THE STATE v. BETTIE SOMSES

CASE NO. CA 51/98

1998/08/02 Maritz, J et Hoff, A.J.

CRIMMINAL PROCEDURE CRIMMINAL LAW

Appeal - accused convicted under law not of application in Namibia - substitution of conviction with reference to applicable law - tests of prejudice and failure of justice.

Statutory "perjury" - section 300(3) of Criminal Procedure Ordinance, 1963 - conflicting statements on oath - terms of statement alleged in charge and that admitted to in s.112 questioning differ - elements of charge not admitted - conviction set aside and matter remitted to magistrate.

THE HIGH COURT OF NAMIBIA

THE STATE **Appellant**

and

BETTIE SOMSES **Respondent**

CORAM: MARITZ, J. et HOFF, A.J.

Heard on: 1999/08/02
Delivered on: 1999-08-02

JUDGMENT

MARITZ, J.: The respondent was convicted in the magistrate's court, Tsumeb of statutory "perjury" in contravention of section 319(3) of the Criminal Procedure Act, 1955. The State charged that her evidence on oath in criminal proceedings before another magistrate of that court conflicted with an earlier witness statement she had made on oath to a member of the Namibian police. Having pleaded guilty, the magistrate convicted, but cautioned and discharged her. The Prosecutor-General, aggrieved by the leniency of the "sentence" imposed, applied for and obtained leave to appeal against the order in terms of section 310 of the Criminal Procedure Act, 1977.

Dr. Horn, appearing for the appellant, submitted at the outset that the respondent could not have been convicted of any offence under the Criminal Procedure Act, 1955. That Act, promulgated by the South African Parliament prior to Namibian independence, is not (and has never been) of application in this country. The analogous statute applicable in the then territory of South West Africa was the Criminal Procedure Ordinance, 1963. Both the 1955 Act (except for sections 319(3) and 384) and the 1963 ordinance (except for sections 300(3) and 370) have since been repealed by section 344(1) of the Criminal Procedure Act, 1977.

The wording of section 319(3) of the 1955 Act and that of section 300(3) of the 1963 ordinance are almost identical. Section 300(3) of the 1963 ordinance reads as follows:

"If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such fxrstmentioned statement, he shall be guilty of an offence and, may, on a charge that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements was false, be convicted on the evidence of one witness of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true."

The only difference between it and section 319(3) of the 1955 Act (under which the respondent was convicted) is that the latter does not make mention of the evidence *"of one witness"* for a conviction. In Namibia, any charge of statutory perjury against the respondent should therefor have been brought under section 300(3) of the Criminal Procedure Ordinance, 1963 and not under the consonant provisions of section 310(3) of the South African Act.

Dr Horn, relying on an earlier judgement of this court in **R v Traut and another,** 1953(1) SA 116 (SWA) at 118A, contended that the respondent had not been prejudiced by the fact that the wrong Act had been referred to in the charge sheet and invited this court to, on appeal, amend the charge and substitute the conviction under the South African legislation for one under the Namibian ordinance.

As a general rule, an accused should not be allowed to escape conviction only as a result of the prosecution's attachment of an incorrect "label" to a statutory offence or an erroneous reference to the applicable statutory provision which has allegedly been contravened.

"(The) principle is that, if the body of the charge is clear and unambiguous in its description of the act alleged against the accused, e.g., where the offence is a statutory and not a common law offence and the offence is correctly described in the actual terms of the statute, the attaching of a wrong label to the offence or an error made in quoting in the charge the statute or statutory regulation alleged to have been contravened, may be regarded as an error not fatal to the charge. Hence, in circumstances such as those, an error of that nature may be corrected on review, if the Court is satisfied that conviction is in accordance with justice, or, on appeal, if it is satisfied that no failure of justice has, in fact, resulted therefrom." (per Henochsberg, J. in **R v Ngcobo; R v Sibega** 1957 (1) SA 377 (N) at 381B-D).

The principle to put substance before form, within this particular context, is a salutary one which is echoed (although in a somewhat different context) in section 86 of the Criminal Procedure Act, 1977 and which has been followed or approved in a number of cases (See e.g. **R v Shabonga,** 1927 TPD 601; **R v Safien,** 1928 CPD 38; **R v Buys,** 1928 T.P.D. 737; **R v Alexander and others,** 1936 AD at 461; **R v Ah For,** 1943 AD 35; **R v Seeber and Another,** 1948 (3) SA 1036 (E); **R v Seeber and Others,** 1948 (3) SA 1191 (E); **R v Liebrandt,** 1950 (2) SA 558 (C); **R v Robinson,** 1954(3) SA 449(0); **R v Ntonja,** 1956 (3) SA 370 (E); **R v Nkabinde,** 1956 (3) SA 104 (N)).

However, before the court will allow such amendment or substitute such conviction with reference to the correct sections, it must be satisfied that the accused have not been or will not be prejudiced in his defence or that a failure of justice will not otherwise occur. In most of the cases I have referred to, the

courts have held that no prejudice would result if "the body of the charge is clear and unambiguous in its description of the act alleged against the accused, e.g. where the offence is correctly described in the actual terms of the statute" and "that the accused realised fully the case he had to meet'. Whereas that approach may probably lead to the correct result in the vast majority of cases, I am reluctant to apply it as a general rule. In my view, the enquiry has to be made with due regard to the particular facts and circumstances of each case. The question as to whether a failure of justice may occur if the amendment will be granted or the conviction will be substituted, may require examination beyond the simple enquiry as to whether or not an accused will be prejudiced in his or her defence.

Had section 319(3) of the 1955 criminal code read the same as section 300(3) of the comparative Namibian provision, I would have had little difficulty in granting the appellant's request. What concerns me though, is the provision that an accused *"may ...be convicted on the evidence of one witness of such offence..."* in the Namibian ordinance -which, as I have pointed out, does not appear in the South African Act. Is it simply permissible to convict an accused, who has pleaded not guilty, on the evidence of one witness or is such *aliunde* evidence required even if an accused has pleaded guilty to the charge and admitted all the elements thereof? If the latter is the case, there will undoubtedly be a failure of justice if I were to accede to the appellant's request to substitute the conviction for one under the applicable

Namibian law: Not only would there then have been certain evidential requirements which have not been met by the appellant, but the respondent (who was not represented at any point in time during the trial or this hearing) would not have been alerted to her rights under that section.

Having considered the question carefully, I am of the view that the reference to the *"evidence of one witness"* in the section was intended by the legislature to refer to the *quantum* of proof required in such cases (compare the *dictum* in **R v Cilliers,** 1954(1) SA 177 (SWA) at 178F-G) and not to be applied as a general rule in cases where the issues are not in dispute between the State and the accused. I find support for that view if one is to consider the immediate context within which the legislature used those words *("upon proof of ...and without proof as to...).* Moreover, the inquisitorial nature of the proceedings following on a plea of guilty which was introduced by section 112 of Act 51 of 1977, was intended to do away with the necessity of *aliunde* evidence as a prerequisite to a conviction following a plea of guilty.

In the premises, I am satisfied that the no prejudice to the respondent and no other failure of justice will occur if I am to consider the appeal as if the respondent had been correctly charged of a contravention of section 300(3) of the Criminal Procedure Ordinance, 1963. Accordingly, I am therefore amenable to consider the appellant's request for a substitution of the conviction with that in mind.

Before doing so, I must be satisfied that the respondent has admitted all the elements of an offence under section 300(3) during questioning by the magistrate in the course of the section 112(l)(b) proceedings.

The elements of the offence have been discussed by Ogilvie Thompson, J.A in **R v Shole** 1960 (4) SA 781 (A) at 789 B-E:

"The offence thus created provides the Crown with a convenient means of bringing to justice the giver of false testimony without the necessity of proving all the requirements of the common law crime of perjury; and, in a proper case, there is, of course, no objection to the adoption of that convenient course. At the same time, sec. 319 (3) casts a considerable burden upon the accused, and the Crown, before it can successfully invoke the section, must strictly satisfy its requirements. Two of those requirements are (a) that the charge must allege that the accused 'made the two conflicting statements', and (b) 'proof of those two statements'. That is to say, the Crown must, in addition to alleging the conflicting statements in the charge sheet, prove (i) that those statements were made and (ii) that they conflict. Each case must necessarily depend upon its own facts; but, in relation to the alleged conflicts between a witness' written statement and his subsequent testimony, the form of the question to which the deponent has replied and the possibility that the ipsissima verba of the reply have not been accurately recorded are factors which must be borne in mind".

The conflicting statements alleged by the appellant are that the respondent stated on oath that *"complainant in case 1767/97 was hiding when she was attacked by the accused"* and that she subsequently testified on oath that *"the complainant in ... case 1767/97 was storming the accused when she was attacked".* Neither of the statements or a transcription thereof was handed in or presented to the respondent during the hearing. When asked whether she could recall what she had sworn to in the witness statement to the investigating officer, she answered in the affirmative and (according to the record) went on to say the following: *"I told him that Dorothea, the complainant in case 1767/97, was attacked by the accused and then she went to hide behind certain men."*

Over and above the fact that it is almost impossible to asses the conflicting nature of those utterances without considering, at the same time, the context within which they were made and the chronology of events within which they fell, one aspect is at least certain: the statement admitted to by the respondent during questioning by the magistrate differs substantially from the one alleged in the charge. Consequently, the magistrate could not have been satisfied that the respondent admitted all the allegations of the charge preferred against her. In my view, he should have entered a plea of not guilty in terms of section 113 of the Act and afforded the appellant the opportunity of proving its case.

Section 310(6) of the Criminal Procedure Act, 1977 applies the provisions of section 309 *mutatis mutandis* to appeals brought at the instance of the Prosecutor-General. Subsection (3) of section 309 confers on this court the powers mentioned in section 304 of the Act -including the powers to "give such judgment ...or make such order as the magistrate's court ought to have given ... or made on any matter which was before it at the trial of the case in question" and to "remit the case to the magistrate's court with instructions to

deal with any matter as the (court) may think fit".

In the result the conviction and resultant order warning and discharging the respondent is set aside and the matter is remitted to the magistrate. He is directed to amend the charge against the respondent by the substitution for the words *"section 319(3) of Act 56/1955"* of the words *"section 300(3) of the Criminal Procedure Ordinance, 1963";* to enter a plea of *"not guilty"* as contemplated by section 113 of the Criminal Procedure Act and to continue with the trial on that basis.