

SOUTH AFRICA / JUDGMENT

S v Mhlambiso and Another (C56/2013, 27/2013) [2013] ZAECGHC 117; 2014 (1) SACR 610 (ECG) (21 November 2013)

[2013] ZAECGHC 117

COURT

Eastern Cape High Court, Grahamstown

BEFORE

B C Hartle, J D Pickering

CASE / FILE NUMBER

C56/2013, 27/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO. C56/2013

SPECIAL

REVIEW

CASE

NO. 27/2013

In

the matter between:

THE
STATE
and
BULELANI
MHLAMBISO Accused
1
LIZWE
SALI Accused
2
REVIEW

JUDGMENT

HARTLE J:

1. The two accused were originally charged with and pleaded not guilty to an offence of housebreaking with the intent to steal and theft. On 11 July 2013 the magistrate acquitted them of this charge, but convicted them both of the substantive offence of “trespassing”.
2. It appears that during the course of the proceedings, whilst the state was presenting the evidence of the complainant, the public

prosecutor requested the court to “amend” or to add a charge of “trespassing” on the basis that it was obviously “covered” in the witness’ testimony. Ostensibly the public prosecutor did so when it became clear that there was insufficient evidence to support the original charge of housebreaking with intent to steal and theft.

3. Despite opposition the magistrate informed the defence attorney, quite erroneously, that the objection to the proposed amendment was without merit since trespassing was a “competent verdict” to the housebreaking charge and allowed it in any event. [1] Without then even giving the accused an opportunity to plead to the putative new charge, the matter proceeded unabated and both accused were convicted on the charge of trespassing in contravention of section 1(1) of the Trespass Act, No. 6 of 1959.
4. During sentence proceedings the magistrate reflected on her mistake by permitting the state to add a charge after the complainant had testified. She stayed further proceedings and submitted the matter to this court for “special review”. [2]
5. On 4 November 2013 [3] the review record was received by the registrar from the magistrate’s office in Queenstown together with a cover letter stating the reasons for the referral as follows:

“The matter was tried by one of our aspirant magistrate who erroneously allowed an additional charge to be preferred to the accused during the testimony of the complainant on the main charge of Housebreaking and theft.

In the result the accused were convicted on the latter charge that was added.

Before sentencing the magistrate sought an opinion on the corrections of the procedure in allowing the additional charge for which the accused were convicted.

Upon considering the matter, our view is that the charges were added unprocedurally and the conviction that followed cannot stand.

It is our view that the conviction should be set aside and the matter be remitted to the magistrate for proceedings to start de novo or any directive that the Honourable Judge deems fit in the circumstances.”

6. There is no provision in the Criminal Procedure Act, No. 51 of 1977 which permits the joining of further charges in the same proceedings against an accused after evidence has already been adduced in the trial. Section 81(1) of the Act provides that any number of charges may be joined in the same proceedings against an accused at any time after the accused has pleaded to the original charge but before evidence has been led in respect of any particular charge.[4]
7. Neither are the provisions of either section 86 (amendment of defective charges) or 88 (curing of defect in charge by evidence)

applicable. A different, new charge, may only be added to the charge sheet before the commencement of evidence.

8. The magistrate was therefore patently at error in granting the state leave to add the charge of “trespassing” in contravention of section 1(1) of the Trespass Act, No. 6 of 1959 during the complainant’s testimony.
9. The convictions under the added charge therefore cannot stand and ought to be set aside on review.
10. In a helpful opinion which was promptly furnished by the office of the Director of Public Prosecutions at the request of a colleague, Mr N Henning submitted that it would serve no purpose to remit the case for trial de novo before another magistrate. Rather he suggested that the entire proceedings (including the convictions) be set aside on review.
11. On the common cause facts accused no. 1 did open the shack of the complainant and entered it. Mr Henning submitted that on the credibility findings by the magistrate a conviction of housebreaking with intent to commit a crime of contravening section 1(1) of Act 6 of 1959 would have been in order in terms of section 262(1) of the Criminal Procedure Act against accused no. 1. However, since the magistrate chose to acquit him completely on this charge and to rely on the irregular second count to convict him, it would now be improper to “revive” the housebreaking charge.
12. I am in agreement with Mr Henning that it would not be fair to the accused for the trial to be started de novo in the circumstances.
13. In the premises the entire proceeding, including the convictions of both accused, are set aside.

B C HARTLE

JUDGE OF THE HIGH COURT

I agree

J D PICKERING

21 November 2013

- [1] This contention is not correct. See commentary on section 262 of Act 51 of 1977 in Hiemstra's Criminal Procedure at pgs 26 – 17 et seq in this regard.
- [2] The provisions of section 304(4) of the Criminal Procedure Act are usually only applicable after the imposition of sentence, but this is clearly one of those instances where sound reasons exist to use the power conferred by the subsection to remedy a manifest injustice and where the interests of justice clearly demand the court's intervention on this basis. See *S v Mafu* 1966
- (2) SA 240 (EC); *S v Eli* 1978
- (1) SA 452 (EC).
- [3] It is not clear why such a lengthy delay ensued before the referral. There is no record to that effect, but it is hoped that the accused's bail was extended pending the review to ameliorate the obvious prejudice to them.
- [4] *S v Hendricks* 1995
- (2) SACR 177 (AD) at 186d – 187h; *S v Thipe* 1988
- (3) SA 346 (T). See also the recent unreported review judgment of this court in a similar matter : *S v Monalisa Ncoko*, CA&R 2013000211 (dated 13 November 2013).

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