THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 314 /2022

In the matter between:

STEPHANUS PETRUS LATEGAN **FIRST APPELLANT**

JOHANNES RETIEF LATEGAN **SECOND APPELLANT**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE **FIRST RESPONDENT**

REGIONAL MAGISTRATE, WYNBERG **SECOND RESPONDENT**

Neutral citation: *Lategan and Another v The Director of Public Prosecutions, Western Cape and Another* (314/2022) [2024] ZASCA 74 (10 May 2024)

Coram: Molemela P, Hughes and Weiner JJA and Windell and Keightley AJJA

Heard: 15 August 2023

Delivered: 10 May 2024

Summary: Interpretation of statutes – sexual offences – Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007(the Act) – whether sections 58, 59 and 60 apply retrospectively to common law sexual offences committed prior to the commencement of the Act, but instituted thereafter – appeal of appellants dismissed.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Ndita J and Nziweni AJ sitting as a full court):

The appeal is dismissed with costs, including costs consequent on the employment of two counsel.

JUDGMENT

Hughes JA (Molemela P, Weiner JA, and Windell and Keightley AJJA concurring):

Introduction

[1] In 2018, the appellants were charged in the Wynberg Regional Court under the common law for sexual offences which were committed from 1974 and 1979. Conspicuously, these offences were committed before the commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act). The charge sheet indicated that the first respondent, the Director of Public Prosecutions, Western Cape (the DPP) would rely on ss 58, 59 and 60 of the Act, even though the Act had not been in existence when the appellants committed the offences. Because the offences were committed prior to the commencement of the Act, the appellants sought an amendment to the charge sheet. The basis thereof being that the Act was not applicable to the offences for which they were charged under the common law, as the Act was not in existence when these offences were committed.

[2] In the regional court proceedings, the court ordered that the DPP remove the offensive sections objected to by the appellants. In making such an order, that court found that the DPP's defence to the appellants' objection was not competent, as the offences they were charged with were predicated on the common law and not on the Act. The regional court reasoned that nowhere in the sections sought to be added to the charge sheet was there an indication that these sections would apply retrospectively.

[3] Subsequently, in the Western Cape Division of the High Court, Cape Town (the high court), the DPP instituted a review of the decision of the regional court. In the review application, the DPP sought a determination that the sections of the Act could apply retrospectively to common law crimes committed prior to the promulgation of the Act even in instances where the institution and investigation of such offences took place after its promulgation. In respect of the proceedings adopted by the DPP, it contended that the order of the regional court was irregular, and was hence subject to review.

[4] In the high court, the appellants submitted that the proceedings in the regional court were procedurally and substantively correct and that, if the DPP was unsatisfied with that court's decision, they should have proceeded by way of an appeal and not review. To this end, they stated that the correct avenue that the DPP ought to have pursued was s 310 of the CPA.[1] A further concern for the appellants was the DPP's reliance on s 69 of the Act. They submitted that this section only applies to offences committed, investigated and instituted before the Act, and so it did not apply in the circumstances of this case.

[5] The high court concluded that the DPP was correct in proceeding by way of review as the regional court committed an irregularity when it ruled that ss 58, 59 and 60 be deleted from the charge sheet. The high court reasoned that, even though the Act was not retrospective, the sections above had retrospective effect and as such were applicable in the appellants' case. This appeal is with the leave of the high court.

The law

[6] Fundamentally, the Act's purpose was to repeal the common law offence of rape and replace it with a new expanded statutory offence of rape; to comprehensively and extensively review, amend all aspects of the laws and the implementation of the law

[1] Section 310 of the CPA provides as follows:
'Appeal from lower court by prosecutor
(1) When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order made under section 85 (2), the attorney-general or, if a body or a person other than the attorney-general or his representative, was the prosecutor in the proceedings, then such other prosecutor may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law.'

relating to all forms of sexual penetration without consent, irrespective of gender.[2] The preamble of the Act is also instructive on the need for a new and amended Act. The legislature took cognisance of the fact that the commission of sexual offences in South Africa is an issue of grave concern against disadvantaged and vulnerable members of society at large, women and children being the most vulnerable members of society.[3]

[7] The Bill of Rights contained in the Constitution of South Africa guarantees that one has the right not to be subjected to violence, in whichever form, and protects the rights of children and vulnerable persons. In light of the Bill of Rights, it is evident that the common law and statutory laws have not dealt with the commission of sexual offences adequately, effectively and in a non-discriminatory manner. Section 2 of the Act succinctly sets out the objective of the Act, which is to afford complainants of sexual offences with the least traumatizing protection that the law can provide. It does this by the introduction of measures which encompass repealing the relevant common law offences, and expanding and extending these offences in some instances in order to eradicate the high prevalence of sexual offences in our country.

[8] The sections of the Act in issue, respectively, are couched as follows:

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

'59. 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. 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.'

[9] Relevant to this matter is s 68 (1)*(b)*, which repealed the common law crimes of 'rape, indecent assault, incest, bestiality and violation of a corpse, in so far as they

[2] Evident from the long title of the Act.
[3] The Preamble of the Act.

relate to the commission of a sexual act with a corpse'. Of significance is the transitional provision, s 69, which reads as follows:

'(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.'

The issue

[10] The issue in this appeal is whether ss 58, 59 and 60 of the Act apply retrospectively when dealing with common law offences where the criminal acts occurred before the Act came into operation, but were only investigated and prosecuted after the commencement of the Act. Further, whether the correct procedure in these circumstances was an appeal in terms of s 310 of the CPA rather than a review as initiated by the DPP.

Discussion

[11] The case of the appellants is that if they are charged under the common law, ss 58, 59 and 60 cannot be applicable, as the Act does not apply retrospectively. For this assertion, the appellants placed reliance on *S and Another v Regional Magistrate Boksburg: Venter and another* (*Boksburg*), where the Constitutional Court made a determination that a presumption exists against retrospectivity of a statute, unless the legislature either expressly or by implication intended such a statute to apply retrospectively.[4] Since the Constitutional Court has pronounced that sexual offences

[4] *S and Another v Regional Magistrate Boksburg*: *Venter and Another* [2011] ZACC 22; 2011 (2) SACR 274 (CC); 2012 (1) BCLR 5 (CC) para 16.

committed by individuals prior to the Act are to be charged in terms of the common law,[5] the incorporation of ss 58, 59 and 60 of the Act to the appellants' case, would undermine and contradict the ruling of the Constitutional Court in *Boksburg*, so they aver. They contended that s 69 of the Act specifically creates a clear divide between matters that fall under the common law and those that fall under the Act. The intention of the legislature is therefore clear: common law sexual offences, regardless of the status of their prosecution, ought to be concluded under common law as if the Act did not exist.

[12] In contrast, the DPP contends that ss 58, 59 and 60, being the sections sought to be incorporated in the charge sheet, are procedural in effect. They relate to evidence and issues of admissibility that are applicable during the trial proceedings. They do not relate to the elements of the charges preferred and, as such, they will not be determinative of the outcome, whether the appellants are acquitted or convicted. As such, the provisions would not impact on the appellants' substantive rights, in respect of their rights to a fair trial in terms of s 35 of the Constitution as well as their rights under the common law. The DPP contends that these sections, being procedural rather than substantive in nature, are prospective in operation. However, as they 'attach new consequences for the future to an event that took place before the statute was effected', these sections, the DPP contended, do not encroach on any of the appellants' existing rights, nor are they detrimental to any of their substantive rights. Further, there can be no doubt in relation to the applicability of these sections in the future prosecution of the appellants.

[13] It is prudent that I reiterate what the situation is in this matter before dealing with the concerns of the appellants. In this matter the sexual offences occurred before the enactment of the Act. However, the criminal proceedings in the matter were only instituted after the date that the statute took effect (16 December 2007). Hence, the old procedure is no longer applicable. In terms of s 69, only in matters where investigations had commenced, or where the trial was already underway before the promulgation of the statute, would the old procedure be applicable. The fact that this

[5] Ibid para 19-23.

case deals with the procedure to be adopted for those matters investigated, instituted and prosecuted after the Act, is notable.

[14] The starting point is to restate that which is trite, that is, that there is a presumption in our common law against the operation of statutes retrospectively unless the 'contrary intention is indicated, either expressly or by clear implication'. In *Boksburg*, the Constitutional Court affirmed that, even though the crime of rape had been repealed in terms of s 68(1)(*b*), it had not been repealed retrospectively. It reasoned that, if that were so, it would have resulted in extinguishing criminal liability incurred before the Act.[6]

[15] It is trite that no statute is to be construed as having retrospective effect unless the legislature clearly intended it to have that effect. Thus, it is prospective in operation, that is forward or future operating, rather than retroactive, that is backward operating, with effect from its enactment. In respect of the issue of retrospectivity, it is imperative to restate the time-honoured principle that is globally recognised on the premise that the legislature would not promote an unjust result:

'An important legal rule forming part of what may be described as our legal culture provides that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws) unless the legislature clearly intended the statute to have that effect: see *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 430. . . Consistent with the underlying rationale of the presumption and the requirement that it can be rebutted only by express terms or clear implication, is the rule that if the court is left in doubt as to the operation of the statute, the law as existing before the enactment must be applied.

. . .

This canon of interpretation was described by my brother Olivier JA in *Transnet Ltd v Chairman, National Transport Commission* 1999 (4) SA 1(SCA) at 7 A as a "time-honoured principle" and in *Gardner* v *Lucas* (1878) 3 App Cas. 582, a decision of the House of Lords, Lord Blackburn (at 603) described it as a "general rule, not merely of England and Scotland, but, I believe, of every civilised nation".

. . .

[6] *Boksburg* para 16; *National Director of Public Prosecutions of South Africa v Carolus and Others* [1999] ZASCA 101; [2000] 1 All SA 302 (A); 2000 (1) SA 1127 (SCA) para 31-32 (*Carolus*). Approved by the Constitutional Court in *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* [2005] ZACC 22; 2007 (3) SA 210 (CC); 2007 (9) BCLR 929 (CC); 2006 (2) SACR 319 (CC) para 26-27.

In *Benner v Canada (Secretary of State)* (1997) 42 CRR (2d) 1 (SCC), a decision of the Supreme Court of Canada, Lacobucci J referred (at 17) to the fact that the terms "retroactivity" and "retrospectivity" can be confusing and he quoted with approval definitions of the two terms given by the well-known Canadian writer on the interpretation of statutes, Elmer A Driedger, in an article in (1978) 56 Canadian Bar Review 264 at 268-9 as follows:
"A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective changes the law from what it otherwise would be with respect to a prior event."

In terms of this terminology the expression "retroactivity" is used for retrospectivity in the "strong" sense while the expression "retrospectivity" is reserved for what is described as retrospectivity in the "weaker" sense'. [7]

[16] It is important to recognise, as noted in the above extract, that the presumption against retrospectivity is founded on the need to avoid unjust interference with vested, substantive rights. The same principle does not apply in respect of matters of procedure. At the hearing of this appeal, the appellants' counsel was invited to point out which substantive rights, of the appellants, if any, would be affected if the sections in question were to be applied in the appellants' prosecution and trial. At best, the appellants' counsel submitted that the provisions in question created uncertainty. He submitted that unless the Act stipulates retrospectivity, then they are entitled to the presumption against retrospectivity in their favour. Astonishingly, the additional response from counsel for the appellants was that they had the right not to be charged with offences which were no longer an offence. Evidently, they rely on the repeal of the crime of rape in terms of s 68(1)(*b*) of the Act. The gist of the submission was that new procedures laid down in a statute cannot be applied in circumstances where the accused person has been charged under the common law.

[7] *Carolus* para 31-35.

[17] In my view, the appellants' reliance on *Boksburg* and *Kaknis v Absa Bank Limited & Another*,[8] in this case, is misplaced. In *Boksburg*, the court did not deal with the procedural aspects of the Act at all. That case dealt with the elements of the offence, and thus with the accused person's vested substantive rights. On behalf of the DPP, it was argued that the appellants' contention that ss 58, 59 and 60 will extinguish existing rights and affect the appellants detrimentally in the future trial is wrong. I agree. This Court's judgment in *National Director of Public Prosecutions of South Africa v Carolus and Others*[9] is apposite when assessing whether the presumption against retrospectivity has been rebutted. This Court held that an important legal principle forming part of our legal culture is that 'no statute is to be construed as having retrospective operation (in the sense of taking away or repairing a vested right acquired under existing laws) unless the legislature clearly intended the statute to have that effect'.[10]

[18] There is no provision in the Act, for it to apply retrospectively. However, the sections in question deal with procedural aspects. As such, where the statute deals with procedural matters, it is termed a 'procedural exception'. Though it equates to retrospectivity, it does so in the 'weak sense'. As the provisions of the Act operate forward it does not amount to retroactivity, being retrospectivity in the 'strong sense,' as discussed in *Carolus*.[11]

[19] In *Boksburg*,[12] the Constitutional Court reiterated that the exclusion does not apply to prosecutions not yet instituted at the date of enactment. There is, therefore, no ambiguity. This is particularly so if one also has regard to the long title and the preamble referred to earlier in this judgment. No substantive rights of the appellants are affected or encroached upon. As such, the presumption is that the legislature intended, *ex facie* the sections in question, that the prosecution of sexual offences outside the provided exclusion be in terms of the procedure as set out in the Act.

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[8] *Kaknis v Absa Bank Limited & Another* [2016] ZASCA 206; [2017] 2 All SA 1 (SCA); 2017 (4) SA 17 (SCA) para 37.
[9] *Carolus* para 31.
[10] *Carolus* para 31.
[11] *Carolus* para 35.
[12] *Boksburg* para 19.

Therefore, it is apparent that the sections are applicable to the future prosecution of sexual offences which are in the prosecutorial system after the enactment of the Act.

[20] The question is whether any of the appellants' existing rights have been adversely affected. In answering this question, it is necessary to juxtapose the provisions of ss 58, 59 and 60 vis-à-vis the common law position. In doing so, the courts' interpretation of the applicable common law position is relevant. The common law requirement pertaining to the admission of a previous consistent statement was that such evidence was admissible if presented voluntarily by a complainant who had made the complaint within a reasonable time after the commission of a sexual offence.

[21] As regards the statutory position introduced by the Act, the essence of ss 58 and 59 is to clearly stipulate that no adverse inferences may be drawn solely from the absence of a previous consistent statement made by the complainant in a sexual offence (s 58), and from the length of the delay between the alleged commission of that offence and the reporting thereof (s 59). Although the approach of the courts in dealing with the admission of a previous consistent statement in sexual offences has not always been uniform, there are many judgments, decided before the commencement of the Act, that have laid down the correct approach to the evaluation of such evidence.

[22] In *S v S*,[13] the accused was charged with the rape of an eleven-year-old girl. In considering the evidence that the complainant had not reported the incident at her school at all and had subsequently not reported it to her mother in detail, the court said:
'Out of context, this erratic behaviour might well present the prosecution with an insuperable problem, for it is a generally accepted evidential requirement that the complainant should report the offence at the earliest opportunity. I should emphasise that this requirement … admits of exceptions in appropriate cases.'
In *S v Cornick and Another*,[14] the sexual offences were allegedly committed before the coming into operation of the Act. This Court confirmed rape convictions even though the charges pertaining to the offences perpetrated on a 14-year-old complainant were only laid against the perpetrator 19 years later. Responding to the contention that it

[13] *S v S* 1995 (1) SACR 50 (ZS) at 56.
[14] *S v Cornick and Another* 2007(2) SACR 115 (SCA).

was improbable that the complainant, if she had been raped, would have failed to report the incident to her grandmother or her parents, this Court said:

'It does not seem to me to be improbable that a young woman who has tried to bury memories of a traumatic event for many years would not appreciate until her mid-twenties … the full extent of what happened only later'.[15]

[23] The aforementioned authorities attest to the fact that the presence or absence of a previous consistent statement or the delay in reporting a rape have always been assessed in the context of all the circumstances of the case as opposed to being considered in isolation. In my view, the effect of ss 58 and 59 is not prejudicial to the appellants because it accords with a long-established approach of this Court; courts have consistently been cautioned to consider all the circumstances of the case when evaluating evidence.

[24] In terms of s 60 of the Act, a court may not apply a special cautionary rule to sexual offences. It is noteworthy that in *S v J*,[16] approximately nine years before the enactment of the Act, this Court held that the cautionary rule in sexual offences cases was based on an irrational and outdated perception, and that it unjustly stereotyped complainants in sexual offences cases. It stated that '[t]he evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule'. It is therefore clear that s 60 of the Act reiterates the legal position that was laid down by the courts even before the enactment of the Act.

[25] Thus, the conclusion I reach is that the retrospectivity, in this instance, does not impinge on any of the substantive rights of the appellants in respect of their future criminal proceedings. Insofar as this retrospectivity is a 'weak' retrospectivity relating only to procedural rules of evidence, no unfairness will be visited upon the appellants in respect of the defence that they may wish to mount during the criminal proceedings. The high court was therefore correct in finding that the provisions of ss 58, 59 and 60 were applicable to the future criminal proceedings of the appellants.

Review or appeal

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[15] Ibid para 32.
[16] *S v J* 1998 (1) SACR 470 (SCA) at 476E.

[26] The appellants argued that the DPP ought to have dealt with this matter in terms of s 310 of the CPA and not by way of review. As the high court confirmed, review proceedings were correctly instituted. The DPP submitted that the institution of review proceedings was in terms of s 22(1)*(c)* of the Superior Courts Act 10 of 2013 and s 24(1)*(c)* of the Supreme Court Act 59 of 1959, in that, the court *a quo* committed 'a gross irregularity' when it misinterpreted the law and applied the law incorrectly. Conspicuously, these two sections, which appears in the current and old act, respectively, are the same.

[27] This Court, through its jurisprudence, has had occasion to deal with what warrants review rather than appeal proceedings in circumstances where a magistrate made a material error in interpreting the law. The process to be adopted, if the exercise of the judicial officer's powers is exercised wrongly and the process leads to a decision which is challenged, is that of review and not of appeal. In *Hira and Another v Booysen and Another*, this Court explains why the position is so in the following passage:

'Whether or not an erroneous interpretation of a statutory criterion, such as is referred to in the previous paragraph (ie where the question of interpretation is not left to the exclusive jurisdiction of the tribunal concerned), renders the decision invalid depends upon its materiality. If, for instance, the facts found by the tribunal are such as to justify its decision even on a correct interpretation of the statutory criterion, then normally (ie in the absence of some other review ground) there would be no ground for interference. Aliter, if applying the correct criterion, there are no facts upon which the decision can reasonably be justified. In this latter type of case it may justifiably be said that, by reason of its error of law, the tribunal" asked itself the wrong question", or "applied the wrong test", or "based its decision on some matter not prescribed for its decision", or "failed to apply its mind to the relevant issues in accordance with the behests of the statute"; and that as a result its decision should be set aside on review'.[17]

[28] I agree with the DPP's contention that the decision taken by the second respondent that the provisions of the Act do not apply to the prosecution of the appellants, flies in the face of the significance and interpretation of s 69 of the Act. As is evident from a reading of s 69, no mention is made of crimes committed before the

[17] *Hira and Another v Booysen and Another* [1992] ZASCA 112; 1992 (4) SA 69 (AD); [1992] 2 All SA 344 (A) at 93G-I.

commencement of the Act, but prosecuted thereafter. It stands to reason that those crimes would not be affected by this section and as such the section 'does not *confer* prosecutorial power on the State in respect of common law crimes, but rather *confirms* it'. This is apparent as '[i]t would therefore be inappropriate to interpret it as a provision that could *curtail* the State's prosecutorial power, which is sourced elsewhere: in the National Prosecuting Authority Act and, ultimately the Constitution'.[18] This misinterpretation by the second respondent culminated in a gross irregularity having been committed by the second respondent and as such, is susceptible to review proceedings. In addition, the proceedings have not reached finality and were adjourned for determination of the review application; finality being a requisite for appeal proceedings to be instituted.

[29] For all those reasons the appeal must fail. I make the following order:
The appeal is dismissed with costs, including costs consequent on the employment of two counsel.

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W HUGHES

JUDGE OF APPEAL

[18] *Boksburg* para 19 and 20.

Appearances

For the appellant:	R Liddell with S Webb
Instructed by:	Liddell, Weeber & Van der Merwe Inc
	Webbers Attorneys, Bloemfontein
For the respondent:	AC Webster with MD Titus
Instructed by:	State Attorney, Johannesburg
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