REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

CR 39/2021

In the matter between:

THE STATE

and

DAVID JONA

HIGH COURT MAIN DIVISION REF NO. 1110/2020

Neutral citation: *State v Jona* (CR 39/2021 [2021] NAHCMD 225 (12 May 2021)

Coram: SHIVUTE J and CLAASEN J

Delivered: **12 May 2021**

Flynote: Criminal Procedure – Guilty Plea – Section 112(1)(a) of the CPA – Discretion to convict in terms of section 112(1)(a) of the CPA – Discretion to be exercised judiciously – Principles of S v Onesmus, *S v Amukoto, S v Shipange* repeated – Issue on review whether the Magistrate exercised his discretion judiciously.

Summary: The accused was charged with three counts of assault with the intent to do grievous bodily harm, and one count of indecent assault, read with the provisions of the Domestic Violence Act, Act 4 of 2003. The issue herein pertains to count 4, namely

that of indecent assault, to wit that the accused undressed his girlfriend, causing her to be naked in public. The court a quo treated it a as a minor offence by virtue of its conviction thereon in terms of s 112(1)(a) of the CPA.

Held – Principles of *S v Onesmus*, *S v Amukoto, S v Shipange* repeated that only relatively minor offences should be dealt with under s 112(1)(a) of the CPA, and that the discretion to apply s 112(1)(a) of the CPA must be exercised judiciously.

Held – In the assessment of whether to summarily convict in terms of section 112(1)(a) of the CPA or to invoke s 112(1)(b) apart from the sentencing limits, a presiding officer to have regard to:

(i) the nature and seriousness of the offense;
(ii) the possibility of compulsory sentences; and
(iii) the particulars of the charge.

Held – The court a quo was misdirected to convict the accused in terms of section 112(1)(a) of the CPA for an offence of indecent assault.

ORDER

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1. The conviction and sentences in count 1, count 2 and count 3 are confirmed.
2. The conviction and sentence on count 4 are set aside.
3. The matter is remitted to the Magistrate with a direction that count 4 be dealt with afresh from the stage of plea.
4. In the event of a conviction the sentencing court must have regard to the sentence, if any, already served on count 4.

REVIEW JUDGMENT

CLAASEN, J (concurring SHIVUTE J)

[1] The accused herein was charged with three counts of assault with the intent to do grievous bodily harm, and one count of indecent assault. The provisions of the

Domestic Violence Act,[1] Act 4 of 2003, were applicable to all counts as counts 1, 3, and 4 were allegations of offences committed to the accused's girlfriend, and count 2 related to an offence committed in relation to a 10 month old baby, his son.

[2] No issue arise in respect of the proceedings of counts 1, 2 and 3 and the proceedings stand to be confirmed. The reviewing court raised a few concerns. One thereof was the disorganised state wherein the record have been forwarded. Upon the return of the case record it was submitted in a better state.

[3] The substantive qualm pertained to count 4. The accused pleaded guilty and was convicted on that count in terms of s 112(1)(a) of the Criminal Procedure Act,[2] (the CPA). The question was whether the discretion to apply s 112(1)(a) of the CPA was exercised judiciously in the conviction of count 4.

[4] The charge particulars of count 4 read as follows:

'In that upon or about the 8th day of September 2017 and at near Epako in the district of Gobabis the said accused did wrongfully, unlawfully, indecently and lasciviously assault Dora Botha with whom the accused had a domestic relationship as defined in section 1 of Act 4 of 2003, to wit ex-girlfriend by undressing her naked in public and thus the accused committed the crime of indecent assault.' My emphasis.

[5] In reply to the question posed in para 3, the court a quo conceded after due consideration that the offence is not a trivial offense. He explained his decision to apply s 112(1)(a) by saying that the prosecutor sought the count to be disposed of in terms of s 112(1)(a) of the CPA and the state had possession of the evidence on the gravity of the offence. The court a quo also motivated the conviction by saying that count 3 and count 4 were committed on the same day and that justice was served by virtue of the punishment of 2 years' imprisonment and a fine of N$ 1000 or 6 months imprisonment respectively. Whilst the remark as to the cumulative imprisonment term may have some sense the conviction turns on a principle that appears to be elusive to many Magistrates and the position cannot be left to continue. That it remains a tricky issue is clear from the numerous review queries and annexures dispatched on the

[1] Combating of Domestic Violence Act, No 4 of 2003.
[2] Criminal Procedure Act, No 51 of 1977 as amended.

topic in an effort to guide Magistrates. As such the review court does not accede to the attempt by the Magistrate to have the conviction cured by the cumulative effect of the sentence on count 3 and count 4.

[6] Section 112(1) of the CPA reads as follows:

‘ Plea of guilty

(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea-

‘(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offense does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding N$ 6000, convict the accused in respect of the offense to which he or she has pleaded guilty on his or her plea of guilty only and;

(i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding N$ 6000; or

(ii) deal with the accused otherwise in accordance with the law;’

[7] What the provision does is to confer a discretionary power to a presiding judicial officer to summarily convict an accused on his or her own admission of guilt without questioning an accused about the offence or hearing evidence thereon. A closer look at the provision shows that the utilization of the section is described with reference to certain sentencing limits. What should not be forgotten is the Namibian jurisprudence in which the provision is embedded, which principles were not abolished.

[8] A full expose of the applicable principles were given 10 years ago in the matter of *S v Onesmus*, *S v Amukoto, S v Shipange.*[3] Notwithstanding, many Magistrates ignore these principles, be it in the chase for reduced court roles or otherwise, oblivious that it amounts to a vitiation of judicial discretion when a court convict in terms of s 112(1)(a) of the CPA when it should have applied s 112(1)(b) of the CPA. Incidentally, no such discretion exist as to the invocation of s 112(1)(b) of the Act, as that is obligatory. A word of caution was extended in *Onesmus* about the discretion under s 112(1)(a) of the CPA that it is ‘a discretion which must be exercised judiciously’[4].

[3] *S v Onesmus*, *S v Amukoto, S v Shipange* 2011 (2) NR 461

[4] Ibid at para 5

(My emphasis). When a presiding officer invoke s 112(1)(a) of the CPA blindly and convict in terms of that provision when it should not have done so, it amounts to a misdirection and mishandling of the judicial discretion afforded by the provision.

[9] Guidance was given in the same case as to what may influence the discretion to convict in terms of s 112(1)(a) of the CPA or to invoke 112(1)(b) of the CPA. It was stated that the discretion will mainly be influenced by the circumstances of the particular case and the information that is available to presiding officer, allowing him or her to form an opinion. The same court provided specific factors[5] to assist a presiding official in its assessment of the discretion namely:

(i) the nature and seriousness of the offense;
(ii) the possibility of compulsory sentences; and
(iii) the particulars of the charge.

It follows that apart from the sentencing limits in the proviso, the above factors also play a role in the decision of a court faced with the decision.

[10] The court also held that in the consideration of whether the matter can be dealt with expeditiously, the presiding judicial officer should be vigilant that the offence is not of a serious nature as 'Only relatively minor offences should be dealt with under s 112(1)(a)...'
My emphasis. It is an exercise not to be done lightly and if any degree of doubt exists about the severity of the offence, questioning ought to be done as stipulated by s 112(1)(b) of the CPA.

[11] *S v Aniseb and another*[6] is a criminal review case written in the year after Namibia attained independence and also dealt the issues at hand. That court did not restrict itself to a list of offences *per se* that qualifies for a conviction under s 112(1)(a) of the CPA, but came to the conclusion that the section was intended for minor offences. The headnote summarised the issue as to the nature of offences as follows:

'While it is true that s 112(1)(a) may be invoked not only in cases involving minor statutory offenses, but also cases involving common law offences such as theft or common

[5] Ibid at para 6
[6] *S v Aniseb and another* 1991 NR 203 (HC)

assault, it could seldom be said that a crime such as housebreaking with the intent to steal and theft is a minor offence. Similarly, while common assault may be classified as a minor offence, it also embraces a wide range of unlawful activity. It is thus necessary that, before deciding whether to deal with an accused charged with common assault in terms of s 112(1)(a), a trial court must have close regard to the particulars of the charge.'

[12] The *Aniseb* matter also underscored an important feature of s 112(1)(a) of the CPA, that although an accused loses the protection built into a conviction in terms of s 112(1)(b) of the CPA, such an accused is not exposed to any serious form of imprisonment. That was at the time when *Aniseb* was written. Currently with the monetary limit that was increased to N$ 6000, it created an anomaly when it comes to sentencing. It exposes persons convicted under s 112(1)(a) of the CPA to heavy imprisonment, which is not in line with the tenor of 112(1)(a) the CPA. This arise when a convicted person is unable to pay the court fine and the court is not mindful of the sentencing principles to impose imprisonment in proportion to the fine and that a lengthy imprisonment ought not to be given under a conviction of s 112(1)(a) the CPA. These brief remarks about sentencing are made in passing, as the issue in the matter before us turns on the conviction.

[13] It is crucial to remember that these principles were not abolished in 2010 when the Criminal Procedure Amendment Act[7] came into operation.

[14] Returning to the matter at hand and applying the above principles, the generic description of the charge is that of unlawful indecent assault. It denotes an indecent handling of the complainant, namely undressing her to be naked in public. This assault denotes a violation on the dignity of the person, one of the foundational values of the Namibian Constitution. The first sentence in the preamble of our Constitution reads as follows:

'Whereas recognition of the <u>inherent dignity</u> and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;' My emphasis.

[7] Criminal Procedure Amendment Act 13 of 2010

[15] To add insult to the injury, the offence occurred within a domestic violence context, namely the person that is supposed to protect and respect his partner is the one to assault and degrade her in public. Not to mention the prevalence of domestic violence offences in our society and in our courts.

[16] In our view, there is nothing in this picture that remotely suggests this particular charge allegation can be construed as a petty form of an offence.

[17] It is disconcerting that though the right to dignity is entrenched as one of the fundamental rights and freedoms[8] and despite the prevalence of domestic violence, the court officials at the institution did not construe this act of undressing a lady in public as a serious offense. The decision to invoke s 112(1)(a) of the CPA in the case at hand trivialized the offence in question. The court is the arbiter to which the victims of violence turn. It does not sit well when a court team does not display an awareness of the pivotal issues about the nature of the offense or a gender responsive approach to justice.

[18] The Magistrate's response of wanting to pass the buck to the prosecutor does not suffice. It is a normal occurrence that prosecutors make proposals in certain instances, as they are privy to the content of the dockets. This is not one of those instances where the court needed more information from the docket before making the decision. The charge particulars speak for itself and just by looking at it, the offence cannot be classified as a minor offense. The following remark made by the Appellate Court in *S v Cook*[9] in relation to the predecessor of s 112(1)(a) of the CPA, remains relevant:

> 'It is the duty of the magistrate to decide whether the offense is of such trivial nature that it meets the requirement of the proviso in section 258(1)(b) and, if he is of the opinion that it does meet the requirement, he should convict the accused.'

[19] Thus, in the situation at hand, though the prosecutor made his/her proposal, ultimately the decision to invoke and convict in terms of s 112(1)(a) of the CPA is that of the court.

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[8] Article 8 of the Namibian Constitution

[9] *S v Cook* 1977 (1) 653 (A)

[20] In the case of count 4, the Magistrate failed to properly apply his mind and thus failed to exercise his discretion to convict in terms of s 112(1)(a) of the CPA judiciously.

[21] In the result it is ordered:

1. The conviction and sentences in count 1, count 2 and count 3 are confirmed.

2. The conviction and sentence on count 4 are set aside.

3. The matter is remitted to the magistrate with a direction that count 4 be dealt with afresh from the stage of plea.

4. In the event of a conviction the sentencing court must have regard to the sentence, if any, already served on count 4.

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C CLAASEN

Judge

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N N SHIVUTE

Judge