

SOUTH AFRICA / JUDGMENT

S v Rikhotso (SS105/11) [2012] ZAGPJHC 106 (15 May 2012)

[2012] ZAGPJHC 106

COURT

South Gauteng High Court, Johannesburg

BEFORE

C.G. Lamont

CASE / FILE NUMBER

SS105/11

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IN SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: SS105/11

DATE: 15/05/2012

In the matter between:

THE STATE

and

JAZZMAN RIKHOTSO.....ACCUSED

J U D G M E N T

LAMONT J:

The accused was charged with 58 counts. They can conveniently be dealt with by identifying the nature of the counts. The accused was charged with 11 counts of kidnapping; 19 counts of rape (contravening section 3 of the Sexual Offences and Related Matters Act No. 32 of 2007 ("the Act")); 4 counts of sexual violation (contravening section 5 of the Act); 6 counts of robbery; 2 counts of pointing a firearm; 2 counts of unlawful possession of a firearm; 2 counts of assault with intent to cause grievous bodily harm; 6 counts of assault; 5 counts of compelling or causing children to witness a sexual offence (contravening section 21(1) of the Act) and 1 count of compelling or causing a person older than 18 years to witness a sexual offence (contravening section 8(1) of the Act). The right of the State to charge the accused with kidnapping, robbery with aggravating

circumstances, pointing a firearm, possessing a firearm, assault with intent to cause grievous bodily harm and assault is not contentious. In a judgment delivered on 11 May 2012 in the matter of Director of Public Prosecutions (Western Cape) v Arnold Prins Case No. A134/08 the right of the State to charge an accused with a contravention of section 5(1) of (the Act) was held not to disclose an offence and the charge was quashed. In the course of the judgment it was held that the legal principle “nulla poena sine lege” was part of our law. The court overruling R v Forlee 1917 TPD 52 held that as no punishment was prescribed in the Act for contravening the section no offence was disclosed. The judgment distinguishes the offence of rape described in section 3 of the Act on the basis that penalties for contravention of that section are dealt with in section 51(2) of the Criminal Law Amendment Act 105 of 1997 (para 12). The State is entitled to charge the accused with a contravention of section 3 of the Act and there is no attack upon the right of the State so to have charged the accused with rape. A rape conviction is competent in the event of the State establishing the elements of the offence. Both anal and vaginal rapes are prohibited. There is no difference between the two. As will appear more fully from what is set out below when I deal with the evidence in my view

the State established all 19 counts of rape.

I now deal with the remaining sections which are contentious in the light of the judgment.

Section 5 of the Act prescribes:

“5. Sexual assault.—

- (1) A person (“A”) who unlawfully and intentionally sexually violates a complainant (“B”), without the consent of B, is guilty of the offence of sexual assault.
- (2) A person (“A”) who unlawfully and intentionally inspires the belief in a complainant (“B”) that B will be sexually violated, is guilty of the offence of sexual assault.”

Section 8 of the Act prescribes:

“8. Compelling or causing persons 18 years or older to witness a sexual offences, sexual acts or self-masturbation.—

- (1) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a complainant 18 years or older (“B”), without the consent of B, to be in the presence of or watch A or C while he, she or they commit a sexual offence, is guilty of the offence of compelling or causing a person 18 years or older to witness a sexual offence.
- (2) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a complainant 18 years or older (“B”), without the consent of B, to be in the presence of or watch—
 - (a) A while he or she engages in a sexual act with C or another person (“D”); or

- (b) C while he or she engages in a sexual act with D, is guilty of the offence of compelling or causing a person 18 years or older to witness a sexual act.
- (3) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a complainant 18 years or older (“B”), without the consent of B, to be in the presence of or watch A or C while he or she engages in an act of self-masturbation, is guilty of the offence of compelling or causing a person 18 years or older to witness self-masturbation.”

Section 21 of the Act prescribes:

“21. Compelling or causing children to witness sexual offences, sexual acts or self-masturbation.—

- (1) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a child complainant (“B”), without the consent of B, to be in the presence of or watch A or C while he, she or they commit a sexual offence, is guilty of the offence of compelling or causing a child to witness a sexual offence.
- (2) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a child complainant (“B”), without the consent of B, to be in the presence of or watch—
- (b) C while he or she engages in a sexual act with D, is guilty of the offence of compelling or causing a child to witness a sexual act.
- (3) A person (“A”) who unlawfully and intentionally, whether for the sexual gratification of A or of a third person (“C”) or not, compels or causes a child complainant (“B”), without the consent of B, to be in the presence of or watch A or C while he or she engages in an act of self-masturbation, is guilty of the offence of compelling or causing a child to witness self-masturbation.”

In each of the sections conduct is described and it is set out that a person who perpetrates such conduct is guilty of an offence.

The offences set out in sections 8 and 21 are offences reflecting the standards of morality of society in relation to children as perceived by the legislature and enacted into law. These counts are dealt with counts 10, 28, 30, 36, 38 and 49.

In my view the accused is entitled to an acquittal on these counts and I do not deal with them further.

The sexual violation referred to in section 5 of the Act is defined as appears from what is set out below. The conduct set out in section 5 of the Act appears to be a codification of a common law offence known as indecent assault. The State established each of the facts required to be proved as an element of the offence set out in section 5 of the Act. If no offence is made out by the section or otherwise then the accused is entitled to an acquittal on these counts.

The Prins case supra was required to and did deal only with the question of the charge sheet. It held that the charge was incompetent as no offence was made out by the Act and hence quashed the charge. The position in the present matter is different. The accused has pleaded to the charges, evidence has been led and the trial save for judgment has been finalised.

In each of the charges relating to section 5 of the Act the charge reads:

“In that upon or about the date and place mentioned ... the accused did unlawfully and intentionally commit an act of sexual

violation with ... a ... female person without her consent by forcing her [to stroke his penis until it hardens (count 7), forcing her to wipe his penis with a cloth (count 32), wipe his penis with her clothes (count 41), wipe his penis with a tissue (count 54)].”

In each count the act performed by the accused is described in detail and it is alleged to be an offence of sexual violation which

is described in the Act.

The particulars set out an indecent assault at common law. To the extent that the charge might be defective for the want of an averment such defect was in my view cured by the evidence which was given which established the facts namely that in each case a person was by force required to touch another's genitals against her will.

Sections 84, 88 and 91 of the Criminal Procedure Act No. 51 of 1977. (“the CPA”) deal with the position.

“84. Essentials of charge.—

- (1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.
- (2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.
- (3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.

“88. Defect in charge cured by evidence.—

Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall,

unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred.”

“91. Charge need not state manner or means of act.—

A charge need not set out the manner in which or the means or instrument by which any act was done, unless the manner, means or instrument is an essential element of the relevant offence.”

Section 68(1) of the Act repealed inter alia: (“the CPA”)

The common law relation to the 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.

Section 261 of the CPA recognises the repeal and substitutes the previous competent verdicts with a series of competent verdicts

having regard to the provisions of the Act. The section reads as follows:-

“261. Rape, compelled rape, sexual assault, compelled sexual assault and compelled self-sexual assault.

—

- (1) If the evidence on a charge of rape or compelled rape, as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or any attempt to commit any of those offences, does not prove any such offence or an attempt to commit any such offence, but the offence of—
 - (a) assault with intent to do grievous bodily harm;
 - (b) common assault;
 - (c) sexual assault as contemplated in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
 - (d) compelled sexual assault as contemplated in section 6 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
 - (e) compelled self-sexual assault as contemplated in section 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
 - (f) incest as contemplated in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
 - (g) having committed an act of consensual sexual penetration with a child as contemplated in section 15 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or
 - (h) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, the accused may be found guilty of the offence so proved.

- (2) If the evidence on a charge of sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in sections 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, does not prove any such offence but the offence of—
- (a) common assault or;
- (b) having committed an act of consensual sexual violation with a child as contemplated in section 16 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, the accused may be found guilty of the offence so proved.”

If no crime is made out by the sections of the Act founding the charge and the common law has been repealed then currently the only sexual offence of which an accused could be convicted is rape as contemplated by the provisions of section 3 of the Act.

The underlying premise of the judgment in Prins’ case is that no punishment has been prescribed for the offence of a contravention of section 5 of the Act. It was held:

“[53] This pattern in the Sexual Offences Act creates an almost irrebutable inference that the omission of penalty clauses with respect to the sexual offences was intentional.”

The court in Prins’ case did not deal with the provisions of section 56 of the Act. Section 56 bears the caption defences and sentencing. Section 56 provides

“56. Defences and sentencing.—

- (1) Whenever an accused person is charged with an offence under section 3, 4, 5, 6 or 7 it is not a valid defence for that accused person to contend that a marital or other relationship exists or existed between him or her and the complainant.
- (2) Whenever an accused person is charged with an offence under—
- (a) section 15 or 16, it is, subject to subsection (3), a valid defence to such a charge to contend that the child deceived the accused person into believing that he or she was 16 years or older at the time of the alleged commission of the offence and the accused person reasonably believed that the child was 16 years or older; or
- (b) it is a valid defence to such a charge to contend that both the accused persons were children and the age difference between them was not more than two years at the time of the alleged commission of the offence.
- (3) The provisions of subsection
- (2) (a) do not apply if the accused person is related to the child within the prohibited incest degrees of blood, affinity or an adoptive relationship.

- (4) A person (“A”) may not be convicted of an offence in terms of section 12 if, at the time when the act of sexual penetration was first committed—
 - (a) A was below the age of 18 years; and
 - (b) the other person (“B”) exercised power or authority over A or a relationship of trust existed between A and B.
- (5) A person may not be convicted of an offence in terms of section 17 (4) or (5) or section 23 (4) or (5) or section 54, if that person is—
 - (a) a child; and
 - (b) not a person contemplated in section 17 (1) and (2) or 23 (1) and (2), as the case may be.
- (6) It is not a valid defense to a charge under section 20 (1), in respect of a visual representation that—
 - (a) the accused person believed that a person shown in the representation that is alleged to constitute child pornography, was or was depicted as being 18 years or older unless the accused took all reasonable steps to ascertain the age of that person; and
 - (b) took all reasonable steps to ensure that, where the person was 18 years or older, the representation did not depict that person as being under the age of 18 years.
- (7) If a person is convicted of any offence under this Act, the court that imposes the sentence shall consider as an aggravating factor the fact that the person—
 - (a) committed the offence with intent to gain financially, or receive any favour, benefit, reward, compensation or any other advantage; or
 - (b) gained financially, or received any favour, benefit, reward, compensation or any other advantage, from the commission of such offence.
- (8) A person may not be convicted of an offence in terms of section 9 or 22 if that person commits such act in compliance with and in the interest of a legitimate cultural practice.”

The section contemplates that on conviction of any offence under the Act there will be a sentence. It contemplates further that the nature and extent of the sentence can vary depending upon certain aggravating factors (Section 56(7)).

In my view the Act contemplates a sentence for a contravention of any offence under the Act and establishes a punishment for an offence of any section. All that is required to establish a punishment is that there be some punishment affixed to the commission of an offence under the Act (see *Prins’ case* para [16]). It is not required of the legislature that the punishment be established and defined as to whether it be a fine, imprisonment or any other form of punishment. All that is required is that there be a punishment.

Inherent in the concept “sentence” is the imposition of a punishment. Sentence is a well-known expression in relation to punishment. It is a concept dealt with in Chapter 28 of the CPA in detail. In my view the reference in the section to the word

“sentence” is a reference which must be read as invoking the right of the judicial officer to pass an appropriate sentence contemplated by the provisions of Chapter 28 of the CPA. The precise nature of available punishments is set out in section 276 of the CPA. My view that this is a proper approach is supported by the approach of the court in the Prins case which invoked similar reasoning in relation to section 3 of the Act.

In my view the Prins judgment in failing to consider Section 56(7) of the Act erred. The judgment is not binding on me and I do not follow it.

I am accordingly of the view that the accused falls to be convicted on the rape and indecent assault counts known as sexual penetration

and sexual violation in Sections 3 and 5 of the Act. For the sake of completeness the definition of each is set out hereunder.

In Section 3 of the Act penetration is:-

“sexual penetration” includes 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, and “sexually penetrates” has a corresponding meaning”

In Section 5 of the Act violation is:-

“sexual violation” includes any act which causes—

direct or indirect contact between the— (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal; (ii) mouth of one person and

(aa) the genital organs or anus of another person or, in the case of a female, her breasts;

(bb) the mouth of another person;

(cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could—

- (aaa) be used in an act of sexual penetration;
- (bbb) cause sexual arousal or stimulation; or
- (ccc) be sexually aroused or stimulated thereby; or
- (ddd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
- (iii) mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the sexual penetration, and “sexually violates” has a corresponding meaning”

The Act has been designed with a view to codifying existing law. In keeping with that intention the legislature repealed a number of common law offences including indecent assault. It appears to me that notwithstanding the wording in section 68 of the Act which repeals the common law offences that that wording is to be read subject to the condition that the Act in fact in fact establishes the substitute or codified offences which are set out therein. To the extent that offences are not created it cannot have been the intention of the legislature to repeal the common law. The section in my view is to be read with that rider.

It is my view that even if no crime is created by section 5 of the Act, section 68 is not effective to repeal the common law. Hence I am of the view that the wording of section 68 (if no new offence is created) is not effective to repeal the common law crime of indecent assault. That is the common law offence which is replaced by section 5.

If I am wrong in my analysis supra concerning the enforceability of section 5, the charge sheet nevertheless makes out the common law offence; the facts established the offence and the accused falls to be convicted.

In convicting the accused of the 4 counts of violation I have accordingly convicted in terms of the counts as alleged without

defining the offence as being a contravention of section 5 or an indecent assault as the facts set out in each count make out either

offence. In my view it is competent for me to approach the matter on this basis by reason of the provisions of sections 84 and 88 of the CPA set out above.

The State has led evidence establishing each of the facts alleged against the accused in all the offences which remain save count 12 on which the accused falls to be acquitted.

The accused accordingly falls to be acquitted on counts 10, 12, 28, 30, 36, 38 and 49.

The accused falls to be convicted on each of the remaining counts namely counts 1 to 9, 11, 13 to 27, 29, 31 to 35, 37, 39 to 48, 50 to 58.

I now deal with the facts.

I made an order that there be no publication of any fact identifying the complainants or the witnesses. I have re-organized this

judgment

so as to enable the reasoning underlying my finding concerning the Act to be independent of the findings of fact. Those findings are lengthy and of interest only to the immediate parties. I have for purposes of publication edited the balance of the judgment by omitting it.

C.G. LAMONT

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

Counsel for the State : Adv. Stellenberg

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