REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO.: CC 168/2011 P

In the matter between:

THE STATE

and

THOKOZANI NHLOSO MCHUNU **ACCUSED**

J U D G M E N T

RALL AJ

[1] The accused, an adult male, faces a total of eight charges before me and an assessor. He pleaded guilty to all of them, namely:-

1. Robbery with aggravating circumstances committed on 27 August 2011;
2. Murder committed on 27 August 2011;
3. Sexual assault committed on 27 August 2011;
4. Attempted murder committed on 27 August 2011;
5. Robbery with aggravating circumstances committed on 30 August 2011;
6. Rape committed on 30 August 2011;
7. Murder committed on 30 August 2011;

8. Attempted murder committed on 30 August 2011.

[2] The accused, who is represented, handed in a signed statement in terms of section 112 (2) of the Criminal Procedure Act. This statement confirms that the accused pleads guilty to all the offences mentioned above except that on the first one it states that he pleads guilty to robbery only. The State accepted the plea on the lesser offence and accepted the accused's plea to the other charges on the basis set out in the statement.

[3] Subject to one qualification, the court is satisfied that the accused has clearly admitted all the elements of the offences to which he has pleaded guilty on the basis set out in his statement.

[4] The qualification relates to the third of the charges, which is one of contravention of section 5 (1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the 2007 Act'). This sub-section reads as follows:-

> 'A person (''A'') who unlawfully and intentionally sexually violates a complainant (''B''), without the consent of B, is guilty of the offence of sexual assault'.

The State alleges that on or about 27 August 2011 and at or near the Thalaleni area, Nkandla, the accused unlawfully and intentionally sexually violated the complainant by inserting his penis between her thighs. This conduct must have resulted in contact between the accused's penis and the complainant's thighs and so falls within paragraph (a) of the definition of 'sexual violation' in section 1 of the 2007 Act.

[5] As I have mentioned, the accused pleaded guilty to the charge and in his statement admitted all the elements of the offence. Amongst the things that he admitted was that the complainant was a 10 year old female child.

[6] I then questioned counsel for both the State and the defence about the consequences of the 2007 Act not prescribing any sentence for the offences of contravening sections 3 (rape) and 5(1) (sexual assault). The only provision which prescribes a sentence is s 54, which deals with the obligation to report the commission

of sexual offences against children or persons who are mentally disabled. This section criminalizes the failure to report knowledge of such offences to a police official and provides a penalty for such a crime. This is contained in paragraph (2)(b) which provides that such a person is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

[7] The closest that the 2007 Act comes to dealing with sentences for the other offences created by it is in section 56 which is headed 'Defences and sentencing'. Sub-section (7) states that 'if a person is convicted of any offence under this Act, the court that imposes the sentence shall consider as an aggravating factor the fact that the person…', Other than that, all there is is a number of references to sentencing, some of which are mentioned below.

[8] In contrast, the act which the 2007 Act to a large extent repealed and replaced, the Sexual Offences Act 23 of 1957 (the 1957 Act) prescribed sentences for the offences created by it and still does so in respect of the offences which have not been repealed. Section 22 of the 1957 Act has always contained detailed sentencing provisions relating to the various offences created by that act.

[9] Both counsel submitted that the court was entitled to impose any sentence which it deemed fit within the limits of its jurisdiction. In advancing this argument, both the State and the defence relied on one case only, namely, the unreported decision of the Free State High Court in *S v Booi* delivered on 12 August 2010 under review number 14/2010. That case dealt with a contravention of section 15 of the 2007 Act which criminalizes the act of sexual penetration with a child. As pointed out in the judgment of Cillie J, concurred in by Hancke AJP, that section replaced, with minor amendments, section 14 of the 1957 Act, which was repealed by the 2007 Act.

[10] The court then went on to consider whether the absence of a penalty clause rendered the criminalization clause (section 15) ineffective on the basis of the *nulla poena sine lege* maxim. This maxim requires that in criminalizing conduct the

legislature should specify a penalty for that offence. The court came to the conclusion that this rule is not of universal application and that where conduct is clearly criminalized by a statute it is punishable at the discretion of the court where the law has not itself attached any penalties. This conclusion was based on *Milton and Cowling, SA Criminal Law and Procedure, 2nd Ed, Volume 3* paragraphs 1 – 20; *Snyman, Criminal Law, 5th Ed,* page 48 and *Burchell, Principles of Criminal Law, 3rd Ed* at page 99, all of whom relied on the judgment in *R v Forlee* 1917 TPD 52. After pointing out that the 1957 Act did provide for a penalty for a breach of s 14 thereof the court concluded:-

> 'The legislature clearly characterized the conduct set out in Section 15 of the new Act as a criminal offence worthy of punishment and it would fly in the face of all common sense to conclude that the absence of a penal provision in the Act, should be interpreted as that no valid offence has been created by the new Act'.

[11] In *Forlee's* case the accused was charged with contravening a statute which prohibited dealing in opium. The prohibition was taken over from an older act which provided a penalty for the offence. However, the new act, which replaced the old one, contained no sanction. It would appear from the judgment (at 56) that both statutes expressly stated that the selling of opium constituted a criminal offence. In delivering the judgment of the court Mason J considered both Roman Dutch authorities and English law and stated the following:-

(a) 'If this omission were intentional, then the legislature considered either that the common law provided a penalty, or that no penalty should be imposed at all. The latter conclusion is negatived by the whole tenour of those statutes…
But the reasonable assumption is that the legislature, whilst intending the prohibition to be absolute and effective, overlooked the absence of any express penalty. It was certainly not the intention of the legislature merely to render null contracts of sale of opium … nor was the prohibition intended to be mere exhortation.' (at 53 – 54)

(b) 'It is clear that no law of this kind can be effective without a penalty, and the argument that the courts must therefore be held to have the power to inflict a penalty, wherever the legislature has intended to create an offence, is of considerable weight' (at 54)

(c) 'Leyser (Med.ad Pand, Book 10, page 280) deals with the specific case we have before us in clear and I think convincing language : in his opinion where the act is definitely prohibited in a manner which renders it clear that the legislature was not exhorting or advising, then it is punishable at the discretion of the Judge where the law has not itself attached any penalty.' (at 55)

(d) 'And this principle is followed in England, namely that the doing of an act which is expressly forbidden by the legislature upon grounds of public policy constitutes an indictable offence, even though no penalty be attached, unless such a method of procedure manifesting appears to be excluded by other provisions of the statute.' (at 55)

(e) 'We have come to the conclusion that the same principle applies in Roman Dutch Law, and that as the act in question was expressly prohibited in the public interest and with the evident intention of constituting an offence, it is punishable under our law' (at 56)

[12] In coming to the conclusion that he did, Mason J relied, *inter alia*, on the decisions in *R v Lloyd* 1904 NLR 59 and *R v Mhlongo* 1910 NLR 271. In the former case the court dealt with a statute which prohibited certain conduct without expressly creating an offence or prescribing a penalty. The court applied English law as laid down in *Hawkins* PC 2.25.4 to the effect that where the law prohibits 'a matter of public grievance to the liberties and security of a subject or commands a matter of public convenience, an offender against such statute is punishable… by way of indictment …unless such method of proceeding do manifestly appear to be excluded by it.' It is not clear from the judgment how the provision in question, which prohibited people from touting for or engaging 'Natives for any services to be performed outside this Colony' satisfied the requirements of the *Hawkins* case.

[13] The latter case dealt with a statute which empowered a minister to prohibit dealing in cattle except under certain circumstances without stating that a contravention of such a prohibition constituted an offence or prescribing a penalty. Relying *inter alia* on *Lloyd's* case, the court held that the act in question created an offence and that it was punishable under the common law.

[14] The principle laid out in *Forlee's* case was supported in the Cape Provincial Division in *R v Langley* 1931 CPD 31 and *R v Baraitser* 1931 CPD 418. However, the decision was sharply criticized by *De Wet and Swanepoel, Strafreg*, 4th Ed at 46-7; *Rabie and Strauss, Punishment: An Introduction to Principles*, 4th Ed at 79-80; *Snyman, Strafreg*, 3rd Ed at 43 and *JM Burchell, South African Criminal Law and Procedure* Volume 1, 3rd Ed at 30.

[15] *Snyman's* criticism is formulated as follows:-

> 'As die wetgewer per abuis die strafnorm uitgelaat het, behoort die wetgewer self sy fout reg te stel, en dit nie aan 'n hof oor te laat om te spekuleer oor wat die wetgewer wou doen en dan self 'n strafnorm te skep nie. Die aangehaalde beginsel is ook te wyd geformuleer: ook gewone regsnorme kan by wyse van uitdruklike verbiedinge geskep word, en gegrond wees 'upon grounds of public policy' maar dit omskêp sodanige regsnorme nie in strafnorme nie'.

[16] *Burchell* expresses his criticism in these words:-

> 'The rule in *R v Forlee*, that where conduct is prohibited, but where no penalty provided the court can conclude that a crime has been created by implication, has rightly been condemned as contravening the principle of legality.'

[17] *De Wet and Swanepoel* are more forthright. The learned authors concede that in a country where the criminal law has not been codified the principle of *nullum crimen sine lege* cannot mean that in no circumstances can conduct be regarded as criminal unless a statute prescribes a penalty for it. However they go on to state that the principle requires that no further crimes can be created by custom and that a legislature which wishes to create a crime must prescribe the penalty in express terms (at 45). The authors base this viewpoint on certain Roman Dutch authorities which they contend were more enlightened than those relied on in *Forlee* , and on *dicta* in R v *Bornman* 1912 TPD 66 at 69; *R v M* 1915 CPD 334 at 340 and *R v Bethlehem Municipality* 1941 OPD 227.

[18] Interestingly, in the latest edition of his work, relied on in *Booi's* case, *Snyman* is less critical of the *Forlee* judgment, as is *Burchell* in the work cited in *Booi's* case. *Snyman* states the following at 41 – 42:-

> 'If a statutory provision creates a criminal norm only, but remains silent on the criminal sanction … the punishment is simply at the court's discretion, that is, the court itself can decide what punishment to impose…
>
> Although there are some cases in which the courts have not adhered strictly to the abovementioned principles, there are also some other, more recent, cases in which the courts, after studying the act as a whole, correctly refused to accept that the legislature intended to create a crime by merely inserting a legal norm without a criminal norm. The latter line of cases it to be preferred'.

[19] *Burchell* echoes what is stated by *Milton and Cowling* in the passage relied upon in the *Booi* case, namely, that the fact that the legislature does not specify what the punishment is for an offence is not regarded as a serious flaw in the legislation because it is presumed in such a case that the determination of the appropriate sentence has been left to the courts.

[20] Significantly, *Forlee's* case was criticized by Ackermann J in a judgment concurred in by Farlam J (as he then was) in *S v Francis* 1994 (1) SACR 350 (C) at 355, where he commented as follows on the criticism of *Snyman* cited above:-

> 'Daar is, na my mening, heelwat regverdiging vir sodanige kritiek. Ek ag dit egter onnodig om dit, vir doeleindes van hierdie uitspraak, verder te neem want, selfs op die aanvaarding dat die beginsels soos in *R v Forlee* neergelê nog die beginsels in hierdie afdeling is, is hulle nie op die feite van die huidige saak van toepassing nie.'

The learned Judge then went on to find that in that case the legislature did not intend to create a criminal offence. The enactment in question contained a prohibition, but did not expressly provide that a contravention thereof constituted an offence or prescribe a penalty.

[21] As can be seen, there are similarities between *Forlee's* case and the present one. In both cases the legislature expressly provided that the conduct in question constituted

an offence and in neither case was a penalty laid down. Furthermore, in both cases the later statute repealed and replaced sections of the earlier statute which created criminal offences and prescribed sanctions for those offences. However, there is a clear difference between the two cases. It is that whereas in *Forlee's* case the later statute only replaced an earlier statute, in the present case the 2007 Act (in s 68) replaced not only an earlier statute but also common law crimes.

[22] It is clear from the 2007 Act that firstly, the legislature intended to criminalize contraventions of section 5(1) of that act, because the sub-section expressly creates an offence. The same applies to many other sections in the Act. For example, section 3 which deals with rape, section 4 which deals with compelled rape, section 12 dealing with incest, section 13 dealing with bestiality and section 14 dealing with sexual acts with corpses. These all form part of Chapter 2 which is headed "Sexual Offences". Similar provisions are to be found in Chapter 3 dealing with sexual offences against children and Chapter 4 which deals with sexual offences against persons who are mentally disabled.

[23] Secondly, a consideration of the 2007 Act as a whole leads to the inescapable conclusion that the legislature intended that the offences created by it should be punishable by the courts. Section 68 of the Act repeals the common law crimes of rape, indecent assault, incest, bestiality and violation of a corpse. These offences, particularly rape, have always been regarded as very serious offences and have always been dealt with accordingly. It is inconceivable that the legislature contemplated that their statutory replacements would not carry with them criminal sanctions. Furthermore, as pointed out above, section 56 (7) of the Act assumes that offenders will be sentenced. Section 50 deals with what must be contained in the National Register for Sex Offenders established under section 42 (1). It refers in numerous places to sentences for sexual offences in terms of the Act and even sentences of imprisonment for sexual offences.

24] A further indication of the legislature's intention that persons guilty of contravening the Act should be sentenced is to be found in section 55. That section provides, *inter*

alia, that any attempt, conspiracy and incitement to commit a sexual offence constitutes an offence and that the offender may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

[25] Furthermore, I am of the view that a law such as the 2007 Act, dealing as it does with extremely serious offences, cannot be effective without penalties.

[26] It is possible that in relation to the offences which replaced the old common law offences referred to in section 68, the legislature intended that the common law relating to sentencing should still apply. This is because under the common law no maximum sentences for the offences were prescribed and instead, the courts, over the years, determined appropriate sentences on the facts of each case. I say this despite the fact that the replacement offences are not identical to the old common law offences. At one stage of course the law did provide that the death penalty could be imposed for rape and the minimum sentence provisions of Act 105 of 1997 applied to common law rape. I should mention in passing that the 2007 Act amended Act 105 of 1997 to bring its provisions relating to sexual offences in line with the 2007 Act.

[27] On the other hand, it appears to me that the failure to provide criminal sanctions for the offences which replaced those created by the 1957 Act and all but one of the new offences created, was an oversight on the legislature's part. There seems to be no other explanation for the fact that a penalty is prescribed for one offence and not the rest. This failure to deal with sentence in express terms is an unfortunate oversight, leads to uncertainty and should therefore be remedied by the legislature.

[28] However, whether or not the failure to provide sanctions was intentional or accidental, on the authority of *Forlee's* case, the courts would be entitled to impose sentences within their prescribed limits.

[29] It remains to be decided whether the principle of legality stands in the way of the implementation of the principles laid down in *Forlee's* case. In this regard, it is important to bear in mind that *Forlee's* case and the ones which preceded and succeeded it, were decided before the advent of the constitutional era in this country. Section 35 of the Constitution entrenches the rights of arrested, detained and accused persons. Section 35 (3) provides that every accused person has the right to a fair trial and that this includes the rights listed in paragraphs (a) to (o). It is important to bear in mind that Section 35 is not exhaustive of all the component parts of the right to a fair trial. The right entrenched in paragraph (l) is 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, which, as will be seen, is a component of the principle of legality.

[30] Snyman, (op cit at 37) states the following in connection with the principle of legality:-

> 'In its broadest sense, the principle of legality can be described as a mechanism to ensure that the State, its organs and its officials do not consider themselves to be above the law in the exercise of their functions but remain subject to it. In the field of criminal law the principle fulfills the important task of preventing the arbitrary punishment of people by State officials, and of ensuring that the determination of criminal liability and the passing of sentence correspond with clear and existing rules of law. The principle of legality in criminal law is also known as the *nullum crimen sine lege* principle (no crime without a law)'.

The learned author goes on to state that an accused may not be found guilty of a crime and sentenced unless the type of conduct with which he or she is charged:-

(a) Has been recognised by the law as a crime;
(b) In clear terms;
(c) Before the conduct took place;
(d) Without the court having to stretch the meaning of the words and concepts in the definition to bring the particular conduct of the accused within the compass of the definition; and

(e) After conviction the imposition of punishment also complies with the four principles set out above.

[31] In relation to sentence, he goes on to state that the applicable sentence (regarding both its form and extent) must already have been determined in reasonably clear terms by the law at the time of the commission of the crime, that a court must interpret the words defining the punishment narrowly rather than widely, and that a court is not free to impose any sentence other than the one legally authorized (the *nulla poena sine lege* principle). One of the most important rules embodied in the principle of legality is the *ius acceptum* rule, which in relation to statutory crimes, provides that if parliament wishes to create a crime, an act purporting to create such a crime will best comply with the principles of legality if it expressly declares:-

(a) That the particular type of conduct is a crime; and

(b) What the perimeters are of the punishment a court must impose if it finds a person guilty of the commission of such a crime.

[32] Apart from *De Wet and Swanepoel*, none of the authors I have referred to is in favour of an outright rejection of the *Forlee* principles. They support them at least in respect of cases where the only omission of the legislature is the failure to stipulate a sanction.

[33] Although, in his judgment in the *Francis* case Ackerman J was critical of the *Forlee* judgment, he left the matter open and decided the case without making a finding on *Forlee*. The learned judge's views were clearly *obiter*, although of course due weight must be given to the views of so eminent a judge. What is of further significance about the judgment is that although Ackerman J stated that the *Forlee* principles were not applicable to that case he did not simply find that because the statute did not expressly create a criminal offence, no offence was in fact created. Instead he analized the legislation concerned to determine whether the legislature intended to create a crime and found that it did not.

[34] This approach is similar to the one followed in *R v Zinn* 1946 AD 346 at 355-6. Whilst the court referred to, amongst others, *Forlee's* case, it did not decide whether or not the principles laid down in it were correct. The court decided not to lay down a specific test for deciding whether an enactment creates a criminal offence. Instead, it decided to apply the general rule of giving effect to the lawgiver's intention and then proceeded to determine whether or not the enactment in question, in the context of its surrounding circumstances, created a criminal offence. The court held that the enactment, which did not expressly create an offence and prescribed no penalty, did not create an offence.

[35] In the line of cases referred to in the quotation from *Snyman* in paragraph [18] above as having adopted a preferable approach, namely, *S v La Grange* 1991 (1) SACR 276 (C); *S v Theledi* 1992 (1) SACR 336 (T) and *S v Van Rooyen* 2002 (1) SACR 661 (T) (the fourth case referred to is the *Francis* case), the decisions were based on the facts of each case. The courts did not simply apply the *nulla crimen sine lege* and *nulla poena sine lege* rules inflexibly. In each case it was found that the enactment in question did not create an offence. Significantly none of the cases involved enactments which expressly created offences and merely omitted to provide penalties. Similar situations obtained in the cases of *R v Bornman* and *R v Bethlehem Municipality* relied on by *De Wet and Swanepoel* in the passage quoted above.

[36] Even in the *Forlee* case, although the court stated the principles widely, they were applied to a statute which expressly created an offence. On the other hand, in the *Lloyd* and *Mhlongo* decisions, which *Forlee* followed, and the *Baraitser* and *Langley* decisions, which followed *Forlee*, it was held that offences were created where the statutes did not expressly do so.

[37] It can therefore be seen that with few exceptions, our courts, whether they adopted the *Zinn* or *Forlee* approach, have not held that a statutory crime can be created without the legislature expressly doing so. The test which I consider should be applied is that no offence is created unless that intention appears clearly, that is, expressly, from the

legislation. If that is the case any uncertainty about the existence of an offence is removed. On this approach, courts should not find that an offence has been created where the enactment does not say so expressly and provides no sanction. Courts will be entitled to make such a finding where, as in the present case, an offence is expressly created but no sanction is provided unless it is found that the legislature did not intend that the conduct in question should not be visited with criminal sanction. However, it is difficult to imagine under what circumstances such a finding would be made. In my view this approach does not conflict with the principle of legality and will not result in a breach of section 35(3) of the Constitution. This is because the intention of the legislature to create a punishable offence is clear. The fact that the sanction is not expressed will lead to uncertainty, but no more so than in the case of common law offences, and I am unaware of any suggestion that this uncertainty results in an unfair trial.

[38] Turning to the facts of the present case, as far as the offences such as rape and sexual assault, which replaced their common law predecessors, are concerned, I am of the view that there is no less certainty about sanction than was the case prior to the enactment of the 2007 Act. This is because of the body of case law that has built up over the years on sentences for the common law offences. Considering all the factors I have mentioned, I am therefore of the view that in respect of those offences, the principle of legality would not be violated were it to be held that those offences are punishable in the discretion of the court, subject to any limits to the court's sentencing jurisdiction. Although it is not necessary for me to decide this issue, I am of the view, as was held in *Booi's* case, that in respect of the other offences created by the 2007 Act, the principle of legality would also not be violated were those to be criminally punishable, notwithstanding the fact that there would be greater uncertainty, at least initially, on sentence. As I have already stated, I am of the view that this matter ought to receive the urgent attention of the legislature.

[39] In conclusion therefore, I find that notwithstanding the fact that the legislature did not provide a sanction for contraventions of sections 3 and 5 (1) of Act 32 of 2007, any

person who contravenes that sub-section is guilty of an offence and is liable to be punished in accordance with the jurisdiction of the court which convicts that person.

[39] The court is therefore satisfied that the accused is guilty of all the of offences to which he has pleaded guilty, on the basis set out in his statement, and accordingly finds the accused guilty of robbery on count 1 and as charged on counts 2 to 8 inclusive.

RALL, AJ

Date of Hearing: 14 September 2011
Date of Judgment: 16 September 2011

Appearances

For the State: M V Mcanyana
For the Accused: Z Anastasiou