

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A125/2013

In the matter between:

SILAS NTULINI

Applicant

and

THE REGIONAL COURT MAGISTRATE,
BLOEMFONTEIN

First Respondent

THE STATE

Second Respondent

CORAM: JORDAAN, J *et* G.J.M. WRIGHT, AJ

HEARD ON: 25 AUGUST 2014

JUDGMENT BY: G.J.M. WRIGHT, AJ

DELIVERED ON: 28 AUGUST 2014

- [1] This is a review application. The Applicant requests that the proceedings in the Bloemfontein Regional Court leading up to his conviction of indecent assault and his sentence of 10 years imprisonment be reviewed and set aside. The

application centres on an alleged irregularity which occurred when the charge sheet was amended.

[2] The First Respondent is the regional magistrate who presided over the trial in the court *a quo*. He is not opposing the application and indicated his intention to abide by this Court's decision on the matter. The Second Respondent, as represented by the office of the Director of Public Prosecutions, opposes the application.

[3] The background to this application may be summarized as follows:

(i) On 26 November 2012 the Applicant pleaded not guilty to a charge of rape. In the charge sheet it was alleged that the Applicant unlawfully and intentionally committed an act of penetration with the complainant by inserting his penis inside her vagina and/or anus, without her consent. Reference was also made to the applicability of Schedule 2 of the Criminal Law Amendment Act, Act 105 of 1997, in that the complainant is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007.

(ii) The State led the evidence of three witnesses where after the Applicant himself testified. Throughout the proceedings the Applicant insisted that he did not rape

or molest the complainant in any way. According to his version he was urinating outside the toilet structure where the complainant was found partially undressed. He vehemently denies ever entering the toilet. A family member of the complainant found her and immediately accused the Applicant of wanting to rape her (the complainant). Children then chased after the Applicant, throwing stones at him.

- (iii) After the Applicant closed his case, the matter was postponed for argument. The magistrate indicated that he expects argument on the following:

“The charge that was put to the accused was contravention of section 3 of the Sexual Offences Act of 2007. This Act came into operation after this incident took place on 13 October 2004.”

- (iv) On 20 March 2013 and before any arguments were presented on the merits of the matter, the prosecutor applied for an amendment of the charge sheet to exclude the references to the provisions of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, Act 32 of 2007 (“the Act”). The Applicant’s attorney objected to the amendment, submitting that the Applicant will be prejudiced by such an amendment as it constitutes a substitution of the charge. The attorney further contended that he did not explain the competent verdicts to the common law crime of rape to the Applicant.

- (v) After further extensive argument on the amendment as well as the evidence that was placed before the trial court, the magistrate allowed the amendment and gave the Applicant the opportunity to re-open his case. After a postponement, the Applicant's attorney placed on record that the Applicant had instructed him to proceed without re-opening his case.
- (vi) On 22 April 2013 the Applicant was found guilty of Indecent Assault. On 29 April 2013 the Applicant was sentenced to 10 years imprisonment.
- (vii) This application was issued during June 2013.

[4] The crime was committed on 13 October 2004. The Act came into operation on 16 December 2007. It repealed the common-law offence of rape and replaced it with an extensive statutory crime of rape. Section 69 of the Act is a transitional provision and provides in subsection 2 thereof that an investigation or prosecution in respect of conduct which would have constituted one of the common law crimes which was initiated before the commencement of the Act may be concluded, instituted and continued as if the Act had not been passed.

[5] It is clear that the prosecution of the Applicant should have been dealt with in terms of the common law from the start. Indecent Assault is a competent verdict on a common-law

charge of rape. The Act itself does not provide for a verdict of indecent assault, but it does provide for conviction on a charge of sexual assault.

- [6] The facts in the present matter show that the complainant was penetrated anally, either with a penis or some other object. If the Act was applicable, these facts would have resulted in a conviction on Rape. Under the common law, the act complained of does not amount to rape, but merely to indecent assault.
- [7] Section 86 of the Criminal Procedure Act, Act 51 of 1977, provides that a court may order a charge to be amended where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between the averment 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 there from, 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.
- [8] A court may order the amendment if it considers that the making of the relevant amendment will not prejudice the accused. The test for prejudice is whether the accused will, as far as the presentation of his or her case is concerned, be in a weaker position than that in which he or she would have

been had the charge been in the amended form when the plea was submitted. (See **R v Baxter** 1928 AD 430)

- [9] Section 86(1) cannot be used to substitute the offence in the charge with another offence. The test for distinguishing between an amendment and a substitution is whether or not the proposed amended charge differs from the existing one to such an extent that it amounts to another charge. [See **S v Barkett's Transport (Edms) Bpk en 'n Ander** 1988 (1) SA 157 (A)]

- [10] In **S v Kruger en Andere** 1989 (1) SA 785 (A) at 796 I the Appellate Division found as follows:

“Die begrip ‘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.’”

- [11] Mr Hiemstra who represented the Second Respondent before us referred to the unreported case of **De Sousa v S** (A231/2012) [2012] ZAFSHC 236 (13 DECEMBER 2012). There the court on appeal declined to amend a charge sheet where it referred to section 3 of the Act. The amendment that was requested would have substituted statutory rape with a charge of indecent assault. The present matter is clearly distinguishable from the **De Sousa** matter as the amendment here does not involve the substitution of the crime of rape

with that of indecent assault. Indecent assault just happens to be a competent verdict on the new and amended charge of common-law rape.

[12] In **S v Motha** 2012 (1) SACR 451 (KZP) the high court permitted an amendment to the charge sheet to include a reference to section 3 of the Act on the basis that there is no resultant prejudice. The court ruled that the common law and the Act both refer to the same crime (rape) but with a different content. Through the amendment the essence of the charge remained the same. *In casu* we are dealing the same situation, albeit in reverse.

[13] We are satisfied that the amendment that was allowed by the magistrate did not amount to a substitution. The statutory rape charge was merely amended to the common law charge of rape. The conviction on indecent assault was competent in terms of the applicable common law. If the amendment was not granted and judgment was to be given on the facts before the trial court, the Applicant would have been found guilty of statutory rape. Indecent assault is a lesser crime.

[14] Allowing the amendment did not result in any prejudice to the Applicant. It is clear that the Applicant's defence would have remained the same had he been charged with common-law rape from the start. The Applicant had legal representation throughout the proceedings in the trial court. The Applicant's attorney could have objected to the charge when it was put

to the Applicant. He did not do so. The Applicant's defence was conducted on the basis that he had not committed any offence. This was put to all the relevant state witnesses. During the testimony of Dr Zahari the Applicant's attorney extensively explored the possibility that the complainant's injuries were caused by a severe case of constipation rather than penetration or an assault. The Applicant did not make use of the opportunity to re-open his case after the amendment was granted.

[15] During argument Mr Hiemstra pointed out that, should the proceedings be set aside, the Applicant may be recharged. That would not only be prejudicial to him, but will compromise the witnesses who will have to testify again. Also, valuable court time will again have to be spent on dealing with the matter.

[16] Mr. Van der Merwe who represented the Applicant before us conceded that he cannot present any convincing argument as to why the application should succeed.

[17] In conclusion: the amendment did not constitute an irregularity and did not result in an unfair trial.

The application is dismissed.

G.J.M. WRIGHT, AJ

I concur.

A.F. JORDAAN, J

On behalf of applicant:

Adv P.L. van der Merwe
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of respondent:

Adv J.H.S. Hiemstra SC
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

GW/spieterse