



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 650/12
Not reportable

In the matter between:

TSHIRANGWANA MASOTSHA TSHILIDZI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Tshilidzi v S* (650/12) [2013] ZASCA 78 (30 May 2013)

Coram: Lewis, Shongwe and Majiedt JJA and Van der Merwe and Swain AJJA

Heard: 23 May 2013

Delivered: 30 May 2013

Summary: Criminal procedure — acceptance by prosecutor of plea of guilty on lesser or alternative charge at the outset of the trial — court bound thereby.

ORDER

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

The conviction and sentence are set aside.

JUDGMENT

VAN DER MERWE AJA (LEWIS, SHONGWE AND MAJIEDT JJA AND SWAIN AJA CONCURRING):

[1] The appellant was convicted by Hetisani J in the Limpopo High Court of rape and sentenced to life imprisonment. The court a quo granted leave to appeal against the sentence, but leave to appeal against the conviction as well was granted by this court. On 23 May 2013 this court set aside the conviction and sentence and indicated that reasons for the order would follow. These are the reasons.

[2] In terms of the indictment the appellant was charged with a main charge of rape and an alternative charge of contravention of s 14(1) of the Sexual Offences Act 23 of 1957. At the outset of the trial, the appellant, who was legally represented, pleaded not guilty on the main charge but guilty on the alternative charge. For this purpose, a statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 was prepared and signed by the appellant. The prosecutor told the court that she had read the statement and accepted the plea. The statement was then read into the record, confirmed by the appellant and handed to the court. The contents of the statement clearly indicated that the appellant was guilty of the offence to which he had pleaded guilty.

[3] Hetisani J, however, refused to accept the plea of guilty on the alternative charge. As a direct result thereof, the appellant withdrew the plea of guilty on the alternative charge and pleaded not guilty on both the main and alternative charges. The trial proceeded on this basis.

[4] It is clear from the record that the trial judge refused to accept the plea of guilty on the ground that it was inconsistent with the summary of substantial facts that accompanied the indictment in terms of s 144(3)(a) of Act 51 of 1977. In so doing, as I will show, he committed a gross irregularity.

[5] In *S v Cordozo* 1975 (1) SA 635 (T) the appellant had been charged in the magistrate's court with reckless driving, or, alternatively, negligent driving. The appellant pleaded guilty to negligent driving and the prosecutor accepted the plea. The magistrate indicated that the court was not bound by the acceptance of the plea and the trial proceeded, resulting in a conviction of reckless driving.

[6] On appeal, this conviction was set aside on the grounds set out as follows by Botha J at 638E-G and 639D:

'In my view it is clear that the magistrate was under a misapprehension, namely, that he could prevent the prosecutor from accepting a plea as was tendered in the present case. It is the function of the Attorney-General and his representatives to decide the charges upon which an accused should be brought to trial and the function of the Attorney-General and his representatives in that regard extends up to the time when a plea is tendered and the decision has to be made whether the plea is to be accepted or not.

The magistrate seems to have thought, according to his reasons for judgment, that the prosecutor was usurping the rights of the court; on the contrary, in my view, it was the magistrate who was trying to encroach upon a power pertaining to the prosecutor, as to the exercise of his discretion in accepting or refusing the plea tendered.

...

When the prosecutor accepted the plea of guilty to negligent driving, it was implicit in his attitude that he was abandoning the main charge, which was one of reckless driving. This was quite clearly again a matter entirely within the discretion of the

prosecutor, and the magistrate was powerless to do anything to change the position created by the acceptance of the plea.'

[7] In *S v Ngubane* 1985 (3) 677 (A) at 683E-F, this position was confirmed by this court when it said the following in respect of the acceptance of a plea by a prosecutor at the commencement of the trial:

'It must be seen as a *sui generis* act by the prosecutor by which he limits the ambit of the *lis* between the State and the accused in accordance with the accused's plea. Whether one in a case such as the present speaks of amendment, withdrawal or abandonment of the murder charge does not really seem to matter. That the *lis* is restricted by acceptance of the plea appears from ss 112 and 113. The proceedings under the former are restricted to the offence "to which he has pleaded guilty" and the latter must be read within that frame.'

[8] Today this is even more clear. The independence of the prosecuting authority concerning prosecutions is entrenched in s 179 of the Constitution and effect is given thereto by the provisions of the National Prosecuting Act 32 of 1998 (see for instance ss 20(1) and 32. See also *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) paras 28-39).

[9] The acceptance by the prosecutor of the plea of guilty on the alternative charge had the result of removing the main charge from the indictment. It follows that the conviction on the main charge could not stand. In addition, as a result of the subsequent withdrawal of the plea of guilty on the alternative charge, this court could not substitute the conviction with one of guilty on the alternative charge. Because of the ineptitude of the trial judge, the appellant spent several years in prison in respect of a crime that he was not in jeopardy of being legally convicted.

[10] For these reasons the conviction and sentence were set aside.

C H G VAN DER MERWE
ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant:

L M Manzini

Instructed by:

Justice Centre, Bloemfontein

For Respondent:

Ms S M Mahada

Instructed by:

The Director of Public Prosecutions,
ThohoyandouThe Director of Public Prosecutions,
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