

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION, GRAHAMSTOWN**

**CASE NO. CA&R 73/2021**

Date heard: 17 November 2021

Date delivered: 25 November 2021

In the matter between:

**MLUNGISI SIHOYI**

Appellant

and

**THE STATE**

Respondent

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**JUDGMENT**

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**RUGUNANAN, J**

- [1] The appeal to this court, with leave granted on petition, is directed against the appellant's conviction in the regional court in Molteno on a single count of sexual assault in contravention of section 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>1</sup> (hereinafter "the Act") and his sentence of 5 years' imprisonment.
- [2] The appellant is presently on bail pending the outcome of the appeal.

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<sup>1</sup> Act 32 of 2007.

- [3] The charge (which does not incorporate an alternative) on which he was convicted reads as follows:

*"THAT the accused is guilty of the crime of contravening the provisions of section 5 (1) read with sections 1, 56 (1), 57, 58, 59, 60 and 61 of the Sexual Offences and Related Matters Amendment Act 32/2007 – further read with sections 256 and 261 of Act 51/1977. IN THAT on or about 6 January 2020 and at or near Molteno in the Regional Division of the Eastern Cape, the said accused did unlawfully and intentionally sexually violate the complainant, to wit ZH<sup>2</sup> (44 year old) by touching her thighs without the consent of the said complainant."*

- [4] The appeal is essentially grounded on the contention that the complainant's evidence as a single witness was not subjected to the necessary caution when the court *a quo* erroneously convicted the appellant on her evidence where it deviated from her statement to the police. Although the complainant's testimony in so far as it related to the touching of her thighs accorded with the allegation in the charge, she testified that the appellant touched her breasts and that he slapped her. This detail did not appear in her statement despite the complainant's protestation that it was mentioned to the police officer who wrote the statement. She also stated that it was mentioned to the prosecutor prior to her testifying in court. For his part the prosecutor did not dispute or object to this and maintained silence. The appellant was found "*guilty as charged*".
- [5] Leaving aside the deviation issue, the parties were requested to address this court on the propriety of the charge on which the appellant was convicted.
- [6] This stems from the recognition that the High Court has the inherent power to review proceedings in the lower courts and to correct errors in proceedings before such courts.

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<sup>2</sup> For present purposes the complainant's full names are referred to in abbreviated form.

- [7] Section 5(1) of the Sexual Offences Act deals with the offence of sexual assault. It provides that:

*"A person ('A') who unlawfully and intentionally sexually violates a complainant ('B'), without the consent of B, is guilty of the offence of sexual assault."*

- [8] Clearly, an unlawful and intentional sexual violation without the consent of a person is a *sine qua non* for a sexual assault.

- [9] Quoting only where relevant for present purposes, section 1 of the Act defines a "sexual violation" as including any act which causes –

"(a) direct or indirect contact between the –

- (i) *genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal ..."*

- [10] It is trite that the words of a statute must be given their ordinary, grammatical meaning having regard to the text as a whole.

- [11] The offending conduct constituting a sexual violation is defined by contact between the genital organs or anus of a person or their breasts (in the latter instance, the breasts of a female person) with any part of the body of another person, or animal or object.

- [12] A "sexual violation", by definition, does not include contact with the thighs of a person.

- [13] Mr Mtsila correctly conceded this.

- [14] Despite this concession, Mr Mtsila contended that the definition of a "sexual violation" should be accorded a wider interpretation. On this approach the offending conduct constituting a sexual violation should include contact



between any part of the body of a person (whether male or female) with any part of the body of another person, or animal or object.

- [15] The wider interpretation, so the argument went, would bring the charge within the scope of the definition and render the conviction of the appellant competent. The prevalence of sexual offences in society, it was contended, supported this approach.
- [16] I recognise that the prevalence of sexual offences in our society is of grave concern and that it is primarily a social phenomenon which is reflective of deep-seated, systemic dysfunctionality in our society.<sup>3</sup> To read into the definition of a “*sexual violation*” something which is not there would render the section open to abuse. I think it would be wrong to accord a more extensive interpretation to the scope of the definition to include the allegation in the charge. Were this court to do so, it would be usurping the function of the legislature.
- [17] It does indeed occur that witnesses when testifying may deviate from their prior written statements. A statement is not intended to be a precursor to testimony of a witness in court;<sup>4</sup> but where there is a deviation each case will obviously be dealt with in terms of the presiding officer’s own evaluation of the credibility, accuracy and truth of what the witness says. The primary task of the court is to find the truth. It will entail weighing up the statement against the *viva voce* evidence,<sup>5</sup> and considering all the evidence before deciding whether the evidence of the witness is reliable or not.<sup>6</sup>
- [18] This case, however, dealt with the prosecution of the appellant for a statutory offence. The whole thrust of the offence was what he did in relation to the complainant. Where it is clear from the definition of a “*sexual*

<sup>3</sup> see the preamble to Act 32 of 2007.

<sup>4</sup> *S v Govender* 2006 (1) SACR 322 (ECD) at 324j-325e.

<sup>5</sup> see *Mathonisi v S* 2012 (1) SACR 335 (KZP) at paragraph [34] in which *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA) at 584 was quoted with approval.

<sup>6</sup> *S v Sauls and Others* 1981 (3) SA 172 (A) at 180E-G.

violation" that the offence can only be committed in a specific manner, then it was necessary to refer in the charge to the manner in which the appellant contravened the section (see section 84(3) of the Criminal Procedure Act 51 of 1977 and the commentary thereto in Du Toit et al, *Commentary on the Criminal Procedure Act*, page 14-16B [Service 60, 2018]).

- [19] The deficiency in the charge is not inconspicuous. In argument this was brought to the magistrate's attention by the appellant's legal representative. The magistrate remarked that he was "*not going to even dwell on that*". Instead, he undertook his own evaluation of the evidence. He found the complainant to have been a credible and a reliable witness to justify the conviction on a charge which I think is "*hamstrung by a substantive irregularity*".<sup>7</sup>
- [20] In my view the prejudice to the appellant, by omitting in the charge the allegation of contact with the complainant's breasts, would have been averted if the State had clearly specified the allegation at the outset or by amending the charge before the appellant had pleaded.
- [21] The failure to have done so was a serious oversight.
- [22] A charge should be drawn up with great care<sup>8</sup> and the State has an obligation to set out the *facta probanda* or the essential elements of the offence.<sup>9</sup> This ensures safeguarding the fair trial rights of an accused. Once this is done the accused is entitled to regard the charge as exhaustive and to prepare a defence accordingly without being taken by surprise during trial.<sup>10</sup>

<sup>7</sup> cf. *Van leperen v S* (A194/2016) [2016] ZAWCHC 109 (26 August 2016) at paragraph [35].

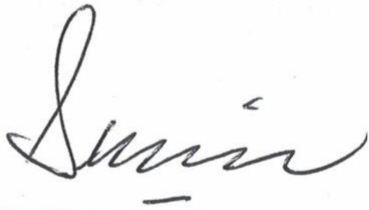
<sup>8</sup> see the SCA cases referred to in *Van leperen v S* *supra* at paragraph [38].

<sup>9</sup> *Van leperen v S* *supra* at paragraph [36].

<sup>10</sup> In *S v Mashinini* 2012 (1) SACR 604 (SCA) at 604b-c the following is stated: "[11] To my mind, the solution to this legal question lies in s 35(3) of the Constitution. Section 35(3)(a) of the Constitution provides that every accused person has a right to a fair trial which, *inter alia*, includes the right to be informed of the charge with sufficient detail to answer it. This section appears to me to be central to the notion of a fair trial. It requires in clear terms that, before a trial can start, every accused person must

[23] In the circumstances the following order is made:

"The appellant's conviction for contravening the provisions of section 5(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 and his sentence of 5 years' imprisonment are reviewed and set aside."



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**S. RUGUNANAN**  
**JUDGE OF THE HIGH COURT**

**BENEKE AJ:**

I agree.



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**M. BENEKE**  
**ACTING JUDGE OF THE HIGH COURT**

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*be fully and clearly informed of the specific charge(s) which he or she faces. Evidently, this would also include all competent verdicts. The clear objective is to ensure that the charge(s) is sufficiently detailed and clear to an extent where an accused person is able to respond and importantly to defend himself or herself. In my view, this is intended to avoid trials by ambush.*



Appearances:

For the Appellant:

Adv N. Redpath  
Instructed by:  
Yokwana Attorneys  
10 New Street  
Makhanda / Grahamstown  
(Ref: Mr Yokwana)  
Tel: 046-622 9928  
Email: [Reception@yokwanaattorneys.co.za](mailto:Reception@yokwanaattorneys.co.za)

For the Respondent:

Adv. S. Mtsila  
Instructed by:  
The Office Of The National Director of Public  
Prosecutions  
Makhanda / Grahamstown