Case No 487/94 /mb

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

SELWYN BOGOSI	FIRST APPELLANT
HENDRIK BALOYI	SECOND APPELLANT
ANDREW MOGWANE	THIRD APPELLANT

and

THE STATE

RESPONDENT

CORAM: HEFER, F H GROSSKOPF JJA et
SCOTT AJA

HEARD: 19 SEPTEMBER 1995

DELIVERED: 28 SEPTEMBER 1995

J U D G M E N T

SCOTTAJA/ -

SCOTT AJA:

The question in issue in this appeal is whether the appellants were entitled to have their pleas changed from guilty to not guilty. On 11 December 1987 and in the Pretoria-North Magistrates' Court the appellants were required, in terms of s 119 of the Criminal Procedure Act, 51 of 1977 ("the Act"), to plead to three counts of fraud and two counts of theft. The charges of fraud related to the unauthorised withdrawal of funds from a bank. The total amount involved was in excess of R388 000. The two charges of theft related to the theft of four cheque forms. The first appellant pleaded guilty on one of the counts of fraud, involving an amount of R132 296,00 and not guilty on the remaining four counts. The second and third appellants both tendered a plea of guilty on all five counts. At the time of pleading the three appellants were legally represented and on behalf of each a written and signed statement was handed into Court. Each

appellant thereafter confirmed the contents of the statement in which all the allegations contained in the charge or charges to which he pleaded guilty were admitted.

The proceedings were thereupon stopped in terms of s 121 (2)(a) of the Act pending the decision of the Attorney-General. In due course the Attorney-General, acting in terms of s 121 (3)(a) gave instructions for the appellants to be arraigned before the Regional Court for sentence, and the matter was then postponed for hearing in that Court. It appears that the first appellant's plea of not guilty on all the counts save one was accepted by the State. On 11 November 1988 and in the Regional Court the three appellants were represented by a new attorney who indicated that his clients wished to change their pleas from guilty to not guilty. He informed the Court that the grounds on which they wished to do so were that prior to pleading they had been threatened and, in addition,

had been promised bail in the event of pleading guilty. By agreement the matter was then postponed. On 26 February 1990 when the matter was resumed, the appellants were represented by counsel who indicated his intention to call the appellants to give evidence in support of their application. Before this was done, however, the Court formally returned a verdict of guilty on the counts in respect of which the appellants had pleaded guilty. It is not entirely clear why this course was adopted and why the question of the change of plea was not disposed of first. From the remarks subsequently made by the regional magistrate in his judgment it would seem that the decision to adopt this course was based on a misunderstanding of s 121 (5)(b) of the Act, to which I shall refer later in this judgment. But whatever the reason, it has not been suggested that the irregularity resulted in a failure of justice within the meaning of the proviso contained in s 309 (3) of the Act and it need not be considered further, save

to observe that had the change of plea been allowed the conviction, of course, would not have stood.

What followed was a "trial within a trial", interspersed with lengthy postponements, at which all three appellants testified as did a number of witnesses called by the State in rebuttal. Finally, and on 14 April 1992, the regional magistrate gave judgment in which he rejected the appellants' evidence as false and dismissed their application to change their pleas. In doing so, he accepted that the standard of proof to be applied was that of the common law and that the State had been obliged to establish beyond reasonable doubt that the explanations tendered by the appellants for having pleaded guilty were false. The earlier finding of guilty was accordingly allowed to stand. The first appellant was sentenced to three years imprisonment subject to the provisions of s 276 (l)(i) of the Act, while the other appellants, who had been convicted on all five counts, were

sentenced to an effective period of five years imprisonment, but also subject to the provisions of s 276 (l)(i). An appeal, against the conviction only, to the Transvaal Provincial Division was unsuccessful and the appellants, with the necessary leave, now come to this Court.

Section 121 (5)(b) of the Act makes provision for the conviction of an accused by the court before which he has been arraigned for sentence following a plea of guilty as contemplated in s 121 (1).

Section 121 (5)(b) reads:

> "Unless the accused satisfies the court that a plea of guilty or an admission was incorrectly recorded or unless the court is not satisfied that the accused is guilty of the offence to which he has pleaded guilty or that the accused has no valid defence to the charge, the court may convict the accused on his plea of guilty to the offence to which he has pleaded guilty 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."

Section 121 (6), in turn, imposes a duty upon the court in certain

circumstances to record a plea of not guilty and to proceed with the trial. The section reads:

> "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 or that the accused has no valid defence to the charge, the court shall record a plea of not guilty and proceed with the trial as a summary trial in that court: Provided that an admission by the accused the recording of which is not disputed by the accused, shall stand as proof of the fact thus admitted."

This section, although different from s 113, has a number of features in common with it. The latter section, of course, deals with the correction of a plea of guilty during a summary trial up to the stage when sentence is imposed. Subsequent to both the trial in the instant case and the appeal in the Court below, this Court has had occasion in Attorney-General. Transvaal v Botha 1994 (1) SA 306 (A) to consider the proper interpretation to be placed on s 113. It was held in that case, briefly stated,

that: (a) section 113 does not burden an accused with an onus to establish any one of the four particular situations dealt with therein (at 328 D - G); and (b) the section does not exclude the common law with regard to the setting aside of a plea of guilty on the grounds of duress or undue influence (330 I - J)). Regarding (a), it should be noted that the four situations dealt with in s 113 include: (i) where there is doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; and (ii) where the court is satisfied that the accused has a valid defence to the charge. Both these situations are dealt with in s 121 (5)(b) as well as s 121 (6). That an accused bears no onus in relation to either is made even clearer in s 121 (5)(b) and s 121 (6) by reason of their juxtaposition in each of these sections with the situation where an accused is obliged to satisfy the court (and accordingly bears the onus) in relation to the incorrectness of the record, and further, the use of the negative in the expression, "is not

satisfied" (cf the Botha case at 328 D and H -I). With regard to (b), there is similarly nothing in s 121 (5)(b) or s 121 (6) to suggest that the common law with regard to the setting aside of a plea of guilty on the grounds of undue influence and the like has been excluded.

It follows that an accused arraigned for sentence under s 121 of the Act would bear the onus of establishing that a plea of guilty or an admission material to his guilt has been incorrectly recorded. He does not, however, bear an onus in the true sense of the word in respect of the other situations referred to in the section which would require the court to record a plea of not guilty. Nor is he precluded from seeking to withdraw his plea of guilty on the grounds that it was vitiated by duress and the like. In that event, he would be obliged to give an explanation for his plea of guilty, but there would be no onus on him to convince the court of its truth. A court would only be entitled to refuse his application if it were satisfied that

the explanation is false beyond reasonable doubt. (See S v Britz 1963 (1) SA 394 (T) at 398 H - 399 B, cited with approval in the Botha case at 324 I- 325 A.)

Mr Reinders, who appeared on behalf of the appellants in this Court, submitted that even if the Regional Court had correctly dismissed the appellants' application to retract their pleas of guilty brought under the common law, that is to say on the grounds of duress or undue influence, the Court had failed to take into account the further protection afforded to an accused person in terms of s 121 (5)(b) and s 121 (6). The protection which is relevant in the present case, it was contended, is that a court is obliged to enter a plea of not guilty if there is a reasonable possibility that the accused is not guilty of the offence to which he has pleaded guilty. Mr Reinders stressed that the appellants in their evidence had not only testified as to the duress to which they allegedly had been subjected but, in addition,

they had asserted their innocence. He submitted that this assertion, in the absence of any other evidence relating to the guilt of the appellants, must have been sufficient to create a reasonable doubt and that the Court accordingly had been obliged in terms of the section to record a plea of not guilty. In support of this submission he placed much reliance on certain passages in S v Malili en 'n Ander 1988 (4) SA 620 (T) at 625 as authority for the proposition that a mere assertion by an accused that he is innocent or that he does not admit an allegation made in the charge is sufficient to require a plea of not guilty to be recorded in terms of s 113 of the Act, and he argued that the same is true of s 121 (5)(b) and s 121 (6).

Common sense dictates, I think, that a person who is innocent will not ordinarily plead guilty to a criminal charge preferred against him. I refer in this context to a plea of guilty which is confirmed by questioning in terms of s 112 (l)(b) or by a written statement in terms of s 112 (2).

The qualification is important because the procedure provided for in s 112 is aimed at preventing, in the case of a serious offence, a plea of guilty which is based on a misunderstanding or error on the part of the accused, so that a subsequent assertion of innocence must necessarily involve the retraction of allegations previously admitted under judicial supervision. The inference of guilt arising from a plea of guilty together with an admission of the facts alleged in the charge in these circumstances is such that, in my view, it will not be displaced or its correctness rendered subject to reasonable doubt simply by a bald assertion of innocence made on a subsequent occasion. Something more is required. There must at least be some explanation for the plea of guilty which, although even improbable, is such as to give rise to a reasonable possibility of innocence. S v Malili, supra, on which Mr Reinders relied, was, of course, decided prior to the decision in Attorney-General, Transvaal v Botha, supra. In the latter case,

this Court accepted that s 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 the plea of guilty" and, in this regard, concluded that "(a)ll that is needed is a reasonable explanation from the accused why he seeks to withdraw the admission or change his plea" (per Smalberger JA at 329 D - E and H). To the extent, therefore, that Malili's case, supra, is in conflict with the above, it must be regarded as having been overruled.

In the present case the evidence upon which reliance is sought to be placed amounts to no more than a number of bald assertions of innocence. The appellants did, of course, offer an explanation for their pleas of guilty, but the submission which is made is premised on a finding that the explanations tendered by the appellants were correctly held to be

false beyond reasonable doubt. All that remains therefore are their unexplained and subsequent assertions of innocence. In my view, these were insufficient to give rise to a reasonable doubt and accordingly did not require a plea of not guilty to be recorded in terms of s 121 (6) of the Act. As previously indicated, the regional magistrate found the explanation offered by the appellants for pleading guilty to be false beyond reasonable doubt. The correctness of this finding was challenged on appeal and this is the issue to which I now turn.

All three appellants testified that for a period of two or more days prior to their first appearance in Court on 4 December 1987, they were repeatedly assaulted by the investigating officer and other members of the South African Police. The assaults, they said, took the form of punching, kicking and slapping. They were also, they said, subjected to electric shocks. In addition, each appellant said that he was threatened that if he

did not plead guilty he would be kept in custody without bail. These allegations were all denied by the investigating officer as well as by a number of other policemen who had been named or otherwise identified by the appellants.

It was common cause that when the appellants first appeared in Court on 4 December 1987 an attorney, Mr Kamfer, who appeared for the second and third appellants, requested that the second appellant be examined by the district surgeon because his client complained that he had been assaulted while in custody. An order was made to this effect and the second appellant was examined by a doctor. The latter's report, however, was not available as the police docket had subsequently been mislaid and according to the investigating officer, Warrant Officer Els, had been stolen. Mr Kamfer testified that when the complaint had been made to him he had examined the appellant's head and had seen no sign of injury, save for what

appeared to be a missing tuft of hair. His evidence did not support that of the second appellant who testified that he had visible cuts on his head and that there were blood stains on his shirt. Mr Kamfer testified that he had subsequently confronted Mr Els but the latter had denied the alleged assault. The description given by the first and third appellants of the injuries they had sustained in the assaults was similarly such that Mr Kamfer could hardly have failed to observe them in court on 4 December 1987. Yet he had no recollection of seeing any injuries.

The second and third appellants in their evidence-in-chief gave an account of what they had told their attorney, Mr Kamfer, both during the consultation prior to pleading guilty and subsequently when they terminated the latter's mandate. On the strength of this disclosure and on the application of the prosecutor they were held by the trial Court to have waived their privilege in relation to the incompetence of their former legal

representative to give evidence against them (see s 201 of the Act). In making this ruling the Court relied mainly on a passage in Wigmore on Evidence vol VIII (Mc Naughton Revision) para 2327 which was approved by this Court in Ex Parte Minister van Justisie: In Re S v Wagner 1965 (4) SA 507 (A) at 514 and relied upon in a number of subsequent cases (see for instance Msimang v Durban City Council and Others 1972 (4) SA 333 (D) at 337; Euroshipping Corportion of Monrovia v Minister of Agricultural Economics and Marketing and Others 1979 (1) SA 637 (C) 645 G - 646 E; S v Nhlapo and Others 1988 (3) SA 481 (T) 482). The correctness of this ruling and hence the admissibility of Mr Kamfer's evidence in relation to what had transpired on the occasions in question, was not challenged in this Court. Mr Kamfer's evidence of what had been said differed sharply from the appellants' version. He testified that when taking instructions from the second and third appellants he had a lengthy

and in depth discussion with them during which they had discussed precisely what the appellants had done and what they had not done; what evidence the State was likely to be able to adduce against them, and the full implications of a plea of guilty as opposed to a plea of not guilty. The impression which Mr Kamfer gained was that the alleged assault on the second appellant had played no role whatsoever in their decision to plead guilty. As far as the subsequent occasion was concerned, Mr Kamfer denied that the second and third appellants had ever told him, as they subsequently testified they had, that they were not guilty of the charges in question and that they had pleaded guilty merely because of threats emanating from the police. His impression was that they were dissatisfied with the advice he had given them and that for whatever reason they had decided to plead not guilty.

The regional magistrate in his judgment found the first

appellant to be a poor witness. This much is apparent from the record. He contradicted himself both with regard to where the alleged assaults took place and also as to the number of persons involved. He was unable to offer any satisfactory explanation why, if he was acting under duress, he should have pleaded guilty to only one of the 5 charges preferred against him. His suggestion at one stage that he was charged with only the one count was clearly false while his contradictory assertion that the police required him to plead guilty to only one of the charges and not the others, was most improbable.

The version of the second and third appellants as to why they had pleaded guilty was wholly inconsistent with the evidence of Mr Kamfer. No basis could be advanced for suggesting that Mr Kamfer was an untruthful witness. On the contrary, he was clearly reluctant to give evidence against his erstwhile clients and very properly raised the issue of

their privilege. It is true that the second appellant's contemporaneous complaint of having been assaulted gives some credence to his evidence. But on the other hand, his description of his injuries and his condition following the alleged assault was not supported by Mr Kamfer. Nor is the fact that he complained to his attorney and permitted the latter to bring the alleged assault to the attention of the Court on 4 December 1987 consistent with his version that he pleaded guilty out of fear of the police. The question in issue, of course, is not whether there was an assault or not, but whether, if there was one, it played any role in the appellants' pleading guilty. As observed by Nestadt AJA in S v Shabalala 1986 (4) SA 734 (A) at 747 A:

> "There must, naturally, be a causal connection between the alleged duress and the making of the statement (in court).
> This will not be assumed."

Also of significance in this regard was the concession made by the third

appellant that he and the second appellant were told by Mr Kamfer that bail had been arranged on the morning of 11 December 1987 and prior to the court appearance at which they pleaded guilty.

On the basis of the foregoing, the regional magistrate, in my view, was justified in coming to the conclusion he did and I can see no basis for interfering with his finding.

The appeal is accordingly dismissed.

D G SCOTT

HEFER JA)
-Concur F H
GROSSKOPF JA)