

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Fanuel Sitakeni Masiya v the Director of Public Prosecutions (Pretoria) and Another

CCT 54/06

Decided on: 10 May 2007

MEDIA SUMMARY

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

The Constitutional Court handed down judgment today in a case concerning the definition of rape. The matter took the form of confirmation proceedings of an order made in the Pretoria High Court. It was coupled with an application for leave to appeal by the applicant, Mr Masiya, against a judgment of that Court upholding his conviction for rape. The questions before this Court concerned firstly, whether the common law definition of rape needs to be developed to include ‘anal penetration of a person’, and whether the conviction of Mr Masiya of rape, ought to be upheld. The application was opposed by the Director of Public Prosecutions (DPP) and the Minister of Justice and Constitutional Development. The Centre for Applied Legal Studies and the Tshwaranang Legal Advocacy Centre were admitted as the friends of the Court.

Mr Masiya appeared in the Regional Court on a charge of rape of a nine-year-old girl, the complainant. Evidence adduced at the trial established that he had penetrated the complainant anally, therefore necessitating conviction on the offence of indecent assault, a competent verdict to rape. The Magistrate, on his own accord, developed the common law definition of rape to include non-consensual penetration of the penis into the vagina or anus of a person and made the definition gender-neutral. The basis was that the distinction between non-consensual penile penetration of the anus of a female or male, on the one hand, and of the vagina, on the other, is irrational, archaic and discriminatory. Having developed the common law, the Magistrate convicted the applicant of rape and referred the matter to the High Court for confirmation of the conviction and for sentencing. The High Court, agreeing with the Magistrate’s reasons for developing the definition, confirmed the conviction on a charge of rape. It held that the existing definition was constitutionally invalid and developed it to include non-consensual anal penetration defined in gender-neutral terms. As a result, certain provisions of the Criminal Procedure Act 51 of 1977 and the Criminal Law Amendment Act 105 of 1997 were amended so as to be gender-neutral and consistent with the developed definition. The case was referred to this Court for confirmation.

In this Court, Mr Masiya appealed his conviction on the merits, and opposed the extension of the definition of rape on various grounds. In particular he contended that the

extended definition, if applied to him, would infringe his fair trial rights, in terms of section 35(3)(l) of the Constitution, 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. The Minister opposed the development of the common law on the basis that the trial court should have decided the guilt of Mr Masiya on the facts of the case, and that the Legislature has taken steps to address the law on sexual offences in the Criminal Law (Sexual Offences) Amendment Bill 2003 which provides, among other things, for the extension of the common law definition. Counsel for the Minister however could not inform the Court when the Bill is likely to be finalised. The friends of the Court supported the judgment of the High Court.

Nkabinde J, in whose judgment Moseneke DCJ, Kondile AJ, Madala J, Mokgoro J, O'Regan J, Van der Westhuizen J, Van Heerden AJ and Yacoob J concur, acknowledged the patriarchal origins of rape across Roman-Dutch, English, South African and African Customary law and that the current understanding of the crime of rape is still one of power, domination and force. She held that there is no reason why the definition of rape, as currently understood, is unconstitutional in so far as the conduct is clearly morally and socially unacceptable, but found that the definition does fall short of the spirit, purport and objects of the Bill of Rights. The definition must therefore be extended to include non-consensual anal penetration of the anus of females. Acknowledging that non-consensual anal penetration of males is no less humiliating, degrading, or traumatic in nature, she emphasised that focusing on non-consensual anal penetration of females should not be seen as being disrespectful to males. When developing the common law, she said, the Court has to decide the case on the facts before it – in this case the anal penetration of a young girl, and not on what the facts might be. Recognising that the Legislature and not the courts has the major responsibility for law reform in our constitutional democracy, she held that extending the definition to include male rape would, in this case, encroach onto the legislative terrain.

Nkabinde J accordingly extended the definition of rape to include non-consensual sexual intercourse or penetration of the penis into the anus of a female. She declined to deal with the merits of the appeal on the facts but, on the basis of the principle of legality, found that the extended definition cannot be applied retrospectively to Mr Masiya. The conviction of rape is set aside and replaced with one of indecent assault. The case is remitted to the Regional Court for sentencing.

Langa CJ, with whom Sachs J concurred, dissented on one point. He found that the definition of rape should also be extended to include unconsensual anal penetration of men. He argued that, once it was accepted that rape was about the infringement of dignity and that anal rape was as severe an infringement of a victim's dignity as vaginal rape, it made no sense to distinguish between men and women. To limit the definition to female victims would in no way increase the protection afforded to women, but would rather reinforce dangerous, gendered stereotypes.