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NOTES AND COMMENTS

AMENDMENT OF AN INDICTMENT: WHEN IS IT PROPER UNDER BOTSWANA LAW?

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INTRODUCTION

Section 149(1) of the Criminal Procedure and Evidence Act[1] gives the court discretion to allow amendments to be made in the indictment or summons at any time before judgements if it considers that such amendment will not prejudice the accused in his defence. It provides:

> Whenever, on the trial of any indictment or summons, there appears to be any variance between the statement therein and evidence offered in proof of such statement, or if it appears that any words or particulars that ought to have been inserted in the indictment or summons have been omitted, or that there is any other error in the indictment or summons the court may at any time before judgment, if it considers that the making of the necessary amendment in the indictment or summons will not prejudice the accused in his defence, order that the indictment or summons be amended, so far as it is necessary, by some officer of the court or other person, both in that part thereof where the variance, omission, insertion, or error occurs, and in every other part thereof which it may become necessary to amend.

The general rule is that an amendment of a summons should be done before the accused pleads and not during reading of judgement or delivery thereof.[2] However, in terms of this section, amendment may be applied for and granted at any time before judgement.

Notwithstanding the seemingly clear language of section 149(1) the extent of the power to amend conferred by this section has been the subject of conflicting decisions of the High Court.

The controversy has centred on what constitutes an "amendment" within the subsection. This paper seeks to analyse the judicial views expressed on the subsection and to ascertain which one is appropriate in the absence of a definitive opinion of the Court of Appeal.

JUDICIAL INTERPRETATION OF THE SUBSECTION

Two views seem to have emerged from the case law. Some judges have been of the opinion that the word "amend" can and does include substituting an existing charge with a new one, while others were of the view that where an amendment had the effect of substituting a new charge then it was invalid for it went beyond the meaning of the word "amend".

An exponent of the second view is Justice Corduff who expressed the view, in *State v Lephole*,[3] that the section only provides for certain amendments to the particulars to bring the charge into line with evidence. He expressed himself thus:

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1. *Cap 08:02 1987 Rev.*
2. *Hlupekile v The State (1982)1 BLR 134.*
3. *1979 BLR 215.*

> Nowhere in the Criminal Procedure and Evidence Act is a court empowered to substitute an entirely new charge for the one to which an accused has pleaded.

Section 148[4] provides only for certain amendments to the particulars to bring the charge into line with the evidence subject to certain safeguards.[5]

This dictum was made in an appeal where the accused was originally charged with rape but during trial evidence pointed or so the presiding magistrate believed, to indecent assault. By section 191 of the then Criminal Procedure and Evidence Act[6] the court is empowered to find an accused guilty of a lesser offence when charged with rape. The trial magistrate invoked provisions of this section and ordered substitution of the charge of rape for indecent assault. The court quashed the conviction and set aside the sentence meted out against appellant. The court held that,

> the substitution of a charge of indecent assault was in the present case a grave irregularity.

Again in *State v Thekiso,*[7] relying on the Zimbabwean case of *State v Moyo,*[8] Justice Corduff observed that,

> The nature and extent of amendments which are permissible in terms of section 148 are limited and while what can be done in any case will depend upon the particular situation obtaining in that case the general rule is that there must not be a new charge substituted for the one to which the accused pleaded.[9]

In *State v Moyo* accused was charged with theft of stock. He pleaded guilty. The prosecutor accepted the plea and tendered to the Magistrate a statement of agreed facts. This was read over to the accused who, in reply, claimed that he had been compelled by terrorists on pain of death to steal the cattle. The magistrate altered the plea to not guilty. Thereupon the prosecutor advised that he intended to charge the accused with 14 counts of theft of stock in substitution for the charge before the court. Later the accused appeared before another Magistrate, who was aware that a plea of not guilty had been entered. In spite of such knowledge he permitted the prosecutor to put to the accused an entirely new charge which alleged the commission of 14 counts of theft of stock. He was asked to plead, and reiterated that he had stolen the cattle under compulsion. Pleas of not guilty were entered. He was convicted on all counts.

On review of the case the issue was whether an 'amendment' whereby a charge to which an accused had pleaded is substituted with an entirely new one was competent. Justice Gubbay observed that the amendment contemplated by section 191[10] must be an *amendment to the charge not the substitution of an entirely new charge* (Emphasis mine). The conviction and sentence were overturned.

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4. Now s.149(1) 1987 Rev.
5. *Supra* N.3 at 217.
6. Cap 08:02 1973 Rev. (Now s.192 1987 Rev.).
7. 1981 BLR 267.
8. 1979(1) SA 1024.
9. Supra N. 7 at 235.
10. Criminal Procedure and Evidence Act Chap 59.

Similarly in the South African case of *R v Muyekwa*[11] Lewis J. held that the substitution of one offence for another was not an amendment. In this case the accused had pleaded guilty to a charge of common assault. During the crown case and in view of the evidence led by the crown, the prosecutor applied for an amendment of a charge of assault with intent to do grievous bodily harm. The Magistrate allowed the amendment and the accused was convicted on the new charge. Lewis J. held that the so-called amendment of the charge was not an amendment within the meaning of the Act[12] but that "it was the substitution of an entirely new charge which was not competent".

The interpretation of section 149 preferred by Corduff was adopted and followed by Justice Barrington Jones in *Monyamane v The State*[13] where he quashed the conviction and set aside the decision of the trial court on the basis that "the procedure adopted by the learned magistrate resulted in a serious irregularity".[14]

In that case the trial court had allowed the changing of a charge of indecent assault to that of rape. In his Lordship's view, if during trial the prosecution realises that the indictment or charge sheet does not cover all the criminal conduct of the accused and wishes to add more charges against the accused, then the proper course that should be followed is for the prosecutor to seek leave to withdraw the case in terms of the proviso to the then section 149[15] of the Criminal Procedure and Evidence Act at the time when the application is made to substitute the charge, and then lay fresh charge against the accused.

Hannah J. expressed the contrary view in *State v Kgano*.[16] He expressed the view that while it is correct that for there to be an amendment there must be some existing thing which is the subject of correcting, it does not mean that the substitution of a new charge for the original necessarily falls outside the scope of the word 'amend'.[17] Justice Hannah adverted his mind to the Zimbabwean High Court decisions in the cases of *State v Moyo*[18] (already discussed above) and *State v Collet*[19] in which an appeal was allowed against an amendment which changed a charge of common assault to one of assault with intent to do grievous harm. He particularly noted the statement by the court in this case to the effect that,

> not every alteration, particularly one that causes the complete destruction of the 'existing thing' or its substitution by something else, can properly be deemed an amendment.[20]

His Lordship then considered the English authorities, which deal with the court's jurisdiction to amend an indictment. The power is contained in section 5(1) of the Indictment Act of 1915, which reads:

11. 1947 (4) SA 433.
12. Sec 225 of Act 31 of 1917.
13. 1985 BLR 230.
14. *Ibid.* at p 235.
15. Now section 150.
16. 1981 BLR 186.
17. *Ibid.* at p 191.
18. *Supra* note 8.
19. 1978 (4) SA 324.
20. *S v Kgano* 1981 BLR 186 at 191.

> where before trials or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the court thinks fit.

In the English case of *R v Johal and Lam*[21] the court held that;

> in the judgement of this court, there is no rule of law which precludes amendment of an indictment after arraignment either by addition of a new count or otherwise.

In *R v Radley*[22] three additional counts of conspiracy had been added by way of amendment at the end of the prosecution case.

Having considered both the Zimbabwean and South African authorities on the one hand and English authorities on the other, Hannah observed obiter that to interpret section 149(1) in the way our courts did was to state the position rather too widely.[23] In this case Hannah J. did not conclusively state the position of the law. The case was decided on other considerations rather than on the basis whether the changing of the charge of supplying or procuring something knowing it was intended to be unlawfully used to procure a miscarriage to administering drugs or other noxious thing with intent to procure a miscarriage.

In *Amogelang v The State*[24] Hannah confronted the issue head-on. After a comprehensive examination of both Zimbabwean and South African authorities he came to the conclusion that the power of amendment conferred by section 149 (1) includes the power to substitute charges.

The question that arises is why this divergence of opinion in the first place? A closer look at the cases suggests that divergence of opinion on this point seems to have arisen because one view relied on similar provisions in section 5(1) of the English indictment Act of 1915 and the other on the South African and Zimbabwean equivalents to section 149(1).

In his review of the authorities in *Amogelang v The State* Hannah J. was fortified in his view by saying:

> I am influenced in reaching this conclusion firstly by the similarity between section 149(1) of our Act and section 5(1) of the English Indictments Act, 1915 . . . Although section 5(1) speaks in general terms of a defective indictment whereas section 149(1) particularises a number of instances when an amendment may be made the section then deals with the matter in a general way stating: or that there is any other error in the indictment or summons.

He concluded,

> To my mind, in this context error or defect are of similar meaning and effect and the circumstances in which an amendment may be made are as wider under section 149(1) as they are under its English counterpart. I respectfully disagree with the narrow interpretation placed upon the section by Corduff J. in *State v Lephole*.[25]

21. (1972) 56 Cr. Appeal R. 348.
22. 1974 58 Cr. Appeal R. 394.
23. *Supra* note 20 at 191.
24. 1984 BLR 201.
25. (1979) BLR 215 at p 217.

His Lordship expressed the view that there was a fundamental difference between section 149(1) and its South African and Zimbabwean counterparts. In the South African equivalent the power to amend is in relation to a charge and the Zimbabwean equivalent also refers to a charge whilst under section 149(1) it is in relation to an indictment or a summons.

A 'charge' consists of statement of offence and particulars thereof while indictment refers to the whole document. In his view this difference is a vital one because while the addition of a new charge to an original charge could be said to be supplying a vacuum with something that should already have been there and thus goes beyond the meaning of the word 'amend' in the sense of the perfecting or ameliorating of an existing thing, the addition of a new charge does not have the same effect. The indictment or summons has been in existence from the outset of the trial and the addition of a new count cannot be said to be merely perfecting or correcting the indictment. The destruction of the count by the substitution of another does not destroy the indictment. The concept of indictment is far wider than that of a charge. Using this logical reasoning Hannah J. arrived at the conclusion that the interpretation to be placed on section 149(1) is that which is placed on its English equivalent.

Once Hannah J.'s reasoning is appreciated it becomes clear therefore that the South African and Zimbabwean authorities were not immediately relevant for they interpreted the word 'amend' in the context of a charge and not an indictment.

The Court of Appeal has not yet intervened in this controversy so that it is likely that we will continue to see conflicting decisions over the interpretation of section 149(1) and the loser is our criminal justice system and indeed the accused who would be perturbed by like cases being treated differently. The situation cries out for court of appeal intervention.

COURT OF APPEAL'S INTERVENTION: WHICH WAY?

It is trite law that where the trial court has discretionary power the court of appeal is not entitled to substitute their discretion for that of the court of trial.[26] The court can only interfere in cases where the court of trial had exceeded its jurisdiction or imposed a sentence, (in matters relating sentencing) which was not legally permissible for a crime or been influenced by facts or motives which were not appropriate for consideration. [27]

The question under consideration does not interrogate the discretionary powers of courts of trial; that is not in dispute. What is at issue is whether the word 'amend' as used in section 149(1) should be given a narrower or broader meaning, that is, should the word 'amend' in the context of section 149(1) be interpreted to mean not only the perfecting of a charge but also the substitution or addition of new charges?

The arguments of Hannah J. are to a large extent very attractive taking into account the fact that our criminal procedure law is fashioned largely along the English system hence the similarity in the provisions of our Act and its English equivalent. However, constitutional argument can be raised to support a narrower interpretation.

The Constitution of Botswana requires that a person charged with a criminal offence must be informed as soon as reasonably practicable, in a language that he understands and in

26. *Ntsompe Shoto and Others v R.* 1960 HCTLR 1. See also *Motsekae Motjolobeka v R* 1955 HCTLR 19.
27. *Ibid.*, p 2.

detail, of the nature of the offence charged.[28] It further requires that the accused be given adequate time and facilities for the preparation of his defence.[29] One could then ask whether a situation where a person is charged with assault and brought to court to answer to that charge is then told that instead of assault in fact now has to answer to a charge of rape is in compliance with the Constitution? Or whether where during trial the prosecutor applies for leave to amend and he substitutes the offence of assault for rape is in consonance with the Constitution?

It is submitted that interpretation which gives a narrower meaning to the word 'amend' will be more in consonance with the Constitution in that it does not permit surprises for the accused who is brought to court.

It is submitted that a better procedure is the one advanced by Barrington Jones J. that if during trial the prosecution realises that the indictment or charge sheet does not cover all the criminal conduct of the accused and wishes to add more charges against him, then the prosecutor must seek leave to withdraw the case and then lay fresh charges against the accused. It is submitted that accused must be acquitted of the charges previous alleged.

In conclusion it is submitted that while Hannah J.'s reasoning is quite attractive the court of appeal should have regard to constitutional requirements in the administration of criminal justice and be persuaded to adopt a narrower interpretation of section 149(1).

28. Section 10(1) (b).
29. *Ibid.* 10(1) (c).