1977 S.C. Op. Atty. Gen. 289 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-366, 1977 WL 24704

Office of the Attorney General

State of South Carolina
Opinion No. 77-366
November 14, 1977

***1** TO: Steven A. Zobel
Intake Supervisor
Charleston County Division of Court Services

QUESTION PRESENTED:

Can a person executing a petition in the family court alleging that a child committed the offense of criminal sexual conduct (in the 1st, 2nd, and/or 3rd degree) request in writing that the case be transferred to the court of general sessions?

AUTHORITIES:

Helfrich v. Brasington Sand & Gravel Co., 233 S.E.2d 291 (1977);

McMillen Feed Mills, Inc. of South Carolina v. Mayer, 265 S.C. 500, 220 S.E.2d 221 (1975);

Moorer v. MacDougall, 245 S.C. 633, 142 S.E.2d 46 (1965);

Sections 16–71, 16–72, 16–80 of Code of Laws of South-Carolina, as amended (1962);

Article III, Section 1B of Act No. 690, 1976 Statutes At Large 1859;

Act No. 157 of 1977 Acts and Joint Resolutions 332;

Sections 14–21–540, 17–25–20, Code of Laws of South Carolina (1976);

Sutherland On Statutory Construction, 4th ed. Vol. 2A, Sections 47.30, 50.1.

DISCUSSION:

In order to answer your question concerning the legality of transferring a child from family court to general sessions court under a petition alleging the offense of criminal sexual conduct in the first, second or third decree, two additional questions must be answered. What was the intention of the Legislature in using the word, ‘rape’ in Art. III, Section 1B of Act No. 690, 1976 Statutes At Large 1859? And how does the intended meaning of rape fit into the statutory scheme of the new Criminal Sexual Conduct Act, Act No. 157, 1977 Acts and Joint Resolutions 332?

Art. III, Section 1B of Act No. 690, 1976 Statutes At Large 1859, states in part:
‘Within two days after the filing of a petition in the family court, alleging the child has committed the offense of murder or rape, the person executing such petition may request in writing that the case be transferred to the court of general sessions. . .’.

The first and foremost rule of construction used in the interpretation of statutes is to determine the legislative intent in choosing the proper words for the statute. This is an essential step since the legislative intent must prevail if it can be reasonably discovered in the language used. Helfrich v. Brasington Sand & Gravel Co., 233 S.E.2d 291 (1977); McMillen Feed Mills, Inc. of South Carolina v. Mayer, 265 S.C. 500, 220 S.E.2d 221 (1975). The meaning of 'rape' as intended by the Legislature can best be determined by a close look at the rape statutes on the books at the time the legislation was written and also at the common law definition of rape. It is generally presumed that the Legislature was aware of the statutory law and common law at the time of the enactment of the legislation. Sutherland On Statutory Construction, 4th ed. Vol. 2A, Section 50.1. In 1976 when Act No. 690 was written, the offense of pape was governed by Sections 16–71, 16–72, and 16–80 of the Code of Laws of South Carolina, as amended (1962). Section 16–71 defined rape as follows:

***2** 'Whosoever shall ravish a woman, married, maid or other when she did not consent, either before or after, or ravisheth a woman with force, although she consent after, shall be deemed guilty of rape.'

The offense was judicially interpreted by our State Supreme Court as 'the carnal knowledge of a woman by force and against her consent'. Moorer v. MacDougall, 245 S.C. 633, 142 S.E. 2d 46 (1965). The same essential elements of rape set forth by Section 16–71 have always been part of the common law offense. The employment of the word rape by the Legislature, without a manifested intention to the contrary or overriding evidence of a different meaning, strongly, if not conclusively, suggests that the term was meant to be construed in its legal sense as recognized by the Legislature at the time of enactment. Sutherland On Statutory Construction, 4th ed. Vol. 2A, Section 47.30. Therefore, since the Criminal Sexual Conduct Statute of 1977 was not in existence, it must be assumed that it was not the intention of the Legislature to include the crimes other than rape set forth in the Act in its definition of rape.

Rape as defined at common law and under the old statutes is also an offense under the new Criminal Sexual Conduct Act. It was, without a doubt, the legislative intent that the offense be included because the new act expressly repeals the old provisions for rape and the essential elements of the offense are found in the statute. Nevertheless, it is abundantly clear from reading the new statute that it encompasses acts other than rape. Section 1(h) of Act No. 157, 1977 Acts and Joint Resolutions 332 consolidates into one unlawful act referred to as 'sexual battery,' the acts of sexual intercourse, anal intercourse, and various sodomic acts and defilements of the body. Sections 1(a) and 1(i) define the 'actor' and the 'victim' as 'a person' strongly suggesting that the statute applies to an act of a female on a male or a male on a male which, of course, was not recognized as rape under the old statute or at common law. A person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim under certain circumstances or where aggravated force is used. Section 2 of Act No. 157. The same basic elements are set forth for a charge in the second or third degree, but with lessening degrees of force and penalty. While a charge of criminal sexual conduct in any of the three degrees may contain the essential elements to constitute the crime of rape, a determination of such cannot be made from a general charge of criminal sexual conduct. In order to fall within the meaning of rape as used in Art. III, Section 1(B) of Act No. 690, 1976 Statutes At Large 1859, the charge of criminal sexual conduct whether in the first, second or third degree must include a description of facts sufficient to constitute the crime of rape under the old statute or at common law. It must be clear from the face of the petition that the charge is rape and not one of a lesser act also included under the Criminal Sexual Conduct Act. An allegation of common law rape alone is an alternative sufficient to come within the intended meaning of rape as used in Act No. 690.

CONCLUSION:

***3** It is the opinion of this Office that an allegation of criminal sexual conduct in the first, second or third degree without further clarification is not sufficient for the transfer of a juvenile under Art. III, Section 1(B) of Act No. 690, 1976 Statutes At Large 1859. [1]

The legislative intent in using the word 'rape' in Art. III, Section 1(B) of Act No. 690, 1976 Statutes At Large 1859 was to include within its meaning the offense of rape as set forth in the old statutes (Sections 16–71, 16–72, 16–80 Code of Laws of South Carolina (1962) and at common law. While the offense of rape is included in the Criminal Sexual Conduct Act, a

charge of criminal sexual conduct in any one of three degrees may be for an act other than rape. Therefore, in order for a person executing a petition in family court to request that the case be transferred, he must allege more than a charge of criminal sexual conduct in the first, second or third degree, he must allege a description of facts sufficient to constitute rape if brought under the old statutes or at common law. However, he may allege, without reference to the new Criminal Sexual Conduct Act, the offense of common law rape. [2]

Betty J. Willoughby
Staff Attorney

Footnotes

1 Note 1. Section 14–21–540, Code of Laws of South Carolina (1976) allows for the transfer of juveniles over 16 years of age for any offense, misdemeanor or felony. Transfer can be made under this statutory provision upon a simple charge of criminal sexual conduct in any degree.

2 It should be taken into consideration that where a common law felony is committed and no provision for punishment is available, Section 17–25–20 of Code of Laws of South Carolina (1976) requires a sentence of not less than three months and not more than ten years at the discretion of the Court.

1977 S.C. Op. Atty. Gen. 289 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-366, 1977 WL 24704