REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

Rev:02/2022
Modimolle Magistrate's Court:A290/2021
REPORTABLE: YES
OF INTEREST TO THE JUDGES: NO
REVISED
DATE: 18 FEBRUARY 2022

THE STATE

V

MODISE JAN MODIMOLLA Accused

REVIEW JUDGMENT

MULLER J:

[1] The accused was charged in the magistrate's court Modimolle for losing his firearm and was sentenced to R6000.00 or 12 months imprisonment half of which is suspended for 3 years on condition that the accused is not convicted of contravening section 120(8)(b) of Act 60 of 2000 committed during the period of suspension.

[2] The peculiarity of the conviction and the sentence is that the accused pleaded guilty to an offence which was allegedly committed on 2 May 2021 and which is surprisingly described in the preamble of the charge sheet as:

> "That the accused is guilty of the crime of contravening the provisions of Section 39(1)(k) of The Arms and Ammunition Act 75 of 1969. [The Arms and Ammunition Act 75 of 1969 was repealed by s 153 of the FirearmsControl Act 60 of 2000. Act 60 of 2000 was assented to on 4 April 2001 and commenced on 1 July 2004, unless otherwise indicated).

[3] A second charge sheet is included in the record. In terms of that charge sheet the

accused is charged with contravening section 120(8)(b) of the Firearms Control Act 60 of 2000.

[4] When the charge in terms whereof the accused was charged with contravening the Arms and Ammunition Act 75 of 1969 was put to the accused the prosecutor informed the court that the accused is charged with one count of negligent loss of a firearm.

[5] The accused, who was represented throughout the trial, pleaded guilty. A statement in terms of section section 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA) was read into the record and handed in. The accused, *inter alia,* admitted in the statement that he contravened the provisions of section 39(1)(k) of Act 75 of 1969.

[6] The magistrate was not satisfied with the contents of the statement and requested that the particulars of the firearm and the fact that the accused was issued with a license to possess same be included. After the request was complied with, the magistrate convicted the accused and pronounced in his judgment:

> "So you are guilty of contravening the provisions of section 39(1)(k) of the Arms and Ammunition Act 75 of 969 as repealed by section 153 of the Firearms Control Act 60 of 2000 which was assented to on 4 April 2001."

[7] The magistrate realised before sentence was passed that the accused was charged under an Act that has been repealed. With the concurrence of the legal representative of the accused, the charge sheet was amended in terms of section 86 of the CPA, to the extent that the original charge was replaced with a charge that the accused contravened section 120(8)(b) of the Firearms Control Act 60 of 2000. (That accounts for the second charge sheet included in the record). The magistrate then convicted the accused under the Firearms Control Act and sentenced him.

[8] The magistrate submitted the case for special review. The Arms and Ammunition Act 75 of 1969 was repealed in its entirety when the Firearms Control Act 60 of 2000 came into operations on 1 July 2004 in terms of schedule 3 of the Firearms Control Act 60 of 2000, subject to schedule 1 of the latter Act, which contains transitional provisions.

[9] The allegation in the original charge sheet is correct that the Arms and Ammunition Act of 1969 has been repealed. The accused was, therefore, charged that he committed an offence in terms of a statutory provision which no

longer constituted a criminal offence.

[10] I will accept for present purposes that section 39(1**)(k)** of the Arms and Ammunition Act 75 of 1965 and section 120(8)(b) of the Firearms Control Act 60 of 2000 are similarly worded.

[11] However, since the original charge was formulated under an repealed Act an amendment in terms of section 86(1) would tantamount to a substitution of the charge with a charge under a different Act even if the statutory provisions are similarly worded The purpose of section 86(1) is to cater for amendments not substitutions.

[12] It was held in S *v Grey* 1985(2) SA 536 (C) at 539-8 that an amendment of a charge from attempted housebreaking with intent to steal to housebreaking with intent to steal is permissible in terms of section 86(1) of the CPA on the basis that there was substantial identity between the old and the new charge and that there was no prejudice to the accused.

[13] The decision was overruled in S *v Barketts Transport (Edms) Bpk and Another* 1988 (1) SA 157(A) at 161H-1628:

> "Na my mening is 'n substitusie van aanklagte nie 'n 'wysiging' binne die betekenis van die woord in art 86(1) nie. Hierdie uitleg word bevestig deur die samehang waarin die woord 'wysig' in die subartikel gebruik word, waaruit blyk dat 'n subsitusie van misdrywe nie inbegrepe is by enige van die soort wysigings nie waarvoor uitdruklik voorsiening gemaak woord nie. Die bepaalde opsigte waarin 'n aanklag ingevolge die subartikel gewysig kan word, hou almal verband met die misdryf gemeld in die aanklag, en is die volgende; (a) indien 'n noodsaaklike bewering ontbreek, selfs waar die aanklag nie n misdryf openbaar nie;
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> (b) waar 'n bewering in die aanklag verskil van die getuienis wat as bewys van so 'n bewering aangevoer word; (c) waar woorde of besonderhede wat in die aanklag moes gewees het daaruit weggelaat is; (d) waar woorde of besonderhede wat uit die aanklag weggelaat moes gewees het, daarby ingevoeg is; (e) waar daar 'n ander tout in die aanklag is.
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> 'n Substitusie van een misdryf vir n ander is klaarblyklik nog 'n invoeging van 'n noodsaaklike bewering, nog 'n aanpassing van 'n bewering in die aanklag by die getuienis, nog die invoeging van die ontbrekende woorde of besonderhede, nog die skrapping van woorde wat nie in die aanklag moes verskyn het nie."

[14] The court continued at 1638-C:

> "Dit is duidelik dat daar in die Crause-saak geen sprake was van 'n subsitusie van 'n nuwe misdryf nie en hierdie uitspraak bied geen steun vir die houding dat 'n substitusie geoorloof is solank dit net nie 'n 'geheel nuwe' misdaad' skep nie *(S v Nesane* 1980 (2) SA 105 M op 105 C-D of solank daar 'substantial identity' is tussen die ou en die nuwe misdrywe *(S v Grey* 1983 (2) SA 536 (K) op 539A-B) of solank dit 'wesenlik gelyksoortig' is (Hiemstra *Suid- Afrikaanse Strafprosesreg* 4de uitg op 213). Na my mening is daar geen ruimte in die bewoording van art 86(1) vir voormelde kwalifikasie nie en die *Nesane*- en Grey-sake kan op hierdie aspek nie goedgekeur word nie."

[15] The court held that the question of prejudice to the accused only comes up if the amendment is indeed an amendment in terms of section 86(1). Substitution of one offence for another offence, even if the offences are substantially similar, as in the present case, is not permissible in terms of section 86(1).

[16] The magistrate relied on S *v Nedzamba* 2013 (1) SACR 335 (SCA) par 20 as authority that the charge sheet may be amended where it was stated:

> "It is generally accepted that the charge-sheets or indictments may be amended on appeal or review. Once again the test is whether the accused could not possibly be prejudiced thereby. When application is made to amend a charge on appeal the court must be satisfied that the defence would have remained the same if the charge had originally contained the necessary averments".

[17] That case dealt with an amendment on appeal of a charge of rape where no reference was made in the indictment to section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 Of 2007 . The court held that the omission to refer to section 3 is not fatal because the crime of rape was not abolished but that the common law relating to the crime of rape was repealed. The crime of rape remained with a different content provided by the provisions of section 3.

[18] The learned Judge of Appeal accepted that an amendment was sought and that the prejudice that the accused may have suffered if granted, was a consideration to be taken into account by the court. Prejudice became a relevant consideration only after the court was satisfied that an amendment and not substitution of the charge was sought in terms of section 86(1).

[19] It will be recalled that the magistrate first convicted the accused for contravening the Arms and Ammunition Act and then amended the charge sheet. Section 86(1) permits a court to amend the charge sheet before judgment. In *S v Ndlovu* 2017 (2) SACR 305 (CC) par 56 it was emphasized that:

> "Courts are expressly empowered in terms of s 86 of the Criminal Procedure Act to order that a charge be amended. Upon realizing that the charge did not accurately reflect the evidence led, it was open to the court *at any time before judgment* to invite the state to apply to amend the charge and to invite Mr Ndlovu to make submissions on whether prejudice would be occasioned by the amendment".

[20] The accused was charged with an offence committed under a repealed Act. He pleaded guilty to that offence and was convicted of having committed that offence on the strength of his statement. To substitute the non-existing offence for a similarly worded offence created under another Act, after conviction and then to deliver a judgment in terms whereof the accused is convicted of the latter offence on the basis of the amended charge sheet, is in conflict with section 86(1). The magistrate was in any event *functus officio.* It amounted to a serious irregularity which rendered that trial unfair in terms of section 35(3)(/) of the Constitution which states that:

> "Every accused person has a right to fair trial which includes the right-
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> ….
>
> (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted."

[21] The Deputy Director of Public Prosecutions was requested to provide an opinion. I am indebted to him and his staff member for their valuable contribution. They are of the view that the state was bound by the charge sheet upon conviction. They agree that the convictions and sentence cannot stand.

[22] The matter, in my view, should be referred back to the magistrate Modimolle for proceedings to be instituted before a different magistrate in terms of section 324 read with section 313 of the CPA.

ORDER

The convictions and the sentence imposed are set aside.

The matter is referred back to magistrate Modimolle for proceedings to be instituted before a different magistrate.

G. C MULLER
JUDGE OF THE HIGH COURT LIMPOPO
DIVISION: POLOKWANE

I agree

E.M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT
LIMPOPO DIVISION: POLOKWANE