174/1958

174/1958

G.P.-S.1568732—1956-7—9,000. S.

U.D.J. 445.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPÉL DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

JOSEF BENJAMIN CRAUSE
Appellant.

versus/teen

DIE STAAT
Respondent.

Appellant's Attorney V.d. Wall, L+P. *Respondent's Attorney*
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate E.K.W. Lichtenberg *Respondent's Advocate* B.G. v.d. Walt
Advokaat van Appellant *Advokaat van Respondent*

(OPD)
(Leave - AD)

Set down for hearing on: Maandag, 17 Nov, 1958.
Op die rol geplaas vir verhoor op:

1.2.4.9.10 (A)

(9:45 - 12.50
2.15 - 3 - 0) C.A.V.

Appeal dismissed.

Schreiner A/C.J. Hoexter de Beer
Hall, (Ag.), & Price (Ag.). - J.J.A.

Kop. 20/11/58.

Record

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

JOSEF BENJAMIN CRAUSE Appellant

and

R E G I N A Respondent

Coram: Schreiner A.C.J.,Hoexter, de Beer JJ.A.,Hall et Price A.JJ.A.

Heard: 17th November, 1958. Delivered: 20-11-1958

J U D G M E N T

SCHREINER A.C.J. :- The appellant was charged in the Bloemfontein magistrate's court with contravening section 31 (1)(c) (a mistake for (b)) of the Motor Vehicle Ordinance (No. 8 of 1941 (O)), by driving a motor vehicle while under the influence of intoxicating liquor or narcotic drugs. The offence is only committed if the vehicle is so driven on a public road. In its original form the summons initiating the proceedings only alleged that the appellant drove the vehicle "op Dewetsdorp pad Bloemfon-"tein". On the 11th December 1957, the date for appearance, the matter was, at the request of the defence, postponed to the 20th January 1958. On that date the appellant pleaded not guilty and his attorney then excepted to the summons on the

ground/.....

ground that it disclosed no offence. Section 169(4) of Act 56 of 1955 provides that the accused may plead and except together. I assume that this covers an exception that the charge does not disclose an offence (see per RAMSBOTTOM J. in David v. Van Niekerk, 1958(3) S.A.82 at page 88). That was, in effect, what was done in this case. But whether the regularity of that procedure could be questioned on the ground that the above assumption is wrong, there is no doubt in my view that the public prosecutor's right to seek an amendment of the charge under the provision to be referred to presently, could not be affected by the course pursued by the accused. In fact the magistrate did not make an order upholding the exception. The prosecutor did not dispute the contention that the summons was defective, but at once asked that it be amended by inserting after the word "Bloemfontein" the words "in "publieke pad". The appellant's attorney opposed the application for amendment and submitted that the magistrate had no power to grant it. The magistrate, however, held that he had power to do so under section 180(1) of Act 56 of 1955 and made the amendment.

The appellant's attorney then asked for a postponement. This was refused and the Crown

evidence was led. At the close of the Crown case there was a further postponement for ten days, until the 31st January 1958. When the hearing was resumed on that date the appellant's case was closed without evidence being ~~called~~ led. The appellant was convicted and was sentenced to a fine of £50. or fifty days imprisonment, his licence being endorsed.

An appeal to the Orange Free State Provincial Division was noted on the grounds that the summons was a nullity and disclosed no offence, that the magistrate erred and committed an irregularity, prejudicial to the appellant in granting an amendment to a summons which was materially defective, and that the magistrate should have granted the appellant's request for a postponement, to enable him to prepare his defence, after the amendment had been granted.

The Provincial Division dismissed the appeal and refused ~~him~~ leave to appeal to this Court, but such leave was subsequently granted under section 363(6)(iii) of Act 56 of 1955.

On the assumption, the correctness of which was not challenged by the Crown and need not be investigated, that the summons in its original form did not disclose an offence, the appellant's counsel contended that

section/.....

section 180(1) did not empower the magistrate to order the amendment of the summons. The section, which is the successor to section 225 of Act 31 of 1917, so far as material reads :-

"180(1) Whenever, on the trial of any charge,.....or if it appears that any words or particulars that ought to have been inserted in the charge have been omitted.....or that there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the necessary amendment in the charge will not prejudice the accused in his defence, order that the charge be amended, so far as it is necessary.....

(2) The amendment may be made on such terms (if any) as to postponing the trial.....as the court thinks reasonable.

(3) Upon the amendment of the charge in accordance with the order of the court the trial shall proceed.....upon the amended charge in the same manner and with the same consequences as if it had been originally in the amended form.

....."

In support of his contention counsel for the appellant relied upon a passage in the judgment of ROOS J.A. in Rex v. Jhazbai (1931 A.D.480 at page 484), and upon its interpretation and application in two cases in the Orange Free State (Regina v. Brandfort Garage (Edms.)Bpk., 1954, 2 P.H. H 162 and Regina v. Uys, 1955 (2)S.A.162). In Jhazbai's case the appellant had been convicted by a magistrate on three charges under the Insolvency Act. An appeal to the Natal Provincial Division was dismissed. When the matter

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came on further appeal to this Court it was argued for the appellant that the charge on the second count was bad in law. The charge did not follow the words of the relative provision of the Insolvency Act but this Court held that the words in the charge were similar to those in the Act. Since section 127(2)(a) of Act 31 of 1917 (now section 315 (2)(a) of Act 56 of 1955) provided that the description in a charge of a statutory offence in wods similar to those of the law creating the offence shall be sufficient, this Court dismissed the appeal on the second count.

The judgment of the Court was delivered by ROOS J.A. and the passage on which the Brandfort Garage and Uys decisions were based reads :-

"The question then arises whether the charge sufficiently sets out the offence or not. If no offence is disclosed in the charge, the court below could not have amended the charge and the appellant would be entitled to rely on this point on appeal even if, as in this case, it had not been raised by him before, Rex v. Herschell (1920 A.D.575); Rex v. Myburgh(1922 A.D.249); section 127(1) of Act 31 of 1917. If, however, an offence is set out but there is a lack of particularity, an amendment could be granted in the lower court and the point could not be taken in this Court to affect the validity of the proceedings below - (section 225 of Act 31 of 1917 as amended by section 25 of Act 39 of 1926)."

In/.....

In the case of Duffy v. Attorney General, Transvaal (1958 (1) S.A.630), BOSHOFF J., in giving the judgment of the court, expressed the view that ROOS J.A. in referring to "the court below" in the above passage was "referring to the court of the Provincial Division, whose "judgment was then on appeal, and not to the magistrate's "court." The same view would presumably apply to the expression "the lower court" also used by ROOS J.A.

This interpretation of what was said by ROOS J.A. provides an explanation of the passage that would make it consistent with what I shall endeavour to show is the correct view of the law, but it must nonetheless be rejected. It is true that the expressions "the court below" and "the "lower court", when used in this Court in relation to an appeal where the proceedings commenced in a magistrate's court, could be used to signify the court a quo i.e. the court from which appeal has been brought to this Court. Indeed it is fair to say that, taken by themselves, the expressions, and particularly the former, would generally be understood to carry that reference. But taking the passage as a whole it seems to me to be clear that ROOS J.A. was contrasting the position of the trial court and the position of a court of appeal, whether that court was

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a Provincial Division or this Court. Only on that basis would there be reason to refer to Rex v. Herschell and Rex v. Myburgh and the 1926 amendment to section 225 of Act 31 of 1917. (Section 127(1), which is also referred to in the passage, does not seem to bear directly on the matter, on either view of what ROOS J.A. had in mind).

Even before Rex v. Jhazbai MATTHEWS J. sitting with TATHAM J. in Ncobo v. Rex (1927 N.P.D. 226) had, at page 229, interpreted section 225 of Act 31 of 1917, as amended in 1926, as meaning that "there must at least be the "charge of an offence" before the power to amend could arise. MATTHEWS J. went on to say, "It appears to me that the princi- "ples laid down by the Appellate Division in Rex v. Herschell "1920 A.D.575, are as applicable to the present case as they "would have been if the charge had been framed before section "225 was amended." With this last statement there can be no quarrel, since Herschell's case was decided, not on section 225, which it was expressly said might be disregarded (see page 579), but on the language of section 105 of the Magistrate's Court Act (Act 32 of 1917), which for present purposes was indistinguishable from section 225, after the 1926 amendment. But the view expressed by MATTHEWS J. that section 225,

as/.....

as amended, only allowed amendment of the charge if it disclosed an offence seems to have anticipated what was said in Rex v. Jhazbai. MATTHEWS J. had further occasion to deal with the question and, sitting with other judges in the Natal Provincial Division, he maintained consistently the same position. (Rex v. Knotten,1931 N.P.D.162; Mpanda v. Rex,1932 N.P.D.43 at page 50; Cohen v. Rex, 1933 N.P.D. 687 at page 691). It was, in my opinion, the same view that ROOS J.A. expressed in Jhazbai's case. The interpretation put upon the above-quoted passage in that case by the courts which decided Regina v. Brandfort Garage (Edms.)Bpk. and Regina v. Uys was in my view the right one.

It is, however, necessary to examine the correctness of what was said in Jhazbai's case. In Herschell's case INNES C.J. at pages 578 and 579 pointed out that before section 105 of the Magistrate's Courts Act was enacted, the powers of the trial court to amend a criminal charge were limited by two considerations - the amendment must not correct a material defect and it must not be prejudicial to the defence. Section 105, which applied to civil pleadings as well as to criminal charges in the magistrates' courts, made prejudice the only limitation. But section 225 of Act

31 of 1917 applied to criminal proceedings in magistrates' courts as well as in superior courts. In its unamended form section 225 only permitted a court to correct errors, including the supplying of omissions, in an indictment, summons or charge, if it considered that such errors were not material to the merits of the case, as well as if it considered that the accused could not be prejudiced in his defence on the merits by the correction of the error.

The remarks of INNES C.J. in Herschell's case showed clearly that there was then a difference in the powers of amendment possessed by a magistrates' court and by a superior court. Point was given to this difference in Rex v. Manion (1926 W.L.D.115) where a desirable amendment that could have been made in the magistrate's court was shown to be impossible in the supreme court. There followed Act 39 of 1926. By section 57 of that Act section 105 of Act 32 of 1917 was restricted to civil proceedings, and by section 25 of the 1926 Act section 225 of Act 31 of 1917 was amended by eliminating all reference to materiality. Since 1926, therefore, although the powers of amending criminal charges possessed by magistrates' courts have been no different from those which they held in 1920, when Herschell's case was

decided/.....

decided, they have flowed, not from section 105, but from section 225 as amended, and now form section 180 (cf. Rex v. Preller, 1952(4) S.A.452 at page 462). The powers of superior courts have been brought into line with those of magistrates' courts. The powers which the latter possessed in 1931 when Jhazbai's case was decided were thus indistinguishable from the powers of which INNES C.J. was speaking when he said in Herschell's case at page 579, "the power of amending a crimi-"nal charge is only limited by the possibility of prejudice "to the accused in the conduct of his defence." Again at page 580 the wideness of the powers of amendment introduced by section 105 is emphasised. There the learned Chief Justice says, "The Court is now empowered at any time before judgment "to alter a charge sheet, even in a material particular, "where that can be done without prejudicing the accused in the "conduct of his defence. And the cases where such prejudice "cannot be avoided by a suitable adjournment must be few indeed." Up to this point in the judgment it is the powers of the trial court that are being stated and commented on. The judgment then proceeds to deal with the position where a defective charge has not been amended by the trial court and, the accused having been convicted, the matter is then raised before-

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the court which is hearing an appeal from the conviction. The whole of the rest of the judgment deals with the powers of a court of appeal and the application of those powers to the case then under investigation. Following upon the last-quoted passage the language of the judgment proceeds :- " An accused, "therefore, who has not objected to a defective charge before "judgment should not be allowed to object on appeal, if the "court of appeal is satisfied that had the point been timeously "taken the charge sheet might have been amended without "prejudice to the conduct of the defence. But the rule must "be confined to cases where the charge sheet, though materially "defective, does disclose an offence. I do not think that any "court of appeal should be justified in allowing a conviction "to stand upon a charge sheet which discloses no offence. " The "rule" to which reference is here made is the rule that had just been stated, namely, that defects in the charge that could have been but were not corrected at the trial, cannot be made the subject of complaint for the first time on appeal. For magistrates' courts, defects that could have been corrected meant, in terms of section 105, all defects, the correction of which could be effected without prejudice to the defence. But the learned Chief Justice goes on to narrow-

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the rule by a proviso, namely, that a court of appeal cannot refuse to pay regard to defects of such a nature that the charge discloses no offence. Such a defect, he says, can always be relied upon on appeal. But he does not say that such a defect could not have been cured by amendment at the trial. What he does say in effect is that although it could have been cured at the trial, it cannot be cured on appeal.

In what follows the learned Chief Justice distinguishes between (1) formal defects, (2)material defects which result in no crime being disclosed, and (3) material defects which do not result in no crime being disclosed. The distinction between formal and material defects was recognised by section 149 of Act 31 of 1917, which corresponds to section 165 of Act 56 of 1955. But for present purposes the important distinction is between (1) and (3), taken together, which cannot be raised for the first time on appeal, and (2) which can.

Myburgh's case which was also cited by ROOS J.A. merely summarises and applies what had been said in Herschel's case.

From what has been said it seems to me to be clear that the passage in Jhazbai's case does not correctly reflect what was laid down in Rex v. Herschel. What

ROOS/.....

ROOS J.A. said was not necessary for the decision of this Court on the second count. The same decision not only could have but clearly would have been reached if Hershel's case had not been taken into account at all or if the pronouncements in it had been correctly reproduced. The reference to that case was an excrescence on the reasoning by which this Court decided to dismiss the appeal on the second count. Since it decided that the charge was not defective any discussion of what the position would have been if it had been defective could not advance the reasoning by which the decision was reached.

The passage in the judgment in Jhazbai's case, being obiter dictum, is in no way binding and, since it appears to have been based on a misreading of Rex v. Hershel, should not be followed, unless indeed, apart from the authority on which it relied, it correctly reproduced the effect of section 225 as amended, i.e. section 180. It was argued on behalf of the appellant that "the charge" to which reference is made in these provisions can only be a charge which discloses an offence. If a charge does not disclose an offence it is not, so it was contended, really a charge at all. There might in some contexts be force in the submission that

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an act or transaction that is defective or invalid is a nullity which should not be called by the name of the act or transaction. But that would be where a question of essential validity or invalidity was under consideration. Sections 180 and its predecessor do not deal with such matters but with documents that may contain errors, omissions, improper insertions and the like. Such documents do not cease to be what they purport to be, namely, charges (including indictments and summonses - see section 1)because they are defective. There is nothing in the language of section 180 to support the view that, if the defects are such that no offence appears, there must be an entirely different approach, so that there is no room for amendment. The history of the provision supports this conclusion. For when in 1926 it ceased to be an objection to an amendment in any court that it related to a material defect, it would surely have been natural, if that had been the intention, to make special provision for that class of material defects which had the effect that the charge disclosed no offence.

It follows that unless he considered that the amendment would prejudice the appellant in his defence the magistrate had the power to amend the charge. It was rightly not contended that he was not entitled to hold

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that there would be no prejudice to the appellant in his defence. The amendment did not introduce a wholly new offence but merely filled a gap in the setting out of an offence which was throughout the contravention of a stated provision of the Motor Vehicle Ordinance. There was the further consideration that as the amendment was granted at the commencement of the proceedings, before evidence had been led, there could be no question of any witnesses having to be recalled or any similar disadvantage.

Since in my view the magistrate acted within his powers in granting the amendment, no question of applying the proviso to section 103(4) of the Magistrates' Courts Act (Act No. 32 of 1944) arises. Nor does any question arise of making, in terms of section 98(2) of the same Act, an order on appeal such as that which the magistrate ought to have made. An argument was addressed to us on behalf of the Crown on these lines and we were referred to Gibson v. Regina (1956 (2) P.H. H 147), but it is unnecessary to express any view upon the applicability of those provisions.

Counsel for the appellant properly refrained from challenging the exercise by the magistrate of his discretion to grant or refuse a postponement. In the circumstances of this case he was clearly justified in refusing to grant it.

For these reasons the appeal is dismissed.

Hoexter, J.A. de Beer, J.A. Wall, A.J.A. Price, A.J.A. Concur. 19/11/58

IN DIE HOOGGEREGSHOF VAN SUID AFRIKA.

(O.V.S. PROVINSIALE AFDELING).

Tussen:

J.B. CRAUSE. Appellant.

teen

REGINA. Respondent.

CORAM.	GROBLER EN DIEMONT, RR.
UITSPRAAK.	GROBLER, R.
VERHOOR OP	10 MAART 1958.

In hierdie saak het die Appellant tereggestaan op 'n aanklag van oortreding van Artikel 31(1) (c) van Ordonnansie No. 8 van 1941 (O.V.S) en die bewoording van die klagstaat het oorspronklik as volg gelees: "Deurdat die beskuldigde op of omtrent die 2de dag van November 1957 en op die Dewetsdorp pad Bloemfontein binne die distrik van Bloemfontein wederregtelik en onwettiglik 'n motorvoertuig tewete 'n motorkar OKE 7828 bestuur het, terwyl hy onder die invloed van bedwelmende drank of verdowingsmiddele verkeer het."

Die aanklag is deur die staatsaanklaer aan Appellant gestel in die Hof. Hy het onskuldig gepleit, en daarop het sy prokureur, Mnr. van Heerden eksepsie geneem teen die aanklag op grond daarvan dat die woorde "publieke

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pad" nie daarin gemeld is nie, en dat dit gevolglik nie 'n misdaad openbaar nie, en hy het aansoek gedoen vir die onmiddellike ontslag van Appellant, en hom beroep op Artikels 166 (2) gelees met Artikel 169 (1) en (4) van Wet 56/1955.

Die staatsaanklaer het aansoek gedoen vir wysiging van die aanklag deur die invoeging van die woorde "publieke pad" tussen die woorde Bloemfontein en "binne." Die hof het die aansoek van die staatsaanklaer toegestaan en die aanklag gewysig. Daarop het Mnr. van Heerden versoek dat die saak uitgestel word, en na aanhoor van die argumente van Mnr. van Heerden en die staatsaanklaer, is die aansoek vir uitstel geweier, en gelas dat voortgegaan word met die verhoor.

Nadat die kroonsaak op 20 Januarie, 1958 gesluit is, is die saak uitgestel en op 31 Januarie, 1958 hervat, toe Appellant se saak deur sy prokureur gesluit is, sonder om enige getuienis te lei. Appellant is skuldig bevind, en 'n boete van £50. of 50 dae G.D.A. opgelê. Verder is beveel dat die vonnis op appellant se bestuurderslisensie ge-endosseer word.

Appellant het teen die skuldigbevinding en

/vonnis.....

vonnis appél aangeteken op die volgende gronde:

"1. Dat die skuldigbevinding regtens nie standhoudend is nie, in dat:

(a) Die klagstaat soos oorspronklik aan die beskuldigde gestel n nulliteit is en as sulks geen misdaad openbaar nie.

(b) Dat die Magistraat fouteer het deur n wysiging waardeur die klagstaat wat mank gegaan het weens n wesenlike gebrek, toe te staan.

(c) Dat deur die wysiging n regskending gepleeg is en die beskuldigde as sulks benadeel is.

2. Dat die beskuldigde in sy verdediging benadeel was in dat,

(a) n Redelike uitstel geweier was na verbetering van die klagstaat.

(b) Voor die wysiging van die klagstaat dit geen misdaad openbaar het nie, en na verbetering daarvan die beskuldigde van n redelike geleentheid om sy verdediging voor te berei

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ontneem was".

Dit is duidelik dat die aanklag, waar dit deur die landdros op aansoek van die aanklaer gewysig is, geen misdaad openbaar het nie, aangesien dit geen bewering bevat het nie dat appellant n motorkar "op n publieke pad" bestuur het, terwyl hy onder die invloed van bedwelmende drank was. (Vgl. R.v. Laubscher, 1949 (4) S.A. 574 (O).

Mnr. Lichtenberg, wat namens appellant opgetree het, het eerstens betoog dat aangesien die oorspronklike aanklag, waarteen eksepsie opgewerp was, geen misdryf openbaar het nie, dit n "nulliteit" was met die gevolg dat die Landdros nie by magte was om dit te wysig nie. Vir hierdie stelling het hy die Hof verwys na beslissings soos R. v. Jhazbai 1931 A.D. 480 op bls. 484; R.v. Brandfort Garage 1954 (2) P.H. 162 (O); R. v. Uys. 1955(2) S. A. 162. Hy het verder betoog dat n aanklag soos die onderhawige wat geen misdryf openbaar nie, nie as n aanklag beskou kan word nie wat ingevolge Artikel 180 van die Strafproseswet vatbaar is vir verbetering nie.

Hierteen het Mnr. van der Walt namens die Kroon aangevoer dat die wysiging van die aanklag geoorloof was ooreenkomstig Artikel 180 (1) van die strafproseswet 1955, wat

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'n Hof magtig om enige wysiging in enige aanklag toe te staan mits dit net nie die beskuldigde by sy verdediging benadeel nie. Hierdie artikel lees:

> "Wanneer daar by 'n verhoor op 'n aanklag 'n verskil blyk te wees tussen die bewering daarin en die bewys wat ter stawing van daardie bewering aangebied word, of indien dit blyk dat enige woorde of besonderhede wat in die aanklag moes ingevoeg gewees het, weggelaat is, of dat enige woorde of besonderhede wat moes weggelaat gewees het, ingevoeg is, of dat daar enige ander fout in die aanklag is, kan die Hof te eniger tyd voor uitspraak gegee word, indien hy van oordeel is dat die aanbring van die nodige wysiging aan die aanklag nie die beskuldigde by sy verdediging sal benadeel nie, gelas dat die aanklag vir sover nodig gewysig word, beide wat betref die deel daarvan waarin die verskil, weglating, invoeg-

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invoeging of fout voorkom, en wat betref enige ander deel daarvan wat dit nodig mag word om te wysig".

Ek kan nie saamstem nie met Mnr. Lichtenberg dat die woord "aanklag" in Artikel 180 (1) alleen betrekking het op, en vertolk moet word as, 'n aanklag wat 'n misdryf openbaar. Die woord "aanklag" in hierdie Artikel beteken "enige aanklag". Die Engelse weergawe "any charge" en die inhoud van die Artikel toon aan dat die woord aanklag daarin gebesig die gewone betekenis het van die woord wat so dikwels in die Strafproseswet voorkom. Artikel 1 daarvan verklaar dat tensy uit die samehang anders blyk, "aanklag" ook 'n akte van beskuldiging of dagvaarding beteken.

Waar die woord "aanklag" in Artikel 180 betrekking het op aanklagte in die magistraatshof, sluit dit ooreenkomstig Artikels 308 en 309 in die "skriftelike verklaring van die aanklag" wat deur die staatsaanklaer by die klerk van die hof ingedien word teen 'n persoon wat hy besluit het om te vervolg, asook die dagvaarding om te verskyn om op die aanklag te antwoord. Ek kan geen rede vind nie om aan die woord "aanklag" in Artikel 180 enige ander betekenis te gee as die wat in Artikel 1 bepaal is.

Dit is wel waar dat Artikel 308 vereis dat in 'n

aanklag ondermeer kortliks en duidelik die "aard van die misdryf en die tyd en plek waar dit gepleeg is" moet uiteensit, en dat die gewraakte aanklag in sy oorspronklike vorm nie voldoen het nie aan die bepalings van Artikel 308 nie, omdat dit geen misdryf openbaar het nie, maar dit is duidelik uit die gebruik van die woord aanklag in menigvuldige artikels in die Strafproseswet dat dit gebrekkige sowel as foutlose aanklagte insluit. Artikel 180 wat bepaal hoe en wanneer gebrekkige aanklagte verbeter kan word deur die Hof, en Artikels 165 en 166 wat oor besware en eksepsies teen aanklagte handel, sommige waarvan selfs geen misdryf openbaar nie, is onteenseglike bewys dat die woord "aanklag" deurgaans in die bedoelde wet 'n dokument beteken wat heet 'n aanklag te wees.

Mnr. Lichtenberg het verder betoog dat Artikel 180 (1) in elk geval nie bedoel is om die wysiging toe te laat van aanklagte wat geen misdrywe openbaar nie, en dit is derhalwe nodig om die betekenis van die artikel en die omvang van die wysigings wat daardeur beoog word te probeer bepaal. Behalwe dat 'n wysiging alleen toegestaan mag word by die verhoor op 'n aanklag, en voor uitspraak gegee word, is die enigste beperking wat op 'n hof gelê word by die toestaan van 'n wysiging dat die hof van oordeel moet wees "dat die aanbring van die nodige wysiging nie die beskuldig-

/de .....

by sy verdediging sal benadeel nie."

Geen beperking is derhalwe gelê op die aard van gebrekkige aanklagte wat gewysig mag word nie, of die aard van die gebreke wat deur wysiging verbeter mag word nie, mits die bedoelde benadeling van die beskuldigde in sy verhoor verhoed word. Die duidelike bewoording van Artikel 180 (1) toon aan dat ondermeer enige nodige woorde of besonderhede wat verkeerdelik weggelaat is, by sodanige aanklag bygevoeg kan word, dat enige woorde of besonderhede wat verkeerdelik ingevoeg is, geskrap kan word, en dat enige ander fout in die aanklag verbeter kan word, om die nodige wysiging te bewerkstellig. In kort word 'n algehele wysiging toegelaat, want wyer toekenning van die mag om 'n aanklag te wysig is nouliks denkbaar, en volgens my mening word aan 'n Hof ingevolge Artikel 180 (1) die mag verleen om selfs aan 'n aanklag wat geen misdryf openbaar nie, die nodige wysiging aan te bring, mits die hof van oordeel is dat die wysiging die beskuldigde by sy verdediging nie sal benadeel nie. Dit is volgens my mening die duidelike en gewone betekenis van die heldere en ondubbelsinnige woorde wat in Artikel 180 (1) gebesig is. En ek beskou nie dat Artikel 180 (1) vatbaar is vir enige ander betekenis nie.

/Vgl.....

(Vgl. Shenker v. The Master 1936 A.D. 136 op bls. 142).

Hierdie sienswyse word ook gestaaf deur die geskiedenis en ontwikkeling van Artikel 180 van die Strafproseswet. Voor die inwerkingtreding van die Strafproseswet Nr. 31 van 1917, en die Magistraatshowewet Nr. 32 van 1917, het daar reeds in die Magistraatshowe in Transvaal, die Kaap en die Vrystaat, wat die toestaan van wysigings van aanklagte in strafsake, en pleitstukke in siviele sake betref, 'n soortgelyke beperking bestaan om benadeling te verhoed van 'n beskuldigde, of die teenparty in siviele sake, as die wat in die huidige Artikel 180 van die Strafproseswet, 1955 en Artikel 111 van die Magistraatshowewet, 1944 voorkom. Maar 'n verdere beperking het bestaan wat die toestaan van wysigings van aanklagte sowel as siviele pleitstukke belet het wat - soos Proklamasie Nr. 21 van 1902 van Transvaal bepaal het - "material to the merits of the case" of tersake dienend was.

Reeds in 1909 het Innes, H.R., sy afkeuring van hierdie beperking uitgespreek (in Cook v. Aldred 1909 T.S. 151) en op bls. 152 (t.a.p.) gesê: "It is extremely unfortunate that the power to amend should be thus restricted in the case of Magistrate's Courts", en bevind dat 'n dagvaarding, wat geen skuldoorsaak openbaar nie, nie vatbaar was vir wysiging nie.

/omdat .....

omdat dit tersake dienend of "material to the merits of the case" was. Cook v. Aldred is gevolg in Crawford and Celliers v. Rex (1909 T.S. 267), waar eweneens op dieselfde gronde beslis dat 'n aanklag wat geen misdryf openbaar nie, nie in die Magistraatshof gewysig kan word nie.

Nogtans is hierdie ongewenste, en stremmende beperking op wysigings van aanklagte nie alleen - en na my mening as gevolg van 'n mate van onbedagsaamheid - herhaal wat Magistraatshowe betref nie, maar ook uitgebrei om Hooggeregshowe in te sluit deur die Strafproseswet Nr. 31 van 1917 - sien Artikel 225 - wat wysigings van aanklagte wat "ter sake dienend is" sowel as die wat 'n beskuldigde in sy verdediging kan benadeel belet het. Dit is egter vreemd en ongerymd dat die Magistraatshowewet, 1917, wat op dieselfde dag as die Strafproseswet 1917 goedgekeur is, dié onnodige en onwyse beperking aangaande wysingings van aanklagte sowel as siviele dagvaarding edm. laat vaar het, en net die beperking van benadeling behou het. (Sien Artikel 105 (1). Die uitwerking van hierdie wette was dat daar 'n ongerymdheid ontstaan het met die gevolg dat 'n Magistraat 'n aanklag kon wysig, selfs waar die wysiging tersakedienend was, maar dié mag aan die Hooggeregshof ontsê is. In die verband het Innes, H.R., in Rex v. Herschel,

1920 A.D. 575 op bls. 578 gesê:

"It is unnecessary here to discuss the effect of those sections (i.e. sections 151, 225 etc. of Act 31 of 1917), because the present case falls under the operation of the Magistrate's Court Act, the provisions of which in regard to amendment are more extensive and more explicit than those of the Criminal Procedure Act. Sec. 105 enacts that in Criminal as well as Civil proceedings a Magistrate's Court may at any time before judgment amend any Summons; but no amendment shall be made by which any party other than the applicant for the amendment may (notwithstanding adjournment) be prejudiced in the conduct of his action, prosecution or defence. The effect of that clause is clear, and the reason for its insertion is almost equally clear. It was intended to do away with Cook v. Aldred

/1909.....

(1909 T.S.P. 150), and the line of decisions which followed it."

Die ongerymdheid van die breër magte van wysiging van aanklagte in Magistraatshowe is egter verwyder deur Wet 39 van 1926 wat Artikel 225 van die Strafproseswet van 1917 gewysig het deur die verbod op wysigings wat tersakedienend is te skrap, en voortaan was die mag om aanklagte te wysig in alle howe alleen beperk deur die moontlikheid van benadeling van n beskuldigde in sy verdediging.

Volgens my mening berus die oorweging van wysigings van aanklagte in strafsake sowel as pleitstukke in siviele gedinge, tans in al ons howe op dieselfde breë grondslag, naamlik die van vermyding van benadeling, en die waarborg van n billike en regverdige verhoor. Indien n aanklag of siviele dagvaarding derhalwe sodanig gewysig word dat die beskuldigde of betrokke gedingvoerder geensins in die voordrag van sy saak benadeel word nie, beskou ek dat die blote feit dat die betrokke aanklag of dagvaarding geen misdryf of skuldoorsaak inhou nie, nie as sodanig ter sake is nie. Inagnemende die bestaande wette kan n beskuldigde of ander gedingvoerder niks meer eis nie - en is dit dan nie die hoogste eis wat enige redelike gedingvoerder aan n Hof kan stel nie? - dan dat n wy-

/siging.....

siging van n saakbeskrywing wat teen hom toegestaan word, hom nie moet benadeel nie, en billik en regverdig moet wees.

In siviele gedinge word dit aanvaar dat die hof dagvaardings en ander saakbeskrywings kan wysig selfs waar dit geen skuldoorsaak inhou nie. In Meyers v. Abrahamson, 1951 (3) S.A. 438 het Van Winsen,W.N.R., gesê op bls. 450:

> "I can find no authority for excluding the Court's power to grant an amendment because the pleading sought to be amended is fatally defective. On the contrary there is considerable authority for the proposition that not only has the court the power to amend a summons which is totally defective, but would, rather than set it aside in toto, allow an amendment where such amendment would occasion no prejudice and prevent a wastage of costs." Sien ook Union Bank of South Africa Ltd. v. Woolf , 1939 W.L.D. 22 op bls. 225; en Mail v. du Plessis, 1948 (1) S.A. 1165 en die sake wat daarin na verwys word op bls. 1168.

/Op .....

Op dieselfde oorwegings kan ek geen grond vind nie vir die uitsluiting van die mag om aanklagte te wysig op die blote grond dat die betrokke aanklag geen misdryf inhou nie. Ek het reeds daarop gewys dat sodanige wysiging volgens my vertolking van die heldere en onduubbelsinnige bewoording van Artikel 180 (1) van die Strafproseswet volkome geoorloof is. Aangesien die teenoorgestelde mening in baie beslissings van ons howe - sommige waarvan ek sal behandel - uitgespreek is, bied ek my mening in alle beskeidenheid aan en ek is gedwing om te bevind dat hulle gegrond is op n verkeerde vertolking van die betrokke wette. Steun vir my gevolgtrekking word gevind in Gardiner & Lansdown, South Africa Criminal Law (6de uitgawe, bls, 333) waar verklaar word dat

> "the sole test to be applied in deciding whether or not an amendment is permissible which converts into a legal charge what previously was an allegation which disclosed no offence, is whether the proposed alteration would prejudice the accused in his defence. The court, be it noted, must be satisfied that the

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amendment will not prejudiced the accused in his defence: in cases where there is a reasonable doubt whether ot not such prejudice would result, the court will properly decide t the question in favour of the accused".

Roos, R.A., het egter die volgende Obiter Dictum uitgespreek in Rex v. Jhazbai, 1931 A.D. 480 op bls. 484:

"If no offence is disclosed in the charges, the court below could not have amended the charges, and the appellant would be entitled to reply on this point on appeal even if, as in this case, it had not been raised by him before, R. v. Herschel (1920 A.D. 575) : R. v. Myburgh (1922. A.D. 249)".

Hoewel die vertolking van hierdie opmerking nie eensluidend in ons howe is nie, moet dit volg uit die letterlike betekenis van die woorde wat hy gebruik het dat d die geleerde Regter bedoël het om te kenne te gee dat indien geen misdryf openbaar is nie, die aanklag (in n saak wat in die magistraatshof ontstaan het) nie "in the court below," menende die Natalse Provinsiale Afdeling, kon gewysig word nie. Die

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woorde is so verstaan deur Boshoff, R., in Duffey v. Attorney-General, Transvaal, 1958 (1) S.A. (T) op bls. 636 - waar die hof ook beslis het dat 'n aanklag wat geen misdryf inhou nie, wel in die magistraatshof gewysig kan word. Indien Roos, R.A. egter bedoel het in Jhazbai se saak om te verklaar - en sy bedoeling is in die lig gesien in R.v. Brandfort Garage en R.v. Uys (t.a.pl) - dat die magistraat nie by magte was om die aanklag te wysig nie, aangesien dit geen misdryf ingehou het nie, is dit my eerbiedige mening dat die obiter dictum verkeerd is. Dit is ook opmerklik dat R. v. Myburgh 1922 A.D. 249 en R. v. Herschel 1920 A.D. 575 waarna Roos, R.A., verwys, hierdie stelling nie steun nie.

In die saak van Brandfort Garage teen R. (1954, 2P.H. 162) is Herschel en Myburgh se sake (T.A.P.) ook in hierdie hof aangehaal as gesag vir die mening dat 'n aanklag, wat geen misdryf inhou nie, nie in die magistraatshof gewysig kan word om dit tot 'n behoorlike klagstaat te verhef nie, maar dit is my beskeie mening dat hierdie obiter dictum van Horwitz, R. wat nie alleen op die aangehaalde obiter dictum in R. v. Jhazbai gegrond is nie, ook berus op 'n verkeerde vertolking van die genoemde sake, wat volgens my begrip daarvan geensins sodanige stelling neergelê het nie. In R. v. Myburgh

(t.s.p.).....

(t.a.p) is beslis dat n beskuldigde geregtig is om selfs op appél beswaar te maak teen, en ontslaan te word op, n aanklag wat geen misdryf inhou nie: en R. v. Herschel (t.a.p) gaan niks verder as om te beslis dat n beskuldigde op appél nie vir die eerste maal met sukses beswaar kan maak nie teen formele en ander gebreke in n aanklag as die dat dit geen misdryf openbaar nie, mits die verhoorhof die aanklag kon gewysig het sonder benadeling van die beskuldigde in sy verdediging. In dié saak het Innes. H.R.gesê op bls. 580:

> "The Court is now emprowered at any time before judgment to alter a charge sheet, even in a material particular , where that can be done without prejudcing the accused in the conduct of his defence. And the cases where such prejudice cannot be avoided by a suitable adjourment must be few indeed. An accused, therefore, who has not objected to a defective charge before judgment, should not be allowed to object on appeal, if the Court of Appeal is satisfied

/that .....

that, had the point been timeously taken, the charge sheet might have been amended without prejudice to the conduct of the defence. But the rule must be confined to cases where the charges sheet, though materially defective, does disclose an offence."

Die obiter dictum in hierdie Hof van Van Blerk, R (soos hy destyds was) in R. v. Uys, 1955 (2) S.A. (O) op bls. 164 dat die betrokke klagstaat wat geen misdaad openbaar het nie 'n nulliteit was, en dat die magistraat nie by magte was om dit te wysig nie, moet derhalwe ook as onjuis beskou word volgens my beskeie mening.

Die volgende vraag is of die landdros se bevinding dat die appellant inderdaad nie deur die toegestane wysiging van die aanklag benadeel sou word nie, reg is. Die betrokke deel van Artikel 180 (1) bepaal dat 'n Hof die nodige wysiging kan toestaan " indien hy van oordeel is dat die aanbring van die wysiging aan die aanklag nie die beskuldigde in sy verdediging sal benadeel nie." Die betrokke hof se oordeel is dus deurslaggewend. En as dié oordeel op 'n regterlike wyse uitgeofen word, kan 'n hof van appél nie daarmee inmeng

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nie. (Vgl. die opmerkings van de Villiers, R.A. in Schenker v. The Master, 1936 A.D. 136) op bls. 142, 145 en 147). Die vraag op appél is derhalwe nie of hierdie Hof van oordeel is dat die wysiging die beskuldigde nie sou benadeel het in sy verdediging nie, maar wel op die landros se oordeel of bevinding aanvegbaar is op grond dat dit nie op regterlike wyse uitgeoefen is nie.

Dit moet in ag geneem word dat die Landdros onmiddelik na sy weiering om appellant se eksepsie die aanklag gewysig het deur die invoeging van woorde wat aandui het "dat appellant sy motor op n publieke pad bestuur het toe hy onder die invloed van bedwelmende drank was, en dat hy appellant se aansoek om n verdaging van die hand gewys het. Al die Kroongetuienis is toe verhoor, en die kroonsaak gesluit. Die saak is toe uitgestel tot n datum wat deur die partye onderling bepaal moes word, en voorlopig tot 31 Januarie, 1958, en die verhoor is op die genoemde datum, en elf dae na die verdaging, voortgesit.

Hoewel appellant se prokureur in sy versoek om uitstel betoog het dat hy nie geweet het wat die saak was wat hy moes bestry nie, het die aanklag beweer dat appellant Art. 31 (1) (c) van Ordonannansie 8 van 1941 O.V.S. oortree

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het, waarvolgens dit 'n misdryf is om onder die invloed van bedwelende drank 'n motorvoertuig op 'n publieke pad te bestuur. Die aanklag het ook uitdruklik beweer dat appellant 'n motorvoertuig onregmatiglik op die "Dewetsdorppad Bloemfontein" bestuur het terwyl hy onder die invloed van bedwelmende drank was. Hoewel die aanklag geen misdryf openbaar het nie, het appellant inderdaad wel geweet watter aanklag die staat bedoel het om teen hom in te bring. (Vgl. die opmerkings van Juta, R.P. in R. v. Jesolowitz 1918 C.P.D. op bls. 577). Hy kon derhalwe nie - veral inagnemende dat die feit dat die verhoor, na sluiting van die kroonsaak, vir elf dae uitgestel is - wesenlik benadeel word in sy verdediging nie. Hy sou inderdaad wat sy verdediging betref nie in 'n gunstiger posisie gewees het nie as die eksepsie toegestaan is en 'n nuwe geldige aanklag op hom bestel is waarop hy op 'n latere datum verhoor is. Die landdros het in sy oortuigende en weldeurdagte uitspraak verduidelik dat hy beweeg was om uitstel te weier ondermeer omdat vier van die Kroongetuies spesiaal van Worcester, Kroonstad en Harrismith gekom het.

Ek stem saam met die landdros se bevinding dat enige moontlike benadeling wat appellant mag kon gely het

/deur.....

deur die weiering van uitstel op die eerste dag van die verhoor, volkome uitgeskakel was deur appellant se reg van 'n versoek om die kroongetuies te laat herroep vir verdere kruisverhoor, toe die saak weer na elf dae hervat is, en dit is ondenkbaar dat sodanige versoek onder die omstandighede geweier sou kon word. Die landdros sê ook in sy redes; "Appellant sou die geleentheid aangebied word om volledige kruisverhoor aan die getuies te stel en die geleentheid hê om die hetuies te herroep vir verdere kruisverhoor."

Die verloop van die saak bewys onteenseglik dat geen fout gevind kan word nie met die Landdros se oordeel en bevinding"dat die aanbring van die betrokke wysiging appellant by sy verdediging nie sou benadeel nie." Die verdediging het aanvaar dat appellant ten tyde van die beweerde misdryf sy motor op 'n publieke pad bestuur het, en die feit is nooit deur kruisverhoor betwis nie. Wat die bewering betref dat appellant onder die invloed van bedwelmende drank was, kan ek sonder aarseling sê dat ek baie min sake teëgekom het waar sodanige feit met sterker oortuiging bewys is; en dit was derhalwe nie verbasend nie dat appellant self geen getuienis gegee het nie, en sy saak gesluit het,

/sonder.....

sonder om enige getuies te roep. Ek beskou die mening volkome geregverdig dat appellant vanweë die oorweldigende krag van die kroongetuienis dit eenvoedig nie kon waag om in die getuiebank te gaan nie.

Volgens die getuienis van n polisiekaptein en twee ervare polisiekonstabels was appellant baie onvas op sy voete. Sy asem het sterk na drank geruik, en hy het merkbaar en duidelik geslinger. Sy oë was bloedbelope. Sy spraak was nie alleen swaar en 'sleeptong' nie, maar hy was nieeens in staat om sy gedagtes uit te druk nie, want hy het herhaalde male aan Kapt. van Vuuren gesê: "Luitenant ek wil weet..... Luitenant ek wil weet", sonder dathy ooit bekwaam was om die sin te voltooi of te verduidelik wat hy wou weet. Sy kar het op n hoofweg en naby Bloemfontein lokasie so geslinger in die nag van die een van die ander kant van die pad, dat konstable Eager, vér after hom moes ry voor hy kon verbykom. Hoewel appellant a speurder is, het hy versuim om op n teken van konstable Eager, wat later voor hom moes inry, sy kar tot stilstand te bring, en na die kar gestaan het, het appellant weer slingerend oor die pad weggery. Sonder enige rede het appellant die konstabels in die uitvoer van hulle pligte uitgeskel en gevloek, en een van hulle ver-

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wurg en met die vuis na hom geslaan. Herhaalde bevele om uit sy kar te klim wou hy nie gehoorsaam nie. Hierdie oorweldigende bewys van appellant se ernstige verlies van selfbeheer en beheer van sy oordeel, sy gedagtes, sy spraak, en sy ledemate as gevolg van bedwelming deur sterk drank het nog appellant nog enige van die twee insittendes in sy kar weerspreek.

Die verloop van die saak was sodanig dat ek dit nie alleen onmoontlik vind om te beslis dat die landdros nie geregtig was om tot die besluit te kom dat die aanbring van die betrokke wysiging appellant nie sou benadeel nie, maar ek is ook volkome oortuig dat appellant inderdaad nie in die minste deur die wysiging benadeel is nie.

Die appèl word derhalwe van die hand gewys.

(get). N.J. Grobler.

ek stem saam (get). M. Diesant.

19 Mei 1958.
BLOEMFONTEIN.