THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 446/08

In the matter between:

SIPHESIHLE PROTAS MSHENGU **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Mshengu v the State* (446/2008) [2009] ZASCA 65 (29 May 2009)

Coram: Jafta, Ponnan and Mhlantla JJA

Heard: 13 May 2009

Delivered: 29 May 2009

Summary: Plea of guilty in terms of s 112 of the Criminal Procedure Act 51 of 1977 – the requirements therefor restated.

ORDER

On appeal from: High Court Petermaritzburg (Natal Provincial Division, (Van Niekerk AJ and Moleko J concurring)

In the result the following order is made:

1. The appeal is allowed and the conviction and sentence are set aside.

JUDGMENT

JAFTA JA (Ponnan and Mhlantla JJA concurring)

[1] On 22 September 2004, the appellant, a 13-year-old, quarrelled with a 14-year-old boy and stabbed him once in the chest with a knife. The victim died as a result of the injury inflicted by the appellant. The next day the appellant was arraigned before the regional court on a charge of murder. He was represented by an attorney at the trial. He pleaded guilty to murder and a statement setting out the basis of his plea was tendered in terms of s 112 of the Criminal Procedure Act 51 of 1977. He was duly convicted on his plea of guilty and sentenced to eight years' imprisonment.

[2] He appealed against the conviction and sentence to the Pietermaritzburg High Court (Van Niekerk AJ, Moleko J concurring). The conviction was challenged on the basis that the statement tendered did not satisfy the requirements of s 112(2) in that it failed to admit that the appellant was criminally liable for his conduct. Accordingly, it was argued, that the magistrate should not have been satisfied that the appellant was indeed guilty. The sentence was attacked on the ground that it was excessive.

[3] The appeal against conviction was dismissed but the sentence imposed by the trial court was set aside. The matter was remitted to the trial court for sentence to be considered afresh. This appeal is with the leave of the high court.

[4] Two issues arise in this mater. The first issue is whether, in view of the appellant's age, the statement tendered on his behalf complied with s 112(2) of the Act. If not, whether the matter should be remitted to the trial court following the setting aside of the conviction.

[5] Before the Act was enacted the prosecution was required to lead evidence in all trials, including cases where the accused had pleaded guilty.[1] Section 112 of the Act introduced a different procedure that dispensed with the leading of evidence where a plea of guilty is tendered.[2] However, Parliament sought to protect accused persons against the consequences of convictions based on incorrect pleas of guilty by including in the section two safeguards designed to determine whether a plea of guilty was properly tendered.[3] The primary purpose of the written

[1] *R v Nathanson* 1959 (3) SA 124 (A) and *S v Roux* 1975 (3) SA 190 (A).
[2] The relevant part of the section is quoted below.
[3] *S v Naidoo* 1989 (2) 114 (A).

statement in terms of s 112(2) is to set out the admissions of the accused and the factual basis supporting his or her guilty plea.

[6] Section 112 provides:

'(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 [R1500], 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.

(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.'

[7] Section 112(2) requires that the statement must set out the facts which he admits and on which he has pleaded guilty. Legal conclusions will not suffice. The presiding officer can only convict if he or she is satisfied that the accused is indeed guilty of the offence to which a guilty plea has been tendered. If not, the provisions of s 113 must be invoked.

[8] The statement tendered by the appellant in this mater must be examined against the above backdrop. It reads:

'2. The charge has been explained to me and I understand the charge that is being brought against me. I was not forced or influenced by any person to plead guilty. I am making this statement freely and voluntarily in front of my mother Ester Mshengu. My explanation is as follows:

3. I admit that I killed Nkosikhona Ngobese, a 14 year old male person, on the 22nd day of September 2004 at and or near Idube Road near House No 324 Mpophomeni in the regional division of Kwa-Zulu Natal. On the day in question I had an argument with the deceased. As a result of the argument I then took out the knife from the motor vehicle, went straight to him and stabbed him once in the chest. The deceased fell on the ground and at that stage he was bleeding. The deceased died as a result of the wound and bleeding. I then ran away. Few minutes later I was apprehended by members of the community who called the police. I was then arrested and charged with murder.

4. I admit that my actions in stabbing the deceased with a knife resulted in the deceased's death. Further to the above I admit that my actions were unlawful and intentional.

5. I admit that my actions at the time of the commission of the offence were unlawful and intentional and that I intended to cause the death of the deceased.'

[9] The above statement does not admit the charge in all of its ramifications. Section 112 requires as much. It amounts instead to a simple regurgitation of what must have been the content of the charge sheet. The accused in this particular instance is rebuttably presumed to be criminally non-responsible. The burden of rebutting this presumption rests on the prosecution. An important step in the proceedings was to ascertain whether his development was sufficient to rebut the presumption. That plainly did not occur. The prosecution would obviously have been relieved of that obligation had an appropriate

admission been made by the accused. That likewise did not occur. No evidence capable of rebutting that presumption had been placed before the magistrate. When regard is had to the record in its entirety, it is obvious that none who were involved in the trial were alive to the presumption of criminal non-responsibility, that was in operation in respect of this child.

[10] What was said in the statement was too terse and open to the construction that, with the benefit of hindsight and the experience of finding himself in a courtroom, he knew that he had done wrong. The statement told the magistrate nothing about his state of mind at the time of the stabbing or of his level of perception then. Nor, if he was mature enough to answer for his behaviour. For, as it was put by Didcott J in *S v M* 1982 (1) SA 240 (N) at 242 D-E:

‘Accused persons sometimes plead guilty to charges, experience shows, without understanding fully what these encompass. The danger of 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.

[11] Before us counsel for the state conceded that standing on its own the statement was deficient in this important respect. He did suggest that any such deficiency was cured by the fact that the child had legal representation. I cannot agree. On the facts of this case, there appears to be no outward manifestation that counsel appreciated that this issue was a live one. One can hardly therefore take any comfort from that.

[12] It follows that the conviction cannot stand and must be set aside.

[13] The next issue that calls for consideration is whether the course suggested in s 312 of the Act should be followed in this case. If a

conviction is set aside solely on the basis that s 112 was not complied with the section requires that the matter be remitted to the trial court for it to comply with or act in terms of s 113. Section 312(1) provides:

'(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.'

[14] In the past the language of the section has been construed to mean that its provisions were peremptory.[4] In *S v Arendse and Another*[5] the Cape High Court held that s 312 was peremptory but declined to remit the case because, in its opinion, it was clear that the remittal would serve no purpose. The court said: [6]

'It seems to me that, notwithstanding the provisions of s 312 (1), that section does not compel this Court to commit a fatuity. The Act cannot intend that this Court must remit, in a case where all are *ad idem*, ie the State is ad idem and the Court agrees with the State and that is also the attitude of the appellants' representative that no conviction can accrue in this case. It seems to me that in those circumstances no Court is even compelled to follow a course and give an order that certain proceedings must now take place which are pointless, can have no purpose and can have no outcome, other than the acquittal of the accused.'

[15] The question that arises is whether the language of the section is indeed peremptory. The construction that favours the view that it is peremptory is influenced by the use of the word 'shall' in the section. The word does not, by itself, conclusively determine that a provision is peremptory. The courts have found it impossible to lay down a conclusive

[4] *S v Khupiso; S v Africa* 1979 (2) SA 605 (O).
[5] 1985 (2) SA 103 (C) at 108F.
[6] Ibid p 107J-108F.

test.[7] A court called upon to determine whether a particular provision is peremptory or directory must construe the language of the concerned provision in the context, scope and object of the Act of which it forms part.[8] Thus in *Maharaj and Others v Rampersad*[9] this court rejected the argument that 'shall' in the context of the enactment it was concerned with indicated that the provision was mandatory. The court said:[10]

'[Appellant's counsel] pointed out that the regulation used the word "shall" – translated in the Afrikaans version by the word "moet" – in relation to the requirement of attaching to the application a plan or map tracing and, on the authority of such decisions as *Messenger of the Magistrate's Court, Durban v Pillay* 1952 (3) SA 678 (A), and *Feinberg v Pietermaritzburg Liquor Licensing Board* 1953 (4) SA 415 (A) at p 419, he contended that this was a "strong indication" that the requirement was peremptory. In the former of the two cases referred to immediately above Van den Heever JA described the word "moet" in Kantian terms as embodying the "categorical imperative". It would be a work of supererogation to refer to the long list of examples in our reported case-law where that word, in the light of considerations pointing to another conclusion, has had to surrender this resounding accolade and been reduced to the status of a mere directory verb.'

[16] In addition to statutory context, the section must be construed consistently with the Constitution and if possible it must be given a construction which will not be inconsistent with an accused's fair trial rights. Section 39(2) of the Constitution obliges every court to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation. In *Fraser v ABSA Bank Ltd* (National Director of Public Prosecutions as Amicus Curiae) the Constitutional Court said:[11]

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[7] *Leibbrandt v South African Railways* 1941 AD 9.
[8] *Charlestown Town Board v Vilakazi* 1951 (3) SA 361 (A).
[9] 1964 (4) 638 (A).
[10] Ibid p 643G-644B.
[11] 2007 (3) SA 484 (CC) para 47.

‘The question raised by this application is whether the Supreme Court of Appeal’s interpretation of s 26 [of the Prevention of Organised Crime Act] has failed to promote the spirit, purport and objects of the Bill of Rights in terms of s 39(2). …Section 39(2) requires more from a Court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights, like the rights to a fair trial in s 35(3), which is fundamental to any system of criminal justice, and of which the rights to legal representation and against unreasonable delays are components. The spirit, purport and objects of the protection of the right to a fair trial therefore have to be considered.’

[17] The purpose of s 312 is to prevent an injustice which may occur if an accused person were to escape punishment for his or her crime only because his or her conviction was set aside on the ground that there was a failure to comply with s 112 of the Act. But an injustice cannot occur where the accused has served the entire sentence by the time the conviction is set aside on appeal. Nor can it occur where a fresh conviction cannot be achieved following a remittal to the trial court. To construe s 312(1) in the manner that renders its provisions peremptory may result in an injustice or even an infringement of an accused person’s right to a fair trial. There can be no justification for ordering that an accused person, who has already served the entire punishment, be subjected to a second trial. Such an order would be inconsistent with the right to a fair trial. In my view it could never have been the intention of the legislature that a court is obliged to comply with the section irrespective of the injustice or unfairness that it may cause. I therefore conclude that s 312(1) is not peremptory.

[18] The course prescribed by the section must, however, be followed unless the court on review or appeal is of the view that it would lead to an injustice or would be a futile exercise. The court retains the discretion not to order a remittal if the circumstances of the case are such that the remittal will be inappropriate.

[19] In this matter the appellant had served more than two years of the original sentence imposed by the trial court when he appeared before it for re-sentencing. Having had regard to a probation officer's report and the time spent by the appellant in detention, the trial court imposed a sentence of three years' imprisonment wholly suspended for five years on certain conditions. There has already been a remittal of the matter to the trial court which considered it appropriate to impose a non-custodial sentence. In these circumstances it would be unfair, in my view, to order a remittal of the case once more.

[20] In the result the appeal is allowed and the conviction and sentence are set aside.

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C N JAFTA
JUDGE OF APPEAL

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