IN THE HIGH COURT, BLOEMFONTEIN
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A176/2013

In the appeal between:

PHOMAS BUTLER PIETERS Appellant

and

THE STATE Respondent

CORAM: RAMPAI, AJP *et* MONALEDI, AJ

JUDGEMENT: RAMPAI, AJP

HEARD ON: 25 NOVEMBER 2013

DELIVERED ON: 6 FEBRUARY 2014

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[1] This is an appeal against the conviction as well as the sentence. The appellant and another were charged, convicted and sentenced together in the district court. A custodial sentence was then imposed on each.

[2] The appellant, who was accused number 2 in the district court, was initially aggrieved by his sentence only. He then sought a second legal advice. After obtaining such legal opinion, he also questioned the correctness or soundness of his conviction as well - hence the appeal.

[3] The appellant's co-accused was a certain Mr Khama Patrick Khama. He was not before us on appeal. The two gentlemen were accused of unlawfully selling unpolished diamonds. That was the main charge. The alternative charge was that they unlawfully possessed unpolished diamonds.

[4] The prosecution alleged that the accused persons unlawfully sold 8 unpolished diamonds, which weighed 5.72 and 3.15 carats and whose value was R15 703.00, to one J J du Toit for the price of R25 000.00 near Johnny's Service Station at Ficksburg on 9 December 2012. Such sale, the prosecution alleged further, was in contravention of section 19(1) of the Diamonds Act 56 of 1986 read with specified related sections.

[5] As regards the alternative charge, the prosecution alleged that the accused unlawfully had in their possession 8, unpolished diamonds which weighed 5.72 and 3.15 carats and whose value was R15 703.00 near Johnny's Service Station at Ficksburg on 9 December 1986 read with specified related provisions.

[6] The appellant's co-accused pleaded guilty to the main charge. His statement in terms of section 112 of the Criminal Procedure Act 51 of 1977 was read into the record, handed in and labelled as exhibit "a". He was legally represented. The appellant also pleaded guilty to the main charge. His statement in terms of section 112 (2) of Act No 51 of 1977 was read into the record, handed in and marked exhibit "c".

He too was legally represented. On 17 January 2013 the appellant was convicted on his plea as was his co-accused.

[7] After their conviction, the district magistrate remanded the trial for sentence. On 25 January 2012 the appellant was sentenced to 4 years imprisonment. His co-accused was sentenced to 5 years imprisonment in terms of section 276(1) of Act 51 of 1977.

[8] On 30 January 2013 the appellant, aggrieved by the sentence imposed on him, applied for leave to appeal against the sentence only. The district magistrate denied him leave to appeal. He was legally represented by Attorney A P Botha.

[9] About three weeks later, on 19 February 2013 to be precise, the appellant was back in the same court. On that occasion he applied for leave to appeal against the conviction only. Yet again his application was unsuccessful.

[10] Then the appellant approached this court by way of a petition. His petition was considered by Moloi J *et* Zietsman AJ. His petition was successful. On 4 December 2013 he was granted leave to appeal against both the conviction and the sentence.

[11] As regards conviction, Mr Nel, counsel for applicant, submitted that there existed exceptional circumstances in *casu* to warrant appellate interference with the verdict even though such verdict was premised on the appellant's plea of

guilty in terms of section 112 of the Criminal Procedure Act 51 of 1977. Counsel submitted that the appellant's written statement – exhibit "c" was substantially defective and that the district magistrate's wholesome acceptance thereof was irregular.

[12] The relief sought is not lightly granted. To interfere on appeal, with a conviction based on an accused's own plea, the court must be satisfied that the conviction was not in accordance with the interests of justice.

[13] Notwithstanding the fact that an appellant was convicted on his plea, an appeal may still be noted against such conviction. Hiemstra's Criminal Procedure Act at 17 – 14, **S v Mavhungu** 1981 (1) SA 56 (A) at 63G, **S v Carter** 2007 (2) SACR 415 (SCA) at 423a –b.

[14] In **S v Mamba** 1957 (2) SA 420 (A) at 422 (A) the court stressed that:

> "… it will only be in exceptional cases that one who has pleaded guilty and been convicted in accordance with his plea will be granted relief on appeal."

[15] The test to be applied was set out 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."**

See also: **S v H en 'n Ander** 2004 (1) SACR 144 (TPD) at 147h – j; **Qoko v La Grange NO and Others** 2004 (2) SACR 521 (ECD). Obviously that test (forcefully) applies where the accused admitted all the elements of the offence. It follows, therefore, that where the accused has not admitted one or more elements, the test is less stringent or burdensome.

Where an appellant who was convicted on his plea of guilty, appeals against his conviction, the legal position is very similar to the case where an accused applies to withdraw his plea of guilty.

[16] I deem it necessary to refer to certain provisions of the applicable statute:

- Section 1 of the Diamonds Act No 56 of 1986 defines the word selling as follows:

> "**'sell'**, in relation to an unpolished diamond, means to sell the unpolished diamond, to offer or expose it for sale, barter or pledge or for any like purpose or to dispose of or deliver it for the purpose of trade;"

- Section 19(1) provides:

> "(1) No person shall sell any unpolished diamond unless-
>
> (a) he or she is a producer;
>
> (b) he or she has manufactured that diamond, if it is a synthetic diamond; or
>
> (c) he or she is a dealer; or

(d) he or she is the holder of a permit referred to in section 26 (h)."

- Section 19(2) thereof regulates the selling of unpolished diamonds and provides:

"(2) The provisions of subsection (1) shall not be construed so as to authorize such producer or dealer or holder of a permit to sell any unpolished diamond which has come into his or her possession in an unlawful manner."

- Section 82(a) thereof criminalises the selling of unpolished diamonds and provides:

"Any person who-
(a) contravenes a provision of section 18, 19 (1), 20, 21 or 55;
[Para. (a) substituted by s. 11 of Act 10 of 1991.]
(b) …
shall be guilty of an offence."

- Section 87(a) thereof provides for the maximum penalty and states:

"in the case of an offence referred to in section 82 (a) or (b), to a fine not exceeding R50 000, or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment;"

[17] The appellant's written statement in terms of section 112(2) of Act No 51 of 1977 was drafted as follows:

"I, the undersigned,

THOMAS BUTLER PIETERS

1.

I am accused number two in this matter. The facts contained herein fall within my personal knowledge and is the truth. I fully understand the charge against me and I hereby wish to plead guilty. I plead guilty whilst at my full and sober senses without being unduly influenced and of my own free will. I especially want to plead guilty because I have remorse for what I have done wrong.

2.

The facts leading to this offence are:

2.1 On the 9th February 2012 and after a period when I was constantly contracted by a buyer of diamonds, I arranged that the buyer and seller meet in Ficksburg and a transaction between them took place.

2.2 I admit that I was responsible and that the value of the diamonds amounted to R15 703,00.

3.

As far as the charge against me is concerned, I specifically admit the following:

3.1 It took place on the 9th February 2012.

3.2 I associate myself with the fact that I wrongfully and intentionally committed the offence I am charged with by arranging a sale of diamonds.

SIGNED AT FICKSBURG THIS 17TH DAY OF JANUARY 2013."

[18] The appellant's written statement in support of his plea of guilty was more important for what it did not say rather than what it actually said. The appellant did not admit: that he was

on the scene of the crime, in other words, Johnny's Filling Station at Ficksburg on Thursday 9 December 2012; that he had unpolished diamonds in his unlawful possession; that he expressly offered them to the buyer namely: Mr J J du Toit for sale or tacitly exposed them to him for that purpose, bartered or pledged or for any like purpose or that he disposed of such diamonds or delivered them to the said buyer for the purpose of trade.

[19] The high watermark of the appellant's actions in this whole saga was his final admission that:

> "… I arranged that the buyer and the seller meet in Ficksburg and a transaction between them took place."

Vide 2.1 exhibit "c".

[20] The appellant also specifically made subsidiary admissions that the value of the unpolished diamonds was R15 703,00; that the illicit transaction took place on 9 February 2012; that he was responsible for facilitating such a deal and that he committed the offence by arranging the unlawful sale of diamonds.

[21] According to paragraph 2 it was apparent that the appellant implicitly denied the allegation that he was the seller or the purchaser of the unpolished diamonds. He accordingly did not admit that he sold or purchased unpolished diamonds. Those two aspects of the charge sheet were fundamental

elements of the statutory offence we were dealing with. It was quite apparent that the appellant's plea or his acknowledgment of guilt was not premised on the basic element of selling, but rather on his misconception of the law.

[22] It was patently clear that he erroneously reckoned that by facilitating the meeting between Mr J.J. du Toit and Mr K.P. Khama for the sale of unpolished diamonds he thereby criminally rendered himself guilty by association. He stated that he did not actively participate during the actual negotiation or transaction between the purchaser and the seller. Apart from his role as a facilitator, the appellant admitted nothing else which factually linked him to the prohibited act of selling unpolished diamonds. There was no admission by the appellant or any other evidence to suggest that he forked out the R25 000.00 purchase price or that he traded any piece of unpolished diamond for that sum of the money before, during or after the transaction. His plea implies that virtually nothing incriminating was found in his possession.

[23] The appellant's co-accused, Khama Khama, also pleaded guilty. In his section 112(2) statement he also explained that the appellant only acted as an intermediary between him and a certain Mr du Toit, a police trap.

[24] In **S v Mshengu** 2009 (2) SACR 316 (SCA) at 319 b – c Jafta JA aptly commented:

> "[7] Section 112(2) requires that the statement must set out the facts which he admits and on which he has pleaded guilty. Legal conclusions will not suffice. The presiding officer can only convict if he or she is satisfied that the accused is indeed guilty of the offence to which a guilty plea has been tendered. If not, the provisions of s 113 must be invoked.
> [8] The statement tendered by the appellant in this matter must be examined against the above backdrop."

[25] The presiding magistrate did not comply with his duties and obligations in terms of section 112. A presiding officer has a discretion to put any question to an accused who pleads guilty by means of a written statement, in order to clarify any matter raised in the statement.

The trial magistrate erred by not questioning the appellant at all on the actual contents of the statement. The statement as such raised aspects which clearly needed clarification.

Should the magistrate have questioned the appellant, he would have realised that the appellant did not handle the diamonds at all nor did he act in any way which may be construed as "selling".

[26] The magistrate misdirected himself in not properly considering the wording of the section 112(2) statement, as compared to the charge sheet and the elements of the offence.

The shortcomings in the magistrate's compliance with the terms of section 112 are defects or irregularities that resulted

in a failure of justice. As a result, the appellant had an unfair trial.

There were no sufficient facts on record to sustain the appellant's conviction. Compare **S v Chetty** 2008 (2) SACR 157 (WLD); **S v Moya** 2004 (2) SACR 257 (WLD) at 261 d.

[27] *In casu* the magistrate erred in accepting the plea of guilty. He should, at the very least, have noted a plea of "not guilty" in terms of section 113 in lieu of questioning. However, the questioning of the appellant was the first right thing to do or the correct procedure to follow.

In cases where a written plea explanation is handed in, the presiding officer should still be satisfied that the particular accused is indeed guilty of the offence to which he pleads guilty. For this purpose the presiding officer may question an accused in order to clarify any matter raised in the statement. Supine judicial approach may lead to miscarriage of justice.

It is the duty of the presiding officer to determine whether the accused admits the allegations in the charge sheet and to satisfy himself that the accused is guilty. The presiding officer should see to it that justice is done.

Questioning acts as safety measure against unjustified convictions. See **S v Naidoo** 1989 (2) SA 114 (A) at 121 E.

[28] The learned magistrate erred in not questioning the appellant on the actual contents of his statement in terms of section 112. He should at least have questioned the appellant as to whether or not he admited the actual act of selling the diamonds to J.J. du Toit as alleged in the charge sheet. He failed to determine whether the appellant admitted all the allegations in the charge sheet and properly understood all the elements of the offence. The court should satisfy itself not only that an accused admits a specific allegation, but also that he understands what such admission entails. Cf. **S v Lebokeng** 1978 (2) SA 674 (O) at 676C; **S v B** 1991 (1) SACR 405 (N) at 405i – 406b. The statement contains the phrase that the appellant considers himself guilty of the offence with which he is charged. He reckoned that **"by arranging a sale of diamonds"** he was just as guilty as someone who actually sold unpolished diamonds. It is clear that the appellant did not properly understand the essence of the offence he was charged with.

[29] It would appear that the appellant's attorney also did not appreciate his client's instructions and the consequences thereof as well as the elements of the crime charged. Compare: **S v Moya** 2004 (2) SACR 257 (WLD) at 261c.

It would seem that the magistrate did not even consider the contents of the statement by the appellant's co-accused. Had he properly applied his mind to the case as a whole, this last-mentioned statement would have alerted him to the fact that the appellant might possibly have a defence to the

charge preferred against him. However, it must be borne in mind that the district magistrate was a relative novice on the bench.

[30] It appears as if the prosecutor also did not apply his mind when he accepted the appellant's plea of guilty. It was the same prosecutor who later did *not* oppose the application for leave to appeal against the conviction.
Record p 95 / 9 – 14.

[31] In the circumstances, I am persuaded that the appellant's written statement in terms of section 112(2) of Act No 51 of 1977 was basically elementary flawed; that the statement substantially lacked admissions or averments required to sustain proper conviction. The shortcomings rendered the statement materially inadequate and the appellant's plea of guilty highly questionable. The statement contained material defects.

[32] The defects in the appellant's written statement in terms of section 112(2) though material, were not incurably fatal. The prosecutor merely accepted the statement on its face value. He regrettably neglected to critically and analytically consider the appellant's averments as embodied in the statement in order to ascertain that the appellant admitted all the elements of the crime of selling unpolished diamonds. It appeared to me that the prosecutor's erroneous acceptance of the appellant's defective statement was due to lack of experience. He did not deserve to be castigated. I think he will acquire the

necessarily prosecutorial skills and experience with the passage of time.

[33] The prosecutor's error notwithstanding, it was ultimately incumbent upon the district magistrate, as the trial court, to invoke the curative procedure in terms of section 112(1)(b) in order to ascertain whether or not the appellant admitted all the elements of the charge. The underlying purpose of the section is to make doubly sure that an accused person who pleads guilty, indeed has no possible defence – **S v Kholoane** 2012 (1) SACR 8 (FB).

[34] At times accused persons tend to plead guilty on account of ignorance of the law. This is a classic example of such a tendency. See **S v M** 1982 (1) SA 240 (N) at 242D-E per Didcott J. It is imperative therefore, for presiding judicial officers to be ever alert to and mindful of such potential dangers for unwary accused. Such danger does not necessarily become diminished where, as in this instance, an accused is legally represented. Although exhibit "c" was drafted by a lawyer, it was not a model of good draftmanship. It left much to be desired. The district magistrate sadly failed to appreciate its material shortcomings. By adopting it as it was without applying section 112(1)(b) failed to question the appellant in order to ensure that he properly understood all the material factual allegations in the charge sheet and failed to determine whether he correctly admitted all the elements of the offence. Therefore he failed to satisfy himself that the appellant was indeed guilty in law. That, in my view was a

material irregularity. Because the appellant was denied the procedural protection created in terms of section 112(1)(b), he was wrongly convicted. The irregularities rendered his trial unfair and resulted in a failure of injustice. The statement could have sustained a proper conviction. Accordingly I have come to the conclusion that, in this matter, exceptional circumstances existed to justify the grant of the relief sought on appeal – **S v Mamba** *supra*. In the circumstances I am inclined to interfere with the verdict.

[35] As regards sentence, the issue should not detain us any longer in view of the conclusion I have reached concerning the verdict. It follows, as a matter of logic, that once the conviction is set aside, the sentence automatically falls away. Mr Nel fairly criticised certain aspects of the sentencing component of the judgment at length. There was substance in the critique. I do not want to dwell on the topic save to say that I am in respectful agreement with Mr Nel that 4 year custodial sentence imposed on the appellant was disturbingly severe and thus inappropriate regard being had to the peculiar circumstances of this particular case.

[36] Irregularities committed in the application of section 112(1) or omissions to apply it have consequences peculiar to that section. Section 312(1) provides –

> "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 to the case may be."

See also: **S v Van Aswegen** 1992 (1) SACR 487 (O) at 490i.

The abovementioned course of action should be followed, unless a court on appeal is of the view that it would lead to an injustice or that it would be a futile exercise.

See: **S v Mshengu** 2009 (2) SACR 316 (SCA) at 322a.

[37] In *casu,* the appellant has already served some fairly long portion of the sentence in a correctional centre. If the matter is remitted to the district court so that the provisions of section 112 or section 113 can be complied with, two possibilities will probably arise. Firstly, evidence may be adduced against the appellant on the strength of which he might ultimately be convicted. In that event there would be some appearance of justice as regards the portion of the sentence he had already served before he was released on bail pending the outcome of his appeal. He was very close to be paroled at the time.

[38] Secondly, there may be no evidence adduced against the appellant. The disputed elements of the offence would then remain unproven. The judicial questioning would have failed to elicit relevant admissions to sustain his conviction. In that scenario he would be entitled to be acquitted. It follows, therefore, that an injustice would have been done to the

appellant through the wrong sentence previously imposed on him and already partially served.

[39] I am of the view that following the ordinary course of action in terms of section 312 would, in the circumstances, potentially lead to an injustice or would be a practically futile exercise – **S v Mshengu,** *supra*, at 322e. It would not be in the interest of justice to remit the matter to the district court in order to have the appellant retried. Nothing can compensate the agony of a retrial. Therefore, I would refrain from remitting the matter.

[40] There remains one more aspect we were urged to consider. It has no bearing on the appellant. It rather concerns his erstwhile co-accused. As I have earlier indicated he was not before us on appeal. Nonetheless Mr Nel, on compassionate grounds, made a special plea to us to consider his situation as well. I was persuaded by counsel's submission that this was one of those rare matters where the interests of justice dictate that a court, sitting as were, in an appellate mode, should intervene *mero motu* by virtue of its inherent power to prevent an injustice.

[41] Like the appellant, Mr Khama Patrick Khama, accused number 1 in the court below, pleaded guilty. His statement in terms of section 112(2), Act No 51 of 1977 was signed by him and his legal representative. It was then handed in and labelled as exhibit "a". It is a two page pro-forma document. Besides paragraphs 3 and 4 which were partially type-written and partially hand-written, the rest of the paragraphs were

pretyped. In my view such a practice is highly unorthodox undesirable and probably irregular. It ethically leaves much to be desired and it must be discouraged.

[42] It will serve no useful purpose to critically analyse exhibit “a”. We now know that the total value of the diamonds was R15 703 and not R25 000 as stated in paragraph 3. We also know that R25 000 was the agreed selling price and not the true market value of those diamonds. How many of the 8 pieces of the precious stones weighed 5,72 carats and precisely how many weighed 3.15 carats? What was the essential difference between the two groupings? Was the transaction actually completed by the physical exchange of diamonds for money? Was the marked trap money found in his possession? Could he distinguish between diamonds and unpolished diamonds?

[43] The admissions attributed to accused number 1 in paragraph 5 were disturbingly vague. For instance, what permission was he really referring to in paragraph 5.1? Was it a valid permit or licence to possess or to ship the diamond from a foreign country into this country or to sell unpolished diamonds? What did he really mean by saying:

> “I admit that I did not have permission to act in that way?”

Did he really admit that he was a diamond smuggler and not a lawful trader with a valid permit, domestic or foreign?

[44] The purported statement of guilt was so vague and deficient that one cannot, without any doubt or reservation, say that accused number one was indeed guilty as he pleaded. I am of the firm view that neither subsection (2) nor subsection (1)(b) was complied with. It being the case, I am inclined to conclude that the conviction cannot be allowed to stand.

[45] As regards sentence, section 87 of the Diamond Act No 56 of 1986 does not prescribe minimum sentences but rather maximum sentences for contravention of section 19. Such sentences are a maximum fine of R25 000 or a maximum custodial period of 10 years imprisonment or both such fine and imprisonment. I could find no compelling reason as to why the district magistrate did not consider the option of a fine. Although the illegal selling of unpolished diamond is a serious offence, the sentence of 5 years direct imprisonment, appeared to me to be disturbingly severe and thus inappropriate regard being had to the personal profile of the individual concerned. In the event that his conviction is confirmed following proper judicial questioning in terms of subsection (1)(b), then his sentence would also need to be reconsidered.

[46] In the circumstances, I am of the view that, in this instance, the interest of justice dictate that we set aside the sentence as well and, remit the case in respect of Mr Khama to the district court in terms of section 312(1) for it to comply with subsection (1)(b) procedure.

[47] Accordingly I propose the following order:

47.1 The appeal succeeds *in toto.*

47.2 The conviction and sentence are set aside.

47.3 The conviction and sentence of accuse number one, Mr K P Khama, are also set aside.

47.4 The plea of accused number one which he made in terms of section 112(2) stands.

47.5 The case of accused number one is remitted to the district court.

47.6 The district magistrate is directed to reconsider the plea of accused number one by complying with the provisions of section 112(1)(b) in accordance with the guidelines as set out in this judgment.

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M. H. RAMPAI, AJP

I concurred and it is so ordered.

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S. R. MONALEDI, AJ

On behalf of the appellant: Adv J. Nel
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of the respondent: Adv Hoffman
Instructed by:
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