PETER GEORG MUTSCHLER v THE STATE

CASE NO. CA 219/2004

2005/07/12

Maritz, J. *et* Shikongo, A.J.

CRIMINAL PROCEDURE

S 84(1) of CPA – purpose of – to inform accused of the case (s)he will be required to meet – charge together with accused's plea, admissions and explanations defines *lis* – touchstone against which court will measure relevancy, admissibility, weight, and sufficiency of evidence during the trial

S 88 of CPA – evidence to cure charge defective for want of averment which is an essential ingredient of offence – purpose of section – section is only operative if omitted averment is an essential element of offence – charge *in casu* not lacking any essential averments – section not of application

S 86(1) and (4) – prosecution did not apply for amendment of charge – if amended on appeal it would severely prejudice the appellant – test of prejudice – whether accused would be in worse position than if the charge had been framed in amended form at time accused was required to plead

CASE NO. CA 219/2004

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PETER GEORG MUTSCHLER

APPELLANT

versus

THE STATE

RESPONDENT

(HIGH COURT APPEAL JUDGMENT)

CORAM: MARITZ, J. *et* SHIKONGO, A.J.

Heard on: 2005.06.29

Delivered on: 2005.07.12

JUDGMENT

MARITZ, J: I have read the judgment of my brother Shikongo, AJ. I agree that the appeal should succeed. I also agree with him that the

evidence falls significantly short of the measure required to sustain a conviction.

Although the magistrate did not give a reasoned judgment, it is apparent that he did not accept the evidence of the complainant as credible or reliable. This conclusion follows logically from the second appellant's discharge notwithstanding the incriminating evidence given by the complainant against him. It is also evident from the fact that the learned magistrate declined to convict the appellant on the basis of any of the allegations of assault particularised in the charge - the formulation of which must have been based on the contents of his witness statement which he later repeated in Court.

The evidence of the second witness for the State, Mr Hausiku, was also compromised by material inconsistencies and conflicts as my Brother's judgment illustrates. It is nevertheless of some significance that his evidence strongly suggests that the complainant was impatient and refused to wait upon the appellant to finish his chores before attending to the complainant. His testimony that the complainant kept on "giving, handing the plastic bag" to the appellant is not irreconcilable with the appellant's evidence that the complainant repeatedly pushed the plastic bag with the overall against his chest. That evidence was also corroborated by the second accused. At issue were the events that

followed upon that conduct. According to Mr Hausiku, the appellant pushed the complainant backwards. Although he later qualified his observation by saying that they "started pushing each other". The appellant testified that he could not remember that he had pushed the complainant but, if he had, he had acted in an "automatic defensive act". The second accused did not see that the appellant pushed the complainant.

My Brother concluded that the evidence presented by the Prosecution was, given its inherent inconsistencies, lacking sufficient evidential weight to convict the appellant and I agree. The conviction becomes even less sustainable if it is considered together with the evidence of the appellant and the second accused.

But I have a more fundamental difficulty with the conviction: My concern is that the magistrate convicted the appellant of the crime of common assault on the basis of a particular act which did not from part of the charge. The allegations which the appellant was required to meet in his defence was that he had wrongfully, unlawfully and maliciously assaulted the complainant by "grabbing him in the neck and trouser therewith by clapping him with an open hand and kickin in the stomatch and thereby incited two dogs to bite him" (*sic*) with intent to do the complainant grievous bodily harm.

Nowhere in the charge, it will be noted, is it alleged that the appellant had “pushed” the complainant. Yet, that was the express basis on which the magistrate convicted the appellant.

The charge against an accused person, whether presented in the form of a “charge sheet” or of an “indictment”, is a vital step in the context of criminal proceedings. The charge contains the allegations of criminal conduct made by the Prosecutor-General on behalf of the State against an accused person and presented for adjudication to a competent Court of Law. It forms the very basis of criminal proceedings against the accused. It not only serves to inform him or her but also the Court of the case which the Prosecution intends to prove. Considered together with an accused’s plea explanation and formal admissions, it defines the *lis* between the State and the accused and will eventually be the touchstone against which the Court will measure the relevancy, admissibility, weight and sufficiency of evidence during the trial.

Although made in a different context, the comments of Miller JA in *S v Hugo*, 1976(4) SA 536(A) at 540E-G, apply equally to the averments of the criminal conduct attributed to the appellant in this case:

> "An accused person is entitled to require that he be informed by the charge with precision, or at least with a reasonable degree of clarity, what the case is that he has to meet and this is especially true of an indictment in which fraud by misrepresentation is alleged. (Cf *R v Alexander & Others,* 1936 AD 445 at 457; *S v Heller & Another*, 1964(1) SA 524 (T) at 535H.) It is of vital importance to such an accused to know what he is alleged fraudulently to have said or done and he ought not to be left to speculate as to the true nature of the misrepresentation laid to his charge, nor to spell out of the charge possible misrepresentations upon which the State might have intended to rely but which it did not reasonably clearly describe. And when the State clearly specifies the misrepresentations upon which it relies, the accused is entitled to regard them as exhaustive and to prepare his defence in respect of those representations and no other." (*emphasis added).*

The charge does not allege that the appellant assaulted the complainant by pushing him. The appellant was therefore not required to meet such an allegation of assault. It is therefore not surprising that the appellant's legal representative did not even bother to cross-examine the second State witness on that point – which was the high water mark of his evidence about the nature of the assault on the complainant.

Whilst conceding the appeal on the merits – correctly so, in my view - Ms de Villiers nevertheless contends that the omission (referred to by her as a "defect") in the charge was cured by the evidence. In support of that contention she relies on the provisions of section 88 of the Criminal Procedure Act, 1977. This section provides:

> "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 judgment, be cured by evidence at the trial proving the matter which should have been averred."

The purpose of section 88, Cooper J pointed out in *S v Kuse*, 1990(1) SACR 191E at 196G-H, "was to abolish the principle accepted in *R v Herschel*, 1920 AD 575 that an appellant was entitled to rely on the point that a conviction based on a materially defective charge was bad although the point was not taken at the trial." He observed that the section "is restricted to the omission of an averment which is an essential ingredient of the offence and is thus only operative when the omitted averment is an essential ingredient of the relevant offence. (*S v Moloinyane,* 1965(2) SA 109 (O) at 11C; *S v Mayongo*, 1968(1) SA 443E at 444H)."

The charge which presents itself in this case is not defective "for the want of an averment which is an essential ingredient" of the crime of assault with intent to do grievous bodily harm. One is therefore not dealing with a situation where the evidence adduced at a trial might have had a curative effect as contemplated by s 88 (Cf *S v Nel*, 1989(4) SA 845(A) at 851B-C).

This is also not a case where the provisions of sections 86(1) or (4) of the Criminal Procedure Act apply. The Prosecution has not applied for an amendment of the charge during the trial – nor has it done so on appeal. In any event, even if they had I would have been inclined to decline the application, not only because the power to amend the charge on appeal should be sparingly exercised, but also because prejudice would result to the appellant if such an amendment is allowed. The approach of the Courts to such amendments has been summarised by Trengove J in *S v F,*1975(3) SA 167(T) at 170G-H:

> "The vital consideration in an application of this nature is, of course, whether there is any possibility that an appellant may be prejudiced if the amendment were allowed. According to the decisions of our courts the test of prejudice, mentioned in s 118(1), is whether the accused would be placed in no worse position than if the charge had been framed in amended form when he was called upon to plead to it. (*S v Kearney,* 1964(2) SA 495A); and, where the application to amend a charge is made on appeal, as in the instant case, the Court must be satisfied that the defence would have remained the same if the charge had originally contained the necessary particulars. On appeal the Court would accede to an application for an amendment of a charge only if it were satisfied that there was no reasonable doubt that the appellant would not be prejudiced. (*R v Rohloff & Others*, 1953(1) SA 274(C); *S v Taitz*, 1970(3) SA 342 (N).)"

Had the appellant been alerted at the outset of the proceedings that he would be at risk to be convicted on the basis that he had pushed the complainant, he would have challenged the evidence of

witnesses to that effect under cross-examination. As it were, his legal representative did not ask the second state witness a single question about the pushing to which he had testified. Moreover, the appellant could have adduced evidence about the allegation. Such evidence could have raised the possibility that he had not acted at all, but that the movement observed was purely a reflex; that he had not acted unlawfully, but in private defence or that he had not acted intentionally.

For the reasons given, I am satisfied that the magistrate convicted the appellant on the basis of conduct which was not averred in the charge and which, in the absence of an amendment, did not present a risk of conviction during the trial to the appellant.

In the premises, I agree that the appeal should succeed and I propose that the following order be made:

> The appellant's conviction of the crime of common assault and the suspended sentence subsequently imposed by the Magistrate, Grootfontein, under Case No. 631/203, are set aside and the following order is substituted:
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> "Accused no. 1 is found not guilty and discharged."

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MARITZ, J.