IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Not reportable

Case No: CA & R 33/23

In the matter between:

D W BAGANANENG **APPLICANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Bagananeng v The State* (Case no CA & R 33/23 (27 October 2023)

Delivered: 27 October 2023

Coram: Phatshoane AJP and Stanton J

Judgment

Phatshoane AJP

[1] This special review has been forwarded to this Court by Senior Magistrate J Schmulling of Kuruman at the request of the defence counsel. It is presumably in terms of s 304A of the Criminal Procedure Act 51 of 1977 (the Act) albeit the accused had not been convicted.[1] On 20 October 2022, the accused, Dimakatso

[1] Section 304A *(a)* of the Criminal Procedure Act 51 of 1977 provides: If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice, he shall, without sentencing the accused, record the reasons for his

Willem Bagananeng, was arraigned before Magistrate P Motsapi in the Magistrates' Court for the District of John Taolo Gaetsewe, Kuruman, on a charge of assault with the intent to do grievous bodily harm in that, it was contended, he hit Mr A Katong (the complainant) with a stone in his rib cage.

[2] The accused, who was undefended, pleaded guilty to the charge. Following this, the trial court subjected him to sharp questioning in terms of section 112(1)*(b)* of the Act. Discernible from the accused's responses is that he did not admit the elements of the offence in all of its ramifications. For instance, he revealed that he had been engaged in a fight with someone else inside the complainant's yard. He and his adversary pelted stones at each other. He does not remember who threw the stone that hit the complainant. He merely saw the complainant lying on the ground. If the stone he threw hit the complainant, it would have been an accident. The accused responses merited a further enquiry on the existence of an intention to cause grievous bodily harm. Ordinarily, in the circumstances described, a plea of not guilty would be entered and the questioning concluded. That simply did not occur. Instead, the trial court invited the prosecutor to question the accused which he did quite extensively. Midstream this, the trial court reminded the accused of his right to legal representation.

[3] Even though the process the trial court undertook to correct the plea to one of not guilty does not appear explicitly on the transcribed record before us, on a copy of a letter which the Senior Magistrate directed to us requesting this review, the plea was corrected in terms of s 113 of the Act to one of not guilty. Section 113(1) provides:

> "If the court at any stage of the proceedings under section 112(1)*(a)* or *(b)* or 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has

opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as is practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 303.

> incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation."

[4] Pursuant to the alteration of the plea the accused secured a legal representative who, upon a perusal of the transcribed record of the proceedings, queried the regularity of the trial court's actions in having allowed the prosecutor to pose questions to the accused in terms of section 112(1)*(b)* of the Act. It is on these bases that this review was forwarded to us to consider the question whether the proceedings before the trial magistrate had been in accordance with justice. I place on record my gratitude to Ms C Jansen and Ms T Birch of the office of the Director of Public Prosecutions for their helpful inputs.

[5] Apparent from the wording of section 112(1)*(b)* of the Act, the magistrate should, when so requested by the prosecutor, or when he/she is of the opinion that the offence merits punishment of imprisonment, or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister, question the accused with reference to the alleged facts of the case in order to ascertain whether the accused admits the allegations in the charge to which he or/she has pleaded guilty and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on the strength of his or her plea and impose any competent sentence. It is trite that s 112(1)*(b)* is intended to protect an accused from the adverse consequences of an ill-considered plea of guilty when the accused has a legitimate defence. The following remarks in *S v Naidoo*[2] are apposite:

> "…(T)he section was designed to protect an accused from the consequences of an unjustified plea of guilty, and that in conformity with the object of the Legislature our courts have correctly applied the section with care and circumspection, and on the

[2] 1989 (2) SA 114 (A) at 121F.

> basis that where an accused's responses to the questioning suggest a possible defense or leave room for a reasonable explanation other than the accused's guilt, a plea of not guilty should be entered and the matter clarified by evidence."

[6] The proceedings before the trial court are assailed principally because of the manner in which the accused was interrogated by the court and the prosecutor following his guilty plea. The fair trial rights guaranteed in s 35 of the Constitution includes the right of an accused to be treated fairly during the plea proceedings in terms of s 112(1)*(b)*.[3] Cross-examination of the accused at the plea stage is impermissible.[4] In *S v Shiburi*[5] the SCA said:

> "When questioning the accused in terms of s 112(1)*(b)* the court's duty is to determine whether an accused's factual statements and answers in his or her plea of guilty adequately support the conviction on the charge. It is not the courts' function to evaluate the plausibility of the answers, or to determine their truthfulness at this stage of the proceedings. Instead, for the purposes of the section, the accused's explanation must be accepted as true. On that premise, the court should consider whether the explanation discloses a possible defence in law to the charge he or she pleaded guilty to. As is plain from the text of the section, the presence of doubt is a jurisdictional factor to trigger the application of the procedure laid down in s 113. Thus, once a basis for doubt exists, objectively considered, the court has no residual discretion but to apply the procedure set out in s 113."

[7] In this case the trial court impermissibly interrogated the accused in a manner that equates to cross-examination and allowed the prosecutor to subject him to the same interrogation. In so doing, the prosecutor attempted to elicit facts unfavourable to the accused's case or his exculpatory statement. The probity of the explanation the accused provided during the questioning cannot be tested by the prosecutor or the magistrate through the s112(1)*(b)* interrogation but must be tested by means of subsequent evidence. Recognizing the mishap, the trial court attempted to suggest a different approach as follows:

---

[3] *S v Fransman and Another* 2018 (2) SACR 250 (WCC) para 12.
[4] *S v Jacobs* 1978 (1) SA 1176 (C) at 1177B-D.
[5] 2018 (2) SACR 485 (SCA) para 19.

"COURT: In a normal process, the Court as this matter has been noted as a s113, in the normal course the court notes everything [the accused] said as admission. However, because the State was erroneously asked to ask questions, the Court is going to scrap the whole process. The State has to prove all the elements of the crime. Should the end of the matter end with a guilty verdict, the defence may proceed with the review [of the] matter and the State, if the matter ends with a not guilty verdict, may also go for review, but at this point the State is put to the proof of all the elements."

[8] Ordinarily, the High Court will interfere in incomplete criminal proceedings in the Magistrates' courts in 'rare' cases 'where a grave injustice might otherwise result' or "where justice might not by other means be attained".[6] The answers provided by the accused during the interrogation did not constitute evidence. However, it is inevitable that the magistrate may already have formed an unfavourable view concerning the accused's demeanour. In my view, this may be detrimental to the accused during the trial before the same magistrate. The interrogation of the accused breached the basic rules and principles governing questioning in terms of s 112(1)*(b)* and violated the accused's fair trial rights. Out of excessive caution, the proceedings ought to be set aside as they were not in accordance with justice.

[9] This brings me to the question whether the matter ought to be remitted to the same magistrate in terms of s 312 of the Act which provides:

"(1) Where a conviction and sentence under section 112 are set aside on review or appeal on the ground that any provision of subsection (1)*(b)* or subsection (2) of that section was not complied with, or on the ground that the provisions of section 113 should have been applied, the court in question shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 113, as the case may be.

(2) When the provision referred to in subsection (1) is complied with and the judicial officer is after such compliance not satisfied as is required by section 112(1)*(b)* or

[6] *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at 120B; See also *S v Van Eeden* 2018 (2) SACR 218 (NCK) para 9.

112(2), he shall enter a plea of not guilty whereupon the provisions of section 113 shall apply with reference to the matter."

[10] As it can be gleaned from the background, the trial had barely commenced when the irregularity was uncovered. In *S v Mshengu*[7] the court held that the course prescribed by s 312 must be followed unless the court on review or appeal is of the view that it would lead to an injustice or would be a futile exercise. It was further held that the court retains the discretion not to order a remittal if the circumstances of the case are such that the remittal will be inappropriate. On the aforegoing exposition, I am of the view, that the remittal of the matter to the same magistrate would be undesirable. The proceedings ought to commence afresh before a different presiding officer. In the result I make the following order.

Order:

1. The proceedings against the accused, Mr Dimakatso Willem Bagananeng, under Case no: 550/2022, in the Magistrates' Court for the District of John Taolo Gaetsewe, Kuruman, be and are hereby set aside;

2. In terms of section 312 of the Criminal Procedure Act 51 of 1977 the matter is remitted to the Magistrates' Court for the District of John Taolo Gaetsewe, Kuruman, to be tried de novo before a different magistrate.

____

Phatshoane AJP

Stanton J concurs in the judgment of Phatshoane AJP

[7] 2009 (2) SACR 316 (SCA) para 18.