THE STATE

Versus

LISANI MARCELLUS NLEYA

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 10, 11 NOVEMBER 2022 & 11 JANUARY 2023

ASSESSORS: 1. Mr Damba
2. Mr Sobantu

Amendment in terms of section 202 of the Criminal procedure and Evidence Act [Chapter 9:07]

*B. Gundani with Ms. N. Ngwenya and Ms. D.E. Kanengini f*or the State
S.J. Madzivire for the accused

DUBE-BANDA J:

1. This court is presently in the process of hearing evidence in this trial. The accused is indicted for the crime of murder, and the indict is formulated as follows:

> That Lisani Marcellius Nleya (accused) is guilty of the crime of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. In that on the 1st of September 2020 and the (sic) Nicholas Cain Nleya's homestead, Village Muzaza, Mangwe area, Plumtree the accused person struck Nicholas Cain Nleya and Margaret Nleya with an axe, kitchen knife and machete and went on to burn their bodies intending to cause the deaths of Nicholas Cain Nleya and Margaret Nleya or realising that there was a real risk or possibility that his conduct may cause the deaths of Nicholas Cain Nleya and Margaret Nleya, continued to engage in that conduct despite the risk or possibility.

2. When the indictment was put to the accused it appeared to me that there might be an error in the manner it was formulated, in that the accused is charged with a single indictment of murder making reference to two deceased persons. I let it pass at that stage. I did so because it is well-known fact that the state is *dominus litus.* It is the prosecutor who decides on which charge to prefer against an accused person and how it should be formulated. The court must be *extremely slow and exercise restraint* in interfering in this terrain of the prosecutor's prerogative, unless of course the interests of justice are likely to be prejudiced.

3. After the summary of the State case and the defence outline were placed on record and both documentary (e.g. two post mortem reports) and real exhibits were introduced in evidence it became very clear that indeed there was an error in the manner the indictment was drawn and formulated. The kind of error which, in the interests of justice justified the interference by the court. I say so because it is clear at this stage of the proceedings that the events of the 1st September 2020 resulted in the deaths of two persons, i.e. Nicholas Cain Nleya and Margret Nleya. Notwithstanding this phenomenon the accused is charged with a single indictment of murder making reference to both the deceased persons. It was at this stage that I *mero moto* raised this issue with both State and defence counsel. Both counsel agreed that indeed an error occurred, and which error may be corrected in terms of section 202 Criminal Procedure and Evidence Act [Chapter 09:07] (CP & E Act).

4. Section 202 of the CP & E Act gives the court broad power to amend an indictment. The section reads as follows:

> (1) When on the trial of any indictment, summons or charge there appears to be any variance between the statement therein and the 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, summons or charge have been omitted, or that any words or particulars that ought to have been omitted have been inserted, or that there is any other error in the indictment, summons or charge, the court may at any time before judgment, if it considers that the making of the necessary amendment in the indictment, summons or charge will not prejudice the accused in his defence, order that the indictment, summons or charge, whether or not it discloses an offence, be amended, so

far as 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. (My emphasis).

(2) The amendment may be made on such terms, if any, as to postponing the trial as the court thinks reasonable and the indictment, summons or charge shall thereupon be amended in accordance with the order of the court, and after any such amendment the trial shall proceed at the appointed time upon the amended indictment, summons or charge in the same manner and with the same consequences in all respects as if it had been originally in its amended form.

(3) The fact that an indictment, summons or charge 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.

5. In *S v Kurotwi & Anor* (CRB 35 of 2011, CRB 39 of 2011) [2012] ZWHHC 36 (31 January 2012) the court held thus:

Section 202 was precisely meant to facilitate the correction, alignment, synchronization and harmonization of the facts and the charge depending on the exigencies of the case at any given time. This is what the State intends to do in this case. Thus the State is perfectly entitled to effect the amendments sought provided there is no prejudice to the other party. If however, there should be any prejudice that prejudice should be capable of extinction in terms of subs (2) of the same section. In other words, the amendment can be made on such terms, if any, as to postponement of the trial as the court thinks reasonable in the circumstances of the case.

This position accords with the general rule governing amendments. In both civil matters and criminal cases the general rule is that amendments will always be allowed provided there is no prejudice or injustice to the other party. That legal position was well articulated by WATERMAYER J way back in1927 in the case of *Moolman* v*Estate Moolman* 1927 CPD 27 at 29 where the learned Judge remarked that:

> "The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is *mala fide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs or in other words the parties cannot be put back for the purposes of justice in the same position they were when the pleading it is sought to amend was filed."

6. By virtue of section 202 of the CP & E Act a court has the power to amend an indictment in the following situations:

   i. The charge lacks an essential averment. See: *S v Hugo* 1976 (4) SA 536 (A).
   ii. An averment in the charge and the evidence that is tendered in proof of such averment are at variance. See: *S v Grey* 1983 (2) SA 536 (C).
   iii. Words or particulars that ought to have been included in the charge have been omitted. See: *R v Crause* 1959 (1) SA 272 (A) 277; *R v Alberts* 1959 (3) SA 404 (A).
   iv. Words or particulars that ought to have been omitted from the charge in fact feature in the charge.
   v. Any other error in the charge. This makes it possible to amend any conceivable defect, provided that the accused will not be prejudiced by such an amendment.

7. This case turns on "any other error in the charge." The only limitation that section 202 of the CP & E Act places on the court's competence to amend is that the amendment may not prejudice the accused in his defence. See: *S v Karibo & another* 1998 (2) SACR 531 (NmHC). In section 202 the words "before judgment" mean the final pronunciation by the court on the guilt or otherwise of the accused. See: *S v Ndaba* 2003 (1) SACR 364 (W) 384a-d. An amendment implies the retention to a great extent of that which is amended. See: *S v Kruger en andere* 1989 (1) SA 785 (A) 7961.

8. The court's competence to amend the indictment is predicated on the absence of prejudice to the accused. See: *S v Ndlovu & Ors* 1979 RLR 236 (G). An amendment will not be granted where the defence is prejudiced by the amendment. To be

prejudiced, the amendment must create an offence the accused was unaware of or alter the manner in which the defence is conducted. An amendment may not substitute completely separate charges or fundamentally change the case against the accused. Before the indictment is amended by the court, the accused must be afforded an opportunity of showing whether there will be any prejudice in conducting his defence. Mr *Madzivire* counsel for the accused submitted that the accused will suffer no prejudice if the indictment is amended to show that he is facing two counts of murder.

9. Section 202 (1) expressly stipulates that the prejudice to an accused, which prevents an amendment of the charge being made, must have a bearing on his defence. In *casu* the accused is charged with a single indictment of murder making reference to two deceased persons. The indictment informed him with reasonable clarity of the case the State intends to prove against him. It made reference to the two deceased persons, the date in which they were killed and the weapons used in their killing. The only missing link is that the two counts were combined into one. What is merely sought with the amendment is to split the indictment to reflect what the evidence speaks to, that the accused is facing two counts of murder.

10. The accused pleaded not guilty to causing the deaths of the two deceased persons. The defence outline refers to the two deceased persons and the circumstances under which they met their deaths. His cross examination of the witness who gave *viva voce* evidence covered the two deceased persons. There is absolutely no indication that shows that if the accused had been charged with two counts timeously he would have conducted his defence in any other way other than the way in which he conducted it without the amendment.

11. For the amendment to be competent the two counts of murder must retain to a great extent that which is sought to be amended. The date of the alleged offence, the scene of the alleged crime, the identities of the victims of the crime, and the weapons allegedly used to cause their deaths will not be changed. What is sought to be done is not a substitution of one offence with another, it is merely an amendment as envisaged in section 202 of the Act.

12. The approach authorised by section 202 of the Act may be summarised as follows: the empowering provision does not authorise the substitution of one charge by another. As a rule, an amendment will not be permitted where there is prejudice to the accused in his defence. An amendment must not introduce an entirely new charge. An amendment will not be allowed where it is clear that evidence will not support the amendment. The concept of amendment implies some degree of retention of what is to be amended. Again the splitting of an indictment amounts to an amendment if nothing new is added to the substance of the whole case. See: *Williams & another v Janse van Rensburg & others* 1989 (4) SA 979 (C) 982-4. In this case what is merely sought to be done is to split the indictment to reflect the two counts of murder. It is clear that the accused will be placed in no worse position by the amendment. I take the view that the amendment envisaged is merely technical to ensure that justice is done. It is in the interests of justice. See: *The State v Zhakata* HH 13/2013. This case falls squarely within the ambit authorised by section 202 of the Act.

13. By virtue of section 202 (2) of the Act, the consequences of a trial during which a charge has been amended are the same as those of a trial that proceeded on the amended charge from the beginning. Therefore the accused's not guilty plea remains and the trial shall proceed as if the accused was in the first instance charged with two counts of murder.

    In the result, the indictment is amended to reflect that the accused is charged with the two counts of murder. State counsel is directed to amend the charge as follows:

    Count 1:

    > That Lisani Marcellius Nleya (accused) is guilty of the crime of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. In that on the 1st of September 2020 and the (sic) Nicholas Cain Nleya's homestead, Village Muzaza, Mangwe area, Plumtree the accused person struck Nicholas Cain Nleya with an axe, kitchen knife and machete and went on to burn his body intending to cause the death of Nicholas Cain Nleya or realising that there was a real risk or possibility that his conduct may cause the deaths of Nicholas Cain Nleya continued to engage in that conduct despite the risk or possibility.

Count 2:

> That Lisani Marcellius Nleya (accused) is guilty of the crime of murder as defined in section 47 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. In that on the 1st of September 2020 and the (sic) Nicholas Cain Nleya's homestead, Village Muzaza, Mangwe area, Plumtree the accused person struck Margaret Nleya with an axe, kitchen knife and machete and went on to burn her bodies intending to cause the death Margaret Nleya or realising that there was a real risk or possibility that his conduct may cause the deaths of Margaret Nleya, continued to engage in that conduct despite the risk or possibility.

It is so ordered.

*National Prosecuting Authority, S*tate's legal practitioners
Tanaka Law Chambers, first accused's legal practitioners