

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE No: CC106/2022

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED: YES/NO

M.G PHATUDI J


SIGNATURE

16/08/2024
DATE

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS,
LIMPOPO PROVINCE

APPLICANT

and

TLAISEGO BENESANE LAZARUS MAGAKWE

RESPONDENT

REASONS FOR JUDGMENT

M.G. PHATUDI J:

BACKGROUND:

- [1] This is an application by the Director of Public Prosecutions, Limpopo, (DPP) the state, for leave to appeal against the conviction and sentence imposed against the Respondent, Mr Tlaishego Ber Lazarus Magakwe, pursuant to

his admission of guilt to culpable homicide in terms of S.220(1) of the Criminal Procedure Act 1977 (the CPA).¹

THE FACTS:

- [2] The respondent was originally indicted in this court on three counts. In count one, he was charged with murder, read with the provisions of S 51 (1) of Act 105 of 1997.² On count two he was charged with contravention of SS.1, 103, 117, 120, 121, and 151, respectively, of the Firearms Control Act 2000.³ On count three, the charge was one of defeating the ends of justice.
- [3] The respondent initially pleaded not guilty to all three counts, and raised private defence as the basis of his defense during his plea explanation in terms of S. 115 of the CPA. I consider it unnecessary to re – live his plea explanation in this judgement, as same was mechanically recorded and, therefore, forms part of the appeal record.
- [4] The trial hearing commenced in earliest on 22 May 2023, at the conclusion of the state's case on 24 May 2023, the respondent unsuccessfully applied for an acquittal in terms of the provisions of S. 174(1) of the CPA in respect of all the counts. The decision to refuse his acquittal at that stage of the proceedings, was made after the court assessed or evaluated the state's case and made a finding, in the exercise of its discretion that, there was a *prima facie* case made out against the respondent which needed an answer.

¹ Act 51 of 1977 as amended

² Act 105 of 1997

³ Act 60 of 2000

- [5] Subsequent thereto on 30 May 2023, the respondent's counsel, Mr. Monene, in order to trim sails to the wind, applied to have trial proceedings further adjourned to 17 July 2023. The state had prior to that initially applied on own volition to have its reservation of questions of law withdrawn by notice, which was granted. Subsequent thereto the state formally applied for its reinstatement.

THE TRIAL PROCEEDINGS ON 17 JULY 2023:

- [6] At the resumption of the trial on 17 July 2023, attorney for the respondent, Mr. Mahlaela, brought an application from the bar seeking to change the accused's plea of not guilty, in particular, of the murder charge, to that of a plea of guilty of culpable homicide. The change of the plea of guilty also covered other charges in respect of which he initially pleaded not guilty. The facts upon which the respondent admitted his guilt were reduced to writing, in terms of the provisions of S.220 of the CPA. (Exhibit A1, Record). In it, he gave a detailed account of the circumstances that led to the deceased's death.
- [7] On a proper reading of the relevant statement he made in terms of S.220, the respondent had unequivocally admitted all the essential ingredients of the crime of culpable homicide. The court having satisfied itself about his culpability, and the state having accepted the respondent's changed plea read with his attendant S.220's admission statement, returned a verdict of guilty of culpable homicide on the strength of his statement, together with ancillary pleas to other charges for which he admitted his guilt.

[8] It was at that moment, after conviction, that the court took the view there was no longer a lis in respect of the prosecution's case which would have impelled the court to evaluate the totality of the evidence for the purpose of deciding whether or not the state succeeded in proving its case against the respondent beyond a reasonable doubt.

[9] On the return of conviction following a changed plea and the admission statement made under S.220 of the CPA, both the prosecution and the defense counsel, were granted an opportunity to address the court on aggravation and mitigation of sentence. The court remarked that "the deprivation of one's life by culpability, cannot be countenanced. It must be rebuked in the strongest possible terms it deserves".⁴ At the end of the proceedings, the court having considered the aggravating and mitigating factors, and in the exercise of its judicial discretion, based on the factual basis presented, imposed the sentence(s) as reflected on the endorsed copy of the court order.⁵

LEAVE TO APPEAL:

[10] Aggrieved with the conviction and sentence imposed, the state applied for leave to appeal for determination by the appellate court in terms of S 319 of the CPA of which it claimed were questions of law.

[11] The state in its application for the reservation of questions of law sought for consideration by the SCA, set them out, *inter alia*, as follows:⁶

⁴ P7 line 1-10, Record.

⁵ Copy of the court order marked "MGP¹".

⁶ Paginated index PP7-8, Record (Man application) dated 07 May 2024.

“

- (a) *whether the court is entitled to convict the accused on a competent verdict of culpable homicide without first considering whether the evidence presented proves the main charge of murder;*
- (b) *whether the court is entitled to disregard other relevant evidence presented at the trial and consider only admissions made in terms of section 220 of the Criminal Procedure Act 51 of 1977, and if so, whether an admission in terms of section 220 of Act 51 of 1977 is a plea of guilty as envisaged in section 112 (2) of Act 51 of 1977;*
- (c) *whether the trial court erred in law by disregarding the established legal principles in section 175 of the Criminal Procedure Act 51 of 1977, by not affording the applicant and the respondent an opportunity to address the court prior to judgment.”*

The respondent filed an answering affidavit opposing the said application.

THE ISSUE:

- [12] The question that arises is whether the foregoing issues raised by the state constitute questions of law.
- [13] The legal regime governing reservation of question of law is stipulated in S.319(1) of the CPA. It provides that:

“

- (1) if any question of law arises on the trial in a superior court of any person for any offense, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, (SCA) and thereupon the first – mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy be transmitted to the registrar of the Appellate Division, (own insertion).”

- [14] I turn now to consider each of the questions sought to be reserved seriatim as follows:

14.1 Whether the court is entitled to convict the accused on a competent verdict of culpable homicide without first considering whether the evidence presented proves the main charge of murder?

14.1.1 I hasten to point out that as stated in the **Director of Public Prosecutions, Western Cape V Schoeman**⁷) three requisites were aptly laid down, namely, (1) it is essential that the question is framed accurately leaving no doubt what the legal point is, (2) the facts upon which the point hinges must be clear, (3) and they should be set out fully in the record together with the question of law.

14.1.2 The question in 14.1 above, was not “accurately framed essentially leaving no doubt what the question of law is”. The question is not only vague, but is capable of varied interpretation, as same was nowhere fully set out in the record as required.

14.1.3 The court was, in view, entitled to convict the respondent of culpable homicide in respect of which he admitted facts in his S220 statement which prompted him to alter his plea of not guilty to the main offence. to that of guilty to a lesser offence. (murder to culpable homicide). The admission statement changing his plea to one of guilty after he admitted his guilt, was accepted by the state.

14.1.4 By unequivocally admitting his guilt in terms of S220, invariably resulting in a change of plea, “the particular points in dispute, (murder count) falls away, and did not need to be adjudicated”.⁸ In other

⁷ 2020(1) SACR 449(sca) PARA: [39] SEE ALSO. DPP, Watal v Magidala & another 2000(1_) SACK 458(SCA) para: [9]

⁸ “Hiemstra’s criminal procedure, Issue 12, (2019) at PP15.

words, formal admissions made in terms of s 220 are facts which, if admitted, eliminate points of main dispute at criminal trial and thus amount to sufficient proof of such fact. Where, however, in an instance as the present, no points in issue remain for adjudication on the evidence, or still on the merits, and if the respondent, admitted facts whose elements proves culpable homicide, and is eventually convicted thereon, it cannot be contended that the court erred in its conviction. See in general, **S v Malebo** 1979(2) SA(B) AT 644.

14.1.5 This observation stems from the fact that no further proof of culpability is required from the state, whatsoever, the accused may seek a verdict. In *casu*, the respondent changed his plea before a conclusion by the trial court on whether to convict of murder or of a lesser offence, (culpable homicide) which naturally required prior evaluation.

[15] Whether the court is entitled to disregard other relevant evidence presented at the trial and consider only admissions made in terms of section 220 of the CPA 1977, and if so, whether an admission in terms of section 220 of the CPA, is a plea of guilty as envisaged in section 112(2) of the CPA.

15.1 The second question is the relic of the first question. As already shown, the court during the S174 application by the respondent at the close of the prosecutions' case, considered the entire state's evidence at that stage in order to decide on the fate of the said application. The result was its rejection by the court.

15.2 The court in its judgement delivered after reasons for the conviction and sentences imposed were requested by the state pursuant to the respondent's changed plea of guilty, made a finding, based on the S.220 admissions of guilty to culpable homicide.

15.3 These factual findings prompted the court to conclude *inter alia* that:-

"[15]Because the evidence of the state witnesses in the main trial was no longer of moment for the purposes of a conviction in respect of the charges in the indictment, that part of the evidence, naturally, became pro non scripto. The section 220 admissions and the admitted facts depicting his guilt had all extinguished the prosecution's evidence it sought in pursuit of a conviction in the main trial⁹.

15.4 Put differently the decision to convict the respondent was inherently based on the strength of his admission statement in terms of S220 representing his changed plea of guilty to culpable homicide. This was not necessarily on account of the state having proved its case against the respondent beyond reasonable doubt in respect of the original dispute or *lis* as the main charge of murder in the indictment had fallen away.

15.5 Applying the reasoning offered by the learned author Heinstra above,¹⁰ the court took the view that the admissions in terms of S220 of his guilty statement, the main dispute (murder charge) which was accepted by the state, indubitably, extinguished the need to adjudicate the state witness evidence since the trial/dispute was prematurely terminated. The usual

⁹ Paginate Index, P38, para [15] Record.

¹⁰ Ibid. sub-paragraph 4.1.4, judgment, and the authorities cited there in

process of evaluation of the totality of the evidence was curtailed by the changed plea to one of guilty, thus eliminating the *lis* between the state and accused. When, as in this case, there was a change of plea to one of guilty, (from not guilty) no facts are in dispute. No evaluation of the evidence would still be required as if the trial unfolded to its logical conclusion. There was, therefore, no evidence left for the court to evaluate. See, **S V Ngubane** 1985(3) SA677(A) of 683.

15.6 By accepting the admission statement under S220 in circumstances where the respondent admitted his guilt to a lesser offence, the state invariably bound itself to that admission in terms of S.12 of Act 86 of 1996¹¹. The corollary is failure by the state then to have objected to the facts admitted in the S220 admission statement analogous to admission of guilt, is accordingly held to it. See in general, **S V Chironga** 1980(4) SA 353(Z)¹².

15.7 I accordingly find that the latter question, like the first, is equally liable to fail for not meeting the threshold in S.319 of the CPA.

[16] The last question is whether the trial court erred in law by disregarding the established legal principle in S175 of the CPA 1977, by not affording the appellant and the respondent to address the court prior to judgement.

16.1 This question is regulated by the provisions of S175(1) of the CPA. The operative words are: - **“after all the evidence has been adduced”**, the

¹¹ Criminal Procedure Amendment Act, 1996. This amendment created a situation where the state binds itself to its own admissions, e.g. the particulars in its charge, or its failure to object to certain evidence/facts.

¹² Chironga cited with approval by Hiemstra at p24 in his “Criminal Procedure” referred to above.

prosecutor and thereafter the accused (his/her counsel) may address the court.

16.2 As already shown, in the instant case, the trial proceedings did not unfold to an extent where it reached its tail end for the court to evaluate the totality of the evidence, or to assess at the end of the defense's case. The respondent admitted his guilt in the middle of the proceedings by changing his plea. In that way, the court was left in no doubt about the guilt of the accused (respondent) in respect of culpable homicide and ancillary charges to which he admitted guilt.

16.3 This court found no potential or actual prejudice occasioned, to the after being satisfied about his guilt, that he be convicted on the strength of his changed plea to admission of guilt pursuant to S220 statement. Crucially, the respondent was throughout the trial proceedings, legally represented.

16.4 It can, therefore, not be said that he could not have had a fair trial in the circumstances, not to have addressed the court subsequent to handing up his S220 statement. (Exhibit A).

16.5 His handing up of the S220 admission statement was, in my view, an admission of his guilt, unequivocally so, and thus constituted waiver to address the court at that stage. See generally, **S V Kwindia** 1993(2) SACR 408(V) at 410. Waiver by an accused person, particularly, legally represented, is not something foreign in our law. See also; **R v Cooper** 1926 AD 54, and also **R v Podbrey** 1948(2) SA 181 (C) at 185.

16.6 Regard being had to the foregoing considerations, I am of the view that there could not have been an irregularity that would otherwise justify reservation of a question of law as formulated by the state.

THE APPROACH:

[17] It often happens, as in the present instance, that the accused in the course of trial changes the pleas to one of guilty to a lesser offence which is then a competent verdict on the main charge, which the prosecutor may accept.

17.1. The appellate court in **S v Sethoga and Others**¹³ aptly explained the material distinction between the acceptance of a plea by the state before and after the commencement of the trial, at the plea stage, where the latter is *dominus litis* and thus entitled after acceptance of a plea of guilty to another offence, to limit the ongoing *lis* between the state and the accused. However, upon commencement of the trial, the duty rests on the court to adjudicate the case as defined on the admitted facts or as in the remaining charge and the changed plea occasioned by the S220 statement of guilt. It is in my view, not open to the prosecution to interfere with the exercise by the trial court of this duty, after acceptance of the facts of guilt accepted by the accused from adjudicating on the case. This is particularly so in that there was no stoppage of the prosecution by the DPP. I, therefore, factually took the view that the court could still decide the issue of conviction on a lesser charge of culpable homicide in which the respondent admitted his guilt in terms of S.220 statement. See in general, **S v Tladi and Another** 1994(1) SACR 174 (NC) At 178.

¹³ 1990 (1) SA 270 (AD) at 275

17.2. If my factual conclusion as aforementioned was a mistake of fact, then inevitably, the question as formulated for consideration by the SCA, does not constitute a question of law. My understanding is that “a question of law is not raised by asking whether the evidence established one or more of the factual ingredients of a particular crime, where there is no doubt or dispute as to what those ingredients are.”¹⁴

[18] If my conclusion leading to a conviction on a lesser offence after satisfying myself about the respondent’s guilt, was a mistake of fact, it follows that the latter question sought to be reserved is incompetent in terms of S.319(1) of the CPA. This is because such “question is not raised by asking whether the evidence establishes one or more of the factual ingredient of a particular crime,” in *casu*, culpable homicide as admitted in Exhibit A The issue of *culpa* required is one usually drawn from the primary facts and therefore, is a question of fact not law¹⁵.

[19] The issue is whether the questions reserved by the state in the present case were unbundled in the **DPP: Western Cape v Schoeman and Another**¹⁶. This judgement breathed in and settled legal principles that clearly distinguished factual and legal errors for purposes of S.319 of the CPA.

CONCLUSION:

[20] In light of the foregoing considerations, I am of the view that the following order would issue: -

¹⁴ Magmoed v Janse van Rensburg & Others 1993 (1) SACR 67 (A) at 94 (b) - (c)

¹⁵ See, S v Petro Louise Enterprises (Pty) Ltd & Others 1978(1) SA 271 (T)

¹⁶ 2020 (1) SACR 449 (SCA) para [51] to [58]

- (a) Application for reinstatement of the previously withdrawn reservation of question of law is granted.
- (b) The reservation of the questions of law brought by the state in terms of S.319 of the Criminal Procedure Act 51 of 1977, are refused.


M. G. PHATUDI J
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

REPRESENTATION:

For the state : Adv C Chauke

On brief : The Director of Public Prosecutions,
Limpopo, Polokwane.

For the Respondent : Mr M Mahlaela

On brief : c/o Malope D Mahlaela Burgersfort

Trial date : 18 July 2023

Reasons for judgment sought : 26 January 2024
(conviction)

Delivered electronically : 16 August 2024