HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: CA 56/2013

In the matter between:

MWEEMBA BRENDAN	**FIRST APPELLANT**
SAMWELE SILILO RODRICK	**SECOND APPELLANT**
LUBASI ELVIS LUBASI	**THIRD APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Mweemba v State* (CA 56/2013) [2013] NAHCMD 344 (20 November 2013)

Coram:	UEITELE J *et* UNENGU AJ
Heard on:	**11 NOVEMBER 2013**
Delivered on:	**20 NOVEMBER 2013**

Flynote: Criminal procedure - Trial - Plea - Plea of guilty - Questioning in terms of s 112(1)(b) of Criminal Procedure Act 51 of 1977 - Object of s 112(1)(b) is to protect accused from consequences of an unjustified plea of guilty - Where accused's responses to questioning suggest a possible defence or leave room for a reasonable explanation other than guilt, a plea of not guilty should be entered in terms of s 113 and the matter clarified by evidence.

Summary: The appellants appeared before the District Magistrates' Court for the district of Katima Mulilo on two charges of contravening the Nature Conservation Ordinance, 1975[1]. The first count was that the appellants contravened section 26(1) read with Sections 1, 26(2), 26(3), 85 87, 89 and 89A of Ordinance 4 of 1975 further read with sections 90 and 250 of the Criminal Procedure Act 1977[2] in that they hunted specially protected game, (namely: three elephants) without a permit. The second count which the appellants faced was that they contravened section 2(1)(a) read with Sections 1, 3, 4 and 5 of Proclamation AG 42 of 1980 as amended by Act 31 of 1990 in that they were in possession of six elephant tusks weighing 43, 75 kg and valued at N$ 31 283, 88.

The appellants who were unrepresented, each, tendered a plea of guilty to the charges. Pursuant to questioning by the learned magistrate in terms of s 112(1)(b) of the Criminal Procedure Act 1977 the appellants were, on 31 January 2013, convicted on both counts and on 11 February 2013 the appellants were, each, sentenced to four years imprisonment in respect of the first count and one year imprisonment in respect of the second count. They appeal against both the conviction and sentence.

Held that where there are co-accused the magistrate is required to question each accused independently even if this involves laboriously repeating the same questions.

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1 Ordinance 4 of 1975.

2 Act 51 of 1977.

Held further that the primary purpose of s 112(1)(b) of the Act is to protect an undefended accused, such as the accused in *casu,* against the consequences of an incorrect plea of guilty.

Held further that the answers given in an enquiry in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 do not constitute 'evidence' under oath from which the court can draw inferences regarding the guilt of the accused. Section 112(1)(b) requires of a court in peremptory language to question the accused with reference to the alleged facts of the crime in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty. It may only convict the accused on account of such a plea if it is satisfied on the basis of such answers that the accused is indeed guilty. Unless the accused has admitted to all the elements of the offence, he or she may not be convicted merely on account of his or her plea.

ORDER

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1. Condonation is granted for appellant’s non-compliance with the Rules.

2. The conviction and sentence are set aside.

3. The matter is remitted in terms of s 312 of Act 51 of 1977 to the Magistrates’ Court for the District of Katima Mulilo who convicted and sentenced the appellants and be tried by a magistrate other than magistrate Sibanda with the directive to comply with the provisions of s 112 of Act 51 of 1977.

4 In the event of a conviction, the court in sentencing, must take into account the sentence already served by the appellants.

5. Pending such appearance in the Magistrates' Court for the District of Katima Mulilo, the appellants are to remain in custody.

JUDGMENT

UEITELE J (UNENGU AJ concurring):

[1] The appellants appeared before the District Magistrates' Court for the district of Katima Mulilo on two charges of contravening the Nature Conservation Ordinance 1975[3]. The first count was that the appellants contravened section 26(1) read with Sections 1, 26(2), 26(3), 85 87, 89 and 89A of Ordinance 4 of 1975 further read with sections 90 and 250 of the Criminal Procedure Act 1977[4] in that they hunted specially protected game, (namely: three elephants) without a permit. The second count which the appellants faced was that they contravened section 2(1)(a) read with Sections 1, 3, 4 and 5 of Proclamation AG 42 of 1980 as amended by Act 31 of 1990 in that they were in possession of six elephant tusks weighing 43, 75 kg and valued at N$ 31 283, 88.

[2] The appellants who were unrepresented, each, tendered a plea of guilty to the charges. Pursuant to questioning by the learned magistrate in terms of s 112(1)(b) of the Criminal Procedure Act 1977 (I will for the sake of convenience, in this judgment refer to this Act simply as the Act), the appellants were, on 31 January 2013, convicted on both counts and on 11 February 2013 the appellants were, each, sentenced to four years imprisonment in respect of the first count and one year imprisonment in respect of the second count.

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[3] Ordinance 4 of 1975.

[4] Act 51 of 1977.

[3] On 12 February 2013 each of the three accused authored a document titled 'Notice of Appeal'. Except for the second appellant whose appeal is directed at both the conviction and sentence the first and third appellants appear to have appealed against their sentences only. Subsequent to their conviction and sentencing the first and third appellants engaged their current legal practitioner of record to pursue their appeal. The second appellant also at a later stage engaged the same legal practitioner. We agreed to hear the condonation application also in respect of the second appellant.

[4] The legal practitioner filed an amended Notice of Appeal accompanied by an application for condonation for the late filling of the amended Notice of Appeal. The application for condonation is supported by an affidavit in which appellants set out reasons as to why the amended Notice of Appeal was filed out of time and the prospects of success on appeal. We are satisfied that the appellants' explanation for the delay in filing the Amended Notice of Appeal, is reasonable and acceptable. Mr Nyambe who appeared for the respondent also agrees that the explanation is reasonable and acceptable. We therefore condone the late filing of the Amended Notice of Appeal in respect of all the three appellants. We now turn to consider the merits of the appeal.

[5] The main ground of appeal against conviction on both count 1 and 2 is that the Magistrate misdirected herself when she convicted the appellants on admissions of bare elements of the offences without further information relating to the circumstances surrounding the commission of the offence. In order to evaluate whether the ground of appeal is indeed sustainable or not we find it appropriate to, in full, quote the questioning of the appellants in terms of section 112(1)(b) in the court *a quo,* but we will defer a quotation of the relevant part of the record until a little later.

[6] Mr Sibeya who appeared for the appellants argued that section 112(1)(b) of the Act was meant to protect an accused particularly an undefended accused from consequences which may follow an ill-considered plea of guilty. He further argued that it is a well settled principle of our law that for a Court to be satisfied that indeed an

accused intends to plead guilty to offences where section 112(1)(b) applies factual information or circumstances surrounding the commission of the offences should be elicited from an accused in addition to the bare admission of the allegations contained in the charges. The Court should be satisfied that an accused admits the facts which underlie the charge and should not merely be bare admissions of the allegations appearing in the charge sheet.

[7] We agree with the submission by Mr Sibeya. This Court has in a number of cases[5] drawn the attention of Magistrates to the provisions of that section and to the correct method of questioning in terms of section 112(1)(b) of the Act which must be applied when that section is invoked. See the remarks of Silungwe, AJ with Muller, J concurring in *S v Combo and Another* [6] that:

> 'It is necessary to appreciate that the primary purpose of s 112(1)(b) of the Act is to protect an undefended accused, such as the accused in *casu,* against the consequences of an incorrect plea of guilty. Such questioning entails two aspects about which the presiding magistrate must be convinced, to wit: firstly, that the accused admits all the elements of the charge and, secondly, that he is guilty thereof. Hence, the court should be satisfied, not only that the accused committed the crime, but also that he committed it unlawfully and with the necessary *mens rea'*

[8] In the matter of *Johny Jorom Ndetapo Kondo v The State*[7] Liebenberg, J with Tommasi J concurring said:

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[5]See the case of Johny Jorom Ndetapo Kondo v The State, an unreported judgment of this Court, Case No. CA 79/2010, delivered on 30 March 2012 by Liebenberg, J; and the case of Elridge Christo Brussel v The State an Unreported judgment of this Court No CA 18/2004 delivered on 15.07.2004 by Mainga, J (as he then was).

[6] 2007 (2) NR 619 (HC).

[7] *Supra* footnote 2.

'Sight must not be lost of the purpose of s 112 where the court, through questioning, or when presented with a written statement, acts as a safety measure against unjustified convictions by satisfying itself that the offence contained in the charge was indeed committed by the accused.'

[9] In the matter of *S v Mkhize*[8] Didcott, J had the following to say:

'Sec. 112 (1) (b), one thus notices, allows an accused person who has pleaded guilty to an offence to be convicted of it without evidence, provided, however, that the court is satisfied that he is indeed guilty of it. The question which presents itself is what comprises the material that must satisfy the court on this score. That it need not consist of evidence is obvious in a situation which is governed by a sub-section dispensing by and large with the occasion for any. Nor, on the other hand, can it ever be found in the plea of guilty itself. If that had been intended, the court would hardly have been commanded in peremptory language to go behind the plea by asking the prescribed questions. There would have been no point in that procedure, especially when it was compared with the provisions of sec. 112 (1) (a) authorizing convictions in special circumstances on pleas of guilty neither amplified nor investigated, but standing entirely on their own. The answers to the questions remain. They were plainly envisaged as the crucial information, and that is why they have to be sought. *Before, however, they are capable of satisfying the court that the accused is actually guilty of the offence to which he has pleaded guilty, they must at least cover all the essential elements of the offence which the State would otherwise have been required to prove*. {My Emphasis}

[10] In the case of *S v Valede and Others*[9] Levy, J stated the following:

'Where there are co-accused the magistrate is required to question each accused independently even if this involves laboriously repeating the same questions…The reason for this is to be found in the wording of s 112(1)(b) itself, which requires that the relevant questions be directed at the accused…*It is important to appreciate that a plea*

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8 1978 (1) SA 264 (N) at 267B-E.

9 1990 NR 81 (HC).

of guilty is nothing more than the legal opinion formulated by the accused himself. He draws a conclusion from certain facts that he is guilty. The magistrate's questioning must be directed at ascertaining those facts for him, the magistrate, to decide whether the conclusion of law or opinion of the accused is justified. The magistrate is fully aware of the elements of the crime with which the accused is charged and these elements must be pertinently put to an accused. {My Emphasis}

[11] The appellants were facing charges of hunting specially protected game and possessing protected game products, which are considered to be very serious for which the Legislature, enacted sentence of not more than twenty years' imprisonment or a fine of N$ 200 000. We have indicated above that in order to evaluate whether the ground of appeal is indeed sustainable or not, it is appropriate to, in full, quote that part of the record reflecting the questioning in the court *a quo*. We turn now to that part of the record which reflects the course of the proceedings before the Magistrate on 30 January 2013 after the appellants pleaded guilty to the two main counts. It reads as follows:

'**COUNT 1**

Q: Has anyone influenced or threatened you to plead guilty to the charge?
A1: No
A2: No
A3 No

Q: Why do you plead guilty?
A1: I hunted elephants.
A2: We hunted elephants unlawfully.
A3 We hunted elephants which are protected.

Q: Where and when did you hunt these elephants?
A1: At Kalimbeza area in the district of Katima Mulilo on 22/10/12
A2: At Kalimbeza area in the district of Katima Mulilo on 22/10/12

A3: At Kalimbeza area in the district of Katima Mulilo on 22/10/12

Q: How many elephants did you kill?

A1: 3

A2: 3

A3 3

Q: Were you authorised to kill these elephants?

A1: No

A2: No

A3 No

Q: Did you have a permit to hunt these elephants?

A1: No

A2: No

A3 No

Q: Did you know that you were required to have permits before you could hunt an elephants?

A1: Yes

A2: Yes

A3 Yes

Q: Did you also know that an elephant is a specially protected game

A1: Yes

A2: Yes

A3 Yes

Q: Did you know that it was wrong and unlawful for you to hunt and kill these three elephants without a permit?

A1: Yes

A2: Yes

A3 Yes

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COUNT 2

Q: Has anyone forced, influenced or threatened you to plead guilty to the charge?

A1: No

A2: No

A3 No

Q: Why do you plead guilty?

A1: I was found in possession of elephant tasks

A2: I was found in possession of elephant tusks

A3: I was found in possession of elephant tusks

Q: When and where was this when you were found in possession of elephant tusks?

A1: At Kalimbeza area in the district of Katima on 22/10/12

A2: At Kalimbeza area in the district of Katima on 22/10/12

A3: At Kalimbeza area in the district of Katima Mulilo on 22/10/12

Q: How many elephant tusks did you possess?

A1: 6

A2: 6

A3: 6

Q: The State alleges that the 6 elephant tusks weighed 43.75 kg valued at N$31 283,88 what do you say to that?

A1: I agree with that.

A2: I agree with that.

A3: I agree with that.

Q: Were you authorised to possess elephant tusks

A1: No

A2: No

A3: No

Q: Did you have a permit to possess such elephant tusks?

A1: No

A2: No

A3: No

Q: Do you know that you were required to have a permit possess such?

A1: Yes

A2: Yes

A3: Yes

Q: Did you know that elephant tusks are controlled game products?

A1: Yes

A2: Yes

A3: Yes

Q: Did you know that it was wrong and unlawful for you to possess such controlled game products without a permit?

A1: Yes

A2: Yes

A3: Yes'

[12] From the above it is clear that the appellants were not independently and individually questioned. We reiterate Levy, J's pronouncements in the matter of *S v Valede and Another*[10] namely that it is highly undesirable to question co-accused at the same time. In this matter the undesirability of that procedure is demonstrated by the fact that wholly unexplored areas of uncertainty relating to the precise nature of the offence, which cry out for further enquiry and which are facts are crucial remain unattended. The following are examples of the crucial facts: what was the role played by each appellant in the process of hunting the elephants, if they acted together what was the factual basis for such acting, who killed how many elephants, the charge alleges that all four accused did hunt three (3) elephants how did this happen?

[10] *Supra* footnote 9.

[13] This matter is furthermore a classic example of appellants having formulated legal opinions about their guilt. The circumstances and the facts on which the conclusions were drawn are unknown. We say so for the following reasons; the Ordinance defines hunting to, amongst others, mean by any means whatsoever kill or attempt to kill, or shoot or attempt to shoot at, or pursue, search for, lie in wait for or drive with intent to kill or to shoot at, or wilfully to disturb. So what is it that they did when they say they hunted elephants? Did they willfully disturb, search for, shoot or kill the elephants? Those facts must emerge from answers that the appellants gave but they are absent. On what, objectively bases could the magistrate then, have been 'satisfied' as required by the section 112 of the Act? In our view the answers by the appellants that they hunted elephants are meaningless because the magistrate is in no better position to ascertain whether the accused admitted the elements of the crime.

[14] Another disturbing aspect are the inferences drawn by the magistrate. In the above quotation the Magistrate asked the appellants what they did wrong, the appellants' reply was that they hunted elephants. To that reply she asked the appellants how they killed the elephants. In the answer given by the appellants there is no statement that they killed elephants this is an inference drawn by the magistrate. In the matter of *State v Simeon Nghishinawa*[11]**,** Liebenberg, J with Tommasi, J concurring said the following:

> 'It is trite law that s 112(1)(b) of Act 51 of 1977 requires the presiding officer in peremptory terms to question the accused with reference to those facts alleged in the charge in order to ascertain whether the accused admits the allegations in the charge to which he or she pleaded guilty. Further, the answers the accused person gives when questioned by the Court do not constitute evidence given on oath from which the Court may draw inferences; thus, regard must be had to what the accused says and not what the Court thinks of it.'

[11]An Unreported judgment of this Court, Case No. CR 20/2012, delivered on 21 September 2012.

[15] In the matter of *S v Thomas*[12] this Court held that:

> '…the answers given by an accused in the course of a s 112(1)(b) inquiry do not constitute 'evidence' on oath from which such inferences may be drawn. (See *S v Naidoo* 1989 (2) SA 114 (A); and *S v Nagel* 1998 (1) SACR 218 (O).) As Didcott, J said in *S v Mkhize* 1978 (1) SA 264 (N) at 268B: 'The test, in short, is what the accused person has said, not what the court thinks of it.'

[16] If we apply the principles stated in the preceding paragraphs 14 and 15 to the present facts, it is obvious that the magistrate could not have come to the conclusion from what the appellants answered, that they killed the elephants. The appellants were not at all questioned on how the elephants were hunted. The answer that 'We hunted elephants necessitated further questioning by the magistrate in order to establish what the appellants meant by stating that they hunted elephants. In the present circumstances the magistrate, for this reason alone, could not have been satisfied that the accused admitted all the elements of the offence.

[17] In respect of Count 2, the charge which the appellants faced was that 'on or about 22nd October 2012 at or near Kalimbeza area in the district of Katima Mulilo the accused did wrongfully and unlawfully possess controlled game products to wit six elephant tusks weighing 43.75kg valued at N$ 31 283-88.' The undesirability of questioning co accused together is again demonstrated by the second count. The appellants were asked 'how many elephant tusks did you possess? Each accused answered six. If each appellant was found in possession of six elephant tusks simple arithmetic tells us that there must then have been eighteen elephant tusks. Again the magistrate failed to ask questions which are crucial to the revelation of the elements of the offence which the appellants faced. Crucial facts such as to who had the control over, how many elephant tusks on 22 October 2012, how the appellants knew that elephant tusks are controlled game products are absent. We are therefore of the view that in this case, the appellants' answers, correctly construed, fell noticeably short of an

[12] 2006(1) NR 83 (HC).

admission of guilt and were consequently insufficient to satisfy the court that they really were guilty.

[18] The conviction on both counts one and two are therefore set aside. We are of the opinion that justice will best be served if proceedings start afresh before another magistrate. We have therefore decided against remitting the matter in terms of s 312 of Act 51 of 1977 to the same magistrate. In the light of the conclusions reached herein, there is no need to deal with the appeal against sentence

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

1. Condonation is granted for appellant's non-compliance with the Rules.

2. The conviction and sentence are set aside.

3. The matter is remitted in terms of s 312 of Act 51 of 1977 to the Magistrates' Court for the District of Katima Mulilo who convicted and sentenced the appellants and be tried by a magistrate other than magistrate Sibanda with the directive to comply with the provisions of s 112 of Act 51 of 1977.

4 In the event of a conviction, the court in sentencing, must take into account the sentence already served by the appellants.

5. Pending such appearance in the Magistrates' Court for the District of Katima Mulilo, the appellants are to remain in custody.

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APPEARANCES

FIRST, SECOND and THIRD APPELLANTS:	O SIBEYA Of Sibeya & Partners
RESPONDENT:	S R NYAMBE Instructed by the Prosecutor-General