



SUPREME COURT OF APPEAL, SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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STATUS Immediate

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Shiburi v The State (205/2017) [2018] ZASCA 107 (29 August 2018)

Today, the Supreme Court of Appeal (SCA) upheld an appeal brought by the appellant, Mr Ntsako Shiburi, against a judgment of the full bench of the Limpopo Division of the High Court, Polokwane (the high court). The issue on appeal concerned, in the main, the proper approach to the questioning of an accused in terms of s 112 of the Criminal Procedure Act 51 of 1977 (the CPA). The appellant, who was unrepresented, pleaded guilty to three counts of rape. After questioning the appellant in terms of s 112(1)(b) of the CPA, the regional court convicted him in terms of his plea of guilty in respect of counts 1 and 2. In his answers to the magistrate's questions, the appellant explained that his companion, who was older than him and was wielding a knife, had instructed him to rape the complainants in counts 1 and 2. In count 3, the court altered his plea of guilty to one of not guilty in terms of s 113 of the CPA. After the State had led the evidence on that count, he was convicted. The appellant appealed to the high court, arguing that (a) his right to legal representation was not adequately explained to him; (b) that the plea of guilty in each of counts 1 and 2 should have been altered to not guilty as the answers he gave to the court revealed a defence of compulsion, and (c) that the State's evidence in count 3 was not sufficient to sustain a conviction. The high court dismissed all of the appellant's contentions. With regard to the questioning in terms of s 112 of the CPA, the high court held that the conduct of the appellant's companion did not meet the definition of compulsion as a defence in law.

On further appeal, the Supreme Court of Appeal found that the appellant's right to legal representation had been adequately explained to him. The court took into consideration that the appellant had previously been legally represented. On a consideration of the peculiar

facts of the case, the court found that the appellant's fair trial right has not been infringed, and the appellant suffered no prejudice.

With regard to the questioning in terms of s 112(1)(b), the majority found that the procedure laid in that section was not properly applied. The majority explained that 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. The majority found that in the present case, the explanation given by the appellant, doubtful as it might have appeared, should have impelled the regional court to alter the plea in each of counts 1 and 2 to one of not guilty, and called on the State to lead evidence. The minority found nothing wrong with application of s 112(1)(b) and would have confirmed the convictions. As to the conviction in respect of count 3, the majority found that the regional court had misdirected itself in its approach to the evaluation of the evidence by considering the evidence of the complainant separately, and not within the totality of the evidence. It also failed to take into account the inherent improbabilities in the complainant's evidence. The minority (per D Pillay AJA) found that there was no basis of interfering with the factual findings of the trial court. As a result, it would have dismissed the appeal and corrected the sentences on the basis that the charge sheet did not inform the appellant of the applicable minimum sentences.

In the circumstances, the majority of the Court (per Makgoka AJA with Shongwe ADP, Saldulker JA and Hughes AJA concurring) set aside the convictions and sentences, and remitted the matter to the regional court to proceed in terms of s 113 of the CPA in respect of counts 1 and 2. In respect of count 3, the majority upheld the appellant's appeal.

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