# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
# JUDGMENT

**Not Reportable**
Case no: 276/13

In the matter between:

**NKHUMELENI DAVID MUDAU** **Appellant**

and

**THE STATE** **Respondent**

**Neutral citation:** *Mudau v S* (276/13) [2013] ZASCA 172 (28 November 2013)

**Coram:** Cachalia, Shongwe, Majiedt JJA

**Heard:** **18 November 2013**

**Delivered:** **28 November 2013**

**Summary:** **Criminal Law and Procedure – sufficiency of a statement in terms of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977 (the Act) – Whether the questioning by the presiding officer was adequate to justify a conviction – applicability of s 312 of the Act – court has a discretion to remit or set aside conviction and sentence if remittal will result in an injustice.**

## ORDER

**On appeal from:** Limpopo High Court, Thohoyandou (Hetisani J sitting as court of first instance):

The appeal is allowed and the convictions and sentences are set aside.

## JUDGMENT

**Shongwe JA (Cachalia and Majiedt JJA concurring)**

[1] On the morning of 10 November 2002 the appellant and one Avhashoni Rasilingwane (the deceased) were found lying side by side on the lawn of one Patrick Khwashaba, near Makwarela Location, in the district of Thohoyandou. The deceased was dead and the appellant was injured on his head and on his hand. The two had apparently met each other the night before at a beer-hall where they had been imbibing sorghum beer together.

[2] The appellant was taken to the local Tshilidzini hospital but subsequently charged with murder and rape of the deceased. Upon a plea of guilty on both charges, the appellant was convicted as charged and sentenced to imprisonment for life on each of the counts. The sentences were ordered to run concurrently (Hetisani J). The appeal before us is against sentence only with the leave of the court below (Makhafola J), because Hetisani J has since retired.

[3] While preparing for this appeal it appeared that the provisions of s 112(1)*(b)*, of the Criminal Procedure Act 51 of 1977 (the Act) were not complied with and also that the provisions of s 113 of the Act should have been

applied. Both counsel for the State and the appellant were invited to provide supplementary heads of arguments to comment on the sufficiency and adequacy of the questioning by the trial judge in view of the provisions of s 312 of the Act which provides as follows:

'(1) Where a conviction and sentence under section 112 are set aside on review or appeal on the ground that any provision of subsection (1)*(b)* or subsection (2) of that section was not complied with, or on the ground that the provisions of section 113 should have been applied, the court in question shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 113, as the case may be.'

[4] I now turn to what transpired during the trial in the court below. After the indictment was put to the appellant, who was legally represented – although I am constrained to add that the quality of the representation was poor – he pleaded guilty, as indicated above, and a statement in terms of s 112(1)*(b)* of the Act was read into the record. For completeness sake I will quote it in full – it reads as follows:

'1. The accused pleads guilty to both counts, namely the count of murder and that of rape.

2. He admits that on or about the 9th November 2002 and at or near Makwarela Township, in the district of Thohoyandou, he went to the beer-hall for drinking.

3. He found the deceased one Avhashoni Elisa Rasilingwane there and at about 23h00 they left the beer-hall together after enjoying the sorghum beer.

4. On the way home, the accused demanded to have sex with the deceased and she refused. The accused then forced the deceased to have sexual intercourse with him.

5. A fight ensued, the deceased hit the accused with a brick all over his head and on the hand. In the event, the accused was injured.

6. Using a fencing pole (standard), the accused assaulted the deceased all over her body until she died.

7. Both the accused and the deceased were found at Matodzi Patrick Kwashaba's house the following morning at 5h00 – the accused injured and the deceased, dead.

8. The accused know that the intentional killing of another is wrongful and unlawful.

9. The accused further understand that having sexual intercourse with a woman without her consent is unlawful and punishable by law.

DATED at THOHOYANDOU on this 4th DAY of JUNE 2003.'

[5] The contents of this statement are merely a regurgitation of the summary of the substantial facts alleged by the State. The presiding judge then put questions to the appellant for clarification. The first question was 'where did the sexual intercourse take place?; the answer was – 'It was on the way home away from the beer-hall'; the judge wanted to know whether it was 'before or after the assault?'. Thereafter there was an interruption, however, eventually no answer was proffered to this question. The next thing, on record was when the judge said that the deceased assaulted the appellant and that the deceased was the first to hit the appellant with a brick – the judge then asked whether the appellant sustained any injuries – the answer was that he was injured on the forehead, and was treated at a hospital. The judge also said that no other weapons were used besides the brick and pole used for fencing – and concluded that those were not weapons in the true sense.

[6] The prosecutor accepted the plea of the appellant and handed in the statement as an exhibit – he also handed in a photo album and a post mortem report, the legal representative did not object to the handing in of those documents. The judge proceeded to hand down judgment and convicted the appellant as charged.

[7] Section 112(1)*(b)* reads as follows:

'(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–

(a) …

(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.'

It is important to note that the provisions of s 112(1)*(b)* are peremptory in that the presiding judge must question the accused person with reference to the alleged facts of a case for purposes of ascertaining whether the accused admits the allegations in the indictment to which he pleaded guilty. However s 112(2) of the Act, provides that if an accused or his legal representative hands in a written statement in which he sets out the facts which he admits, the court may, *in lieu* of the questioning under subsec (1)*(b)*, convict the accused on the strength of such statement and sentence him provided the court is satisfied of his guilt. In the present case the court questioned the appellant in order to clarify the statement and received no satisfactory answers – and in some instances received no answer at all – the judge, notwithstanding, proceeded to convict the appellant.

[8] Murder and rape are crimes which require specific intent – see *Jonathan Burchell* and *John Milton* – Principles of Criminal Law 3rd Edition 667 and 699 – therefore the court ought to be satisfied not only that the accused committed the act complained of, but also that he/she committed it unlawfully and with the necessary *mens rea* (see *S v Carter* 2007 (2) SACR 415 (SCA) para 26; *S v Mshengu* 2009 (2) SACR 316 (SCA) para 7) – In the statement by the appellant it is simply stated that: 'the accused is aware that the intentional killing of another is wrongful and unlawful'. The appellant does not admit that he knew

that it was wrongful and unlawful and that he hit the deceased with the necessary intention. The admission must be accompanied by an understanding of what the admission embraces (see *S v Mbuyisa* 2012 (1) SACR 571 (SCA) para 7). Section 112(1)*(b)* contemplates admissions of facts and not an admission of law or a legal conclusion – see *Mshengu*, supra, at para 7.

[9] The legal position is clear that the purpose of questioning an accused person – after a plea of guilty – is for the court to be satisfied that the accused is indeed guilty of the offences he pleaded guilty to. If not, the provisions of s 113 of the Act must be invoked. It is not only to ascertain from the accused whether he admits the allegations in the indictment. He must admit all the elements of the offences with which he is charged and must be encouraged to tell his story of what actually happened – see *Mkhize v The State & another* 1981 (3) SA 585 (N) at 586D-587A; where Broome J referred to a passage in *S v Witbooi & others* 1978 (3) SA 590 (T) at 594H-595A where Boshoff AJP said:

'Section 112 (1) *(b)* and s 112 (2) and (3) are primarily concerned with the facts of the case and to ensure that an accused person is guilty of the offence to which he has pleaded guilty and also to ensure that he is properly sentenced on the true facts of the case. It follows that, where a magistrate acts under the provisions of these sections, he should follow a course that would enable him to ascertain the true facts of the case. The course recommended is to question the accused himself with reference to the alleged facts of the case in order to ascertain what his version is so that the prosecutor can know whether the account of the accused agrees with the evidence which he has at his disposal. If his account does not agree with the evidence which the prosecutor has available, the prosecutor may then decide to place his evidence before the court and it will then be for the court to adjudicate upon the facts of the case.' (See *S v Mshengu*, supra, para 7).

[10] In the present case the judge did not inquire on the state of mind of the appellant to determine *mens rea* at the time of the alleged murder and the rape – nor did the judge deal with his level of perception then. There is undisputed

evidence that the appellant was 'overly drunk' – all this evidence came up only during mitigation of sentence and not during questioning by the presiding judge. In S v M 1982 (1) SA 240 (N) at 242D-E Didcott J observed that –

'Accused persons sometimes plead guilty to charges, experience shows, without understanding fully what these encompass. The danger of their doing so is obvious in a society like ours, which sees many who are illiterate and unsophisticated coming before the courts with no legal assistance. The danger is greater still, it goes without saying, when such a one is a young child with a limited grasp of the proceedings.'

The latter portion of his observation may not be relevant to the present case, however, the essence of his observation cannot be more true.

[11] It is clear that the provisions of subsec (1)*(b)* or subsec (2) of s 112 were not complied with because of the inadequacy and insufficiency of the questioning and therefore that the provisions of s 113 ought to have been invoked and a plea of not guilty entered on both counts.

[12] In conclusion I find that the statement in terms of s 112(1)*(b)* is insufficient and the questioning by the presiding judge was inadequate to address the real issues of whether or not the appellant intended pleading guilty to both charges and whether indeed he admitted all the elements of the offences to justify a conviction. This court retains the discretion not to order a remittal as such an order would lead to an injustice *(Mshengu*, supra, paras 18 and 19) The appellant was convicted and sentenced in 2003, he has been in custody ever since he was arrested on 10 November 2002 – although bail was fixed for him, he could not afford to pay it.

[13] In the result the appeal is allowed and the convictions and sentences are set aside.

**J B Z SHONGWE**
**JUDGE OF APPEAL**

APPEARANCES

FOR APPELLANT: M J Manwadu

Instructed by:

Justice Centre, Thohoyandou;

Justice Centre, Bloemfontein

FOR RESPONDENT: A Madzhuta

Instructed by:

Director of Public Prosecutions, Thohoyandou;

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