IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

High Court Review Ref: 13919/2013
Magistrate's serial no. 17/2013
Bredasdorp Magistrates' Court case no. BSH 9/2013

In the matter between:

THE STATE

And

[R…….] [R……..]

[A……..] [V……..]

REVIEW JUDGMENT dated 7 January 2016

BINNS-WARD J:

[1] This matter came before me on special review on 19 September 2013. The accused, who were both juveniles - accused no. 1 having been 16 years of age, and accused no. 2, 14 years old - had been convicted of robbery with aggravating circumstances. The complainant had been threatened with a knife during the robbery. They were legally represented and had both pleaded guilty to the charge.

[2] Accused no. 2 was also charged with contravening s 55 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (hereafter referred to for convenience as 'the Sexual Offences Act'). The charge sheet alleged in that regard that the accused had attempted to commit a sexual offence, namely by requesting [the complainant] to remove her trousers (*Afr.* '*gepoog om aan* (sic) *'n seksuele misdryf te pleeg te wete deur* [die klaagster]. *te versoek om haar broek af te trek*').

[3] Accused no. 1 was sentenced to a term of three years' correctional supervision and, in addition, to a period of three years' imprisonment suspended for five years on the usual conditions. There is no difficulty with the proceedings in respect of accused no. 1, and in his case the conviction and sentence will therefore be confirmed. There is also no reason to question the propriety of accused no.2's conviction on the count of robbery.

[4] As to the charge in terms of the Sexual Offences Act (count two on the charge sheet), the magistrate held as follows in her judgment :

> As far as count 2 is concerned, I have to agree with the submissions made by Mr Du Toit [the accuseds' attorney] in that the charge of attempted rape has not been proven. However, contravening s 5(2) of the Sexual Offences Act has been proven. That is the Criminal Law Amendment Act of 2007. The Criminal Procedure Act 261(1)(c) makes provision for the court to convict the accused as such and therefore satisfied the state has proved its case as far as count 1 is concerned, and as far as count 2 is concerned, in respect of accused no. 2, he is convicted therefore of contravening s 5(2) of Act 32 of 2007.

[5] There are a number of difficulties with the conviction of accused no. 2 in respect of the alleged sexual offence. Matters were perhaps destined to go awry because there was a fundamental flaw in the charge sheet that was not recognised at the outset.

[6] Section 55 of Act 32 of 2007 provides:

> 55 **Attempt, conspiracy, incitement or inducing another person to commit sexual offence**
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> Any person who-
>
> (a) attempts;
>
> (b) conspires with any other person; or
>
> (c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,
>
> to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

The term 'sexual offence' was defined in s 1 of the Act as follows at the relevant time:

> '**"sexual offence"** means any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71 (1), (2) and (6) of this Act'.

[7] Chapters 2, 3 and 4 of the Sexual Offences Act provide for a great variety of offences. One of them, created in terms of s 5(2) of the Act, is to '*unlawfully and intentionally inspire the belief in a complainant …that* [the complainant] *will be sexually violated*'. It is difficult to conceive, however, how anyone could attempt to commit the offence provided in terms s 5(2) because its commission requires the complainant to be brought to believe that he or she

will be sexually violated. When such a belief in the complainant is induced the offence is choate. Unless such a belief is induced, no offence is, or can be, committed. Questions of attempts to commit the crime thus do not arise, for the elements of the offence require the complainant to have formed the requisite belief. It thus cannot have been the state's intention to allege that the accused had *attempted* (in the sense provided in terms of s 55(a)) to contravene s 5(2) of the Act.

[8] So what then was the sexual offence that it was alleged that accused no. 2 had attempted to commit? The charge did not say. The prosecutor referred early on in the proceedings to the charge as being one of rape. The magistrate seems from the extract from the judgment quoted earlier to have thought that the charge was one of attempted rape. The common law offence of rape has now been replaced by the offence of an unlawful act of sexual penetration in terms of s 3 of the Sexual Offences Act. Requesting some-one to remove their trousers, which is the *actus reus* alleged in the charge sheet, is not an act of 'sexual penetration' within the definition of that term in s 1 of the Act. Thus any conception based on the express terms of the charge sheet that the accused faced a count of rape or attempted rape was wholly without foundation. Indeed, having not identified any sexual offence in terms of the Act whatsoever, the charge sheet was fundamentally defective. The essential character of any cognisable offence was entirely lacking.

[9] The evidence adduced at the trial made it absolutely clear that the accused had on at least three occasions during his knife-wielding confrontation with the complainant ordered her to remove her trousers. It was plainly established in the circumstances that the complainant believed that she was in serious danger of being raped by him. It is also probable that by directing her to remove her trousers the accused intended her to be put into that state of belief. The complainant was hardly cross-examined. It was merely put to her that accused no. 2 had not intended to rape her and that he denied having told her to remove her trousers. The accused's case was closed without leading any evidence. In the circumstances it is evident that the evidence established not the *attempted* commission of an (unidentified) sexual offence in terms of s 55 of the Act, as alleged, but rather the commission of a *choate* offence in terms of s 5(2), with which the accused had not been charged. It is also apparent that whereas the charge sheet purported to prefer a charge of attempt to commit a sexual offence not specified in the charge sheet, the accused was convicted of the choate commission of a sexual offence not specified in the charge sheet.

[10] The magistrate purported to convict the accused of contravening s 5(2) of the Act on the basis of it being a competent verdict in terms of s 261(1)(c) of the Criminal Procedure Act 51 of 1977. Section 261(1)(c) provides, insofar as relevant:

> **261 Rape, compelled rape, sexual assault, compelled sexual assault and compelled self-sexual assault**
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> (1) If the evidence on a charge of rape or compelled rape, as contemplated in sections 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or any attempt to commit any of those offences, does not prove any such offence or an attempt to commit any such offence, but the offence of-
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> (a) …;
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> (b) common assault;
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> (c) sexual assault as contemplated in section 5 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007;
>
> (d) …
>
> the accused may be found guilty of the offence so proved.

An offence in terms of s 5(2) of the Sexual Offences Act qualifies as '*sexual assault as contemplated in terms of s 5*' of that Act within the meaning of s 261(1)(c) of the Criminal Procedure Act. Section 261(1), however, only finds a basis for application if the accused has been charged with an offence in terms of ss 3 or 4 of the Sexual Offences Act, or an attempt to commit any of those offences, which he clearly was not.

[11] My resulting query to the magistrate about the competence of the conviction in terms of the competent verdict provision unfortunately contained a material typographical error because it referred to s 261(2), and not s 261(1)(c), of the Criminal Procedure Act. Nevertheless, it was apparent from the magistrate's response, which underlined the words '*rape*', '*section 3*' and '*or any attempt to commit any of those offences*' in the introductory part of s 261(1), that she had indeed considered that the charge in count 2 had been one of attempted rape. It was on the basis of that apprehension that she had regarded it to be within her power to bring in a conviction in terms of s 5(2) of the Sexual Offences Act. It will be evident from the discussion in paragraphs [5]-[8], above, that the magistrate was in point of fact misdirected as to the character of the charge and, like the prosecutor and apparently also the defence attorney, had failed to appreciate the defective nature of the charge sheet in that the type of sexual offence that the accused was alleged to have attempted to commit was not identified therein at all.

[12] The magistrate's response to my query was dated 11 December 2013. It is not apparent from the file when it received by the Registrar, but it seems that its delivery must have been delayed because it was only on 16 May 2014 that I referred the record to the Director of Public Prosecutions ('the DPP') for comment. Counsel in the office of the DPP prepared a memorandum dated 8 September 2014, for which I am grateful. The DPP signed a letter, dated 9 September 2014, addressed to me enclosing the memorandum and endorsing its content as reflecting his own opinion. The letter and enclosure did not reach me. The record was returned to me only on 4 January 2016 under cover of a letter from the DPP's office, which stated rather enigmatically '*Your letter dated 16/05/2014 refers. Attached hereto please find the original charge sheet*.' It was only after I had traced my query to the magistrate and the subsequent request for comment from the DPP and caused my registrar to make appropriate enquiries at the office of the DPP that the aforementioned memorandum, dated 9 September 2014, was made available to me. The administrative muddle that occasioned the inordinate delay is deplorable, whatever the (as yet undetermined) reasons for it might have been. Fortunately, in the peculiar circumstances of the case, the accused has not been prejudiced.

[13] The DPP has argued that because the evidence established the commission of an offence in terms of s 5(2) of the Sexual Offences Act, the defect in the charge sheet should be remedied by amendment on review to bring it into line with the proven offence.

[14] It is well established that the High Court may amend a charge on review. It may do so by virtue of the effect of s 304(2)(c)(iv) of the Criminal Procedure Act. However, as pointed out in *S v Barketts Transport (Edms) Bpk en 'n Ander* 1988 (1) SA 157 (A), at 160I, the power thereby afforded to the review court is no wider than the power that the trial court could have exercised. The defect in the charge sheet could notionally have been remedied by the magistrate in terms of s 86(1) of the Criminal Procedure Act at any time before judgment by amending the charge sheet. I have attached the qualification 'notionally' advisedly, because the power conferred by s 86(1) is not unrestricted. It may not be exercised unless the court is satisfied that making the amendment will not prejudice the accused. Furthermore, and of particular pertinence in the current matter, the power afforded by the provision is one of *amendment*, not of *substitution*; see *Barketts Transport* supra, at 161D-I.

[15] Section 86(1) of the Criminal Procedure Act provides:

> Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge 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 therefrom, 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, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.

[16] In *Barketts Transport* supra, loc. cit., Vivier JA, treating of s 86(1) of the Criminal Procedure Act, approved the import of the word '*amended*' pronounced in *Risley v Gough* 1953 Tas SR 78, at 79. In that case Gibson J had remarked '*I cannot construe the word "amended" other than to mean the perfecting or ameliorating of an existing thing – not supplying a vacuum with something that should be there*'.

[17] After approving the dictum of Gibson J, Vivier JA continued at pp. 161J-162F of the judgment in *Barketts Transport* as follows:

> 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 substitusie van misdrywe nie inbegrepe is by enige van die soort wysigings waarvoor uitdruklik voorsiening gemaak word 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; (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 fout in die aanklag is.
>
> 'n Substitusie van een misdryf vir 'n ander is klaarblyklik nòg 'n invoeging van 'n noodsaaklike bewering, nòg 'n aanpassing van 'n bewering in die aanklag by die getuienis, nòg die invoeging van ontbrekende woorde of besonderhede, nòg die skrapping van woorde wat nie in die aanklag moes verskyn het nie. Die vraag is dus of dit dien tot regstelling van ' 'n ander fout in die aanklag'. Mnr *Marais* het betoog dat dit wel die geval is. Dit is moeilik om te sien hoedat daar sprake kan wees van 'n 'fout in die aanklag' in die huidige saak. Die beskuldigdes was aangekla van 'n oortreding van art 31(1)(a) van die Wet en die klagstaat het 'n korrekte verwysing na, en uiteensetting van, hierdie misdryf bevat. Wat gebeur het, is dat hulle van 'n verkeerde misdryf aangekla is, maar daar is geen sprake van 'n fout in die sin van die soort gebreke wat in art 86(1) genoem word nie. Na my mening moet die woorde 'ander fout in die aanklag', in die samehang waarin dit in art 86(1) gebruik word, *eiusdem generis* vertolk word, sodat dit verwys na 'n gebrek in die aanklag wat soortgelyk is aan die soort gebreke wat voorheen in die subartikel genoem word, en nie na 'n verkeerde aanklag nie. So bv word die hof in die laaste gedeelte van die subartikel uitdruklik gemagtig om 'n wysiging te beveel in sowel dié deel van die aanklag waar die 'gebrek, verskil, weglating, invoeging of fout' voorkom, as in 'n

> ander deel van die aanklag wat dit nodig mag word om te wysig. In 'n artikel in 1984 THRHR op 240, deur Delport en Van Loggerenberg, wat hierdie konstruksie van art 86(1) steun, word tereg daarop gewys dat 'n uitleg wat die substitusie van een misdryf deur 'n ander toelaat, die beginsel van ons strafprosesreg, dat 'n beskuldigde vooraf van 'n aanklag verwittig moet word, geweld sou aandoen. (underlining supplied for emphasis).

The effect of Vivier JA's approval of the construction of the provisions advocated by Delport and Van Loggerenberg has, of course, now been reinforced by the fair trial requirements in s 35(3) of the Constitution, which include (in para (a)) the right of an accused '*to be informed of the charge with sufficient detail to answer it*' (underlining supplied for emphasis)

[18] It follows from the aforegoing that an amendment to a charge is permissible only when the essential character of the intended charge (albeit in defective form) is evident on the charge sheet to which the accused person was called upon to plead. In the current case the charge sheet reflected that the accused was charged with attempting to commit a sexual offence in terms of the Sexual Offences Act. The content of the charge as framed did not, however, provide any objective support for the notion that a charge of attempted rape was being preferred. The essential character of that offence was not evident on the charge sheet. The magistrate and the prosecutor's apprehension to the contrary does not derogate from or alter that fact. Furthermore, as I sought to explain earlier, an offence in terms of s 5(2) of the Act is one that cannot be reconciled with the provisions of s 55 of the Act, which pertains only to sexual offences which an offender may attempt to commit. The charge laid in terms of the charge sheet was, as illustrated above, fundamentally predicated on s 55 of the Sexual Offences Act, even if in a manner that did not make out a cognisable offence. Moreover, it is apparent from the evidence adduced by the state at the trial that the prosecutor would not have been in a position to support an application, after the charge had been put and pleaded to and the evidence adduced, to rectify the charge sheet to identify the sexual offence alleged as one of attempted rape, thereby bringing the case within the ambit of s 261(1) of the Criminal Procedure Act.

[19] In my view it would be prejudicial to the accused at this stage, considering a suggestion on review that the charge sheet might be amended, to put this court *ex hypothesi* in a position that the trial court might have been at any stage before the conclusion of the evidence. This must be so because it is not possible at this stage to say what effect the suggested amendment might have had on the accused's response in defence had it been moved and granted at any earlier stage.

[20] Accordingly it must be accepted at this stage, for all the aforegoing reasons that the charge sheet is not amenable to amendment in terms of s 86(1) of the Criminal Procedure Act, either to allege a charge of attempted rape, or an offence in terms of s 5(2) of the Sexual Offences Act. The remedial approach suggested by the DPP thus cannot be adopted.

[21] Section 86(4) and s 88 of the Criminal Procedure Act also do not provide a remedy. The first mentioned provision is to the effect that, save if the court has refused to amend the charge sheet, the fact that a charge that was amenable to amendment in terms of s 86(1) has not been so amended shall not affect the validity of the proceedings. The second mentioned provision is to the effect that '[w]*here a charge is defective for 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*'. I agree with the observation by the authors of Du Toit et al *Commentary on the Criminal Procedure Act* (Juta) (Looseleaf service 52, 2014), at 14-29 – 14-30, that the import of the two provisions is practically indistinguishable. The point made earlier that the essential character of the alleged offence must be evident from the defective charge sheet to which the accused has been asked to plead is underscored by the words '*the relevant offence*' in s 88. It confirms that the essential character of a cognisable offence must be apparent *ex facie* the charge sheet, even if defectively framed to the point of legal inadequacy. If that were not so one would not be able to identify '*the relevant offence*'. In other words, the inadequacy in the charge sheet must be of such a nature that one can relate the missing ingredient to an offence that is identifiable on the basis of the defectively framed allegations in the charge sheet. That was not the case in respect of count two on the charge sheet to which accused no. 2 was required to plead.

[22] In the circumstances it is clear that the conviction of accused no. 2 in terms of s 5(2) of the Sexual Offences Act was incompetent and falls to be set aside.

[23] The magistrate treated the robbery and the offence in terms of s 5(2) of the Sexual Offences Act as one for the purposes of sentence. She sentenced accused no. 2 to five years' compulsory residence in the Bonnytoun Child and Youth Care Centre in terms of s 76(1) of the Child Justice Act 75 of 2008 and, in addition, to three years' imprisonment suspended for five years on condition that he not be convicted of robbery, theft, assault with intent to do grievous bodily harm or any attempt to commit such offences during the period of suspension. The effective date of the sentence was antedated to 24 October 2012 (being the date of the accused's arrest) in terms of s 77(5) of the Child Justice Act as it read prior to its

amendment, with effect from 19 May 2014, in terms of s 5 of the Judicial Matters Amendment Act 14 of 2014. In my view, the sentence imposed remains appropriate despite the setting aside of the conviction in terms of s 5(2) of the Sexual Offences Act.

[24] In the result the following order is made:

1. The conviction and sentence of accused no. 1 in respect of count one (robbery with aggravating circumstances) are confirmed on review.
2. The conviction of accused no. 2 under the defectively framed charge in count two of having committed an offence in terms of s 5(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is set aside.
3. The conviction of accused no. 2 in respect of count one (robbery with aggravating circumstances) is confirmed on review.
4. The sentence of five years' compulsory residence in the Bonnytoun Child and Youth Care Centre and, in addition three years' imprisonment wholly suspended for five years on condition that he not be convicted of robbery, theft, assault with intent to do grievous bodily harm or any attempt to commit such offences during the period of suspension, imposed on accused no. 2 in respect of counts one and two treated as one for the purposes of sentence and antedated to 24 October 2012 is confirmed in respect of count one, and shall be deemed to have been imposed in respect of count one considered alone.

A.G. BINNS-WARD
Judge of the High Court

STEYN J:

I agree.

E.T. STEYN
Judge of the High Court