
SOUTH AFRICA / JUDGMENT

S v Ryk (CA & R 49/2019) [2019] ZANCHC 35 (30 August 2019) [2019] ZANCHC 35

COURT

Northern Cape High Court, Kimberley

BEFORE

Phatshoane, Smith

CASE / FILE NUMBER

CA & R 49/2019

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In the High Court of South Africa

(Northern Cape Division, Kimberley)

Case No: CA & R 49/2019

In the matter between:

THE STATE

and

INGRID RYK

Date: 30 August 2019

Corum: Phatshoane J and Smith AJ

REVIEW JUDGMENT

Smith AJ

1. This matter comes before us by way of a special review in terms of s 304 of the Criminal Procedure Act, 51 of 1977 (“the CPA”).

The 19 year old Ms Ingrid Ryk, the accused, was arraigned before Magistrate J Klasse in the Regional Court held at Springbok on two counts of housebreaking with the intent to steal and theft. In respect of Count 1 the State alleged that on 03 April 2018 she had unlawfully and intentionally broke into the bedroom of Mr Petrus Muhambo with the intention to steal and stole Mr Muhambo's two cellular phones. On Count 2 it is said that, on that same date, she unlawfully and intentionally broke into the bedroom of Ms Maria Roberts with the intention to steal and stole her duvet cover.

2. The accused pleaded guilty to both counts. In a nutshell, she explained that she broke into Mr Muhambo's flat with the intention to steal and stole his two cell phones. She also admitted having unlawfully and intentionally broken into Ms Roberts's flat and intentionally stole her duvet cover. She says that on that fateful evening she went to a block of flats situated at Verstesuiwer,

Rooiwal, Namakwaland, where she threw a brick onto a window of complainant's (Mr Muhambo) apartment. Its shards cut her hand

which started bleeding. She open the window from the outside and gained entry into the flat. She then took two cellular phones so as to permanently deprive the owner thereof of its ownership and left the apartment. She proceeded to Ms Roberts' apartment where she also threw a brick onto the window of her bedroom and gained entry. She then took one duvet cover and permanently deprived Ms Roberts of its ownership. Thereafter, she went home to sleep. On the next morning her grandfather woke her up upon the arrival of the members of the South African Police. She gave the Police the two cellular phones that she had stolen. The duvet was covered in blood. She was apprehended. She acknowledged that she had no right or permission to act in the manner that she did.

3. On the basis of the aforesaid plea the Magistrate returned the guilty verdict on 05 September 2018. The State did not prove any previous convictions on the part of the accused. Counsel for the accused, Mr Richards, was afforded an opportunity to address the Court in mitigation of the sentence. Prior to the address by the prosecutor in aggravation, in light of the accused's age, the Magistrate requested that the probation officer's report be placed before Court for its consideration.
4. Two reports by probation officers were filed with the Court on 03 October 2018. The Magistrate noted, from the reports filed, that the accused's grandfather, Mr Abraham Oortman, had remarked that she was mentally disabled. He then called the grandfather to testify regarding the accused's condition which he did as follows:

"Mnr Oortman : "Nee, sy is nie. Ek verstaan haar nie."

Hof: "Hoekom se oupa so"

Mnr Oortman: "Die kind is net eie ek"

Hof: “Ekskuus”

Mnr Oortman: “ Die kind is eie ek, Die maak net soos sy lus het en se vir ons wat sy wil en ... (onduidelik)”[1]

5. Mr Oortman explained that the accused was once struck with a brick on her head and had since behaved in a rude and disrespectful manner. He went on to say:

Hof: “Ja maar wat doen sy? Hoekom sè ek wil weet wat doen sy wat u sè sy gaan aan?”

Mnr Oortman: “ Sy gaan aan soos sy skel ons en vloek ons en sy gaan, sulke dinge sy doen, sy het niks maniere nie, sommige tye...”

Hof: “So sy is maar soms net onbeskof?”

Mnr Oortman: “Ja sy is baie, sy is nie reg nie”[2]

6. Counsel for the accused, Mr Richards, remarked:[3]

“Ja maar ek, soos ek se uit konsultasies, Edelagbare en ek het nou al n hele paar sake gehad waar n mens net agterkom maar iets is nie pluis hier nie, maar ek het nie die indruk gekry nie. Ek het dalk ‘n indruk gekry dat die persoon nie gevorder het op skool nie, maar dit opsigself is nie aanduidend dat ‘n persoon nie geestes of geesesversteurdheid het Edelagbare, maar net wel miskien ‘n intellektuele agterstand.”

7. Following the testimony of Mr Oortman the Magistrate could still not establish whether the accused was capable of understanding the nature of the proceedings. Therefore, he suggested that the accused be subjected to an evaluation by a psychiatrist or clinical psychologist to obtain clarification on her mental state before he could impose a sentence. When the Court reconvened on 12 December 2018 a report dated 03 December 2018 by Doctor GP Monroe, a specialist psychiatrist of West End Specialised Hospital, Mental Health and DR TB Services, Northern Cape Department of Health, was placed before the Court. It reads:

‘This is to certify that I have evaluated the mental state of the above mentioned person in West End Specialised Hospital today 03.12.2018 as requested.

The evaluation consisted of interviews with the accused, her grandfather and perusal of SAPS docket.

According to information at hand the accused left school in Grade 6 for no apparent reason. It seems that her biological parents neglected her and her twin brother. She is raised by her grandparents.

During the evaluation the accused presented scanty account of herself. She had poor ability to understand basic concepts and poor ability to verbalize her thoughts. She presented with poor account of events during the alleged offence.....

In my opinion the accused will find it difficult to follow Court proceedings so as to make a defence.'

8. On the basis of the aforesaid report the Magistrate postponed the proceedings to 13 February 2019 and explained:

'Ek sal maar nou net die saak eers uitsel na 13 Februarie na aanleiding van die psigiater se aanbeveling om nou te bepaal moet ek dan nou die, moet ek nou op hierdie stadium 'n pleit van onskuldig notuleer of moet ek dan nou maar die saak vir spesiale hersiening stuur..'

9. The proceedings of 13 February 2019 were not transmitted to this Court. Be that as it may, the opinion by the Doctor that the accused will find it difficult to follow the Court proceedings so as to make a defence, weighed with the Magistrate and created doubt in his mind whether the plea of guilty had correctly been entered. He, therefore, referred the case to this Court for a special review. In his correspondence dated 05 July 2019 he states:

"Tydens vonnis oplegging en gesprekvoering met haar gedurende die verrigtinge, het ek besef dat sy abnormaal optree. Ek het gevolglik

haar oupa opgeroep as getuie, en het hy my vermoede gestaaf en het ek haar verwys vir psigiatrisse evaluasie.

Dit blyk uit die verslag van die psigiater dat "the accused will find it difficult to follow court proceedings so as to make a defence."

In die lig hiervan word die saak op spesiale hersiening gestuur, met die versoek dat sy Edele die Hersieningsregter die verrigtinge tersyde sal stel. Ek is van mening dat om op hierdie stadium 'n pleit van onskuldig te notuleer in terme van Artikel 113 van Wet 51 van 1977, geen doel gaan dien as gevolg van die bevinding van die psigiater nie."

10. Upon receipt of the record I requested the office of the Director of Public Prosecutions to provide its legal opinion on the matter. I am thankful to Adv C.G Jansen for her memorandum in this regard. She is of the view that the matter be remitted to the trial

magistrate who has a discretion either to act in terms of s113(1) of the CPA or to request the prosecutor to place the accused on the waiting list for a formal forensic observation to be conducted as contemplated in s79(2) of the CPA.

11. Section 113 (1) of the CPA provides:

"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.”

Section 113(2) reads:

“If the court records a plea of not guilty under subsection (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise.”

12. The import of s113(1) is that where a Court has doubt whether the accused admitted or admits an allegation in the charge sheet, or whether such admission was correctly made regarding either guilt or the possible existence of a defence, a plea of not guilty must be noted. Doubt can arise from a reply during the initial questioning or during argument, or from the information furnished during the sentencing phase or from questions or any other material evidence which is provided to the Court. The procedure encapsulated in s113(1) applies from initial questioning of the accused in terms of s112 of the CPA up to a stage before the imposition of sentence.
13. One of the circumstances in which s113(1) of the CPA can be invoked is where the criminal capacity of an accused is brought into question in the course of the proceedings. In *S v Aranoff*,^[4] in almost similar circumstances such as the present, the Court laid down the following guidance:

‘The regional magistrate had the power under s 113 of the Act, once he made the finding that accused was not criminally responsible for his deed, to "enter a plea of not guilty and require the prosecutor to proceed with the prosecution". Such an entry of a plea of not guilty would have resulted in the earlier conviction automatically falling away. See *S v Du Plessis* 1978

(2) SA 496 (C); *S v Lukele* 1978

(4) SA 450 (T). For future guidance, this is the procedure which should be followed.

14. In *Sv Aranoff* supra the Magistrate had made an order in terms of s78(6) of the CPA that the accused was not guilty and had to be detained in a mental hospital or prison pending the signification of the decision by the State President. The Court held that no specific authority was embodied in s78(6) to set aside the verdict of guilty. A finding of not guilty was inconsistent with the earlier finding of guilty which was made before the evidence of the doctors came to light. It therefore set aside the existing conviction.
15. There would be no need in this case to set aside the conviction. On the basis of the aforesaid authority, I am of the view that the Magistrate ought to have changed the guilty plea to that of not guilty in terms of s113(1) of the CPA.
16. It does not appear that the doctor perused the record of the proceedings for purposes of the one day evaluation he conducted on the accused. A perusal of the record was pertinent because the accused had given a comprehensive plea explanation which fully disclosed all

material facts which created the impression that she admitted all the elements of both the offences with which she was charged. It further appeared that she was of a sound and sober mind and understood the proceedings. In my view, the psychiatrist's report handed in evidence did not sufficiently establish that the accused had no criminal capacity. To my mind, a mental observation period of 30 days in terms of s79(2)(a) of the CPA would have been more appropriate.

17. From the foregoing analysis, I am of the view that this matter be referred back to the Magistrate to be disposed of in terms of s113 of the CPA. I make the following order.

Order:

The matter is remitted to the Presiding Magistrate, Mr J Klasse, to be disposed of in terms of s113(1) of the Criminal Procedure Act, 51 of 1977.

SMITH V.M

Acting Judge

Northern Cape Division

Phatshoane J concurs in the Judgment of Smit AJ

[1] See the record pages 76 lines 16-21

[2] See record page 78 lines 19-25

[3] See Page 80 of the record

[4] 1979

(2) SA 179 (T) at 180D-E

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