



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Reportable

CASE NO.: CA&R 06/2026

High Court Ref. No.: 217857

In the matter between:

THE STATE

and

VUSI JOBELA

Accused

JUDGMENT: AUTOMATIC REVIEW

DA SILVA AJ

Introduction

- [1] This matter comes before this Court on automatic review under sections 302–304 of the Criminal Procedure Act, 1977.¹ It concerns a young man of 25 years, a first offender, who stood trial in the regional court on a charge of murder. The charge was framed with reference to section 51(1) and Part I of Schedule 2 to the Criminal Law Amendment Act, 1997,² section 1 of the Domestic Violence Act, 1998,³ and section 103 of the Firearms Control Act, 2000.⁴
- [2] The State alleged that on or about 18 November 2023, at Madlalani Location in Ngcobo, in the Eastern Cape, the accused unlawfully and intentionally killed the deceased, a woman with whom he was in an intimate relationship, by strangling her. The charge sheet was drawn in a way that, on conviction, would trigger the prescribed sentence of life imprisonment. This was so because the death of the deceased resulted from the alleged domestic violence – an act of physical or sexual abuse, defined in section 1 of the Domestic Violence Act, by the accused, with whom she was in a domestic relationship as defined in section 1 of the same Act.
- [3] The accused enjoyed legal representation throughout. After the charge was put, the magistrate explained that, if convicted of murder as

¹ Act 51 of 1977 (the CPA).

² Act 105 of 1997 (the minimum sentences legislation).

³ Act 116 of 1998.

⁴ Act 60 of 2000.

charged, the accused faced a mandatory sentence of life imprisonment in terms of the minimum sentence regime. The accused indicated that he understood.

[4] When called upon to plead, the accused pleaded not guilty to murder. His legal representative then advised the court that, in accordance with her instructions, the accused wished to plead guilty, not to murder, but to a contravention of section 1(1) of the Criminal Law Amendment Act, 1988⁵ which criminalises certain conduct committed while voluntarily intoxicated. A written statement in terms of section 112(2) of the CPA was handed in.

[5] The magistrate considered this statement. He noted difficulties flowing from the accused's professed lack of recollection and contradictions about his mental state. Correctly so, as will become apparent, he declined to accept it. The matter was then stood down so that an "amended" statement could be prepared.

[6] In due course, a second section 112(2) statement was tendered. The prosecutor indicated that the State accepted this as a plea of guilty to contravening section 1(1) of the 1988 Act. After confirming with the accused that the statement reflected his instructions and was freely and

⁵ Act 1 of 1988 (the 1988 Act).

voluntarily made, the magistrate convicted him of that offence, without putting any further questions.

[7] In mitigation, the accused's personal circumstances were placed on record. He was 25 years old, a first offender, the father of a minor child, unemployed but doing odd jobs and contributing what he could towards the maintenance of his child and household. It was recorded that he reported the matter to community members and to the police, and that liquor and jealousy played a role.

[8] Emphasising, rightly, the scourge of domestic violence and the killing of women by their intimate partners, the magistrate sentenced him to 20 years' imprisonment.

[9] The question is whether that conviction and sentence can stand.

The issue narrowed

[10] The point for determination is narrow in formulation but profound in consequence. Once the magistrate appreciated that the first section 112(2) statement did not cover all the elements of the statutory offence in section 1(1) of the 1988 Act, the procedural landscape changed entirely. The protective machinery of sections 112 and 113 of the CPA was triggered.

[11] The pivotal question is this: Was the magistrate, at that moment, obliged in terms of section 113 to record a plea of not guilty and require the State to proceed on evidence, rather than permitting the accused to submit a cosmetically “amended” statement in order to cling to a plea of guilty?

[12] If so, and if he failed to do so, the conviction and sentence are not in accordance with justice and must be set aside. How sections 304 and 312 then direct this Court’s remedial path is part of the story.

The legal framework

Section 1(1) of the 1988 Act: voluntary intoxication

[13] Section 1(1) of the 1988 Act creates a distinct offence dealing with voluntary intoxication. In broad terms, a person is guilty, and liable to the same punishment as for the underlying act, if:

13.1 he consumes or uses an intoxicating substance;

13.2 this impairs his faculties to appreciate the wrongfulness of his acts, or to act in accordance with that appreciation;

13.3 he knew that the substance could have that effect;

13.4 while so impaired, he commits an act prohibited by law and punishable under any penalty; and

13.5 he is not criminally liable for that underlying act because of the impairment.

[14] The section is Parliament's response to *S v Chretien*,⁶ which held that voluntary intoxication may exclude criminal capacity and lead to an acquittal even on grave charges. The 1988 Act seeks to close that perceived "gap" by criminalising the prior decision to become intoxicated, knowing the potential effect on one's capacity.

[15] Cases such as *S v Lange*,⁷ *S v Mbele*⁸ and *S v September*⁹ have unpacked the elements. From them emerge three propositions, central here:

15.1 Lack of capacity because of intoxication is not presumed; it is an element that must be proved or clearly admitted.

⁶ 1981 (1) SA 1097 (A).

⁷ 1990 (1) SACR 199 (W).

⁸ 1991 (1) SA 307 (W).

⁹ 1996 (1) SACR 325 (A).

15.2 Prior knowledge of the disinhibiting effect of the intoxicant is a distinct element.

15.3 The accused must have committed a specific underlying act prohibited by law, in respect of which he is acquitted because of lack of capacity, but for which he is then held liable under section 1(1).

Sections 112 and 113: the protective gatekeeping role

[16] Section 112(2) permits an accused who pleads guilty to hand in a written statement setting out the facts he admits and on which the plea is based. If the court is satisfied that these admissions sustain guilt of the offence to which he has pleaded, it may convict “on the strength of such statement”.

[17] Sections 112(1)(b) and 112(2) are not meant to be a conveyor belt to swift conviction. *S v Naidoo*¹⁰ is a reminder that their purpose is protective: to shield an accused, who may be confused, overawed, eager to please, or ill-advised, from the consequences of an unjustified

¹⁰ 1989 (2) SA 114 (A).

plea of guilty. Later decisions such as *S v Lebokeng*,¹¹ *S v Nkosi*¹² and *S v Mathe*¹³ underscore that, at the plea stage, the court is confined to the facts actually admitted. Missing elements may not be supplied by inference or by judicial imagination.

[18] Where the explanation is equivocal, internally inconsistent or incomplete, and a potential defence is disclosed, the safety valve lies in section 113. Section 113(1) provides that, if at any stage before sentence it appears that the accused does not admit an allegation in the charge or has a valid defence, or if the court is in doubt whether he is in law guilty of the offence to which he has pleaded, the court must enter a plea of not guilty and require the prosecution to proceed.

***Shiburi v S* and the constitutional lens**

[19] In *Shiburi v S*,¹⁴ the Supreme Court of Appeal explained how section 112 now operates through the prism of the fair-trial right in section 35(3) of the Constitution. Section 112 is not merely a procedural convenience; it is a constitutional safeguard.

[20] *Shiburi* makes three points particularly germane:

¹¹ 1978 (2) SA 674 (O).

¹² 1986 (2) SA 261 (T).

¹³ 1981 (3) SA 664 (NC).

¹⁴ 2018 (2) SACR 485 (SCA).

20.1 When questioning an accused under section 112(1)(b), the court's function is to determine whether the accused's factual explanation, accepted as true, supports a conviction on the charge.

20.2 At that stage, the court does not test plausibility or credibility; it simply asks whether, on the accused's own version, all elements are covered or whether a defence is disclosed.

20.3 Once doubt arises in this sense, section 113 is triggered. The court has no residual discretion: it must record a plea of not guilty and require the State to proceed.

[21] *Shiburi* also draws attention to section 312: where a conviction and sentence following section 112 are set aside because section 113 ought to have been applied but was not, section 312 directs that the matter must be remitted to the trial court to act in terms of section 113, unless remittal would lead to injustice or be futile.

Section 304: the High Court's review powers

[22] This matter reaches us on automatic review under sections 302 and 303, but it is section 304 that furnishes this Court with the power to intervene. Section 304(1) empowers a reviewing court to consider the proceedings on the record and, if not satisfied that they are in accordance with justice, to confirm, alter or set aside the conviction or sentence. Section 304(4) confirms that the court may act *mero motu* where the conviction or sentence is not in accordance with justice.

[23] Especially important here is section 304(2)(b)(v). It provides that, when dealing with a case on review or appeal, the court may remit the case to the magistrate's court "with instructions to deal with any matter in such manner as the court of appeal or review may think fit". That remedial power dovetails with section 312(1):

23.1 section 304(2)(b)(v) tells us that we may remit with instructions;

23.2 section 312(1) tells us what those instructions must be where a conviction under section 112 has been vitiated because section 113 was not invoked.

[24] Together, sections 304 and 312 complete the statutory picture. At first instance, sections 112 and 113 protect an accused against an unsafe plea of guilty. On review or appeal, sections 304 and 312 ensure that,

where those protections have not been properly applied, the matter does not rest there: the proceedings are corrected and the case is sent back with appropriate instructions.

The two section 112(2) statements

[25] Against this framework, one returns to the facts.

The first statement

[26] In this statement, the accused records, in substance, that he attended a drinking spree and became drunk. On his way home, he met the deceased, his girlfriend. They sat under a tree, quarrelled about an alleged affair, but later “were fine”. “Drunk as I was”, he continued drinking and passed out. He says he awoke and found the deceased lying next to him. He then went to a neighbour and to the police.

[27] On the crucial question whether he committed any assault on the deceased, he says he “does not recall any act [he] did to the deceased”, but adds that he “does not dispute having committed the alleged act of murder”. On his mental state, he both says that his faculties “was so impaired and such that I could not appreciate my actions and the wrongfulness” and that he knew liquor would impair his faculties and

that he “knew that my actions were wrongful unlawful and therefore punishable in law”.

[28] Already, the difficulties are plain:

28.1 He expressly disavows any recollection of an assault.

28.2 The phrase “I do not dispute having committed the alleged act of murder” is formulaic and sits uneasily alongside his professed lack of memory.

28.3 His assertions about his ability to appreciate wrongfulness are mutually destructive.

[29] Properly read, the first statement does not amount to a clear admission that he strangled the deceased, nor does it clearly admit that his criminal capacity was excluded by intoxication. Objectively, his explanation is reasonably consistent with a plea of not guilty.

[30] At that point, the jurisdictional facts for section 113(1) were present. The statement indicated both that he did not admit an allegation in the charge and that his explanation disclosed at least a potential defence. Under *Shiburi*, once such doubt arises the court “has no residual

discretion”: it must enter a plea of not guilty and require the prosecutor to proceed.

[31] That is not what occurred.

The second, “amended” statement

[32] Instead, the magistrate stood the matter down to allow an “amended” statement. Section 112(2) does not, however, create a third procedural track whereby, once doubt in the section 113 sense has arisen, the court may grant “leave to amend” in order to rescue a guilty plea. Whatever space there may be for clarifying or supplementing a statement, that space disappears once the explanation itself reveals non-admissions and doubt. At that point, the terrain belongs to section 113 alone.

[33] The second statement repeated, in essence, the same narrative: drinking at a shebeen; leaving because he felt drunk; meeting the deceased who was looking for him; sitting under a tree chatting; an argument about an alleged affair; resumption of conviviality; further drinking; passing out; and later waking up. When he woke, he listened to a WhatsApp voice note from an unknown number. The sender

claimed to have seen him killing the deceased and threatened to inform her family. The accused then checked and found the deceased lying dead next to him. He went to a neighbour, who had received the same voice note, and later to the police.

[34] Significantly, the “amended” statement omitted even the earlier, equivocal assertion that he did not “dispute” having committed the alleged murder. It still did not describe any act of strangling or assault. The only “admission” that he killed the deceased comes second-hand, via a nameless sender of a voice note. In substance, the factual concession is: “someone said I killed her”. That is not equivalent to an admission, on his own version, that he committed the unlawful act of killing the deceased.

[35] Far from curing the defects in the first statement, the second entrenched them. It repeated the basic narrative while withdrawing even the earlier quasi-admission. The magistrate’s attempt to manage this by permitting an “amended” statement rather than invoking section 113 rendered the ensuing conviction vulnerable.

Were the elements of section 1(1) admitted?

- [36] The decisive question may now be posed: whether the two statements, taken separately or together, covered the essential elements of the section 1(1) offence.

Consumption, impairment, and knowledge

- [37] On both versions, the accused admits that he voluntarily consumed liquor, felt drunk, continued drinking, and ultimately passed out. He accepts that he knew liquor could impair his faculties. These admissions go some distance towards the consumption and knowledge elements.
- [38] But mere intoxication, even extreme, is insufficient. Section 1(1) requires impairment at the level of criminal capacity: the inability either to appreciate the wrongfulness of one's conduct or to act in accordance with that appreciation. That is why the section was enacted in response to *Chretien*; it is confirmed in *Lange*, *Mbele* and *September*.
- [39] Here, the first statement contains mutually inconsistent assertions: he both could not appreciate his actions and their wrongfulness, and yet he knew his actions were wrongful and punishable. The second statement says nothing at all about his capacity at the critical moment; it simply describes his drunkenness and the fact that he passed out. On such a footing, one cannot say that he unequivocally admitted that his criminal

capacity was excluded. That is fatal, because lack of capacity is an element that must be clearly admitted or proved; it cannot be inferred from general assertions of drunkenness, especially where the accused has also said that he knew his actions were wrongful.

Commission of the underlying prohibited act

[40] Section 1(1) also requires that, while so impaired, the accused “commits an act” prohibited by law and punishable under any penalty. The underlying act here is the unlawful killing of the deceased, charged as murder.

[41] In neither statement does the accused say: “I strangled her”, “I assaulted her”, or even “I killed her”. The first statement “I do not dispute having committed the alleged act of murder” is, at best, a formula that jars with his professed lack of memory. The second retreats from even that. It leaves the assertion that he killed her resting solely on an anonymous voice note.

[42] Decisions such as *Naidoo*, *Lebokeng*, *Nkosi* and *Mathe* insist that, under section 112, the court may not fill gaps in the admitted facts by inference. The accused's own admissions, taken as true, must themselves cover every element. On the statements before the magistrate, they did not.

Non-liability for that act because of intoxication

[43] The fifth element of section 1(1) is that the accused is not criminally liable for the underlying act because his faculties were impaired by intoxication. The section presupposes that he would be acquitted on the underlying charge because of lack of capacity, and then visited with liability for the intoxication-offence instead.

[44] On his own version, the accused never clearly admits that he would have to be acquitted of murder because his capacity was excluded. Given the contradictory statements about his appreciation of wrongfulness, and the silence of the second statement on capacity, that element remains unadmitted. Taken together with the absence of any clear admission that he committed the underlying act, the statutory requirements of section 1(1) were not met on his own explanation.

When doubt arose, what did the law require?

[45] The moment the magistrate realised, and he did, that the first section 112(2) statement did not cover all the elements of the section 1(1) offence, doubt in the *Shiburi* sense existed. At that point, the guilty-plea procedure had reached its outer limit. Section 113 mandated a pivot: a plea of not guilty, and a trial on evidence.

[46] By instead permitting an “amended” statement and proceeding to convict on it, the magistrate acted outside the statutory scheme. The second statement did not cure the defects; it amplified them. The conviction built on that foundation was not in accordance with justice. That conclusion squarely engages section 304(1) and (4), which empower and oblige this Court to intervene.

[47] Because the conviction and sentence followed on the section 112(2) procedure, and because section 113 should have been applied but was not, this is precisely the situation contemplated by section 312(1). That section tells us that, where a conviction and sentence based on section 112 are set aside on appeal or review for such a reason, the matter **must** be remitted to the trial court with a direction to act in terms of section 112 or 113, unless remittal would be unjust or futile. No such impediment presents itself here.

[48] Section 304(2)(b)(v) specifies how the order should be framed, allowing the court to remit the case to the regional court “with instructions” on how the matter must be handled going forward. Section 312 then sets out what those instructions are required to be.

The human context and the limits of judicial zeal

[49] The regional magistrate’s concern is understandable. A woman is dead. The circumstances suggest a killing in an intimate relationship. Our courts have often spoken of the epidemic of gender-based violence and the need for sentences that reflect society’s revulsion and provide deterrence. The time-honoured sentencing triad in *S v Zinn*,¹⁵ the crime, the offender, and the interests of society—bears heavily in such cases.

[50] He also referred to cases where a sentence of life imprisonment for murder was replaced with a lengthy term of 20 years’ imprisonment, with comments about voluntary intoxication and culpability. But however weighty these considerations may be at the sentencing stage, they presuppose one thing: a lawful conviction. They cannot justify relaxing the demands of section 112(2), or diluting the elements of section 1(1), or bypassing section 113 and, ultimately, sections 304 and 312. Policy

¹⁵ 1969 (2) SA 537 (A).

concerns, however pressing, cannot trump the statutory safeguards designed to protect fair-trial rights.

The roles of the attorney, the prosecutor and the magistrate

[51] One cannot read this record without disquiet.

[52] The first failure lies with the accused's Legal Aid attorney. He was a young, indigent man, wholly reliant on her advice. It was her duty to ensure that any plea of guilty rested on unequivocal factual admissions that satisfied every element of the statutory offence. On the facts contained in both section 112(2) statements, he did not admit that he killed the deceased; nor did he clearly admit that his criminal capacity was excluded by intoxication as required by section 1(1). A competent attorney would have advised that the facts he was willing to place on record did not amount, in law, to an admission of guilt. He should have been advised to plead not guilty and insist that the State prove its case.

[53] Instead, she prepared two statements that were factually deficient and internally inconsistent, and persisted in a plea that did not cover the offence's essential elements. In doing so, she exposed her client to conviction and a severe sentence on a legally unsound basis. That is a serious failure of professional responsibility.

[54] The prosecutor too did not discharge his role. A prosecutor is not a mere adversary; he is a minister of justice. He was duty-bound to scrutinise the section 112(2) statements and to satisfy himself that the plea was competent in fact and law. On minimal scrutiny, it was apparent that neither statement contained an admission that the accused killed the deceased, nor a clear admission that his criminal capacity was excluded. The prosecutor should not have intimated acceptance of the plea. He ought instead to have drawn the deficiencies to the court's attention and invited the magistrate to follow section 113.

[55] Finally, there was a failing on the part of the magistrate. Judicial officers must ensure that proceedings are fair and that guilty pleas are safely grounded in both fact and law. The magistrate was correct to identify problems in the first statement and to decline to accept it. But the second statement did not mend matters; it left the central omissions intact. Yet he accepted it without further probing and convicted. Under section 112(2), he was required to be satisfied that the accused's admissions embraced all essential elements of the offence. Once the first statement revealed doubt in the section 113 sense, the law required him to enter a plea of not guilty. That safeguard was not observed.

[56] Taken together, the failures of the attorney, the prosecutor and the magistrate meant that no one in that courtroom ensured that this accused, facing an allegation of the utmost gravity and exposure to life imprisonment, was convicted only on the basis of clear, complete and unambiguous admissions. The statutory protections crafted precisely for such circumstances were left on the shelf.

Conclusion and order

[57] The Court is now in a position to answer the question posed earlier.

[58] Once the magistrate recognised that the first section 112(2) statement did not cover all the elements of the section 1(1) offence, section 113 of the CPA obliged him to record a plea of not guilty and require the State to proceed with a full prosecution. By instead attempting to “rescue” the guilty plea through an amended statement, and then convicting on the strength of that amended statement, he acted outside the statutory framework.

[59] Thus, the conviction and sentence are, in the language of section 304(1) and (4), not in accordance with justice.

[60] Because the conviction and sentence followed upon the section 112(2) procedure, and because they are vitiated by a failure to invoke section 113 when doubt plainly arose, section 312(1) is directly engaged. It requires that, once such a conviction and sentence are set aside, the matter be remitted with directions to proceed in accordance with sections 112 and 113, unless remittal would be unjust or futile.¹⁶ No such difficulty presents itself here.

[61] Section 304(2)(b)(v), read together with section 312(1), thus dictates the shape of the order. This Court must set aside the conviction and sentence, and must remit the matter to the regional court, with appropriate instructions.

[62] Two considerations are decisive:

62.1 On neither version did the accused make the essential admission that he committed the underlying prohibited act, the unlawful killing of the deceased.

¹⁶ In *S v Mshengu* 2009 (2) SACR 316 (SCA), para 17, it was held that the course prescribed by section 312 has to be followed, unless the court of appeal was of the view that it would lead to an injustice or would be a futile exercise.

62.2 Equally, he never clearly and consistently admitted that he lacked criminal capacity due to intoxication, and was for that reason not criminally liable for that act.

[63] A life has been lost. The allegation is grave. The interests of justice, for the accused, for the deceased's family, and for society, demand that the matter now proceed in the only proper way: through a full trial before a different regional magistrate.

[64] It should be recorded, for completeness, that the accused has been in custody since his first appearance on 24 November 2023, initially pending the finalisation of the matter when bail was not secured, and thereafter pursuant to the sentence imposed by the trial court.

Order

[65] In the result, the following order is made:

1. The conviction of the accused on a charge of contravening section 1(1) of the Criminal Law Amendment Act 1 of 1988 is reviewed and set aside.

2. The sentence of twenty (20) years' imprisonment is likewise set aside.
3. In terms of sections 304(2)(b)(v) and 312(1) of the Criminal Procedure Act 51 of 1977, the matter is remitted to the Director of Public Prosecutions and to the regional court, Ngcobo, for the accused to be tried *de novo* on the original charge(s) of murder (and any competent alternatives) before a different regional magistrate, who must proceed further in accordance with section 113 of the Criminal Procedure Act.
4. The question of the accused's further detention or release pending that trial is left for determination by the trial court in accordance with the applicable provisions of the Criminal Procedure Act 51 of 1977.

AM DA SILVA

ACTING JUDGE OF THE HIGH COURT

I concur,

L RUSI

JUDGE OF THE HIGH COURT

Judgment Delivered on : 27 January 2026