

SOUTH AFRICA / JUDGMENT

# S v Ndiike (CA&R 244/2018) [2018]

## ZAECGHC 103 (25 September 2018)

[2018] ZAECGHC 103

## COURT

Eastern Cape High Court, Grahamstown

## BEFORE

Bloem, Pickering

## CASE / FILE NUMBER

CA&amp;R 244/2018

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CA&amp;R 244/2018

REVIEW NO. 20180117

In the matter between:

THE STATE

and

AMOS NDIKE

Accused

REVIEW JUDGMENT

Bloem, J

- [1] The accused was charged in the East London Magistrate's Court with contravening section 17 (b) of the Domestic Violence Act.[1] The state alleged that on 19 November 2017 the accused assaulted Unathi Mabhulu "by slapping her several times and hitting her with a fist, grabbing her and kicking her" in contravention of a protection order that was issued against him on 23 October 2017. On 3 July 2018 the accused, assisted by an attorney, pleaded guilty. He handed into court a written statement in terms of section 112 (2) of the Criminal Procedure Act[2] wherein he set out the facts which he admitted and on which he pleaded guilty. Paragraphs 5 and 6 of that statement read as follows:

*“I am guilty of the crime of contravening the provisions of section 17 (b), read with sections 1, 5, 6, 7 and 17 of the Domestic Violence Act, Act 116 of 1998 – contravention of protection order. In that a protection order was issued on the 23 October 2017 at East London Magistrate’s Court in terms of which I was prohibited and/or ordered and/or directed not to abuse, assault, threaten, harass or stalk the complainant, Unathi Mabulu.*

On the 19 November 2017 and at Orange Groove (sic) in the District of East London I did wrongfully and unlawfully contravene a prohibition and/or condition and/or obligation order imposed on me in terms of the protection order against me in that I assaulted her by hitting her several times with an open hand, pushing her violently, kicking her once on the body and hitting her with a fist on her body.”

- [2] The magistrate convicted the accused on the strength of that statement and sentenced him to eighteen months’ imprisonment which was wholly suspended for five years on condition that the accused not be convicted of contravening section 17 (b) of the Domestic Violence Act committed during the period of suspension.
- [3] The matter was subsequently sent on special review. Unfortunately this is not the first time that this court is required to review proceedings emanating from the East London Magistrate’s Court in which an accused person who should have been charged with having contravened section 17 (a) has been charged and convicted of having contravened section 17 (b). This court dealt with a similar situation in *S v Ben*[3] wherein the proceedings were also sent to this court on special review. In that matter I dealt with the same problem in paragraphs 2 to 7 thereof, which read as follows:

*“[2] The magistrate subsequently sent the matter on review because the accused, who was represented by an attorney when he pleaded guilty and when he was sentenced, effectively pleaded guilty to an offence created by section 17 (a) of the Domestic Violence Act. The problem is that the accused was charged with having contravened the provisions of section 17 (b), pleaded guilty and was convicted thereof. Insofar as it is relevant to this matter section 17 of the Domestic Violence Act reads as follows:*

*“Notwithstanding the provisions of any other law, any person who –*

- (a) contravenes any prohibition, condition, obligation or order imposed in terms of section 7;
- (b) contravenes the provisions of section 11 (2) (a);
- (c) ...; or
- (d) ...,

*is guilty of an offence ...”.*

- [3] Section 7 sets out the court’s powers in respect of protection orders. Section 7 (1) provides that the court may prohibit a respondent from inter alia committing any act of domestic violence, like abusing a complainant, entering the complainant’s residence or committing any act as specified in the protection order. According to the accused’s plea the magistrate’s court issued

a protection order against him on 28 December 2017 wherein he was ordered not to abuse, assault, threaten, harass or stalk the complainant. He was also ordered not to enter her residence. Section 11 (2) (a) provides that no person shall publish in any manner any information which might, directly or indirectly, reveal the identity of any party to the proceedings.

[4] It is clear from the accused's plea that, despite the charge sheet making reference to section 17 (b), the accused had no doubt in his mind that he was charged with having contravened the provisions of section 17 (a) in that he contravened the terms of the protection order that was issued on 28 December

2017. Neither section 17 (b) nor section 11 (2) (a) applies to the charge. In the circumstances the accused should have been charged with having contravened section 17 (a).

[5] The issue is whether the charge can at this stage be amended. In *S v Kruger en andere*[4] the state made an application in terms of section 86 (1) of the Criminal Procedure Act for the amendment of the charge on appeal.

Section 86 provides for the amendment of a charge. Section 86

(1) reads as follows:

*“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”.*

[6] In *S v Kruger en andere* it was found that section 86 (1) did not authorise the amendment of a charge that resulted in the creation of a new charge by substituting one charge for another. It drew a distinction between an amendment of a charge and the substitution of such a charge. A charge has been amended where, in its amended form, a degree of that of which has been amended has been retained. On the other hand, if in its proposed amended form, there will be no identification with the original charge, the proposed amendment will in effect be a substitution. In *S v Kruger en andere* the court refused an application to amend the charge because an amended charge “sou dus die beskuldigde die pleging van ‘n heel ander misdryf as waarvan hy oorspronklik aangekla is, ten laste lê. Dit sou neerkom op ‘the complete destruction of the “existing thing” or its substitution by something else.’”[5]

[7] In this case if there is an amendment, it will be to the charge sheet and not to the charge. The accused knew all along what he was charged with. He pleaded guilty to that charge. The fact that the charge sheet referred to section 17 (b) is, in the circumstances of this case, immaterial. If the amendment is allowed all that will happen is to bring the charge sheet in

line with the charge. Since the accused will suffer no prejudice the amendment should be allowed. The charge sheet, the conviction and sentence must reflect that the accused was charged, convicted and sentenced in terms of section 17 (a) of the Domestic Violence Act.”

[4] The above reasoning applies to the facts of this case which means that the charge sheet, the conviction

and sentence must reflect that the accused was charged, convicted and sentenced in terms of section 17 (a) of the Domestic Violence Act.

[5] The impression is created by the present matter as well as S v Ben that prosecutors at the East London Magistrate’s Court, or at least some of them, use an incorrect template or precedent without having regard to section 17 of the Domestic Violence Act. There is a duty on public prosecutors to charge accused persons under the correct statutory provisions. Magistrates should similarly be vigilant not to convict accused persons under incorrect statutory provisions, lest the administration of justice be brought into disrepute.

[6] In the result, it is ordered:

6.1. That the preamble of the charge sheet be amended to read as follows:

*“That the accused is guilty of the crime of contravening the provisions of section 17 (a), read with sections 1, 5, 6, 7 and 17 of*

*the Domestic Violence Act, 1998 (Act No. 116 of 1998) – contravention of a protection order ...”.*

6.2. The accused’s conviction and sentence be and are hereby set aside and replaced with the following:

*“1. The accused is convicted of having contravened the provisions of section 17 (a) of the Domestic Violence Act, 1998 (Act No. 116 of 1998), as charged.*

2. The accused is sentenced to eighteen months’ imprisonment which is wholly suspended for five years on condition that he not be convicted of contravening section 17 (a) of the Domestic Violence Act committed during the period of suspension.”

6.3. The sentence is ante-dated to 3 July 2018.

G H BLOEM

Judge of the High Court

Pickering, J

I agree

J D PICKERING

Delivered on 25 September 2018.

- [1] Domestic Violence Act, 1998 (Act No. 116 of 1998).
  - [2] Criminal Procedure Act, 1977 (Act No. 51 of 1977).
  - [3] S v Ben (unreported judgment in the Eastern Cape Division, Grahamstown under case number CA&R 140/2018, delivered on 5 June 2018).
  - [4] S v Kruger en andere 1989 (1) SA 785 (A).
  - [5] S v Kruger en andere at 796G-H.
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