REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR: 40/2013

In the matter between:

THE STATE

and

MALENGI LINUS **ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO. 725/2013

Neutral citation*:* *State v Linus* (CR 40/2013) [2013] NAHCMD 229 (31 July 2013)

Coram: HOFF J and SHIVUTE J

Delivered: **31 July 2013**

Summary: A magistrate has the final say whether a case should be finalised in terms of s 112(1)*(a)* – Where a magistrate is in doubt regarding the seriousness of the offence an enquiry in terms of s 112(1)*(b)* is advisable.

Magistrate's Court is a court of record and it is the duty of a magistrate to record proceedings in a clear and intelligible manner – failure to do so will leave the record incomplete.

Accused person has the right to address the court on an appropriate sentence and must be allowed to exercise this right.

Where prosecutor suggests a particular sentence (after the address by the accused) the accused person must be given the opportunity to respond to such suggestion and this must be apparent from the record – This is in line with the principle of fair trial.

ORDER

(a) The conviction and sentence are set aside.

(b) The proceedings are returned to the presiding magistrate who is ordered to apply the provisions of section 112(1)*(b)* of Act 51 of 1977.

(c) Should the accused after questioning by the magistrate be convicted, the magistrate should continue to sentence the accused person afresh.

JUDGMENT

HOFF J (SHIVUTE J concurring):

[1] The accused was charged with theft of electrical equipment valued at N$4000. The accused pleaded guilty and the prosecutor requested that the case be finalised in terms of the provisions of s 112(1)*(a)* of Act 51 of 1977. The accused was thereafter convicted on his plea of guilty.

[2] The accused was sentenced to a fine of N$4000 or 12 months imprisonment which was suspended on condition that the accused does 400 hours of community service at the Ministry of Labour in Rundu.

[3] I addressed a query to the magistrate to explain why the accused was not provided the opportunity to address the court on the issue of community service.

[4] The magistrate replied that the accused was provided with such opportunity but that there was an oversight on his part to put it on record.

[5] Before I deal with the query and the reply of the magistrate I first need to deal with the fact that the accused was convicted on his mere plea of guilty in terms of the provisions of s 112(1)*(a)* of Act 51 of 1977.

[6] Section 112(1)*(a)* was meant to be utilised in those instances where accused persons are charged with relatively minor offences where the presiding magistrate is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine.

[7] The magistrate in order to decide whether to finalise the matter in terms of s 112(1)*(a)* is often guided by the prosecutor's attitude who has more information than the court regarding the circumstances under which the offence had been committed, however it is the presiding officer who takes the final decision.

[8] The presiding magistrate, given the lack of information, and in the absence of any address by the prosecutor regarding the State's case, is often left to decide the issue on the particulars in the charge and the nature of the offence.

[9] In my view theft of goods valued at N$4000 can hardly be considered to be of a minor nature.

[10] One should also not lose sight of the fact that in terms of s 112(1)*(a)* the accused is convicted without any evidence but on the *opinion* of the accused that he or she is guilty. This may become problematic especially where the court is faced with an illiterate accused person who lacks sufficient understanding of the consequences of the plea of guilty.

[11] Where the magistrate has any doubt regarding the seriousness of the offence the magistrate has the power in terms of the provisions of s 112(1)*(b)* to conduct an enquiry in spite of the prosecutor's request that the case be finalised in terms of s 112(1)*(a).*

[12] What is ironic in this particular case is that the prosecutor having requested the matter to be finalised in terms of s 112(1)*(a),* before sentence maintained that the offence is a of a serious nature.

[13] I am of the view that given the particulars of the charge sheet and the nature of the offence this case is an example where the magistrate should have applied the provisions of s 112(1)*(b).*

[14] Returning to the magistrate's reply that it was an oversight on his part to put on record that the accused was afforded the opportunity to address the court before imposing sentence, it should be emphasised that the magistrate's court is a court of record in terms of the provisions of s 4(1) of the Magistrate's Court Act 32 of 1944 as amended.

[15] Section 76(3) *(a)* of Act 51 of 1977 reads as follows:

'The court shall keep a record of the proceedings, whether in writing or mechanical, or shall cause such record be kept and the charge sheet, summons or indictment shall form part thereof.'

[16] Section 76(3)*(b)* reads as follows:

'Such record may be proved in a court by the mere production thereof or a copy thereof in terms of s 235.'

[17] In *S v Heibeb* 1994 (1) SACR 657 (Nm) at 663i-j Muller AJ stated as follows:

'It is the duty of the presiding officer to keep a proper record and record the proceedings in a clear and intelligible manner in the first person and also to record the explanation of the rights of the accused fully and clearly.'

[18] In the absence of recording what has been explained to the accused person, one is left in the dark (figuratively speaking) as to what was conveyed to the accused by the magistrate.

[19] Section 274(2) of Act 51 of 1977 reads as follows:

'The accused may address the court on any evidence received under subsec (1) as well as on the matter of sentence, and thereafter the prosecution may likewise address the court.'

[20] In *S v Mokela* 2012 (1) SACR 431 SCA at 437 par. 14 Bosielo JA (Snyders JA and Wallis JA concurring) stated the following regarding the right to address the court prior to sentencing:

'It is generally accepted that both the accused and the State have a right to address the court regarding the appropriate sentence. Although s 274 of the Criminal Procedure Act uses the word 'may', which may suggest that a sentencing court has a discretion whether to afford the parties the opportunity to address it on an appropriate sentence, a salutary judicial practice has developed over many years, in terms whereof courts have accepted this to be a right which an accused can insist on and must be allowed to exercise. This is in keeping with the hallowed principle that, in order to arrive at a fair and balanced sentence, it is essential that all facts relevant to the sentence be put before the sentencing court. The duty extends to a point where a sentencing court may be obliged, in the interests of justice, to enquire into circumstances, whether aggravating or mitigating, which may influence the sentence which the court may impose. This is in line with the principle of a fair trial. It is therefore irregular for a sentencing officer to continue to sentence an accused person, without having offered the accused an opportunity to address the court; or as in this case, to vary conditions attached to the sentence, without having invited the accused to address him on the critical question of whether such conditions ought to be varied or not.'

(See also *S v Namseb* 1991 (1) SACR 223 (Nm) per O'Linn J).

[21] I must state that the magistrate did explain the rights of the accused prior to sentencing. However it is clear from the record that what prompted the magistrate to impose community service was the prosecutor's suggestion that 'if the accused is willing to do community service we suggest that the accused does 200 hours of community service'.

[22] The accused was not given the opportunity to respond to this suggestion by the prosecutor and the magistrate immediately thereafter sentenced the accused to a fine of N$4000 or 12 months imprisonment which were wholly suspended on condition that the accused does 400 hours community service at the Ministry of Labour in Rundu.

[23] This in my view is an irregularity and not in line with the principle of a fair trial.

[24] In the result the following orders are made:

(a) The conviction and sentence are set aside.

(b) The proceedings are returned to the presiding magistrate who is ordered to apply the provisions of section 112(1)*(b)* of Act 51 of 1977.

(c) Should the accused after questioning by the magistrate be convicted, the magistrate should continue to sentence the accused person afresh.

E P B HOFF

Judge

N N SHIVUTE

Judge