

8/12/2010
REPORTABLE
IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

CASE NO: A1097/09

In the matter between:

N.P. THSABALALA

APPELLANT

And

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/ NO .	
(2) OF INTEREST TO OTHER JUDGES: YES/ NO .	
(3) REVISED.	
2010-12-08 DATE	 SIGNATURE

THE STATE

RESPONDENT

JUDGMENT

MAVUNDLA J;

- [1] The appellant was charged and convicted at the Volksrust Magistrates Court on two counts of fraud and two counts of forgery. He was sentenced to six months imprisonment in respect of each count. He now appeals against both the conviction and sentence.

- [2] The appellant was represented by an attorney who withdrew from the matter just before the charges were put to the appellant. The appellant was asked whether he would want to get another legal representative. The appellant chose to proceed with the matter and conducted his own defence.
- [3] The appellant pleaded guilty on all counts. The magistrate in terms of s112 (2) of the *C P A* asked the appellant questions. The appellant was convicted on count 1, 2, and 4 on the basis of his answers provided during the questioning in terms of s112 (2). A plea of not guilty was entered in respect of count 3. The State led the evidence of a single witness Mr. Alfred Makhuba. The appellant did not testify. The Magistrate accepted the evidence of the State and convicted the appellant on these counts as well. The appellant, as indicated earlier was sentenced to six months imprisonment on each count.
- [4] In mounting the attack against the conviction of the appellant, it was submitted that the magistrate erred in not warning the

appellant that he has a right to remain silent when purportedly explaining the provisions of section 112 (2).

[5] It needs mention that before the legal representative of the appellant withdrew from the matter, it was put on record by the prosecutor that the matter was set down for trial and that the accused indicated that he intends to plead guilty. At that stage the legal representative of the appellant placed on record that he had discussed the case thoroughly with the appellant and he then requested to withdraw from the matter, which request was granted. The charges were then put to the appellant who pleaded guilty to all the counts, after having been questioned in terms of s112 (2).

[6] The right of an accused person to remain silent was long before the advent of *The Constitution of the Republic of South Africa, Act, and No.108 of 1996* recognised by the Courts. However, in *S v Nkosi en Ander*¹ it was held that it was not necessary for the presiding officer to inform the accused person of his right to

¹ 1984 (3) SA 345 (A) 353D-E.

remain silent. It was further stated that the rationale behind s112 (2) is:

- i. that by admitting guilt the accused admitted the State's case;
- ii. that the questioning in terms of s112(1)(b) serves to protect accused against the consequences of an unjustified guilty plea i.e. it is not directed at self incrimination; and
- iii. That any warning to the accused at that stage, would conflict with the spirit of section 112(1) (b) [as well as section 121(1) and 119] and the scheme of Act 51 of 1977."

In *S v Mabaso and Another*² this *dictum* was followed by the majority full bench.

- [7] There are divergent views on the question whether the right to remain silent demands that before s112 (2) is employed an accused person must be informed of this right to remain silent.

² 1990 (3) SA 185 (A) 201C-E.

[8] In *S v Maseko*³ it was held that there is a duty on a presiding officer in the light of the constitutional entrenchment of this right to remain silent to warn an accused of this right before invocation of s112.

[9] In *S v Damons and Others*⁴ Nugent J stated that an accused person cannot tender a guilty plea without simultaneously accepting that he has an obligation to answer questions. “A *right to continue to remain silent is inherently incompatible with a plea of guilty...To speak of a right to silence as if it can survive its abandonment seems to me to be inherently contradictory*”.

[10] The Supreme Court of Appeal held in the *Director of Public Prosecutions, Natal v Magidela and Another*⁵ that it is incorrect to accept that failure to inform an accused person of his right to silence *ipso facto* resulted in an unfair trial and consequently renders the admissions so elicited inadmissible. The Court did

³1996 (2) SACR 91 (W).

⁴ 1997 (2) SACR 218 (W) 224E-F and 225B.

⁵ 2000 (1) SA 458 (SCA) 465E-466B.

however state (at 456H-J) that the previous Appellate Division cases may have to be revisited in the light of the new constitutional dispensation.

[11] The question whether there is an obligation to inform an accused of his right to remain silent when asked questions in terms of s112 (2), in my view, must be answered in the context of the right to remain silent. It also requires appreciation of the import of s39 (2) of the Constitution. which provides as follows:

“ (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights.”

[12] In *Hyundai*⁶ Langa CJ with regard to s39 (2) held that in interpreting a Statute the interpretation must be such that the ethos of the Constitution is achieved.

⁶ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors Pty Ltd* 2001 (1) SA 545, 2000 (10) BCLR 1079 (CC) paras 21-26.

[13] Section 2 of the Constitution provides that “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

[14] The *S v Nkosi en Ander* (supra) and *S v Mabaso and Another* (supra) cases were decided before the advent of the democratic constitution. In as much as these Appellate decisions are authoritative, they need be followed, with respect, in the context of *stare decisis* to the extent they are consonant with the present supreme law; *vide Afrox Healthcare BPK v Strydom*⁷ I am of the respectful view that the interpretation of such authorities must be seen through the prism of the Constitution. I am respectfully mindful of the caution that the High Court must defer to the Supreme Court before departing from *stare decisis*. I am further of the respectful view that there is good wisdom in *Director of Public Prosecutions, Natal v Magidela and Another* (supra) that s112 (2) need be revisited.

⁷ 2002 (6) SA 21 (CC) at p39 para[28]-[30].

[15] It needs borne in mind that s35 (1) guarantees an arrested person the right to remain silent and to be informed of the consequences of not remaining silent; s35 (3)(h) guarantees an accused person the right to remain silent and an not to testify during the proceedings; while s35(3)(j)⁸ guarantees an accused person the right not to be compelled to make self incriminating evidence. I am of the respectful view that the purpose of these sections is to accord both an arrested person and an accused person protection and to ensure that when prosecuted he has a fair trial.

[16] In *Maseko*⁹ matter the Court said:

“...the correct position is as stated by Kentridge AJ in *S v Zuma and Others*¹⁰, where he quotes with approval from different matter:

‘Constitutional rights conferred without express limitation should not be cut down by treading implicit restrictions into

⁸ “S35(3) Every accused person has a right to a fair trial which includes the right-(j) not to be compelled to give self-incriminating evidence.”

⁹ (*Supra*) at 95f-h.

¹⁰ 1995 (2) SA 642 (CC) at 651 I,

them, so as to bring them in line with the common law.
(*Attorney-General v Moagi* 1992 Botswana) LR 124, at 184.)

[16] That caveat is of particular importance in interpreting s25 (3) of the Constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In *S v Rudman and Another; S v Mthwana*¹¹ the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to inquire

"...whether there had been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted."

[17] An accused person cannot be selectively informed of his right to remain silent. Where an accused person is unrepresented, in my view, he must be informed of his right to remain silent so

¹¹ 1992 (1) SA 343 (A).

that he can make an informed decision¹² whether to or not to exercise this right¹³. In line with what was said by Langa CJ in *Hyundai (supra)*, the interpretation to s112 (2) must be consonant with the ethos of the constitution. This section must be interpreted in a manner that obliges the trial officer to inform an unrepresented accused of his right to remain silent. This approach is consonant with s35 (4) of the constitution which demands that any information in this section that must be conveyed to an accused. Besides the questioning in terms of section 112(2) might unlock admissions which would then be used to convict the accused.

[18] In the matter of *Director of Public Prosecutions, Transvaal v Viljoen*¹⁴ Streicher J. said:

‘In terms of s 35 (3) (h) an accused has the right to a fair trial, which includes the right to remain silent (not a right to be informed of the right to remain silent). The right is clearly one that can be waived. For waiver knowledge is required. It is for

¹² Vide *Director of Public Prosecutions, Transvaal v Viljoen* 2005 (1) SACR 505 (SCA) at 520h-i para[43].

¹³ Vide *S v Hlakwane and Another* 1993(2) SACR 362 (0) at page 364h.

¹⁴ 2005 (1) SACR 505 (SCA) at 520h para [43].

this reason that accused should be informed of their right to remain silent at a trial so that an informed decision can be made as to whether to remain silent or not. A failure to so inform an accused may result in the trial being unfair (*Director of Public Prosecutions, Natal v Magidela and Another*¹⁵.) But that can only be the case if the accused is unaware of his right to remain silent.”

[19] In my view, s 35 (3) (j) section imports that self incriminating evidence cannot be solicited from the accused person directly or indirectly. It is therefore, in my view, necessary that an accused who intends to plead guilty be informed of this right to remain silent before he is questioned in terms of s112 (2). The unrepresented untutored accused might think that he is obliged to answer the Court’s questions. It is necessary that an accused be informed of his right to remain silent, even if he has pleaded guilty so that he can make an informed decision. I am of the view that a different approach to this question would not

¹⁵ 2000 (1) SACR 458 (SCA) in para [18].

be consonant with the ethos of the constitution. There is in my view an obligation on the presiding officer to inform an accused of his right to remain silent before he is questioned in terms of s112 (2).

[20] Where an accused person is asked questions in terms of s112 (2) without having been informed of his right to remain silent there is an irregularity but the trial is not necessarily vitiated by such failure¹⁶. However such failure might render the trial unfair. Not every irregularity renders a trial unfair. Whether a trial is unfair is a matter to be decided on case by case basis.

[21] *In casu*, the appellant was asked questions without being advised of his right to remain silent. All that was explained to him was the purpose of the questioning, namely to determine whether he actually intended to plead guilty and if he is not mistaken in his plea. The appellant was then asked to explain what he did. The appellant then proceeded to explain in his words what he had done. The magistrate was then satisfied

¹⁶ *Vide S v Khuzwayo* 2002 (1) SACR 24 (NCD) at 29G,

that the appellant intended to plead guilty. However, the magistrate did not simply accept the guilty plea in respect of all the counts. In respect of count 3 a plea of not guilty was entered in terms of s113 (1). The State then called a single witness in respect of count 3 charge. I am satisfied that the appellant was not prejudiced by the fact that he was not warned of his right to remain silent when s112 (2) was employed. I am accordingly of the view that the proceedings were fair and not tainted by the failure to so warn him.

[22] The appellant was in respect of counts 1 and 4 charged with forgery. The appellant admitted that he falsified a Degree certificate issued by the University of Johannesburg (count 1) by removing the original names thereon and inserting his names in April 2003.

In respect of count 4 the appellant also admitted that he falsified a degree certificate issued by the University of Zululand. He admitted in respect of both counts that he knew that what he was doing was wrong and had no right to do so.

Mr. Mogotsi on behalf of the appellant conceded that the appellant was correctly found guilty on these count 1 and 4.

[23] The charge against the appellant in Count 3 was that on 17 April 2008 he wrongfully, falsely with intent to defraud gave out and pretended to Mandlakayise Alfred Makhudu that he is the Minister of Department of Land Affairs employed by the department of Land, Affairs and would build him a house were he to give him an amount of R650 in cash, to the loss and prejudice of Mandlakayise Alfred Makhudu, and that when he gave out and pretended as aforesaid well knowing that he is not the Minister of Land Affairs and this committed the crime of fraud.

[24] It is not in dispute that the appellant received from the complainant the amount of R650. 00. During his plea explanation the appellant admitted receiving this amount and further said that the complainant wanted him to assist him in processing a claim at the Land Affairs to get an RDP house. He

informed the complainant to give him an amount of R650 so that he can open a file for him at his offices.

[25] The State called the complainant who confirmed that he gave the appellant the aforesaid amount. The reason he gave him the money was because the appellant had informed him that he works for Land Affairs and was going to build him a house at the farm. The appellant gave him a piece of paper written Land Affairs Commissioner. The following day it was brought to his attention that the appellant was arrested. He too went to demand his money from the appellant but has not to date received his money.

[26] The appellant save for cross examining the witness did not testify in his own defence. The court accepted the evidence of Mr. Makhudu and convicted the appellant on this charge.

[27] It is contended on behalf of the appellant that this charge was prematurely brought against the appellant because he could not

open a file for the complainant as the result of his arrest the following day to the receipt of the money.

[28] Makhudu was a single witness. The Court was satisfied with this witness. The appellant did not testify. What the appellant said in his plea explanation is no evidence. Besides it was not in issue that he did receive this amount of R650. Makhudu produced the piece of paper on which it was written "Land Affairs Commissioner". It was not disputed that this document was received by Makhudu from the appellant. The court accepted the evidence of Makhudu and convicted him accordingly on this count. Where there is evidence imperilling an accused person, such as *in casu*, he can ill afford to exercise his right of silence. I am of the view that the conviction of the appellant on count 3 cannot be faulted. The appeal against count 3 should be dismissed and the conviction confirmed.

[25] The charge on count 2 was one of fraud in that "...on or about 14 April 2007 and at or near the Clinic in the district of Volksrust

the accused did wrongfully, falsely and with intent to defraud give out and pretended to Jabu Nzimande that he is Thabo Mohamutsa from the Department of Health at the offices of MEC Mpumalanga and did then and there by means of the said false pretences induced (sic) the said Jabu Nzimande to the loss or potential loss of Jabu Nzimanade and at the Department of Health to use the equipment, the date stamp and also the printers of the clinic whereas in truth and in fact when the accused so gave out and pretended as aforesaid he well knew that he was not Thabo Mohamutsa of the Department of Health and the MEC Mpumalanga.”

[30] The appellant pleaded guilty to count 2. The appellant admitted that he made use of the stamp and equipment as mentioned in the charge sheet. He admitted that he knew that he was not employed at the Department of Health. He further stated that he interviewed some members of the staff in order to get information they as a party needed to persuade some action against the management. The magistrate convicted him on this

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- [30] The appellant pleaded guilty to count 2. The appellant admitted that he made use of the stamp and equipment as mentioned in the charge sheet. He admitted that he knew that he was not employed at the Department of Health. He further stated that he interviewed some members of the staff in order to get information they as a party needed to persuade some action against the management. The magistrate convicted him on this

count on the basis of his plea of guilty and explanation in terms of s112 (2).

[31] It was submitted on behalf of the appellant that the appellant did not admit all the elements of this offence and that the magistrate erred in convicting the appellant on this count. It is submitted that the conviction on this count should be set aside.

[32] The State conceded, quite correctly that the conviction on count 2 is not in accordance with the law and should be set aside. The appellant did not admit that he had intended to defraud. A plea of not guilty should have been entered in respect of this count. The conviction on this count should therefore be set aside.

[33] In respect of count 2 it was submitted by the State that the conviction should be set aside and appellant referred to the magistrate to be tried de novo on this count. This concession was correctly made since not all the elements were admitted by the appellant. The conviction of the appellant was not in

accordance with justice but vitiated by an irregularity and should be set aside.

[34] I am of the view that since the setting aside of the conviction on count 2 is not on the merits but on a technicality, the appellant should in terms of s322 of CPA be referred back to the magistrates court for retrial in terms of s324 CPA.

[35] The appellant was sentenced to six months in respect of each count. There was no submission made on behalf of the appellant in this regard. I do not think that the sentences imposed in respect of those counts that must stand should be interfered with because they are not excessive.

[36] In the result I make the following order:

1. That the appeal against conviction and sentence in respect of counts 1, 3 and 4 is dismissed and the conviction and sentence on these counts are confirmed.

2. That the appeal against both convictions and sentence in respect of count 2 is upheld and the conviction and sentence are set aside.
3. That the case of the appellant in respect of count 2 is remitted to the Magistrates Court for the District of Mpumalanga at Volksrust for retrial before another magistrate in terms of section 322 read with s324 of the Criminal Procedure Act 51 of 1977.

Delivered on 08 December 2010



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

I agree.



R. G. TOLIMAT

JUDGE OF THE HIGH COURT

For the appellant: Adv. JM Mogotsi
For the respondent: The state