

BACK TO THE FUTURE: A LESSON IN FAIRNESS AND RETROSPECTIVITY

***S v Acting Regional Magistrate, Boksburg:
Venter and Another (CCT 109/10) [2011] ZACC 22;
2011 (2) SACR 274 (CC)***

"The interpretation of statutes is a craft as much as a science and the judges, as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing" (Donaldson J in *Corocraft Ltd v Pan American Airways Inc* [1968] 3 WLR 714 732).

1 Introduction

The purpose of any legislation is to safeguard the welfare of society. Any law that fails to do that cannot justify its existence. In *S v Acting Regional Magistrate, Boksburg: Venter* ((CCT 109/10) [2011] ZACC 22; 2011 (2) SACR 274 (CC)) the question of nullity of the particular wording of section 69 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007, hereinafter "the Act") and its subsequent constitutionality, were in question. The court had to decide whether to confirm the ruling of the South Gauteng High Court, Johannesburg (Case No A11/2010) that the particular wording of the section was inconsistent with the Constitution of the Republic of South Africa, 1996, or whether it could apply the various rules of interpretation and save the section from invalidity.

2 Facts

This matter was referred to the Constitutional Court from the South Gauteng High Court (*S v Acting Regional Magistrate, Boksburg* 2011 (4) BCLR 443 (GSJ)) for a declaration on the constitutional invalidity of section 69 the Act, in terms of section 172(2)(a) of the Constitution.

At this point it is prudent to trace this matter's journey to the Constitutional Court historically.

The matter was first heard in the Regional Magistrate's Court, Boksburg in September 2009. In February of that year a complaint of rape was laid against the accused, Mr Van der Merwe (the second Respondent in the present case); he was arrested in July 2009. In the court's *a quo* he was charged with the charge of rape in terms of section 3 of the Act. The state alleged that he had in 2005 raped the complainant (M, a girl who was 3 years old at the time of the alleged offence) in that he "unlawfully and intentionally committed an act of sexual penetration with the complainant by inserting his penis into her vagina without her consent" (par 7).

The accused brought two objections to the charge. 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)” (par 7), and secondly that “he could not be charged with common-law rape either, because that kind no longer existed, having been repealed by the Act, almost 2 years before he was charged” (par 7). He brought these objections relying on section 85(1)(c) of the Criminal Procedure Act (51 of 1977, hereinafter “the CPA”), which provides that “an accused [person] may, before pleading to the charge under section 106, object to the charge on the ground – ... (c) that the charge does not disclose an offence”.

The objection was upheld on the grounds that due to the wording of section 69 of the Act, the alleged offence had been committed before the Act was in force and the investigation only commenced after that date. Because the Magistrate’s Court is not empowered to pronounce on the validity of any law (as per s 110 of the Magistrates’ Court Act 33 of 1944) it referred the matter to the High Court for such pronouncement.

In the High Court the state brought an appeal against the decision made in the Magistrate’s Court, based on section 310(2) of the CPA which provides that

- “(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, insofar 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.”

The state alleged that the objection ought to be upheld for the following 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. The second reason advanced was that section 69 did not apply in the circumstances of this case and thus did not need to be scrutinized for constitutional validity” (par 9).

The High Court upheld the Magistrate’s Court decision. It reasoned as follows: “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" (par 11).

Section 69 of the Act was subsequently declared unconstitutional, the court order providing, *inter alia* that:

"(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) 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(l)(b) which was initiated before the commencement of this Act may be concluded, instituted and continued as if this Act had not been passed" (par 11).

The matter was then referred to the Constitutional Court for consideration.

3 Issue

The Constitutional Court had to consider whether the sections in question could be construed in a manner that made them consistent with the Constitution, and if so whether or not that interpretation (*ie*, a purposive interpretation favoring constitutionality) should be adopted, thus saving the provisions from invalidity. If, on the other hand, it found that the provisions were inconsistent with the Constitution (see above) and that the decision by the High Court was correct, it would have to consider whether it would be in the interests of justice for such order to apply retrospectively.

4 Rules of interpretation

Decision on the matter lay in proper interpretation of both sections 68 and 69 of the Act.

Section 68 reads as follows:

"The common law relating to the –

- (a) irrebuttable presumption that a female person under the age of 12 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."

The High Court found that a reading of sections 68 and 69 resulted in section 69 being inconsistent with the Constitution. It reasoned that the wording of the section resulted in "The unintended, but absurd, consequence of an entirely unnecessary limitation in the wording of those provisions ... 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" (par 2 of the High Court judgment). This would have the undesired result of offences committed within that time frame, escaping prosecution.

The court held further that "the absurd limiting effect of the words ... 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 ... 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" (par 15 of the High Court decision).

Given this interpretation, and the High Court's finding, the result was that the accused would escape criminal liability entirely, and could not be prosecuted nor found guilty of the offence as charged, because no such offences existed in the law at the time.

In this regard the Constitutional Court asked the question whether section 68 and 69 of the Act apply retrospectively in repealing the common-law crime of rape.

Du Plessis (*The Interpretation of Statutes* (1986)) considers the rule that "where enactments centre around the status and protection of the citizens of a country, the presumption is that such enactments promote rather than frustrate justice, equity and reasonableness" (Du Plessis *The Interpretation of Statutes* 38). It is necessary to consider this rule because part of the arguments leading up to the decision made by the High Court was that failing to invalidate the section would result in inequity, unfairness and unreasonableness for the accused, and prosecuting him under either the common-law or the new statutory provision would have the undesirable result that would ignore the presumption that the law must be interpreted *in favorem libertas*.

In the interpretation and application of legislation the legal presumption is that the legislature intends enacted legislation to regulate future matters only, unless the contrary appears either expressly or by necessary implication (*Transnet Ltd v Ngcezula* 1995 (3) SA 538 (A)). The purpose behind this presumption is to prevent unfair results. The question is, would escaping criminal liability, in the circumstances in the present case, be an unfair result?

Section 35(3)(l) of the Constitution provides that

"Every accused person has a right to a fair trial, which includes the right –

...

(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;"

which effectively means that a new offence cannot be created retrospectively.

Subsection (n) of the same section provides that

“Every accused person has a right to a fair trial, which includes the right—

...

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.”

This effectively means that crimes cannot be created and penal sanctions cannot be increased with retrospective effect. This is the legal presumption that the law must be interpreted *in favorem libertas*. The effect of this presumption is that legislation is to be interpreted in such a way that it favours the individual best. This, however, does not mean that legislation can never act retrospectively. When this is the express intention of the legislature, it will still be up to the courts to “test” whether such retrospectivity is constitutional. This is a legal presumption which has been enshrined in the Constitution (s 35(3)(l) and (n)).

As early as 1978 in *Lek v Estates Agents Board* (1978 (3) SA 160 (C)), the court had to consider what the effect of retrospectivity by “necessary implication” would be. Here the court held that “The presumption against retrospectivity does not apply when it must be inferred from the provisions of the Act that the Legislature intended the Act to be retrospective. Such an inference can be drawn when the consequences of holding an Act to be non-retrospective would lead to an absurdity or practical injustice” (169). Thus, “necessary implication” can only be inferred if failing to do so would result in absurdity or unfair results ensuing from such application.

This was then further confirmed in *Kruger v President Insurance Co Ltd* (1994 (2) SA 495 (D) 503G), where the court held that legislation would be retrospective by necessary implication if the purpose of the legislation was to grant a benefit or to effect even-handedness in the operation of law.

5 Findings

The above contentions were confirmed by the Constitutional Court in this case at paragraph 16, where it considered the decision in *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* ([2005] ZACC 22). In that case, the court held that “Generally, legislation is not to be interpreted to extinguish existing rights and obligations. This is so unless the statute provides otherwise or its language clearly shows such a meaning. That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed” (par 26).

It reasoned further that in terms of the common law the presumption that statutes apply to prospective matters only, that is, to incidents which transpired after promulgation of any legislation. The rationale for this presumption is based on the premise that the legislature, by its enactments, has no intention to take away existing, fundamental rights. This premise resulted in the

presumption graduating into a formal rule of interpretation commonly known as the “presumption against retrospectivity”. Historically, this presumption has evolved into a vital and important mechanism by which the courts are/were able to protect fundamental rights from being interefered with by the legislature. There is a rider to the presumption, however, in that, where “it is clear from the unambiguous language of the statute that the legislature intended to interfere with the fundamental rights” (par 68) the the presumption against retrospectivity cannot be invoked.

In *Curtis v Johannesburg Municipality* (1906 TS 308) the court stated that generally “in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation” (311).

In the present case the court also considered what the purpose of the legislation was. It found that the purpose, besides being made evident throughout the act, was clearly stated in the Act’s long title, preamble as well as its objects. The purpose or proclamation was “to afford complainant's of sexual offences the maximum and least traumatizing protection that the law can provide” (as set out in s 2 of the Act) and further that it would do this by introducing “measures which seek to enable the relevant organs of state to give full effect to the provisions of this act ... by criminalizing all forms of sexual abuse or exploitation” (s 2(b) of the Act). Bearing this in mind, the court found that “it is impossible to interpret the provisions to render any sexual offences incapable of prosecution” (par 22).

It then considered the rule regarding departure from the clear language of the statute and relied on the decision of *Venter v R* (1907 TS 910), which held that a court may depart from the clear language 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 results 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” (*Venter v R* supra 915). This being the case the court found that the clear language did not lead to absurdity and that “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.”

6 Conclusion

It is trite that in terms of the common law, legislation must generally be construed in a manner which is consistent with fundamental rights, particularly those which embraced the principles of justice and equity and “notions of basic fairness and justice” (*S v Zuma* 1995 (2) SA 642 (CC)).

Section 39(2) of the Constitution provides:

“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.”

These rules and sentiments apply not only to accused persons but also to victims of crimes. Rules of fairness and justice thus apply to both, and although it is true that it would be offensive and contrary to fairness to subject the accused person to prosecution for crimes that were not so declared at the time of his having committed such offence, the stance taken by the High Court leads to gross unfairness for victims in the present circumstances.

Du Plessis (*Re-Interpretation of Statutes* (2002)) states further that "The Constitution does not explicitly mention the common-law maxim *semper in dubiis benigniora praeferenda sunt* ... but surely reliance on this maxim ... can facilitate resort to constitutional values in statutory interpretation" (Du Plessis *Re-Interpretation of Statutes* 161). It is submitted that this reasoning applies in the present case too. The rights of both accused persons as well as complainants must be safeguarded, and this is echoed by the words of the Constitutional Court in this matter in its final summation:

"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 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" (par 23).

The rules of statutory interpretation can and ought to be used to save legislative provisions from invalidity where it is in the interests of justice to do so. The rules of interpretation have, to a greater extent, been entrenched in the Constitution (see above). It is important to bear this in mind when faced with the possibility of offenders being set free on such technicalities as was evidenced in the case at hand. That being the case, however, it is also important to temper this position with the ultimate goal of obtaining justice for the community, which entails both a just result for the perpetrator as well as the victim.

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