Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

HIGH COURT REF NO: 953/2003
CASE No: 4/6004/2002
MAGISTRATE'S SERIAL No: 60/2003

In the matter of

THE STATE

and

QCINIKHUYA NYANGA

REVIEW JUDGMENT DELIVERED : 1 AUGUST 2003

MOOSA, J:

Introduction:

1. The accused was charged in the district court of Wynberg with one count of robbery. He pleaded guilty. He was not legally represented. He was questioned by the magistrate in terms of Section 112(1)(b) of the Criminal Procedure Act, No 51 of 1977 ("the Act"). The magistrate was not satisfied that the accused admitted all the allegations of robbery in the charge sheet. He recorded a plea of not guilty in terms of Section 113 of the Act and asked the State to proceed with the prosecution. The prosecutor sought a postponement. He informed the court that the complainant had returned overseas and he was unable to lead any evidence. The application was refused and the State closed its case. The accused elected not to testify or call any witnesses and closed his case. The State applied for a conviction on the lesser charge of theft. The court, on the basis of the admissions made at the Section 112(1)(b) enquiry, convicted the accused on a competent verdict of theft and sentenced him to six months imprisonment.

2. The senior control magistrate was not satisfied that the conviction was in accordance with justice and submitted the matter for special review to this division in terms of Section 304(4) of the Act. She was not the presiding officer. The grounds of review were formulated as follows:

> *"It is of concern to me that at no stage was it admitted or*

proved that the handbag was the property or in the lawful possession of Daniela Accettura or that no right or permission had been given for the removal of the handbag. It is further of concern to me that the accused's participation consisted only of running away with the main perpetrator and the admission (in response to a somewhat leading question that they would have shared in the proceeds of the spoils ("buit"). There is no indication whether this was ever discussed with the main perpetrator or whether this was just a hope on the part of the accused before court. The matter was discussed with the presiding officer who is adamant that the conviction is in accordance with justice. It is my respectful submission that the inferences drawn by he magistrate in this matter do not support a conviction and I humbly request that the conviction and sentence be set aside."

3. The presiding officer was requested to furnish his reasons for the conviction. In his response he said:

"The court was satisfied that accused admitted to all the allegations of theft and that theft was a competent verdict and the only conclusion the court could come to was to a conviction of

theft."

4. In his plea explanation the accused admitted that he was present on the date and at the place alleged in the charge sheet. He explained that he and a friend had walked past the complainant. The friend took the handbag that had been laying next to her. Both of them ran away. The accused was arrested but the friend got away with the handbag. In an answer to a question the accused said that he and his friend would have shared in the proceeds of the spoils. He accepted that the bag contained R4000. He also admitted that what he did was wrong.

The Issue:

5. The crux of the issue is whether or not the presiding officer was correct in convicting the accused on a charge of theft which, in terms of Section 260, is a competent verdict to a charge of robbery. The conviction is based on the admissions made by the accused in terms of Section 112(1)(b) and which was elevated to proof of such allegations in terms of Section 113(1). (See **S v Nyembe** 1978 (1) SA 311 (NC) at 312H; **S v Mkhize** 1978 (1) SA 264 (N) at 267B-F; **S v Jacobs** 1978 (1) SA 1176 (C) at 1117B-C.) It is a trite principle of law that unsworn statements made by the accused during questioning in terms of Section 112(1)(b) does not constitute evidence *per se*, but can be regarded as *sui generis* material of an evidential nature

designed to establish the guilt or otherwise of the accused. But in the case where the plea is converted from one of "guilty" to "not guilty" in terms of Section 113(1), the *sui generis* material which constitute admissions of those allegations in the charge stands as proof of such allegations and as such acquires evidentiary value.

6. In **S v Hendricks** 1995 (2) SACR 177 (A) at 178j-179a-b, **Marais, JA** held that

> *"[T]he effect of the proviso to Sec 113(1) of the Act was that factual allegations adverse to himself made during the enquiry for which Sec 112 provides, 'stand as proof in any court' of those allegations, provided of course that they are not allegations which the court is satisfied are incorrectly admitted allegations. See* ***S v Ncube; S v Mphateng en 'n Ander*** *1981 (3) SA 511 (T) at 513E-G."*

7. 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 1117B.) 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. (See **S v Lebokeng** 1978 (2) SA 674 (O) at 675G-H; **S v Hendricks (supra)** 187b-e; **S v De Klerk** 1992 (1) SACR 181 (W) at 183a-b; **S v Diniso** 1999 (1) SACR 532 at 533g-h.)

Preliminary Issues:

8. Before deciding whether such conviction was in accordance with the law or not, there are a number of other preliminary issues which have to be determined. The first of which is whether the accused could be convicted on a lesser charge of theft on the basis of his Section 112(1)(b) admission, without evidence being led. Secondly, whether the accused can be convicted of a lesser, but competent charge without being warned of such eventuality. The third is whether the court can draw inferences from the Section 112(1)(b) admissions to establish common purpose. Fourthly, whether the admissions made by the unrepresented accused to a leading question concerning the sharing in the proceeds of the crime, vitiated the proceedings and caused the hearing to be unfair. Lastly, whether all the elements of

the charge of theft have been proved beyond reasonable doubt. This court will deal with these issues in *seriatum*.

9. The first issue is whether the accused can be convicted on a lesser, but competent charge of theft on the basis of Section 112(1)(b) admissions after Section 113(1) is applied and no evidence is tendered.

    9.1 The accused was charged with robbery. No alternative charge was put to him. In terms of Section 260 of the Act, theft is a competent verdict of robbery. The prosecutor sought to proceed with the proof of the charge of robbery. The court, at the stage of the Section 112(1)(b) enquiry was therefore not competent to consider a conviction on a lesser charge. The prosecutor who was *dominis litis* was entitled to proceed with proving the charge of robbery. (See **S v Hlokulu** 1988 (1) SA 174 (C); **S v Sethoga** 1990 (1) SA 270 (A); **S v Seleke** 1980 (3) SA 745 (A).)

    9.2 Because the complainant was not available to give evidence the State was unable to prove the charge of robbery. What remained were the Section 112(1)(b) admissions which by then had been elevated to proof of those allegations in terms of Section 113(1). Such admissions therefore had the same attributes and value as objective facts. At this stage of the

proceedings, the court was entitled to consider whether the accused was guilty of a lesser charge to the one to which a plea of not guilty was entered in terms of Section 113(1). **Zietsman, J** (as he then was) in **S v Mathe (supra)** at 669E said as follows:

> *"Teoreties mag daar gevalle wees waar 'n skuldigbevinding ingebring kan word ten spyte van die aantekening van 'n pleit van onskuldig ingevolge art 113 van Wet 51 van 1977, en die versuim deur aanklaer om verdere getuienis aan te bied."*
>
> (See also **S v Ncube**; **S v Mphateng en 'n Ander (supra)**.)

9.3 In that matter the court was referring to the same charge to which a plea of not guilty was recorded. In the present instance the consideration is a lesser but competent charge to the one to which a plea of not guilty was recorded.

9.4 In my view, nothing prevented the trial court from convicting the accused on the basis of Section 112(1)(b) admissions, without further evidence being tendered, on a lesser, but competent charge of theft which was a competent verdict of robbery in respect of which the court had

recorded a plea of not guilty in terms of Section 113(1). I am strengthened in this regard by the *obiter* remarks of **Zietsman, J** in the **Mathe** case **(supra)** that it is theoretically possible, although very seldom in practice possible, of convicting an accused of the same charge on which a plea of guilty has been tendered, but a plea of not guilty has been recorded and no further evidence has been led at the trial.

10. The second issue is whether an unrepresented accused can be convicted of a lesser, but competent charge without having been warned of such eventuality.

10.1 The answer to this issue is whether the accused has been prejudiced or not. The accused pleaded guilty to the count of robbery. He was found guilty of a lesser charge of theft. In **S v Mwali** 1992 (2) SACR 281 (A) the court held that it would be proper to substitute a competent verdict notwithstanding the fact that the accused had not been charged in the alternative with such offence and the possibility of such a conviction had not at any stage been drawn to his attention. The court held further that, on the facts of that case, there had been no prejudice to the accused as a result of the failure to so charge him in the alternative or to inform him of the possibility of a conviction on a competent charge.

10.2 The prosecutor's acceptance of a plea of guilty on an alternative or lesser charge is a *sui generis* act which limits the ambit of the *lis* between the State and the accused. (**S v Ngubane** 1985 (3) SA 677 (A) at 683E.) Section 113(2) reserves to the prosecution, as *dominis litis*, the right to accept a lesser charge than the one on which a plea of not guilty has been recorded, provided such election is done prior to any evidence being led. (In this regard see **Du Toit et al** : Commentary on the Criminal Procedure Act, page 17-16A.)

10.3 In the present case, the prosecution, as *dominis litis*, accepted a plea of guilty on a charge of theft without leading evidence, and without having informed the accused of the fact that he could be convicted of a lesser, but competent charge. The critical consideration is whether the accused has been prejudiced.

10.4 The accused initially pleaded guilty to a charge of robbery. Even if he had been informed that he could be convicted of a charge of theft, it is unlikely that his conduct of the case would have been different. There is no indication that he has been prejudiced. The court is therefore of the view

that the accused, who was unrepresented, can be convicted of a charge of theft without having been warned of such eventuality.

11. The third issue is whether the court can draw inferences from Section 112(1)(b) admissions after the court applied the provisions of Section 113(1) in order to establish common purpose.

11.1 Common purpose is a conclusion of law which is established from the proven facts. Because the Section 112(1)(b) admissions are elevated to facts in terms of Section 113(1), nothing prevents the court from drawing inferences from such facts to establish other facts, provided they are the only reasonable inferences to be drawn from such facts. (**R v Blom** 1939 (AD) 188 at 202-203; **S v Ncube**; **S v Mphateng en 'n Ander (supra)** at 513A-I to 514A; **S v Goitsemang** 1997 (1) SACR 99 (O) at 102h.)

11.2 In the instant case it was the accused and a co-perpetrator who were involved. The main perpetrator managed to escape the net of justice. The accused, who played a secondary role in the commission of the crime, was apprehended. The accused admitted that he ran away with

the co-perpetrator when the latter grabbed the complainant's bag. He also admitted that he was going to share in the proceeds of the spoils.

11.3 The question is whether the facts admitted are adequate to establish common purpose. The concern raised by the senior control magistrate is that there is no indication that the *"sharing of the spoils"* was ever discussed with the co-perpetrator. She submitted that it could merely be a hope on his part. It is trite that in the case of common purpose there need not necessarily be a pre-planning of the commission of the offence by co-conspirators. The common purpose can arise at the spur of the moment and can be inferred from the surrounding circumstances. (**S v Safatsa and Others** 1988 (1) SA 868 (A) at 898A-B.)

11.4 The court is satisfied that the admitted facts and the inference drawn from such facts are sufficient to found a conclusion of law that the accused and his co-perpetrator had a common purpose to commit the crime. There does not have to be a causal connection between the conduct of the accused and the event for the operation of a common purpose. It would be sufficient if the accused identifies himself with the event. (See **S v Safatsa (supra)** at 901I.)

12. The fourth issue is whether the leading question eliciting an incriminating answer concerning the *"sharing of the spoils"*, vitiates the proceedings or makes the proceedings unfair.

12.1 Leading questions should as far as possible, be avoided. It is desirable to ask the accused what happened and how the offence was committed. The presiding officer must ensure that through a process of questioning the accused is confined to the point in issue and particularly to the allegations in the charge. (See **S v Phundula**; **S v Mazibuko; S v Niewoudt**; 1978 (4) SA 855 (T) at 861C-F; **Mkhize v The State and Another; Nene and Others v The State and Another** 1981 (3) SA 585 (N) at 586H; **S v Gwenya** 1995 (2) SACR 522 (E) at 527f.)

12.2 After the accused had described what had happened, the presiding magistrate asked whether he had agreed to share in the proceeds. The response was affirmative. The phrasing of the question was unfortunate. It could have been phrased more indirectly and appropriately. It is clear that the presiding officer was attempting to concentrate the explanation on the proceeds of the spoils.

12.3 The leading question must be seen against the background of the fact that he had pleaded guilty, that he was granted an opportunity to explain what had happened and that he was in the company of the main perpetrator with whom he ran away after the handbag was taken and he admitted that they had stolen the handbag. The latter admission was unsolicited.

12.4 What is normally frowned upon is when leading questions are asked to elicit each separate allegation in the charge. This did not occur in the instant case. I am not convinced that, in the light of the particular circumstances, the leading question was such as to vitiate the proceedings or make them unfair.

13. Lastly, whether all the elements of the offence of theft have been proved beyond reasonable doubt.

13.1 The senior control magistrate expressed her concern that at no stage was it admitted or proved that the handbag was the property or in the lawful possession of Daniela Accettura or that no right or permission had been given for the removal of the handbag. The accused admitted that the handbag lay

above the head of a woman. When asked whether the complainant had resisted when his friend took the handbag, he replied that once they ran away, she had stood up. He also admitted that what he had done was wrong. From these facts the only reasonable inference that can be drawn is that the handbag was the property or in the lawful possession of the complainant, Daniela Accettura and that he and his friend had no right or permission to remove the handbag from her possession.

13.2 The circumstances in **S v Mathe (supra)** were similar to the present case except that in the **Mathe** case **(supra)** the court found that all the elements of the lesser charge were not proved. In that case the accused was charged with housebreaking and theft and he pleaded guilty. After questioning a plea of not guilty was recorded in terms of Section 113. No evidence was led and the accused was convicted of theft. On review the court held that there was no evidence to infer the intent to steal. The accused's admissions and allegations were not sufficient to conclude that it was the only reasonable inference to be drawn. **Zietsman, J** set the test at p 669H as follows:

"Wat die hof dan moet doen is om die beskuldigde se erkennings en sy versuim om getuienis af te lê te oorweeg en te beoordeel, en homself dan af te vra

of al die elemente van die misdaad wat die beskuldigde nie erken het nie bo enige redelike twyfel teen hom bewys is."

13.3 In the instant case the court recorded a plea of not guilty to robbery because the allegations of assault and force were not admitted. The court found the accused guilty of theft. I am satisfied that in the instant case all the elements of theft have been proven beyond reasonable doubt. (See also **S v Talie** 1979 (2) SA 1003 (C) at 1004G-H; **S v Molauzi** 1984 (4) SA 738 (T) at 742F-H.)

Conclusion:

14. In the premises I am of the view that the conviction and sentence was in accordance with justice and in the circumstances both the conviction and sentence is confirmed. I might mention that this case has raised a number of novel issues and the senior control magistrate was justified in submitting the matter for special review in terms of Section 304(4) of the Act.

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E MOOSA

N C Erasmus: I agree.

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N C ERASMUS