IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A65/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

11 November 2022
Date

Signature

In the matter between:

DAVID VUSI NKOSI Appellant

And

THE STATE Respondent

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JUDGMENT

M. MUNZHELELE J

Introduction

[1] When crimes are committed against persons, prosecutors should discharge their duties diligently and competently to avoid a miscarriage of justice towards victims of crimes in the words of the Hounarable Justice Nkabinde in *Ndlovu v The State*[1] para 58;

> " When even the most heinous of crimes are committed against persons, the people cannot resort to self-help: they generally cannot prosecute the perpetrators of these crimes on their own behalf. This power is reserved for the NPA. It is therefore incumbent upon prosecutors to discharge this duty diligently and competently. When this is not done, society suffers. In this case the prosecutor failed to ensure that the correct charge was preferred against Mr Ndlovu. The prosecutor was from the outset in possession of the J88 form in which the injuries sustained by the complainant were fully described. It boggles the mind why the proper charge of rape read with the provisions of section 51(1) of the Minimum Sentencing Act was not preferred. This can only be explained as remissness on the part of the prosecutor that, further, should have been corrected by the Court. This error is acutely unfortunate – victims of crime rely on prosecutors performing their functions properly. The failings of the prosecutor are directly to blame for the outcome in this matter".

[2] The appellant appeared at Benoni Regional Court on the charge of contravention of section 55 of the Criminal Law (sexual offences and related matter Act) 32 of 2007 which reads as follows;

> 'in that on or about the 11 July 2017 and at or near Patfontein in the regional division of Gauteng the accused did unlawfully and intentionally attempt to commit a sexual offence to Mapule Magubane(13 years old) by grabbing or pulling or undressing her pyjama and panty. (Court's underlining emphasis).'

The appellant was found guilty as charged and sentenced to seven (7) years imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act[2]. He was declared unfit to possess a licenced firearm in terms of section 3(1) of the Firearm Control Act[3].

[3] The appellant is appealing his conviction, and sentence as the application for leave to appeal was granted on 11 May 2021 by the trial court. The basis for the appeal is that the evidence of the complainant as a single witness should have been taken with

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[1] [2017] ZACC 19
[2] 51 of 1977
[3] 60 of 2000

caution, more so because she is a child witness. The entire evidence is alleged to be based on her evidence. The second important issue is the type of offence with which the appellant was charged. The charge is defective because it is not clear as to what offence was attempted by the appellant. The second issue is the only issue which the court will deal with on this appeal.

Background of the case

[4] A child, aged 13 (thirteen) years, who was left in the appellant's company by the child's grandmother, was touched on her breast and her pyjamas were undressed until the middle of her thigh by the appellant,. The child's grandmother had gone to work in the morning, leaving David Nkosi with her granddaughter, who was at that time still asleep. The complainant was awakened by the appellant' actions, the appellant entered the blankets under which she was sleeping and touched her inappropriately, and pulled her pyjamas and panty to her thighs. The complainant jumped and ran to her friend's place. She narrated the ordeal to Mrs Scotland, her friend's mother, who took her to the police station to report the matter. Mrs Skosana saw the accused zipping his trouser and putting on the belt, and when he saw Mrs Skosana, the appellant said that he did not rape the child without being asked while running after the child. The accused was arrested after that.

[5] The version of the appellant is that he only went and looked for the complainant because she did not return home in time from a visit to her friend. He denies the allegation against him.

Arguments on behalf of the appellant

[6] The appellant was convicted, on the basis of these merits, as charged. Mr Alberts, for the appellant, contends that the accused was entitled to be informed of the case he was to meet with a reasonable degree of clarity as stated in *S v Hugo*[4] at para

[4] 1976(4) SA 536 (A)

540 D, Section 35(3) (a) of the Constitution of the Republic of South Arica 1996, *R v Mnguni*[5], and *S v Nembanzeni*[6].

[7] Considering the vast array of offences in the Sexual Offences and Related Matters Act[7], Mr Alberts argued that the charge sheet should have been required to specify the offence the alleged attempt refered to. He further argued that even the trial court failed to specify the offence the appellant was convicted of.

Assessment of the case

[8] Mr Lalane, for the respondent, did not argue the point of a defective charge sheet. During the arguments in court, Mr Lalane conceded that the charge sheet did not specify which offence was attempted by the appellant. He also conceded that there was no application by the prosecutor to amend the charge. The court also never made an order in terms of section 86 to amend the charge. Section 86 of the criminal procedure Act[8] provides that.

> *" Court may order that charge be amended.*
>
> *(1) Where a charge is defective for want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the Court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.*
>
> *(2) The amendment may be made on such terms as to an adjournment of the proceedings as the Court may deem fit.*

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[5] 1958 (4) SA 320 (T)
[6] 1976 (3) SA 68(T)
[7] 32 of 2007
[8] 51 of 1977

(3) Upon the amendment of the charge in accordance with the order of the Court, the trial shall proceed at the appointed time upon the amended charge in the same manner and with the same consequences *as if it had been originally in its amended form.*

(4) The fact that a charge is not amended as provided in this section shall not unless the Court
refuses to allow the amendment, affect the validity of the proceedings thereunder.

[9] During the trial, it was unclear which offence the evidence revealed. Thus, section 88 of the Criminal Procedure Act 51 of 1977 would not be applicable. Section 88 provides defect in charge cured by evidence.

" Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgement, be cured by evidence at the trial proving the matter which should have been averred."

[10] The prosecutor should formulate a charge with great care to protect the accused's constitutional right to a fair trial (see generally *S v Legoa*[9] at [20]; *S v Mhlongo*[10] at [15]; *S v Mukuyu*[11] at [13]; *S v Mponda*[12] at [13], [14]; *S v Tshali*[13] at [11]);

The Constitution of South Africa, 1996 on section 35(3)(a) provides that:

"every accused person has a right to a fair trial, which includes the roght to be informed of the charge with sufficient detail to answer it."

In S v Hugo 1976 (4) SA 536 (A), the Court held that:

"the charge should inform the accused of the case the State wants to advance against him."

That is what fairness requires and what is expressly required in section 35(3)(a) of the Constitution Of South Africa. The conviction in the case of Hugo above was set aside on the basis that the accused was prejudiced, because evidence had been admitted regarding allegations which did not appear on the charge.

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[9] 2003 (1) SACR 13 (SCA)
[10] 2016 (2) SACR 611 (SCA)
[11] 2017 (2) SACR 27 (GJ)
[12] 2007 (2) SACR 245 (C)
[13] 2007 (2) SACR 23 (C)

[11] In *S v Ndlovu*[14], the Constitutional Court pointed out that the prosecutor's failure to draft an accurate charge was unacceptable.

[12] The purpose of a charge sheet is to inform the accused of the nature of the charge against him and to inform the court accordingly as well. This enables the accused to prepare for his defence. If the charge was unknown to the prosecutor, he should have stated it. The charge should disclose an offence.

[13] Section 55 of the criminal law (sexual offences and related matters Act 32 of 2007 stipulates that;

> *" any person who attempts to commit a sexual offence in terms of this act is guilty of an offence."*

The sexual offence has a corresponding meaning in terms of section 1 of Act 32 of 2007 and it reads as follows;

> *"sexual offence' means any offence in terms of Chapters 2, 3 and 4 and section 55 of this Act and any offence referred to in Chapter 2 of the Prevention and Combating of Trafficking in Persons Act, 2013, which was committed for sexual purposes;."*

All the prosecutor had to do was to choose the offence according to the circumstances of the case, which offence the accused attempted to commit and state it on the charge sheet so that the Appellant would know. But the prosecutor failed to do that.

[14] In *Sv Namzi*[15] at [39], Henney J and Loots AJ referred to the 'continuous carelessness of prosecutors in drafting charge sheets and indictments' in matters involving the minimum sentence provisions in Act 105 of 1997. In the present case, the court says that the prosecutor carelessly drafted a charge sheet with an incomplete charge.

[15] *In S v Prinsloo* [2014] ZASCA 96 (unreported, SCA case no 534/13, 15 July 2014)It has been said that:

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[14] 2017 (2) SACR 305 (CC)

[15] (unreported, WCC case no 06/2017, 9 October 2018)

> " when a prosecutor drafts the charges, 'he is performing an important public . . . task which can have significant consequences for the public at large and especially for an accused".

See *Moodley & others v National Director of Public Prosecutions & others*[16] at [26] and *Mahupelo v Minister of Safety and Security & others*[17] at [130]. The importance of the prosecutorial task of identifying and formulating the relevant charge(s) is highlighted by the fact that a conviction 'can only occur in respect of a charge on which an accused is indicted, or a competent verdict in respect thereof' (*S v Bam* 2020 (2) SACR 584 (WCC) at [54]).

[16] In *S v Tyebela*[18], Milne JA stated at 29G-H:

> 'It is a fundamental principle of our law and, indeed, of any civilised society that an accused person is entitled to a fair trial.'

[17] In thiscase, the question is whether, where there has been an incomplete charge, it can be said that an appellant had a fair trial. The appellant had a right to know what charge he was facing, and not guess what kind of offence would be on such a different array of offences outlined in Chapters 2, 3 and 4 of the Criminal Law(Sexual Offences and Related Matters Act 32 of 2007. Where the state intends to choose upon either of those offences in the Act, it would be unfair for the accused not to know which offence he is facing. A fair trial will generally demand that the state's intention be brought to the attention of the accused at the outset of the trial in the charge sheet so that the accused is placed in a position to appreciate the charge appropriately that he faces as well as the type of sentence that accompany such offence.

[18] The regional magistrate found the appellant "guilty as charged" without having amended the charge. The evidence could cure the defective charge, but the evidence, in this case, does not cure the defect. There was not enough evidence led for rape, seeing that the appellant was already discharged of the offence of sexual assault. The respondent conceded that the charge was defective, so the appellant's conviction should be set aside.

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[16] 2008 (1) SACR 560 (N)
[17] 2017 (1) NR 275 (HC)
[18] 1989 (2) SA 22 (A)

Order

[19] As a result, the court orders as follows:

1. The appeal is upheld;
2. The conviction and the sentence are set aside.

M.MUNZHELELE
Judge of the High Court

I agree.

C. J VAN DER WESTHUIZEN
Judge of the High Court

Heard on: 25 October 2022
Electronically Delivered: November 2022

Appearances:
For the Appellant: Mr H.L Alberts
Instructed by: Legal Aid South Africa

For the Respondent: Adv. S Lalane
Instructed by: National Prosecution Authority