



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

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

Today the Supreme Court of Appeal (SCA) dismissed an appeal with costs including the costs of two counsel.

The initial proceedings took place in the Wynberg Regional Court (the regional court) where the appellants, in 2018, were charged under common law for sexual offences which were committed from 1974 and 1979. These offences were committed before the commencement of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act) and the charge sheet indicated that 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. Due to the offences being committed prior to the commencement of the Act, the appellants sought an amendment to the charge sheet, alleging 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.

In the regional court proceedings, the regional court ordered the DPP to 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.

Subsequently, the DPP instituted a review of the decision of the regional court in the Western Cape Division of the High Court, Cape Town (the high 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 prior to 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. 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.

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. It

reasoned that, even though the Act does not apply retrospectively, the sections above applied retrospectively and as such were applicable in the appellants' case

Before the SCA, the issue for determination was 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. Tied to that, was whether the correct procedure in the present case was an appeal in terms of s 310 of the CPA rather than a review as initiated by the DPP.

In reaching a conclusion on the first issue, the SCA reasoned that the question to examine was whether any of the appellants' existing rights had been adversely affected and by answering this question, it was necessary for the SCA to juxtapose the provisions of ss 58, 59 and 60 *vis-à-vis* the common law position. In doing this exercise, the SCA found that the effect of ss 58 and 59 is not prejudicial to the appellants because it confirms a long-established approach of the SCA, in terms of which courts were reminded to consider all the circumstances of the case when evaluating evidence, and cautioning against the consideration of any aspect of the case in isolation. With regards to s 60 of the Act, the SCA similarly found that the retrospectivity, in that instance, also did not impinge on any of the substantive rights of the appellants in respect of their future criminal proceedings. Insofar as the retrospectivity was a 'weak' retrospectivity relating only to procedural rules of evidence, no unfairness would be visited upon the appellants in respect of the defence that they may wish to mount during the criminal proceedings. The SCA, on this issue, therefore held that the regional court was therefore correct in its finding that the provisions of ss 58, 59 and 60 were applicable to the future criminal proceedings of the appellants.

With regards to the second issue of the correct procedure to be employed by the DPP, the SCA held that the misinterpretation of the law and applying the law incorrectly by the second respondent culminated in a gross irregularity having been committed by the second respondent and as such, was susceptible to review proceedings.

In the result, the SCA dismissed the appeal with costs, including costs consequent on the employment of two counsel.

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