

SOUTH AFRICA / JUDGMENT

Kisten v S (AR686/13) [2015]

ZAKZDHC 5 (28 January 2015)

[2015] ZAKZDHC 5

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Woodley, Moodley, Chetty

CASE / FILE NUMBER

AR686/13

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: AR686/13

In the matter between

SHANDEL ANNE KISTEN.....APPELLANT

and

THE STATE.....RESPONDENT

JUDGMENT

Delivered on: 28 January 2015

WOODLEY J

[1] The appellant was charged in the Durban Regional Court with the murder of her stepfather on 15 October 2009, when she was 15 years and 9 months old. Assisted by her mother, she pleaded guilty to the murder on 25 May 2011.

[2] The appellant, who was legally represented at all material times during the trial and on appeal by attorney Siven Samuel ('SamueP),

confirmed to the learned magistrate in the court a quo, that she understood the charge against her and agreed with the contents of her statement in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977 (the Act). In the statement, the appellant set out the events that preceded the murder and thereafter described how she strangled the deceased and attempted to create the impression that he had committed suicide. However a few days after the murder she was overwhelmed with guilt and confessed to her mother and subsequently, after her arrest, to

the police.

- [3] The state, represented by prosecutor Ms Val Mellis, accepted the facts as set out in the statement. When the magistrate queried the motive for the murder with Samuel because the statement did not disclose the motive, Samuel responded that the motive would be set out during sentencing. The magistrate then convicted the appellant as charged on the basis of her Section 112(2) statement without questioning her further on its contents and adjourned the trial for presentence reports to be prepared,
- [4] The sentence proceedings commenced on 11 April 2012, when the appellant was over 18 years of age. In the interim she had commenced a relationship and gave birth to a child on 29 October 2011. Three presentence reports by the probation officer, N L Mdletshe, social worker and Chiidline Counsellor, Joan van Niekerk, and the correctional supervision officer, A N Moodley were admitted in evidence. The compilers testified and were crossexamined on the contents of their reports.
- [5] At the commencement of the proceedings on the following day, 12 April 2012, Samuel brought an application to amend the averments in the appellant's plea of guilty, which effectively changed the plea from an admission of guilt to a plea of not guilty. The learned magistrate pointed out that the averments in the plea explanation could not simply be amended without a proper basis therefor, especially as the report of the correctional officer in respect of the allegations of the appellant, amounted to hearsay.
- [6] The appellant was then called to testify about her disclosure to Moodley, her role and that of her mother in the murder. She testified that she did not plan the murder but became involved in it because she assisted her mother. Her version was therefore that she was an accomplice and not the perpetrator of the murder. She alleged that she had decided to disclose the second version, which was the truth, because she realised that she had been charged with premeditated murder and she did not want to be in prison without her baby, although it meant implicating her mother. The appellant also admitted that she had made false allegations against Moodley and specifically conceded that the allegations of sexual abuse were not the reason for the murder.
- [7] The prosecutor advised that both versions of the appellant were not inconsistent with the contents of the docket. However she contended that the appellant's credibility had been undermined by her failure to take her attorney and the various persons who interviewed her into her confidence and by her false allegations in an affidavit against Moodley and that the State and defence had struck a deal about the sentence. The prosecutor submitted that the plea ought not to be amended in terms of Section 113 because, although the appellant's version had changed, she still admitted participation in the murder, Therefore only the averments in her plea ought to be amended to correlate with the appellant's second version.
- [8] The magistrate however ruled that the appellant's plea be changed in terms of Section 113 to not guilty and accepted the withdrawal of her admissions. The state led no evidence and closed its case. The magistrate convicted the appellant of murder on the admissions she had

made in her statement in terms of Section 112(2) statement, after rejecting her amended version of events leading to the murder and holding that the truth lay in her admissions in her original statement in terms of Section 112(2). She was sentenced to 10 years imprisonment.

- [9] Her appeal against conviction and sentence lies with the leave of the court a quo. The appellant is on bail pending finalisation of the appeal proceedings.

Grounds of Appeal

- [10] The main thrust of the appeal is that the proceedings in the court a quo were prejudicial to the appellant and not in accordance with justice as the court a quo erred in convicting the appellant on the basis of the admissions made in her original Section 112(2) statement although she had withdrawn those admissions, the state had failed to prove that the appellant had made her Section 112(2) statement voluntarily, and the state had led no evidence after the magistrate changed the appellant's plea in terms of Section 113. Further the magistrate had erred by entering the arena and questioning the appellant and her witnesses at length. Mr Samuel advanced several further arguments that the conviction was also not sustainable on the merits and the sentence imposed on the appellant was inappropriate. He contended that the appeal court should therefore set aside the conviction and find the appellant not guilty, alternatively order that the trial commence de novo.
- [11] Mr Walters, who represented the state, concisely set out the misdirections by the presiding magistrate and irregularities in the trial proceedings and conceded that as the proceedings were fatally flawed, the conviction and sentence ought to be set aside and the matter be heard de novo.
- [12] If trial proceedings are flawed because of procedural irregularities then the court of appeal may exercise its powers of review in terms of Section 304(2) read with Section 309 of the Act and set aside the result in the court a quo without pronouncing on the merits of the matter, I accordingly turn to a consideration of the proceedings before the court a quo.

The law and relevant legal principles

- [13] The procedure which follows upon a plea of guilty is prescribed by Section 112 as read with Section 113. The former Section provides inter alia for the questioning of the accused in order to test the validity of his plea of guilty and the latter Section makes special provision for the correction of a plea of guilty to one of not guilty.

'Section 112 : Plea of guilty

- (1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea

....

- (b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain

whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.

- (2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.
- (3) Nothing in this Section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.

Section 113 : Correction of plea of guilty

- (1) If the court at any stage of the proceedings under Section 112(1)(a) or (b) or 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation'
- [14] The primary purpose of a statement in terms of Section 112(2), which sets out the same purpose as questioning in terms of Section 112(1)(b), is to set out the admissions of the accused and the factual basis supporting the plea of guilty.¹
- [15] In *S v Nyambe*² it was held that the purpose of questioning in terms of Section 112(1) is to satisfy the court not only that an offence was committed but that it was the accused who committed it.

[16] In *S v Mshengu Jafta* JA said:

'Section 112(2) requires that the statement must set out the facts which he admits and on which he has pleaded guilty. Legal conclusions will not suffice. The presiding officer can only convict if he or she is satisfied that the accused is indeed guilty of the offence to which a guilty plea has been tendered. If not, the provisions of Section 113 must be invoked'³

[17] Corrective action in terms of Section 113 can be taken at any time before sentence is passed, that is even after a conviction.⁴

[18] It is also dear that when an accused applies to change his plea of guilty in terms of Section 113, no onus should be placed on him.⁵ In *Ooko v La Grange NO & Other* Jones J held:

'There is every justification for not saddling an accused person with an onus where he wishes to change his plea from guilty to not guilty at the trial stage. The presumption of innocence, the duty on the prosecution to prove guilt beyond reasonable doubt, and our notion of what is meant by a fair criminal trial within the framework of the Constitution cry out against imposing any kind of onus on an accused person at that stage. All he need do is give a reasonable explanation for wanting to change his plea.'⁶

Proceedings before the court a quo

[19] The learned magistrate was concerned at the plea stage only with the failure of the appellant to furnish a motive and raised the issue with Samuel. He however accepted Samuel's submission that the motive would be set out during the sentence proceedings and convicted the appellant on the basis that she admitted the facts on which the charge was based, and that the legal requirements for the commission of the offence were adequately covered by the admissions.

[20] However no clear motive emerged during the evidence of the witnesses who testified when the trial resumed for sentence proceedings. Instead there were inconsistent reports of sexual impropriety on the part of the deceased by the appellant. Ms Mdletshe reported that the appellant had informed her that although the deceased had always played a supportive fatherly role towards her, she had been sexually harassed by the deceased and therefore planned to murder him. Ms Van Niekerk reported that the appellant had once described her relationship with the deceased as 'very close'; he provided for all her needs and supported her and her mother. In a later interview the appellant had made some vague allegations of sexual abuse by the deceased which were not repeated during further consultations. Van Niekerk noted that these allegations were also not discussed with the school counsellor with whom the appellant engaged. Moodley reported that the appellant had described some incidents of inappropriate behaviour on the part of the deceased towards her which culminated in his murder, which included an incident which she did not report to Mdletshe or Van Niekerk.

- [21] Nevertheless, no clarification on these contradictory aspects of the reports was sought by Mr Samuel. Instead he attempted to elicit concessions from these witnesses that the murder was not premeditated and that a custodial sentence was inappropriate, which the witnesses refused to make. Despite a particularly concerted effort by Samuel to get Van Niekerk to state that there was no premeditation on the part of the appellant, Van Niekerk persisted that the appellant had not made full disclosure although she was a young adult and capable of making an informed decision.⁷ She also testified that she had recommended to the appellant that she did not fall pregnant.
- [22] It is noteworthy that the reports of these witnesses had been made available to the defence prior to the interrogation of the reports in court, Samuel would have been alive to the fact that the discretion to impose an appropriate sentence vests in the presiding officer, who would consider the presentence reports and recommendations in order to judicially determine an appropriate sentence. The appellant herself was advised that the sentencing discretion vests in the magistrate and counselled on the prospect of serving a custodial sentence,
- [23] However it was only when, despite intensive cross-examination on the suitability of a custodial sentence, all three witnesses persisted that a term of imprisonment was appropriate and /or that the appellant had refused to acknowledge that the trial court may impose such a custodial sentence, that the application in terms of Section 113 was made, immediately prior to the imposition of sentence.
- [24] It is therefore apparent that only in the face of the looming reality of imprisonment, did the appellant decide to change her plea and retract the admissions therein. In my view, although an accused may change his or her plea at any time before sentence, in the circumstances of this matter, the timing of the application in terms of Section 113 is of grave concern, as is the external manipulation of the appellant referred to by Van Niekerk, The extreme confidence of the appellant that she would not be committed to a correctional facility, and her decision to have a child in the belief that this would influence the sentence to be imposed on her, also have the potential to seriously undermine the public confidence in the constitutional imperative of an independent judiciary and dispensation of justice without prejudice.
- [25] Nevertheless the learned magistrate correctly pointed out the need for a proper basis for the application for change of plea. However, it is at this juncture that the proceedings became tainted with material procedural irregularities. Firstly, the testimony of the appellant in the trial within a trial, which the magistrate and counsel agreed was a proceeding 'sui generis' insulated from the main trial⁵, was subsequently incorporated as evidence in the main trial, which together with the admissions formed the matrix on which the conviction of the appellant was determined.
- [26] Thereafter the magistrate allowed his frustration at the turn in the proceedings to infuse his attitude towards the appellant and misdirected himself by subjecting her to extensive interrogation, when there was no onus on her, and she was required only to furnish a

reasonable explanation for the retraction of her plea. The allegation that she acted under duress and undue influence constituted, in my view, sufficient reason to amend her plea, as Section 113(1) does not exclude these common law grounds for setting aside a plea of guilty. It would therefore have been expedient and fair to the appellant to proceed to trial rather than embarking on a trial within a trial,

- [27] The learned magistrate also failed to consider that, as the appellant denied that she had made the admissions in her statement in terms of Section 112(2) freely and voluntarily, thereby placing the issue of voluntariness in dispute, the admissions could not be considered part of the evidential material nor could he determine the truthfulness or otherwise of her aforesaid admissions, as he did in his judgment, without the state proving the voluntariness of the admissions withdrawn by the appellant.⁸ Hence the reliance on *S v Ncube*⁹ was ill conceived, as the state failed to adduce the requisite evidence and consequently failed to discharge its onus, once the plea was changed in terms of Section 113(1).
- [28] I am persuaded that a failure of justice has resulted from these material irregularities as the proceedings before the court a quo were not in accordance with justice. The proceedings, the conviction of the appellant and the sentence imposed on her, consequently fall to be reviewed and set aside. As I am also of the view that the matter should be remitted for hearing de novo before another court, it not necessary nor advisable to comment further on the credibility of the witnesses or the merits of the matter.
- [29] However I am compelled to note my concern with the failure of the prosecutor to disclose information available to her when the plea of guilty was tendered. The prosecutor accepted the facts set out in the plea and did not raise any objections or concerns nor did she request the court to question the appellant to test the plea of guilty, as the trial court must also pass judgment on the reliability of the admissions¹⁰. Yet in response to the application in terms of Section 113, when the appellant's amended plea was premised on a different set of facts, the prosecutor advised the court that both versions of the appellant were not inconsistent with the contents of the docket. Notably, the appellant testified that the state had some suspicion that her plea was not correct because of the discrepancy between her height and weight and that of the deceased.
- [30] But if the prosecutor was aware that the appellant may not have been the perpetrator of the offence but an accomplice or that she played a lesser role in the perpetration of the offence, she was under an obligation to disclose potentially exculpatory information in her possession to the court to enable the presiding officer to cover the possible defence by questioning the accused, or elicit information which could impact on the determination of sentence.¹¹
- [31] In my view the prosecutor was so intent on securing a conviction that she lost sight of her primary duty to ensure that justice is done. In *S v Macrae Wallis* JA pertinently stated:

'It needs to be stressed once again that the duty of prosecutors is not to secure a conviction at all costs or to defend convictions once obtained. Their duty is to see that so far as possible justice is done. As Jones J expressed it in *S v Fani & Others* 1994

(1) SACR 636(E) at 638e-f:

'The object of criminal proceedings in our law has never been to secure a conviction at all costs. The duty of the prosecution is to present all the facts in an objective and fair manner so as to place the court in a position to arrive at the truth.'¹²

Order:

1 The trial proceedings under Case No 41/2117/10 in Regional Court, Durban are reviewed and set aside.

2 The conviction of the appellant and the sentence imposed on her by the court a quo are reviewed and set aside,

3 The matter is remitted to the Regional Court, Durban, for trial novo before another presiding officer.

4 Bail granted to the appellant is extended on the same conditions as presently operating until her appearance in the Regional Court.

Moodley J

Chetty J

Date of Hearing: 28 August 2014

Date of Judgment:

For the Appellant: Mr S Samuel

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1S v Nixon 2000(2) SACR 79 (W) at 86g

21978

(1) SA 311 (NC) 312

32009 (2) SACR 316 (SCA) at [7]

4S v Nixon 2000

(2) SACR 79 (W) at 87h; S v Carter 2007

(2) SACR 415 (SCA) at 431 h~i

5 Du Toit Commentary on the Criminal Procedure Act 17-40

7 page 35 line 21 - page 36 line 12

8 S v Sewela 2007

(1) SACR 123 (W)

9 1981

(3) SA 511 (T)

10 S v Naidoo 1985

(2) SA 32 (N) 37G-H

11 S v Rozani; Rozani v Director of Public Prosecutions, Western Cape 2009

(1) SACR 540 (C)

12 2014

(2) SACR 215 (SCA) at 225 f-h

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