REPORTABLE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 369/12

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE	Appellant
and	
ARNOLD PRINS	Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Intervening Party
CENTRE FOR CHILD LAW	First Amicus Curiae
WOMEN'S LEGAL CENTRE TRUST	Second Amicus Curiae

Neutral citation: *DPP v Prins (Minister of Justice and Constitutional Development & two amici curiae intervening)* (369/12) [2012] 106 ZASCA (15 June 2012)

Coram: MPATI P, NAVSA, BRAND, MALAN and WALLIS JJA.

Heard: 13 June 2012

Delivered: 15 June 2012

Summary: Criminal law – s 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 – failure to specify in same statute penalty on conviction – in light of the provisions of s 276 of the Criminal Procedure Act 51 of 1977 does failure mean that the section does not create a criminal offence – application of maxim *nulla poena sine lege* and principle of legality.

ORDER

On appeal from: Western Cape High Court (per Blignault J, Fortuin J and Mantame AJ concurring, sitting on appeal from a regional magistrate):

1 The appeal is upheld.

2 The order of the high court is set aside and replaced by the following order:

'The appeal succeeds and the order of the magistrate is altered to one dismissing the objection to the charge.'

JUDGMENT

WALLIS JA (MPATI P and NAVSA, BRAND and MALAN JJA concurring)

[1] No judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children, the right to be children; to grow up in innocence and, as they grow older, to awaken to the maturity and joy of full humanity. The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone. It is a sad reflection on our world, and societies such as our own, that women and children have been abused and that such abuse continues, so that their

rights require legal protection by way of international conventions[1] and domestic laws, as South Africa has done in various provisions of our Constitution[2] and in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act). It was rightly stressed in argument, in the light of evidence tendered and admitted in this appeal, that the Act is a vitally important tool in the ongoing fight against this scourge in our society.[3] The issue in this appeal is whether, as the high court held, the Act is fatally flawed in consequence of the legislature not having expressly specified the penalties attracted by the commission of the offences set out in chapters 2, 3 and 4 thereof.

[2] It is unnecessary to spell out in great detail the consequences of the high court's judgment on the protection of victims of sexual violence. There are many judgments in which our courts have emphasised the need for the rights of vulnerable people, in particular women and children, to be respected and protected. One of the ways in which that needs to be done is by the effective prosecution of those who infringe those rights. In *S & another v Acting Regional Magistrate, Boksburg: Venter & another*,[4] Mthiyane AJ, speaking of s 69 of the Act, said:

'Our Constitution sets its face firmly against all violence, and in particular sexual violence against vulnerable children, women and men. Given this, and the Act's emphasis on dignity, protection against violence against the person, and in particular the protection of women and children, it is inconceivable that the provision could

1 The principal ones to which we were referred by counsel for the first amicus were the United Nations Convention on the Rights of the Child (Article 19) and the African Charter on the Rights and Welfare of the Child (Article 16). Counsel for the second amicus referred us principally to articles 4 and 23 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 2 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women and Article 4 of the Declaration on the Elimination of Violence against Women..

2 Particularly ss 9, 10, 12(2), 28(1)(*d*) and 28(2) of the Constitution.

3 Since the Act came into operation, there have been over 12 000 convictions for offences under it, of which rape and sexual assault provide the bulk. There are some 297 pending cases involving offences under the Act in courts across South Africa.

4 *S & another v Acting Regional Magistrate, Boksburg: Venter & another* (CCT 109/10) [2011] ZACC 22; 2011 (2) SACR 274 (CC) para 23.

exonerate and immunise from prosecution acts that violated these interests.'

If the judgment of the high court in this case is correct, then its consequence is to 'exonerate and immunise from prosecution acts that violate' the interests of vulnerable children, women and men who have been subjected to sexual abuse. In order to determine whether that is so it is necessary to set out the circumstances in which the issue arises.

Background to the appeal

[3] Mr Arnold Prins was charged, before the regional court at Riversdale, with contravening s 5(1) of the Act in that he sexually assaulted the complainant by touching her breasts and private parts without her consent. Prior to his being called upon to plead, he objected to the charge sheet in terms of s 85 of the Criminal Procedure Act 51 of 1977. His objection was based on the fact that neither s 5(1) itself, nor any other provision of the Act, provides for a penalty for the offence created by s 5(1). The magistrate upheld the objection, apparently on the basis that the absence of a penalty infringed Mr Prins' fair trial rights in terms of the Constitution, although his reasons are not entirely clear. The Director of Public Prosecutions, Western Cape appealed to the Western Cape High Court against that decision. That court (per Blignault J, Fortuin J and Mantame AJ concurring), concluded that, in the absence of a penalty in the Act, the charge failed to disclose an offence and dismissed the appeal. This further appeal is with the leave of the high court.

[4] The appeal has been heard urgently by this court in view of its implications for all prosecutions arising under the various provisions of the Act. None of the 24 sections describing sexual offences in chapters 2, 3 and 4 of the Act prescribes a penalty, nor does the Act contain a general

penalty clause. Accordingly, if the judgment of the court below is correct, the Act will be rendered largely ineffective, because, in terms of that judgment, the absence of specified penalties means that it will have failed in one of its purposes, that of creating criminal offences. That has serious implications for the ability to prosecute those who have committed sexual offences since the Act came into operation on 16 December 2007 and have not yet been prosecuted. They could at most be prosecuted for lesser common law offences and perhaps not prosecuted at all. It could also potentially affect the validity of convictions and sentences under the Act since that date. All this was spelled out in an affidavit by the appellant that was admitted by consent at the commencement of the appeal. The statistics provided by the South African Police Service to the Women's Legal Centre, and referred to in footnote 3, show the potential scale of the problem.

[5] The judgment by the Western Cape High Court is in conflict with three other judgments, one in the Free State,[5] one in KwaZulu-Natal,[6] and one in South Gauteng,[7] and it is imperative that there be clarity. The Minister of Justice and Constitutional Development, under whose portfolio this legislation falls, was granted leave at the outset of the hearing to intervene and advance contentions in support of the validity of the legislation. The Centre for Child Law and the Women's Legal Centre Trust applied to be admitted as amici curiae and those applications were also granted. They too contended that the legislation was effective to enable the prosecution of the various offences provided therein. Their arguments were largely based on a desire to ensure that the court gives due weight to the constitutional rights of women and children.

5 *S v Booi (14/2010) [2010] ZAFSHC 91 (12 August 2010)*.
6 *S v Mchunu* (168/2011) 15 September 2011
7 *S v Rikhotso* (SS105/11) [2012] ZAGPJHC 106.

The principle of legality

[6] I have already outlined the importance of this case from the perspective of the right of all people, but in particular women and children, who are the most vulnerable and the most affected, to be protected against sexual violence. But that alone cannot be decisive of this appeal. The reason is that the decision by the high court flows from a constitutional principle that is equally fundamental, namely the principle of legality.[8] The power of the state to prosecute people and the power of courts to try, convict and sentence offenders are public powers of the greatest importance. In the history of the struggle for basic human rights the abuse of the criminal process by governments to suppress dissent and stifle the views of those opposed to the regime in power is notorious. One can trace this in the history of many countries, but our own experience suffices to underline the fact that abuse of power, including abuse of the criminal process, lies at the heart of tyranny and oppression. In the light of that history our Constitution demands that the 'Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'.[9] The courts, as the guardians of the Constitution, are likewise constrained. Accordingly, it is essential to ensure that the powerful feelings of disgust that sexual assault and sexual abuse arouse do not overwhelm the need for the State, in the form of the prosecuting authority in this case, to satisfy us that it would be lawful for a court trying Mr Prins, not only to convict him, but also to sentence him in a lawful manner. Just as we cannot invent new punishments,[10] so also we cannot invent a power to impose a punishment if none exists.

8 *Fedsure Life Assurance Ltd v Greater Johannesburg Metropolitan Council* 1999 (1) SA 374 (CC) paras 56 to 59.
9 *Fedsure* para 58.
10 *S v Malgas* 2001 (2) SA 1222 (SCA) para 2.

[7] Both the magistrate and the court below founded their judgments on the principles encapsulated in the maxims *nullum crimen sine lege* (no crime without a law) and *nulla poena sine lege* (no punishment without a law). These maxims can be traced back to the French Revolution[11] and the provision in Articles 7 and 8 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789, which in translation read:

'7 No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law …

8 The law must prescribe only the punishments that are strictly and evidently necessary, and no one may be punished except by virtue of a law drawn up and promulgated before the offence is committed, and legally applied.'[12]

The principles embodied in these maxims have subsequently been embodied in a number of human rights instruments. They are part of our law and are contained in ss 35(3)*(l)* and *(n)* of the Constitution, which read as follows:

'(3) Every accused person has a right to a fair trial, which includes the right—

(l) 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 or omitted;

(m) …

(n) 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.'

[8] The two maxims are, within their respective spheres, reflections of the principle of legality. In *S v Dodo*,[13] Ackermann J summed up their effect, insofar as the imposition of sentences for crimes is concerned, as

11 Or possibly earlier. See Aly Mokhtar 'Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects' (2005) *Statute Law Review* 41 at 46-7.

12 *Uttley, R (on the application of) v Secretary of State for the Home Department* [2004] UKHL 38; [2004] 4 All ER 1 (HL) para 39. The incorporation of these provisions in the Declaration of the Rights of Man is hardly surprising. The French kings were absolute monarchs and summary imprisonment and other forms of punishment were commonplace. The defining moment of the revolution was the storming of the Bastille, a symbol of royal tyranny.

13 *S v Dodo* 2001 (3) SA 382 (CC) para 13.

follows:

'[T]he nature and range of any punishment, whether determinate or indeterminate, has to be founded in the common or statute law; the principle of legality *nulla poena sine lege* requires this.'

In other words the imposition of a sentence by a court must have its justification in either the common law or statute. In the absence of a provision that empowers the court to impose a sentence it is powerless to do so. This is not a new principle created by the Constitution. As long ago as 1924 the authors of the leading textbook on criminal law and procedure[14] wrote:

'The punishment to be inflicted for an offence must be of the nature and extent authorised by law.'

[9] The issue in the present case is whether our courts have power to impose a sentence for offences under the Act. That question is complicated by the fact that certain of those offences[15] are specifically referred to in Schedule 2 to Criminal Law Amendment Act 105 of 1997 (the minimum sentencing legislation). The court below thought that this resolved any problem related to those offences, but it is unclear whether that is correct, as the legislation merely provides for a minimum sentence, not a general power to impose a sentence for these offences. However, whatever the position in those cases, the offence constituted by s 5(1) of the Act and the bulk of the offences in chapters 2, 3 and 4 of the Act are not affected by the minimum sentencing legislation and raise in unadulterated form the fundamental question of whether the courts have any power to sentence offenders for these offences.

The courts' sentencing powers

14 Frederick G Gardner and Charles W H Lansdown *South African Criminal Law and Procedure* Vol 1 at 420.

15 Those constituted under ss 3, 4 17, 23, 20(1) and 26(1) of the Act.

[10] Conduct is criminal either under the common law or by statute. In the latter case it is usual for the legislature both to define the criminal conduct and to specify the penalty or range of penalties that may be imposed by courts trying the statutory offence. Where that occurs the powers of the court in regard to sentence are, generally speaking, clear, although problems can arise.[16] In the case of common law crimes the position is different, because it has never been the practice for parliament, as the only legislative body having power to deal with this question, to prescribe the sentences that courts may impose for such crimes. In such cases courts imposed sentence in the exercise of a judicial discretion within the limits of their jurisdiction. I will first examine the nature and extent of that discretion.

[11] The jurisdiction of the high courts in regard to sentence for common law offences was in general not circumscribed by statute.[17] In regard to magistrates' courts, where most criminal cases were prosecuted, the constraints within which the courts operated in imposing sentences on offenders were laid down in the statute prescribing the scope of their jurisdiction and their general powers. The relevant provision has for many years been s 92 of the Magistrates' Courts Act 32 of 1944. That now reads:

'Limits of jurisdiction in the matter of punishments.—

(1) Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence—

(a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division, or not

16 *S v Van Dyk* 2005 (1) SACR 35 (SCA).

17 There was a limited exception to this general rule in regard to the death sentence. Until 1935 the death sentence was mandatory for murder. Under s 277(1) of the Criminal Procedure Act 51 of 1977 the death sentence was mandatory for the crime of murder without extenuating circumstances until this provision was struck down by the Constitutional Court in *S v Makwanyane & another* 1995 (3) SA 391 (CC). There were a number of notorious statutory offences for which minimum sentences were prescribed.

exceeding 15 years, where the court is the court of a regional division;[18]

(b) by fine, may impose a fine not exceeding the amount determined by the Minister from time to time by notice in the Gazette for the respective courts referred to in paragraph *(a)*;

(c) …

(d) by correctional supervision, may impose correctional supervision for a period as contemplated in section 276A (1) (b) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).'

[12] The general powers of both the high courts and the magistrates' courts in relation to sentence were affected, in respect of certain common law crimes, by the provisions of the minimum sentencing legislation, which introduced requirements for the imposition of minimum sentences in relation to the offences described in Schedule 2 to that Act, most of which were common law offences. Courts were empowered to impose sentences less than the prescribed minimum sentences where there were substantial and compelling circumstances justifying the imposition of a lesser sentence and in some other limited circumstances.[19] In its initial form the legislation did not alter the jurisdiction of regional magistrates' courts. Instead they were enjoined, in cases where they were satisfied that a sentence greater than any falling within that court's jurisdiction should be imposed for a scheduled offence, to refer the case to the high court for the purpose of sentencing.[20] That has since been altered to extend the sentencing powers of the regional court in relation to the scheduled offences, whilst conferring an automatic right of appeal on a person convicted and sentenced on this basis.

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18 This section originally provided for sentences of six months and three years imprisonment respectively. That was changed in 1977 (Act 91 of 1977) to 12 months and ten years and in 1998 (Act 66 of 1998) to its present limits.

19 This was dealt with by this court in *S v Malgas* supra and that judgment was endorsed by the Constitutional Court in *S v Dodo* supra.

20 Section 52 of Act 105 of 1997.

[13] Within these general constraints our courts, both the high courts and the various levels of magistrates' courts, have continued to impose sentences across the whole spectrum of common law criminal offences from murder to common assault; robbery, housebreaking, theft and malicious injury to property; kidnapping; fraud, forgery and uttering, and extortion; sexual offences, ranging from rape to indecent assault; and many others. In doing so they exercised a judicial discretion on the basis that 'the measure of punishment is a matter for the judge who imposes it'.[21] The rules governing the exercise of that discretion were set out in countless decisions of this court. It is appropriate to reflect on how Mr Prins, if convicted, would have been dealt with under that regime. He was charged on the basis of an allegation that he had fondled the complainant's breasts and private parts without her consent. Such conduct (if proven) has always constituted a crime in South Africa. Until the coming into force of the Act it was prosecuted as the common law crime of indecent assault, which was repealed and replaced by the offence of sexual assault in s 5(1) of the Act.[22] There was no statutorily prescribed sentence for this offence. Accordingly under the law as it stood prior to the coming into force of the Act Mr Prins would have been prosecuted for the common law offence of indecent assault and, if convicted, sentenced by the regional magistrate to a sentence within his statutory powers.

[14] None of this is controversial. Problems arise when statutory offences are created without specifying a penalty. That is the problem in the present instance. Although the instances where this arose are rare, where a criminal offence was created by legislation, but no penalty was prescribed in that legislation, there were judgments that held that the

21 I Lionel Swift and A B Harcourt QC *The South African Law of Criminal Procedure* (1st ed, 1957) at 479.

22 The long title to the Act says *inter alia* that it repeals the offence of indecent assault and replaces it with the offence of sexual assault.

court could impose a sentence, within the limits of its general jurisdiction.[23] That also had some academic support. Thus Professor Snyman writes:

'If a statutory provision creates a criminal norm only, but remains silent on the criminal *sanction* … the punishment is simply in the court's discretion, that is, the court itself may decide what punishment to impose.'[24]

The high court's decision effectively holds that this latter proposition is incorrect and that, in the absence of a statutorily prescribed penalty, no offence is created, however clear the language of the statutory provision. That is necessarily implicit in its conclusion that the charge sheet failed to disclose an offence. In other words it held that the absence of a penalty provision in the Act in respect of these offences meant that the relevant sections did not give rise to an offence at all.

[15] This conclusion conflates the operation of the two maxims. One can readily see that, when a court is confronted with the question whether a statutory provision prohibiting particular conduct is a crime, the failure of the legislature to attach a penalty to non-compliance is an important factor in determining whether a crime was constituted thereby. This was the determining factor in this court in *R v Zinn*,[25] where it was held that a *Besluit* by the Transvaal Volksraad, prohibiting the use or occupation of land in townships by 'Coloured' people, did not, in the absence of a criminal penalty, create a criminal offence. Greenberg JA, who gave the judgment of the court, carefully refrained from deciding whether, in the absence of both an express statement of criminality and a penalty, it was

23 *R v Forlee* 1917 TPD 52 and the cases cited in paras 40 and 41 of the judgment of Blignault J in the high court.

24 C Snyman *Criminal Law* 5 ed 41. This passage, appearing in the third edition, was cited by Ackermann J in *S v Francis* 1994 (1) SACR 350 (C) at 355d-h, with apparent approval. See also Milton and Cowling *South African Criminal Law and Procedure* Volume III Statutory Offences 2 nd edition para 1-20; M A Rabie and M C Maré *Rabie and Strauss Punishment: An Introduction to Principles* (4 ed) 81-82.

25 *R v Zinn* 1946 AD 346.

permissible for a court to construe a legislative prohibition on particular conduct as creating a crime by necessary implication.

[16] That issue arose in the controversial decision in *R v Forlee* supra, which concerned a statute that prohibited the sale of opium, save by a pharmacist under a prescription, but did not say that such a sale was a crime nor provided for a penalty for making such a sale. Mason J pointed out that the sale of opium in such circumstances had always been a crime and that the possession of opium, other than by a pharmacist or under a prescription, was said specifically to be a crime. He concluded that the absence of a penalty did not mean that the sale of opium was not an offence punishable by the courts within their ordinary powers. I agree with Greenberg JA in *Zinn*'s case, supra,[26] that:

'The final conclusion, in *Rex v Forlee* (*supra*), that the enactment constituted an offence was based on the broad ground that the act in question (viz., the sale of opium) was "expressly prohibited in the public interest and with the evident intention of constituting an offence".'

The approach of the court was that an inference of an intention to criminalise the prohibited conduct could be drawn from the language of the statute even though there was no clear statement to that effect.

[17] The decision in *R v Forlee* has been the subject of considerable academic, and some judicial, criticism on the basis that to hold that a statute creates a crime by necessary implication infringes the principle of legality.[27] However, it is unnecessary to decide whether the criticism is justified, because that question does not arise in the present case. We are not asked to infer that s 5(1) and the other relevant provisions of the Act render the conduct described therein criminal. The problem in the present

26 At 355.

27 J C de Wet and H L Swanepoel, *Strafreg* 4 ed 46-47; C Snyman *Criminal Law* 5 ed 41-42; *S v Francis* supra at 355d-h.

case is the effect of the absence of a penalty provision on the offences created by the Act. Before turning to address that issue I will briefly indicate why it is clear that the Act creates criminal offences in chapters 2, 3 and 4 thereof.

The Act creates criminal offences and contemplates offenders being sentenced

[18] There can be no doubt that the Act in express terms created criminal offences in ss 2 to 26 thereof, all of which are couched in similar terms. My starting point is the statement of the objects of the Act in s 2 thereof, which reads:

'Objects

The objects of this Act are to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic by:

(a) Enacting all matters relating to sexual offences in a single statute;

(b) criminalising all forms of sexual abuse or exploitation;

(c) repealing certain common law sexual offences and replacing them with new and, in some instances, expanded or extended statutory sexual offences, irrespective of gender …'

Each of these objects refers expressly to the creation of criminal offences.

[19] The long title to the Act also makes its purpose clear. It is first a consolidating measure directed at bringing together in one piece of legislation all criminal offences of a sexual nature. Second, it replaces and in some respects broadens the scope of existing common law crimes of a sexual nature. Third, it creates a number of new offences. This emerges clearly and without any need for explanation or clarification

from the following portions of the long title:

'To comprehensively and extensively review and amend all aspects of the laws and the implementation of the laws relating to sexual offences, and to deal with all legal aspects of or relating to sexual offences in a single statute, by—

* repealing the common law offence of rape and replacing it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender;

* repealing the common law offence of indecent assault and replacing it with a new statutory offence of sexual assault, applicable to all forms of sexual violation without consent;

* creating new statutory offences relating to certain compelled acts of penetration or violation;

* creating new statutory offences, for adults, by criminalising the compelling or causing the witnessing of certain sexual conduct and certain parts of the human anatomy, the exposure or display of child pornography and the engaging of sexual services of an adult;

* repealing the common law offences of incest, bestiality and violation of a corpse, as far as such violation is of a sexual nature, and enacting corresponding new statutory offences;

* enacting comprehensive provisions dealing with the creation of certain new, expanded or amended sexual offences against children and persons who are mentally disabled, including offences relating to sexual exploitation or grooming, exposure to or display of pornography and the creation of child pornography, despite some of the offences being similar to offences created in respect of adults as the creation of these offences aims to address the particular vulnerability of children and persons who are mentally disabled in respect of sexual abuse or exploitation;

* eliminating the differentiation drawn between the age of consent for different consensual sexual acts and providing for special provisions relating to the prosecution and adjudication of consensual sexual acts between children older than 12 years but younger than 16 years;

* criminalising any attempt, conspiracy or incitement to commit a sexual offence …'

[20] It is convenient, in considering a more specific example, to look at the charge facing Mr Prins. He was charged with a contravention of s 5(1) of the Act, which provides that:

'(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.'

Nothing could be clearer than that this provision creates a criminal offence. The same is true of each of the other provisions that define criminal offences in chapters 2, 3 and 4 of the Act. They are all couched in language that proclaims unequivocally that their purpose is to render criminal the conduct described therein. This is not a case where the intention to criminalise the conduct in question must be inferred. It is expressly stated. The language of the sections is unequivocal and the context provided by the need to protect vulnerable people against sexual attacks in the light of the Constitution and South Africa's international obligations reinforces the construction that each of the relevant sections creates a criminal offence.[28] No other construction has been suggested.

[21] The Act is equally unequivocal in its contemplation that on conviction the courts will impose an appropriate sentence on the accused. That is clear from s 56(7) of the Act, which provides that:

'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.'

In addition, the National Director of Public Prosecutions is required to

28 The language of the sections must always be read in the light of the context. *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) paras 18 and 24. Here language and context converge.

develop and publish directives dealing with the sentencing of persons after conviction of offences under the Act, and the provision of pre-sentencing reports and information concerning the impact of the sexual offence on the complainant.[29] A number of other sections contemplate the imposition of a sentence on a person convicted of contravening any of the provisions in chapters 2, 3 and 4 that creates an offence. The National Register for Sex Offenders, provided for in s 42, must contain particulars of the sentence imposed on an offender whose name falls to be included in the Register.[30] Among the persons whose names must be included in the Register are those who are serving or have served a sentence of imprisonment as the result of a conviction for a sexual offence against a child or a person who is mentally disabled.[31]

[22] The Act thus expressly renders criminal the conduct described in the various sections in chapters 2, 3 and 4 thereof and contemplates the imposition of sentences on offenders. Its aim is the prosecution and sentencing of persons who commit these offences. This is not a matter of implication but is expressly stated in the Act. The difficulties raised by *R v Forlee* do not arise in this case.

The issues

[23] Against this background, the conclusion by the high court that the charge sheet did not disclose an offence was, on the face of it, incorrect. It undoubtedly disclosed an offence, unless the absence of a penalty in the Act itself, or elsewhere in other legislation, has the effect of displacing the clear language of these sections and rendering their statement that particular conduct is a criminal offence nugatory. That raises two separate

29 Section 66(2)(*a*)(viii).
30 Section 49(*b*)(iv). If the conviction and sentence took place in a foreign country the equivalent information must be included (s 49*(c)*).
31 Section 50(1)(*a*)(iii) read with s 50(2)(*a*)(i). See also s 55.

issues. The first is whether, notwithstanding the absence of an express penalty provision in the Act, there is a legal basis in either the common law or an applicable statute for the imposition of sentences on persons convicted of the various offences set out in the Act. If there is, the basis for the high court's decision falls away as it was entirely founded on the absence of any penalty. The second issue arises if the high court was correct in holding that there is no legal basis for imposing a penalty on offenders. If that is so the effect of this on the validity of charge sheets in relation to offences set out in the relevant sections of the Act must be determined. As already noted the high court held that this invalidated the charges. That may be incorrect, as the effect of a decision that these sections do not create criminal offences, because of the absence of a statutorily prescribed penalty, is to say that the relevant sections are unconstitutional. That follows from the reliance on the maxim *nulla poena sine lege* and the principle of legality. A magistrates' court lacks jurisdiction to hold that a statute is unconstitutional. Accordingly, if a question of the constitutionality of a statutory offence arises in the course of a criminal trial in the magistrates' court, the proper approach is to conduct the trial, subject to a reservation of rights in relation to the point of unconstitutionality, and then to raise that point in an appeal. There may be special circumstances in which it would be proper to stay the proceedings before the magistrate pending an appropriate challenge in the high court, but in general that approach should be eschewed for the reasons stated by Langa CJ in *Thint (Pty) Ltd v National Director of Public Prosecutions & others*.[32] In this case, considering the magistrate's view that he lacked any sentencing power, as well as the importance of the issues and the public interest, an approach to the high court would probably have been the better course.

32 *Thint (Pty) Ltd v National Director of Public Prosecutions & others: Zuma & another v National Director of Public Prosecutions & others* 2009 (1) SA 1 (CC) para 65.

[24] The two issues identified in the previous paragraph were not addressed in that form by the court below and they were not raised in precisely those terms in the formulation of Mr Prins' objection to the charge sheet. There it was said that the charge did not comply with the requirements of the Criminal Procedure Act 51 of 1977 (the CPA) because it did not refer to the penalty provisions applicable to the crime; that because there was no reference to any penalty provisions the charge lacked a material element of the statutory offence; that the charge did not disclose an offence because it did not refer to the applicable penalty provisions and that it lacked sufficient particularity because of the absence of a reference to the relevant penalty provisions. In each of these forms the objection was deficient because it proceeded from the erroneous premise that it is necessary to the validity of a charge, at least one of committing a statutory offence, to specify the penal consequences of conviction. That is not correct. All that is required is that the charge set out the particulars of the offence with which the accused is charged.[33] That does not include the sentence that may be imposed on conviction. It is only necessary to specify the penal consequences of conviction where the prosecution proposes to rely upon specific provisions, such as those in the minimum sentencing legislation, where it is necessary to forewarn the accused of the potential consequences of conviction, if that may affect the manner in which the defence is conducted. Whilst it may be customary and desirable, when an offence is created by statute and the statute also specifies the penalty, for the charge sheet to refer to the penalty,[34] its absence does not render the charge invalid or warrant the quashing of the

33 Section 84(1) of the CPA. Insofar as the judgment in *S v Rautenbach* 1991 (2) SA 700 (T) at 701j-702a suggests that the penalty is an essential part of a statutory criminal offence that statement was *obiter* and is incorrect.
34 *S v Ndlovu* 1999 (2) SACR 645 (W) at 649f-i

charge.[35] Whether it may, in some circumstances, impinge on an accused person's fair trial rights in another way does not arise in this case. Before us, counsel for Mr Prins accepted that his fair trial rights were not in issue.

[25] There is much to be said for the proposition that the issue, that Mr Prins was seeking to raise by his objection, only properly arises at the end of a case where an accused has been convicted and the issue of sentence comes to the fore. However, now that it is before us, it is undesirable not to deal with it knowing that it will otherwise return to this court in the near future. However, if the argument on his behalf is upheld, attention will need to be given to the appropriate form of relief. On the charge as formulated, he could plead guilty to, or be found guilty of, assault with intent to commit grievous bodily harm or common assault,[36] and there is no question about the entitlement of the regional court before which he has been arraigned to sentence him for those offences. Accordingly, even if his contentions are correct it does not necessarily follow that the charge should be quashed.

A legal basis for sentencing offenders under the Act

[26] I turn then to deal with the first question, namely, whether there is any provision of the common law, or of a statute, that provides for the imposition of sentence on a person convicted of an offence under the Act, for which no penalty is expressly stipulated and which does not fall within the minimum sentencing legislation. The debate before us revolved around this question and in particular the state's reliance on s 276 of the CPA. It is appropriate to note that this argument was not raised before the high court (and presumably before the magistrate). Had

35 *S v Badenhorst* 1991 (1) SACR 623 (T).
36 Section 261 (*a*) and (*b*) of the CPA.

it been, I have no doubt that a judge, as experienced as Blignault J, would have dealt with it and possibly the outcome of the case would have been different. Although there was some muted protestation on behalf of Mr Prins about the fact that in the high court reliance had not been placed on s 276 counsel accepted that the argument was one of law that can properly be raised before us.

[27] Section 276(1) provides that:

'Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence …'.

The sub-section goes on to specify imprisonment, periodical imprisonment, declaration as an habitual criminal, committal to an institution established by law, a fine, correctional supervision and imprisonment from which a person may be placed under correctional supervision, as permissible sentences. Sub-section (2) makes these powers in regard to sentence subject to other provisions requiring a court to impose a specific sentence or limiting its powers in regard to sentence or derogating from powers conferred under legislation to impose some other type of sentence or order a forfeiture in addition to any other punishment.

[28] The State argued that s 276(1) is a general penalty provision empowering courts to impose sentences in all situations where there is no other provision in law prescribing the sentence that can be imposed for an offence.[37] It contends that the section provides the legal foundation for the imposition of sentences in relation to common law crimes as well as statutory crimes, where no sentence is otherwise prescribed. Beyond that the precise scope of the court's sentencing powers depend upon whether

37 E du Toit, F J de Jager, A Paizes, A St Q Skeen and S van der Merwe *Commentary on the Criminal Procedure Act* (loose-leaf) p28-9 (Service 47, 2011).

it is a high court, a regional court or a magistrates' court. In this way it was submitted that the principle of legality is satisfied. It is immaterial, so this argument proceeded, that the provisions in regard to sentence are derived from a statute other than the Act and need to be garnered from s 276, read with the jurisdictional limitations on the court before which the accused is charged. That is the case with, for example, rape, where the sentencing powers of courts are derived from the minimum sentencing legislation. It is the case with all common law crimes, where the elements of the offence are derived from the common law and the sentencing powers of the court derive from s 276 of the CPA. The State contended that the same position prevails when a statute creates a crime but does not itself provide for a penalty. The permissible penalties are then to be found in s 276 read with the relevant provisions (if any) regarding the powers of the court concerned in regard to sentence.

[29] Counsel for Mr Prins join issue with this argument. They contend that the opening words of s 276(1), namely:

'Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence …',

contain a general enabling provision, as far as the various forms of punishment are concerned, but are not meant as a source of the power to sentence an offender for a statutory crime. They rely on the following passage from the judgment of this court in *S v Van Dyk*:[38]

'The correct interpretation of the section must be determined from the context of s 276 as a whole. It is headed: "Nature of Punishments". Section 276(1) lists, in general terms, various forms of punishment available for consideration and imposition by a court which has convicted a person of an offence either in terms of a particular statute or under the common law. The use of the words "subject to" at the beginning of subsec (1) indicates that the subsection will be subservient to any provision of the

38 *S v Van Dyk* fn 16 above, para 10.

common law, the Act or another statute in case of conflict (cf *S v Marwane* 1982 (3) SA 717 (A) at 747H – 748B).'

They submit that if s 276 may be invoked in respect of any offence for which no other sentence is prescribed then it renders the penalty provisions in all other legislation superfluous and contend that the proposition that it resolves the question of a legal basis for sentencing offenders under the provisions of the Act 'is simply not correct'. They also point out that the charge sheet makes no reference to this section.

[30] I start, as with the interpretation of any other statutory provision, with the language of s 276(1). Its operative words are 'the following sentences may be passed upon a person convicted of an offence'. There is nothing obscure or unclear about that language. It identifies the sentences that our law permits and says that those sentences may be imposed upon a person convicted of an offence. It echoes the similar language of the earlier Criminal Procedure Acts. Thus s 338(2) of the Criminal Procedure Act 31 of 1917 read:

'Sentences to the following punishments may be passed upon a convicted offender subject to the provisions of this Act or of any other law or of the common law …'

Section 329(3) of the Criminal Procedure Act 56 of 1955 read:

'The following sentences may subject to the provisions of this Act or any other law or of the common law be passed upon a person convicted of any offence …'

The section has a twofold purpose. In the first place it empowers courts to impose sentences upon persons convicted of crimes. It is the embodiment of the principle *nulla poena sine lege*. Second it limits the punishments that courts may impose to those set out in the section and no others. That is what, as was said in *S v Malgas* supra,[39] prevents the courts from devising new punishments.

39 Para 2.

[31] That these sections have been, and s 276 now is, the source of the power of our courts to impose sentences is apparent from looking at the case of common law crimes. There is no other provision of our law dealing with the power of courts to impose sentences for such crimes. Absent s 276 neither the magistrates' courts nor the high courts would be entitled to impose sentences on people who commit common law crimes. Counsel for Mr Prins accepted that this is correct. But that poses an insuperable problem for his argument. The language of s 276(1) does not restrict its field of operation to common law crimes. It is an entirely general empowering provision. An offence is defined in s 1 of the Act as 'an act or omission punishable by law' and is not confined to common law offences. Counsel was unable to point to anything in the section or elsewhere in the CPA or in any material extraneous to the CPA that would suggest that the power to sentence offenders, conferred by s 276(1), should be confined to common law crimes. However, his argument necessarily requires that we give a restrictive interpretation to the section to confine the scope of its operation to common law crimes.

[32] We were referred to the opening words of s 276(1), that make its provisions subject to the other provisions of the CPA or any other law. The first part of this provision is there to make it clear, for example, that s 276(1) does not override the power of a court, in terms of s 297, to postpone the passing of sentence or to discharge the person with a caution and reprimand. The latter subordinates the court's general sentencing powers to specific legislation dealing with offences. Thus, a court is not entitled to exercise its powers under s 276(1) to sentence to imprisonment a person convicted of the offence of contravening their licence in terms of s 74(1) of the Electronic Communications Act 36 of 2005, in the face of the provisions of s 74(2) of the latter Act, which state that the penalty for

an offence under s 74(1) is that the licensee must outsource the construction or placing into service of the relevant electronic communications facility or electronic communications network to a third party. Similarly the provisions of s 276(2), upon which some reliance was also placed, do not warrant the restrictive construction of s 276(1) for which counsel contended. The opening words also make it clear that courts are bound to have regard to specific penal provisions in legislation. It does not follow that the absence of specific statutory penal provisions renders the court's power to impose the sentences provided for in s 276 nugatory. On the contrary it is to those powers that courts must turn in imposing sentence. This has always been accepted in respect of common law crimes and there is no reason to confine it to those crimes.

[33] Nor is there anything in the context of the statute to justify a restrictive construction. Historically the section is derived from s 242 of the Criminal Procedure Code enacted in Ordinance 1 of 1903 of the Transvaal. However that section simply specified the range of permissible sentences and did not say that courts were empowered to impose those sentences on offenders. Similarly there appears not to have been a provision in either of the Criminal Procedure Ordinances[40] in the Cape or the Criminal Procedure Ordinance 18 of 1845 (Natal) specifically empowering courts to impose sentences on offenders. When the Criminal Procedure Act 31 of 1917 was passed it took the earlier provision in the Transvaal Code as its basis but recast the section to say that the specified punishments 'may be passed upon a convicted offender'.[41] That was done at a time when it was known that there were a number of statutory offences on the statute books and the possibility that the legislation in which they were contained might lack a penalty provision had arisen in

40 Ordinance 40 of 1828 and Ordinance 73 of 1830.
41 The 1917 Act was passed a few months after the decision in *R v Forlee* supra.

some cases. The general language used is only consistent with its applying to both common law and statutory crimes. The historical background is therefore inconsistent with the limitation of language for which counsel contended.

[34] The next important contextual matter is the principle of legality and the need for the power to impose punishment and the extent of that power to be contained in a law. Section 276(1) recognises and embodies that principle in relation to common law crimes. There seems to be no reason why it should not also be taken to ensure that the principle is recognised and complied with in relation to any statutory crimes where the legislature has, for whatever reason, not incorporated a specific penalty provision in the statute creating the offence. An interpretation of the section in compliance with the principle of legality is constitutionally mandated.[42]

[35] It is also helpful to examine whether the restrictive interpretation counsel sought to place on the key words in s 276(1) has a sensible outcome. He accepted that they empower courts to impose sentences for the offences of assault with intent to do grievous bodily harm and common assault, which are the alternative crimes of which Mr Prins could have been charged and convicted on precisely the same factual allegations as the main offence under s 5(1) of the Act. This raised the following conundrum. Had the prosecutor included, in the alternative to the main charge under s 5(1) of the Act, an alternative charge of common assault based on precisely the same facts, no objection could have been made against that charge. The reason is that the magistrate would have been empowered by s 276(1) to impose an appropriate sentence for that

42 Section 39(2) of the Constitution.

offence. Once that is recognised the obvious question is why should it be any different in relation to the statutory offence? The absurdity of importing a limitation into the language of s 276(1), so that a charge based on a particular set of facts will be unimpeachable if it is a charge of a common law crime, but invalid if it is based on a statute making those facts a statutory crime, is apparent. It is even more apparent when it is recognised that the statutory crime is in substance the equivalent of the common law crime that it replaces. No reason could be suggested why the application of s 276(1) to the statutory crime would place Mr Prins in a less advantageous position than he would have been in had he been charged on the same facts with the crime of indecent assault. The statutory offence under s 5(1) mimics the common law offence of indecent assault. Thus the courts will have a pattern of sentencing in past cases to guide them in fixing an appropriate sentence for the equivalent statutory offence.

[36] Although it cannot affect the construction of s 276(1), we were addressed on the reasons for the omission in the Act to specify penalties for the offences in chapters 2, 3 and 5. However, the submissions fluctuated wildly, with parties commencing by saying that the omission was a mistake and, under probing questions from the bench, ending by saying that it was deliberate. All that this demonstrates, as was said in *Natal Joint Municipal Pension Fund v Endumeni Municipality*, supra,[43] is that little purpose is served by speculation as to the intention of Parliament.[44] We simply do not know whether the omission of specific penalties in relation to these offences or a general penalty clause covering them, whether the omission was deliberate or an oversight. What we do

43 Para 20.

44 Significantly the Minister did not say in the affidavit in support of his application to intervene why the Act did not contain any penalty provisions in respect of these offences. As he chose not to tell us why this had happened I do not think it appropriate for us to speculate on the reasons.

know is that the legislation clearly anticipated that people would be charged with offences under the Act and, after conviction, would be sentenced. In the absence of any provision in the Act governing penalty the necessary implication is that this was to be left to the general discretion of the courts in terms of their powers under s 276(1).

[37] In addition Parliament has, since the judgment of the high court was delivered, met and passed an amending Bill,[45] that expressly provides that the powers of courts in regard to sentence for the offences in chapters 2, 3 and 4 of the Act are those specified in s 276 of the CPA.[46] Whilst this Bill still awaits the assent of the President it nonetheless provides a clear example of subsequent legislation constituting a 'legislative declaration' of the meaning parliament wishes to have ascribed to earlier legislation.[47] Whilst I do not suggest that this principle can be used to afford a meaning to legislation that it is not otherwise capable of bearing – that would amount to retrospective legislation – it is appropriate to invoke it in this case where the Act clearly aimed at creating offences and ensuring that the courts sentence those they convicted of those offences. In addition the amending Bill says that its purpose is to provide expressly that the imposition of penalties for certain offences in terms of the Act is to be left to the discretion of the courts. That accords with what I regard as the

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45 Criminal Law (Sexual Offences and Related Matters) Amendment Act 2012 (B19/2012).

46 It inserts the following section in the Act:

56A (1) A court shall, if—

(a) that or another court has convicted a person of an offence in terms of this Act; and

(b) a penalty is not prescribed in respect of that offence in terms of this Act or by any other Act, impose a sentence, as provided for in section 276 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which that court considers appropriate and which is within that court's penal jurisdiction.

(2) 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 the 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.'

47 *Patel v Minister of the Interior & others* 1955 (2) SA 485 (A) at 493A-D; *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC) para 66.

necessary implication to be drawn from the language of the Act itself. Accordingly this is a proper case where the legislative declaration coincides with the implications to be drawn from the Act itself.

[38] For all those reasons the argument that s 276(1) must be construed as being a provision empowering courts to impose sentences in relation only to common law crimes must be rejected. In my opinion it is a general empowering provision authorising courts to impose sentences in all cases, whether at common law or under statute, where no other provision governs the imposition of sentence. I reject the argument that the Act, in creating the offences set out in chapters 2, 3 and 4 thereof, infringed the principle of legality by not prescribing the penalties to be imposed for those offences. I also reject the contention, unsupported by authority, that a statutory offence can only be created by parliament if it includes a penalty in the enacting legislation. That may be a requirement in countries where the criminal law is codified, but that is not the position in South Africa.

[39] It follows that the decisions of the magistrate and the high court were wrong and must be set aside. The order I make is as follows:

1 The appeal is upheld.

2 The order of the high court is set aside and replaced by the following order:

‘The appeal succeeds and the order of the magistrate is altered to one dismissing the objection to the charge.’

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant:	B E Currie-Gamwo (with her B Hendry-Sidaki) from the office of the National Director of Public Prosecutions Instructed by: State Attorney, Bloemfontein
For respondent:	P A Botha (with him Y Isaacs) Instructed by: Cape Town Justice Centre Bloemfontein Justice Centre
For intervening party:	M R Madlanga SC (with him V Ngalwana and N Nharmuravate). Instructed by: State Attorney, Johannesburg and Bloemfontein.
For first *Amicus Curiae*	S Budlender Instructed by: Legal Resources Centre, Cape Town Locally represented by: UFS Law Clinic, Bloemfontein.
For second *Amicus Curiae*	M Norton (with her S Cowen) Instructed by: Women's Legal Centre Trust Locally represented by: Webbers, Bloemfontein