Case No : 614/91
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the appeal of:

THE ATTORNEY-GENERAL OF THE TRANSVAAL APPELLANT

and

MARTHA HELENA BOTHA RESPONDENT

SMALBERGER, JA :-

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v H

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In the matter between:

THE ATTORNEY-GENERAL OF THE TRANSVAAL APPELLANT

and

MARTHA HELENA BOTHA RESPONDENT

CORAM: CORBETT, CJ, HOEXTER, SMALBERGER, KUMLEBEN, et VAN DEN HEEVER, JJA

HEARD: 9 SEPTEMBER 1993

DELIVERED: 30 SEPTEMBER 1993

J U D G M E N T

SMALBERGER, JA :-

This is an appeal, with the necessary leave, by the Attorney-General of the Transvaal against a decision of the Full Bench of the Transvaal Provincial Division. The appeal turns upon the proper interpretation of sec 113(1) of the Criminal Procedure

Act - 51 of 1977 ("the Act") which provides for the correction of a plea of guilty in certain circumstances. Since its introduction sec 113 has been the subject of widely divergent views and differing interpretations in the various Provincial Divisions, as reflected in a large number of reported decisions. This Court has not previously been called upon to pronounce definitively on the meaning and ambit of the section, although the vexed question of onus was obliquely touched on in S v Naidoo 1989(2) SA 114(A) at 122F-123C.

The respondent, who at the time was not legally represented, pleaded guilty to six counts of fraud in the Magistrate's Court, Barberton. She was questioned in terms of sec 112(1)(b) of the Act. As the magistrate was satisfied that she admitted the allegations in the charges in question, he convicted her on all six counts. The matter was then postponed for sentence. At the resumed hearing (some ten months

later) the respondent was represented by an attorney. He applied on her behalf to retract her original pleas of guilty. The respondent testified in support of the application. She alleged that she had been unduly influenced by the investigating officer to plead guilty. She also claimed that he had threatened to lock up certain members of her family. The effect of her evidence was that she had pleaded guilty because of duress. In her evidence in chief she did not specifically claim to have a valid defence to any of the charges. Under cross-examination, however, she raised a defence to two of them - the other four were not alluded to. The investigating officer gave evidence denying her allegations of duress. The magistrate, relying upon the decision in S v Mazwi 1982(2) SA 344(T), held that the onus rested upon the respondent to prove her allegations on a balance of probabilities, and that she had failed to do so. The application was

accordingly dismissed, and the respondent was sentenced to a fine of R100 or two months imprisonment on each count.

The respondent appealed to the Transvaal Provincial Division. A Full Bench of three judges was constituted to hear the appeal. Her appeal succeeded. The convictions and sentences were set aside, as well as the order dismissing her application to amend her pleas. It was ordered that pleas of not guilty be substituted for the original pleas of guilty on all six counts, and the matter was remitted to the magistrate for further hearing. The judgment of the court a quo is reported - see S v Botha 1990(1) SA 668(T).

Amongst the reported decisions which bear on the interpretation of sec 113 are S v Mbhele 1980(1) SA 295(N); S v Zwela 1981(1) SA 335(0); S v Pillay 1981(4) SA 151(N); S v Mazwi (supra); S v Hazelhurst 1984(3) SA 897(T); S v Dingile en 'n Ander 1986(3) SA

253(NC); S v De Bruin 1987(4) SA 933(C); S v Malili en 'n Ander 1988(4) SA 620(T); S v Booysen 1988(4) SA 801(E); S v Fourie 1991(1) SACR 21(T) and S v Zakay 1991(1) SACR 167(E). No useful purpose would be served by analysing each of them. They give full expression to the maxim quot homines tot sententiae. The mere passing reference to these judgments is not meant to detract from the considerable time, thought and effort that went into their preparation, nor do I seek to minimize the valuable assistance I have gained from consulting them. The proper meaning of sec 113, however, ultimately depends upon its purpose, the language of the section, seen in its proper context, and the calling in aid of such canons of interpretation as may be relevant.

The procedure to be followed upon a plea of guilty at a summary trial is regulated by secs 112 and 113 (1) of the Act. The two sections are complementary

and -must be read in conjunction. Sec 112(1)(b) deals with the interrogation of an accused who pleads guilty in order to test the validity of the plea. Sec 113(1) provides for various grounds upon which a plea of guilty should be corrected to one of not guilty. The predecessor to the Act, the Criminal Procedure Act 56 of 1955, did not contain similar provisions. In terms of sec 258(1)(b) of Act 56 of 1955 a lower court in serious cases meriting imprisonment could only convict upon a plea of guilty if there was evidence aliunde i.e. evidence, other than the unconfirmed evidence of the accused, that the offence in question had actually been committed. As a safety mechanism, which it was intended to be, evidence aliunde ensured that an accused did not plead guilty to an offence which had not been committed. It provided no other safeguards. Nor did it necessarily establish the identity of the offender. It therefore failed to protect adequately an innocent

accused who mistakenly considered himself guilty, nor did it serve to eliminate or negate the effect of duress calculated to induce an accused to plead guilty. (I include under duress, for the purposes of this judgment, undue influence, fear, fraud and the like.) Sec 112(1)(b), which imports inquisitorial elements into the criminal procedure, provides additional safeguards. It was specifically designed to protect an accused from the consequences of an unjustified plea of guilty and in conformity with that object the courts have generally applied the section with care and circumspection (S v Naidoo (supra) at 121F).

Act 56 of 1955 contained no provisions dealing with the correction or retraction of a plea of guilty. The matter fell to be dealt with under the common law. The common law approach was correctly enunciated as follows in S v Britz 1963(1) SA 394(T) at 398H-399B:

> "The accused wishing to withdraw his plea of guilty must give a reasonable explanation as

> to why he had pleaded guilty and now wishes to change his plea. A reasonable explanation could be, for example, that the plea was induced by fear, fraud, duress, misunderstanding or mistake. If he fails to give an explanation the court would be entitled to hold him to his plea of guilty. If he does give an explanation there is no onus on him to convince the court of the truth of his explanation. Even though his explanation be improbable the court is not entitled to refuse the application, unless it is satisfied not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he should be allowed to withdraw his plea of guilty."

Prior to the decision in S v M 1986(4) SA 958(ZSC) it appears to have been generally accepted that this approach (to which I shall refer as "the Britz principle") applied when the retraction of a plea of guilty was sought at any time before sentence i.e. even beyond the stage of conviction. The decision in S v M has raised doubts as to whether this is correct. I shall revert to this later.

The relevant provisions of secs 112 and 113 of the Act provide as follows:-

"112(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea-fa) the presiding judge may, if he is of the opinion that the offence does not merit the sentence of death, or the presiding judge, regional magistrate or magistrate may, if he is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a whipping or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, convict the accused in respect of the offence to which he has pleaded guilty on his plea of guilty only and -

(i) impose any competent sentence, other than the sentence of death or imprisonment or any other form of detention without the option of a fine or a whipping or a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette; or

(ii) deal with the accused otherwise in accordance with law;

(b) the presiding judge shall, if he is of the opinion that the offence merits the sentence of death, or the presiding judge, regional magistrate or magistrate shall, if he 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 whipping or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he admits the allegations in the charge to which he has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he has pleaded guilty, convict the accused on his plea of guilty of that offence and impose any competent sentence:. Provided that the sentence of death shall not be imposed unless the guilt of the accused has been proved as if he had pleaded not guilty.

(2) ....

(3) ....

> 113(1) If the court at any stage of the proceedings under section 112 and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty or is satisfied that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge, 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.
>
> (2) ......"

It appears from the reported decisions to which I have referred that the cardinal issues which have arisen in the interpretation of sec 113(1) are (1) whether it supersedes the provisions of the common law with regard to the correction (including the retraction) of a plea of guilty; (2) whether it places an onus on an accused in relation to the correction of such a plea; (3) if so, what the nature of such onus is; and (4)

whether the nature or incidence of the onus varies depending upon whether the question of correction arises before or after conviction. I shall deal with these issues in due course, but first it is necessary to consider more closely the precise field of operation of sec 113(1).

As is apparent from its wording, sec 113(1) caters for four distinct situations in which a court is required ("shall") to correct a plea of guilty under sec 112 and substitute one of not guilty. They are where the court (1) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty ("situation 1"); (2) is satisfied that the accused does not admit an allegation in the charge ("situation 2"); (3) is satisfied that the accused has incorrectly admitted any such allegation in the charge ("situation 3") or (4) is satisfied that the accused has a valid defence to the charge ("situation 4"). Any of these

situations can arise "at any stage of the proceedings under section 112 and before sentence is passed". On a literal interpretation of secs 112(1) and 113(1) (and there is nothing to detract from such an interpretation) "the proceedings under section 112" commence at the point where "an accused at a summary trial in any court pleads guilty to the offence charged". It is this plea of guilty which brings the provisions of sec 112(1) into operation and leads the presiding judicial officer to act under either sec 112(1)(a) or sec 112(1)(b), depending upon the opinion which he forms.

I do not agree with the view that has been expressed in certain judgments that "the proceedings under section 112" only commence when the presiding judicial officer decides that the matter is one that falls under sec 112(1)(b) and embarks upon questioning of the accused. There is no legal or logical

justification for limiting "the proceedings under section 112" to that stage onwards, thereby effectively excluding sec 112(1)(a) from the operation of sec 113(1). The natural meaning of the words embrace all proceedings under sec 112 i.e. under both sec 112(1)(a) and (b). There is clearly scope for the operation of sec 113(1) in respect of both those sub-sections. This can be illustrated by the following example. An accused pleads guilty as charged to assaulting a complainant by slapping him once in the face. The presiding judicial officer is of the opinion that the offence only merits a fine (within the permissible limits) and convicts the accused in terms of sec 112(1)(a). During the accused's address in mitigation of sentence it appears that he slapped the complainant in self defence (private defence). If the judicial officer concerned is satisfied that the accused has a valid defence to the charge, he is obliged by sec 113(1)

to enter a plea of not guilty. There is no reason to believe that the Legislature intended to exclude sec 112(1)(a) from the operation of sec 113(1) simply because - it deals with lesser offences. An accused person's right to protection against a wrong conviction is no less important if the offence is minor than if it is major. In either case there is an equal possibility of an unjustified plea of guilty, and in the case of a minor offence the primary protection afforded by preconviction interrogation is lacking. What is more, such a limited interpretation does not conform to the well-known rule of interpretation that the Legislature intends all persons affected by its enactments to be treated equally. In the circumstances I must respectfully differ from the contrary view expressed by the majority of the court a quo at 672E-F (read with 674A) of the reported judgment.

It must also be noted that the provisions of

sec 113(1) apply at any time "before sentence is passed". The Legislature has not sought to distinguish between the position before and after conviction. It - has advocated a uniform approach to the proceedings from plea to sentence. As will appear later, this is relevant to the question of onus.

I have hitherto dealt with the position where an accused pleads guilty at a summary trial to the offence charged. Sec 112(1) also caters for the case where an accused pleads guilty to an offence of which he may be convicted on the charge i.e. one which is a competent verdict. In that case the provisions of sec 112(1)(a) or (b) only come into operation if "the prosecutor accepts that plea". It is the acceptance of the plea, not the plea itself, which brings either sec 112(1)(a) or (b) into operation. Without such acceptance neither sub-section has any application - the trial will simply have to proceed on the offence as

charged. That being so, it is arguable that "the proceedings under section 112" only commence, for the purposes of sec 113(1), when the prosecutor accepts the plea to the lesser offence. If that is so then there is nationally a period between the plea to the lesser offence and the acceptance thereof by the prosecutor (e.g. where the prosecutor needs to obtain the consent of the Attorney-General to accept the plea) when the accused could seek to withdraw such plea. That situation, if it were to arise, might not be capable of being dealt with under sec 113(1) but only under the common law. This situation does not, however, arise in the present matter and it is therefore not necessary to express a definite view on it.

I come now to the question whether sec 113(1), in the four situations in which a court is obliged to correct a plea of guilty, places any onus on an accused. I commence with certain general observations. Sec 112

introduced an inquisitorial plea procedure previously unknown. As I have mentioned, the intention of the Legislature, in enacting secs 112 and 113, was to afford an accused greater protection than before against a wrong conviction. Sec 113 must accordingly be interpreted in a manner consonant with such an intention. The proper approach to plea correction is in favorem innocentiae which militates against saddling the accused with an onus. The Legislature must also be taken to have been aware of the common law principles relating to the withdrawal of a plea (as enunciated in cases such as S v Britz (supra)) which placed no onus on an accused. (I am assuming for the present that those principles apply at any time up to sentence.) If the Legislature had intended in sec 113(1) to place an onus on an accused where none had existed before under the common law, one would have expected it to express such intention in clear and unambiguous language. This it

has not done.

While situations (2), (3) and (4) require that the court be satisfied with regard to the matters referred to, sec 113(1) is silent on who (if anyone) is to satisfy the court and what standard of satisfaction is required. It does not specifically place any onus on the accused. By contrast, when the Legislature is minded to place an onus on an accused it does so unequivocally. Thus section 114(2) of the Act, which deals with the committal of an accused who has pleaded guilty in a magistrate's court for sentence in a regional court, provides, inter alia, that "the plea of guilty and any admission by the accused shall stand unless the accused satisfies the court that such plea or such admission was incorrectly recorded". Sec 122C (4) of the Act, which deals with a plea of guilty in a magistrate's court on a charge to be adjudicated in a regional court, provides inter alia:

> "If the accused satisfies the court that the plea of guilty or an admission which is material to his guilt was incorrectly recorded, or if the court is not satisfied that the accused is guilty of the offence to which he has pleaded guilty ....."

Here we have a juxtaposition of two different situations - where the accused is required to satisfy the court, on the one hand, and where the court is required to be satisfied (as in sec 113(1)) on the other. In the latter instance there is no suggestion that the accused must provide, by way of discharging an onus, such satisfaction. (See too secs 121(5) (a), (aA) and (b), 122C 3(a) and (b) and 140(2)(a) of the Act.) The aforegoing considerations lead inexorably to the conclusion that sec 113(1) does not burden an accused with an onus, and that the phrase "is satisfied" cannot be taken to mean " if proved by the accused to the satisfaction of the court".

In my view all four situations envisaged in

sec 113(1) are premised on reasonable doubt. Situation 1 is a clear case. The words "in doubt" presuppose a reasonable doubt in relation e g to whether an accused falls within the- terms of a particular statutory prohibition or his conduct constitutes the offence charged. Such doubt can arise either in response to questioning by the court in terms of sec 112(1)(b), or from information volunteered by the accused or because the court mero motu entertains a doubt on the law. (The instances listed are not intended to be exhaustive.) Where the court, in those circumstances, is in doubt as to whether the accused is in law guilty of the offence to which he has pleaded guilty, it is obliged to record a plea of not guilty.

Situations 2 and 3 require the court to be satisfied in each instance as to the existence of a certain state of affairs, being essentially matters of fact. Situation 4 requires satisfaction in relation to

a matter of law, or part law and part fact. The change in wording between situation 1 ("in doubt") and the other three situations ("is satisfied" - Afrikaans "oortuig is") may at first blush seem significant. Had situations 2 and 3 been cast in negative terms i e had sec 113(1) in this respect read "is not satisfied that the accused admits an allegation in the charge or that the accused has correctly admitted any such allegation", they would perhaps have fallen in line more conveniently with the test of reasonable doubt in situation 1. The effect of the wording, however, in either instance is largely the same.

There are compelling reasons for holding that the phrase "is satisfied" does not postulate a test other than that of reasonable doubt. Firstly, there is no apparent reason why in principle the test in situation 1 should differ from those in the other three situations. Secondly, there is a measure of

overlapping between situations 1 and 4. Defences such as private defence, compulsion and necessity could, depending upon the circumstances, be brought within the ambit of both situations. One would expect the test to be the same in both instances. Thirdly, in criminal matters, as a general principle, the operative test is one of reasonable doubt. As there is no onus on the accused, a test of balance of probabilities would be inappropriate. Fourthly, the greater protection that secs 112 and 113 were designed to provide to an innocent accused would be stultified by too stringent a test. Fifthly, secs 112 and 113 relate to procedural steps that follow on a plea of guilty. They were not designed to be used as part of the normal State case to prove an accused's guilt. They should therefore not be interpreted in a manner which would place an undue obstacle in the way of an accused who seeks to retract a plea of guilty or admissions made in relation thereto.

Sixthly, the words "is satisfied" or their Afrikaans equivalent "oortuig is", given their ordinary, grammatical meaning, do not necessarily exclude a test of reasonable doubt. Within the framework of criminal law or procedure, to be satisfied that a certain state of affairs exists excludes any reasonable doubt in that regard. Finally, sec 113 should be interpreted in a manner consonant with the common law principle which requires no more than that an accused place sufficient material before a court to raise a reasonable doubt concerning the correctness of a plea of guilty. In this regard it is unlikely that the Legislature would have placed a higher onus on the accused under sec 113(1) than under the common law.

The conclusion to which I have come in respect of situations 2, 3 and 4 is therefore the following. If a court, in the course of questioning an accused in terms of sec 112(1)(b), or in consequence of the

accused's response to questions put by it after conviction but before sentence, or because of submissions made or information volunteered by the accused, or from other material placed before it, has a reasonable doubt as to whether the accused admits an allegation in the charge, or has correctly admitted any such allegation, or is reasonably left in doubt as to whether the accused has a valid defence to the charge, it is obliged to enter a plea of not guilty.

The correction of a plea in terms of sec 113(1) will in many instances involve the retraction of an admission. Such correction should normally follow when the accused indicates that he no longer admits the charge or an allegation in the charge. At that stage of the proceedings the question whether the retraction of the admission may later be proved to be false is irrelevant. The court is still involved in a pre-trial procedure. All that is needed is a reasonable

explanation from the accused why he seeks to withdraw the admission or change his plea.

In passing it should be noted that the Legislature probably intended sec 112 to provide for the expeditious and inexpensive disposal of a matter where an accused pleads guilty while at the same time creating a safety mechanism designed to prevent as far as possible an innocent accused from being wrongly convicted. Where correction of a plea of guilty is sought in terms of sec 113(1) a "trial within a trial" is frequently held. While opposed applications for retraction of a plea under the common law have usually been dealt with in this way, it would not seem to be appropriate to do so under sec 113(1). Such a procedure is generally cumbersome and time-consuming, does not always serve a useful purpose and may ultimately prejudice an accused (cf S v Booysen (supra)) . In most instances it may well be preferable

to enter a plea of not guilty with the minimum of delay and proceed with the trial. It is, however, not necessary to express a firm view on the matter.

I now come to the critical question, particularly as far as the present appeal is concerned, whether sec 113(1) supersedes the common law. In seeking to set aside her pleas of guilty in the trial court on the ground of duress, the respondent relied upon the ordinary relief available under the common law. She did not, and indeed could not, invoke the provisions of sec 113(1). Grounds for setting aside a plea of guilty such as duress, undue influence and the like arise from events which occur anterior to the proceedings under sec 112 and do not have their origin in that section. They cannot on their own (i.e. without being coupled to a valid defence, which is the case in respect of four of the six charges against the respondent) be brought within any of the situations

catered for in sec 113(1). The reason is that standing alone they do not raise a reasonable doubt that the accused is in law guilty of the offence to which he has pleaded guilty or that he has a valid defence to the charge (situations 1 and 4) . Nor do they relate to any allegations in the charge (situations 2 and 3) . Sec 113(1) therefore provides no protection or safety mechanism for an accused who pleads guilty because of duress, undue influence or the like. Yet these are valid grounds under the common law which are frequently raised for setting aside a plea of guilty. In my view it is unthinkable that the Legislature could have intended to exclude such common law rights without any corresponding protection being afforded by sec 113(1).

I agree with what was said by the court a quo in the reported judgment at 673H-I, namely:

> "[D]ie reg van 'n beskuldigde om onskuldig te pleit al kan hy nie aanvoer dat hy onskuldig is nie en om bewys van sy skuld te verg word deur ons reg erken. Daardie reg kan nie ' n

> beskuldigde ontse word wanneer hy aanvanklik weens 'n onbehoorlike daad soos dwang skuldig pleit nie."

Justice connotes that a wrongdoer should be fairly tried in accordance with the principles of the law (R v Rose 1937 AD 467 at 477). A wrongdoer who has pleaded guilty under duress cannot be fairly tried if his plea is allowed to stand. In this respect the remarks of RUMPFF, CJ, in S v Mushimba en Andere 1977(2) SA 829(A) at 844H are apposite, in that justice, in the sense in which it applies here:

> "is nie 'n begrip wat veronderstel dat die beskuldigde noodwendig onskuldig is nie. Geregtigheid wat geskied het in hierdie sin is die resultaat wat 'n bepaalde eienskap van verrigtinge aandui. Die eienskap toon aan dat aan vereistes wat grondbeginsels van reg en regverdigheid aan die verrigtinge stel, voldoen is."

Furthermore, the provisions of a statute are not intended to alter or exclude the common law unless the words thereof do so expressly or by necessary

implication (Casserley v Stubbs 1916 TPD 310 at 312) . The words of sec 113(1) in my view do neither. There is accordingly no basis for holding that sec 113(1) excludes the common law in relation to such matters as do not fall within its purview. It follows that the ground raised by the respondent for setting aside her pleas was not excluded by sec 113(1).

I revert now to the question to which I alluded earlier in this judgment viz whether the Britz principle applies where a retraction of a plea of guilty is sought after conviction but before sentence. In S v M (supra) it was held that the test propounded in Britz's case is only applicable where a change of plea is sought before a verdict of guilty is entered. Once a finding of guilt is made, additional considerations come into play. One such consideration relied upon is that the presumption of innocence no longer operates in favour of the accused. The court concluded that

where an accused seeks to withdraw his unequivocal plea of guilty after conviction he is required to show on a balance of probabilities that the plea was not voluntarily made. This view was followed in S v De Bruin (supra) at 935I-936A.

Britz's case involved an application to retract a plea of guilty before conviction. In propounding the test at 398H-399A quoted above CLAASSEN, J, (with whom JANSEN, J, concurred) did not specifically seek to limit its application to a retraction sought before as opposed to after conviction. It was suggested in S v M, with reference to what appears at 397A-B of the judgment in Britz's case, that the learned judge was apparently of the opinion that no such application could be entertained after conviction. Therefore the test he propounded could only have been intended to apply to the position before conviction.

I am not satisfied that the somewhat

inelegantly worded passage at 397A-B necessarily reflected a view that no application for a change of plea can be entertained after conviction (but before sentence). (As convincingly pointed out in S v Mazwi (supra) at 346F-348H the common law clearly permits the withdrawal of a plea of guilty before sentence.) The passage in question reads:

> "It sometimes happens that an accused person who has pleaded guilty on arraignment later applies to have his plea changed to one of not guilty. Such an application is sometimes made before the leading of evidence, during the State's case or during the defence case or at the end of all the evidence, but before judgment. In R v Plummer 1902(2)" K.B. 339, it was held that a plea cannot be changed after judgment. There is also a case on record where such an application has been made after judgment. See R v Blakemore, (1948) 33 Cr. App. R 49, but this case was overruled in R v McNally, 1954 Cr. App. R 90."

R v Plummer laid down that an accused is entitled to withdraw his plea of guilty at any stage before sentence. R v Blakemore was a case where a

withdrawal of a plea of guilty was allowed after sentence, a view not followed in R v McNally. CLAASSEN, J, could hardly have been under a mistaken impression as to what was held in those cases. In my view the references in the passage quoted to "judgment" are only explicable on the assumption either that the court had in mind the final stage of judgment i.e. sentence, or that it per incuriam used the word "judgment" instead of "sentence". This appears to be the only reasonable explanation for what appears in the passage quoted. I am therefore unable to accept that Britz's case was premised on the understanding that no correction of a plea of guilty could be sought after conviction, and see no reason for limiting the application of the Britz principle on that ground. The principle has been applied in cases where applications to retract a plea of guilty after conviction have been made (see S v Zwela (supra) and S v Pillay (supra)).

And in both <u>S v Mazwi</u> (<u>supra</u>) at 348H and <u>S v Hazelhurst</u> (<u>supra</u>) at 910B-F it was accepted that the Britz principle necessarily applies in respect of the common law both before and after a verdict of guilty has been entered (but before sentence).

I see no logical reason why this should not be so. In a case of duress, where the common law principles apply, the same duress which induces the plea of guilty is also likely thereafter to operate on the mind of the accused and to govern any subsequent answers given or admissions made in response to questioning under sec 112(1)(b) by the presiding judicial officer. Its insidious influence extends, or is likely to extend, beyond the plea of guilty up to and including the time of conviction. The danger of a wrong conviction is therefore as great after as before a verdict of guilty has been entered. Duress vitiates both the plea and the conviction. In such circumstances why should an

accused be burdened with a heavier onus after conviction than immediately before? It is no answer to say that the presumption of innocence no longer operates in his favour after conviction.

In my view it was therefore open to the respondent to seek to withdraw her pleas of guilty after her conviction under the common law on the grounds of duress. I do not propose to deal with the evidence. Suffice it to say that I agree with the court a quo that despite the somewhat unconvincing nature of her evidence the respondent gave a reasonable explanation for her pleas which has not been shown beyond reasonable doubt to be false. Her application to retract her pleas of not guilty should therefore have been granted, as found by the court a quo. In the result the appeal must fail.

In terms of sec 311(2) of the Act this Court has a discretion to award costs against the appellant,

such costs being those "to which the respondent may have been put in opposing the appeal", duly taxed. In my view there is no reason in this matter to depart from the general principle that costs should follow the result. The respondent is accordingly entitled to an order for costs.

The appeal is dismissed. The appellant is ordered, in terms of sec 311(2) of Act 51 of 1977, to pay the respondent's costs of appeal.

J W SMALBERGER
JUDGE OF APPEAL

CORBETT, CJ)
HOEXTER, JA)
KUMLEBEN, JA) concur
VAN DEN HEEVER, JA)