REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A134/08

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE Appellant

and

ARNOLD PRINS Respondent

JUDGMENT DELIVERED ON 11 MAY 2012

BLIGNAULT J:

Introduction

[1] Mr Arnold Prins ("respondent") was indicted in the regional court at Riversdale on a charge of contravening the provisions of section 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ("the Sexual Offences Act") on 19 September 2009 by touching the breasts and private parts of the complainant without her consent.

[2] Section 5(1) of the Sexual Offences Act reads as follows:

> ***"5 Sexual assault***
>
> *(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."*

[3] Prior to the commencement of the trial respondent objected to the charge sheet in terms of section 85 of the Criminal Procedure Act 51 of 1977. It was contended on his behalf that the charge does not disclose an offence as section 5(1) of the Sexual Offences Act does not contain any penalty for the alleged offence.

[4] The regional magistrate upheld respondent's objection and quashed the charge.

[5] The Director of Public Prosecutions, Western Cape ("appellant") thereupon appealed to this court against the decision of the regional magistrate. A full court was constituted to hear the appeal.

[6] Mr L J Badenhorst appeared on behalf of appellant at the hearing of the appeal. Mr P A Botha, assisted by Ms Y Isaacs, appeared on behalf of respondent. The court is indebted to counsel for their helpful submissions.

[7] Mr Botha's principal argument was based on the legality principle in criminal law expressed in the maxim *nulla poena sine lege* (no punishment without a law). The principle is to the effect that an accused can only be punished in accordance with a fixed predetermined law. Before discussing this principle it is, however, necessary to look at certain relevant provisions of the Sexual Offences Act.

The Sexual Offences Act

[8) The Sexual Offences Act came into operation on 16 December 2007. In terms of section 68(1) thereof it repealed, *inter alia, "the common law relating to the crimes of rape, indecent assault, incest, bestiality and violation of a corpse, insofar as it relates to the commission of a sexual act with a corpse".*

[9] The Sexual Offences Act contains a preamble and an objects clause. The thrust of the objects clause is contained in the following parts of section 2:

> ***"2 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;..."

[10] Chapter 2 of the Sexual Offences Act is headed "*Sexual Offences".* It comprises sixteen (17) such offences, including the offence described in section 5(1). Typical examples of these offences are *"rape"* as described in section 3, *"compelled rape" as described* in section 4, "*sexual assault"* as described in section 5, *"compelled sexual assault".* as described in section 6 and *"compelled self-sexual assault"* as described in section 7. I quote these sections hereunder:

"3 Rape

Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.

4 Compelled rape

Any person ('A') who unlawfully and intentionally compels a third person ('C'), without the consent of C, to commit an act of sexual penetration

with a complainant ('B'), without the consent of B, is guilty of the offence of compelled rape.

Sexual assault, compelled sexual assault and compelled self-sexual assault (ss 5-7)

5 Sexual assault

(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.

(2) A person ('A') who unlawfully and intentionally inspires the belief in a complainant ('B') that B will be sexually violated, is guilty of the offence of sexual assault.

6 Compelled sexual assault

A person ('A') who unlawfully and intentionally compels a third person ('C'), without the consent of C, to commit an act of sexual violation with a complainant ('B'), without the consent of B, is guilty of the offence of compelled sexual assault.

7 Compelled self-sexual assault

A person ('A') who unlawfully and intentionally compels a complainant ('B'), without the consent of B, to-

(a) engage in-

(i) masturbation;

(ii) any form of arousal or stimulation of a sexual nature of the female breasts; or

(iii) sexually suggestive or lewd acts,

with B himself or herself;

(b) engage in any act which has or may have the effect of sexually arousing or sexually degrading B; or

(c) cause B to penetrate in any manner whatsoever his or her own genital organs or anus,

is guilty of the offence of compelled self-sexual assault.

[11] Chapter 3 of the Sexual Offences Act is headed "*Sexual Offences against Children*". It comprises eight (8) such offences, for example *"Consensual sexual acts with certain children"* and *"Sexual exploitation and sexual grooming of children"*. Chapter 4 of the Sexual Offences Act is headed "*Sexual Offences against persons who are mentally disabled*". It comprises four (4) such offences, for example *"Sexual exploitation and sexual grooming of persons who are mentally disabled"*.

[12] A remarkable feature of the 29 sexual offences described in chapters 2, 3 and 4 of the Sexual Offences Act is that not one of them contains any penalty clause. The six examples of these offences, quoted above, are in this regard typical of all of them. Only the offence of rape, described in section 3 of the Sexual Offences Act, can be distinguished from the other offences as penalties for it is dealt with in section 51(2) of the Criminal Law Amendment Act 105 of 1997.

[13] By contrast there are numerous provisions in the Sexual Offences Act that create offences which do contain typical penalty clauses. Section 38, for example, reads as follows:

> ***"38 Offences and penalties***
>
> *(1) (a) Any person who, with malicious intent lays a charge with the South African Police Service in respect of an alleged sexual offence and makes an application in terms of section 30 (1), with the intention of ascertaining the HIV status of any person, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding three years.*
>
> *(b) Any person who with malicious intent or who in a grossly negligent manner discloses the results of any HIV tests in contravention of section 37, is guilty of an offence and is liable to a fine or to imprisonment for a period not exceeding three years.*
>
> *... ...*
>
> *(2) An alleged offender who, in any manner whatsoever, fails or refuses to comply with or avoids compliance with, or deliberately frustrates any attempt to serve on himself or herself, an order of court that he or she be tested for HIV, is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding three years."*

[14] Sections 45, 46, 47 and 48 of the Sexual Offences Act impose certain obligations upon employers and employees with respect to the National Register for Sex Offenders established in terms of the

provisions of the Sexual Offences Act. Sub-section (3) in each case contains a similar penalty clause save that the period of imprisonment is seven years. Sections 48 (dealing with licence applications) and 48 which create offences in respect of fostering, kinship care-giving, temporary safe care-giving, adoption of children or curatorship also contain typical penalty clauses. Sections 50, 52 and 54 likewise contain penalty clauses.

[15] Section 55 of the Sexual Offences Act can be described as a hybrid provision. It reads as follows:

> ***"55 Attempt, conspiracy, incitement or inducing another person to commit sexual offence***
>
> *Any person who-*
>
> *(a) attempts;*
>
> *(b) conspires with any other person; or*
>
> *(c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,*
>
> *to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."*

The *nulla poena sine lege* principle

[16] The *nulla poena sine lege* principle, with its concomitant, *nullum crimen sine lege* (no crime without a law), constitute essential elements of the doctrine of legality in criminal law. The *nulla poena sine lege* principle has been described in Burchell *Principles of Criminal Law* 3rd ed (2005) 99 as follows:

> *"Punishment is an integral part of the concept of a crime. Without the liability to punishment there would be no distinction between penal and non-penal laws. Thus it follows that 'to render any act criminal in our law, there must be some punishment affixed to the commission of the act and where no law exists affixing such punishment there is no crime in law."*

[17] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) Chaskalson P, Goldstone J and O'Regan J (in a joint judgment) described the nature and effect of the principle of legality in South African law. See the following passages in their judgment:

> *"[56] These provisions imply that a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood*

to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions.

... ...

[58] It seems central to the conception of our constitutional order 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. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality."

[18] In support of these statements regarding legality, the justices referred, *inter alia,* to the following passage in Dicey *Introduction to the Study of the Law of the Constitution* 10th ed 193, in which he formulated what he described as the second of three *"distinct though kindred conceptions"* of the rule of law:

"We mean in the second place, when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."

[19] Dicey's first conception of the rule of was formulated as follows in the same work, 8th edition 1938:

> *"We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law in contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."*

[20] Prof A S Mathews in *The Rule of Law – A Reassesment* in *Fiat Justilia Essays in Memory of Olivier Deneys Schreiner* (1983) endorsed Dicey's propositions on legality. In a discussion of the manner in which legality secures justice in the field of civil liberties, he said, *inter alia,* the following:

> *"Legality requires that the qualifications or limitations on the basic freedoms should be general, prospective, open and clear. Expressed differently, restrictions on liberty that are over-broad, vague or discriminatory will violate the legality principle and facilitate the erosion of civil liberties. Where the restrictions are imposed by the criminal law, legality is expressed in the maxim nullum crimen sine lege; but the principle of a narrow and precise definition of legal inroads into freedom is equally applicable when they are imposed outside the criminal law by executive action or in terms of private law. Freedom through legality means, in a nutshell, that the law's constraints will be narrow and precise".*

[21] The existence in our law of the *nulla poena sine lege* principle was endorsed in the judgment of Ackermann J in *S v Von Molendorff and*

Another 1987 (1) SA 135 (T) at 169 C-J. In *S v Malgas* 2001 (2) SA 1222 (SCA) para 2 Marais JA described it thus:

> *"... ...Parliament is obviously empowered to create new offences and abolish old ones (whether they were statutorily created or originated in the common law) and to provide for the penalties courts may impose.*
>
> *... ... ...*
>
> *.No court exercising criminal jurisdiction in South Africa could convincingly claim to be the sole constitutional repository of power to do such things. Indeed, the courts have no inherent power to do any such thing. They cannot create new crimes. Nor can they invent a new kind of penalty such as, for example, physical detention under lock and key at some place other than a prison."*

[22] The *nulla poena sine lege* principle was reaffirmed in the judgment of Ackermann J (this time in the Constitutional Court) in *S v Dodo* 2001 (3) SA 382 (CC) para [13]:

> *"... the 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. This principle was in fact endorsed in Malgas. Even the exercise of the Court's 'normative judgment' [S v Dzukuda and Others; S v Tshilo 2000 (4) SA 1078 (CC)] in determining the nature and severity of the sentence within the options permitted by law has to be judicially exercised; it is not unfettered. This was and is true of all sentencing, not merely in the case of the most severe sentences. Statutes abound which limit court powers, even those of a High Court, to impose sentences relating to, for*

example, the extent of the punishment, the circumstances under which it may be imposed or when execution thereof may be suspended."

[23] In support of the affirmation of the *nulla poena sine lege* principle Ackermann J referred, *inter alia,* to De Wet and Swanepoel *Die Suid-Afrikaanse Strafreg* 4th ed 44 - 47. This work contains a full discussion of the *nullum crimen sine lege* and *nulla crimen sine lege* principles. The authors state, *inter alia,* that it is generally accepted in Western European countries with their codified legal systems that no act is punishable unless it is contained in a law. This statement is supported by an impressive array of authorities.

[24] The *nulla poena sine lege* principle is applied in other countries. In Emmerson et al *Human Rights and Criminal Justice* 2nd edition (2007) para 10.06 it is said that the principle is embedded in English law. The authors quote, *inter alia,* the following passage in Professor Glanville Williams' work *Criminal Law The General Part* second edition (1961) 575:

"'Englishmen are ruled by the law, and by the law alone', wrote Dicey. 'A man may with us be punished for breach of law, but he can be punished for nothing else'. In its Latin dress of nullum crimen sine lege, Nulla Poena sine lege – that there must be no crime or punishment except in accordance with fixed, predetermined law – this has been regarded by most thinkers a self-evident principle of justice ever since the French Revolution. The citizen must be able to ascertain

beforehand how he stands with regard to the criminal law; otherwise to punish him for breach of that law is purposeless cruelty."

[25] The judgment of Lord Bingham in the House of Lords in *R v Rimmington* [2005] UKHL 63 para [33] contains a description of the development and application of the principle in the English common law. He summarised the position as follows, in para 33:

> *"33 There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done. If the ambit of a common law offence is to be enlarged, it "must be done step by step on a case by case basis and not with one large leap": R v Clark (Mark) [2003] EWCA Crim 991, [2003] 2 Cr App R 363, para 13."*

[26] In *Uttley, R (on the application of) v Secretary of State for the Home Department* [2004] UKHL 38 (30 July 2004) Lord Rodger, in para [39], provided a short history of the development of the *nulla poena sine lege* principle:

> *"These and similar provisions embody a principle of comparatively modern origin: there can be no room for it in legal systems which do not use statutes to prescribe a particular punishment or range of punishments for individual offences, but rely instead on the court to choose the appropriate punishment for any given offender. That was once the case with most legal systems. Therefore, although traces of*

the doctrine can be found in the writings of Bartolus de Saxoferrato in the 14th century (Commentaria ad digestum vetus, de iustitia et iure, 1.9.49 - 51), it really came to prominence only towards the end of the 18th century when developments in constitutional thinking led to the idea that crimes and their punishments should be regulated by statutes passed by the legislature. Article 8 of the French Declaration of the Rights of Man 1791 famously proclaimed that "nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit et légalement appliquée." Ten years later, in his Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts, p 20, para 24, von Feuerbach gave the principle its familiar and enduring Latin form, nulla poena sine lege. From these beginnings the principle came to be generally recognised and eventually to take its place in many constitutions, as well as, for example, in article 7(1) of the European Convention on Human Rights and article 15 of the International Covenant on Civil and Political Rights."

[27] In *R v Rimmington supra* para 34 Lord Bingham also summarised the application of the *nulla poena sine lege* principle in the case law of the European Court of Human Rights with respect to the European Convention of Human Rights ("the Convention"):

> *"34 These common law principles are entirely consistent with article 7(1) of the European Convention, which provides:*
>
> *'No punishment without law*
>
> *(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier*

penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

The European Court has repeatedly considered the effect of this article, as also the reference in article 8(2) to "in accordance with the law" and that in article 10(2) to "prescribed by law".

35 The effect of the Strasbourg jurisprudence on this topic has been clear and consistent. The starting point is the old rule nullum crimen, nulla poena sine lege (Kokkinakis v Greece (1993) 17 EHRR 397, para 52; SW and CR v United Kingdom (1995) 21 EHRR 363, para 35/33): only the law can define a crime and prescribe a penalty. An offence must be clearly defined in law (SW and CR v United Kingdom), and a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, the consequences which a given course of conduct may entail (Sunday Times v United Kingdom (1979) 2 EHRR 245, para 49; G v Federal Republic of Germany (1989) 60 DR 256, 261, para 1; SW and CR v United Kingdom, para 34/32).

... ...

Article 7 precludes the punishment of acts not previously punishable, and existing offences may not be extended to cover facts which did not previously constitute a criminal offence (ibid).'"

[28] The principles summarised by Lord Bingham are consistently applied in decisions of the European Court of Human Rights. See, for example, *Scoppola v Italy (No 2)* [2009] ECHR 1297 paras [92] and [93].

"92. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see S W v the United Kingdom and C R v the United Kingdom, 22 November 1995, para 34 and 32 respectively, Series A nos 335-B and 335-C, and Kafkaris, cited above, para 137).

93. Article 7 para 1 of the Convention goes beyond prohibition of the retrospective application of criminal law to the detriment of the accused. It also sets forth, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege). While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see, among other authorities, Coëme and Others v Belgium, nos. 32492/96, 32547/96 32548/96, 33209/96 and 33210,96, para 145, ECHR 2000 VII)."

[29] In the matter of *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* [1990] 1 S.C.R. 1123, a judgment of the Supreme Court of Canada, Lamer J quoted from two decisions of the Supreme Court of the United States and then said the following:

"The principles expressed in these two citations are not new to our law. In fact they are based on the ancient Latin maxim nullum crimen sine lege, nulla poena sine lege -- that there can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive. The rationale underlying this principle is clear. It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards (see Professor L.Tribe American Constitutional Law (2nd ed. 1988), at p. 1033). This is especially important in the criminal law, where citizens are potentially liable to a deprivation of liberty if their conduct is in conflict with the law."

[30] The *nulla poena sine lege* principle has also been applied by the High Court of Australia. See *Polyukhovich v The Commonwealth of Australia and Another* [1991] HCA 32 para 103:

"103. I do not accept the submission of the Commonwealth in the absolute terms in which it was proffered. In legislation, judicial decisions and statements of principles, both of municipal and international law, there has emerged a general abhorrence of retroactive criminal law. The notion that there should be no crime or punishment, except in accordance with law, was recognized as early as 1651, when Hobbes wrote:

> *'No law, made after a fact done, can make it a crime ...*
> *For before the law, there is no transgression of the law':*

Leviathan, (1651), Chs.27-28, quoted in Glanville Williams, Criminal Law: The General Part, 2nd ed. (1961) (hereafter "Williams"), p 580.

[31] I conclude, therefore, that the *nulla poena sine lege* principle, as an integral element of the legality doctrine, is firmly established as part of the South African legal system.

An implied provision of the Constitution?

[32] I have thus far dealt with *nulla poena sine lege* as a principle of the common law. I now turn to the provisions of the Constitution of the Republic of South Africa 1996 ("the Constitution"). In *Fedsure* the justices held that "*the principle of legality is implied within the terms of the interim Constitution*". It seems to me that there is no distinction in principle to be drawn in this regard between Dicey's second conception of legality that was under consideration in that case and his first conception of legality which is reflected in the *nulla poena sine lege* principle.

[33] The rule of law is one of the founding values of the Constitution. Section 1(c) thereof reads as follows:

"1 Republic of South Africa

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

[34] I agree in this regard with the views expressed by Burchell *Principles of Criminal Law* 3rd edition (2005) 106:

"The principle of legality is the juristic kernel of the Rule of Law in the context of the criminal law. The founding provisions of the Constitution of the Republic of South Africa, 1996, refer to the 'rule of law' and so any aspects of the principle of legality not specifically referred to in the Constitution could be read into the Constitution by an interpretation of the ambit of the Rule of Law."

[35] The provisions of sub-sections 35(3)(l) and (n) of the Constitution also support an interpretation that the *nulla poena sine lege* principle is an implied provision of the Constitution. They 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;

... ...

(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;"

[36] The provisions of sub-sections 35(3)(l) and 35(3)(n) of the Constitution, read together, are similar to those of Article 7(1) of the Convention. According to the interpretation of Article 7(1) by the European Court of Human Rights, it does not only prohibit the retrospective application of the offence and the punishment. It also sets forth the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*).

[37] In my view sub-sections 35(3)(l) and 35(3)(n) of the Constitution must be interpreted in the same manner. This interpretation follows from a literal application of the words used. As to sub-section 35(3)(l): A statute which does not describe a crime would not be *"an offence under either national or international law at the time it was committed"*. The

principle *nullum crimen sine lege* would therefore apply, independently of any question of retrospectity.

[38] Sub-section 35(3)(n) of the Constitution only refers to a conviction, *crimen,* and not to punishment, *poena.* This sub-section, however, requires that a comparison be made between the *"prescribed punishment"* at the time that the offence was committed and the *"prescribed punishment"* at the time of sentencing. On a proper interpretation of the concept *"prescribed punishment"* it means, in my view, *prescribed by law.* The application of the sub-section thus presupposes that a punishment must be *prescribed by law* on both occasions. If a punishment is not prescribed by law, as in the present case, this provision would, to the detriment of the accused, not be capable of implementation.

[39] I am accordingly of view the *nulla poena sine lege* principle should be regarded as an implied provision of the Constitution.

Submissions on behalf of appellant

[40] Mr Badenhorst, on behalf of appellant, relied strongly on the judgment of Mason J in *R v Forlee* 1917 TPD 52. The appellant in that case had been indicted in terms of a statute which forbade the selling

and possession of opium. His main ground of appeal was that the statute in question contained no penalty clause. Mason J referred to a number of Roman Dutch writers and expressed the view that where an act is definitely prohibited in a manner which makes it clear that the legislature was not exhorting or advising, then it is punishable at the discretion of the judge where the law has not itself attached any penalty. He stated that the same principles had been followed in England as well as in three decisions of the Cape and Natal courts, namely *R v Berg* 1 Searle 93, *R v Lloyd* 1904 25 NLR 59 and *R v Mhlongo* 1910 31 NLR 1. Mason J concluded that as the act in question had been expressly prohibited in the public interest and with the evident intention of constituting an offence, it was punishable at the discretion of the judge.

[41] *R v Forlee* was followed in this court in *R v Langley* 1931 CPD 31 and *R v Baraitser* 1931 CPD 418 but these decisions did not refer to any new principle or authority and they did not take the matter any further. Neither judgment discussed or referred to the *nulla poena sine lege* principle. The issue was also referred to in R v Zinn 1946 AD 346 at 354-355 but the court did not find it necessary to decide it.

[42] In my view *R v Forlee* cannot be regarded as good law. De Wet en Swanepoel *op cit* 46-47 subjected the judgment to trenchant criticism. They pointed out that it relied on outdated opinions of Roman Dutch

writers whilst ignoring the later and more enlightened views of Van der Linden. In *S v Francis* 1994 (1) SACR 350 (C) at 355 d – g Ackermann J referred to some the criticism of Forlee. He said that in his opinion there was considerable justification for such criticism. For purposes of that decision, however, he found that it was not necessary to take the matter further.

[43] *R v Forlee,* I may add, ignored the *nulla poena sine lege* principle or the considerations underlying it. The notion that punishment should in each case be left at the discretion of the judge is indeed the antithesis of the *nulla poena sine lege* principle. In my view, moreover, such the decision cannot be justified in terms of any recognised rule of the interpretation of statutes.

[44] Apart from *R v Forlee,* Mr Badenhorst argued that the law is correctly stated in the following passage in Milton and Cowling *South African Criminal Law and Procedure* Volume III Statutory Offences 2nd edition para 1-20:

> *"It is fundamental to any civilized system of criminal law that punishment is not inflicted except in respect of a contravention of the law previously defined as a crime (nulla poena sine lege). Conversely, the doctrine of legality requires that in criminalizing conduct the legislature should specify the penalty for the offence (nulla crimen sine poena). This principle is, however, by no means universally observed. It is true that*

more often than not the legislature in criminalizing conduct will specify the penalty attached to a contravention of the enactment. However, failure so to specify is not regarded as a serious flaw in the legislation. In such a case, it is presumed that the determination of the appropriate punishment has been left to the courts. To the extent that the courts habitually exercise such a discretion in the punishment of common-law crimes, this practice is not objectionable."

[45] In my view this passage is not convincing. It is firstly a *contradictio in terminis* to describe a principle as *"fundamental to any civilized system of criminal law"* and then to say that non-compliance with that principle is not a *"serious flaw"*. Apart from *R v Forlee,* the authors do not cite any judgment in support of their statement nor do they provide any analysis of the *nulla poena sine lege* principle. It seems to me, upon analysis, that the views expressed in this passage are simply the result of an unsuccessful attempt to reconcile the *nulla poena sine lege* principle with *R v Forlee.*

[46] Appellant's counsel also relied on the judgment in *S v Booi* [2010] ZAFSHC 91 (12 August 2010). This matter came before two judges in the Free State High Court by way of an automatic review in terms of section 302 of the Criminal Procedure Act 51 of 1977. The accused had been convicted of contravening section 15 of the Sexual Offences Act ie consensual sexual penetration with a child. The judges invited and received a written response from the Director of Public Prosecutions in

regard to the effect of the absence of a penalty clause in the section. In the judgment only brief mention was made of the *nulla poena sine lege* principle without any discussion thereof. After referring to the above-quoted passage in Milton and Cowling and to *R v Forlee,* the judges decided that the sentence fell within the discretion of the magistrate.

[47] I do not, with respect, find the judgment in *S v Booi* persuasive. It should be noted first that no-one was invited to argue this issue, which is, on any version, a difficult one, on behalf of the accused. The judgment, furthermore, refers to *R v Forlee* with approval but it ignores the subsequent criticism of it. It contains no analysis of the *nulla poena sine lege* principle or any reference to Ackermann's judgment in *S v Dodo.*

[48] Mr Badenhorst also placed reliance upon two rules of the interpretation of statutes, namely (i) the avoidance of absurd results (cf *S and Another v Regional Magistrate: Venter and Another* 2011 (2) SACR 274 (CC) and (ii) the presumption that the legislature acts rationally (cf *Principal Immigration Officer v Bhula* 1931 AD 337). Applying these two rules, he submitted, the court should adopt an interpretation of section 5(1) of the Sexual Offences Act that would avoid the unfortunate consequences if the section cannot be enforced.

[49] It seems to me, however, that these rules of interpretation do not assist appellant. They are in the first place presumptions and would only apply where a particular word or phrase in a statute is ambiguous. See *Adampol (Pty) Ltd v Administrator, Tvl* 1989 (3) SA 800 (A) 809F-H. The presumptions cannot be used to rewrite or complete any piece of legislation. It is, secondly, not correct to judge questions of absurdity or rationality in the light of the possible consequences of a decision that section 5(1) of the Sexual Offences Act cannot be enforced at this stage. The question is whether the section, as it was promulgated and still stands, discloses a defence or not.

[50] Mr Badenhorst argued that the legislature intended to leave the question of punishment at the discretion of the court. Mr Botha, for respondent, asked rhetorically: If that were the intention, why did the legislature not say so? I agree. Mr Badenhorst, furthermore, did not cite any authority (apart from *R v Forlee)* to support such a radical departure from the words of the statute. The concept of conferring such a discretion on the court would also contradict and totally undermine the *nulla poena sine lege* principle.

Was the omission of a penalty clause a mistake?

[51] The question whether the omission of a penalty clause in section 5(1) of the Sexual Offences Act was not perhaps a mistake, was raised in argument. In that event it might be suggested that the *casus omissus* rule should be applied. A *casus omissus* can be described as a *contingency* not provided for by the legislature or, put differently, a gap in the statute that has not been filled.

[52] There is a clear pattern in the Sexual Offences Act, namely that all the sections creating sexual offences are without penalty clauses whilst the sections creating less serious offences do contain penalty clauses. The only exception to the pattern is to be found in section 55 of the Sexual Offences Act, quoted in para [15] above, which deals with the position of accomplices and the like with respect to sexual offences. Section 55 does contain a penalty clause but it is meaningless because it refers to *"the punishment to which a person convicted of actually committing that offence would be liable."*

[53] This pattern in the Sexual Offences Act creates an almost irrebuttable inference that the omission of penalty clauses with respect to the sexual offences was intentional. In that event, however, it must be accepted that the words of the statute reflected the true intention of the

legislature. As such they fundamentally contradict and undermine the *nulla poena sine lege* principle.

[54] A possible alternative solution is that the *casu omissus* rule may find application. The requirements for the application of the rule are strict. I dealt with them in my judgment in *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 (1) SA 374 (WCC). It appears from this judgment and the authorities mentioned therein that the rule can only be applied if there is certainty as to the real intention of the legislature. Its intention, it has been said, must be indisputable. In the light of the authorities mentioned in *S v Tieties* 1990 (2) SA 461 (AD) 463 E-J, I summarised the position as follows:

> *"[22] It seems to me therefore that it would be permissible to provide for a casus omissus if the intention of the legislature is clear. If that intention is only the subject of surmise, speculation, expectation or even probability, this method of interpretation is not allowed."*

On the issue of a *casus omissus*, I may mention, the *Dunga* judgment was referred to with approval in *Collett v Firstrand Bank Ltd* 2011 (4) SA 508 (SCA) para [17].

[55] In the present case there is, in my view, two reasons why the *casus omissus* rule can not be applied. In the first place it is an

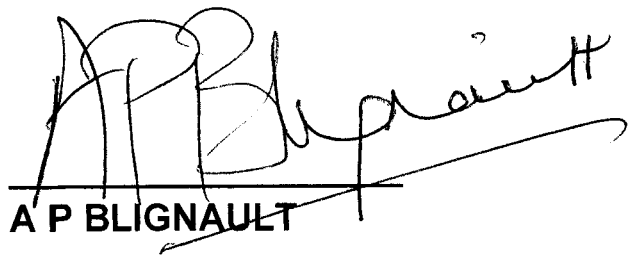
essential element of the crime itself that it is required to be filled in. The reason for the *nulla poena sine lege* principle is to inform the citizens of the consequences of any proposed course of conduct and to enable the courts to avoid the imposition of arbitrary penalties. The filling in of a word or phrase in section 5(1) of the Sexual Offences Act in order to describe a punishment would be totally inconsistent with such a reason.

[56] The second reason why the *casus omissus* rule does not apply, is that there is no certainty as to what the legislature intended if the omission had been a mistake. There is not even a probability. It would a matter of speculation. This becomes obvious when one considers, for example, what word or phrase is required to be inserted in section 5(1) of the Sexual Offences Act, and in the other sections creating sexual offences, in order to reflect the suggested intention of the legislature. Penalties may consist of fines or imprisonment or both. Penalties may include maximum or minimum limitations and the conditions for the relaxation of both.

Conclusion

[57] I am accordingly of the view that the regional magistrate was correct in deciding that the charge against respondent did not disclose an offence.

[58] In the premises, the appeal is dismissed.



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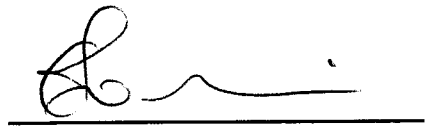

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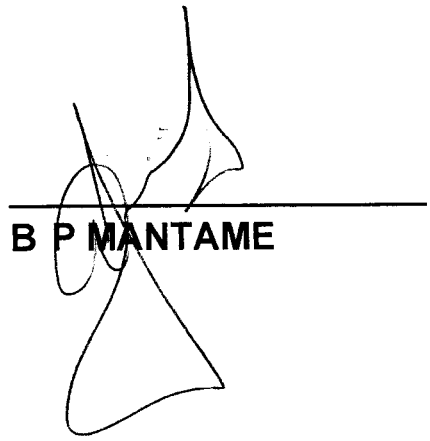

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