

SOUTH AFRICA / JUDGMENT

Mkhize v S (AR365/21) [2023] ZAKZPHC 11 (3 February 2023)

[2023] ZAKZPHC 11

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Chetty, Ploos van Amstel

CASE / FILE NUMBER

AR365/21

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

No: AR365/21

In

the matter between:

SIBUSISO
BLESSING MKHIZE
APPELLANT

And

THE
STATE
RESPONDENT

This

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ORDER

On

appeal from: the Regional Court, Izingolweni:

1.
The appeal is upheld.
2.
The conviction and sentence dated 31 July 2020 is set aside.
3.
The case is remitted to the court a quo for it to deal with the matter in terms of s112(2), and, if necessary, s113, of the Criminal Procedure Act 51 of 1977.

JUDGMENT

Chetty J (Ploos van Amstel J concurring):

- [1] The appellant was charged in the Regional Court, Izingolweni, with one count of murder in which it was alleged that on 5 August 2019 in Nyandezulu Location, KwaZulu-Natal, he unlawfully and intentionally killed a female, Ms B [....] S [....] N [....] ('the deceased'). The State alleged that the murder was premeditated and the charge against the appellant was framed in terms of s 51(1), Schedule 2, Part I of the Criminal Law Amendment Act 105 of 1997 ('the Amendment Act') in respect of which life imprisonment would be applicable in the event of a conviction, and the absence of substantial and compelling circumstances.
- [2] The appellant was legally represented at his trial and pleaded guilty to the charge against him. After considering the admissions contained in the appellant's statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 ('the Act'), the presiding magistrate found the appellant guilty of premeditated murder as charged, and sentenced him to life imprisonment in the absence of any substantial and compelling circumstances. The matter comes before this court as an appeal in terms of s 309 of the Act.
- [3] The factual background of the matter emerges solely from the contents of the appellant's s 112(2) statement, the post mortem report and the photographic album, which exhibits were admitted into evidence by the appellant at the commencement of the proceedings in the court a quo. The appellant was in a romantic relationship with the deceased. They had lived together for approximately two years prior to her death. On 4 August 2019, the appellant called the deceased and informed him that she was visiting her mother, who lived in Port Shepstone, and that she would be spending the weekend at her mother's home as she normally did. Later that evening the appellant tried to call the deceased but was unable to get through. He decided to drive to the deceased's mother's home. On his arrival, he was informed by the deceased's mother that the deceased was not present and that she had not seen her daughter since February of that year. This was contrary to what the appellant had been led to believe by the deceased.

- [4] The appellant returned home alone that evening. The deceased returned home the following morning at which stage the appellant enquired from her where she had been over the weekend. She responded that she had been to visit her mother, whereupon the appellant telephoned her mother in her presence. An argument then ensued over the allegation that the deceased had been lying as to her whereabouts, resulting in her eventually admitting that she had been visiting another man in Port Shepstone.
- [5] The appellant became enraged at the deceased's admission that she was seeing another man under the pretext of visiting her mother. He grabbed hold of a knife in the house and stabbed the deceased

repeatedly. She attempted to flee without success. Realising what he had done, the appellant telephoned the deceased's sister, who arrived at his house and summoned the police. The appellant admitted that the injuries reflected in the post mortem report and the Form J88 were correct, and that these injuries caused the death of the deceased.

- [6] On the basis of the admissions contained in the s 112(2) statement, the presiding magistrate was satisfied that the appellant had admitted to all of the elements of the crime of murder and found the appellant guilty as charged. It is in regard to this precise finding that this appeal turns. It was submitted on behalf of the appellant that the conviction was not in order as nowhere in the

s 112(2) statement does the appellant admit the necessary intention to kill the deceased or the element of unlawfulness. Counsel for the respondent was unable to mount any argument in rebuttal. The requirement in s 112(2) of the Act is for an accused to 'set

out the facts which he admits' in a statement, on the strength of which he or she may be convicted. (*S v Chetty* 2008 (2) SACR 157 (W)). Although the appellant admitted to having stabbed the deceased repeatedly and that she died as a result of the wounds inflicted,

these do not constitute facts from which the court a quo could have justifiably drawn the conclusion that the appellant had the necessary intention to kill the deceased.

- [7] The facts contained in the s 112(2) statement constitute admissions on the part of the appellant. In *Negondeni v The State* (00093/15) [2015] ZASCA 132 (29 September 2015) para 10 the court said the following in relation to a statement made in terms of s 112(2):

'It has been made clear in *S v Mbuyisa* that s 112(b) contemplates admissions of facts and not admissions of law or legal conclusions. In *S v Lebokeng* en 'n ander it was stressed that the court should be satisfied not only that the accused committed the act in question but that he committed it unlawfully and with the necessary mens rea. As was stated in *S v Nyanga*

"Section 112(1)(b) questioning has a twofold purpose. Firstly, to establish the factual basis for the plea of guilty and secondly to establish the legal basis for such plea. In the first phase of the enquiry, the admissions made may not be added to by other means such as a process of inferential reasoning. (S v Nkosi 1986

- (2) SA 261 (T) at 263H-I; S v Mathe 1981
- (3) SA 664 (NC) at 669E-G; S v Jacobs (supra at 1177B) (1978)
- (1) SA 1176 (C) at 1177B). The second phase of the enquiry amounts essentially to a conclusion of law based on the admissions. From the admissions the court must conclude whether the legal requirements for the commission of the offence have been met. They are the questions of unlawfulness, actus reus and mens rea. These are conclusions of law. If the court is satisfied that the admissions adequately cover all these elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty.” (Footnotes omitted)
- [8] In light of the above authority no basis in law exists for inferences to be drawn from the admitted facts. Instead, the presiding magistrate ought to have questioned the appellant in terms of s 112(2) of the Act to establish whether the appellant admitted to the essential elements of the offence. Differently put, the questions and answers must cover all the essential elements of the offence which the State, in the absence of a plea of guilty, would have been required to prove. Section 112(1)(b) and s112(2) are designed to avoid the necessity for calling evidence in cases where it is clear that the accused understands all the elements of the charge and admits them all. (S v Shiburi 2018 (2) SACR 485 (SCA) para 18). From the admitted facts in the statement by the appellant, it was not possible for the magistrate to be satisfied that the appellant acted with the requisite intent – either in the form of dolus directus or dolus eventualis – to kill the deceased. Intent cannot be inferred from the admitted facts.
- [9] It follows that the conviction and life sentence imposed on the appellant cannot stand. In remitting the matter, the court seized with the matter must proceed in terms of s 112(2) of the Act in which the written statement and admissions by the appellant stand. The magistrate may then proceed to question the appellant in terms of s

112(2) to establish whether he admits he had the intention to kill the deceased and appreciated the unlawfulness of his actions. If the appellant does not admit this, the magistrate must change the plea to one of not guilty in terms of s 113. Section 113(1) provides that all allegations which the appellant admitted under s 112(2) shall stand as proof. The accused should be asked further whether he admits premeditation. If not, the state can choose to accept the plea on murder without premeditation.

Order

[11] In the circumstances, the following order is made:

1. The appeal is upheld.
2. The conviction and sentence dated 31 July 2020 is set aside.

3. The case is remitted to the court a quo for it to deal with the matter in terms of s112(2), and, if necessary, s113, of the Criminal Procedure Act 51 of 1977.

Chetty J

I agree

Ploos van Amstel J

Appearances:

For appellant:

Mr P Marimuthu

Instructed by:

Legal Aid South Africa Durban

For respondent:

Mr A Meiring

Instructed by:

Director of Public Prosecutions Durban

Heard on:

16 January 2023

Judgement

delivered: 3 February 2023

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