CASE NO.: CR 19/2010

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

ABRAHAM MPANDA

(HIGH COURT REVIEW CASE NO.: 182/2010)

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: September 28, 2010.

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused was arraigned in the magistrate's court Outapi on a charge of assault on a member of the police in contravention of s 35 (1) of the Police Act, 1990 (Act 19 of 1990), alternatively, for interference with a member in the exercise of his duty in contravention of s 35 (1) of the said Act. He pleaded guilty on the main charge but was subsequently convicted on the alternative charge and

sentenced to a fine of N$800-00 or 6 months imprisonment. The accused was unable to pay the fine and has started serving his sentence.

[2] When the matter came before me on review the following query was directed to the trial magistrate:

> *"From the record it appears that the accused pleaded only to <u>one</u> charge namely, the main count.*
> *Could he then have been convicted on the alternative charge if he did not plead to that charge?"*

[3] The magistrate replied in the following terms, quoted *in extenso*:

> *"1. The charge sheet only reflects the main charge and not the alternative charge. Without concluding, I hold the view that the accused was only informed of the main charge and not the alternative charge.*
>
> *2. At the time of putting the charge, the prosecutor drafted also an alternative charge. The accused was again not advised of the alternative count and was only requested to plea to the main charge. During questioning in terms of section 112 (1) (b) of Act 51 of 1977, the accused did not admit to some of the essential elements on the main charge, but admitted, in my view to the allegations and essential elements on the alternative charge. The prosecutor accepted the plea on the alternative count and the accused was convicted and sentenced on the lesser charge.*
>
> *3. Although I proceeded as if the accused pleaded to both charges, and did not realise, firstly that I did not inform him of the alternative charge, and secondly, did not ask him to plea thereto, I find the proceedings not to be in order for the reason that the accused was convicted of an offence he did not plea to.*
>
> *4. I humbly submit that I erred in convicting the accused on the alternative charge. As such, the conviction and sentence is susceptible to interference."*

[4] The concise summary by the magistrate correctly reflects the issue under consideration and is commendable. His concession that the conviction and sentence are not in accordance with justice and requires interference is also well made.

[5] Although it is referred to in the record of the proceedings as the "main count", it was in fact the only count which was preferred against the accused and the only one on which he was required to plead. Despite the accused pleading guilty on a charge of contravening s 35 (1) of Act 19 of 1990, he denied having assaulted the complainant and only admitted to resisting him by refusing to leave the premises when instructed to do so by the complainant; the latter acting in his capacity as a police officer. The State thereafter indicated that it would accept a plea on the "lesser charge"; a charge never put to the accused but on which he was eventually convicted and sentenced.

[6] From a reading of s 105 of the Criminal Procedure Act No. 51 of 1977 it is *imperative* that the charge be put to the accused and that he pleads thereto:

> *"The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of section 77 and 85, be required by the court forthwith to plead thereto in accordance with section 106."* (My emphasis)

Where the State in the present case relied on the alternative charge for a conviction, the charge had to be put to the accused whereafter he was required to plead thereto. Where the accused was not asked to plead to the charge (in this case the alternative charge), then no *lis* arose thereanent between the parties and the accused could not, in those circumstances, have been convicted on that charge (*S v Mbokazi* 1998 (1) SACR 438 (N) at 442h-j). In the present case the court *a quo* convicted the accused as if he had pleaded on the alternative charge and misdirected itself by so doing. On that basis the conviction cannot be permitted to stand.

[7] What remains to be considered is whether the accused could be convicted on the charge set out in the alternative in terms of s 270 of Act 51 of 1977 as a competent verdict? Section 270 reads as follow:

> "*If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves*

the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved." (My emphasis)

[8] The essential elements of s 35 (1) of Act 19 of 1990 are (i) an assault (ii) perpetrated on a member of the Namibian Police (iii) in the execution of his/her duty or functions whilst that of s 35 (2)(a) are (i) to resist or wilful hinders or obstructs (ii) a member (iii) in the execution of his/her duty or functions. Clearly, there is a material difference between the prohibited acts as set out in s 35 (1) and (2) respectively; each essentially having different elements, constituting two separate crimes. Suffice it to say that, in my view, an assault on a member (s 35 (1)) does not encompass and include all the prohibited acts set out in s 35 (2) of the Act and therefore a conviction on the latter, as a competent verdict, would be impermissible. Two separate and independent crimes were enacted by s 35 (1) and (2) of Act 19 of 1990 for which an accused may be charged.

[9] In the result, the Court makes the following order:

1. The conviction and sentence are hereby set aside.

_____

LIEBENBERG, J

I concur.

_____

TOMMASI, J