REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: The State Appellant and John Joshlyn Isaack Respondent	**Division of Court:** High Court, Main Division
Case No: **HC-MD-CRI-APP-CAL-2021/00091**	**Heard on:** **4 August 2023**
Coram: Liebenberg J *et* Christiaan AJ	**Delivered:** 4 September 2023
Neutral citation: *S v Isaack* (HC-MD-CRI-APP-CAL-2021/00091) [2023] NAHCMD 543 (4 September 2023)	

ORDER:

1. The conviction and sentence are set aside.
2. The matter is remitted to the trial court with a direction to proceed in terms of s 113 of the Criminal Procedure Act 51 of 1977 and to bring proceedings to its natural conclusion.

REASONS FOR ORDERS:

LIEBENBERG J (CHRISTIAAN AJ Concurring):

[1] This is a criminal appeal brought by the appellant wherein it prays for an order to have the sentence and conviction by the court a quo set aside and have the matter remitted to the trial court for a not guilty plea in terms of s 113 of the Criminal Procedure Act ('the CPA') 51 of 1977 to be entered. This follows after the respondent was arraigned in the Magistrate's court for the district of Luderitz on a charge of assault with intent to cause grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act 4 of 2003. He pleaded guilty and was questioned in terms of s 112 (1)*(b)* of the CPA.

[2] When questioned about his intent when slapping and strangling the complainant, with whom he was in in a domestic relationship, until she passed out, his response was that he had no intention to cause her any grievous bodily harm. At the end of the questioning, the trial court convicted the respondent of common assault, presumably on account of his 'lack' of intent. It is evident from the s 112(1)*(b)* questioning that he did not admit all the elements of the offence he was charged with.

[3] Counsel for the appellant raises four grounds of appeal namely:

'That the learned magistrate misdirected himself or erred in law or fact by convicting the respondent of common assault when his response to the questions was that "I slapped my girlfriend several times on the face and I strangled her and she passed out";

That the learned magistrate misdirected himself by failing to enquire from the prosecutor if the State accepted the plea on assault common as the respondent was charged with assault with intent to cause bodily harm;

That the learned magistrate erred by finding that the respondent admits all the allegations to the charge and convicting the respondent of common assault as the respondent was not charged with common assault;

That the lower court misdirected itself by failing to enter a not guilty plea in terms of s 113 of the CPA when the respondent failed to admit all the elements to the offence of assault with intent to do grievous bodily harm.'

[4] The grounds of appeal are common cause between the parties and for purposes of this judgment, it is thus only necessary to traverse on the law applicable in the present circumstances. Despite the various grounds of appeal raised, the appeal turns on only one issue, and that is, the failure of the trial court to stop proceedings and enter a plea of not guilty as per the provisions of s 113 of the CPA as soon as respondent answered that he had no intention to cause the complainant any grievous bodily harm. The court in *S v Pieters*[1] considered the objectives when questioning the accused in terms of s 112 (1)*(b)* and stated the following at 828B – H:

'[10] In *S v Baron* 1978 (2) SA 510 (C) at 512G it was held (per Van Winsen J) that the questioning under s 112(1)(b) is an important part of the legal process and was introduced to protect an accused — especially the unrepresented or illiterate accused — against an ill-considered plea of guilty and that in the application of s 112(1)(b) there is much room for misunderstanding which can result in prejudice to an accused person.

[11] In *S v Nyanga* 2004 (1) SACR 198 (C) at 201b – e Moosa J stated the purpose of s 112(1)(b) as follows:

"Section 112(1)(b) questioning has a twofold purpose: firstly, to establish the factual basis for the plea of guilty and, secondly, to establish the legal basis for such plea. In the first phase of the enquiry, the admissions made may not be added to by other means such as a process of inferential reasoning (*S v Nkosi* 1986 (2) SA 261 (T) at 263H – I; *S v Mathe* 1981 (3) SA 664 (NC) at 669E – G; *S v Jacobs* (supra at 1117B)). The second phase of the enquiry amounts essentially to a conclusion of law based on the admissions. From the admissions the court must conclude whether the legal requirements for the commission of the offence have been met. They are the questions of unlawfulness, *actus reus* and *mens rea*. These are conclusions of law. If the court is satisfied that the admissions adequately cover all the elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty. (See *S v Lebokeng en 'n Ander* 1978 (2) SA 674 (O) at 675G – H; *S v Hendricks* (supra at 187b – e; *S v De Klerk* 1992 (1) SACR 181 (W) at 183a – b; *S v Diniso* 1999 (1) SACR 532 (C) at 533g – h.)" '

[1] *S v Pieters* 2014 (3) NR 825 (HC).

[5] What is also common cause is that the trial court *mero motu* convicted the respondent on the competent verdict of common assault, despite having been charged with and pleading guilty to assault with intent to cause grievous bodily harm. As soon as the respondent answered in the negative to not having any intention to cause grievous bodily harm, the court should have entered a plea of not guilty. This position was expressed as follows in *S v Naidoo*[2]

'It is well settled that the section was designed to protect an accused from the consequences of an unjustified plea of guilty, and that in conformity with the object of the Legislature our courts have correctly applied the section with care and circumspection, and on the basis that where an accused's responses to the questioning suggest a possible defence or leave room for a reasonable explanation other than the accused's guilt, a plea of not guilty should be entered and the matter clarified by evidence.'

[6] There is no dispute in the present instance about the misdirection by the trial court. Counsel for the respondent concedes, as submitted by the state, that the conviction and sentence stands to be set aside and the matter remitted to the trial court to proceed in terms of s 113 of the CPA. The authorities in this regard are trite and consequently, the conviction and sentence stand to be set aside.

[7] In the result, the following order is made:

1. The conviction and sentence are set aside.
2. The matter is remitted to the trial court with a direction to proceed in terms of s 113 of the Criminal Procedure Act 51 of 1977 and to bring proceedings to its natural conclusion.

[2] *S v Naidoo* 1989 (2) SA 114 (A) 121.

J C LIEBENBERG **JUDGE**	**P CHRISTIAAN** **ACTING JUDGE**