

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 14/2010

In the review between:-

THE STATE

versus

JOSEPH BOOI

CORAM: HANCKE, AJP *et* CILLIÉ, J

JUDGMENT BY: CILLIÉ, J

DELIVERED ON: 12 AUGUST 2010

JUDGMENT

[1] The accused in this matter was convicted of a contravention of section 15 of Act 32 of 2007 Criminal Law (Sexual Offences and Related Matters) Amendment Act in the Regional Court and sentenced to nine (9) years imprisonment. The Regional Court President sent the matter on review with the following remark:

“The Magistrate informs me that she imposed the sentence of Nine (09) years imprisonment under the mistaken belief that the

offence was one that fell within the ambit of the minimum sentences act (Act 105 of 1997). She has subsequently realized that this is not so and has informed me that had it not been for the mistaken belief that the Minimum Sentence Act (Act 105 of 1997) applied she would have imposed a lesser sentence.

Kindly have the matter placed before a reviewing Judge to have the sentence set aside and the matter remitted to the Magistrate to consider sentence afresh.”

He requests that the sentence be set aside and the matter be remitted to the trial magistrate to impose sentence afresh.

- [2] When the matter came before me on review, the fact that Act 32 of 2007, although declaring conduct of the nature set out in section 15 an offence, does not provide for any penalty for a contravention of that offence, caused me to direct the following enquiry to the Office of The Director of Public Prosecutions: Free State:

“The accused was ultimately convicted of contravening section 15 of Act 32 of 2007 i.e. consensual sexual penetration with a child.

However I fail to find any penalty clause for this contravention in the act.

Can you help? And if there is no penalty provided in the Act for this offence what's the result there-of?

Your comments would be appreciated.”

I am indebted to Mr. Chalale of that office for the very helpful response received from him.

- [3] The question is whether the absence of a penalty clause renders the criminalization clause (section 15) ineffective on the basis of the maxim *nulla poena sine lege*. This *maxim* requires that in criminalizing conduct the legislature should specify the penalty for that offence.

Milton and Cowling in the well-known work **SA Criminal Law and Procedure**, 2nd Edition, Vol. 3 (Statutory Offences) par. 1 – 20 however points out that:

“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.”

See also Snyman: **Criminal Law**, 5th Edition, p. 48;

Jonathan Burchell: **Principles of Criminal Law**, 3rd Edition,
p. 99.

The authority relied on by the learned authors put it beyond
doubt that:

“Where the act is definitely prohibited in a manner which renders
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.”

See **REX v FORLEE** 1917 TPD 52.

- [4] It is to be emphasised that the position set out above is not
to be equated to a failure by the legislature to criminalize
conduct. It is generally accepted that if the legislature
intends to criminalize conduct, it must say so in express
words – but creating crimes without declaring that the act
specified is in itself an offence, by providing that such act
shall entail particular punishment, is in order. See **REX v**

FREDERIKS 1923 TPD 350 at 353.

- [5] It is of some importance to note that section 15 of Act 32 of 2007 replaces with minor amendments section 14 of Act 23 of 1957 (it broadened the offence to be gender non-specific). Act 23 of 1957 does in fact provide for a penalty for such conduct. The legislature clearly characterised the conduct set out in section 15 of the new Act as a criminal offence worthy of punishment and it would fly in the face of all common sense to conclude that the absence of a penal provision in the Act, should be interpreted as that no valid offence has been created by the new Act.
- [6] It therefore follows that the sentence for the offence of which the accused was convicted, falls within the discretion of the magistrate. As pointed out *supra* the magistrate laboured under the misapprehension that a minimum penalty is prescribed. The request that the sentence imposed be set aside and the matter remitted to the magistrate to impose sentence afresh, must therefore be acceded to. However, in considering an appropriate sentence the magistrate may very well heed the following remarks of Mr. Hiemstra, Deputy

Director of Public Prosecutions: Free State, which accompanied the response of Mr. Chalale:

“Although we were not asked to comment specifically on what an appropriate sentence might be, I may add that the maximum sentence provided for in Section 22(f) of Act 23 of 1957 would still serve as a useful guide as to what the legislator viewed as an appropriate sentence for the worst kind scenario for this particular offence. It should also be borne in mind that the offence is an ‘artificial’ one imposed on youthful persons by their supreme guardian, aimed at their protection despite the fact that there was consensual intercourse. The ‘victim’ in these matters is always a **willing partner** and is rarely if ever the complainant. This places the issue of sentence immediately in an entirely different category than those reserved for sexual offences in which the complainant was an **unwilling victim**. There is nothing in the record to suggest that the instant matter is one which deserves the maximum sentence. The magistrate’s judgment is unfortunately unhelpful in that, although it finds in favour of the accused that intercourse was consensual, no clear findings of fact are made. It must be assumed that the main points of the accused’s version have been accepted, which would include a measure of initiative taken by the complainant, as well as a fair degree of intoxication of both complainant and accused. On those assumptions a sentence of 3 years

imprisonment of which a portion may be suspended would appear to be indicated.”

I agree herewith.

The following order is made:

The sentence imposed by the magistrate is set aside and the matter is remitted to the magistrate to impose sentence afresh.

C.B. CILLIÉ, J

I agree.

S.P.B. HANCKE, AJP

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