

IN THE COURT OF APPEAL HELD AT LOBATSECRIMINAL APPEAL NO. 1/96

In the matter between:

MICHAEL KATLHOLO - Appellant  
 vs.  
 THE STATE - Respondent

Appellant In Person  
 Mr. B.W. Morara for the Respondent

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 J U D G M E N T  
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CORAM: Aguda, JA  
 Schreiner, JA  
 Steyn, JA

SCHREINER J.A.:

The Appellant was granted leave to appeal against his conviction by senior magistrate T. Mogomotsi on a charge of contravention of Section 318 read with Section 33 of the Penal Code. He was sentenced to a fine of P300 or imprisonment for one year. His co-accused was acquitted.

The charge in the summons was as follows:-

"STATEMENT OF OFFENCE"

Possession of stolen property contrary to section 318 as read with Section 33 of the Penal Code Cap. 08:01.

"PARTICULARS OF THE OFFENCE"

The first accused person on the 12th day of October 1994 and the second accused person on the 18th day of October 1994 at Madiba

Ward Mahalapye within the Central Administrative District were found in possession of stolen property."

Section 318 of the Penal Code Cap. 08:01 provides:-

"Any person who is found by a peace officer to be in possession of or carrying or conveying in any manner, anything which is reasonably suspected of having been stolen or unlawfully obtained and he is unable to give a satisfactory account as to how he came by it is guilty of an offence."

The other section mentioned in the charge, Section 33, merely provides that where no penalty is specially provided for any offence it is to be punishable with imprisonment for a term not exceeding two years or with a fine or both.

A cursory examination of the charge as drafted shows it to be both inadequate and misleading. Section 128 of the Criminal Procedure and Evidence Act Cap. 08:02 declares that every indictment or summons shall contain, and shall be sufficient if "it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." The present charge does nothing of the sort.

The Statement of Offence incorrectly says that the offence relates to "possession of stolen property." It does not. It

deals with property which is "reasonably suspected of having been stolen." Furthermore it seems to imply that possession of the property is the most important if not the only, aspect of the offence. This is not so. In the context of Code which contains various offences relating to property the important element in Section 308 is the failure by the accused person to give a satisfactory account as to how he came by the property found in his possession by a peace officer. The charge is silent on this. The Particulars of the Offence are in the same vein. They allege that the accused and his co-accused were found in possession of "stolen property" and not "property reasonably suspected of having been stolen." They do not describe what property it is alleged was in the possession of each or both of the accused and in respect of which they were required to give an explanation. More importantly, however, it follows the Statement of Offence by omitting all reference to the question of the satisfactory account of how the accused came by the property of which they, or one of them, were found in possession.

I am satisfied that even if the Appellant had been able to read and understand the English legal language as set out in Section 318 and had done so he would have been completely confused as what case has to be proved against him because the verbal description of the offence in the charge did not remotely describe the offence set out in Section 318. The defects in the charge are so numerous and fundamental that it can be said that it does not disclose an offence.

The charge in the form set out at the beginning of this judgment remained unchanged throughout the trial. It is not necessary therefore to consider the vexed question of whether it can be amended in view of the fact that, at least for some purposes, it should be regarded as a nullity see (R. v. CROUSE 1959 (1) S.A. 272 (A)). This is a case where the general proposition laid down by Innes C.J. in R. v. HERSCHEL 1920 ad 575, namely, that "a Court of appeal would not be justified in allowing a conviction to stand upon a charge sheet which discloses no offence" is applicable.

Section 149 of the Criminal Procedure and Evidence Act deals with the correction of various types of error in an indictment or summons. Subsection (3) provides:

"the fact that an indictment or summons has not been amended as provided in this Section shall not, unless the court has refused to allow the amendment affect the validity of the proceedings thereunder."

This subsection does not, in my view, have the effect of making a charge which does not disclose an offence into a valid charge upon which an accused person may be properly tried.

I am of the view that the present appeal should succeed and the conviction and sentence set aside. I would substitute for the conviction an order that the charge be quashed.

Delivered in open court at Lobatse this <sup>15th</sup> day of July, 1996.

*W.H.R. Schreiner*  
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W.H.R. SCHREINER  
JUDGE OF APPEAL

I agree.

*T.A. Aguda*  
.....  
T.A. AGUDA  
JUDGE OF APPEAL

I agree.

*J.H. Steyn*  
.....  
J.H. STEYN  
JUDGE OF APPEAL