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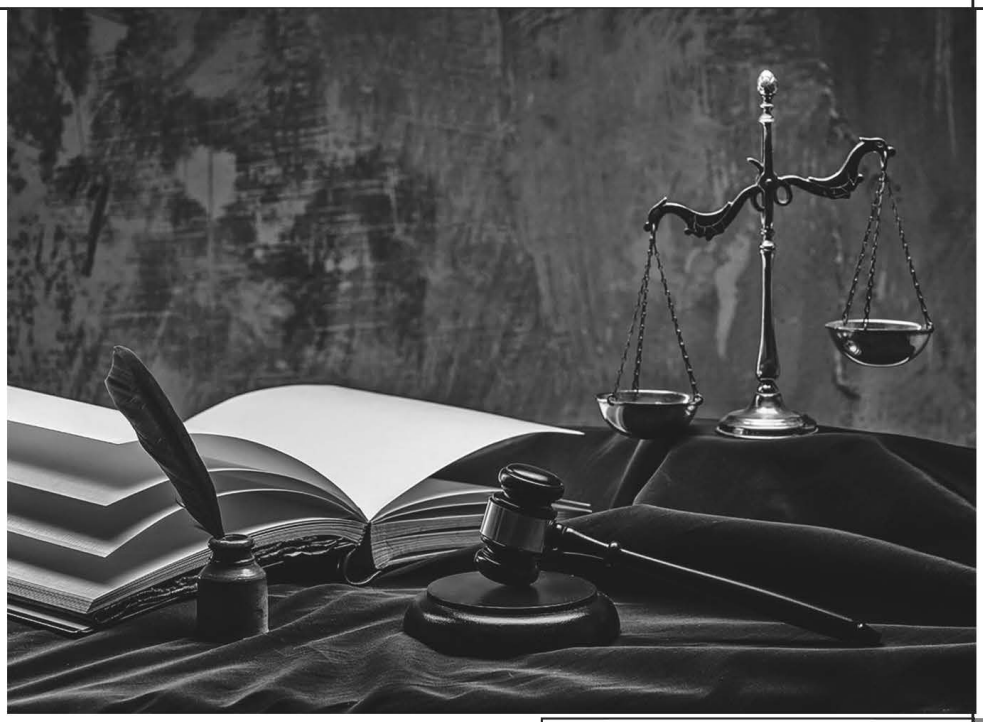

READER FOR CRW2602

Case Law

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CRIMINAL LAW CASEBOOK

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CASE 1

S v MASIYA 2007 (2) SACR 435 (CC)

FANUEL SITAKENI MASIYA	Applicant
versus	
DIRECTOR OF PUBLIC PROSECUTIONS (PRETORIA)	First Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
and	
CENTRE FOR APPLIED LEGAL STUDIES	First Amicus Curiae
TSHWARANANG LEGAL ADVOCACY CENTRE	Second Amicus Curiae
Heard on:	9 November 2006
Decided on:	10 May 2007

JUDGMENT

NKABINDE J:

[1] This case is about the constitutional validity of the common law definition of rape to the extent that it excludes anal penetration and is gender-specific. The case concerns the manner in which the definition of rape has been understood, developed and interpreted in South African law. The definition has been debated by the courts, Legislature and civil society over the years. Essentially, this matter comes before this Court on two bases. First, confirmation proceedings in terms of section 172(2)(a)[1] of the Constitution. Second, an application for leave to appeal[2] against the whole of the judgment and order of the Pretoria High Court[3] in which that Court confirmed the applicant's conviction by the Regional Court.[4]

[2] The full terms of the order against which leave to appeal is sought read as follows:

> ''1. The common law definition of rape is declared to be unconstitutional as it currently stands, for the reasons given by the learned Magistrate in his judgment and for the further reasons set out in this judgment.
>
> 2. The definition of rape is extended to include acts of non-consensual sexual penetration of the male penis into the vagina or anus of another person.
>
> 3. The provisions of Act 105 of 1997 and its schedules and Section 261(1)(e) and (f) and (2)(c) of the Criminal Procedure Act 51 of 1977 and the schedules to the latter Act relating to bail

1 Section 172(2)(a) provides: ''The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.''

See also section 167(5) of the Constitution which provides: ''The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.''

2 In terms of section 172(2)(d) of the Constitution. The section reads: ''Any person . . . with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.''

3 *S v Masiya* 2006 (11) BCLR 1377 (T); 2006 (2) SACR 357 (T).

4 *S v Masiya* case no SHG 94/04 11 July 2005, unreported.

provisions are declared to be invalid and are inconsistent with the Constitution to the extent that they are gender specific.

4. Where the provisions referred to in (3) above are gender specific there be a reading in of 'person' wherever reference is made to a specific gender.

5. The proceedings in the Court *a quo* are determined to be in accordance with justice in terms of the provisions of Section 52 of Act 105/1997.

6. Sentencing of the accused is postponed until the Constitutional Court has made a determination on the order of Constitutional invalidity referred to in (3) of this order.''

Background

[5] The facts appear from the judgment of the High Court. I restate only the relevant facts to make the discussion in this judgment comprehensible.

[6] Mr Masiya, 44 years of age, was initially brought before the District Court at Sabie on a charge of rape. The state alleged that on or about 16 March 2004 at or near Sabie he wrongfully and unlawfully had sexual intercourse with a nine-year old girl (the complainant), without her consent. The case was transferred to the Regional Court at Graskop where he was tried on that charge. At the trial Mr Masiya, represented by an attorney from the Nelspruit Justice Centre, pleaded not guilty. He elected to remain silent and did not advance a statement explaining his plea. The evidence established that the complainant was penetrated anally.

[7] Mr Masiya neither gave evidence nor called witnesses to testify. The state applied that he be convicted of indecent assault, a competent verdict on a charge of rape.[5] The defence contended that if Mr Masiya were to be found guilty he should be convicted of indecent assault.

[8] The Regional Court, of its own accord, considered whether the common law needed to be developed. The defence contended that Magistrates' Courts do not have the power to pronounce on the constitutionality of a rule of the common law. The Regional Court remarked that the court, ''albeit a creature of statute, has jurisdiction in terms of the Constitution to judge the constitutionality of a legal principle under common law and, if necessary to develop the principle so that it conforms with the constitutional values enshrined in our Constitution''.[6] The Court remarked that there is nothing in the Constitution or other legislation that precludes it from enquiring into or ruling on the constitutionality of a rule of the common law and developing it where necessary. It pointed out that sections 8(3)[7] and 39(2)[8] of the Constitution speak, respectively, of ''a court'' and ''every court, tribunal or forum''.

[9] The Regional Court remarked further that-

> ''[I]n terms of the existing common law definitions of crime, the non-consensual anal penetration of a girl (or a boy) amounts only to the (lesser) common law crime of indecent assault, and not rape, because only non-consensual vaginal sexual intercourse is regarded as rape. One's initial feelings of righteousness would however immediately rebel against such

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5 Section 261 of the CPA provides: ''(1) If the evidence on a charge of rape or attempted rape does not prove the offence of rape or, as the case may be, attempted rape, but— ...

(b) the offence of indecent assault; ...

the accused may be found guilty of the offence so proved.''

6 Above n at para 43.

7 Section 8(3) provides:

''When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—

(a) in order to give effect to a right in the Bill of Rights, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of common law to limit the right, provided that the limitation is in accordance with section 36(1).''

8 Section 39(2) provides:

''When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.''

thought. Why must the unconsensual sexual penetration of a girl (or a boy) *per anum* be regarded as less injurious, less humiliating and less serious than the unconsensual sexual penetration of a girl *per vaginam*? The distinction appears on face value to be irrational and totally senseless, because the anal orifice is no less private, no less subject to injury and abuse, and its sexual penetration no less humiliating than the vaginal orifice. It therefore appears that the common law definition of rape is not only archaic, but irrational and amounts to arbitrary discrimination with reference to which kind of sexual penetration is to be regarded as the most serious, and then only in respect of women.''[9] (Footnote omitted.)

[10] The Regional Court held that the definition should be developed to promote constitutional objectives, and that courts may develop the current definition of rape given Parliament's lengthy delay in promulgating the Criminal Law (Sexual Offences) Amendment Bill of 2003 (the 2003 Bill)[10] so as to afford society the full protection of the Constitution. The Court held that although the development would impact on Mr Masiya's fair trial rights in terms of section 35(3)(n)[11] of the Constitution those fair trial rights could be limited on the basis that—

(a) non-consensual anal penetration already constitutes an offence, namely indecent assault, and is manifestly immoral and unjust;

(b) retroactive punishment could have been foreseen by Mr Masiya;

(c) such development will be consistent with foreign law;

(d) the rights of society are weightier than those of Mr Masiya not to be convicted of and sentenced to a more serious offence;

(e) less restrictive means to achieve the purpose sought to be achieved by the extension of the definition of rape would have been for Parliament to address the lacuna with an appropriate law, but Parliament has dragged its feet; and

(f) the developed definition would become law of general application if endorsed by the High Court upon referral.

[11] The Regional Court thus extended the definition of rape to include-

> ''. . . acts of non-consensual sexual penetration of the male sexual organ into the vagina or anus of another person''.[12]

It expressly refrained from ruling on whether non-consensual oral penetration should constitute the crime of rape as that was not an issue in the proceedings. Having convicted Mr Masiya of rape in terms of the extended definition, the Regional Court stopped the proceedings and committed him to the High Court in terms of section 52[13] of the Act for the purpose of sentence.

...

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9 Above n at para 17.

10 Bill B50–2003.

11 Section 35(3)(n) provides:

> ''Every accused person has a right to a fair trial, which includes the right- .....
>
> 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''.

12 Above n at para 45.

13 Section 52 of the Act provides:

> ''(1) If a regional court, following on-
>
> *(a)* a plea of guilty; or
>
> *(b)* a plea of not guilty,
>
> has convicted an accused of an offence referred to in-
>
> (i) Part I of Schedule 2; or
>
> (ii) Part II, III or IV of Schedule 2 and the court is of the opinion that the offence concerned merits punishment in excess of the jurisdiction of a regional court in terms of section 51 (2),
>
> the court shall stop the proceedings and commit the accused for sentence as contemplated in section 51 (1) or (2), as the case may be, by a High Court having jurisdiction.

Issues

[19] The primary questions to be considered relate to-

(a) whether the current definition of rape is inconsistent with the Constitution and whether the definition needs to be developed;

(b) whether Mr Masiya is liable to be convicted in terms of the developed definition;

(c) whether the declaration of invalidity of the relevant statutory provisions should be confirmed;

(d) whether the merits of the criminal conviction should be dealt with by this Court; and

(e) appropriate relief.

....

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(2)*(a)* Where an accused is committed under subsection (1) (a) for sentence by a High Court, the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court, and the plea of guilty and any admission by the accused shall stand unless the accused satisfies the Court that such plea or such admission was incorrectly recorded.

(b) Unless the High Court in question—

(i) is satisfied that a plea of guilty or an admission by the accused which is material to his or her guilt was incorrectly recorded; or

(ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence,

the Court shall make a formal finding of guilty and sentence the accused as contemplated in section 51 (1) or (2), as the case may be.

(c) If the Court-

(i) is satisfied that a plea of guilty or any admission by the accused which is material to his or her guilt was incorrectly recorded; or

(ii) is not satisfied that the accused is guilty of the offence of which he or she has been convicted and in respect of which he or she has been committed for sentence or that he or she has no valid defence to the charge,

the Court shall enter a plea of not guilty and proceed with the trial as a summary trial in that Court: Provided that any admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted.

(d) The provisions of section 112 (3) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), shall apply with reference to the proceedings under this subsection.

(3)*(a)* Where an accused is committed under subsection (1) (b) for sentence by a High Court, the record of the proceedings in the regional court shall upon proof thereof in the High Court be received by the High Court and form part of the record of that Court.

(b) The High Court shall, after considering the record of the proceedings in the regional court, sentence the accused as contemplated in section 51 (1) or (2), as the case may be, and the judgment of the regional court shall stand for this purpose and be sufficient for the High Court to pass such sentence: Provided that if the judge is of the opinion that the proceedings are not in accordance with justice or doubt exists whether the proceedings are in accordance with justice, he or she shall, without sentencing the accused, obtain from the regional magistrate who presided at the trial a statement setting forth his or her reasons for convicting the accused.

(c) The Court in question may at any sitting thereof hear any evidence and for that purpose summon any person to appear to give evidence or to produce any document or other article.

(d) Such Court, whether or not it has heard evidence and after it has obtained and considered a statement referred to in paragraph *(b)*, may—

(i) confirm the conviction and thereupon impose a sentence as contemplated in section 51 (1) or (2), as the case may be;

(ii) alter the conviction to a conviction of another offence referred to in Schedule 2 and thereupon impose a sentence as contemplated in section 51 (1) or (2), as the case may be;

(iii) alter the conviction to a conviction of an offence other than an offence referred to in Schedule 2 and thereupon impose the sentence the Court may deem fit;

(iv) set aside the conviction;

(v) remit the case to the regional court with instruction to deal with any matter in such manner as the High Court may deem fit; or

(vi) make any such order in regard to any matter or thing connected with such person or the proceedings in regard to such person as the High Court deems likely to promote the ends of justice.''

The current law of rape

[26] In our law, rape is understood as the non-consensual penetration of a vagina by a penis. The generally accepted definition of rape, according to Heath J in *Ncanywa,*[14] is ''the (a) intentional (b) unlawful (c) sexual intercourse with a woman (d) without her consent.'' Heath J remarked that ''[t]he element of unlawfulness is based essentially on the absence of consent.''[15] The four elements in the definition of rape were echoed by Van der Merwe J in *S v Zuma*[16] in which the absence of *mens rea* was relevant.[17] Burchell and Milton state that the definition of rape is the ''the intentional unlawful sexual intercourse with a woman without her consent.''[18] Snyman prefers this definition: ''Rape consists in a male having unlawful and intentional sexual intercourse with a female without her consent.''[19] Both share an understanding of ''sexual intercourse'' as the ''penetration of the woman's vagina by the male penis''.[20]

[27] The definitions presuppose non-consensual sexual penetration of a vagina by a penis. The definition of rape is not unconstitutional in so far as it criminalises conduct that is clearly morally and socially unacceptable. In this regard it is different from the common law crime of sodomy which was declared unconstitutional by this Court[21] because it subjected people to criminal penalties for conduct which could not constitute a crime in our constitutional order. There is nothing in the current definition of rape to suggest that it is fatally flawed in a similar manner. The current definition of rape criminalises unacceptable social conduct that is in violation of constitutional rights. It ensures that the constitutional right to be free from all forms of violence, whether public or private,[22] as well as the right to dignity[23] and equality[24] are protected. Invalidating the definition because it is under-inclusive is to throw the baby out with the bath water. What is required then is for the definition to be extended instead of being eliminated so as to promote the spirit, purport and objects of the Bill of Rights.

.....

[29] The facts of the present case deal with penetration of the anus of a young girl. The issue before us then is whether the current definition of rape needs to be developed to include anal penetration within its scope. The facts do not require us to consider whether or not the definition should be extended to include non-consensual penetration of the male anus by a penis. Strong arguments were presented to us to the effect that gender-specificity in relation to rape reflected patriarchal stereotypes inconsistent with the Constitution. This Court[25] has stressed that it is not desirable that a case should be dealt with on the basis of what the facts might be rather than what they are.

[30] It can hardly be said that non-consensual anal penetration of males is less degrading, humiliating and traumatic and, to borrow the phrase by Brownmiller, ''a lesser violation of the personal private inner space, a lesser injury to mind, spirit and sense of self.''[26] That this is so does not mean that it is unconstitutional to have a definition of rape which is gender-specific. Focusing on anal penetration of females should not be seen as being disrespectful to male bodily integrity or insensitive to the trauma suffered by male victims of anal violation, especially boys of the age of the complainant in this case.

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14 Above n.

15 Id at 186A-B. See also *R v K* 1958 (3) SA 420 (A) at 423B-C and the remarks by Wessels CJ regarding the element of consent in *R v Mosago and Another* 1934 AD 32 at 34.

16 2006 (7) BCLR 790 (W) at 828E.

17 Id at 828F-G. The Court stated that: ''[t]he element of intention is vital because rape can only be committed intentionally. A principle of our criminal justice system is expressed in the maxim *actus non facit reum nisi mens sit rea* – the act is not wrongful unless the mind is guilty.''

18 Above n at 699 and 705.

19 Snyman *Criminal Law* 4 ed (Butterworths, Durban 2002) 445.

20 Id at 446. See also Burchell and Milton above n at 706.

21 *National Coalition for Gay and Lesbian Equality v The Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

22 Above n .

23 Above n .

24 Above n .

25 *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 81.

26 Albertyn et al ''Women's Freedom and Security of the Person'' in Albertyn and Bonthuys *Gender, Justice and Equality* (Juta, Cape Town 1996) Chapter 9 at 26 quoting Brownmiller *Against Our Will: Men, Women and Rape* (1975) at 378.

Extending the definition to include non-consensual penetration of the anus of the male by a penis may need to be done in a case where the facts require such a development. It needs to be said that it is not constitutionally impermissible to develop the common law of rape in this incremental way. This Court has stated that in a constitutional democracy such as ours the Legislature and not the courts has the major responsibility for law reform and the delicate balance between courts' functions and powers on one hand and those of the Legislature on the other should be recognised and respected.[27] The terrains of the courts and Legislature, Chaskalson P said in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*,[28] should be kept separate even though they may overlap. The issue of male rape is therefore a matter that will no doubt be dealt with in an appropriate fashion either by the Legislature or the courts when the circumstances make it appropriate and necessary to do so.

[31] The constitutional role of the courts in the development of the common law must be distinguished from their other role in considering whether legislative provisions are consistent with the Constitution.[29] The latter role is one of checks and balances on the power provided for in our Constitution, whereby courts are empowered to ensure that legislative provisions are constitutionally compliant. The development of the common law on the other hand is a power that has always vested in our courts. It is exercised in an incremental fashion as the facts of each case require. This incremental manner has not changed, but the Constitution in section 39(2) provides a paramount substantive consideration relevant to determining whether the common law requires development in any particular case. This does not detract from the constitutional recognition, as indicated above, that it is the Legislature that has the major responsibility for law reform. Courts must be astute to avoid the appropriation of the Legislature's role in law reform when developing the common law. The greater power given to the courts to test legislation against the Constitution should not encourage them to adopt a method of common-law development which is closer to codification than incremental, fact-driven development.

[32] Accordingly, I conclude that the definition is not inconsistent with the Constitution but needs to be adapted appropriately. The question remains whether the facts of this case require that the definition be developed so as to include anal penetration of a female.

Development of the common law

[33] The question of development of the common law was comprehensively discussed by Ackermann and Goldstone JJ in *Carmichele*[30] in which the duty of courts that is derived from sections 7, 8(1), 39(2) and 173 of the Constitution was stressed. The Court sounded a reminder to judges when developing the common law to "be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary."[31] The Court repeated with approval the remarks of Iacobucci J in *R v Salituro*,[32]—

> "Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the Judiciary to change the law. . . . In a constitutional democracy such as ours it is the Legislature and not the courts which has the major responsibility for law reform. . . . The Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."[33]

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27 *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 61.

28 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 183.

29 Cases in which this Court has decided on the validity of legislative provisions and therefore been at liberty to provide relief beyond the facts of the case include: *Mabaso v Law Society, Northern Provinces and Another* 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) and *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC).

30 Above n .

31 Id at para 36.

32 (1992) 8 CRR (2d) 173; [1991] 3 SCR 654, as cited by Kentridge AJ in *Du Plessis* above n .

33 *Carmichele* above n at para 36 citing *Du Plessis* above n at para 61.

The Court however said that ''courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights . . . whether or not the parties in any particular case request the Court to develop the common law under s 39(2).''[34] Where there is deviation from the spirit, purport and objects of the Bill of Rights, courts are obliged to develop the common law by removing the deviation.[35]

[34] The High Court emphasised the alleged inequality and discrimination engendered by the definition and the resultant inadequate and discriminatory sentences.[36] In oral argument counsel for Mr Masiya argued against the development only if the developed definition of rape were to apply to him. The DPP and amici substantially supported the judgment of the High Court and argued that the definition perpetuates gender inequality and promotes discrimination. The DPP further contended that the definition perpetuates leniency in sentencing.

....

[36] The *amici*, likewise, contended that apart from the gendered nature of the origins of the definition, the elements of the crime of rape perpetuate gender stereotypes and discrimination because they are suggestive of the fact that only males can commit the crime and only females can be raped. They argued that once it is recognised that the primary motive for rape is not sexual lust but the desire to gain power or control over another person, with sex being the violent means by which the power is exercised, the rationale for maintaining the gender distinction falls away. That might be so. However, for the reasons given above, it would not be appropriate for this Court to engage with these questions. In this respect there are three important considerations that favour restraint on the part of this Court. The first is that what is at issue is extending the definition of crime, something a Court should do only in exceptional circumstances.[37] The second is that the development would entail statutory amendments and necessitate law reform. The third is that, historically, rape has been and continues to be a crime of which females are its systematic target. It is the most reprehensible form of sexual assault constituting as it does a humiliating, degrading and brutal invasion of the dignity and the person of the survivor.[38] It is not simply an act of sexual gratification, but one of physical domination. It is an extreme and flagrant form of manifesting male supremacy over females.

[37] The Declaration on the Elimination of Violence against Women[39] specifically enjoins member States to pursue policies to eliminate violence against women. Non-consensual anal penetration of women and young girls such as the complainant in this case constitutes a form of violence against them equal in intensity and impact to that of non-consensual vaginal penetration. The object of the criminalisation of this act is to protect the dignity, sexual autonomy and privacy of women and young girls as being generally the most vulnerable group in line with the values enshrined in the Bill of Rights–a cornerstone of our democracy.

[38] The extended definition would protect the dignity of survivors, especially young girls who may not be able to differentiate between the different types of penetration. The evidence of Dr Grabe, an expert witness who testified in the High Court, that the complainant referred to a ''hole'' thinking that the anus is the only place she experiences as a ''hole'', clearly illustrates this point. Women and girls would be afforded increased protection by the extended definition. One of the social contexts of rape is the alarming high incidences of HIV-infection. Anal penetration also results in the spread of HIV.

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34 Id.

35 On the development of the common law see *S v Thebus and Another* 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at paras 28–31.

36 Above n at para 71.

37 See in this regard *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as* Amici Curiae*)* 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) at para 45. The remarks are echoed by Snyman above n at 48: ''[a] court is not free to extend the definition or field of application of a common-law crime by means of a wide interpretation of the requirements for the crime.''

38 See *S v Chapman* 1997 (3) SA 341 (A) at 344I-345B. This Court has said in *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC) at para 12 that rape, like domestic violence, is ''systemic, pervasive and overwhelmingly gender-specific . . . [and] reflects and reinforces patriarchal domination, and does so in a particularly brutal form.''.

39 United Nations General Assembly Resolution 48/104 of 1993, 20 December 1993.

[39] The consequences caused by non-consensual anal penetration might be different to those caused by non-consensual penetration of the vagina but the trauma associated with the former is just as humiliating, degrading and physically hurtful as that associated with the latter. The inclusion of penetration of the anus of a female by a penis in the definition will increase the extent to which the traditionally vulnerable and disadvantaged group will be protected by and benefit from the law. Adopting this approach would therefore harmonise the common law with the spirit, purport and objects of the Bill of Rights.

[40] One of the important considerations arising out of the question whether to develop the current definition relates to the appropriate weight that ought to be given to the 2003 Bill[40] which is a work in progress.

.....

Retrospective application of the definition

[47] Essentially, the question is whether the conviction of rape is in accordance with justice even though the definition of rape did not include non-consensual anal penetration at the time the crime was committed. The High Court held that the principle of legality has no application in this case since no new crime is created. It held that Mr Masiya knew he was acting unlawfully when he assaulted the complainant and that it has never been a requirement that an accused person should know, at the time of the commission of the crime, whether it is a common-law or statutory crime or what its legal definition is. Mr Masiya contended that the extended definition should not apply to him as the application would constitute a violation of his rights in terms of section 35(3)(l) of the Constitution.

[48] The ordinary principle of common law is that when a rule is developed it applies to all cases, not only those which arise after the judgment in which the law has been developed has been handed down. As Kentridge AJ observed in *Du Plessis*:[41]

> ''In our Courts a judgment which brings about a radical alteration in the common law as previously understood proceeds upon the legal fiction that the new rule has not been made by the Court but merely 'found', as if it had always been inherent in the law. Nor do our Courts distinguish between cases which have arisen before, and those which arise after, the new rule has been announced. For this reason it is sometimes said that 'Judge-made law' is retrospective in its operation. In all this our Courts have followed the practice of the English Courts. . . . [I]t may nonetheless be said that there is no rule of positive law which would forbid our Supreme Court from departing from that practice.''
>
> ....

[52] One of the central tenets underlying the common-law understanding of legality is that of foreseeability–that the rules of criminal law are clear and precise so that an individual may easily behave in a manner that avoids committing crimes.[42] In this regard, the amici referred to the decision of the European Court of Human Rights in *SW v United Kingdom*[43] where the Court held—

> ''However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for

40 Above n .

41 Above n at para 65.

42 Snyman above n at 41.

43 *SW v United Kingdom; CR v United Kingdom* (1995) 21 EHRR 363 at para 36/34 at 399. The applicant in *SW*, a United Kingdom citizen, was charged and convicted with the offence of raping his wife. His conviction was confirmed by the House of Lords. He subsequently referred a complaint to the European Commission of Human Rights, where he complained that in breach of Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms he was convicted in respect of conduct which at the relevant time did not constitute an offence, breaching the principle of legality. The case was ultimately decided upon by the European Court of Human Rights in favour of the United Kingdom, unanimously holding that there had been no violation of Article 7(1) of the Convention.

The factual circumstances in *CR* concerned a case of marital rape, where the wife had left the husband and had returned to her parents' home. The husband forced his way into the home, assaulted and attempted to have sexual intercourse with her against her will. He was charged with attempted rape and assault occasioning actual bodily harm. He pleaded guilty and subsequently unsuccessfully appealed to the House of Lords. The applicant then referred a complaint to the European Commission of Human Rights. The European Court of Human Rights decided this case similarly to *SW*.

elucidation of doubtful points and for adaptation to changing circumstances . . . provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen''.

The Court used the element of foreseeability and Article 17 of the Convention,[44] which is intended to exclude the abuse of any specific rights safeguarded by the Convention for any of the purposes set out in the Article, to find that the accused's conviction of the rape of his wife was not an infringement of the principle of legality as contained in Article 7(1) of the Convention.[45] The Court, in coming to their decision, emphasised the distinction between reinterpretation and clarification of the common law and the creation of a new common-law offence. It appears that the Court found the surprise element entailed by the retroactive application of the common law to be an unacceptable feature in this case.

...

[54] Section 35(3)(l)[46] of the Constitution confirms a long-standing principle of the common law that provides that accused persons may not be convicted of offences where the conduct for which they are charged did not constitute an offence at the time it was committed. Although at first blush this provision might not seem to be implicated by finding Mr Masiya guilty of rape in this case, because the act he committed did constitute an offence both under national law and international law at the time he committed it, in my view, the jurisprudence of this Court would suggest otherwise.

[55] In the first case in which the Court addressed section 35(3)(l) and its counterpart in respect of sentence, section 35(3)(n), *Veldman v Director of Public Prosecutions,*[47] the Court held that the principle of legality is central to the rule of law under our Constitution. That case concerned the question of whether, where the sentencing jurisdiction of a court had been increased after an accused had pleaded, the accused could be sentenced in terms of the increased jurisdiction. The Court held it could not. The Court observed that once an accused has pleaded, the constitutionally enshrined principle of legality requires that the sentencing jurisdiction of a court cannot be varied to the detriment of the accused, even where it was clear that the increased sentence was a permissible sentence for the charge involved. The Court held that—

> ''[t]o retrospectively apply a new law, such as section 92(1)(a), during the course of the trial, and thereby to expose an accused person to a more severe sentence, undermines the rule of law and violates an accused person's right to a fair trial under section 35(3) of the Constitution.''[48]

[56] The strong view of legality adopted in *Veldman* suggests that it would be unfair to convict Mr Masiya of an offence in circumstances where the conduct in question did not constitute the offence at the time of the commission. I conclude so despite the fact that his conduct is a crime that evokes exceptionally strong emotions from many quarters of society. However, a development that is necessary to clarify the law should not be to the detriment of the accused person concerned unless he was aware of the nature of the criminality of his act. In this case, it can hardly be said that Mr Masiya was indeed aware, foresaw or ought reasonably to have foreseen that his act might constitute rape as the magistrate appears to suggest.[49] The parameters of the trial were known to all parties before the Court and the trial was prosecuted, pleaded and defended on those bases. It follows therefore that he cannot and should not bear adverse consequences of the ambiguity created by the law as at the time of conviction.

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44 Article 17 states:

> ''Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.''

45 Article 7(1) states:

> ''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.''

46 Above n .

47 2006 (2) SACR 319 (CC).

48 Id at para 37.

49 See above para 10.

[57] The evidence adduced at the trial established that Mr Masiya was guilty of indecent assault. To convict him of rape would be in violation of his right as envisaged in section 35(3)(l) of the Constitution. I conclude therefore that the developed definition should not apply to Mr Masiya.

[58] The next question that calls for consideration is whether the declaration of invalidity referred to this Court in terms of section 172(2)(a)[50] should be confirmed.

.....

[62] In conclusion, I decline to confirm the declarations of invalidity in paragraph 3 of the order.

Merits

[63] Mr Masiya has challenged the decision of the Regional Court mostly on various factual grounds and urged this Court to consider the merits of the conviction. In effect, Mr Masiya is seeking leave to appeal to this Court on the merits of his conviction. Even if it could be said that in this regard his application raises a constitutional issue, which is unlikely given this Court's judgment in *S v Boesak*,[51] it is not in the interests of justice to grant him leave to appeal directly to this Court on this issue. Mr Masiya has still not been sentenced and once he has been, he will have the right to seek leave to appeal to the appropriate court in the ordinary way. In that sense, his application for leave to appeal on the merits is premature. Accordingly, the application for leave to appeal on the merits of his conviction should be refused.

[64] I must dispose of one further matter before I deal with the relief. That relates to the question whether the Magistrates' Courts have the power to develop the common law.

....

Relief

[70] Section 172(1)(b)[52] of the Constitution confers a discretion on this Court to make any order that is just and equitable. Having found that the common-law definition of rape is not constitutionally invalid but merely falls short of the spirit, purport and objects of the Bill of Rights, the declaration of invalidity of the definition of rape should therefore be set aside and replaced with an appropriate order. As set out earlier, the development is limited to an inclusion of non-consensual penetration of the male penis into the anus of a female person in the definition.[53] For the reasons set out above, I decline to confirm the declaration of constitutional invalidity of the statutory provisions and the relevant Schedules of the Act and the CPA. The declaration of invalidity should therefore be set aside. It follows that the orders in paragraphs 3 and 4 of the High Court order[54] should also be set aside.

[71] Having found that the developed definition cannot apply to Mr Masiya, it cannot therefore, on the facts before us, be said that his conviction is in accordance with justice. The conviction of rape should, on the facts, be replaced with a conviction of indecent assault. The order of the High Court in paragraph 5 cannot therefore stand. The appeal against the conviction of rape should therefore be upheld.

[72] Having substituted the conviction of rape with that of indecent assault, it is necessary to remit the matter to the Regional Court to impose appropriate punishment. It needs be said that the offence of indecent assault is egregious. Mr Masiya assaulted a nine-year old child. The offence arouses public indignation. The Regional Court is obliged, when considering an appropriate punishment, to apply its mind to the nature and gravity of the offence of which Mr Masiya has been convicted and not merely look at the legal definition thereof. The fact that he has been convicted of indecent assault does not automatically mean that the sentence to be imposed upon him should be more lenient than if he had been convicted of rape.

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50 Above n .

51 Above n at para 23.

52 Above n .

53 Above para 45.

54 Above para .

[73] The assistance the Court has received from all counsel in this matter is appreciated.

Order

[74] In the result, the following order is made:

1. The application for leave to appeal against the declarations of invalidity and the order and judgment of the High Court confirming the conviction of Mr Masiya of rape is granted.
2. The application for leave to appeal against the conviction on the merits is dismissed.
3. The order of the High Court is set aside in its entirety.
4. The order of the Regional Court referring the criminal proceedings to the High Court for purposes of sentence in terms of section 52(1)(b)(i) of the Criminal Law Amendment Act 105 of 1997, is set aside.
5. The common-law definition of rape is extended to include acts of non-consensual penetration of a penis into the anus of a female.
6. The development of the common law referred to in paragraph 5 above shall be applicable only to conduct which takes place after the date of judgment in this matter.
7. The conviction of Mr Masiya by the Regional Court of rape is set aside and replaced with a conviction of indecent assault.
8. The case is remitted to the Regional Court for Mr Masiya to be sentenced in the light of this judgment.

Moseneke DCJ, Kondile AJ, Madala J, Mokgoro J, O'Regan J, Van der Westhuizen J, van Heerden AJ and Yacoob J concur in the judgment of Nkabinde J.

CASE 2

S v A 1993 (1) SACR 600 (A)

Citation	1993 (1) SACR 600 (A)
Court	Appèlafdeling
Judge	Botha AR
Heard	February 19, 1993
Judgment	March 18, 1993
Counsel	JA Booysen namens appellant nr 1, HJ de Vos namens appellant nr 2 JA Venter namens die Staat

Flynote

Assault—Wat constitutes—Accused forced complainant to lick up his own urine—Forcing a person to drink any substance could constitute an assault—By application of de minimis non curat lex *rule trivial assaults would not be included—In case of licking up of urine there could be no question of* de minimis.

Indecent assault—What constitutes—Administering of shocks to penis—In context of circumstances where rape suspect forced to masturbate before policewoman and forced to lick up his own urine, administering of electric shocks to penis constituting indecent assault.

Headnote

The two appellants were young police constables who were one night on duty J in a charge office where there was also a policewoman on duty. The first appellant brought a rape suspect, one M, into the charge office. The second appellant told M to drop his trousers and ordered him to masturbate. Whilst he did this the two appellants laughed at him. After M urinated second appellant forced him to lick up the urine from the floor. The first appellant then left the charge office and returned with an instrument used to administer electric shocks. The second appellant ordered M to tie the cord around his penis whereupon first appellant turned the lever and administered a shock to M. The second appellant then ordered M to put the cord into his mouth whereupon first appellant again turned the lever and administered a shock to M. Second appellant then ordered M to masturbate again. Both appellants then punched M. The events all took place in view of the policewoman. As a result of these events the appellants were charged in a Provincial Division with indecently assaulting M and *crimen injuria* in respect of the policewoman. They were convicted as charged and first appellant was sentenced to a total of 30 months' imprisonment of which 12 months was suspended. The second appellant was sentenced to three and a half years' imprisonment of which 12 months was suspended. The appellants appealed against their convictions and sentences.

The trial Court held that the second appellant's actions in forcing M to lick up his urine did not constitute an assault. The Court also found that the administering of the electric shocks to M's penis did not amount to indecent assault. For the first appellant's conviction of indecent assault the trial Court relied on the fact that as a policeman the first appellant was under a legal duty to ensure that second appellant did not indecently assault M by forcing him to masturbate and as he did not prevent this assault he was also guilty of indecent assault. On appeal it was contended on behalf of the first appellant that the principle in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) could not be applied in criminal law to offences where intent was an element of the offence and that the failure of a person to prevent another from committing a crime, which led to that person actually committing the crime, could not render the first person guilty of committing that same

crime: in the present case to find the first appellant guilty of assault on the basis of the assault which the second appellant had committed offended against the legal convictions of the community. ...

A poisonous or dangerous: the forced drinking of any substance could constitute an assault and the *de minimis non curat lex* rule could be applied to ensure that trivial assaults were not made punishable.

Held, further, that the appellants had been correctly convicted on the two counts.

Held, further, that the sentences were appropriate in the circumstances.

The decision in *S v A en 'n Ander* 1991 (2) SACR 257 (N) approved in part and criticised in part. ...

JUDGMENT

BOTHA AR

[1] Die eerste aanklag lui dat die appellante skuldig is aan onsedelike aanranding—'Deurdat op of omtrent 8 Augustus 1990 en te of naby die Suid-Afrikaanse Polisie aanklagkantoor, Dannhauser, in die distrik van Dannhauser, die beskuldigdes wederregtelik en onsedelik vir V M, 'n volwasse man, aangerand het deur hom met die plat hand te klap, met 'n gebalde vuis te slaan, hom te forseer om te masturbeer, hom op sy privaatdele en mond te skok met 'n instrument wat elektriese impulse voortbring en om hom te forseer om sy eie urine van die vloer af op te lek.'

[2] Die tweede aanklag *(crimen injuria)* bevat eerstens hoofsaaklik dieselfde H bewerings as die eerste aanklag ... en tweedens, die toevoeging aan die einde van die bewerings, van die volgende woorde:

> '. . . in die teenwoordigheid van S D, 'n volwasse vrou, met die opset om haar, die vermelde S D, in haar eer te krenk of aan te tas en I waardeur haar eer gekrenk of aangetas is'. . . .

. . . Die gebeure kan ter wille van gemak van verwysing in vyf fases verdeel word, met betrekking tot—

(1) die eerste masturbasie;

(2) die oplek van die urine;

(3) die toediening van die skokke;

(4) die tweede masturbasie; en

(5) die vuishoue.

[3] Die eerste appellant is deur die Verhoorhof op die eerste aanklag skuldig bevind uit hoofde van fases (1), (3), (4) en (5). Fase (2) is uitgesluit omdat die Verhoorhof die oplek van die urine nie as 'n aanranding beskou het nie. Ten aansien van fases (1) en (4) was die Verhoorhof se bevinding dat die eerste appellant 'n regsplig gehad het om die twee episodes van masturbasie te verhoed; dat sy versuim om dit te doen hom skuldig gemaak het aan aanranding in dié opsigte; en dat dit 'n onsedelike aanranding uitgemaak het. Ten aansien van fases (3) en (5) het die eerste appellant se skuldigbevinding berus op sy eie aandadigheid. In die geval van (3) het die Verhoorhof bevind dat die toediening van 'n skok aan M se penis nie 'n onsedelike aanranding uitgemaak het nie, maar dat dit 'n daad van gewone aanranding was, net soos die skok in die mond en die vuishou by (5). Die Verhoorhof het verder bevind dat die saamvoeging in dieselfde aanklag van aanrandingshandelinge wat nie onsedelik is nie en dié wat wel onsedelik is, nie 'n skuldigbevinding van onsedelike aanranding ingevolge die aanklag verhoed nie. ...

[4] . . . Ter aanvang is dit nodig om die Verhoorhof se beskouing van die aard van B die gebeure in fases (2) en (3) in oorweging te neem. Wat (2) betref, het die Verhoorhof bevind dat die gedwonge oplek van die urine nie 'n aanranding uitgemaak het nie. Volgens die uitspraak van Hugo R is daar aanvaar, op gesag van *S v Marx* 1962 (1) SA 848 (N), dat dit 'n aanranding is om iemand te dwing om iets giftig of gevaarlik te drink, maar daar is bevind dat urine nie so 'n vloeistof is nie; daar was geen bewys dat urine C enige nadelige gevolge vir M mag gehad het nie, hoe walglik sy ervaring ook al was. Volgens Hugo R sou dit 'gevaarlik' wees om die beginsel van die *Marx*-saak uit te brei, om ook onaangename maar nie-giftige stowwe in te sluit. Ek kan met eerbied nie met hierdie beskouing saamstem nie. Om iemand te dwing om iets te drink, is om inbreuk te maak op sy liggaamlike integriteit, en dit is

onteenseglik so, al is die vloeistof wat hy gedwing word om in te neem onskadelik. Hugo R se sienswyse het klaarblyklik berus D op die gedagte dat dit in bepaalde omstandighede onvanpas sou wees om in hierdie soort gevalle strafregtelike aanspreeklikheid te postuleer, soos byvoorbeeld waar een persoon 'n ander sou dwing om 'n slukkie water te drink. Maar as daar in die strafreg nie van sulke gedrag kennis geneem word nie, is dit nie omdat die 'slagoffer' se liggaamlike integriteit in beginsel nie daardeur aangetas word nie, maar wel omdat die strafhof hom E nie besig hou met onbenulighede nie . . . Wat fase (3) betref, het die Verhoorhof bevind dat die toediening van 'n skok op M se penis nie 'n onsedelike aanranding was nie. Met hierdie G bevinding kan ek ook nie saamstem nie. Die Verhoorhof se gedagtegang, soos dit blyk uit Hugo R se uitspraak, was dat die appellante M se geslagsorgaan gekies het as die plek waar die skok toegedien sou word, nie omdat hulle 'enige onsedelike doel' gehad het nie, maar bloot omdat dit ''n gerieflike en gevoelige liggaamsdeel was om hom te beseer'. Hierdie sienswyse is nie gegrond op enige getuienis wat voor die Verhoorhof was H nie; dit berus op blote bespiegeling. Bowendien druis dit lynreg in teen die aard van die voorafgaande en daaropvolgende gebeure, toe M gedwing is om te masturbeer. Dit is duidelik dat die appellante se aanranding, as 'straf' vir die verkragting wat M sou gepleeg het, toegespits was juis op sy geslagsorgaan. As sodanig was dit onsedelik, en daar is geen gronde om te betwyfel dat dit die opset van die appellante was om M onsedelik aan te rand nie . . .

[5] Nou kom ek terug op die vraag na die appellante se gemeenskaplike oogmerk. Met die toediening van die skokke het die appellante klaarblyklik saam opgetree; wat dit betref, was hulle mededaders. Soos ons nou gesien het, was een van die skokke 'n onsedelike aanranding, en op daardie basis alleen is die eerste appellant se skuldigbevinding op die eerste aanklag reeds onaanvegbaar. Maar die gesamentlike optrede van die appellante in hierdie fase is van groter betekenis as net dit. Die eerste appellant het hier die voortou geneem: onmiddellik nadat M aangerand is deur die gedwonge oplek van die urine, het die eerste appellant die skokmasjien gaan haal en op die toonbank gesit, reg vir gebruik; en toe M in opdrag van die tweede appellant die draad teen sy penis sit, was dit die eerste appellant wat die slinger gedraai het. Sy optrede spreek helder en luid van 'n aktiewe vereenselwiging met die proses van aanranding waarmee die tweede appellant besig was. Ek kan nie met die Verhoorhof akkoord gaan dat die gesamentlike doel van die appellante beperk moet word tot fase (3) van die gebeure en dat die getuienis nie 'n bevinding van gemeenskaplike opset regverdig ten opsigte van die voorafgaande fases (1) en (2) en die daaropvolgende fases (4) en (5) nie. Laasgenoemde het geëindig in 'n aanranding met die vuis deur albei appellante, wat weereens bevestig dat die eerste appellant gemene saak gemaak het met die optrede van die tweede appellant; die afleiding is oorweldigend dat sy medewerking ook betrekking gehad het op wat tussenin gebeur het . . . Dit is onrealisties, na my mening, om die onderskeie fases van die aanranding apart en in isolasie te beskou. Die enigste redelike afleiding is dat die eerste appellant opsetlik met die tweede appellant meegedoen het aan die verwesenliking van die oogmerk om M te straf deur hom aan te J rand. Gevolglik is die eerste appellant aanspreeklik nie alleen vir die dade wat hy self verrig het nie, maar ook vir dié wat deur die tweede appellant gepleeg is.

[6] Die eerste appellant se appèl teen sy skuldigbevinding op die eerste aanklag kan dus nie slaag nie.

[7] Met betrekking tot die tweede appellant se skuldigbevinding op die eerste aanklag het die Verhoorhof bevind, soos vroeër aangedui is, dat die B opdragte wat hy aan M gegee het by fases (1), (2) en (4) implisiete dreigemente van geweldpleging bevat het, wat op sigself aanrandingshandelinge uitgemaak het . . . Dit val nie te betwyfel nie dat aanranding ook kan bestaan uit 'n onregstreekse toediening van geweld. Vanweë hierdie beginsel is skuldig aan aanranding op C as hy B aansê om geweld op die liggaam van C toe te pas en B dit doen. A is strafregtelik aanspreeklik omdat hy B gebruik as die instrument of die middel waardeur geweld op C gepleeg word, en A is aanspreeklik ongeag of sy opdrag aan B met 'n dreigement van geweld teenoor B gepaard gegaan het. Dit moet ook die posisie wees waar A sy opdrag aan C self gee, om geweld op homself toe te pas, maar in hierdie geval kom die vraag na vore of C deur die uitvoering van A se opdrag nie toestem tot die aanranding op hom nie. In die omstandighede van die H huidige saak is dit egter ondenkbaar dat M vrywillig toegestem het om te masturbeer en sy urine op te lek. Die aard van daardie handelinge en van die tweede appellant se optrede skakel vanself 'n redelike moontlikheid van vrywillige toestemming uit. (Ek praat van toestemming as 'n feit; dit is onnodig om in te gaan op die vraag of toestemming regtens 'n regverdigingsgrond sou uitgemaak het.) Mnr *De Vos* het toegegee, soos hy

verplig was om te doen, dat hy hom nie op toestemming kon beroep nie. M is I dus gedwing om te doen wat hy gedoen het, in die sin dat hy nie vrywillig daartoe toegestem het nie. Dwang in daardie sin is genoeg om die tweede appellant aanspreeklik te hou vir wat M aan homself gedoen het. Of die tweede appellant se optrede op sigself op aanrandings in die vorm van dreigemente van geweld neergekom het, kan dus buite rekening gelaat word.

[8] Uit die voorgaande volg dit dat die argument in *(c)* verwerp moet word. Die Verhoorhof het tereg bevind dat die tweede appellant skuldig is aan onsedelike aanranding ten opsigte van die episodes van masturbasie in fases (1) en (4). Aan die hand van wat hierbo gesê is, is die tweede appellant ook skuldig aan aanranding ten opsigte van die oplek van die urine in fase (2), en aan onsedelike aanranding ten opsigte van die skok B aan M se privaatdeel in fase (4). Dit volg verder dat dit onnodig is om aandag te skenk aan die betoog in *(d)*. . . .

[9] Gevolglik misluk ook die tweede appellant se appèl teen sy skuldigbevinding op die eerste aanklag.

[10] Oor die appellante se skuldigbevindings op die tweede aanklag val daar nie veel te sê nie, in aggenome die bevindings waartoe reeds hierbo geraak is . . . Die Verhoorhof het haar getuienis dat sy geskok en verneder was, geglo. Die Verhoorhof, wat ook die geleentheid F gehad het om die appellante in die getuiebank waar te neem, het voorts bevind dat hulle ongetwyfeld besef het dat D in haar waardigheid gekrenk sou word deur die gebeure van die aand, so brutaal en kru soos dit was. Gevolglik het die Verhoorhof die argumente wat namens die appellante aangevoer is, verwerp. Daar bestaan geen gronde vir hierdie Hof om met die Verhoorhof in hierdie opsig te verskil nie.

[11] Die appèl ten opsigte van die skuldigbevindings op die tweede aanklag G moet dus ook misluk.

CASE 3

S v SIBIYA 1955 (4) SA 247 (A)

Citation	1955 (4) SA 247 (A)
Court	Appellate Division
Judge	Schreiner ACJ, Van Den Heever JA, Hoexter JA, Fagan JA and Steyn JA
Heard	August 29, 1955
Judgment	September 14, 1955
Annotations	Link to Case Annotations

Flynote

Criminal law—Theft—What constitutes—Taking must have been without belief in consent and with intention of depriving owner of whole benefit of ownership—When such intention may be inferred—Unauthorised user or borrowing never was or has ceased to be theft. - Application of principles of abrogation by disuse and stare decisis.

Headnote

Per SCHREINER, A.C.J., HOEXTER, J.A., and FAGAN, J.A., concurring: The law requires for the crime of theft, not only that the thing should have been taken without belief that the owner (where it is the owner whose rights have been invaded) had consented or would have consented to the taking, but also that the taker should have intended to terminate the owner's enjoyment of his rights or, in other words, to deprive him of the whole benefit of his ownership. The intention may be inferred from evidence of various kinds and in particular from abandonment of the thing in circumstances showing recklessness as to what becomes of it.

Per HOEXTER, J.A.: As according to the modern view there is no real difference, so far as moral reprehensibility is concerned, between unauthorised borrowing and unauthorised user, it would be wrong, even if it were still possible. to adopt the view that the Roman-Dutch Law, although it no longer regarded unauthorised user as theft, still regarded unauthorised borrowing as theft, either as *furtum rei* or as *furtum usus*. ...

JUDGMENT

D SCHREINER, ACJ

[1] The appellant and one Mdunge were convicted of the theft of a motor car by a regional magistrate's court and were each sentenced to twelve months' imprisonment. They appealed to the Natal Provincial Division which dismissed their appeals but granted the appellant leave to appeal to this Court; Mdunge made no request for leave to appeal.

[2] Mdunge and the appellant were employed at a garage in Durban and on a night in August, 1954, they took the complainant's car, which was being parked in the garage, and drove it for their own amusement to various places in the neighbourhood. While Mdunge was driving the car he capsized it in a donga at the side of the road. When the police arrived Mdunge and the appellant were still on the scene. Mdunge was arrested the same night, the appellant a day or two later.

[3] At the trial the case for the defence was that they had always intended to return the car to the garage.

It is not easy to ascertain from the magistrate's judgment what precisely was his approach to this defence, but BROOME, J.P., who gave the judgment in the Provincial Division, assumed in the accused's' favour that they had intended to return the car, a view which he found to accord with the general probabilities. Counsel for the Crown advanced an argument to the contrary in this Court, based on the failure to do anything towards returning the car, but the accident was followed by the arrival of the police and the case was not like those in which the car is abandoned, whether after an accident or not. It seems to me, therefore, to be clear that BROOME, J.P.'s assumption was rightly made and that the appeal must be dealt with on the basis that Mdunge and the appellant throughout intended to take the car back when they had used it for their night's entertainment.

[4] One of the appellant's grounds of appeal was that,

> 'The conviction was bad as *furtum usus* is not an indictable offence. The accused, in the circumstances, did not commit the offence of theft.'

In overruling this ground BROOME, J.P., referred to a number of cases, starting with *Rex v Fortuin*, 1 B.A.C. 290. Relying in particular on *Rex v Mtaung*, 1948 (4) SA 120 (O), he reached the conclusion that a person who takes something which belongs to another and from which the owner derives benefits,

> 'if he takes with the intention of using those benefits to the owner's deprivation he is a thief, whether he intends his own use or the owner's deprivation to be for a short time or for a long time or permanent.'

In *Rex v von Elling*, 1945 AD 234, the judgments of WATERMEYER, C.J., and TINDALL, J.A., were concurred in by the rest of the Court. At p. 236 the learned CHIEF JUSTICE said,

> 'The ordinarily accepted definition of theft which I take from Gardiner and Lansdown on *Criminal Law* is as follows: 'Theft is committed when a person fraudulently and without claim of right made in good faith takes or converts to his use anything capable of being stolen with intent to deprive the owner thereof of his ownership, or any person having any special property or interest therein of such property or interest''.

(It should be noted that the reporter has erroneously closed the inverted commas at the end of the first paragraph on p. 237 of the 1945 AD Reports. From the end of the definition on p. 236 the language is that of WATERMEYER, C.J., and not of the authors of *Gardiner and Lansdown.)* After pointing out that a fraudulent taking or dealing with another's property cannot deprive him of his legal right of ownership, though it can deprive him of the benefits of ownership such as use and possession, the learned CHIEF JUSTICE went on to say,

> 'If the thief's adverse possession or control is accompanied by an intention to put an end to the enjoyment by the true owner of the benefits of his ownership, then the thief is, so long as he remains in adverse possession, continuously committing the crime of theft.'

On p. 239 the learned CHIEF JUSTICE, dealing with the position of one who assists the principal thief, said,

> 'and if his act be accompanied by the necessary intention to deprive the true owner of the benefits of his ownership, then the assistant is guilty of theft.'

Again, at p. 247 TINDALL, J.A., referring to the position of von Elling, as an assistant of the principal thief, said,

> 'And the latter must be taken to have appreciated that the natural effect of his conduct was to further the purpose of depriving the owner of his rights to the car.'

I have not cited these passages from *von Elling's* case as being decisive of the present question for this Court was there dealing with the liability for theft of one who had assisted the principal thief after the theft had been committed, and was not directly concerned with the question whether theft requires an intention to effect a total deprivation of the owner's enjoyment of his property, or whether an intention to deprive him temporarily of its use is sufficient. But the extracts are nevertheless important in the decision of this case.

[5] In the first place, the contrast between the definition of *Gardiner and Lansdown* and the view expressed in the quotation from the judgment of BROOME, J.P., brings out what the issue is that has to be decided. The reason why WATERMEYER, C.J., substituted for the word 'ownership', used by *Gardiner and Lansdown,* 'the benefits of his ownership' clearly was because a thief cannot by his theft take the owner's title from him. And it is, I think, no less clear that by 'the benefits of his ownership' the learned CHIEF JUSTICE meant 'the whole benefit of his ownership'; the plural 'benefits' was not used so as to make it sufficient for theft that the taker should intend to deprive the owner of portions of the benefit of ownership, such as the use of the thing for a time. What the definition of *Gardiner and Lansdown* means in the present connection and what it was understood by this Court in *von Elling's* case to mean, is that theft is committed when a person takes a thing, and not merely the use of a thing, with the intention of depriving the owner of the thing i.e. of the whole benefit of the thing.

[6] In the second place, the passages quoted from *von Elling's* case show that this Court treated it as the established or accepted view that the intention to effect a total deprivation of the owner's enjoyment of his property is an essential part of the mental element required for theft. What the ingredients of so important a crime as theft are should, if possible, not be in doubt, and if there is an ordinarily accepted enumeration of those ingredients one should presumably hesitate long before disturbing it. I shall return to this aspect later.....

[7] I must repeat that so far as I can ascertain none of the authorities states that the taking of a thing against the will of the owner for a temporary purpose and with the intention of returning it was a crime in Roman Law or in Roman-Dutch Law. I do not think that one is entitled to assume that it was a crime merely because it is and was at all material times a delict and because no authority says specifically that it was not a crime. In a matter of this kind it seems to me that there is great danger of error in using Roman Law texts apparently dealing with delicts in order to declare what the definition of a particular crime is in South Africa to-day. We cannot, I think, be sure whether the Roman lawyers ever had present to their minds the question what state of mind was necessary to make a person guilty of the crime, as opposed to the delict, of *furtum*.

[8] Even if texts could be brought to light which suggest or even prove that Fortuin could have been successfully prosecuted criminally under Roman or Roman-Dutch Law this would in my view provide only slender grounds for departing from what has been in substance the established definition of theft in South Africa for, at least, about a century.

[9] Furthermore, it seems to me that it would be most unfortunate if we were to rest our law of theft upon such an uncertain foundation as is suggested by the expressions '*animus furandi',* 'evil intention', 'fraudulent or dishonest purpose', 'te kwaaier trou', 'furtively' and the like. In so far as these expressions are not question-begging, amounting to no more than 'theftuously', they seem to me to be too uncertain to be useful in the definition of theft. They tend, moreover, to blur the distinction between intention and motive, to which I have already referred. There should if possible be a high degree of rigidity in the definition of crimes; the more precise the definition the better. It should not be left to Judges to decide whether a particular act was done with evil intent or furtively, defining those expressions as best they can to meet the case before them. Without wishing in the least to detract from the importance of elasticity or capacity for growth in wide areas of our legal field, I do not think that the definition of a crime is such an area. If there are acts similar to theft which shouldbe punished the Legislature must intervene. As was said by SMITH, J., in *Fortuin's* case, *supra* at p. 298, it is not for the Courts to create new crimes; nor is it for the Courts to give an extended definition to a crime in order to provide a new protection for property, even if modern conditions indicate that in some instances such protection might be desirable. In particular one must remember, with Groenewegen *ad Inst*. 4.1.7, that the definition of theft involves the reputation of the person accused of it. A thief is with us a criminal and a person should not be stigmatised as a thief unless he has done what in South Africa is well recognised as constituting the crime of theft, in other words, again to quote SMITH, J., unless, in common parlance, he intended to steal the thing.

[10] For these reasons I have come to the conclusion that the law requires for the crime of theft, not only that the thing should have been taken without belief that the owner (where it is the owner whose rights have been invaded) had consented or would have consented to the taking, but also that the taker should have intended to terminate the owner's enjoyment of his rights or, in other words, to

deprive him of the whole benefit of his ownership. The intention may be inferred from evidence of various kinds and in particular from abandonment of the thing in circumstances showing recklessness as to what becomes of it.

[11] Statements in *Rex v Mtaung, supra*, which are inconsistent with these conclusions must, of course, be taken as overruled, but the correctness or otherwise of the actual decision is not in issue and is not pronounced upon.

[12] The appeal is allowed and the conviction and sentence of the appellant are set aside. (HOEXTER JA and FAGAN JA concur.) ...

VAN DEN HEEVER, JA

[13] I have had the advantage of reading the judgments of the ACTING CHIEF JUSTICE and my Brother HOEXTER in this matter, but find myself unable to agree with their conclusions. Of what I have to say on this subject the greatest part has been said before. I should, however, I think, add a few observations. ....

[14] It may be that, all other things being equal, the dishonest bailee's conduct is more reprehensible than that of a person not entitled to possession. Morals, however, cannot affect the question. A party to a contract of sale may have been thoroughly immoral and dishonourable in the methods he used in order to close the deal without being amenable to the sanctions of either the criminal or the civil law. That does not make him a thief. On the other hand one has no difficulty in appreciating that a person who must first obtain unlawful possession of another's property in order to make illicit use of it, is more likely to cause breaches of the peace than a person who merely misuses property already in his lawful possession.

[15] I maintain that it is a fiction to say that in the present case it was the intention of appellant throughout to return the owner's property which he had removed and used.

[16] Say the car had an 'expectation of life' of 80,000 miles and the tyres of 12,000 miles. Some of the rubber must have been left on the roads. There must have been some detrition of bearing surfaces. Some of those miles were lost. Appellant, who is a garage hand, must have appreciated the normal wear and tear which takes place when a car travels on the roads even if there is no accident. A motor car, like a candle, is consumed in use. The degree, which is real and calculable, cannot affect the principle. It is this attenuated and depreciated thing that he intended to restore, not the car he had taken. He says the candle may be shorter but you have it, so I have stolen nothing. If he was charged with stealing a whole car I cannot see why he should escape conviction because the Crown could not prove that he stole more than one-Nth of the car.

[17] Nowhere in the Roman or Roman Dutch authorities can I find support for the proposition that a person who fraudulently takes another's property out of the latter's possession or that of his agent and then uses it unlawfully, is not guilty of theft. In so far as that proposition has been accepted in our case law it was wrongly accepted. Nor can I find any support for the proposition that theft is committed only if the doer intends to deprive the owner permanently of his property. That, I think, is an intrusion from English law.

[18] The definition of the crime in Gardiner and Lansdown on *Criminal Law* which was adopted in *Rex v von Elling*, 1945 AD 234, is not inconsistent with the Roman or Roman Dutch concept. Deprivation may be temporary. Ownership is a composite notion which can only be explained by a complex of rights. To cling to the identity of 'the thing' seems to me an artificial literalness. Where for example a youth desirous of breaking the record for travelling from Cape Town to Algiers by motor car, takes my car, which he knows I will not lend him, and enters upon the adventure, he very effectively deprives me of my rights of ownership even if he fully intends to restore the vehicle after he has had his way with it. To introduce such factors as the risks to which he exposes my car into the question seems to me only to obscure the issue.

[19] Nowadays in cases of theft we are apt to look at the economic effect of the act by which a person fraudulently converts value to his own use rather than be hypnotised by the concrete mechanics by means of which the crime is committed (*R v Solomon*, 1953 (4) SA 518 (AD)).

[20] It seems to me irrational that the law should with criminal sanctions, even against the owner, protect a right of retention, yet allow a stranger with impunity to make large inroads into that complex of rights and enjoyment which is called ownership.

STEYN JA

[21] In the view I take of this matter, it is not necessary to enquire or to decide whether or not according to the old authorities the unauthorised taking of an article with the *bona fide* intention of returning it to the owner, is theft. Although the old authorities do not appear to me to be clear, I shall assume that they did regard such a taking as theft. But whatever the law may have been in the Netherlands, it would seem that for a long time before the decision in *Rex v Mtaung*, 1948 (4) SA 120 (O), that conception of theft had not been applied or enforced in this country. All the earlier decisions rejected the view that such a taking constitutes theft. ...

[22] ...It is a fair inference from this that in *Porter's* time, and going further back even than 1845, an unauthorised borrowing of the kind here in question, would not have been and had in fact not been recognised by the Cape Courts as constituting the crime of theft. This means that when *Mtaung's* case was decided, the view that such a borrowing is not theft, had been accepted and acted upon for a hundred years and more.

[23] There is no reported case to show that during that period any Court had given a decision to the contrary. Had such a decision been given, at any rate after *Rish's* case, it would no doubt have reached the law reports. There is, I think, every reason to suppose that the official view reflected the common understanding of the crime of theft. In *Dier's* case, *supra* at p. 439, SMITH, J., remarked:

> 'In this case the accused took the boats merely to make a temporary use of them, and without any intention whatever of permanently depriving their owners of them; or, in common parlance, he never intended to steal them. The act was wrongful, and a trespass for which the owner may maintain a civil action to recover damages for the injury sustained; but neither in law nor in common sense can it be called a crime.'

[24] I quote this merely as an indication of the *communis opinio* of the time that an unauthorised taking with the *bona fide* intention of returning the article taken, is not theft. I am not aware of any change in more recent times in that general conception. In the public mind such a taking, although it may be regarded with various degrees of disapproval, depending upon the circumstances is not theft. Although such takings are matters of very frequent if not daily occurrence, the practice has been not to bring prosecutions on charges of theft, and when on such a charge the evidence showed no more than such a taking, an acquittal has always been regarded as the proper verdict. In spite of circumstances calling for the repeated recognition of this kind of theft, recognition has been withheld. ...

[25] For these reasons I agree that the appeal must succeed.

CASE 4

S v NKOSI 2012 (1) SACR 87 (GNP)

In the matter between:	
PATRICK DUMISANI NKOSI	Appellant
and	
THE STATE	Respondent

JUDGMENT

MAKGOKA J

[1] This appeal turns on the thin line between theft and attempted theft. The appeal is against both conviction and sentence. The appellant stood trial with another accused (accused 2) in the regional court, Ermelo, on one count of theft (read with sections 1, 11 and 14 of the Stock Theft Act 57, of 1959). The appellant, who was accused 1, was legally represented throughout his trial.

[2] Despite his plea of not guilty, the trial culminated in his conviction on 26 January 2009, upon which he was sentenced to 5 years' imprisonment. The vehicle which was found to have been used in the commission of the offence was declared forfeited to the State. With leave of the regional court, the accused is now before us on appeal against both conviction and sentence.

[3] Although the notice of appeal on the merits was directed at the conviction as a whole, in the heads of argument filed on behalf of the appellant, as well during argument before us, the attack on conviction was limited to the question whether, on the facts of the case, theft had been completed or whether the appellant should only have been convicted of attempted theft.

[4] The circumstances that gave rise to the appellant's conviction can be summarized as follows: the appellant was a registered police informer connected to the Stock Theft Unit of the Davel South African Police Service. The standard procedure for the appellant was as follows: once he became aware of information concerning stock theft, he would contact the police and furnish them with the information. He could not himself take any steps regarding the suspicion.

[5] On the morning of 29 March 2008 at approximately 4h30, Mr. Daryll Kadish, a farmer in the Davel area, received a phone call from accused 2, who told him he had information about cattle theft in process at his farm. He phoned the police and drove to the farm, where he found two of his nine cattle tied to poles. The rest were not tied.

[6] About 200 meters from where the cattle were tied, he found the appellant's bakkie with a trailer, both stuck in the mud. He found the appellant at the vehicle. He questioned the appellant as to what he was doing there. The appellant informed him that he was there on a stock theft assignment on the instruction of a Captain Van Rensburg. Upon further inspection of the scene, it appeared to him that people had tried to push the vehicle out of the mud.

[7] Captain Van Rensburg testified and corroborated Kadish in material respects of what he found at the scene, including the presence of the appellant and the bakkie, as well as the tied cattle.

[8] It was common cause during the trial that the appellant also phoned Inspector Kobus Jurgens Janse Van Rensburg (to be distinguished from Captain Van Rensburg, who was phoned by accused 2), at 04h58 on the morning of 29 March 2008, and informed Janse van Rensburg that he had information of

a stock theft that was in process at Davel and that he, the appellant, had found the thief and had arrested him. He wanted Janse van Rensburg to immediately send police officers to the scene.

[9] It was further common cause that Janse van Rensburg dispatched two police officers, Inspectors Sibanyoni and Hartley, to the scene, who found the scene as described by Kadish.

[10] The appellant's explanation for his presence at the scene, with his bakkie stuck in the mud was the following: during the night of 28 March 2008 he received a request from accused 2 to assist him load some cattle. He agreed after he was directed to where the cattle had to be loaded. He proceeded to the camp as directed, and about 200 meters from where the cattle were stationed, his bakkie got stuck in the mud. He and accused 2 tried unsuccessfully to push it out. Accused 2 then left to summon help. When accused 2 did not return, he phoned Janse van Rensburg. He denied that he had any intention of stealing the cattle.

[11] The appellant further testified that he knew accused 2 as he once saw him at an auction and once delivered liquor at his house at the end of January 2008. The appellant led the court to believe that he did not have any further communication with accused 2 from end of January 2008 until the night of 28 March 2008. However, it was established during cross-examination, through his cellphone records, that the appellant and accused 2 had frequently contacted each other between 24- 28 March 2008. The appellant and accused 2 implicated each other and each offered an exculpatory explanation about their involvement with the incident which led to their arrest.

[12] The regional magistrate, correctly, rejected the version of the appellant as not been reasonably possibly true. He found that as a police informer, he did not follow the prescribed procedure referred to above, simply because he and accused 2 had agreed to steal the cattle. Only when they could not execute their plan because the bakkie got stuck in the mud, did he phone the police to try justify his bakkie's presence at Kadish's camp.

[13] Unfortunately, the regional magistrate did not consider in any detail the question whether theft or merely attempted theft had been established. He simply arrived to a conclusion that ''[d] it is duidelik dat beskuldigdes reeds op daardie stadium die beeste vir hulleself toegeeien het . . . '' (it is clear that the accused persons had already appropriated the cattle at that stage), without any basis or reasons for his conclusion.

[14] It was argued by Mr. Van Rooyen, on behalf of the appellant, that the State's case, at best, establishes that only attempted theft had been proven. Ms. Voster, for the State argued, with reference to *S v Ncube en 'n Ander* 1998 (1) SACR 174 (T), that completed theft had been established.

[15] In *S v Ncube* (*supra*), the accused were arrested by the police while they were moving or lifting a box from the back of an open delivery vehicle, with an intention of stealing the box. However, the police intervention prevented them from actually removing it from the vehicle. The question arose on review whether the accused had committed theft or merely attempted theft. The court held that theft had been completed.

[16] In coming to that conclusion the court relied, by analogy, on the general principle applied in some shop-lifting cases, where a person who hides an article in a self-service store with an intention to walk out of the shop without paying therefore, is guilty of theft despite that he had not succeeded in doing so because of security officers' intervention.

[17] In my view, there are two reasons why *Ncube* should not be followed: firstly, the authorities are not harmonious on the shop-lifting cases. There are conflicting judgments. The court in *Ncube* cited two old South West African cases, *S v Xinwa* 1970 (2) PH H 171 (SWA) and *Uirab v S* 1970 (2) PH H 172 (SWA). There are cases which are in conflict with the two mentioned, for example *S v Khumalo* 1975 (4) SA 345 (N) and *Mqambuzana* 1976 (1) SA 212 (EC) where it was decided that such conduct merely amounts to attempted theft.

[18] Secondly, one should be cautious not to lavishly apply the shoplifting principle to all other cases where a determination has to be made between completed and attempted theft. Theft out of self-service shops constitutes, in my view, special form of theft in that ''by die self-bedieningswinkel gevalle bestaan daar dan altyd die risiko dat 'n voornemende dief wat 'n artikel byvoorbeeld onder sy klere sou versteek, met die handeling sal wegkom en so die versteekte item suksevol sou kon steel'' (in

cases of theft from self-service shops, there is then always the risk that a prospective thief who for example hides an article under his clothes succeeds with the act and thus successfully steals the hidden item)— Stafford J (as he then was) in *S v Tau* 1996 SACR 97 (T) at 102 h-i.

...

[22] In my view, the appellant's conduct amounted to acts of execution or consummation of the offence, which do constitute an attempt. (*S v Josephus* 1991 (2) SACR 347 (C) at 348 f-h.) The conviction should therefore be set aside and replaced with one of attempted theft.

MNGQIBISA-THUSI agreed.

CASE 5

S v NDEBELE AND OTHERS 2012 (1) SACR 245 (GSJ)

In the matter between

STATE

and

NDEBELE M AND ANOTHER ACCUSED

JUDGMENT

LAMONT J

[1] The three accused faced numerous counts, they were charged with the following offences:

— Count 1, during the period February 2007 to May 2008 and at or near Sasolburg in Westonaria while managing or employed by or associated with a certain enterprise they conducted or participated in the conduct of directly or indirectly advancing the enterprise's affairs through a pattern of racketeering activities as contemplated by section 2 (1) (e) of the Prevention of Organised Crime Act 121 of 1998 (hereafter POCA);

— Accused 1 faced the additional count 2 alone which is a count under section 2 (1) (f) of POCA comprising the management of the enterprise.

— Counts 3, 4, 5, 6 and 7 were each of theft levelled against all three accused and related in each case to a vending machine known as a credit dispensing unit. The remaining counts namely, counts 8 up to 78 287 were counts concerning theft arising out of the alleged use of the vending machinery forming the subject matter of counts 3 to 7. Those counts can conveniently be summarised and considered in respect of the activities in relation to each of the five machines. In respect of each of the five machines it is alleged that the accused used each machine to steal electricity and electricity credits. All the counts can be grouped into those two categories and be understood in that sense.

[2] The accused elected to plead not guilty and made no statement. .....

[3] At the commencement of the trial an application was brought to quash some of the charges based on a contention that electricity was not capable of theft. The charges in question were those which related to the manipulation of the vending machines so as to result in theft of electricity. The application was dependent upon the finding at that stage that electricity could not be stolen and that electricity had the physical properties contemplated in *S v Mintoor* 1996 (1) SACR 514 (C) which held that electricity could not be stolen.

[4] The submissions made by the State were firstly that the factual finding in *Mintoor* was incorrect and that the evidence which would be led before me would establish that. Hence so it was submitted, I would be free not to follow *Mintoor*. Secondly it was that I should develop the common law as contemplated by section 39 of the Constitution.

[5] It appeared to me that inasmuch as a quashing is in the nature of an exception that if the facts founding the exception were in dispute that it was proper to allow those facts to be led during the course of the trial and make a decision at the end of the trial. This would enable me to decide whether the factual basis of *Mintoor's* case was different to the factual basis before me. Patently at this stage of quashing I could not consider the question of development of the common law. I also considered that

if the common law did not as currently formulated provide that theft of electricity was a crime and I extended it to find that theft of electricity is a crime that this might result in me creating a new offence. This new offence may have come into being after the accused had performed the acts complained of.

[6] It appeared to me that there was a more than slight possibility (which would be more conveniently decided at the end of the case) that electricity was in fact capable of theft and that the law had already been advanced by judgments relating in particular to theft of *incorporeals*.

[7] In order to more easily understand the case and the charges which underpin the evidence it is necessary to consider the nature of the enterprise undertaken by Eskom and the nature of the enterprise undertaken by whomsoever the persons were who had control and possession of the vending machines in question.

[8] Eskom concludes contracts with vendors under and in terms of which it supplies vending machines to those vendors. These vending machines are known as Credit Dispensing Units. The vending machines can print vouchers which are used by customers to obtain a supply of electricity equal to the value of the voucher.

[9] There are two types of vending machines which Eskom supplies. There is a type of machine where vouchers can be printed to an unlimited value. The only control that there is over the ability of the machine to print vouchers is that once a certain number of vouchers has been reached the machine will no longer print vouchers. There is a difficultly with these machines in that the voucher counter can be tampered with so as to prevent the machine ever reaching the printed number of vouchers which would limit its ability to print further vouchers. The other type of vending machine is a type where the total value of the vouchers which can be printed is limited by Eskom to the extent of the credit Eskom has received from the vendor (a prepaid machine). Currently the prepaid type of machine is the one which is more popularly provided.

[10] The economic difference between the two types of vending machines is immediately apparent. In the one type of machine Eskom extends credit to the vendor and has no effective control over the total value of vouchers which can be issued by the machine. In the other there is a credit control placed by Eskom on the total value of vouchers which can be issued in that the total value is limited to an amount equal to the credit in the possession of Eskom. Eskom placed what it believed to be effective controls over the use of the machines by requiring the vendors using the machines to provide information reflecting the usage. Vendors were required to communicate information to the central database of Eskom. This communication would take place either electronically by remote access or physically by way of an Eskom representative obtaining the information from the machine in question and downloading it onto the Eskom central database.

[11] Through this mechanism Eskom would at the intervals determined by it be kept fully aware of the extent to which each vending machine had issued vouchers, what the total and individual value of those vouchers were, what amount was due to it, and other data pertaining to the issue of vouchers. Each of these vending machines retains extensive records of each transaction which emanates from it. Certain of the information is printed upon the vouchers which are given by the vendor to the customer. Vouchers are issued with a view to each voucher being used to obtain the right to use the amount of electricity purchased at a particular prepaid electricity meter situated at the customer's premises (usually his house).

[12] The vouchers reflect the value of electricity being purchased, the date and time when the voucher was printed, the number of the vending machine and the code required to be entered into the particular meter for which the voucher is valid.

[13] It is immediately apparent that vouchers cannot be printed at random. Vouchers are printed for particular customers who provide their meter number and who intend to use the voucher almost immediately. Once the code has been entered into the particular meter by the customer, the customer is entitled to and is able to access electricity up to the value of the voucher as and when the customer requires it.

[14] It is apparent why the system is referred to as a prepaid system. The vendor prepays Eskom; the customer in advance of obtaining the electricity which he requires, prepays for it.

[15] Eskom is able, by using the information obtained from the machine which issued the vouchers, to ascertain the total value of the sales made by the machine as also detailed information of each machine.

[16] The remaining question which arises irrespective of the link of the accused to the events is whether or not electricity can be stolen.

[17] In order for a theft to take place, the property which is removed must be a thing capable of being stolen. According to Roman and Roman-Dutch Law as a *contrectatio* was the handling of a thing, theft could not be committed of an incorporeal thing which could not be touched and so could not be taken in hand. The general rule seems to be that only corporeal or movable things are capable of being stolen and thus incorporeal property cannot be stolen. See *South African Criminal Law and Procedure*, Volume 2, 3rd edition by Milton page 600. Property stolen must be "'n selfstandige deel van die stoflike natuur." See *Snyman, Strafreg* 3de uitgawe, page 493...

[18] The fact that an incorporeal cannot form the subject of theft, has been recognised as a difficulty, particularly where money and shares are concerned. The question was left open in *v Milne* or *Erleigh*, 1951 (1) S 791 (A). The fact that an account holder is not the owner of money in his bank however, does not mean that he is not a person with a special property or interest therein, such as to result in the monies being capable of theft. See: *v Kotze*, 1961 (1) S 118 (SCA). The Supreme Court of Appeal has held that a person who receives monies into his bank account in his name, knowing that he is not entitled thereto and who uses them commits theft. See *Nissan South Africa (Pty) Limited v Marnitz NO and others* (*stand 1 at 6 Aeroport (Pty) Limited intervening*), 2005 (1) SA 441 (SCA) at paragraphs 24 and 25.

[19] The underlying objection to holding that an incorporeal is capable of theft is the requirement that there should be a *contrectatio*. Inasmuch as a taking is required, so the argument goes, there can only be the taking of a physical movable. This matter was dealt with directly in *v Harper and Another*, 1981 (2) S 638 at 664 and following which held an incorporeal capable of theft.

[20] This concept has been recognised in our society, for example in *Nissan supra*. In the modern day there are more complicated transactions than existed historically and hence than were considered historically. In Nissan's case, the thief received into his bank account a credit independently of any action taken by him, which resulted in the amount reflected as standing to his credit being increased. In the ordinary course these credits are owned and possessed by the bank. The customer has only a special interest to them arising out of the contract he has with the bank. The credits exist electronically and constitute a cash value sounding in money. The rights reflected by the credit accordance with the customer/banker contract however vest in the customer who can use the credits at his will. The customer whose account was debited to create the credit in the other customer's bank account has diminished claims against the bank in his account. On the authority of Nissan such person has lost a thing capable of being stolen and that thing is stolen when the customer uses the credit to which he is not entitled. There is no physical handling of anything.

[21] Hence the *contrectatio* is constituted by an appropriation of funds, which already exist in his account but, to which the customer is not entitled. This is not a *contrectatio* constituted by a physical removal of something from the owner. It is a taking of an electronic credit given by mistake and not processed or owned which is used deliberately against the interest of the owner. The *contrectatio* is constituted by an appropriation of a characteristic which attaches to a thing and by depriving the owner of that characteristic.

[22] Inherent in the finding in Nissan's case is that this appropriation of a characteristic attaching to a thing does constitute theft. Once this understanding of what can be stolen is reached, the subsequent decisions which are all collated in South African Criminal Law and Procedure (supra) at 601 become explicable.

[23] A decision which is out of step with that thinking, which has been in existence for many years now, is *v Mintoor*, 1996 (1) SAC 514 (C) at 515 where it was held that electricity is an energy and that energy is incapable of theft. The learned Judges, who reached that conclusion, had no regard to the authorities (some of which postdate the judgment) to which I have referred in relation to the appropriation of a characteristic attaching to a thing and merely adopted the Glanville Williams reasoning as authority

for the proposition that electricity, could not be stolen. v Harper was not considered. The minority judgment in Milne earlier cited supra was not considered.

[24] It is necessary to consider what electricity is in this context. Eskom creates electricity by the use of fuel sources which power turbines. There is a cost involved in the creation of the electricity produced. That electricity is inserted into a grid. At points on the grid, there are consumers who, if Eskom permits them, may receive electricity and use such electricity. That right to receive and use the electricity, is subject to terms and conditions which Eskom imposes upon its consumers and to which they agree. One of the requirements is the obligation to pay money for the right to receive measured quantities of electricity.

[25] Eskom, when it provides the electricity, does so using closed circuit. The flow of electricity is dependent upon the flow of electrons. Eskom creates energy which results in electrons flowing (this is what we call electricity). No electrons are lost. The characteristic attached to the electrons is that when they are driven in this way, they are energized and capable of driving a load. The energy does not exist as an abstract concept it exists in reality in the form of energizing electrons.

[26] The electrons which are driven, and which, while travelling we call electricity, are the free electrons moving through the circuit. They belong to, are processed and released by Eskom. Eskom has the countrywide grid and the consumer has the tiny portion of the circuit attached to that grid which comprises the circuitry in his house after the meter. The number of electrons within the customer's circuitry is insignificant by comparison to the number of electrons in the grid. The process by which the electricity is delivered is that as an electron travels into the customer's circuitry, one leaves the customer's circuitry returning to the grid. In this way there is a flow of electrons which remains in balance. The number of electrons which enter and leave the circuit of each customer, as I have stated, are insignificant in relation to the total number of electrons in the grid.

[27] That being so for all practical purposes, once the customer uses the circuit and allows electron into his circuitry, the electrons of Eskom remain within his circuit, in substitution for those electrons having departed. In this way, the electrons change position, having originally being possessed by Eskom and subsequently being possessed by the consumer. The characteristic which attaches to the electron is the energy by which it moves. That characteristic is consumed when the electricity passes through a load in the customer's residence on the customer's circuit. The energy is transferred into the load used by the consumer (a kettle, a light, or other electrical appliance). That characteristic and the extent to which it has been used or transformed by the use of the electrical appliance is measureable. That characteristic is the characteristic which Eskom chooses to produce and sell to its customers. Once that characteristic, energy, is used by the electrical appliance or the load, it is no more.

[28] This also is the solution to the question of whether or not there has been a permanent deprivation. Electrons are not lost and eventually return to the grid from the customer's circuitry. However the characteristic attached to the electron, namely the force and energy it has while it is being driven towards and through the customer's circuit is removed from it. ....

[29] I consider another example: if electricity is not capable of being stolen, then anyone would be entitled without permission of the owner to attach a load to his batteries and deplete the energy within them, thereby rendering the batteries useless. Yet nothing will have been stolen. Nothing physically has been taken from the battery; however its characteristics have changed.

[30] It appears to me that modern day society has already advanced and accepted that there can be theft of this nature. See for example the informative article by Snyman, ''*Die gemeenregtelike vermoeiings misdade en die eise van ons moderne samelewing*,'' 1977 SAC 11 particularly at 14.

[31] It has long been recognised that the abstract and incorporeal nature of a right, which has been taken in the context of notes and coins is a loss. See for example, *v Scoulides,* decided in the 50's (1956 (2) SA 388 (AD) at 394 G).

[32] The same reasoning applies to the submissions made in relation to electricity credits.

[33] In my view, the evidence established the guilt of accused 1 and 2 as charged in the charge sheet.

[34] I accordingly make the following order, that accused numbers 1 and 2 are found guilty of the charges levelled against them in the charge sheet in their entirety. Accused 3 is found not guilty and is acquitted.

CASE 6

EX PARTE MINISTER OF JUSTICE: IN RE R v GESA; R v DE JONGH 1959 (1) SA 234 (A)

Citation	1959 (1) SA 234 (A)
Court	Appellate Division
Judge	Schreiner ACJ, Hoexter JA, Malan JA, Van Blerk JA and Price AJA
Heard	November 6, 1958
Judgment	November 24, 1958

Flynote

Criminal law—Robbery—What amounts to—Handing over of thing obtained by threats of personal violence.

Headnote

Where A threatens B with personal violence in order to get possession of a thing belonging to B, and B hands the thing over to A rather than run the risk of bodily injury, A is guilty of robbery and, it follows, also guilty of theft.

R v Gesa, 1957 (1) SA 657 (O), and *R v de Jongh*,, 1957 (3) SA 659 (O), overruled. *R v Sitole*, 1957 (4) SA 691 (N), approved.

Case Information

Appeal by the Minister of Justice in terms of sec. 385 of Act 56 of 1955. The facts appear from the judgment of SCHREINER, A.C.J.

...

JUDGMENT

C SCHREINER ACJ

[1] The Minister of Justice, having doubts as to the correctness of the decisions in *R v Gesa*, 1957 (1) SA 657 (O), and *R v De Jongh*, 1957 (3) SA 659 (O), on a question of law, has, under sec. 385 of Act 56 of 1955, submitted them to this Court for determination of the question whether the two decisions are right in law in holding that where A threatens B with personal violence in order to get possession of a thing belonging to B, and B hands the thing over to A rather than run the risk of bodily injury, A is not guilty of robbery or theft.

[2] The basis of the decisions, which were given in automatic review proceedings, without argument being heard, was that because the complainants themselves handed over their money, their acts were in law voluntary and could therefore not found proper convictions for robbery or theft, even though the complainants handed over the money solely by reason of threats of personal injury. The threats having been uttered in circumstances that showed that, at least as far as the complainants knew, the accused were able to carry them out, verdicts of common assault were competent on the charges of robbery. Such verdicts were substituted by the reviewing Courts and the sentences were substantially reduced.

[3] According to the legal proposition relied on in theses cases the traditional robber's demand, as he points his firearm at the victim,—'Your money or your life!'—could not lead to a conviction for robbery, or even for theft, if the victim handed over his money in order to save his life; but there could be a conviction for robbery if he remained passive and had his money removed from his person. If the villain–the term is hardly colourless but I use it to avoid begging the question whether there was theft or robbery–after making the classic demand, is interrupted before the victim reacts, it would presumably be impossible to find him guilty of attempted robbery, for it could not be established that he would actually have removed the goods of the victim from his person if the latter had failed to hand them over. If in addition to remaining passive the victim by words or conduct indicated in which pocket his money was and invited the villain, instead of killing him, to take the money, and the villain did so, this would presumably be equivalent to a handing over and would, upon the proposition in question, negative theft or robbery.

[4] Before examining the acceptability of the proposition directly, it is necessary to consider a related argument advanced by Mr. *Beck*, who appeared in support of the two decisions. While submitting that, for robbery, violence is not enough if it is followed by a handing over and not by a taking without a handing over, he contended also that there must always be some violence, as opposed to mere threats, however formidable. To eliminate the element of handing over from this part of the argument one may presuppose a case in which the goods are in the presence of the victim but not in his pockets or attached to his person; they can, therefore, if the victim submits, be removed by the villain without violence in the form of force applied to the victim's person. The present argument then would be, that in such cases if the victim is merely 'held' up and forced by threats to allow the removal of the property from his presence, this is no robbery, for robbery requires actual violence.

[5] It is easy and natural in any language and in any century to say that there is a crime of robbery, *rapina* or *roof* which consists of theft with violence, but such a statement, neatly descriptive though it may be, cannot amount to a precise legal definition from which the characteristics of the crime can be extracted. In relation to the factor of violence some qualification and distinction is unavoidable. One distinction, for instance, appears to be generally accepted. If violence is only used as a direct step towards gaining possession of the thing desired, in order to separate it from the victim's person, this is not robbery (see cases cited in *Gardiner and Lansdown*, 6th ed. p. 1707). For robbery the violence must aim at reducing the victim to impotence or submission. The victim need not be physically incapacitated; it is enough that his will is overborne by fear, so that the villain can safely take possession of the goods. It seems unreasonable, in the submission type of case, to hold that there is a robbery if the pistol is poked into the victim's ribs but none if it is pointed at his forehead without contact. I cannot think that such a distinction is supportable. It is true that in the case of *The State v Joubert*, 4 O.R. 188, the very brief report states that the Court was of the opinion that

> 'actual and physical force is indeed necessary to constitute the crime of robbery.'

Such force was found in the fact that the accused had put his hand into the complainant's pockets. But he did not do so in order to overpower or intimidate the complainant. And in any event the opinion that the use of actual force is necessary for robbery was in my view erroneous.

[6] In neither of the two cases under investigation was there actual violence, but from the reference to certain of the authorities quoted in *Gesa's* case it might seem that the presence of actual violence was treated as an essential element of robbery. The *ratio decidendi* of each decision was, however, as I have indicated, the proposition that there could be no theft or robbery because the complainant handed over his money himself rather than run the risk of sustaining the injury with which he was threatened.

[7] The problem of fitting the handing over of property by reason of deception or threat into an adequate system of criminal law is not a new one. The problem arises out of the reasoning that all thefts, and consequently all robberies, require that the victim should have been deprived of his goods against his will, and that if there is a conscious, intentional act of handing over on the part of the victim, this can never be against his will. A willed act, so it is said, is still a willed act though brought about by deception or fear. In a philosophical sense that may or may not be correct, depending, presumably, on the meaning to be assigned to the expression 'willed act'. But, assuming that a question of logic is involved, the law is not invariably dictated by logical considerations. Thus it may be said in a sense to be illogical to hold that there may be a culpable homicide even though the killing was intentional. Yet

the law does so hold (see the cases referred to in *R v Tenganyika*, 1958 (3) SA 7 (FC) at p. 12). We have here to deal with a practical question in the law of theft. That law does not disregard the effect that deceit or fear may have had in leading the victim to hand over his property to the villain.

[8] It is useful to test the position by looking at our law regarding theft by false pretences. Where a person has been induced by a false and fraudulent representation to hand his goods over to the representor, our law treats this as theft. A legal system does not necessarily have to reach this conclusion, though if it does not, it must presumably make other provision. That is what the English law did.....

[9] As a result of the wideness of our concept of theft some overlapping with the crime of fraud occurs (*Rex v Davies*, 1928 AD 165 at p. 170). And questions, with which we are not here concerned, may arise as to the sufficiency of the particulars provided by an indictment for theft, where false pretences are involved. But the existence in our law of a partly overlapping crime of fraud provides no reason for doubting that there may be theft even when there is a 'voluntary' handing over of the goods by the victim, if he was fraudulently deceived by the recipient into handing them over.

[10] The above examination of the position in relation to theft by false pretences is sufficient, in my view, to preclude one from holding that, on principle, there can be no theft and therefore no robbery where there is a voluntary handing over, in the sense that the victim consciously and intentionally delivers the goods to the villain. Both in fraud and in intimidation the law may treat the vitiated will as if it were non-existent. It all depends on how the particular legal system covers by particular crimes the field of misconduct in question.

[11] Just as in the case of theft by false pretences there may be overlapping between theft and fraud, so in regard to robbery there may be overlapping with extortion. It was suggested by the learned Judge in *Gesa's* case that the accused might have been charged with extortion. I do not find it necessary to express any view on the correctness of this suggestion, for even if it was correct it would not exclude a verdict of guilty of robbery, since there was a threat of immediate injury and the money was on the persons of the victims. We are not concerned in the present proceedings to delimit the areas of robbery and extortion or to decide on the extent to which they overlap, if at all.

[12] The researches of my Brother HOEXTER, whose judgment I have had an opportunity of reading, show that some at least of the civilian writers consider that robbery includes cases of handing over under threat. Others apparently prefer to treat such cases as examples of a crime akin to but not identical with true robbery, whatever the result of such treatment may be. It might, perhaps, be difficult, if one had to consider only the Roman Dutch writers, to say with complete confidence that threats of violence resulting in a handing over of goods amounted to *roof* in the law of Holland. But if we examine the law of South Africa from all angles there is no room for doubt. ....

[13] For these reasons I am of the opinion that the law was wrongly stated in the two decisions and that where A threatens B with personal violence in order to get possession of a thing belonging to B, and B hands the thing over to A rather than run the risk of bodily injury, A is guilty of robbery and, it follows, also of theft.

[14] MALAN, J.A., and PRICE, A.J.A., concurred in the above judgment.

CASE 7

S v MSHUMPA 2008 (1) SACR 126 (E)

THE STATE	
And	
LUDWE MSHUMPA	ACCUSED NO 1
DAVID ALEXANDER BEST	ACCUSED NO 2
Registrar:	CC27/2007
Magistrate:	High Court: EAST LONDON LOCAL CIRCUIT DIVISION
DATE HEARD:	
DATE DELIVERED:	11/05/2007
JUDGE(S):	Froneman J

Flynote

Killing of an unborn child not murder—no prospective declaration to extend current definition or application of murder to include such killing made–legislature better suited to reform law in that regard if considered necessary–injury to unborn child can be dealt with at sentencing stage where assault perpetrated on mother.

JUDGMENT

FRONEMAN J (sitting with two assessors).

[1] On the morning of 14 February 2006 Ms. Melissa Shelver, a young pregnant mother, and the baby's father, Mr. David Best, consulted the gynaecologist monitoring Ms. Shelver and the baby's progress at a medical facility in Southernwood, East London. They had been doing so regularly during the pregnancy. The examination revealed that things were going well with both mother and baby. The would-be parents had been following the progress of the baby in Ms. Shelver's womb by way of modern technology and they knew it would be a daughter. They had decided to name her Jenna-May. The baby was in the 38th week of pregnancy and her birth was imminent. There were no complications during the pregnancy and an uneventful birth was anticipated.

[2] They returned to and entered their car after visiting the gynaecologist. Having done so, Mr. Ludwe Mshumpa also got into the back of the car. He threatened them with a gun and ordered Mr. Best to drive to an isolated area near Fort Jackson outside East London. There he and Mr. Best got out of the car. Mr. Best was then shot in the shoulder by Mr. Mshumpa. Mr. Mshumpa returned to the driver's side of the vehicle and shot Ms. Shelver twice through the stomach from her right side to her left. He then made off with certain goods of Mr. Best, namely his watch, wallet and cell phone, without taking anything from Ms. Shelver. Mr. Best got back into the car and with some difficulty managed to drive to an emergency medical aid station. Both he and Ms. Shelver were taken from there to hospital. They were fortunate. Both of them survived. The shot to Mr. Best's shoulder missed his lungs by a couple of millimetres. Ms. Shelver would have died had she not received medical treatment.

[3] The unborn child in Ms. Shelver's womb was not so fortunate. Despite apparently excellent immediate emergency treatment by two teams of doctors, treating both mother and child, the baby

did not survive. A ceasarian section was performed in theatre, but despite valiant efforts at resuscitation the baby's life could not be saved. She was stillborn, a result of the two gunshots fired into Ms. Shelver's stomach shattering parts of her cervical spine. Poignancy was added to this tragedy by the fact that Ms. Shelver held the baby after birth, thinking that she was alive, only to be told later that she had indeed been stillborn.

[4] The kind of attack perpetrated on 14 February 2006 is unfortunately not so uncommon to South Africans, but the shooting of a baby in the mother's stomach as part of the exercise is nevertheless quite unusual and shocking. The shooting of an unborn child in the mother's womb raises the vexing legal question of whether such a killing constitutes a separate crime of murder, besides the offence aimed at the mother carrying the unborn child. So, even on the undisputed facts thus far described, the case would have been out of the ordinary. The prosecution of Mr. Mshumpa alone would have required the consideration of unusual factual and legal issues. It is no surprise that he is indeed an accused in the matter—Accused no 1. But, in true Alice in Wonderland terms, things only get curiouser and curiouser. Mr. Best, himself a victim of the shooting, is also an accused—Accused no 2. This is but the beginning of a very strange tale.

[5] The indictment is a good place to start the tale. Both Mr. Mshumpa and Mr. Best are charged with the murder of the unborn child in the womb of its mother (count 2), the attempted murders of Ms. Shelver and Mr. Best (counts 3 and 4), attempting to defeat or obstruct the course of justice (count 6) and the unlawful possession of a firearm and ammunition (counts 7 and 8). Mr. Best alone faces two further charges of statutory conspiracy, incitement, instigation or procurement of other persons to commit, firstly (as count 1), the offences just set out–that is, counts 2 to 8—and, secondly, unrelated to the incident that took place on 14 February 2006, to kill Mrs. Hester Jacoby and Mr. Richard Schultz (count 9).

[6] Briefly stated it is the State's case that as a result of personal reasons resulting from Mr. Best's entangled love relationships with Ms. Shelver and another girlfriend, Ms. Tanya Jacoby, he approached a state witness, Mr. Andile Tukani, for assistance in getting rid of the unborn child. Mr. Tukani in turn involved Mr. Mshumpa, accused no 1, in the plot. The eventual plan entailed obtaining a gun, which was then to be used in a staged shooting and robbery. To make things convincing to the outside world Mr. Best would himself be shot in the shoulder during the so-called robbery. Care also had to be taken to shoot Ms. Shelver through the stomach so that the unborn child should be killed and not Ms. Shelver herself. No valuables were to be taken from her either. Effect was given to the plan when Mr. Tukani, in the company and with the knowledge of the two accused, procured a gun and ammunition in the township. Mr. Mshumpa then completed the execution of the agreed plan by the shooting and robbery on 14 February 2006, in the manner already described. The plan to kill Mrs. Jacoby and Mr. Shultz never really got off the ground beyond discussion between Mr. Best and Mr. Tukani of some bizarre, even farcical, schemes of how to give effect thereto.

[7] Both accused pleaded not guilty to the respective charges against them. During the trial it emerged that Mr. Mshumpa did not dispute his participation in the events of 14 February 2006, but his defence was that he did so under compulsion and threats from Mr. Tukani. His evidence confirmed the existence of a plan involving himself, Mr. Best and Mr. Tukani, but differed in some details from the scheme already described.

[8] Mr. Best denied any involvement in the offences he was charged with. He claims that Mr. Tukani falsely implicated him in a plot probably hatched by Tukani, with the connivance of Mr. Mshumpa. He attributed the need for Mr. Tukani to do so to the latter's desperate greed for money and the necessity of him having to settle some underworld debt.

[9] The main factual issues that we need to determine thus relate mainly to the respective involvement, if any, of the three main protagonists (Mashumpa, Best and Tukani) in the events leading up to what happened on 14 February 2006. What happened on that fateful day after Mshumpa got into the car is largely common cause. It is what happened before then that will determine the guilt or otherwise of the two accused before court.

[10] Whatever the outcome of that factual enquiry, Mr. Marais, who appears for the State, also argued that our law has reached the state of development where the intentional killing of an unborn child in the

womb of the mother constitutes murder, a contention strenuously opposed by Mr. Cilliers and Mr. Price, counsel who appeared for, respectively, Mr. Mshumpa and Mr. Best. In addition they also raised certain other points of law relating to the various charges brought against the accused. During the course of the trial we also made certain rulings on the admissibility of statements made to a clergyman and a senior policeman by Mr. Best after trials within a trial on those issues, and I also made a ruling about the propriety of attempting to obtain a ruling on the admissibility of the statement to the police officer before a decision was made by the defence on whether to call Mr. Best as a witness in that particular trial within a trial. We indicated that reasons for these rulings would be given in this judgment.

....

[47] What remains is to determine what offences the two accused are guilty of on an acceptance of these facts. Our findings on the facts are unanimous and I wish to record the invaluable assistance I received from my assessors in the consideration of these factual issues. They also assisted me greatly in the research and discussion of the legal issues that follow, but in terms of the law I carry sole responsibility for deciding these issues of law.

The killing of the unborn child

[48] At the start of this judgment I referred to the uncontested evidence that both mother and baby were doing well before the shooting on 14 February 2006. The evidence of Dr. Kirsten, a neo-natal medical expert, established that the baby was viable, in the sense that it was almost absolutely certain that had she been delivered by caesarean birth on the day of the incident, she would have been born alive and healthy. Generally speaking medical science now considers a foetus viable–in lay terms, considers it a baby–by the 25th week of pregnancy. Dr. Kirsten's evidence graphically illustrated that the baby was 'alive' in the womb of her mother at the time of the shooting incident, in the sense that she would have experienced pain in the same manner as a normal living baby that had already been born and was alive in the world outside her mother's womb. Her reaction to the pain inflicted upon her by the two bullet wounds that entered her body caused a reaction that would normally manifest only itself in normal birth upon being expelled from the womb, by a baby inhaling air. When a living person is shot and experiences great blood loss one of the compensatory mechanisms of the body to cope with this crisis is accelerated breathing in an effort to obtain more oxygen. The same happened to the baby in Ms. Shelver's stomach. In reaction to the pain caused by the bullets she tried to breathe, but obviously she was unable to breath in oxygen. Instead, the evidence of her attempt at breathing was the fact that amniotic fluid and red blood cells were found in her lungs afterwards–it meant that in her distress caused by the pain of the bullet wounds she inhaled some of her own blood. In medical terms she was alive in the womb of her mother and died there as a result of the gunshot wounds to her body. Medically speaking her life and death inside the womb did not differ in nature from life and death of a normal person living in the outside world, but only in the location where that life and death occurred.

...

[51] Argument in this matter was heard on Wednesday (8 May 2007) and we indicated that we would hand down our judgment today, Friday (10 May 2007). Yesterday judgment was delivered in the Constitutional Court in the matter of *Masiya v Director of Public Prosecutions and others*, Case CCT 54/06. Although it dealt with the definition of rape, it is a judgment that has a material bearing on the legal issue of whether it is competent and proper for me to develop the common law to include the killing of an unborn child under the definition of murder. In view of its outcome it is not necessary for me to deal in the same detail as I would otherwise have done with the difficulties standing in the way of the development of the common law in the manner advocated by Mr. Marais.

[52] In brief summary some of the most important impediments are the following.

[53] The present definition of the crime of murder is that it consists in the unlawful and intentional killing of another person (Burchell, *Principles of Criminal Law* 3rd ed., at 667; Snyman, *Strafreg*, 5th ed., at 423 ("die wederregtelike en opsetlike veroorsaking van die dood van 'n ander mens")). That has always been understood as requiring that the person killed had to be born alive. In terms of the present application of the definition of murder, the killing of an unborn child by a third party thus does not amount to murder.

[54] The extension of the definition of a crime, or the extension its application to new circumstances was frowned upon even in our pre-constitutional common law, primarily upon the basis that it offended against the principle of legality (*R v Sibiya* 1955 (4) SA 247 (AD) at 256H—257A); *S v Von Molendorff and another* 1987 (1) SA 135 (T) at 169C—170D). In textbooks it is stated that the courts do not have the power to create new crimes any more (Snyman, *Srafreg*, 5th ed., at 45; Burchell, *Principles of Criminal Law*, 3rd ed., at 96).

[55] Although the Constitution expressly expects the higher courts to develop the common law in order to bring it into line with the foundational values stated in the Constitution (for example in sections 8, 39 and 173 of the Constitution), the principle of legality is enshrined in section 35 (3) (l) of the Constitution. This section provides for the inclusion, as part of the fair trial rights of an accused, the right ''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''. It is one thing to develop the common law in civil matters to eradicate patterns of unequal personal, social and economic domination on the ground that these patterns offend against the foundational values of the Constitution, but it is quite another thing to bring about this development in the face of the legality principle explicitly recognized as a fundamental right itself in section 35 (3) (l) of the Constitution.

[56] The Constitution does not expressly confer any fundamental rights, most importantly the right to life, on an unborn child. As far as I am aware no South African court has ever held that an unborn child that was not born alive holds any right in its unborn state (an extensive discussion of, and reference to, the case law and literature on the subject both here and in other countries is contained in *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA)).

[57] The 'born alive' principle has never been discarded or developed in the manner Mr. Marais suggests, in those countries where murder is a common law crime (compare *Attorney Generals's Reference (No. 3 of 1994)* [1997] 3 All ER 936 (HL)). Nor, as far as I am aware, have the courts developed or interpreted statutory homicide laws to do away with the 'born alive' principle where they did not contain express words to that effect (compare the Californian case of *Keeler v Superior Court* 2 Cal. 3d 619). The dominant trend where unborn baby killing has been criminalized has been to enact specific 'feticide laws' aimed at killing by third parties and not the mother, and not to change the definition of the crime of murder to accommodate such instances.

[58] Failure to develop the law in order to include the killing of an unborn child as murder will not leave such an act unpunished and thus bring the law into disrepute. The act may still be punished as part of the offence committed against the mother, whether that may be murder, attempted murder or any other kind of assault upon the mother. The aggravation of the assault on the mother, in the form of harm to the foetus in her stomach, may suitably be taken into consideration at the sentencing stage.

[59] There are practical difficulties in formulating a reasonably precise extended definition of murder to include the killing of an unborn child. These issues include whether the definition should require the viability of unborn babies as a prerequisite, whether it should be restricted to only third party killings and exclude the mother, and to what extent and how it fits in with the criminal offence and sanction for illegal abortion under *The Choice on Termination of Pregnancy Act* 92 of 1996.

[60] The Constitutional Court judgment in *Masiya*, referred to above, has now fortunately made my task much easier by its clarification of the extent to which the Constitution allows our High Courts to develop the criminal law. As I understand the judgment it states, in a nutshell, that such a development of the common law of crimes must be done incrementally and cautiously in accordance with the dictates of the Constitution (paras. [30] to [33]); that the development should not have retrospective effect, dealing with the past, because that would offend the principle of legality, but that it is competent to effect the development prospectively, to operate only in future (paras. [47] to [51]).

[61] The application of these principles to the particular facts of the matter before it in the *Masiya* case is also instructive for present purposes. Although in issue there, was the extended meaning given to the definition of the crime of rape, the effect of the application of the extended definition to the accused there is similar to the position of the accused here. The act of the accused in *Masiya* constituted indecent assault under the old definition of rape, but fell within the new extended definition of rape,

which now also includes anal penetration of a female without her consent. The Constitutional Court held that because of the principle of legality as set out in section 35 (3) (l) of the Constitution Mr. Masiya could only be found guilty of indecent assault and not of rape under the extended definition (para [71]). It also commented that the fact that he has been convicted of indecent assault did not ''automatically mean that the sentence imposed upon him should be more lenient than if he had been convicted of rape'' (para [72]).

[62] On an application of the *Masiya* judgment to the present case it seems clear that I cannot retrospectively declare the killing of an unborn child to constitute the crime of murder. Nor may I find the accused guilty of murder, for the simple reason that it would offend the principle of legality enshrined in section 35 (3) (l) of the Constitution. When the unborn child was killed on 14 February last year the acts or omissions of the accused did not constitute the offence of murder at the time. The accused cannot therefore be guilty of murder on count 2.

[63] The only remaining issue on this aspect is whether I should make a prospective declaration that the definition of murder should be extended to include the killing of an unborn child. I think not. The first reason for declining to do so is substantive in nature; the others perhaps based more on pragmatic considerations.

[64] The prospective extension of the definition of rape in *Masiya* effectively extended the ambit of protection from the crime to an existing class of persons in society, namely women. Rape is a crime which impinges upon the fundamental rights of dignity, privacy and physical integrity of woman in a brutal and degrading manner. There is no counterpart in the Constitution for the protection of the rights of an unborn child. What is protected in the Constitution, however, is everyone's right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction, and to security and control over one's body (section 12 (2) (a) and (b)). The case of an assault, in whatever form, by a third party on a pregnant woman with a view to injuring the child in her womb, is an outrage even if viewed simply from the perspective of the injury to the mother. The wonder of pregnancy lies not in the separateness of the mother and the child in her womb, but in their unique togetherness during that period. An assault by an outsider on one is at the same time an assault on both, in their togetherness. Our existing common law of crimes of assault, in its various forms, already provides protection in this regard. And, as pointed out in *Masiya*, the extent and nature of the particular assault in any given case may have a more important role to play in determining an appropriate sentence, rather than the formal name given to the particular crime involving the assault. The appropriate development in respect of appropriately punishing third parties who intentionally harm or kill unborn babies may thus in my judgment be done within the ambit of existing crimes of assault against the pregnant mother. Such an approach would not only avoid the formal difficulties of formulating a precise definition for an extended crime of murder, but would also not make the punishment of an injury or killing of an unborn child dependent on the stage the pregnancy has reached.

[65] The pragmatic considerations include the problem of precise definition that I have just referred to. Another is the possible uncertainty that a prospective declaration of a new or extended crime by a High Court of first instance will create. There is no provision in the Constitution for an automatic referral for confirmation by the Constitutional Court in such a case, as there is when national or provincial legislation or the conduct of the President is declared constitutionally invalid (section 172 of the Constitution). I am not saying that there is no merit in making the killing of an unborn child a crime, either as part of the crime of murder or as a separate offence, only that in my view the Legislature is, as the major engine for law reform (*Masiya*, para [33], referring to *Carmichele v Minister of Safety and Security and another* 2001 (4) SA 938 (CC)), better suited to effect that radical kind of reform than the courts.

The other offences

[66] On the basis of our factual findings it remains to determine which of the other offences the accused may be guilty of.

[67] Attempted murder of Ms Shelver (count 3)

In our judgment both accused are guilty on this count. Any person will know that there is a foreseeable risk of death by shooting anyone, including a pregnant woman, in the stomach. The medical evidence that Ms. Shelver would have died had there been no emergency treatment went unchallenged. The direct intent to kill the child does not exclude intention in the form of *dolus eventualis* in respect of the mother. The egregious killing of the unborn child is an aggravating feature of the assault and will receive proper consideration at the sentencing stage.

[68] Attempted murder of Mr. Best (count 4)

Suicide or attempted suicide is not a crime in our law (*Ex parte Die Minister van Justisie: In re S v Grotjohn* 1970 (2) SA 355 (AD)), so it appears that Mr. Best cannot be guilty on this count as a co-perpetrator. Mr. Mshumpa is, however, guilty, on the same basis as that in respect of the attempted murder of Ms. Shelver, namely that he must have subjectively foreseen the risk of death resulting from shooting Mr. Best in the shoulder, but that he nevertheless proceeded in acceptance of that possible consequence. Mr. Best's consent to the attempt on his life does not render his conduct lawful in our law (*S v Robinson* 1968 (1) SA 666 (AD).

[69] Robbery with aggravating circumstances (count 5)

On the basis of the facts accepted by us we have to accept that the accused never had the intention to steal the valuables handed over by Mr. Best to Mr. Mshumpa in the car on the way to Fort Jackson. Nothing was taken from Melissa. Mr. Mshumpa did however threaten her with rape, in execution of the instruction to act aggressively so as to convince her of the genuineness of the event. It is clear that Ms. Shelver was terrified: she believed that force was going to be applied to her in that respect. That is sufficient to constitute assault (Burchell, *Principles of Criminal Law,* 3rd ed., at 680). Both accused must have anticipated that result. We find both of them guilty of assault under this count.

[70] Attempting to defeat or obstruct the course of justice (count 6)

The whole purpose of faking a kidnapping and robbery was to mislead the police and prevent the detection of the true crimes. That constitutes the crime with which the accused are charged on this count (*S v Daniels* 1963 (4) SA 623 (E)). In addition Mr. Best gave a false statement about what had happened to the police (*S v Burger* 1975 (2) SA 601 (C)). They are both guilty on this count.

[71] Unlawful possession of a firearm and ammunition (counts 7 and 8)

Mr. Mshumpa admitted that he knew that one needed a licence to possess a firearm, but was unaware of the need for a licence for the possession of ammunition. This evidence is so unusual that, strangely, it carries the reasonable possibility of being true. Mr. Best has no such excuse. He is guilty of both counts, Mr. Mshumpa only of count 7.

[72] Statutory conspiracy or incitement (counts 1 and 9)

Under count 1 Mr. Best, Accused no. 2, is charged with statutory conspiracy with, or incitement of, Mr. Mshumpa and Mr. Tukani, to commit the offences set out in counts 2, 3, 4, 5, 6 , 7 and 8, in contravention of section 18 of Act 17 of 1956. It would amount to a duplication to convict Mr. Best of this offence in addition to his conviction of the actual offences under the other counts (Snyman, *Strafreg*, 5th ed., at 295). We have found him guilty under counts 3, 5, 6, 7 and 8, but not of count 2 (because I held that the crime of murder does not encompass the killing of an unborn child), nor of count 4. The latter finding in respect of count 4 was based on the fact that in our law suicide or attempted suicide is not a crime. However, it seems to me that nothing in principle prevents finding Mr. Best guilty under count 1 of statutory incitement of Mr. Mshumpa to commit attempted murder in respect of count 4.

We found earlier that Mr. Best did incite Mr. Tukani to kill Mrs. Jacoby and Mr. Schultz. The fact that Mr. Tukani did not actually agree to do it, or that the suggested ways to give effect thereto were impractical, constitutes no defence to a charge of incitement (*S v Nkosiyane* 1966 (4) SA (AD)). He is thus guilty of count 9.

Summary

[72] In summary:

Mr. Mshumpa, Accused no 1, is found guilty as charged in respect of count 3 (attempted murder of Ms. Shelver), count 4 (attempted murder of Mr. Best), count 6 (attempted obstruction of justice) and count 7 (unlawful possession of a firearm), and of assault in respect of count 5.

Mr. Best, Accused no 2 is found guilty as charged on count 3 (attempted murder of Ms. Shelver), count 6 (obstruction of justice), counts7 and 8 (unlawful possession of a firearm and ammunition), count 9 (statutory incitement to murder Mrs. Jacby and Mr. Schultz), guilty of assault under count 5, and guilty of statutory conspiracy in respect of the completion of the offence set out in count 4, under count 1.

CASE 8

S v GARDENER AND ANOTHER 2011 (1) SACR 570 (SCA)

In the matter between:	
PETER GRAHAM GARDENER	First Appellant
RODNEY MITCHELL	Second Appellant
and	
THE STATE	Respondent
Neutral citation:	Gardener v The State (253/07) [2011] ZASCA 24 (18 March 2011)
Coram:	HEHER, CACHALIA and SERITI JJA
Heard:	18 February 2011
Delivered:	18 March 2011
Updated:	

Flynote

*Criminal law—fraud—prejudice—intention to prejudice—company director intentionally and without acceptable explanation withholding disclosure of facts relevant to transaction in which company interested—*a priori *case of fraud.*

Criminal law—sentence—role of public interest in balance of factors.

JUDGMENT

HEHER JA (CACHALIA and SERITI JJA concurring)

[2] The appellants, Mr Gardener and Mr Mitchell, were at material times joint chief executive officers of LeisureNet Limited, a listed company, and directors of LeisureNet International Limited, an offshore subsidiary, and of its subsidiary, Healthland Germany Limited. The last-mentioned held half the shares in Healthland Germany GmbH, the balance being held by a Jersey company, Dalmore Limited.

[3] In May 1999 International purchased Dalmore's interest in Healthland Germany for DM 10 million. The appellants each held a 20 per cent interest in the business of Dalmore in Germany and received a proportionate share of the purchase price (DM 2 million each) in consequence. The price was raised and paid by LeisureNet. The appellants had not disclosed their interest in Dalmore to LeisureNet or International before or at the time of the sale and did not do so subsequently. That fact only came to light in the course of an enquiry into the affairs of LeisureNet subsequent to its liquidation in 2001. The appellants were charged with (inter alia) fraud in failing to disclose their interest in Dalmore to the board of LeisureNet during the period about April to December 1999 ('the Dalmore charge') and were duly convicted. Gardener was sentenced to 12 years' imprisonment (of which 4 years were conditionally suspended). Mitchell was likewise sentenced to 12 years' imprisonment, but, in his case, 5 years were conditionally suspended.

[4] The appellants acknowledged from the outset of the trial that they had at all material times been under a duty to disclose their interests in Dalmore to the LeisureNet board and, in failing to do so, had

breached that duty. In the appeal they also conceded that their conduct had made them guilty of contravening s 234(1) of the Companies Act 61 of 1973, with which offence they had been charged in the alternative to the Dalmore charge. That concession was limited to an admission of negligence in failing to make the disclosure, culpa being sufficient *mens rea* for a contravention of the section.

...

The law governing fraud

[29] It is trite that:

> 'Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.'

JR L Milton: *South African Criminal Law and Procedure*, Vol. 2 (3rd Edition) at 702. And see *S v van den Berg* 1991 (1) SACR 104(T) at 106b.

[30] With regard to the question whether non-disclosure is criminally fraudulent Coetzee J in *S v Burstein* 1978 (4) SA 602(T) at 604G-605B, stated the law in this regard as follows:

> 'The question whether non-disclosure is criminally fraudulent is not an easy one. As pointed out by Hunt in *SA Criminal Law and Procedure* Vol 2 at 716, silence may well constitute civil fraud without constituting criminal fraud. The distinguishing feature lies mainly in the presence or absence of the necessary intention to defraud. There are very few cases of criminal non-disclosure. The most comprehensive judgment on this topic is that of Trollip J (as he then was) in *S v Heller and Another* (2) 1964 (1) SA 524(W) at 536–538, which I adopt, with respect, as an authoritative statement of the law. For the purpose of dealing with the facts of the present case more conveniently, I would summarise the requisites of this type of fraud, as discussed by the learned Judge, as follows:
>
> *(a)* a duty to disclose the particular fact;
>
> *(b)* a wilful breach of this duty under such circumstances as to equate the non-disclosure with a representation of the non-existence of that fact;
>
> *(c)* an intention to defraud which involves
>
> (i) knowledge of the particular fact;
>
> (ii) awareness and appreciation of the existence of the duty to disclose;
>
> (iii) deliberate refraining from disclosure in order to deceive and induce the representee to act to its prejudice or potential prejudice;
>
> *(d)* actual or potential prejudice of the representee.'

See also *S v Heller* (2) 1964 (1) SA 524(W) at 536F-537F; *S v Brande and Another* 1979 (3) SA 371 (D) at 381A-D; *S v Harper and Another* 1981 (2) SA 638 (D) at 677F-H.

[31] Professor Snyman puts the required *mens rea* thus:

> 'There is a distinction drawn between an intention to deceive and an intention to defraud. The former means an intention to make somebody believe that something which is in fact false, is true. The latter means the intention to induce somebody to embark on a course of action prejudicial to herself as a result of the misrepresentation. The former is the intention relating to the misrepresentation, and the latter is *the intention relating to both the misrepresentation and the prejudice*.' [Emphasis provided].

Snyman *Criminal Law* (5 ed) at 531–2; *S v Isaacs* 1968 (2) SA 187(D) at 191C-192A; *S v Huijzers* 1988 (2) SA 503(A) at 506I-508B.

[32] The authorities I have cited support the view that an intention to cause actual or potential prejudice is a necessary element of the crime of fraud. But it may be that proof of deceit which is calculated (likely) in the ordinary course of things to result in such prejudice is sufficient without a subjective mental

element.[1] The law has not been argued before us and it is unnecessary to decide the question, since, for reasons which will appear, the State has, in my view, succeeded in proving an intention to cause prejudice beyond a reasonable doubt.

Intention to defraud

[33] The State was required to prove beyond reasonable doubt that the appellants withheld disclosure of their interest in Dalmore with intent to deceive the board of LeisureNet (and thereby to induce it to act on the misrepresentation to its prejudice).

[34] There being no direct insight into the minds of the appellants, the case for the State was built on the cumulative effect of the objective probabilities. The contention, which was accepted by the court a quo, was that the weight of such probabilities was sufficient to disprove beyond a reasonable doubt, the truth of the explanations furnished by the appellants in evidence for their non-disclosure throughout the period April to December 1999. Once that finding was made an intention to defraud followed as the only reasonable inference.

[35] In the context of the events which I have described, the probabilities that influence a decision as to whether, in failing to make disclosure, the appellants intended to defraud the company, can be assessed by reference to the following:

1 What had to be disclosed, not so much as a requirement of law but rather as a matter of pragmatism.

2 The appellant's knowledge of the duty and their observance of it in general.

3 Their opportunity to disclose.

4 Whether the failure was isolated or repeated.

5 The prominence and importance of the subject matter requiring disclosure in the minds of the appellants.

6 What the effects of disclosure would have been.

7 Whether there were reasons for withholding disclosure.

8 Whether the appellants derived a clear benefit from non-disclosure.

9 The conduct of the appellants in relation to the performance of their duty.

...

Actual or potential prejudice to LeisureNet

[56] At the hearing in this Court counsel did not press the absence of prejudice. This was unsurprising. By failing to declare their interest in Dalmore the appellants—

(a) precluded LeisureNet from considering the advantages and disadvantages of the sale uninfluenced by the participation of the appellants;

(b) precluded LeisureNet from investigating and considering the circumstances under which that interest was obtained with a view to taking disciplinary steps against the appellants and/or recovering the whole or part of the profit which the appellants derived or stood to derive from the sale;

(c) threatened the relationship built up between the company and the exchange control authorities;

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1 See particularly, *R v Jolosa* 1903 TS 694 at 700; *R v Henkes* 1941 AD 143 at 161; *R v Kruse* 1946 AD 524 at 532–4; *S v Huijzers* at 507I-508B; *S v Sithole* 1997 (2) SACR 306 (ZSC) at 312d-313c.

(d) induced LeisureNet to raise the finance and pay them for their interest in Dalmore.

In all of these matters there resided a potential for prejudice to LeisureNet.

...

The intent to cause actual or potential prejudice

[57] As I have previously indicated the withholding of the fact and details relating to their interest in Dalmore was deliberate and not accidental. It was done to avoid one or more of the consequences that I have identified. All of those consequences involved the self interest of the appellants to a substantial degree. They were all the probable result of the reaction of LeisureNet's board to the unwelcome news.

...

[59] For all the aforegoing reasons I conclude that there is no merit in the appeal against the conviction for fraud.

...

[78] The appeals of both appellants against conviction are dismissed. The appeals of both appellants against sentence are upheld. The sentences imposed by the Western Cape High Court are set aside and replaced by the following:

Each accused is sentenced to seven years' imprisonment.