

IN THE HIGH COURT OF SOUTH AFRICA

CIRCUIT LOCAL DIVISION OF THE VEREENIGING

CIRCUIT DIVISION,

VEREENIGING

CASE NO: CC 469/08

DATE: 2010.05.28

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In the matter between

THE STATE

and

RUBEN QUEEN MOKOENA

Accused 1

MVULA NICODIMUS SHABANGU

Accused 2

J U D G M E N T

20 SPILG J: Mr Tlouane who appears for both accused has applied to recall Mr Abraham Letshele. Firstly it is for the purpose of introducing the section 112 statement made by Mr Letshele when he pleaded guilty to charges relating to the same offence for which the accused before me has been indicted.

Secondly he wishes to introduce the statement, should the accused either admit making it or authorising it to be made, for the purpose of testing the credibility of

the witness and for this purpose alone. The application has made from the Bar literally minutes after the court excused Mr Letshele.

Two issues arise. One is the reason for not seeking to introduce this evidence during the cross-examination of Mr Letshele and the other is a substantive law issue as to whether or not the section 112 statement can be admitted and used at all for the purpose of testing Mr Letshele's credibility.

Miss Ngobeni, for the State, contends both that the State is prejudiced by the introduction of this evidence after the witness had been excused and also on certain substantive grounds that will be set out later.

10 The explanation for the delay is as follows: Mr Tlouane had received the section 112 statement, after requesting it, a day before Mr Letshele gave evidence. He had raised with Ms Ngobeni his wish to introduce it but was told that she would object. For this reason he believed that the appropriate course was to make an application separately and after Mr Letshele had given his evidence. Mr Tlouane accepts that this was an inappropriate way of dealing with the matter.

In my view the standard procedure adopted by any defence, when seeking to introduce a document that may be objected to, is by advising the court of these facts and then the court will hear argument on whether or not the document may be introduced. There may be occasions when the court considers it prudent that the witness be
20 excused during argument so as to preclude the witness being pre-cognised of the purpose and import of the line of cross-examination to be adopted. To the extent that this may have weighed with Mr Tlouane in making his decision, the answer is simply that the court would ensure that the witness is excused when argument is presented.

However, the error cannot preclude Mr Tlouane from seeking to recall the witness after he has given evidence particularly where, as in this case, it was applied for within minutes of the witness being excused. I am satisfied that it was a *bona fide*

decision made by Mr Tlouane and the only basis upon which a court would not condone the recalling of the witness is if there was prejudice to the State or prejudice to the witness of such a nature that may undermine the fair trial of this matter.

Once the issue is characterised as a balancing the interests of securing a fair trial on the one hand, and the inconvenience to the State, then the simple delay of minutes in seeking to put further questions to the witness - and the State accepting that there is no prejudice *per se* in recalling – renders the outcome in my view, self-evident; the application to recall the witness should be granted unless there is a substantive law impediment.

- 10 The substantive impediment that Miss Ngobeni raised today on behalf of the State, is that of prejudice to the witness in that at the time the section 112 statement was made, the witness was a minor, and that he made his statement on legal advice.

In passing this is precisely the type of argument that justifies ensuring that the witness is not present during the course of argument as it may suggest to the witness, quite unintentionally, a way to answer should the document be allowed to be put to him. Insofar as the merits of the substantive issue are concerned, if it is shown that the witness made the statement (and in this case it was made before a court and appears to have been accepted by the State), then it is for him to explain why he said what he did which then leaves it open to the court to determine what weight, if any, is to be
20 given to the statement.

It is essential that there be no confusion between allowing evidential material to be used and the weight that is to be given to the answers furnished in reply. This can be tested by the simple illustration that I put to Miss Ngobeni. If the section 112 statement was to the effect that the witness had accepted sole responsibility and had explained that the killing of the deceased was as a consequence of some issue they had between them, then it would be absurd to suggest that this could not be used to

test his credibility if the witness had then sought to implicate others. There is, quite rightly, a very limited scope for excluding evidence and it is generally based on authenticity, on relevance, on privileged communication and, in the context of criminal law and procedure, those self-incriminatory statements which cannot be accepted because of public policy or lack of reliability.

Accordingly, the witness ought to be able to explain his statements and depending on the explanation given (and the court will always be alive to the fact that it is made within the context of a plea that has as its objective to seek clemency within the context of sentencing, or might have that as an objective) the court will weigh
10 whether the statement has ultimately any value whatsoever. But unless that document is dealt with, there in my view would be a failure of justice in not allowing its contents to be tested through cross-examination.

I believe that Miss Ngobeneni raised another issue yesterday, which related to whether or not such a document could be used at all, because of its nature as a guilty plea under section 112 where the witnesses was a co-accused until the separation of trials was ordered pursuant to the decision to plead guilty and that the section 112 plea may contain statements incriminating the accused before me. In my view the answer is that the statement of one accused cannot be used to incriminate his co-accused where there is yet to be a separation of trials pursuant to the former pleading guilty.

20 The safeguard that exists where the statement was made before there was a separation, in my view, prevails and continues and attaches to the document itself and a court would always be alive to that.

This court is at some disadvantage because the infrastructure that it ought to have to be able to undertake the necessary research in a matter of this nature, has not been made available to it by reason of the court administration under the Court Manager of the South Gauteng High Court. By now this court should have had access

to internet facilities in order to readily be able to undertake the necessary research in giving a decision of this nature which, emanating from a High Court, has an impact amounting to precedent binding at least on all Magistrates within its jurisdiction.

This is not the place to detail the attempts made to ensure that this court had the resources available before it commenced with this Circuit so as to ensure that its decisions could be carefully considered and are based on full and up to date research using all the research tools available and which should have been provided to it.

I nonetheless must make a decision and I am alive to the fact that it needs to be done on as narrow a basis as possible by reason of the compromised position in
10 which the court finds itself due to the failure of its administrative infrastructure.

I will therefore confine myself in regard to this second substantive issue as I see it. The textbooks to which I have been able to have regard are *Law of Evidence by Schmidt and Rademeyer* as well as *Hiemstra's Criminal Procedure*. In its commentary on section 112 *Hiemstra's Criminal Procedure* refers to the case of *S v Witbooi and Others* 1994 (1) SACR 44 (CK). In that case three accused were charged in the Magistrate's Court with stock theft. Accused 3 had pleaded guilty and accused 2, upon being questioned under section 115 of the Criminal Procedure Act, incriminated his co-accused alleging that he had helped accused 1 and 3. Accused 3 admitted, while being questioned under section 112, that he had stolen the ox from the
20 complainant and that accused 1 and 2, who also knew that it was stolen, helped him slaughter the ox. The magistrate convicted accused 3 on the basis of his plea and the trial then proceeded before the same magistrate against accused 1 and 2. The High Court, on review, considered whether the magistrate ought to have separated the trials of the accused. The court on review, consisting of Heath J and Claassen AJ, held that the magistrate had not erred in failing to separate the trial of accused 2 from that of the other two accused simply on the basis that his defence, as disclosed in the plea

explanation, tended to incriminate his co-accused. The court, however, found that the failure of the magistrate to separate the trial of accused 3 from the other accused, and after accused 3 had been convicted, prejudiced the other accused and amounted to a failure of justice. This resulted in the conviction of accused 1 and 2 being set aside.

The court referred to the case of *S v Ntuli & Others* 1978 (2) SA 69 (A) at page 73 (B), the effect of which was that there would not be any substantial prejudice from the failure by the court to separate the trial of accused 2 from that of 1 and 3, but that the failure of the court to separate the trial of accused 3 who had pleaded guilty from the trial of accused 1 and 2 obviously prejudices them. The reason appears at page 10 51(f) of the judgment where the court said that the magistrate in convicting accused 3

“against the background of his replies and the questioning by the magistrate in terms of section 112 (1)(b) amounts to an acceptance, not only of all the elements of the offence, but at the same time an acceptance of his version that he had slaughtered the ox with the assistance of accused 1 and 2 and that he had in fact informed accused 1 and 2 that the had stolen the ox.”

As appears on page 51 (g) to (i) of the *Witbooi* judgment, the court explained that the magistrate effectively could not disabuse his mind from a finding that he had made and which was necessary for him to make when convicting accused 3 on the basis of his plea as explained. Moreover the prejudice to the other accused was evident to the 20 court and I would add that the issue of prejudice, in the form of potential prejudice by reason of the accused's perception of the magistrate's court finding regarding the co-accused who had pleaded guilty, is equally self-evident.

I am satisfied that the concerns that the court had in that case cannot be extrapolated to apply in the present situation. The reasons are twofold. Firstly, the section 112 statement is not sought to be used as proof of content, but to test the credibility of the witness. Secondly, I do not believe that the court can fall into the

potential trap of regarding the contents of section 112 as evidence incriminating the accused before me.

I should just revert to the argument by Miss Ngobeni that section 112 can have no value since in the process it involved a guardian and a legal representative. In my view, as with every other document sought to be introduced as evidential material from which conclusions are ultimately sought to be drawn, if the witness is the author of the document, or can demonstrably be shown to have associated himself or herself with the document, it amounts to evidential material that the other party must be entitled to use in order to test the credibility of the witness in question.

10 Finally I would like to make an observation, and at this stage it is an observation only, because of the lack of resources at my disposal to ascertain whether or not any case has dealt with this aspect. I found that the section 112 statement constitutes evidential material which can be used by the accused should the person who made it, and who has been convicted, be called to give evidence.

In my view, the natural consequence of this finding is that section 112 statements are to be made available by the State to the legal representative of the accused together with the contents of that part of the docket to which the defence is entitled, where the State intends calling an alleged accomplice who has already been convicted.

20 In order to fulfil the requirements of a fair trial process in a criminal court, the legal representative of the accused ought to be able to prepare fully and in particular be able to prepare fully for the cross-examination of witnesses called by the State. This requires adequate preparation and the ability to sift through the documentation, determine how best to test the veracity of State witnesses and consider the advisability of calling any witness. As I have indicated, this is an observation and I believe that a section 112 statement ought to be provided with the docket where reliance may be

placed by the State on a witness who has pleaded guilty in relation to the same offence for which the accused has been charged.

By reason of what I have said, Mr Letshele must now be recalled and Mr Tlouane may seek to introduce the section 112 statement.
