether the relevant sections fall within the legal category of procedure or substantive law.

Can the relevant sections be classified as being substantive or procedural of nature?

[38] Such a debate is well known in the context of legal proceedings. Our case law is replete with authorities that state that, it is rather difficult to determine the difference between a substantive and a procedural clause of a statute.

[39] The Act has both substantive and procedural elements in it. At the very least, this much is evinced in the Act when the following is stated:

> "To comprehensively and extensively review and amend all aspects of the law 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- . . . *further regulating procedures, defences and other evidentiary matters in the prosecution and adjudication of sexual offences*; . . ." (my own underlining)

[40] As the applicant correctly contends, it is trite that the presumption against retrospectivity does not apply to procedural provisions of legislation, if they do not affect substantive rights.

[41] At this point, it is apposite to quote the provisions of the relevant sections in full. The relevant sections provide as follows:

"58 Evidence of previous consistent statements

Evidence relating to previous consistent statements by a complainant shall be admissible in criminal proceedings involving the alleged commission of sexual offence: Provided that the court may not draw any inference only from absence of such previous consistent statements.

59 Evidence of delay in reporting

In criminal proceedings involving the alleged commission of a sexual offence, the court may not draw any inference only from the length of any delay between the alleged commission of such offence and the reporting thereof.

60 Court may not treat evidence of complainant with caution on account of nature of offence

Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence."

[42] In the case of CT v M T and Others 2020 (3) SA 409 (WCC) (29 January 2020) the following was stated:

> "19 . . . I remind myself at the outset that the rules of court are concerned with the procedure by which substantive rights are enforced. They do not lay down substantive law . . . If rule 43 were abolished, the substantive power will not disappear. Only the procedure by which it is invoked would change . . . "

[43] Plainly, the above-cited provisions are prescribing to the Court how to approach three different types of evidence. They are guidelines to the Court's decision making. They determine a method with which the Court may adjudicate the different types of evidence. Put simply, the relevant sections guide the Court on the manner in which it should adjudicate and deal with evidence of a complainant involving sexual offence; delay in reporting commission of sexual offence; and previous consistent statements. In my view, they deal fundamentally with the authority of the Court.

[44] Therefore, they are procedural rules because they deal with the methods, which regulate the proceedings of the Court. They prescribe rules of litigation. This I say because they serve as a mechanism through which the efficient running of trial in dispensing justice is sought. They specify the method of how the Court should give effect to the Act. They seek to regulate the manner the Court adjudicates the case presented before it.

[45] Moreover, the relevant provisions do not by any stretch of imagination, prescribe sentence, and define what constitutes an offence. They do not impose duties or obligations upon an accused person. See *Minister of Public Works v Haffejee NO* 1996 (3) SA 745, at 752 B-E.

[46] It is thus my firm view that, the relevant sections are matters of procedure and have nothing to do with substantive law. Gleaning from the ruling of the Regional Court Magistrate, it also appears in page 108, line 25 of the record; that the Regional

Court Magistrate correctly, acknowledged that the relevant sections are procedural in nature.

Constitutional values

[47] Moreover, the Constitution reigns supreme. Section 39 (2) of the Constitution is prescriptive and states that when the Court interprets a legislation it should promote the spirit of the Bill of rights. Equally, section 9, of the Constitution states:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (my underlining)
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination."

[48] The right to a fair hearing is not only applicable to an accused person but also to the victim of a crime. In my view, the relevant sections seek to observe procedural fairness. This view is reinforced by what is stated in the preamble of the Act when the following is stated:

> " Whereas the South African common law and statutory law do not deal adequately, effectively and in a non-discriminatory manner with many aspects relating to or associated with the commission of sexual offences, and a uniform and co-ordinated approach to the implementation of and service delivery in terms of the laws relating to sexual offences is not consistently evident in

> Government; and thereby which, in too many instances, fails to provide adequate and effective protection to the victims of sexual offences thereby exacerbating their plight through secondary victimisation and traumatisation;"

[49] It is easy to discern from the language of the above extract that the Act enjoins and strives for the fundamental principles and tenets of fairness and equality for all the victims in matters that relate to sexual offences. It is important to note that the principle of equity permeates throughout the preamble of the Act. All the indications are that, for equity to prevail, it is highly critical that no victim of sexual offence should be placed at a disadvantage.

[50] Clearly, the Act has discernible purposes and objectives. It is clear from the preamble that the legislature intended to protect victims of sexual offences, in all instances.

[51] In the matter of *Du Toit v Minister for Safety and Security and Another* (CCT 91/ 08 [2009] ZACC 22, at paras 36- 40, the court opined:

> "An indication of retrospectivity, without more, is not sufficient to determine its scope and it is necessary to ascertain the meaning of the section in question, and the extent of its retrospective effect, by considering its context and purpose.

Context, purpose and object

[37] As far back as 1950, Schreiner JA in his minority judgment in Jaga v Dönges NO and Another; Bhana v Dönges NO and Another 24 set out the relationship between 'text' and 'context' thus:

"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning. . . The second line of approach appears from what was said by Lord Greene, then Master of the Rolls in Re Bidie . . .

'Few words in the English language have a natural or ordinary meaning in the sense that their meaning is entirely independent of their context.'"

[38] In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others, this Court, per Ngcobo J, held that, "[t]he emerging trend in statutory construction is to have regard to the context in which the words occur, even where the words to be construed are clear and unambiguous." This has been the consistent approach of this

Court when interpreting statutes. The move away from the "plain words" of the statute is necessitated by the fact that the text of the Constitution and the legislation giving effect to its provisions is value-laden and "value can hardly be expressed in clear and unambiguous language."

[39] Two contexts are relevant here. First, there is a historical context: the purpose of the legislation and the social and historical need it was designed to address. This is the broad context in which the Reconciliation Act operates and is discussed above in the section entitled "Amnesty in its constitutional and historical context".29 But there is also the narrow statutory context of section 20(10) provided by the rest of the Reconciliation Act and, in particular, the other sections of the Act that deal with the consequences of amnesty. The meaning of a particular section within an Act may be ascertained by examining the scheme established by the Act. That scheme emerges from the provisions of section 20(7) to (9).

[40] Section 20(7) provides that a person who has been granted amnesty shall not be civilly or criminally liable in respect of acts for which he or she was granted amnesty.

This means that once amnesty is granted, no civil or criminal liability can be imposed for the past acts. Section 20(7) thus changes the legal consequences of the acts for which amnesty was granted, for the future, from the date on which amnesty was granted. It is retrospective but not retroactive in effect and applies both in respect of civil and criminal liability."

[52] Back to the instant case, from reading of the Act, I do not get the impression that the legislature intended to discriminate amongst the victims of sexual offences, but instead it wanted to afford victims equal protection of the law. Though the relevant

sections are introducing new rules of procedure; they also signified a turning point in criminal procedure related to the treatment of sexual offences victims in courts. In my view, the relevant sections constitute new procedures going forward, regardless whether the offence is a common law offence or statutory offence.

[53] This is also evinced by the fact that section 69 of the Act, only specifically mentioned cases which were already investigated and /or prosecuted at the commencement of the Act. As I have already indicated, in terms of section 69 of the Act, the applicable procedure to pending matters already before court or already investigated is the one which existed before the commencement of the Act.

[54] The corollary of this, in my view is that; the procedure which is going to be applicable for those offences under common law which were prosecuted and investigated after commencement of the Act would be the new legal procedures as contemplated by the Act.

[55] Though the Act generally is prospective, it does, however, imposes new rules in respect of past incidents, which were only prosecuted or investigated after its commencement. Ex facie the provisions of section 69, it is evident that the section was designed to ensure a fair and consistent application of procedural due process.

[56] Equally important, it can never accord with public policy that for a country with a legal system operating in a constitutional democracy; to have a certain sector of

victims of sexual offences being offered a legal protection through legal procedures which accord with constitutional values; yet, under the very same legal system, another sector of victims of sexual offences is left vulnerable and is subjected to legal procedures which offend constitutional values. Particularly, if the provisions of section 9 (1) of the Constitution, are taken into account.

[57] Besides, the intention of the legislature in the Act is unambiguous. The intention of the legislature was to retain a common legal framework as far as the legal procedure is concerned, with an enshrined commitment to protection of fundamental constitutional rights.

[58] In footnote 28 of the *Du Toit* Judgment, supra, the following is stated:

"28 Most recently, in *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11, Case No CCT 77/08, 7 May 2009, as yet unreported, at para 21, the purpose and context of legislation were held to play an important role in clarifying the scope and extent of that legislation. In *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC) at paras 19–20 this Court, per Sachs J, considered the importance of interpretation in the context of a constitutional democracy. This importance stems from the fact that the Constitution must be understood as responding to the country's painful past and laying the foundations for a democratic and open society. Legislation must then be read with a mind to the role that such legislation should play in the value system articulated by the Constitution."

[59] In Veldman case, supra O' Regan J at paras 49- 50, remarked:

"The distinction between substance and procedure, however, is not always easy to draw, as the Courts have often observed. Some procedural provisions can have a fatal effect on the ability to launch a cause of action or to raise a defence and so have a material substantive effect. In these circumstances Courts have been slow to take the view that the statute should operate with immediate effect on all pending claims. . .

[50] The issue of retrospectivity must therefore not be determined by sole regard to whether the provision in question is procedural or not. All the more so in our constitutional order. The Constitution, and the Bill of Rights in particular, provides a framework in terms of which legislative provisions must be interpreted. Section 92 must now be construed in light of them. In each case, the question is a matter of interpretation. And that is the question we have to consider in relation to s 92 (1) (a): does it, properly construed, have application to proceedings that were pending at the time that it came into force? This exercise of construction must, of course, seek to promote the spirit, purport and objects of the Bill of Rights'.

Do the procedural rules impair the substantive rights?

[60] This brings me to the question of whether the procedural rules will have an impact on substantive rights and obligations of an accused person? *In Haffejee NO, supra,* at 753 B-C, the court opined in relation to the substantive rights:

"In other words it does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and

capable of enforcement by invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. *Aliter* if they are not."

[61] I cannot see how the procedural rules contemplated by the relevant sections will have a fatal effect on any rights to a fair trial as envisaged by section 35 (3) of the Constitution.

[62] First and foremost, section 58 of the Act, makes previous consistent statements by the complainant admissible in a criminal trial. There is nothing new about allowing previously consistent statements into evidence, as this was the position, even before the commencement of the Act. The only new introduction is that, 'the court may not draw any inference only from the absence of the previous consistent statement'. The section does not say that the court should not draw any inference from absence of previous consistent statement; it merely prohibits the court from drawing an inference solely from its absence. I cannot see how this may impair upon the substantive rights of the second and third Respondents, surely, this is not a drastic change as it is not really far reaching.

[63] Equally with section 59, the court is only disallowed by the Act from drawing any inference only from the length of any delay between the alleged commission of the offence and the reporting thereof. Section 59, cannot be by no stretch of imagination be considered to mean that the evidence of delay in reporting cannot be adduced or the complainant cannot be cross-examined on it.

[64] I have wrestled with one fundamental question which is; why should the evidence of a victim in a sexual offence case be treated with caution? When it comes to section 60, the very premise of differential treatment of a sexual offence complainant is offensive. It is significant to note that all laws in the country must be consistent with the Constitution. In a constitutional democracy, it is not possible or conceivable that the complainants of a sexual offence can be discriminated even with the absence of the Act. The Bill of Rights has been described as a cornerstone of our constitutional democracy. Surely, the differential treatment of sexual offences victims derogates from the Bill of Rights.

[65] The cautionary rule utterly infringes on the right to dignity of victims of sexual offences. Quite clearly, the cautionary rule applicable to sexual offences victims is repugnant with the constitutional values and thus cannot survive constitutional scrutiny. Under no circumstances, can a cautionary rule which is only applicable to sexual offences complainants, pass the constitutional muster. In a constitutional democracy, there is no reason to perpetuate the plainly unjustified and unequal treatment of sexual offences complaints.

[66] Section 39 (2) of the Constitution perfectly encapsulates the point when it states that, 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. Section 39 (4) of the Constitution provides that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

[67] Obviously, from the foregoing, the survival of the application of cautionary rule on sexual offences victims is not sustainable; even on ground of protecting the substantive rights of an accused person. There can never be any reason to perpetuate the unjustified unequal treatment of sexual offences victims.

[68] There can be no gainsaying that the Act seeks to afford protection to victims of sexual offences. In my view, the relevant sections are designed to ensure that the protection afforded by the Act is enforced. All of the relevant sections do not affect substantive rights of the second and third Respondents.

Do the relevant sections apply retrospectively?

[69] The determination of the Regional Court Magistrate, only focused on the presumption against retrospectivity and did not delve further and interrogate the relevant sections. On the strength of the aforegoing, it is clear that sections 58, 59 and 60 of the Act apply retrospectively. Consequently, the order made by the Regional Court Magistrate, ordering the deletion of the relevant sections from the charge sheet was irregular.

Should the applicant have proceeded by way of an appeal?

[70] Under the circumstances of this case, there is no merit in this submission. Clearly, the Regional Court Magistrate committed an irregularity when she ordered that the relevant sections should be deleted from the charge sheet.

Did the applicant in its papers assert that the relevant sections are procedural in nature?

[71] As a rule, the Applicant must make up a case by the allegations averred in the founding affidavit and it cannot make out its case through arguments or in the replying affidavit.

[72] Insofar as the procedural nature of the relevant sections, the Applicant in paragraphs 41-43 of its founding affidavit, avers the following:

"41. The legislature promulgate ss 58, 59 and 60 for purposes of dealing with significant procedural and evidential issues to be applied by the courts in prosecution of sexual offences in the future, after the commencement dates of Act 32 of 2007.

42. The commencement date of Act 32 of 2007 was 16 December 2007.

43. In order to delineate the legal position in respect of the procedure for the prosecution of both common law crimes and the newly created statutory sexual offences, with reference to the date of commencement of the investigation and the institution of the prosecution, the legislature promulgated transitional provisions in s 69, to be read with s 68 of Act 32 of 2007."

[73] It is my considered view that in the circumstances of this case, it was not necessary for the Applicant to spell out that the relevant sections are procedural in nature. This is so because the Applicant already staunchly averred in its papers that the Act intends to delineate the legal position in respect of the procedure for the prosecution of both common law crimes and the newly created statutory sexual offences. Additionally, in the founding affidavit, it is averred that the relevant sections apply retrospectively, albeit the Act does not apply retrospectively. It was thus proper for the Applicant to argue the point of procedural nature of the relevant sections.

Applications to strike out

[74] These applications were not pursued during the hearing of the application.

[75] In the results, the following order is made:

(a) The provisions of sections 58, 59 and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 are applicable in the criminal proceedings under case number SHM95/18.

(b) The Order of the Regional Magistrate handed on the 10 December 2019, ruling that the provisions of sections 58,59, and 60 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 are not of application in the criminal trial under case number: SHM 95/18, is hereby reviewed and set aside.

(c) The second and third Respondents are ordered to pay the costs of this application on a party to party scale, jointly and severally, the one paying the other to be absolved. Costs include costs of two Counsel.

CN NZIWENI
ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

T C NDITA
JUDGE OF THE HIGH COURT