

The principle of legality in constitutional matters with reference to *Masiya v Director of Public Prosecutions and Others* 2007 (5) SA 30 (CC)

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SYNOPSIS OF THE FACTS

The complainant in the matter was a nine-year-old girl who alleged that she had been raped by a man who was known to her, Mr. Fanuel Sitakeni Masiya, on 16 March 2004. She was medically examined one week later on 23 March 2004. Mr. Masiya had initially appeared before the District Court at Sabie; later the case was referred to the Graskop Regional Court where he was charged with rape.

The complainant stated that she had been both anally and vaginally penetrated. The observations of the medical professionals did not confirm these allegations entirely, but expert medical evidence satisfied the Regional Court that anal penetration had indeed taken place and that the accused was the perpetrator. Although the common law definition of rape did not include anal penetration, the magistrate convicted the accused of rape and committed him to the High Court for sentencing.

The High Court confirmed that Magistrates' Courts are not expressly precluded from developing the common law for purposes of passing the constitutionality test. The court, after much deliberation, concluded that the Magistrates' Court had been correct in its assessment that the definition of rape in the common law needed to be developed, that the definition of rape needed to be extended to include anal penetration, and that it needed to be applicable to males and female alike. The court recognised that the accused had been convicted of an offence that did not exist at the time when he committed it (i.e., rape consisting of anal penetration) but accepted that his rights relative to retrospective criminalisation¹ could, in the circumstances of the case, for various reasons be limited.

¹ Section 35(3)(l) and (n) of the Constitution of the Republic of South Africa, 1996.

In its judgment the majority of the Constitutional Court confirmed that the definition of rape should be extended, but only to include female anal penetration. This finding was based on the notion that the common law needed to be developed in accordance with the “spirit, purport and objects of the Constitution” in terms of section 39(2) of the Constitution. Further, the court referred to *Veldman v Director of Public Prosecutions, Witwatersrand Local Division*² (hereafter *Veldman*) in stating that the principle of legality was a “central to the rule of law under our constitution”. The Court found that it would be sufficient to develop the common law prospectively in this case and, furthermore, that the extended definition should not apply *in casu* and that Mr Masiya should be charged with indecent assault as opposed to rape.

THE PRINCIPLE OF LEGALITY

At its very basis, the principle of legality (*nullum crimen sine lege*) can be described as “a mechanism to ensure that the state, its organs and its officials do not consider themselves to be above the law in the exercise of their functions but remain subject to it”.³

The two main theories that this principle relates to are the doctrine of substantive justice (also referred to as the crime control model) and the doctrine of strict legality (referred to as the due process model). While the former is aimed at “prohibiting and punishing any conduct that is socially harmful or causes danger to society, whether or not that conduct has been legally criminalised at the moment that it was taken”,⁴ under the latter a person may only be held criminally liable and punished if at the moment that a transgression was committed “it was regarded as a crime under the relevant legal order; in other words under the applicable law”.⁵

The South African Constitution,⁶ in section 35(3)(l) and (n), contains indications that South Africa adheres to the doctrine of strict legality.⁷ The most important facets of the *nullum crimen sine lege* principle are as follows:

“An accused may not be found guilty of a crime and sentenced unless the type of conduct with which he is charged:

- (a) has been recognised by the law as a crime [known as the *ius acceptum* principle which is recognised in both common law and statutory crimes];

2 2006 (2) SACR 319 (CC).

3 See Snyman CR *Criminal Law* (2008) 36.

4 Cassese A *International Criminal Law* (2003) 140.

5 *Ibid.*

6 The Constitution of the Republic of South Africa, 1996.

7 Section 35(3) of the Constitution states that “[e]very accused person has the right to a fair trial...”. Section 35 (3)(l) states that the right to a fair trial includes the right “not to be convicted of an act or omission that was not an offence either under national or international law at the time it was committed or omitted”. In Section 35(3)(n), that deals with sentencing, states that a convicted person has the right “to the 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”. The aforementioned principles are an indication that the South African Constitution favours the strict legality principle as both lean towards the *favor rei* principle which forms the basis of the strict legality doctrine that seeks to protect the accused against abuse of state power. Section 35(3)(l) and (n) give effect to Article 11(2) of the United Nations Universal Declaration of Human Rights.

- (b) in clear terms [the *ius certum* principle];
- (c) before the conduct takes place [the *ius praeivium* principle];
- (d) without the court having to stretch the meaning of the words and concepts in the definition to bring the particular conduct of the accused within the compass of the definition [the *ius strictum* principle], and
- (e) after conviction the imposition of punishment also complies with the four [preceding] principles” [the *nulla poena sine lege* principle].⁸

THE COURT'S POSITION WITH REGARD TO THE PRINCIPLE OF LEGALITY

The central question with regard to the principle of legality was whether a conviction of rape, in this case, was “in accordance with justice even though the definition of rape did not include non-consensual anal penetration at the time the crime was committed”.⁹

Despite the High Court's view that the “principle of legality has no application in the case as no new crime was created”,¹⁰ both the majority and minority of the Constitutional Court in *Masiya v Director of Public Prosecutions and Others*¹¹ (*Masiya*) were in agreement that the principle of legality required that the accused not be charged under the extended definition of rape.

The High Court substantiated its view on the relevance of the principle of legality by stating that “Mr Masiya knew that he was acting unlawfully when he assaulted the complainant and that it has never been a requirement that an accused person should know, at the time of the commission of the crime, whether it is a common law or statutory crime or what its legal definition is”.¹² This finding, too, was rejected by the Constitutional Court.

In answering the question whether the common law could be developed prospectively only, the Constitutional Court found this to be the case. Further, the court stated that “if [it] were to accept that the Principle of Legality is a bar to the development of the common law, the Courts could never develop the common law of crimes at all” and that this conclusion “would undermine the principles of our Constitution which require the courts to ensure that the common law is infused with the spirit, purport and objects of the Constitution”.¹³ The Court was of the view that “fairness to an accused requires that the development not apply to him but only to those cases which arise after judgement in this matter has been handed down”.¹⁴ The Court went further to discuss the elements of the *nullum crimen sine lege* principle under national and international law. It stated that the *Veldman*¹⁵ case was

⁸ Snyman (fn 3 above) 36.

⁹ *Masiya v Director of Public Prosecutions and Others* 2007 (5) SA 30 (CC) para 47.

¹⁰ *Masiya* para 47.

¹¹ 2007 (5) SA 30 (CC).

¹² *Masiya* para 47.

¹³ *Masiya* para 51.

¹⁴ *Masiya* para 51.

¹⁵ Fn 2 above.

a clear indication that the *nullum crimen sine lege* principle is a “central rule under our constitution”. Based on this analysis of the principle of legality, the court found that the extended definition should not apply to Mr. Masiya.

DISCUSSION

Prior to the *Masiya* case reaching the Constitutional Court, it was stated in both the Regional Court and the High Court that the common law definition of rape needed extension and that this definition should apply *in casu* to Mr. Masiya. The Constitutional Court, for the reasons indicated above, did not follow this view and found that the *nullum crimen sine lege* principle was applicable in the *Masiya* case based on its analysis of international and South African law that provided a premise for the court to interpret the section 35 (3) rights purposively. In performing this analysis, the court applied the *favor rei* principle¹⁶ and concluded that “the developed definition should not apply to Mr. Masiya”.¹⁷ Further, as stated above, the court began its evaluation of the relevance of the principle of legality to the *Masiya* case by asking whether it would be in the interests of justice to apply the charge of rape *in casu*. In the light of international and South African law it was found that the principle of legality was applicable.

The five elements of the principle of legality (namely, *ius acceptum*, *ius certum*, *ius praeivium*, *ius strictum*¹⁸ and *nulla poena sine lege*) were all applied in the *Masiya* case, resulting in the conviction on the charge of rape being overturned.

The relevant provisions of section 261 of the Criminal Procedure Act¹⁹ that the court applied in the *Masiya* case were as follows:

“(1) If the evidence on a charge of rape or attempted rape does not prove the offence of rape or, as the case may be, attempted rape, but— (...)

(e) the statutory offence of—

- (i) unlawful carnal intercourse with a girl under a specified age;
- (ii) committing an immoral or indecent act with such a girl; or
- (iii) soliciting or enticing such a girl to the commission of an immoral or indecent act;

(f) the statutory offence of—

- (i) unlawful carnal intercourse with a female idiot or imbecile;
- (ii) committing an immoral or indecent act with such a female; or
- (iii) soliciting or enticing such a female to the commission of an immoral or indecent act,

(2) If the evidence on a charge of indecent assault does not prove the offence of indecent assault but— (...)

(c) the statutory offence of—

16 I.e., that if two rules are potentially applicable, the one more favourable to the accused should be chosen.

17 *Masiya* para 57.

18 As explained at 114 above.

19 Act 51 of 1977.

- (i) attempting to have unlawful carnal intercourse with a female idiot or imbecile; or
- (ii) committing an immoral or indecent act with such a female, the accused may be found guilty of the offence so proved.”

The above parts of section 261, that the High Court and the Regional Court sought to have repealed, drew a clear distinction between rape and indecent assault with reference, for example, to carnal intercourse.

In the Constitutional Court the principle of legality was applied in answering the question whether Mr Masiya’s could be charged with rape. The Court 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. Although at first blush this provision might not seem to be implicated by finding Mr Masiya guilty of rape in this case, because the act he committed did constitute an offence both under national law and international law at the time he committed it, in my view, the jurisprudence of this Court would suggest otherwise. ...

“The strong view of legality adopted in [the *Veldman* case]²⁰ suggests that it would be unfair to convict Mr. Masiya of an offence in 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 exceptionally strong emotions from many quarters of society”.

The court in the *Masiya* case, therefore, applied the principle of legality strictly, and the conviction for rape in the Regional Court was set aside and replaced with indecent assault.

The court acknowledged the emotive aspects of the case, but again confirmed the notion that, although public opinion is an important consideration in constitutional trials, it should not be viewed as the overriding factor in considering constitutional validity.²¹

CONCLUSION

The *Masiya* case may be seen as a good example of the operation of the principle of legality. The court also expounded the operation of the right to non-retrospective punishment and confirmed its stance that both sections 35(3)(l) and 35(3)(n) are “central to the rule of law under our Constitution”²² in which the *nullum crimen sine lege* and the *nulla poena sine lege* principles are given effect. Furthermore, this judgement indicates that South African courts follow the *favor rei* principle and, more specifically, the strict legality or due process model when ruling on the principle of legality.

20 Fn 2 above.

21 See *S v Soci* 1998 (3) BCLR 376 (E), where the court stated the following: “Consideration of the public mood lent flexibility to the application of the fundamental rights provisions. It allowed courts to have regard to prevailing circumstances, as well as to the public acceptance of constitutional values which would increase in time. Courts should endeavour to educate the public to accept that a fair trial meant a constitutional trial, and *vice versa*.”

22 At para 55.

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