

A404/05

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE

Date: 24/3/05

Case No. 23/2003

JSI/2003

5180

In the matter of

THE STATE

Versus

LINDIWE LUCY MTHETHWA

JUDGMENT

Van der Westhuizen, J:

- [1] The accused was charged in the Magistrate's Court, Polokwane (Pietersburg), with assault with the intent to do grievous harm.
- [2] The part-heard matter was sent on review in terms of section 304A of Act 51 of 1977, because the magistrate seems to be of the view that an incorrect charge was put to the accused.
- [3] Before the plea-proceedings commenced, various conversations took place between the magistrate and the prosecutor as well as between the magistrate and the lawyer of the accused. The magistrate was however inaudible on many

occasions. It can be gleaned from the record that the prosecutor appeared to have initially put a charge of contravening section 39(1)(i) of Act 75 of 1969, whereafter a discussion took place between the prosecutor and the magistrate. After an adjournment the prosecutor requested the court to withdraw ("cancel") this charge against the accused, thereby indicating that the said charge was not applicable to the facts of the case.

- [4] Although the prosecutor was at fault in not drafting the annexure correctly, by also alleging that the accused pointed a firearm at the complainant, I am of the view that this aspect does not affect the validity of the trial proceedings up to date. Various sections of the Criminal Procedure Act 51 of 1977 can be applied to deal with such shortcomings.
- [5] The magistrate is empowered by the provisions of section 86(1) to amend a charge under the following circumstances:

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 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."

It would appear that the charge could be amended to include an allegation that the accused pointed the complainant with a firearm without causing any prejudice to the accused.

- [6] Section 266 deals with competent verdicts on a charge of assault with the intent to do grievous bodily harm and can also be applied to this matter, should

the magistrate find that the evidence does not substantiate the assault charge. The section provides that if the evidence on a charge of assault with intent to do grievous bodily harm does not prove the offence of the assault with intent to do grievous bodily harm, but the offence of common assault, indecent assault, or pointing a fire-arm, air-gun or air-pistol in contravention of any law, the accused may be found guilty to the offence proved.

- [7] In the light of the fact that the accused is represented by a lawyer, the provisions of section 266 may also find application. It is clear from the wording of section 266 of Act 51 of 1977 that the pointing of a firearm in contravention of section 39(1)(i) of Act 75 of 1969 is a less serious charge than assault with the intent to do grievous harm.
- [8] It would therefore appear that the matter ought to be referred back to the Magistrate's Court for completion of the trial and the application of section 86 of Act 51 of 1977 or, alternatively, section 266 of the Act. This is also the view of the office of the Director of Public Prosecutions.
- [9] I accordingly refer the matter back to the trial court. Because this referral does not entail the setting aside of proceedings or a finding of the trial court, it does not amount to appeal proceedings, and I am therefore of the view that the concurrence of a second judge is not necessary. I furthermore wish to apologise for the long delay on my side in finalizing this matter, which was caused by the logistical difficulties and the work load resulting from my appointment to the Constitutional Court in Johannesburg, amongst other factors. I trust that the trial court will deal with the matter as fairly as possible, also taking the delay into account.