REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. AR 414/2010

In the matter between:

THEKWINI SOLOMON MOTHA **Appellant**

and

THE STATE **Respondent**

JUDGMENT

GORVEN J:

1]The state evidence was that on 16 May 2009 the complainant in this matter, M, who was a 12-year-old girl at the time, was raped in her mother's home. This much is clear from her testimony, the medical examination undertaken by a doctor shortly afterwards and the corroborating evidence of her 17-year-old cousin and her grandfather. Her mother was away at the time and her evidence was that she was living with relations close by and went to the house to close up. It was approximately 18h00 and a candle was lit in the room which she entered. The homestead was a two roomed structure. She searched for the keys and she said that, as she was doing so, the appellant pushed the ajar door open, entered and closed the door behind him. He then threw her on the bed and, after undressing both of them to the extent necessary, placed his penis inside her vagina and started to move up and down causing her great

pain. When she shouted loudly, he placed his hand over her mouth and muffled her cries. Her 17-year-old cousin Mavegi, who had arrived in the other room, heard the cries. During her arrival Mavegi had made a noise which M heard and then ran outside and told her what had happened. Mavegi challenged the appellant with this but he denied the allegation. The two of them left to go to their grandfather. As they were leaving, the appellant threatened to kill them if they told family members of what had happened. The grandfather returned alone, found the candle still alight in the room and retrieved the appellant's shoes. They were visible and were near the entrance to the room. By this time the appellant had left. It was common cause that all three of these witnesses knew the appellant, who lived nearby and who called the mother of M auntie.

2]This resulted in the appellant being charged with one count of rape in the following terms:

'THE STATE versus THEKWINI SOLOMON MOTHA

(Hereinafter referred to as the accused)

RAPE

That the accused is guilty of the crime of Rape (read with the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997)

In that upon about 16/05/2009 and at or near Manyandeni in the Regional Division of KwaZulu-Natal, the accused did unlawfully and intentionally have sexual intercourse with a female person, to wit [M] (12 years) by inserting his genitals into her genitals without her consent.'

3]The appellant was represented at the trial and pleaded not guilty. In his plea explanation he denied having any sexual dealings with M but admitted, in terms of s 220 of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act), that he had been present at the complainant's homestead that night. He was convicted as charged. The learned regional magistrate imposed

a sentence of life imprisonment, having found no substantial and compelling circumstances warranting a deviation from that prescribed by s 51 (1) of the Criminal Law Amendment Act 105 of 1997. At the time of trial s 51(1) read with schedule 2 of that Act provided for a sentence of life imprisonment for rape as contemplated in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (the Act). The appeal against both conviction and sentence comes before us as of right.

4]The appellant stated that he came across M at her homestead after having consumed alcohol given to him as a result of a harvesting job done by him. He wanted a different kind of alcohol because he was feeling constipated. He purchased this from her because her mother usually sold alcohol from that homestead. He then sat down on a log outside the house and took off his shoes whilst M played with a ball in his vicinity. She then removed his shoes and took them into the room and, after a while, he requested that she retrieve the shoes and bring them to him. She went into the room but did not emerge and, as a result, he entered the room, which was dark, and stood there for four to five minutes calling for her but not himself looking for the shoes which, on the grandfather's uncontested evidence, the shoes were near the entrance. When Mavegi arrived and asked what M was doing in the room, M exclaimed and the two of them left. He also left without retrieving his shoes. He could give no reason why M would have removed his shoes. He could give no reason why he did not search for his shoes before M emerged. He could give no reason why the two girls exclaimed and left or why he did not take his shoes after they left when he needed them for the following day's work. He could give no reason why they should falsely accuse him of having raped M.

5]At the appeal, no submissions were made on behalf of the appellant against the factual findings of the learned regional magistrate. Neither did counsel for

the appellant make any submissions to the effect that any misdirections were committed in evaluating the evidence. Counsel quite correctly conceded at the hearing that no such submissions would hold water. I cannot fault the magistrate on any of these findings. The evidence of the appellant was grossly improbable to the extent that it was correctly rejected as being false beyond reasonable doubt. The evidence for the state was quite correctly accepted.

6]Counsel for the appellant, in his heads of argument, raised the point that no mention was made in the charge sheet of the provisions of s 3 of the Act and that the charge had been brought under the common law. Counsel for the respondent, in heads of argument prepared by a different counsel to the one who argued the matter, conceded that no reference was made to s 3 of the Act and that the charge sheet should have been headed, in the third line set out in para [2] above: 'Rape in terms of section 3 of Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007' instead of simply 'Rape'. He moved that the charge be amended to read as set out above. He submitted that no prejudice would result to the appellant if this court, on appeal, so amended the charge since the defence would not have been conducted any differently.

7]Counsel for the appellant submitted, in opposition to this motion for amendment, that the crime for which the appellant had been charged was the common law crime of rape which, as he put it, was abolished on 16 December 2007 when the Act came into force. That being the case, the crime for which the appellant had been charged did not exist at the time the offence was committed. To allow such an amendment would therefore amount to substituting a new offence for the one with which the appellant had been charged.

8]It is clear law that an amendment to a charge may be effected on appeal in terms of s 86(1) of the Criminal Procedure Act.[1] This was dealt with in *Barketts Transport* in the following manner:

'Mnr Marais het die aansoek om wysiging gegrond op die bepalings van art 86(1) van die Strafproseswet 51 van 1977, saamgelees met arts 309(3) en 304(2)(c)(iv) van dieselfde Wet. Laasgenoemde twee artikels magtig die wysiging van 'n aanklag op appèl of hersiening deurdat die Hof 'die bevel gee wat die landdroshof moes gegee het' en verleen geen wyer magte van wysiging as wat in art 86 bevat is nie. (*R v Gibson* 1956 (2) PH H147 (A).) Aangesien hierdie Hof in die Smith -saak beslis het dat afsonderlike oortredings daargestel word deur art 31(1)(a) en (b) onderskeidelik, is die vraag vir beslissing gevolglik of art 86(1) van die Strafproseswet 'n 'wysiging' van die aanklag magtig wat daarop neerkom dat 'n nuwe aanklag geskep word, dws dat een misdryf deur 'n ander vervang word.'

In that matter, Vivier JA held that the amendment sought amounted to a different charge and disallowed it.

9]The test for the sometimes slippery distinction between an amendment and a substitution was set out in *S v Kruger & Andere* [2]by van Heerden JA in the following terms:

'Die begip 'wysiging' veronderstel 'n mate van behoud van dit wat gewysig word. Indien 'n voorgestelde 'gewysigde' aanklag glad nie meer met die oorspronklike aanklag identifiseerbaar is nie, is daar dus nie sprake van 'n wysiging nie, maar wel van 'n vervanging. Hierdie slotsom bring vanselfsprekend mee dat die grens tussen 'n wysiging en 'n vervanging in die praktyk nie altyd maklik te trek sal wees nie. In elke geval sal nagegaan moet word of die voorgestelde 'gewysigde' aanklag tot so 'n mate van die oorspronklike aanklag verskil dat dit in wese 'n ander aanklag is.'

The test is therefore whether the suggested amended charge differs from the existing one to such an extent that it amounts to another charge.

10]If an amendment is competent on the test set out above, it may be granted

1 *S v Barketts Transport (Edms) Bpk en 'n Ander* 1988 (1) SA 157 (A) at 160I-J
2 1989 (1) SA 785 (A) at 796H-J

on appeal. This does not resolve the matter, however. An additional consideration is that an amendment will only be granted where no possible prejudice could result to the accused.[3]

11]There is therefore a two step process which must be undertaken by a court confronted with an application for an amendment of a charge on appeal. The first question is whether what is sought amounts to an amendment or a substitution of the charge. If it amounts to an amendment, the next question is whether it would be prejudicial to the appellant to grant the amendment.

12]In order to determine whether what is proposed in the present matter would amount to an amendment or a substitution of one charge for another, it is necessary to construe the provisions of the Act. Section 3 provides, in its relevant parts, as follows:

'Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.'

Section 1(1) provides as follows:

'sexual penetration' includes any act which causes penetration to any extent whatsoever by-

(a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;

(b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or

(c) the genital organs of an animal, into or beyond the mouth of another person,

and 'sexually penetrates' has a corresponding meaning;'

Section 68 provides, in its relevant parts, as follows:

'(1) The common law relating to the-

(b) crimes of rape . . .

is hereby repealed.'

3 *S v F* 1975 (3) SA 167 (T) at 170G-H; *S v Kuse* 1990 (1) SACR 191 (E) at 197*a-d*

13]What becomes clear from the relevant parts of the Act is the following. First, it is not the crime of rape which was abolished, it is the common law relating to the crime which was repealed. This means that the crime of rape remains a crime but has a different content. This content, which was previously provided by the common law, is now provided by s 3 of the Act. The content provided by s 3 includes that content previously provided by the common law, namely the penetration of the genital organ of the complainant by the genital organ of the accused. The balance of s 3 includes actions, now construed as rape, which, under the common law, did not constitute rape.

14]As is clear from the charge sheet in the present matter, the state alleged, in somewhat clumsy terms, that the genital organ of the appellant had penetrated that of the complainant. In other words, the charge sheet contained averments which constituted the offence of rape as defined in s 3 read with the definition of sexual penetration in s 1(1). This means that the appellant was not charged for a non-existent offence. Counsel for the appellant argued, somewhat faintly, that the lack of any reference to 'sexual penetration' meant that the charge sheet was deficient. This is not so. An act that falls within the definition of sexual penetration was alleged, viz. the insertion of the accused's genital organ into that of the complainant. This much counsel conceded. The only omission was the reference to s 3 of the Act referred to above. The charge was of rape, each element was alleged and therefore no substitution of the offence for another would occur. The proposed amendment falls within the third category of s 86(1) of the Criminal Procedure Act in that words or particulars that should have been inserted in the charge were omitted. The suggested amended charge does not differ from the existing one to such an extent that it amounts to another charge. It simply remedies the omission. It is therefore clear that what is sought by the state is an allowable amendment.

15]The next question which arises is whether it would be prejudicial to the appellant to allow the amendment of the charge on appeal. Counsel for the appellant could make no submissions in this regard. Neither can I conceive of any possible prejudice. All of the elements of the offence emerged from the charge as put and were proved in court. The only aspect not mentioned in the charge, as I have said above, was a reference to the Act which now gives content to the offence. This matter is similar to that of *S v Mahlangu* [4] where the appellant was charged with and convicted of the common law offence of bribery. That offence had been repealed and substituted by the offence referred to in s1 (1)(a)(i) of Act 94 of 1992. On appeal it was held that the charge could be amended to reflect the offence under that section. The elements were essentially the same and the defence of the appellant would not have been presented any differently so there could be no prejudice. I respectfully endorse the reasoning of the court in that case which applies equally to the present matter.

16]The application to amend the charge must be granted. Since there is no other basis on which the appeal against conviction can succeed, it must be refused.

17] As regards sentence, counsel for the appellant submitted that it was arguable that substantial and compelling circumstances existed which ought to have resulted in the magistrate departing from the sentence of life imprisonment prescribed for this offence under s 51(1) read with Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. He was not able to make any submission that, on the test set out in *S v Malgas*,[5] the learned regional magistrate had misdirected himself in finding that no such

4 1997 (1) SACR 338 (T)
5 2001 (1) SACR 469 (SCA)

circumstances existed. He was also, for good reason, unable to submit that the sentence was so startlingly inappropriate to warrant interference on appeal. As a consequence, this court cannot interfere with the sentence. Even if this was not the case, however, the sentence is appropriate in all the circumstances.

18]In the result, I propose that the appeal against conviction and sentence be dismissed.

GORVEN J

NKOSI AJ – I agree

GORVEN J – It is so ordered.

DATE OF HEARING:	26 May 2011
DATE OF JUDGMENT:	31 May 2011
FOR THE APPELLANT:	Adv J Butler
FOR THE RESPONDENT:	Adv N Buthelezi