CASE NO.: CR 12/2011

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

DANIEL NDAMANGULUKA

(HIGH COURT REVIEW CASE NO.: 48/2011)

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

Delivered on: 27 May 2011.

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused appeared in the Magistrate's Court, Oshakati on a charge of theft of cash in the amount of N$6 300, to which he pleaded not guilty. In his plea explanation he admitted having taken N$4 600 *"because I was separated*

from my friends and I was never given food" and that the money was used to buy food. The matter was then postponed for further investigation and trial.

[2] During a subsequent appearance the prosecutor informed the court that the accused intended pleading guilty to theft of cash in the amount of N$4 600 only, and that the State would accept the plea. After confirming this with the accused the court convicted the accused on his mere plea of guilty in terms of s 112 (1)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), hereinafter referred to as 'the Act'. He was sentenced to a fine of N$600 or 3 months imprisonment. Whereas the fine was not paid, the matter became reviewable in terms of s 302 (1)(a)(i) of the Act.

[3] On review a query was directed to the magistrate inquiring from her whether, in the light of the accused having initially raised a defence, the court should not first have explored this defence before it proceeded invoking the provisions of s 112 (1)(a) of the Act; whether in the circumstances of the accused being unrepresented, s 112 (1) (b) should not instead have been applied to ensure that the accused did not erroneously plead guilty to the charge, albeit on a lesser amount; and lastly, in view of *S v Aniseb,*[1] the magistrate was of the view that a charge of theft of N$4 600 was considered to be a *minor offence* which could be dealt with in terms of s 112 (1)(a) of the Act.

[4] The magistrate's reply came almost two months later by which time the accused had almost fully served his sentence. The delay was explained by saying that the record was misplaced. I find the explanation disturbing in the sense that the inattentive handling of a case record could have grave consequences for a convicted

[1] 1991 (2) SACR 413 (NM)

person who might be serving a sentence in circumstances where the conviction ought to be set aside on review; and had there been a quicker response from the magistrate, then the prejudice suffered by the accused would have been substantially less. The accused in this case by now would have served his sentence in full, making this judgment purely academic.

[5] It seems necessary to remind those officers responsible for the preparation and handling of review cases, as well as magistrates, to strictly comply with the provisions of the Act and to deal with those cases as a matter of urgency. Justice can only be delivered through proper administration by its officials.

[6] The magistrate responded to the query in the following terms:

> *"1. (i) The Court was of the opinion that the matter may be finalized in terms of Section 112 (1)(a) as the Complainant indicated that he had recovered all of the stolen money and accused indicated that he had no defense and just wanted to finalise the matter.*
>
> *(ii) Yes the Court agrees with the learned judge's opinion to question the accused in terms of Section 112 (1)(b) however, in this instance the Court is of the opinion that the accused in the first instance just raised the defence to prolong the Court proceedings as is normally done by all accused. It should also be noted that the case was finalized upon the request of the accused.*
>
> *2. With the new amendments to the fines imposed in terms of Section 112 (1)(a)(b) (sic) I was of the opinion that the charge of theft of N$4 600, which was wholly recovered by the Complainant is not such a serious offence, nor is it a minor offence as stated by the learned judge. Sentence must be*

> *individualized depending upon the circumstances of each case, under no circumstances should sentence(s) be standardized. Each case must be treated on its own merits and in light of circumstances. The admission of guilty (sic) is a yardstick in determining the seriousness of the offence committed. In sentencing the Court also had regarded (sic) to time already spent by accused in custody prior to accused being able to pay bail."*
> (emphasis provided)

[7] The record of the proceedings held on 15 February 2011 certainly does not support the contention that the complainant had recovered all the stolen money; or that the accused was desirous to have the matter finalised as suggested by the magistrate in her reasons. Court proceedings as *per* the record were as follows:

> *"SP: Changing of plea from not guilty to guilty as complainant (sic) is pleading guilty to the amount of N$4 600 instead of the N$6 300 and the state accepts the plea.*
> *CRT: Accused are you in agreement with the changing of the plea from not guilty to guilty?*
> *A: Yes.*
> *CRT: Plea changed to that of guilty.*
> *SP: May court apply prove of Section 112 (1)(a).*
> *CRT: Accused the court finds you guilty based on your own admissions and you are convicted as such in terms of Section 112 (1)(a).*
> *SP: No previous convictions.*
> *CRT: Accused rights to mitigation explained ……"*

[8] It was only during the prosecutor's submissions before sentence that it was brought to the court's attention that "all the money was recovered" and not at the

stage when the magistrate was required to exercise her discretion whether to invoke the provisions of s 112 (1)(a) or not. Hence, it could not have been a factor taken into consideration at the stage of pleading. It is furthermore evident that not all the stolen money had been recovered as stated by the prosecutor and accepted by the magistrate, because only N$4 600 of the N$6 300 for which the accused stood charged, was recovered. This could neither have been a reason to invoke the provisions of s 112 (1) (a).

[9] In the matter of *The State v Shikale Onesmus; The State v Piratus Amukoto; The State v Junias Mweshipange*[2] this Court comprehensively dealt with the approach to be followed by a judicial officer when required to exercise his or her discretion whether or not to invoke the provisions of s 112 (1)(a); and there is no need to repeat what has been stated therein. In the present instance it will suffice to say that it would appear that the magistrate only focussed on the sentence that were to be imposed and completely disregarded the nature and seriousness of the offence and its particulars. In this regard the following was said in the *Shikale Onesmus* case at p. 5 of the record:

> *"[6] In deciding the course, the presiding officer will be guided by (i) the nature and the seriousness of the offence (S v Phundula[3]); (ii) the possibility of compulsory sentences; and (iii) the particulars in the charge. When considering the particulars with the view of disposing of the case expeditiously, the judicial officer is required to look for indications that the offence is not of a serious nature. Only relatively minor offences should be dealt with under s 112 (1) (a) and in S v Aniseb and Another[4], Hannah AJ (as he then was), remarked as follows:*

[2] (Unreported) Case No. CR 08/2011 delivered on 30.03.2011
[3] 1978 (4) SA 855 (T) at 859.
[4] 1991 (2) SACR 413 (Nm) at 415g-i (1991 NR 203 (HC)).

'The policy behind s 112 (1) (a) is clear. The Legislature has provided machinery for the swift and expeditious disposal of minor criminal cases where the accused pleads guilty. The trial court is not obliged to satisfy itself that an offence was actually committed by the accused but accepts his plea at face value. The accused thus loses the protection afforded by the procedure envisaged in s 112 (1) (b), but he is not exposed to any really serious form of punishment. The court may not pass a sentence of imprisonment or any other form of detention without the option of a fine or whipping and any fine imposed must not exceed [N$300]' (Emphasis provided)

[7] The words of the subsection are similar to those of its predecessor[5] and it seems clear that the Legislature's intention from the onset has been that an accused could be convicted on his bare plea of guilty, but this procedure should be reserved for cases considered to be 'minor', 'trivial' or 'not serious'."

[10] A charge of theft of N$4 600 cannot be seen to fall in the category of cases considered to be minor or not serious; hence, had the magistrate exercised her discretion judiciously, she instead would have questioned the accused in terms of s 112 (1)(b) of the Act in order to determine whether he was guilty of the offence for which he stood charged – especially against the background where the accused had already raised a defence. I find the magistrate's remark that the accused merely *"raised the defence to prolong the Court proceedings as is normally done by all accused"*, respectfully, misplaced.

[11] Every accused has the right to plead not guilty on any charge preferred against him or her, as the State bears the onus to prove an accused's guilt beyond reasonable

[5] Section 258 (1) (b) of Act 56 of 1955.

doubt. And, it is not a matter of the accused wilfully frustrating court proceedings by pleading not guilty, as the magistrate appears to suggest; for it is an accused's Constitutional right to do so. There is nothing in the record of the proceedings showing that the accused acted wilful and the magistrate's remark in that regard is accordingly without merit.

[12] At the time the magistrate had to decide whether or not to summarily finalise the matter in terms of s 112 (1)(a) after the accused decided to change his plea to guilty, regard should have been had to the following: The accused was unrepresented and at first pleaded not guilty, raising a defence of necessity and admitted having taken the amount of N$4 600. The fact that the accused thereafter informed the court that he wanted to change his plea to one of guilty *per se* could not have changed the circumstances under which the alleged crime was committed and the magistrate ought to have investigated these circumstances through s 112 (1)(b) questioning, in order to satisfy herself that an offence was actually committed by the accused – particularly because of the defence earlier raised. By questioning the accused the magistrate could have determined whether or not there was any merit in the defence initially raised, and without doing so, she could not have reached the conclusion she did.

[13] Given the present circumstances the magistrate's failure to question the accused in terms of s 112 (1)(b) of Act 51 of 1977 constituted an irregularity vitiating the entire proceedings; hence, the conviction and sentence must be set aside

[14] Resultantly, the conviction and sentence are hereby set aside.

LIEBENBERG, J

I agree.

TOMMASI, J