308/88
/mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

RASHIED SINGH

and

THE STATE

CORAM : JOUBERT, SMALBERGER, VIVIER, KUMLEBEN JJA et FRIEDMAN AJA

HEARD : 11 SEPTEMBER 1989

DELIVERED : 29 SEPTEMBER 1989

J U D G M E N T

KUMLEBEN, JA/....

KUMLEBEN, JA:

On 8 March 1985 the appellant stood trial in the regional court for the regional division of the Cape held at Wynberg on a charge of culpable homicide. It alleged that on 15 November 1982 he had unlawfully killed the deceased, Samsodien Parker. At the outset of the hearing Mr Pienaar, who at the time appeared on behalf of the appellant, raised the defence of autrefois acquit and, in terms of sec 106(1)(d) of the Criminal Procedure Act, No 51 of 1977 ("the Act"), such a plea was entered. No formal admissions were made or evidence led in support of this plea. In the course of argument certain documents were handed in by consent and certain statements of fact made by counsel from the Bar were apparently accepted as correct. The magistrate dismissed the special plea. On appeal to the

Cape of Good Hope Provincial Division of the Supreme Court it suffered the same fate. The judgment of Lategan J, with Van Heerden J concurring, has been reported: 1986(4) S.A. 263. Leave was, however, granted by the court a quo for a further appeal to this court.

From the record the facts giving rise to the special plea may be thus summarised.

On 17 November 1982 the appellant first appeared in the magistrate's court at Athlone pursuant to the provisions of sec 119 of the Act. The matter was remanded to 15 December 1982. On that date the prosecutor informed the court that he proposed putting the charge to the appellant in terms of sec 119. His legal representative pointed out to the appellant that he was not standing trial. The charge was one of

murder of the said Samsodien Parker with an alternative charge of culpable homicide. The appellant pleaded not guilty to both counts. In terms of sec 122(1) the court was thus required to and did act in terms of sec 115 of the Act by asking the appellant whether he wished to disclose his defence. He responded by handing in a signed written statement containing certain admissions. The magistrate thereupon in terms of sec 122(1) "stopped the proceedings and adjourned the case" pending a decision of the Attorney-General. The bail which had been granted was extended and the case postponed to 12 January 1983. The case (No F 3145/82) was adjourned several times, the appellant's last appearance in that court being on 13 June 1983.

The Attorney-General having decided in terms of sec 122(2)(i) that the appellant should stand trial

in the regional court, the appellant first appeared in such court in the present case (No F 3346/84) on 4 December 1984, on which occasion the case was remanded. On 8 March 1985, when it was intended that the trial should proceed on the merits, the appellant, as I have said, raised the special plea.

In support of this plea the appellant relied on what was alleged to have taken place on 13 June 1983 at his last appearance in the magistrate's court. His case, as presented by counsel, was that on that date the presiding magistrate had a letter in his possession written by the Attorney-General, or on his behalf, addressed to the magistrate in which the Attorney-General informed him that he (the Attorney-General) declined to prosecute. The magistrate told this to the appellant and added "jy kan maar gaan".

The appellant did just that, after retrieving his bail money.

The position as regards this letter is anything but clear. In fact the record in this regard is a masterpiece of obfuscation. The appellant handed in written heads of argument in support of the special plea and the argument and proceedings at this hearing, which were recorded and transcribed, form part of the record. According to it, the court said that the letter was attached to the heads of argument marked Exhibit A. This exhibit is in fact the written statement in terms of sec 115, to which I have referred, and no document is annexed to it. Counsel said, or implied, that the relevant letter was attached to the Notice of Special Plea. In fact the document attached to this notice is an unsigned copy of a letter to the Senior Public

Prosecutor, Wynberg in which he is told inter alia that "The Attorney-General has decided not to institute a prosecution at this stage." The most plausible explanation of what happened is to be inferred from what is said in the magistrate's judgment, namely, that there were two letters and that the wrong, or less relevant, one was inadvertently included in the record. It does, however, appear that the magistrate was quoting from the other letter when he said in his judgment:

> "Die skrywe van die Prokureur-Generaal was aan die Landdros Wynberg gerig en verwys na die saak F 3145/82 en waarvan die afskrif as bewysstuk C ingehandig is. Dit lees 'die Prokureur-Generaal versoek dat u die beskuldigde Rashied Singh sal meedeel dat hy weier om 'n vervolging teen hom in te stel'".

For the purposes of this case I am prepared to assume that this was the instruction in the letter and that it was communicated to the appellant. (It, one notes in

passing, does not purport to stop a prosecution but intimates that one will not be instituted.) As regards the statement to the appellant that he may go, if the magistrate at the time had before him or knew of the other letter, which qualified the Attorney-General's instruction with the words "at this stage", the magistrate's informal, and somewhat ambiguous, discharge of the appellant is less likely to have been intended as an acquittal or verdict of not guilty. Be that as it may, for the purposes of argument I also assume in favour of the appellant that such was his intention and the effect of his dismissal of the appellant.

Turning to the special plea, in Rex v Manasewitz 1933 A.D. 165 at 168 this court (per Wessels C.J.), in explaining the nature of the defence of

autrefois acquit, stated:

> "There is no doubt whatever that by our law an accused person when once acquitted of an offence may not be tried again for the same offence if he was in jeopardy on the first trial. 'He was so in jeopardy if (1) the Court was competent to try him for the offence; (2) the trial was upon a good indictment on which a valid judgment of conviction could be entered, and (3) the acquittal was on the merits, i.e., by verdict on the trial or in summary cases by dismissal on the merits followed by a judgment or order of acquittal.' (Russell on Crimes, 8th ed. at p. 1818.)"

See too S v Ndou and Others 1971(1) S.A. 668 (A) at 672, in which Rex v Manasewitz is referred to with approval. In the former case - S v Ndou and Others - the accused were arraigned in the Supreme Court on a charge of contravening certain statutory provisions. They pleaded not guilty and whilst the trial was in progress the Attorney-General stopped the prosecution pursuant to sec 8 of the Criminal Procedure

Act No 56 of 1955 ("the 1955 Act"), as a result of which they were entitled to a verdict in terms of the said section. One of not guilty was pronounced and they were discharged. On appeal it was not disputed that the verdict of not guilty in such circumstances was to be regarded as an acquittal on the merits - see p 671 G - H. (The disputed issue on appeal in that case was whether there was a "substantial identity" of the respective offences, an aspect which does not presently arise since the offence of culpable homicide featured in the charge in both instances.)

It is clear from these two decisions - and indeed others - that there must have been a trial or a prosecution, followed by an acquittal, before a plea of autrefois acquit can be sustained when an accused is again charged. (In this judgment I shall refer

either to "trial" or "prosecution" since they are for present purposes synonomous and interchangeable.)

A trial , though not defined in the Act, has a settled and well-recognised connotation:

> "'In a general sense, the term 'trial' denotes the investigation and determination of a matter in issue between parties before a competent tribunal, advancing through progressive stages from its submission to the court or jury to the pronouncement of judgment. When a trial may be said actually to have commenced is often a difficult question but, generally speaking, this stage is reached when all preliminary questions have been determined and the jury, or a judge in a non-jury trial, enter upon the hearing and examination of the facts for the purpose of determining the questions in controversy in the litigation.' Catherwood v. Thompson, (1958) O.R. 326, per Schroeder, J., at p.331."

(cited in the 1986 Supplement of "Words and Phrases Legally Defined", 2nd Edition (Butterworth), at page 316 s.v. "TRIAL"). This word is always to be

interpreted in the context in which it appears and in particular circumstances may have a more restricted meaning. Thus in R v Tucker 1953(3) S.A. 150 (A), in considering its meaning in sec 372(1) of the "Criminal Code" (Act 31 of 1917), Hoexter J.A. observed at 159 G - H:

> "I am not losing sight of the fact that as a general rule it is correct to say that a trial involves the decision of some question at issue and that a plea of guilty makes it unnecessary for a superior court to try any issue of fact. But in my opinion the word 'trial' in sec. 372, as in sec. 370, is used to denote the proceedings after arraignment, whether upon a plea of guilty or not guilty." (My underlining.)

"Prosecution", in turn, generally means:

> "A criminal action; a proceeding instituted and carried out by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime." (Black's Law Dictionary (5th. Ed.) 1099.)

With these prefatory general comments, I turn to examine the case as presented by Mr Farlam, on behalf of the appellant in this court. In essence it was that from the time that the appellant pleaded before the magistrate in terms of sec 119 the prosecution commenced; that the appellant was consequently from that point entitled to a verdict in terms of sec 106 of the Act; that the Attorney-General by his letter stopped the prosecution in terms of sec 6(b) of the Act; and that the magistrate thereupon found him not guilty. Thus, so it was argued, the special plea ought to have been upheld. The above three sections, which are relied upon and bear directly on the question, read as follows:

Sec 119:

"When an accused appears in a magistrate's court and the alleged offence may be tried by a superior court only or is of such a nature or magnitude

that it merits punishment in excess of the jurisdiction of a magistrate's court, the prosecutor may, notwithstanding the provisions of section 75, on the instructions of the attorney-general, whether in general or in any particular case, put the charge, as well as any other charge which shall, in terms of section 82, be disposed of in a superior court, to the accused in the magistrate's court, and the accused shall, ..., be required by the magistrate to plead thereto forthwith." (My underlining.)

Sec 106(4):

"An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted."

Sec 6(b)

"An attorney-general or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under section 8, may -

(a) .....

(b) at any time after an accused has pleaded, but before conviction, stop the prosecution in respect of that charge, in which event the court trying

the accused shall acquit the accused in respect of that charge: ...." (My underlining.)

In examining the contention that the plea during the sec 119 proceedings initiated, or was part of, the trial, one must in the first place consider how the procedure envisaged by sec 119 came to be introduced into the Act. It is a new section not to be found in the former 1955 Act. Sec 119 is the first of four new sections comprising Chapter 19 of the Act. They appear under the caption "Plea in Magistrate's Court on Charge Justiciable in Superior Court". It (sec 119) was introduced to enable the inquisitorial elements of secs 112 and 115 to be enlisted in a magistrate's court with reference to a charge justiciable by the Supreme Court as a matter of convenience and to avoid delays in the interest of all concerned. (Cf. S v Makama 1979(4) S.A. 104 (BH) 105 E

- F and S v Seleke en h Ander 1980 (3) S.A. 745 (A) 753 G - 754 A.) It is for this particular and restricted purpose that such a charge (i.e., one relating to an offence which may only be tried in a superior court) is put to an accused in the magistrate's court and he is required to plead to it. The other three sections in Chapter 19, which follow upon sec 119, implement this objective and ensure that, if there is to be a trial, the accused will in due course be arraigned in court for it to take place.

Throughout Chapter 19 the language of the sections bears out and makes plain the distinction between sec 119 "proceedings", as they are explicitly and consistently termed, and any subsequent arraignment or committal for "trial". Thus, for instance, sec 122 provides that:

"(1) Where an accused under section 119 pleads not guilty to the offence charged, the court shall act in terms of section 115 and when that section has been complied with, the magistrate shall stop the proceedings and adjourn the case pending the decision of the attorney-general.

(2) Where the proceedings have been adjourned under subsection (1), the attorney-general may -

(i) arraign the accused on any charge at a summary trial before a superior court or any other court having jurisdiction, including the magistrate's court in which the proceedings were adjourned under subsection (1); or

(ii) institute a preparatory examination against the accused,

and the attorney-general shall advise the magistrate's court concerned of his decision.

(3) The magistrate, who need not be the magistrate before whom the proceedings under section 119 or 122(1) were conducted, shall advise the accused of the decision of the attorney-general, and if the decision is that the accused be arraigned -

(a) in the magistrate's court concerned, proceed with the trial from the stage at which the proceedings were adjourned under subsection (1) or, if the accused

is arraigned on a charge which is different from the charge to which he has pleaded, require the accused to plead to that charge, and, if the plea to that charge is one of guilty or the plea in respect of an offence of which the accused may on such charge be convicted is one of guilty and the prosecutor accepts such plea, deal with the matter in accordance with the provisions of section 112, in which event the provisions of section 114(1) shall not apply, or, if the plea is one of not guilty, deal with the matter in accordance with the provisions of section 115 and proceed with the trial;

(b) in a regional court or a superior court, commit the accused for a summary trial before the court concerned."

(My underlining.)

The substance of these provisions similarly refutes the contention advanced on behalf of the appellant. Section 119, one need hardly repeat, refers to an alleged offence which may be tried by a superior court only. It is incongruous and

contradictory to argue that the trial commences with a plea in terms of sec 119 before a court lacking jurisdiction to hear the matter. And, apart from the absence of jurisdiction, the magistrate is in any event statutorily prohibited from proceeding to trial: he is obliged in terms of sec 122(1) "to stop the proceedings and adjourn the case." Moreover, as the quoted provisions of sec 122 clearly indicate , it is only after the proceedings in terms of sec 119 have been completed that the accused, if such be the decision, is committed for summary trial in a court selected by the attorney-general.

A further consideration serves to illustrate the fallacy of the appellant's contention. In terms of sec 119, the purpose of which is a further enquiry should an accused plead guilty or not guilty, an accused is

obliged to plead. The pleas he is entitled to raise are set out in sec 106 of the Act, one of which is that the court has no jurisdiction to try the offence. If it is so that the court at this stage is involved in a trial, as the appellant contends, such a plea, when proferred, would have to be upheld since in the nature of things it would be well-founded. On the appellant's argument the magistrate would then be bound in terms of sec 110(2) to adjourn the case to the court (the supreme court) having jurisdiction. Thus, if appellant's premise is sound, the avowed object of sec 119 proceedings could in this manner be frustrated. This could never have been the intention of the Legislature.

An argument along similar lines to that of the appellant in this case was advanced in a somewhat

different context before Milne J in S v Hendrix and Others 1979(3) S.A. 816 (D). The State proposed calling a witness, one Abdul Morera, who had featured as an accused with others in sec 119 proceedings and had pleaded not guilty. The trial was a sequel to such proceedings. The defence objected to his being called, submitting that he was not a competent witness for the prosecution. As it was put in the judgment at page 818 A- B:

> "The simple ground for this submission was that these proceedings, that is to say this trial, is a continuation of the s 119 proceedings and that Morera is still an accused person before this Court; alternatively, or as part of the same submission, that Morera, having pleaded to the charge which was put to him in terms of the proceedings under s 119 read with s 115, was entitled to a verdict in respect of that charge."

In rejecting this argument the learned judge said at page 819 C - F:

"In my view s 119, indeed the provisions of chap 19 of the 1977 Act, do not, where the accused pleads not guilty, envisage a trial nor that anything more shall be held than a preliminary enquiry in order to clarify the matters in respect of which the State and the accused are at issue. It is necessary for a 'charge' to be put to the accused in order for him to know what the State case against him is eventually going to be. It is necessary for him to 'plead' to that charge to indicate what his answer to that charge is. If his plea is one of guilty, then there is provision for the proceedings to continue to finality. If, however, he pleads not guilty then it seems to me quite clear that the proceedings thereafter are not trial proceedings. It is expressly provided in s 122 that the proceedings shall be stopped and the provisions of ss (2), (3) and (4) are merely procedural provisions which are formal preliminaries to the trial which is to be held thereafter. If in fact the subsequent trial envisaged in s 120 (2)(i) were a continuation of the s 119 enquiry or proceedings it would have been quite unnecessary to provide that the record of those proceedings shall form part of the record of the court in the trial. Nevertheless ss (4) expressly provides that that is the position, from which it is a necessary inference in my view that the trial is not a continuation of the same proceedings but fresh proceedings altogether."

Thus, for substantially the same reasons, the

court in that case ruled that the sec 119 proceedings could not be regarded as the start of, or part of, the subsequent trial. (See too S v Lubbe en Andere 1989(3) S.A. 245 (T).)

It remains to deal with certain other submissions of Mr Farlam.

He, as did counsel in the Hendrix case, sought to rely on sec 106(4), which has been quoted above. It, so it was submitted, states in unqualified terms that once an accused has pleaded he is entitled to demand that he be acquitted or convicted. And in the instant case, so the argument ran, since he was acquitted he cannot be tried again. This submission is manifestly unsound. It is clear that an accused person cannot claim to have been acquitted by a court which was not competent to try him and therefore that the plea, to which this subsection refers, is one tendered

at the commencement of a trial and not the plea to which sec 119 refers. (See too S v Hendrix (supra) at 818C - F.) This conclusion is confirmed by the opening and concluding sections of Chapter 15 of the Act in which the provisions relating to "The Plea" are set out. Section 105 implicitly refers to the charge being put to an accused at the commencement of the trial itself. And sec 108 provides that, if an accused tenders a plea other than one of guilty, he shall by such plea be deemed to demand that the issues raised by the plea be tried. But, as has been pointed out, upon a plea of not guilty in the sec 119 proceedings an accused has no such right: on the contrary, the magistrate is obliged in terms of sec 122(1) to stop the proceedings and adjourn the case pending the decision of the attorney-general.

Counsel next submitted that, should the attorney-general decide in terms of sec 122 (2)(i) to arraign the accused before the magistrate's court in which the sec 119 proceedings were held, the accused is not required to plead again. This, so it was submitted, indicates that the plea in the course of the sec 119 proceedings was a plea at the trial. Section 122(3)(a) - quoted above - provides that in such a case the magistrate's court concerned may proceed with the trial from the stage at which the proceedings were adjourned without, it follows, requiring the accused to plead again. But "proceed with the trial" cannot, for the reasons given, mean that it had already commenced. Sec 122(3)(a), in order to avoid an act of superfluity, in effect provides that in such a case the plea in the sec 119 proceedings is taken to be the plea at the trial in the magistrate's court concerned. As a

counter to this submission, counsel was asked why, if the interpretation of a plea in the sec 119 proceedings contended for by him is correct, an accused when arraigned in the Supreme Court or in some other court pleads again. His answer was that this is an unnecessary practice not authorised by any provision in the Act. Not so. Section 105, as has been mentioned, enjoins the prosecutor to put the charge to an accused before his trial is commenced, without any proviso in that section exempting the prosecutor from this duty should the charge have been previously put, and a plea recorded, in sec 119 proceedings.

In the course of the debate before us the question was raised whether sec 122(2) authorises the attorney-general to stop the proceedings after they have been adjourned by the magistrate in terms of sec

122(1) or whether the attorney-general is obliged to arraign the accused for trial or institute a preparatory examination. The factual position in this case is that the Attorney-General did not stop a prosecution because, as has been shown, none had commenced. Thus the pertinent question, correctly posed in reference to the facts of this case, is whether the attorney-general can decide against taking further action in a matter which has been the subject of sec 119 proceedings and has been adjourned and referred to him for consideration in terms of sec 122(1). Sec 122(2) is in my view no bar to his doing so. It postulates, and caters for, the situation where the attorney-general <u>does</u> decide to proceed with the matter and it enunciates the two options open to him: to arraign the accused on a charge or to institute a preparatory examination. It goes without saying that,

if the explanation given by an accused in his statement in terms of sec 115 at the sec 119 proceedings can be verified and establishes his innocence, or if for any other reason the attorney-general is satisfied that a prosecution is not warranted, he is not obliged to send the matter to trial or institute a preparatory examination. If that were the position, he would be obliged to go through the unnecessary formality of proceeding to trial only to stop the prosecution in terms of sec 6(b) as soon as the accused has pleaded. The relevant point in the instant case is that, should he decide not to prosecute at the stage when the sec 119 proceedings are adjourned and the case referred to him for his decision, and convey his decision to the accused, he would not be doing so at a time when he is "conducting a prosecution" in terms of sec 6. For this reason a right to claim an acquittal in terms of

paragraph (b) of this section would not accrue. Thus, the intimation by the Attorney-General in this case to "refuse to prosecute", if it is to be taken to mean that he was not proceeding with the matter, did not and could not preclude him from subsequently changing his mind and charging the accused, as he did, in the regional court on the count of culpable homicide. Such an intimation can have no more relevance or efficacy than the withdrawal of a charge before plea, in which event an accused can always be charged again.

The special plea was, in my view, correctly rejected by the trial court. The appeal is dismissed.

M E KUMLEBEN
JUDGE OF APPEAL

JOUBERT JA)
SMALBERGER JA)
VIVIER JA) - Concur
FRIEDMAN AJA)