

A 277/10/ES

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

DATE: 13/4/2010

Magistrate
BOCHUM

Case No: B166/2009
High Court Ref No: 1740

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED. ✓

30/3/2010

DATE



SIGNATURE

THE STATE v MATOME ALBERT MAGWETE

REVIEW JUDGMENT

PRINSLOO, J

- [1] This matter came before me as a special review in terms of section 304(4) of the Criminal Procedure Act, Act 51 of 1977.
- [2] The accused was convicted on eight counts of theft in the magistrate's court of Bochum on 5 November 2009.
- [3] All eight counts were taken as one for the purpose of sentence. The accused was sentenced to three years imprisonment.

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- [4] All eight counts related to the theft of tombstones, of all things.
- [5] At the commencement of the trial, the accused, who was legally represented, pleaded guilty to all the charges. His legal representative handed up a written statement, in terms of the provisions of section 112(2) of Act 51 of 1977 ("the Act").
- [6] The concern of the learned magistrate of Bochum, when referring the matter for special review, involved the convictions on counts 1 and 2.
- [7] The relevant portion of count 1 reads as follows:
- " THEFT
- That the accused is guilty of the offence of theft
- IN THAT upon or about 29 May 2009 and at or near Bochum in the district of Bochum, the accused did unlawfully and intentionally steal the following items, to wit
- 5 x tombstones
- the property or in the lawful possession of Smakalina Esther Machaba with intent to deprive the complainant permanently of her property.
- ..."
- [8] Count 2 reads as follows:

"

THEFT

THAT the accused is guilty of the offence of theft

IN THAT upon or about 27 May 2009 and at or near Westphalia Farm in the district of Bochum, the accused did unlawfully and intentionally steal the following items, to wit

5 x tombstones

the property or in the lawful possession of Mokgadi Raphadu with intent to deprive the complainant permanently of her property.

..."

- [9] The statement offered on behalf of the accused in terms of section 112(2) of the Act, *supra*, which was read into the record, reads as follows with regard to counts 1 and 2:

"Count 1. I agree that on 29 May 2009 I went to Bochum in the company of my employees and took five tombstones belonging to Semakaleng Machaba without her permission.

Count 2. I admit that on 27 May 2009 I went to Westphalia Farm in the company of my employees and took five tombstones belonging to Mokgadi Raphadu without her permission."

The usual admissions were also made to the effect that the accused knew that he was committing a crime and that he had not been unduly influenced or coerced by anyone to make the statement.

[10] The accused was duly convicted.

[11] As part of the sentencing procedure, the prosecutor then called some of the complainants in aggravation of sentence.

[12] In respect of count 1, as I have said, the charge was in respect of five tombstones and so was the plea, from which the conviction followed, before the evidence in aggravation was led. From the evidence, it appeared that what the accused had in fact stolen was "five pieces emanating from two different stones".

[13] With regard to count 2, as I have pointed out, the charge was in respect of "5 x tombstones" and the accused, in his written statement, pleaded guilty to taking "5 tombstones" and he was convicted on the strength thereof before the complainant testified. When the complainant testified (after a leading question) she stated that "five pieces of the tombstone" were stolen.

[14] It therefore appeared from the evidence, that although the accused had pleaded guilty as charged, the theft in respect of count 1 was not of "five tombstones" but of "five pieces emanating from two different stones".

Similarly, with regard to count 2, it appeared from the subsequent testimony that the theft was not of five tombstones but of "five pieces of the tombstone".

- [15] It is this state of affairs which inspired the learned magistrate to refer the matter for special review in order to determine whether or not the proceedings were in accordance with justice with regard to the convictions on counts 1 and 2.
- [16] I referred the matter for comment to the learned Director of Public Prosecutions who, in a very helpful memorandum, suggested that the two counts should be amended to bring them in line with the subsequent evidence whereupon the convictions on those counts should be set aside and replaced with convictions flowing from the amended charges. It was suggested that the convictions on the other counts and the sentence as imposed should be confirmed.
- [17] Although section 86(1) of the Act provides for the amendment of the charge "at any time before judgment", it appears that the courts have, for many years, recognised that the charge can also be amended on appeal or review in appropriate circumstances.
- [18] In Hiemstra's *Criminal Procedure* the following is said at 14-19:
- "On appeal or review it is still possible to amend the charge. This can be done in terms of sections 304(2)(c)(iv) and section 309(3), being the 'order as the magistrate's court ought to have given'. Although it is not entirely clear that a power to amend is contained in these words, the power to amend on appeal or review has never really been doubted since *R v Gibson*

1956(2) PH H 147 (A). See also *Barkett's Transport supra* at 160I [my note: the reference is 1988 1 SA 157 (A)] and *S v Kruger supra* at 795C-D [my note: the reference is 1989 1 SA 785 (A)]. The essential question is whether there is any reasonable possibility of prejudice to the accused if the amendment is granted. The test is whether the accused will be worse off than he or she would have been had the charge in its amended form existed when he or she was initially asked to plead (*S v F* 1975 3 SA 167 (T) at 170G-H). It must be clear that the defence would have remained exactly the same had the charge initially read as it does after the amendment (*R v Mahomed* 1929 AD 58; *R v Naidoo* 1948 4 SA 69 (N))."

[19] In *Barkett's Transport, supra*, the following is said at 160H-J:

"Mnr Marais het die aansoek om wysiging gegrond op die bepalings van artikel 86(1) van die Strafproseswet 51 van 1977, saamgelees met artikels 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 artikel 86 bevat is nie (*R v Gibson* 1956(2) PH H 147 (A))."

[20] In *S v Kruger, supra*, the following is said at 795C-D:

"Dit word egter reeds sedert laatstens 1956 aanvaar dat 'n hof van appèl die bevoegdheid het om 'n wysiging toe te staan wat die verhoorhof voor uitspraak sou kon bewillig het ..."

- [21] See also the discussion on the subject in Du Toit et al *Commentary on the Criminal Procedure Act* at 14-24 and authorities there quoted. See also *S v Nesane* 1980 2 SA 103 (V) at 104C-F and *S v Kuse* 1990(1) SACR 191 (E) at 197a-d.
- [22] Returning to the test when it comes to considering an amendment on appeal or review, as set out by the learned author in *Hiemstra, supra*, namely whether the accused will be worse off than he would have been had the charge in its amended form existed when he was initially asked to plead, it is clear, that he would have offered the same written plea-explanation than he did during the actual trial. To start with, he pleaded guilty to the theft of five tombstones on both counts and he also offered pleas of guilty in respect of the theft of the tombstones relating to the other six charges. Where the learned magistrate took all the counts and convictions together for purposes of sentence, I consider it totally unlikely that the final sentence would have been any different had counts 1 and 2 been framed to provide for "two tombstones consisting of five pieces" and "one tombstone consisting of five pieces" respectively.

[23] Against this background, I consider that the requirements for amending a charge on review have been met and, accordingly, counts 1 and 2 are amended to read as follows:

"Count 1: In that upon or about 29 May 2009 and at or near Bochum in the district of Bochum the accused did unlawfully and intentionally steal the following items, to wit, 2 x tombstones consisting of five pieces, the property or in the lawful possession of Smakalina Esther Machaba with intent to deprive the complainant permanently of her property.

Count 2: In that upon or about 29 May 2009 and at or near Westphalia Farm in the district of Bochum the accused did unlawfully and intentionally steal the following items, to wit, 1 x tombstone consisting of five pieces, the property or in the lawful possession of Mokgadi Raphadu with intent to deprive the complainant permanently of her property."

[24] In the circumstances I make the following order:

1. Counts 1 and 2 are amended as described above.
2. The accused is convicted on counts 1 and 2 as amended.
3. The convictions in respect of counts 3, 4, 5, 6, 7 and 8 are confirmed.
4. The sentence as imposed in respect of all eight charges is confirmed.



W R C PRINSLOO
JUDGE OF THE NORTH GAUTENG HIGH COURT

I agree



H J FABRICIUS
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

B166-09