THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 00093/2015

Reportable

In the matter between:

RICHARD NEGONDENI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Negondeni v the State* (00093/15) [2015] ZASCA 132 (29 September 2015)

Coram: Leach, Willis and Mathopo JJA

Heard: **28 August 2015**

Delivered: **29 September 2015**

Summary: Criminal trial – accused given no warning of prospect of minimum sentence – accused having incompetent legal representative selected by the judge – s 112 of Criminal Procedure Act 51 of 1977 not properly applied – accused did not have a fair trial - conviction and sentence set aside – matter remitted to the court a quo for trial de novo before a different judge.

ORDER

On appeal from: Limpopo Local Division of the High Court, Thohoyandou, (Renke AJ sitting as the court of first instance)

1 The appeal is upheld.

2 The convictions and sentences in respect of all counts are set aside.

3 The case is remitted to the court a quo for trial de novo before a different judge.

JUDGMENT

Willis JA (Leach and Mathopo JJA concurring):

[1] The appellant, Mr Richard Negondeni, was indicted in the Limpopo Local Division, Thohoyandou High Court (Renke AJ) on a count of murder, a count of robbery and two counts of rape. He pleaded guilty in terms of s 112 of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act) and was convicted on all four counts. He was sentenced to life imprisonment on the count of murder, with which lesser sentences imposed on the other counts were ordered to run concurrently. With the leave of this court, he appeals against his convictions and sentences on all counts.

[2] The indictment alleges, in relation to the murder count, that the appellant killed an adult female, Ms Ntsombeni Makhanye (the deceased), on 2 April 2002 at Ha-Dumasi, in the district of Thohoyando; in relation to the first count of rape that he did so in respect of the same person at the same place at about the same time; in relation to the count of robbery that, using force and violence, he took the deceased's cellular telephone from her at about the same place and time; and, in

relation to the second count of rape, that he committed the crime on 6 February 1999 at the Thohoyando Technical School, his victim having been another woman, Ms Sylvia Netshiavha. The indictment made no reference to the prescribed minimum sentences set out in the Criminal Law Amendment Act 105 of 1997.

[3] In the summary of substantial facts annexed to the indictment it is alleged that 'before leaving the scene (where the rape of the deceased had been committed), the accused robbed the victim and then stoned her to death.' It is also alleged that the deceased's decomposed body was recovered in the bush at Ha-Dumasi on 11 July 2002 and that: 'The cause of death could not be determined because of the advanced state of decomposition of the deceased's body.' In respect of the second count of rape, the summary alleges that the victim was forcefully taken by the appellant from a shopping complex and then raped in the bush at knife-point.

[4] At the commencement of the appellant's trial on 19 February 2007, the state prosecutor informed the court that he had been given to understand, from the court orderlies, that the appellant no longer wished to be represented by his legal representative, appointed by 'the Law Clinic'. The appellant's legal representative appeared to have been taken by surprise by this and said: 'I have never heard anything. Can he just speak for himself?' The judge then asked the appellant whether he had 'a problem'. The appellant replied that he did not have a problem 'so far' but said: 'It is just that we have not yet finished a consultation.' After further questioning, the appellant repeated his complaint that: 'We have not consulted sufficiently.' The judge then said that the trial should proceed but the appellant could consult with his legal representative during the adjournments of the court.

[5] The counts were then put to the appellant. He pleaded guilty to the first count of murder but, immediately thereafter, when asked by the judge to confirm this, said: 'Maybe I did not understand well.' Further discussions took place between the appellant and the judge whereupon the appellant said: 'I do understand but when I am asked to plead on the charge of murder I am not so sure as to whether I should plead not guilty or I should explain the circumstances.' The court then decided that the matter should stand down to the next day so that the appellant could consult

more fully with his legal representative. His legal representative then informed the court that he would not be available the next day. At this, the court said:

'I do not want, and I will not tolerate any further delays in the proceedings. The witnesses are inconvenienced and so am I, and I want to proceed with this matter tomorrow. I personally arranged with experienced counsel, Mr Dzumba, to come down now to see him. Mr Dzumba will take over his defence.'

[6] The next day the trial proceeded with counsel, Mr Dzumba, appearing as the appellant's legal representative. At the commencement of the proceedings on that day the court asked the appellant whether he was satisfied 'with the change in his legal representation'. The appellant replied: 'I am satisfied.'

[7] The appellant was then asked to plead once more, and on this occasion he pleaded guilty to all four counts. Mr Dzumba then read into the record a written statement by the appellant in terms of s 112 of the Criminal Procedure Act. It reads as follows:

'1. I, the undersigned, RICHARD NEGONDENI, hereinafter referred to as Accused, do hereby plead guilty to all the four counts, namely that of murder, rape, robbery and rape, and explain as follows for the first three counts:

2. On the 2nd April 2002 as indicated in the indictment, I met the deceased NTSOMBENI MAKHANYE at the Thohoyandou Shopping Complex.

3. I asked her to accompany me to Ha-Dumasi and we boarded the taxi together.

4. On arrival at Ha-Dumasi we sat in some bushes and I forced to have sexual intercourse with her, without her consent.

5. We quarreled and I hit her on the head with a stone. She fell down and never spoke again. I then got shocked, frustrated and confused.

6. I took her cellphone and left for home. I decided to tell nobody about what had happened.

7. In connection with count 4, I plead also guilty to the second charge of rape. I admit that I met one Sylvia Netshiavha at the Thohoyandou Shopping Centre on the 6th February 1999.

8. I proposed love to her and together we went to Block F not far from the Thohoyandou Technical School.

9. In the buses not far from the said school I forced one Sylvia Netshiavha to have sexual intercourse with me without her consent.

10. Afterwards, the victim, one Sylvia Netshiavha, reported the matter to the police and I was arrested later that day.

I know and understand that it is unlawful to kill another person intentionally without any justifiable ground.

I further know that it is unlawful to intentionally take another person's property without her permission.

I further know that it is unlawful to intentionally have sexual intercourse with a female person without her consent.'

[8] The judge then asked the appellant whether the statement was correct. The appellant confirmed that it was. The judge then enquired from the appellant as to the size of the stone that was used to hit the deceased. After the appellant had demonstrated, it was agreed among all concerned that it was 'about the size of a soccer ball'[1]. The court then proceeded to find the appellant guilty on all four counts.

[9] The first issue that arises is whether this terse statement, especially insofar as it relates to the count of murder, is sufficient to satisfy the requirements of s 112 (1)*(b)* of the Criminal Procedure Act which reads as follows:

'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

[1] In *S v Makhaya* 2004 (1) SACR 444 (C); JOL 12062 (C) it was held that it is 'undesirable that the accused should do any demonstration in court' for purposes of section 112(1)(*b)* but, in the circumstances of this case that issue is irrelevant.

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 . . . .'.

[10] It has been made clear in *S v Mbuyisa*[2] that s 112*(b)* contemplates admissions of facts and not admissions of law or legal conclusions.[3] In *S v Lebokeng en 'n ander*[4] it was stressed that the court should be satisfied not only that the accused committed the act in question but that he committed it unlawfully and with the necessary *mens rea.* As was stated in *S v Nyanga*

*'*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 vJacobs* (supra at 1177B) (1978 (1) SA 1176 (C) at 1177B). 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.

[11] From the record, it is not clear, beyond reasonable doubt, whether the appellant admitted that his act of hitting the deceased on the head with a stone caused her death. In addition, the appellant's statement that he was shocked, confused and surprised cries out for further enquiry, as it is not clear whether the appellant even admitted that he had acted with the requisite intent – either in the form of dolus directus or dolus eventualis – to kill the deceased, for a conviction on the count of murder properly to be made. It is therefore not even certain whether the correct conviction would have been culpable homicide. The conviction on the count

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[2] *S v Mbuyisa* 2012 (1) SACR 571 (SCA); (183/1) [2011] ZASCA 146.

[3] Para 7. See also *S v Zerky* 2010 (1) SACR 460 (KZP) para 20; (R421/09)[2009] ZAKZPHC 17.

[4] *S v Lebokeng* en 'n ander 1978 (2) SA 674 (O); [1978] 3 ALL SA 139 (O). See also *S v Ngubane*1978 (2) PH H189 (N); (30/83) [1985] ZASCA 41; *S v Moniz* 1982 (1) SA 41 (C) 46; [1982] 3 ALL SA 157 (C); *S v Phikwa* 1978 (1) SA 397 (E); [1978] 1 ALL SA 557 (E); *S v Tshumi & others* 1978 (1) SA 128 (N); [1978] 1 ALL SA 273 (N); *S v Mthetwa; S v Khanyile* 1978 (2) SA 773 (N); [1978] 2 ALL SA 328 (N); *S v Serumala* 1978 (4) SA 811 (NC); [1978] 4 ALL SA 733 (NC). *S v Naude* 1978 (1) SA 566 (T); [1978] 1 ALL SA 685 (T); *S v Thobejane* 1978 (1) PH H116 (T); *S v Jacobs* 1978 (1) SA 1176 (C) 1178; *S v Medupa* 1978 (2) PH H125 (O); *S v Matlabeng en 'n ander* 1983 (4) SA 431 (O) and *S v Mbova* en andere 1996 (1) SACR 239 (NC) 242(I).

of robbery and both counts of rape may be justified, if one has regard to the contents of the statement, but clearly the appellant ought not to have been convicted of murder merely on the strength of the s 112 proceedings.

[12] In addition, as appears from what is set out below, the events that occurred after the appellant's conviction, shows that he did not enjoy a fair trial. After a previous conviction for assault perpetrated in 1990 was proven against him, the judge then enquired from counsel for the State and the defence whether the minimum sentencing provisions of s 51 of the Criminal Law Amendment Act 105 of 1997 were of application and, if so, what they prescribed in relation to the appellant's convictions. It is clear, from the record that both the judge and the appellant's counsel were unaware of what that Act in fact provided. Indeed it led to the judge adjourning in order to discuss the provisions of the Criminal Law Amendment Act with counsel in chambers. This in itself was irregular. It was a discussion which ought to have taken place in open court. Importantly, counsel for the State did not bring the minimum sentencing provisions to the attention either of the appellant or the court before this enquiry was made, and the appellant's plea was therefore clearly tendered without his knowing of them.

[13] After the adjournment, the appellant was briefly led in mitigation. This established that the appellant was 32 years of age at the time, he left school during standard nine, had been working at a bakery at the time of his arrest in respect of counts 1 to 3 and was married with two school-going children. He said he felt ashamed at what he had done and was sorry for the pain which he had caused the family of the deceased and the victim of the second count of rape. The state prosecutor cross-examined the appellant as to the second count of rape. The appellant explained that, although he had been arrested shortly after the date relating to count four, 'the matter was not proceeded with', he had gone to the parents of his victim 'to settle this issue' and was later informed in court that 'the charge was through'. Apart from this, no further evidence was adduced from the appellant as to the circumstances under which the offences were committed.

[14] The State led the evidence of a police officer and the father of the deceased as to the state of decomposition of the deceased's body and that she had been

identified by her clothing. Photographs taken by the forensic photographer of the deceased's badly decomposed body, shortly after it had been discovered, were handed in as exhibits. The complainant in respect of the second count of rape was called by the State to testify. She confirmed that she had non-consensual sexual intercourse with the appellant although the circumstances in which she agreed to accompany the appellant on a walk from the shopping centre to the technical college were sketchily put before the court. When asked whether she was scared of men now, as a result of the rape, she replied: 'No.'

[15] The court a quo then proceeded to sentence the appellant to life imprisonment on the count of murder, holding that it was obliged to do so in terms of the Criminal Law Amendment Act, on account of the close association between the rape and murder of the deceased. The appellant had at no stage in the trial or, it would appear from the record, at any time before that, been warned by the court that, if convicted, he faced the risk of life imprisonment. The court a quo also sentenced the appellant to ten years' imprisonment for the rape of the deceased, two years for the robbery and ten years for the rape of Ms Sylvia Netsiaba. The sentences on counts two, three and four were, as mentioned previously, ordered to run concurrently with the sentence on count 1. In any event, in terms of section 39 (2) of the Correctional Services Act, No 111 of 1998, the sentences on counts two, three and four would automatically run concurrently with the sentence of life imprisonment.

[16] In view of the appellant's patently concerned and hesitant stance at the commencement of the trial, the court a quo was at the outset of the proceedings wrong in insisting that the trial proceed as it did. However well-intentioned the court a quo may have been in appointing Mr Dzumba to act for the appellant, and even though the appellant confirmed the next day that he was satisfied with this arrangement, it was wrong for the court a quo to have prevailed upon him to accept the arrangement. Quite apart from any other difficulties concerning issues of principle that may exist with this course of action, it did not afford the appellant the time for a proper consultation to be held. This legal representative's apparent lack of awareness about the minimum sentencing provisions in the Criminal Law Amendment Act is indicative of the fact that the appellant did not have the quality of

legal representation that one could reasonably expect, especially in so gravely serious a case. This court has repeatedly stressed the importance of warning a person of the risk of minimum sentences being imposed.[5] In the circumstances of this particular case, the injustice of the appellant not having been so warned is manifest. This is all the more obvious in a case in which a legal representative appointed at the 11th hour is not fully aware of the implications of the minimum sentencing legislation. Against this background the appellant did not have a fair trial.

[17] When the well settled law relating to the procedural fairness of an accused person's trial is applied against the aggregate of the facts and circumstances of this case, one's sense that the appellant did not have a fair trial is compounded. The right of every person to a fair trial is a constitutional one.[6] That right was infringed and for that reason the conviction and sentence cannot be allowed to stand.

[18] What is to be done? On the one hand, the appellant manifestly did not have a fair trial. Against this, the State, the victims and their families of serious crimes such as these, including the family of the deceased also have an interest in the appellant not being allowed to walk free, without further ado. In this regard the provisions of s 312 of the Criminal Procedure Act are of importance They provide 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.

(2) When the provision referred to in subsection (1) is complied with and the judicial officer is after such compliance not satisfied as is required by section 112 (1) *(b)* or 112 (2), he shall enter a plea of not guilty whereupon the provisions of section 113 shall apply with reference to the matter.'

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[5] See, for example, *S v Legoa* 2003 (1) SACR 13 (SCA) paras 20 and 21; (33/2002)[2002] ZASCA 122; *S v Ndlovu* 2003 (1) SACR 331 (SCA) para 12; (75/2002) [2002] ZASCA 144; and *S v Makatu* 2006 (2) SACR 582 (SCA) paras 3 and 17; (245/05) [2006] ZASCA 72.

[6] See s 34 of the Constitution, 1996.

[19] In *S v Tshumi & others*[7] James JP, with Milne J concurring, said:

'It is clear that the magistrate failed to appreciate what his duty was as laid down by sec. 112, and failed to satisfy himself on a number of important questions such as whether it was established by the answers that the accused either individually or collectively acted unlawfully, or with common purpose in assaulting the deceased. In fact the magistrate appears to have completely failed to grasp the fact that since sec. 112 (1)*(b)* makes it possible to dispense with evidence to establish all the essential elements of the charge, his questions must be directed to satisfying himself that an accused fully understands all the elements of the charge when pleading guilty, and that his answers reveal that he has in fact committed the actual offence to which he has pleaded guilty.'[8]

Having found that the conviction could not stand, James JP continued as follows:

'What should now be done? Clearly the convictions and sentences cannot stand, nor is it possible, since the magistrate has retired, for the case to be remitted to him to deal correctly with it by making proper use of the provisions of sec. 112 (1) *(b)*. Justice will, I consider, be done in these circumstances if the case is sent back for trial by another magistrate.

The convictions and sentences are accordingly set aside and the case is sent back for trial *de novo* by another magistrate.'[9]

[20] Other cases in which it has been decided that a trial de novo is appropriate in circumstances such as this include *S v Witbooi & others,*[10]S *v Mokoena*,[11] *S v Van Deventer*[12] *S v Mbova en andere*[13]*, S v Williams*[14] *and S v Mofokeng.*[15] In *S v Heugh & others*[16] the case was remitted to the magistrate for him to deal with, in his

[7] *S v Tshumi & others* 1978 (1) SA 128 (N); [1978] 1 ALL SA 273 (N).
[8] At 130B-D.
[9] At 130G-H.
[10] *S v Witbooi & others* 1978 (3) SA 590 (T); [1978] 2 ALL SA 641 (T).
[11] S v *Mokoena* 1982 (3) SA 967 (T); [1982] 4 ALL 461 (T).
[12] *S v Van Deventer* 1978 (3) SA 97 (T); [1978] 2 ALL SA 573 (T).
[13] *S v Mbova en andere* 1996 (1) SACR 239 (NC).
[14] *S v Williams* 2008 (1) SACR 65 (C); (29/04/07) [2007] ZAWCHC 48.
[15] *S v Mofokeng* 2013 (1) SACR 143 (FB); (191/2012) [2012] ZAFSHC 117.
[16] *S v Heugh & others* 1997 (2) SACR 291 (E); [1997] JOL 1408 (E).

discretion, in terms of s 113 of the Criminal Procedure Act[17]. *See also Mkhize v the State & another Nene & others v the State & another*.[18] In *S v Fikizolo*[19] the conviction and sentence was set aside, consequent upon shortcomings applying the provisions of s 112 of the Criminal Procedure Act properly, without ordering a trial de novo, but there were additional serious misdirections by the magistrate that compelled the appeal court to do so.[20] Each case must be decided on its own merits. In particular, as to whether the trial should be heard de novo, the interests of justice, not only with respect to an accused person but also the State and society as a whole should be taken into consideration.

[21] Even before s 112 of the Criminal Procedure Act came into operation, there was precedent in this court for remitting a trial for a hearing de novo where procedural irregularities had been committed and the interests of justice require it.[21]

[22] During the course of argument, counsel for the appellant placed considerable reliance on the unreported judgment in this court in *S v Mudau*[22] in which this court recognised that, where a trial had been tainted by procedural unfairness, a court of appeal had a discretion to remit the matter for a hearing de novo. Although in that case the court declined to do so, each case must be decided on its own merits and the facts of *Mudau* were materially different from this one. In this case, despite the

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[17] Section 113 of the Criminal Procedure Act reads as follows:
(1) 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.
(2) 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.

[18] *Mkhize v the State & another Nene & others v the State & another* 1981 (3) SA 585 (N); [1981] 1 ALL SA 195 (N).

[19] *S v Fikizolo* 1978 (2) SA 676 (NC); [1978] 3 ALL SA 229 (NC).

[20] See for example *S v Fikizolo* 1978 (2) SA 676 (NC).

[21] See for example *R v Zackey* 1945 AD 505. See also *R v Read* 1924 TPD 718 and *S v Vezi* 1963 (1) SA 9 (N); [1963] 1 ALL SA 315 (N); *R v Foley* 1926 TPD 168 and *R v Cohen* 1942 TPD 266 at 273.

[22] *S v Mudau* (276/13) [2013] ZASCA 172 (28 November 2013.

period of imprisonment that the appellant has already served, the interests of justice require a fresh trial. The appellant, after all, faces a possible life sentence should he properly be convicted.

[23] In all the circumstances of this case, the interests of justice will best be served by setting aside the convictions and sentences and remitting the matter for a trial de novo. It is appropriate, against the full canvas of events, to direct that the trial be heard by a different judge.

[24] One further aspect should be mentioned. At the commencement of the appellant's application for leave to appeal, his then legal representative (who had neither appeared at his trial and who did not argue his appeal) stated that he agreed with the conviction and sentence 'meted out by the court' and that he had explained to the appellant that he had 'no prospects of success' in the matter and that, if he wished to proceed, he would have to do so 'on his own'. With that he abandoned the appellant to argue the application in person. This is inexplicable. As should be apparent from what has been set out above, there was much to be said. It also constituted an extraordinary dereliction of the duty of defence counsel to do their best, even if they privately consider the case to be a hopeless one. On his own, the appellant performed rather well. For example, he submitted that the killing of the deceased could be construed as 'an accident' and 'it was not like it was planned that I wanted to kill somebody or the deceased for that matter.'

[25] The following order is made:

1 The appeal is upheld.
2 The convictions and sentences in respect of all counts are set aside.
3 The case is remitted to the court a quo for trial de novo before a different judge.

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N P WILLIS

JUDGE OF APPEAL

APPEARANCES:

For the Appellant:	S O Ravele (Attorney)
	Instructed by:
	S O Ravele Attorneys, Makhado
	c/o Phatsoane Henney Attorneys, Bloemfontein
For the Respondent:	M Sebelebele
	Instructed by:
	The Director of Public Prosecutions, Thohoyandou
	The Director of Public Prosecutions, Bloemfontein