

SOUTH AFRICA / JUDGMENT

S v Koeries (146/2023) [2023] ZAWCHC 128; [2023] 4 All SA 629 (SCA); 86 SATC 441 (24 May 2023) [2023] ZAWCHC 128

COURT

Western Cape High Court, Cape Town

BEFORE

Francis, Slingers

CASE / FILE NUMBER

146/2023

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

High Court Review Ref: 146/2023
Magistrate's
Serial No.1/23
Magistrate's
Court Case No. A230/21

In the matter between: THE STATE
and
CRAIG KOERIES
SPECIAL REVIEW

JUDGMENT

FRANCIS J:

[1] This matter was referred to this Court as a special review by Magistrate van der Heyde, sitting in the Bellville Magistrate's Court, who presides in the trial of Craig Koeries ("the accused"),

[2] The charge which the accused faces is reproduced verbatim below:

"State v Craig Koeries

Count 1 Culpable Homicide

That the accused is guilty of contravening Section 61(1) read with Section 1, 34 and 89 of the National Road Traffic Act, Act 93 of 1996.

In the accused did upon 3 April 2021

And on the corner of Sacks Circle Belhar

A Public road in the District of Belville regional Division of Western Cape

Being the driver of a vehicle, to wit, Silver A3 Audi

At the time when such vehicle was involved in or contributed to an accident in which Melissa la Vita was killed, did unlawfully”

- [3] The record reflects that on the day of the trial, the prosecutor put the charge to the accused in the exact words as reflected in the charge sheet. The accused, who was legally represented throughout the trial, confirmed that he understood the charge and that he intended to plead guilty.
- [4] The accused subsequently pleaded guilty and submitted a written statement in explanation of his plea in terms of section 112 (2) of the Criminal Procedure Act No 51 of 1977 (“the CPA”) which was signed by both him and his legal representative.
- [5] Paragraph 3 of the plea statement states as follows:
- “... In that I am guilty of contravening section 61(1) read with section 1, 34 and 89 of the National Road Traffic Act, Act 93 of 1996 in that I did upon the 3 April 2021 on the corner of Sacks Circle Belhar, a public road in the district of Belville of Western Cape, being the driver of a silver audi A3 at the time when such vehicle was involved who contributed to an accident in which Mylisa Lydia La Vita was killed:”*
- [6] In the remainder of the plea statement, the accused confirms his guilt in respect of all the elements necessary to sustain a culpable homicide charge. He admits that on the day in question, he acted unlawfully and negligently in that he failed to take reasonable steps and care and failed in his duty to keep a proper lookout to avoid an accident that led to the death of the deceased.
- [7] After confirming that the statement was made by the accused freely and voluntarily, and that he understood the contents of the statement and the consequences thereof, the court accepted the written statement and found the accused guilty on the charge of culpable homicide.
- [8] The Magistrate heard evidence in mitigation and aggravation of sentence and then adjourned the matter in order to consider the sentence to be imposed.

- [9] In the covering letter motivating the request for a special review, the Magistrate explained that whilst she was deliberating on what sentence to impose, she realised that “the annexure A to the J15 charge sheet was defective and not as clear as the charge that was put to the accused by the prosecutor in court on 16 March 2023 to which charge the accused pleaded guilty. Further, that the section 112 written plea was defective in that:
- “1. the Accused pleaded guilty to contravening section 61 (1) of Act 93/1996 in paragraph 3 thereof instead of Culpable Homicide;*
2. Despite the plea in paragraph 3 thereof, the acknowledgements by the Accused contained in paragraphs 4 to 11 were clearly in line with the intention of the Accused to plead guilty to the charge of Culpable Homicide.”
- [10] The Magistrate is correct. The charge sheet is not a model of clarity. The main purpose of a charge sheet is to inform the accused of the case that the State wants to advance against him or her (*S v Hugo* 1976 (4) SA 536 (A)). Indeed, section 84 of the CPA stipulates that sufficient information of the offence with which the accused is charged must be set out in the charge sheet.
- [11] The elements of the crime of culpable homicide are the causing of death of another person unlawfully and negligently (see, *S v Burger* 1975 (4) SA 877 (A) at 878 H). In the matter at hand, one would have expected the charge sheet to expressly set out the elements of culpable homicide and the factual allegations that would be required to sustain a verdict of guilty. However, apart from alleging that the accused was the driver of a vehicle that was involved in, or contributed to, an accident in which the deceased was killed, there are no further averments of the respects in which the accused’s conduct were unlawful or negligent.
- [12] Nor does the charge sheet set out in what respects the accused is alleged to have contravened the various sections of the National Road Traffic Act 93 of 1996 (“the NRT Act”) referred to in the charge sheet. Section 60 of the NRT Act is generally used to prosecute drivers in so-called hit and run situations where the driver of a vehicle is involved in an accident that kills or injures a person or causes damage to property and flees the scene.
- [13] Section 61(1) of the NRT Act provides as follows:
- “The driver of a vehicle at the time when such vehicle is involved in or contributes to any accident in which any person is killed or injured or suffers damage in respect of any property, including a vehicle, or animal shall—*
- (a) immediately stop the vehicle and report the accident on the prescribed form and in the prescribed manner, the officer concerned shall deal with the report in the prescribed manner and the chief executive officer must ensure that the accident is recorded in the register of accidents in the prescribed manner and within the prescribed period;
- (b) ascertain the nature and extent of any injury sustained by any person;

- (c) if a person is injured, render such assistance to the injured person as he or she may be capable of rendering;
 - (d) ascertain the nature and extent of any damage sustained;
 - (e) if required to do so by any person having reasonable grounds for so requiring, give his or her name and address, the name and address of the owner of the vehicle driven by him or her and, in the case of a motor vehicle, the licence number thereof;
 - (f) if he or she has not already reported the accident to a police or traffic officer at the scene of the accident, and unless he or she is incapable of doing so by reason of injuries sustained by him or her in the accident, as soon as is reasonably practicable, and in the case where a person is killed or injured, within 24 hours after the occurrence of such accident, or in any other case on the first working day after the occurrence of such accident, report the accident to any police officer at a police station or at any office set aside by a competent authority for use by a traffic officer, and there produce his or her driving licence and furnish his or her identity number and such information as is referred to in paragraph (e); and
 - (g) not, except on the instructions of or when administered by a medical practitioner in the case of injury or shock, take any intoxicating liquor or drug having a narcotic effect unless he or she has complied with the provisions of paragraph (f), where it is his or her duty to do so, and has been examined by a medical practitioner if such examination is required by a traffic officer.”
- [14] Section 89(1) of the NRT Act states that anyone who contravenes the provisions of the said Act shall be guilty of an offence and section 89(4) lists the penalties with which a person may be held liable for contravening any provisions of sub-section 61(1) of the NRT Act.
- [15] The charge sheet is wholly deficient in so far as the accused’s alleged transgressions of the NRT Act are concerned. Apart from alleging that the accused was the driver of the vehicle which was involved in, or contributed to, an accident in which the deceased was killed, there is absolutely no indication in the charge sheet of the respects in which the accused was alleged to have contravened the relevant provisions of the NRT Act.
- [16] The record contains a pro-forma charge sheet relating to a contravention of section 61 of the NRT Act and it appears that the charge sheet which was served on the accused was a cut and paste from this pro-forma charge sheet; the term “culpable homicide” was merely tacked on in the heading of the charge sheet. Clearly, no thought or effort was put into the drafting of this charge sheet. A pro-forma precedent was used without much thought, in a mechanical fashion, and without any regard to the facts that must have been evident in the police docket which one assumes was available when the charge sheet was prepared.
- [17] The accused’s legal representative, too, appears to have failed in his duty to properly interrogate the charge. The plea statement, which he also signed, merely parrots the charge sheet. The accused pleads guilty to a statutory offence in his plea statement which, like the charge sheet, contains no factual averments to sustain a guilty plea on the statutory offence.

On the other hand, the accused does not expressly plead guilty to the common law crime of culpable homicide but admits to facts which are sufficient to sustain a conviction on this charge. The accused was not charged in the alternative and nor is culpable homicide a competent verdict on a charge relating to a contravention of section 61 of the NRT Act and vice versa.

[18] Sections 86 and 88 of the CPA does provide some succour to the State where there may be deficiencies in the charge.

[19] Section 86 of the CPA provides as follows:

“Court may order that charge be amended

Where a charge is defective for the want of any essential averments therein or where there appears to be any variance between any averment in the charge and the evidence adduced in proof of such averment, where it appears that words or particulars ought to have been inserted in the charge have been omitted therefrom, or were 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, 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 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.” (own emphasis)

[20] Thus, section 86 of the CPA does allow for the amendment of the charge but this must be done before judgment. This means that any amendment of the charge sheet should have been effected before the pronouncement by the trial court on the guilt of the accused (see, *S v Ndlovu* 2017 (2) SACR 305 (CC)). In this matter, once the Magistrate accepted the plea and convicted the accused, she became functus officio.

[21] Section 88(1) of the CPA provides that:

“Defect in charge cured by evidence

Where 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 judgement, be cured by evidence at the trial proving the matter which should have been averred.” (own emphasis)

[22] Again, section 88 of the CPA does not assist the court or the accused in this matter since judgment had already been granted by the time the defect in the charge sheet was noted.

[23] In terms of section 304A[1] of the CPA, a magistrate may refer a matter to this court after conviction but before sentence if he or she is of the opinion that

the proceedings in respect of which an accused was convicted are not in accordance with justice or doubt exists whether the proceedings

are in accordance with justice.

- [24] It is possible for an appellate court to amend the charge on appeal or review provided that the court is satisfied that the defence would have remained the same if the charge had already contained the necessary averments and the accused could not be possibly prejudiced by the amendment (see, *S v Nedzamba* 2013 (1) SACR 335 (SCA) para [20]).
- [25] On receipt of the special review, this Court invited the parties to make such submissions as they deemed necessary on whether the charge sheet can be amended on review, especially in light of the accused's plea statement, and what cause of action the parties would propose in the event that this Court was to conclude that there was an irredeemable irregularity in the trial proceedings.
- [26] The State conceded that the charge sheet was not properly drafted and that the charge that was read into the record incorrectly referred to a contravention of the NRT Act. Nonetheless, it was suggested that the charge be amended on review since it was the accused's intention to plead guilty to culpable homicide and he had admitted to all the elements of this offence in his section 112 (2) plea statement. A similar approach was adopted by the accused's legal representative. He stated that his instruction by the accused was to plead guilty to culpable homicide and, as a consequence thereof, had "elevated" this aspect in his plea explanation.
- [27] It appears to me that the common-sense approach would be to confirm the conviction of the accused on the charge of culpable homicide albeit that the charge sheet refers somewhat obliquely to this offence. There can be no prejudice to the accused as it is apparent that at all relevant times it was his intention to plead guilty to this offence. This was confirmed by his legal representative and reflected in the accused's plea statement. A new trial, with its accompanying waste of time and inconvenience, is avoided without the accused being prejudiced in any way; this outcome is one that would be in the interests of justice.
- [28] At first blush, the approach adopted by this Court may appear to be somewhat unorthodox and unusual. However, a similar approach was adopted in *S v Mbokazi* 1998 (1) SACR 438 (N) where it was held that a review court may substitute a conviction of one offence to which charge the accused had pleaded (fraud) for an irregular conviction of another offence (theft) to which charge he had not pleaded but had nevertheless been convicted. A substitution of this nature is proper only if the evidence establishes the guilt of the accused on the substituted charge. In the matter at hand, of course, the accused has indicated that it was always his intention to plead guilty to the charge of culpable homicide and the factual admissions in his plea explanation sustains a conviction on this charge.

ORDER

- [29] In the circumstances, I propose the following order:

[29.1] The conviction of the accused on the charge of culpable homicide is confirmed.

[29.2] The matter is remanded to the Bellville Magistrate's Court for the finalisation of the sentence.

FRANCIS J

Judge of the High Court

I agree and it is so ordered.

SLINGERS J

Special Review Judgment

The judgment was handed down on 24 MAY 2023

[1]304A Review of proceedings before sentence (1)

- (a) If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice, he shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as is practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 303.

[1]304A Review of proceedings before sentence

(1)

- (a) If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice, he shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as is practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 303.

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