IN THE HIGH COURT OF LESOTHO

HELD IN MASERU **CRI/T/0002/2018**

In the matter between:

REX **APPLICANT**

Vs

TLALI KAMOLI **1ST RESPONDENT**

PITSO RAMOEPANE **2ND RESPONDENT**

LITEKANYE NYAKANE **3RD RESPONDENT**

MOHLALEFI SEITLHEKO **4TH RESPONDENT**

HEQOA SEITLHEKO **5TH RESPONDENT**

Neutral Citation: *REX v Kamoli & 4 Others (CRI/T/0002/2018) [2021] LSHC 74*

CORAM: **HUNGWE AJ**

DATES OF HEARING: **14 May 2021**

DATE OF JUDGEMENT: **19 May 2021**

RULING ON CROWN APPLICATION TO AMEND

HUNGWE AJ

Introduction

[1] Trial in this matter was scheduled to start on 10 May 2021. On 5 May the accused filed a notice in terms of Section 160 (1) as read with section 162 (2) (e) of the Criminal Procedure and Evidence Act, 1981 ("CP & E Act") objecting to the jurisdiction of the High Court to try the charges listed in the indictment dated 21 December 2021. Further notices were filed on 6 May 2021. The basis for the objection to jurisdiction was that the Magistrates Court is full endowed with the jurisdiction and competence to try the charges in terms of section 59 of the Subordinate Courts Act, 1988. On 7 May 2021 the Director of Public Prosecutions, ("DPP") filed and served a Notice of Intention to Oppose the accused's objection to the jurisdiction of the High Court.

[2] On 10 May 2021, the Crown formally applied for the amendment to the indictment;

(a) by amending the statutory provisions of the fourteen attempted murder charges;

(b) by adding as alternative counts to the fourteen attempted murder charges, charges of risk of injury or death;

(c) by removing the three substantive counts of aggravated assault and including charges as second alternatives charges to courts 2, 3 and 4;

(d) by adding a third count of unlawful damage to property;

(e) by editing the charge of issuing of clearly and/or manifestly illegal superior order; and

(f) by adding one count of obstructing the course of justice (bringing the administration of justice into disrepute), with an alternative charge of obstructing the course of justice (defeating and/or interfering with the course of justice). [the latter charge being preferred against accused 1 only].

The reason given by the Crown for this belated application to amend the indictment was that it became apparent during trial preparation, which included interviewing of witnesses, that it would be in the interests of justice for the charges to be amended and for the additional charge of unlawful damage to property as well as the other charge of obstructing the course of justice to be included.

[3] It was further contended by the Crown that although the body of the fourteen attempted murder charges referenced a charge of murder, the statutory provisions *ex*

facie the indictment dated 21 December 2017, was ambiguous and did not reference attempted murder but instead referenced both risk of injury or death and aggravated assault.

[4] Therefore, so the submission by the Crown went, it was in the interests of justice for the indictment to be amended prior to the accused pleading to the charges. In any event, it is trite that charges could be amended during the course of a trial; as can a defect be cured by the evidence as envisaged by section 158 of the Criminal Procedure and Evidence Act and amendment can even be effected on appeal. Clearly, it was submitted by Crown Counsel, this Court can exercise its discretion and grant the amendment as prayed since no prejudice would be suffered by the accused. That this must be so arises from the fact that no new facts have been alleged by the Crown and the witness statements and documents relied upon by the Crown for the proposed amendment were discovered to the accused. Further, the Crown submitted that sections 25 (1) and 140 (1) of the Criminal Procedure and Evidence Act provides for the joining of any number of offences in the same charge and for the charging of persons in the same offence to be charged together.

[5] Crown Counsel submitted that although there was a supplementary list of witnesses (three names) those witnesses' statements had long been discovered but their names had been omitted on the original list of witnesses.

[6] Counsels for accused 1, 2, 4 and 5 objected to the amendment. They sought the court's indulgence to be given time to consult with their clients on the proposed amendments as well as to prepare comprehensive and meaningful legal arguments in opposition to the amendment of the indictment. Advocate *Tuke*, for accused 3, withdrew as that accused's counsel. The court ordered the Registrar to appoint new *pro deo* Counsel for accused 3. In the meantime, the matter was postponed to allow time for counsel to file heads of argument addressing two issues; first, the amendment of the indictment and; second, the objection to the jurisdiction of this court to try the charges.

The objection to the amendment of the indictment

[7] Both the Crown counsel and the accused's counsel filed written heads of argument within the timelines directed by the court. However, what emerged from the heads of argument was that the accused generally took the point that it would be procedurally appropriate for a formal joining of issue (*litis contestatio)* before the question of jurisdiction is properly raised for determination by this court. Section 162 (1) is apposite. It states:

"162 (1) If the accused does not object that he has not been duly served with a copy of the charge, or apply to have it quashed under section 159 he shall either plead to it or except to it on the ground that it does not disclose any offence cognizable by the Court.

(2) If he pleads to the charge he may plead –

(a) that he is guilty of the offence charged or, with the concurrence of the prosecutor, of any other offence of which he may be convicted on the charge; or

(b) that he is not guilty; or

(c) that he has already been convicted or acquitted of the offence with which he is charged; or

(d) that he has received a Royal pardon for the offence charged; or

(e) that the Court has no jurisdiction to try him for offence charged; or

(f) that the prosecutor has no title to prosecute"

Section 162 (1) of the Act gives an accused person who has been served with an indictment and has not applied for the quashing of the charges two options; to except to the charge, or to plead to the charge. The section then sets out the types of pleas available to that person. *In casu*, the accused gave notice of intention to object to the jurisdiction of the court before which they are indicted.

[8] A determination on the question of whether or not the court has jurisdiction can only be made upon this court satisfying itself in such manner and upon such evidence

as the court thinks fit. Therefore, there must be *litis contestatio* which then requires the court to make a determination on the issue. Section 168 refers.

[9] Depending on the outcome of the determination of plea to jurisdiction, then and only then can a trial resume to finality. It was on this basis that counsel for accused chose to address primarily the question of amendment of the indictment and left the question of jurisdiction for later. Crown counsel elected to tackle both issues in his detailed heads.

[10] On 14 May 2021 counsel presented argument. Crown counsel argued on both issues as directed by the court. Consistent with their position, defence counsel were satisfied with their stated position that a determination of the application for an amendment was required first before any argument would be made on the objection to jurisdiction.

[11] In their joint heads of argument counsels for accused 1, 3 and 4, Mr *Molati* and Mr *Mafaesa* persisted with the points raised in their written heads. Counsel urged the court to dismiss the application for amendment sought by the Crown on two grounds.

First, they argue that the concept of amendment implied a degree of retention of that which was to be amended. Where a proposed amendment was in no way identifiable with the original charge, it ceased being an amendment but rather became a substitution. In their contention it would be unfair for the Crown to introduce a new charge at trial stage as this would deny an accused person the right of cross-examination and the opportunity of answering the charge before the magistrate. If the Crown wished to enlarge the indictment in consequence of new evidence available to the Crown, then his course is to direct a re-opening of the preparatory examination. This submission is borrowed root, stem and trunk from ***R v Mall and Others*** 1960 (1) SA 73 without any effort to distinguish it either on the facts or the law under consideration. It is proper that I point out that this case dealt with a situation where there had been a preparatory examination. As such it has no relevance in the context of the present application.

[12] Counsels did not refer the Court to any authority for the proposition that the Crown cannot introduce a new charge where no new facts are relied upon before the accused have pleaded or that an unfair trial would result where a new charge was introduced before the commencement of a trial. Most importantly counsel did not in any way raise as a possible impediment to their argument, the applicability of sections 158 and 161 of the CP & E Act. I will return to this point later.

[13] Mr *Mohau*, for Accused 3, did not in his written submission, challenge the court's power to order an amendment of the indictment. He expressly focused his submission to the objection to jurisdiction. He repeated this position in his oral submissions. No argument in opposition therefore was raised on behalf of accused 3 against the proposed amendments.

[14] Mr *Nathane* for accused 5 took a similar position. His written submissions expressly informed the court that they are directed at the issue of jurisdiction which can only be *lis* once the accused had tendered their pleas. Consequently, he had no submissions to take in respect of the application for amendment of the indictment.

The Law

[15] It is trite that the Court may order an amendment to a charge sheet or indictment in any manner the court thinks fit if it appears to be defective. Such an order may be made before or during a trial or hearing unless the required amendment would cause prejudice to the accused.

Section 161 (1) of the Criminal Procedure and Evidence Act of Lesotho No 9 of 1981.

Section 86 (1) of the Criminal Procedure Act No 51 of 1977, South Africa

Section 202 (1) of the Criminal Procedure and Evidence Act of Zimbabwe, *[Chapter 9.07]*

[16] In exceptional cases an indictment may even be amended during an appeal or review to correct a formal defect. This may include amending the wording of a count to remove an ambiguity or to identify the relevant statutory provision.[1] In determining whether an amendment to a charge sheet or indictment will cause prejudice to the accused, the Court considers the stage of the proceedings at which the amendment is sought.[2]

[17] It is quite clear from the provisions of section 86 (1) of the Criminal Procedure and Evidence Act, 1981 that the discretion conferred upon a Court to order an amendment to the charge or indictment can only be exercised if the court considers that the making of such an amendment will not prejudice the accused in his defence. In ***S v Ndaba***[3] it was held by LABE J at 384 (para [117]), after stating that what was intended by prejudice was that the accused should have been prejudiced in the conduct of this defence by the granting of the amendment, that the onus was on the

[1] QAA v R [2010] VSCA 155; Nelson v R (197) 67 Cr. App. R. 199
[2] R v Street [1960] VR 669; R v Westerman (1991) 55 A Crim R 353
[3] 2003 (1) SACR 364 (W)

State to prove the absence of prejudice to the accused. In support of this statement LABE J referred to ***R v Alexander and Others***[4] and ***R v Bruins***[5].

[18] Although it is not stated in either of these cases at the passages cited, in so many words that the onus is on the State to prove the absence of prejudice, it appears to be quite clear from the discussion of the facts of each case, that the Court approached the matter on the basis that the State had to show that the accused had not been prejudiced.

[19] In ***S v Mpambanso***[6] an amendment was sought well after the state and defence had closed their cases. Applying the test of prejudice in the foregoing cases, the Court found that it would not say that the accused would not be prejudiced by the amendment sought and consequently refused to grant it.

[20] It is important to note that an amendment can be effected at any time before judgement. However, the probability that the accused person will be prejudiced is, of course greater as the trial proceeds to its end because the defence would not have borne the amendment in mind. In the interest of completeness one perhaps needs to

[4] 1936 AD 445 at 460-1
[5] 1944 AD 131 at 13405
[6] 2013 (2) SACR 186

mention that in extensive and complex trial involving several charges the central and decisive particulars have far-reaching and important consequences and accordingly the Court will be slow to allow an amendment at the late stage clearly because such an amendment can prejudice the accused person. See ***S v Heller***[7]*;* and ***S v Mpambanso***[8]. Fortunately, *in casu* this has no application.

[21] The test for prejudice is whether the accused will (as far as the presentation of his case is concerned) be in a weaker position than in which he or she would have been had the charge been in the amended form when the plea was tendered. This does not lack to being deprived of a handy technical point. There will be prejudice if the accused person would reasonably have presented or sought other evidence or would have cross-examined differently had the charge sheet read differently and an adjournment or other indulgence cannot remove the prejudice.

[22] In the words of INNES CJ in ***R v Herschel***[9]

> *"the cases where such prejudice cannot be avoided by a suitable adjournment must be few indeed."*

[7] 1971 (2) SA 29 (A)
[8] Supra
[9] 1920 AD 575 @ 580

[23] In my view, in the present case prejudice does not even arise. The accused have not yet pleaded and therefore put forth a defence which would conceivably be prejudiced by an amendment. Moreover, this I prefer to call, cosmetic amendment to the indictment hardly raised any issues of moment. To say that the accused were or would be prejudiced in the preparation of their defence is untenable.

[24] It needs to be mentioned that the statutory amendment power is wide ranging and allows amendments that add charges, substitute charges for inapplicable charges and add or vary the particulars of an offence. The Court may also amend the charge to correct the omissions of an essential element, or to state the correct statutory provision. It is not necessary that the original charge sheet or indictment correctly sets out the essential elements of the charge or the relevant statutory provisions before the amendment power can be exercised.

[25] Section 161 (1) places no onus on the State to establish the absence of prejudice before the Court may, for example, order and/or sanction the changes in the indictment to be amended. See ***S v Maqubela***[10].

[10] 2014 (1) SA 378 (WCC)

[26] The submission made on behalf of the accused was that seeking an amendment so near the trial date is unfair and prejudicial to the right of the accused. I am unable to agree with these submissions. The authorities cited, both in terms of the statutory powers of amendment and the case law demonstrate that the court enjoys a wide discretionary power to order or sanction an amendment provided that such an amendment does not occasion an injustice or prejudice to the accused.

[27] In *casu*, the accused have not shown or demonstrated any prejudice that cannot be cured by an adjournment. The accused have known all along that they face the charges in the indictment. The only new charges relate to accused 1. But again, he has always been aware of the facts upon which those new charges have been framed. He cannot point to the prejudice he stands to suffer by virtue of the sanctioning of the amendment as he has not yet pleaded to any charge. It must be remembered always that it is in the nature of amendments that by seeking them the State will be hoping to reduce the chances of an acquittal and increase its chances of securing a conviction. Unless this is done surreptitiously for example, after witnesses have been excused and all chances of cross-examination lost, there is no basis to hold that such an amendment will be outside the ambit of the statutory power to amend. Fairness to the interest of the administration of justice is key. As long as it is done,

fairly, openly and after representations from the accused are taken into account amendments prior to the commencement of trial will normally be granted.

[28] I have perused the original indictment and the amended indictment. I am satisfied that indeed these are merely cosmetic amendments which ought to be sanctioned in the interests of justice.

Consequently, I grant the amendments sought by the Crown as reflected in the amended indictment.

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HUNGWE AJ