

Reportable:	<u>YES</u> / NO
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

Case Nr: 2/2013

Date delivered: 29/11/2012

In the matter between:

The State

and

Petrus Swartz

Coram: Olivier J et Pakati J

JUDGMENT

Olivier J:

[1]. The accused Mr Petrus Swartz, appeared in the Magistrate's Court on 2 charges of assault with intent to cause grievous bodily harm. On both counts he pleaded guilty to common assault¹. The prosecutor accepted these pleas. The legal representative of the accused submitted a written statement in terms of section 112 (2) of the Criminal Procedure Act ("*the Act*"). In it the accused alleged that a stone which he had aimed at Mrs Gertruida Beukes had ricocheted off a house and had hit the one complainant against the head and the other against the shoulder. He stated that he had not intended to injure the complainants but that his legal

¹ Which would in terms of section 266 (a) of the Criminal Procedure Act, 51 of 1977, have been competent verdicts.

representative had explained to him that he should have foreseen injuries.

- [2]. Not surprisingly the magistrate proceeded to question the accused² about whether he had actually foreseen injuries. Pleas of not guilty were then recorded on both counts.
- [3]. The prosecution presented the evidence of Beukes. A medical report on the injuries sustained by the complainant Jaden Beukes was handed in by consent. It reflected a bruise and an abrasion on the forehead.
- [4]. The accused's case was closed without presenting any evidence.
- [5]. The accused was then on both counts convicted of assault with intent to cause grievous bodily harm.
- [6]. The magistrate has submitted the matter for special review³ and has requested that both convictions be set aside and substituted with convictions of assault (common). The magistrate's request is based upon the provisions of section 113 (2) of the Act, which read as follows:

*"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**".*

² In terms of the proviso to section 112 (2) of the Act.

³ In terms of section 304 A of the Act.

(My emphasis)

[7]. The magistrate's reasoning seems to be that the initial acceptance of the pleas had already constituted an explicit indication, as envisaged in section 113 (2), that the prosecution would not proceed on the original charges, in other words on the charges of assault with intent to cause grievous bodily harm, but rather on the lesser but competent verdicts of assault.

[8]. I am indebted to Mrs A H Van Heerden, an advocate of the office of the Director of Public Prosecutions, for the opinion with which she has provided me. It is a well considered and comprehensive opinion which has been of great help in writing this judgment. Mrs Van Heerden has, with reference to the applicable case law, come to the conclusion:

[8.1] that the provisions of section 113 (2)⁴ have changed the legal position which had previously existed when a plea of not guilty had been noted after an accused had pleaded guilty to a competent verdict or an alternative charge;

[8.2] that the words "*unless the prosecutor explicitly indicates otherwise*" refer to an indication by the prosecutor after the plea of not guilty has been noted; and

⁴ Section 113 (2) was introduced into the Act by the provisions of section 8 of the Criminal Law Amendment Act and came into operation on 23 December 1991.

[8.3] that, in the absence of such a contrary indication at that stage, the trial would have to proceed on the charge/s originally laid against the accused.

[9]. The position prior to the enactment of section 113 (2) was explained as follows in **S v Cordozo**⁵ at 638E-F:

"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."

[10]. It was confirmed and explained as follows in **S v Ngubane**⁶ at 683 B-E:

"It is a matter of some difficulty, in the absence of specific provision in the Act, to determine what the provision is where eg a plea of culpable homicide is accepted by the prosecutor in respect of an indictment for murder and the court subsequently records a plea of not guilty in terms of s 113 and requires the prosecutor "to proceed with the prosecution". Does the plea so entered relate to the

⁵ 1975 (1) SA 635 (T)

⁶ 1985 (3) SA 677 (A)

charge of murder or does it relate to culpable homicide? Does the prosecutor proceed with a prosecution for murder or for culpable homicide? Our writers on criminal procedure are not in agreement on this. Hiemstra Suid-Afrikaanse Strafproses 3rd ed at 268 Second Cumulative Supplement 1983 at 16 is of the opinion that a plea recorded in terms of s 113 relates to the original charge and that the prosecution proceeds in respect of such charge, whereas writers such as Van der Merwe, Barton and Kemp Plea Procedures in Summary Trials at 41 - 43 hold the opposite view.

Many of the apparent difficulties seem to arise from an attempt to categorise acceptance of a plea (as envisaged by s 112) as being either a withdrawal under s 6 (a) or a stopping of a prosecution under s 6 (b). (Cf Kotzé 1978 De Jure 211, 1979 THRHR 44; Joubert 1982 De Jure 345.) Strictly speaking it would seem to be neither. 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."

- [11]. The legal position in cases where a plea of guilty to a competent verdict or to an alternative charge had been accepted by a

prosecutor, but had then been corrected and changed to a plea of not guilty, was therefore that the prosecution could proceed only on the crime in respect of which the plea of guilty had been accepted⁷ by the prosecutor and to which the *lis* had been limited by the initial acceptance of that plea⁸.

- [12]. Insofar as cases are concerned where an accused had pleaded guilty to a competent verdict or to an alternative charge, and insofar as the legislature may with section 113 (2) have intended that in such cases the prosecutor would after the plea of not guilty had been noted⁹ have the opportunity of reconsidering the original acceptance of the plea on the lesser count, the provisions of section 113 (2) would therefore constitute a material departure from the legal position which had previously existed.
- [13]. The fact that the provisions of section 113 (2) were obviously intended to ensure that the trial would by default proceed on the "*original charge laid against the accused*" suggests that they were indeed intended to provide for cases where the plea that is "*corrected*" in terms of subsection (1) was a plea of guilty to a competent verdict or to an alternative charge.
- [14]. In a case where the plea of guilty had been tendered in respect of a single charge, and not in respect of a competent verdict or an alternative charge, the prosecution would obviously proceed on

⁷ Which could be a competent verdict or the subject of an alternative charge and which would usually be a lesser offence than, respectively, the original charge or the main charge.

⁸ See also **S v Mokoena en 'n Ander** 1981 (1) SA 148 (O); **S v Mlangeni** 1976 (1) SA 528 (T)

⁹ In terms of section 113 (1) of the Act

that charge¹⁰ and the unaffected allegations¹¹ “*shall stand as truth*” in respect of that charge¹².

- [15]. If section 113 (2) had been intended to apply also to such cases, the reference in it to “*the original charge laid against the accused*” would therefore have been superfluous. Such an interpretation would be contrary to the common law presumption “*that a statute does not contain superfluous provisions and that a meaning must be given to every word thereof*”¹³.
- [16]. A provision for an explicit indication that the trial is not to proceed on the original charge would also be nonsensical when there is in any event no alternative count and no basis for the trial to proceed in respect of a competent verdict.
- [17]. Insofar as the prosecution may in a such a case – in other words where no alternative charge or competent verdict is concerned – after the correction of a plea of guilty desire the trial to proceed on a different charge, the joinder of such a charge before evidence has been led would in any event be provided for by section 81 (1) of the Act¹⁴.

¹⁰ After the Court had in terms of section 113 (1) “*require(d) the prosecutor to proceed with the prosecution*”.

¹¹ Elicited during questioning by the presiding officer.

¹² See proviso to section 113 (1).

¹³ **Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School** 2008 (5) SA 1 (SCA) para [26]; See also **Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd** 1993 (4) SA 110 (A) at 116F-117A.

¹⁴ Compare **Lefaso v S**, an unreported judgment on appeal in the Orange Free State Provincial Division under appeal nr A261/06, delivered on 25 October 2007, with Saffli reference [2007] ZAFSHC 119, para [8]; **S v Maritz**, an unreported judgment in the South Gauteng High Court, Johannesburg, under case nr A273/2012, delivered on 22 November 2012, with Saffli reference [2012] ZAGPJHC 237, para [39]

[18]. It can therefore safely be assumed that the provisions of section 113 (2) were intended to apply specifically to cases where there had been a plea of guilty to a competent verdict or to an alternative count, and not to the “*original*” charge.

[19]. Mrs Van Heerden’s reasoning is as follows:

[19.1] The correction of such a plea of guilty (to a lesser charge) to one of not guilty would normally be preceded by the questioning of the accused on the plea of guilty.

[19.2] Such a questioning would in turn only have been permissible after the prosecutor had accepted a plea of guilty (on the lesser offence) as required by section 112 (1)¹⁵.

[19.3] The initial acceptance of the plea of guilty would already have constituted an “*indication*” by the prosecutor regarding the conviction sought by the prosecution.

[19.4] The “*indication*” provided for in section 113 (2) therefore has to refer to a further opportunity, after that plea has been corrected or changed to one of not guilty, to indicate whether the prosecution would nevertheless be prepared to proceed on the lesser crime.

¹⁵ See **S v Tladi en ‘n Ander** 1994 (1) SACR 174 (NC) at 178b; **S v Peter** 1996 (2) SACR 212 (C) at 217b

- [20]. I agree with this reasoning. The provisions of section 113 (2) have to be understood and interpreted in the context of the rest of in particular chapter 17¹⁶ of the Act, and specifically in the context of the provisions of section 113 (1) and section 112 of that chapter¹⁷. It is a trite principle of interpretation “*that words used in a statute should be read in the light of their context*”¹⁸, which would obviously include (but not be limited to) “*the language of the rest of the statute*”¹⁹.
- [21]. The wording of the preamble to the Criminal Procedure Amendment Act²⁰, which as already mentioned introduced section 113 (2) into the Criminal Procedure Act and is therefore part of the background of section 113 (2), is also significant. It stated that the provisions of that Act were intended to amend the Criminal Procedure Act so as to, *inter alia*, “*provide that a prosecution will in certain circumstances proceed with the charge initially laid against the accused*”.
- [22]. I am also of the view that a plain reading of the wording of section 113 (2) leads to the same conclusion. The so-called golden rule of interpretation requires the language of this section “*to be given its*

¹⁶ Which deals with pleas of guilty

¹⁷ Which provisions are also referred to in respectively section 113 (2) and section 113 (1)

¹⁸ **University of Cape Town v Cape Bar Council and Another** 1986 (4) SA 903 (A) at 914A

¹⁹ **Jaga v Dönges NO and Another; Bhana v Dönges NO and Another** 1950 (4) SA 653 (A) at 662G-663A

²⁰ 5 of 1991

grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency ...”²¹.

- [23]. The ordinary grammatical meaning of the word “*indicates*”, couched in the present tense, is that it refers to an indication given at that stage, in other word after the plea of guilty on the lesser count has been corrected in terms of section 113 (1), and not to an indication which had already been given before the plea of not guilty was noted.
- [24]. In my view the words “*unless the prosecutor explicitly indicates otherwise*”, and specifically the verb “*indicates*”, were couched in the present tense²² to provide for the immediate future²³, and not to make unnecessary and superfluous reference to an indication which would already have been given when the plea of guilty was initially entered, and before the questioning (which led to the correction of the plea) took place.
- [25]. Such an interpretation would in my view not result in any repugnancy, absurdity or inconsistency.
- [26]. The fact is that section 112 (1) of the Act requires the prosecutor to accept a plea of guilty before hearing the answers to the presiding officer’s questions, and the possibility always exists that

²¹ **Brink v Premier, Free State and Another** 2009 (4) SA 420 (SCA) para [11]; See also **The University of Cape Town v Cape Bar Council and Another, supra**, at 913H-J and **Ebrahim v Minister of the Interior** 1977 (1) SA 665 (A) at 678A

²² See **Ndlovu v Ngcobo; Bekker and Another v Jika** 2003 (1) SA 113 (SCA) para [5]

²³ Compare para [153] of the minority judgment in **General Council of the Bar of South Africa v Geach and Others** 2013 (2) SA 52 (SCA); **Union and South-West Africa Insurance Co Ltd v Fantiso** 1981 (3) SA 293 (A) at 301B

the accused's answers may produce a version which is at odds with the evidence available to the prosecutor.

- [27]. The plea of guilty, and its acceptance, may even have been preceded by negotiations between the prosecutor and the accused (or his/her legal representative)²⁴ or by some indication by or on behalf of the accused of the factual basis on which the plea of guilty would be founded, and the answers subsequently provided during the questioning may then differ materially from such factual basis. Why should the prosecutor under such circumstances remain bound by the initial acceptance of the plea?
- [28]. At the very least the acceptance of a plea to a lesser charge would have been based on the assumption that the elements of that offence would be admitted. If that does not happen, and the prosecutor has at his/her disposal evidence to prove the original charge, why should the prosecutor not be entitled to do so?
- [29]. It was in the **Ngubane** case remarked that "*in the absence of a specific provision in the Act*" it was "*a matter of some difficulty*" to determine whether the corrected plea would in such a case relate to the original charge or to the lesser charge. In my view the legislature has now by means of the enactment of section 113 (2) of the Act provided such a "*specific provision*".

²⁴ Compare **North Western Dense Concrete CC and Another v Director of Public Prosecutions (Western Cape)** 1999 (2) SACR 669 (C)

- [30]. In the interpretation of legislation “*the legislature is presumed to know the law, including the authoritative interpretation placed on its previous enactments by the courts*”²⁵.
- [31]. Against this background the provision in section 113 (2) of an opportunity to in a manner of speaking reconsider the initial acceptance of the plea of guilty to a lesser charge, is in my view a clear indication of a deliberate departure from the **Ngubane** position, where the prosecutor would have been bound by the initial acceptance of the plea of guilty on the lesser charge and would therefore only have been entitled to proceed with the prosecution on that charge²⁶.
- [32]. In **S v Nyanga**²⁷ the accused had pleaded guilty to a single count of robbery. After questioning a plea of not guilty had been recorded. The prosecutor’s application for a postponement in order to present evidence was refused. Both the prosecutor and the accused then closed their cases without presenting any evidence. The prosecutor applied for a conviction on the competent verdict of theft, and the accused was so convicted.
- [33]. On review the prosecutor’s request for a conviction of the lesser crime of theft was apparently equated with the acceptance of a plea on the lesser crime of theft and it was at 203a held that:

²⁵ **Road Accident Fund v Monjane** 2010 (3) SA 641 (SCA) at 646G-H

²⁶ Compare **Port Elizabeth Municipal Council v Port Elizabeth Electric Tram Way Co Ltd** 1947 (2) SA 1269 (A) at 1279

²⁷ 2004 (1) SACR 198 (C)

“Section 113(2) reserves to the prosecution, as dominis litis, the right to accept a lesser charge than the one on which a plea of not guilty has been recorded, provided such election is done prior to any evidence being led. (In this regard see Du Toit et al Commentary on the Criminal Procedure Act at 17-16A.)”

[34]. In my respectful view the request for a conviction of theft could not really under these circumstances have been equated to an election in terms of section 113 (2). The prosecutor did not, after the plea of not guilty was record, indicate that the trial could proceed on the lesser crime of theft. The application for a postponement was obviously aimed at presenting the evidence of the complainant, which would have been necessary to prove robbery (and not just theft²⁸). The indications are therefore that the prosecutor in the **Nyanga** case had actually desired the trial to continue on the charge of robbery. The request for a conviction of theft after both cases had been closed was not really an election for the prosecution to proceed on a lesser charge, but rather a concession that the accused could on the available evidence not be convicted of robbery, but only of theft. The request for and the eventual conviction of theft were in my view simply based on the provisions of section 260²⁹ of the Act, and not on those of section 113 (2).

²⁸ Because the accused had during the questioning admitted theft

²⁹ Which *inter alia* provides that “if the evidence on a charge of robbery does not prove the offence of robbery ..., but - the offence of theft the accused may be found guilty of the offence so proved”

- [35]. The fact remains, however, that the court in the **Nyanga** case interpreted section 113 (2) as providing a prosecutor with the option of proceeding on a lesser charge, provided no evidence has been led.
- [36]. The interpretation of section 113 (2) as providing a prosecutor who had initially accepted a plea of guilty to an alternative count or on a competent verdict with this option after that plea is corrected to one of not guilty, is supported by Kruger in **Hiemstra's Criminal Procedure**³⁰ and by the authors of **Commentary on the Criminal Procedure Act**³¹ at 17-43³².
- [37]. The Supreme Court of Appeal did in **S v Tshilidzi**³³ reaffirm the **Ngubane dictum**, but only as regards the limitation of the *lis* through the initially acceptance³⁴ of a plea to a lesser charge or crime. The facts of that matter were that the appellant had pleaded not guilty to the main charge of rape, but guilty to the alternative charge of a contravention of section 14 (1) of the Sexual Offences Act³⁵. The prosecutor had accepted the plea of guilty to the lesser charge. The trial judge "*refused to accept*" the plea of guilty and as a result of this the accused then "*withdrew*" that plea and pleaded not guilty to that charge as well. The trial proceeded and the appellant was eventually convicted of rape. It was therefore not a case where the plea of not guilty to the

³⁰ At 17-17 to 17-18

³¹ Du Toit *et al*

³² Compare also **Lefaso v S**, *supra*, para [7] and **S v Maritz**, *supra*, para [41]

³³ 2013 JDR 1356 (SCA)

³⁴ In other words before the questioning of the accused

³⁵ 23 of 1957

alternative was recorded in terms of section 113 (1) and the provisions of section 113 (2) were therefore not applicable.

- [38]. In the **Tladi** case referred to above the full court of this division held, with reference to the **Cardozo**³⁶ and **Mlangeni**³⁷ cases, that where a plea of not guilty is noted in terms of section 113 (1) the trial could only proceed in respect of the charge which had been corrected, and therefore on the charge which had initially been accepted by the prosecutor. It was held that in such a case the trial could not proceed on a charge not covered by the plea of guilty, and especially not on a more serious charge.
- [39]. Although the review was heard after the coming into operation of section 113 (2), no reference was made to it and the case can therefore in my view not be seen as a guide for the interpretation of section 113 (2).
- [40]. I am therefore of the view that, in the absence of an explicit indication that the trial against the accused in the present matter could still continue in respect of the competent verdicts of assault, the trial by default proceeded on the charges originally laid against the accused, in other words on the charges of assault with intent to cause grievous bodily harm.
- [41]. The wording of section 113 (2) of the Act does not require an election by the prosecutor, as to the charge in respect of which the prosecution is to proceed, **before** the trial can proceed. It provides

³⁶ Para [9] *supra*

³⁷ Footnote 8 *supra*

that the trial **shall** proceed on the original charge/s, and in other words not on the lesser charge/s, “*unless*” the prosecutor indicates otherwise.

- [42]. The evidence of Beukes was that the complainants had been sleeping outside the house when the accused threw the stone which ricocheted off the house and hit the complainant in the second charge. According to her the complainants had been sleeping outside the house approximately 15 meters from where she and the accused had been standing before the incident. She testified that she had been too drunk to notice the injury to the second complainant’s head. Her evidence was that a nearby flood light provided light in the area of the house. She testified that the accused would have been able to see the people lying outside the house. She denied that anybody else was hit by a stone.
- [43]. The magistrate found that the accused had in fact seen the people lying outside the house before throwing the stone or stones at the house. In my view, however, Beukes’s evidence did not exclude the reasonable possibility that the accused may in fact not have seen the people lying outside the house. There was no evidence that he had looked in that direction while he and Beukes were drinking approximately 15 meters from where the people were sleeping. It is also not clear from the evidence exactly where the accused was when he threw the stone.
- [44]. Beukes’s evidence that the accused would have been able to see the people from where they had stood before the stone was

thrown did not in my view justify the inference, as the only reasonable inference to be drawn, that the accused did in fact see them. If he did not, there would have been no reason for the accused to foresee that the stone could hit and injure somebody outside the house at that hour of the night. It follows that I am of the view that both convictions should be set aside.

[45]. As far as the other charge is concerned Beukes in any event denied that that complainant had been hit by a stone.

[46]. The following order is therefore made:

The convictions are set aside.

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

I agree:

**B M Pakati
JUDGE
NORTHERN CAPE DIVISION**