REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case no: CR 06/2013

In the matter between:

THE STATE

and

JACOB AWALA **ACCUSED**

High Court NLD review case ref no: (23/2012)

Neutral citation: *The State v Awala* (CR 06/2013) [2013] NAHCNLD 14 (26 March 2012)

Coram: TOMMASI J and LIEBENBERG J

Delivered: **26 March 2012**

Flynote: Criminal Procedure – Plea - section 113 (1) of the Criminal Procedure Act, 51 of 1977 to be applied both in terms of a conviction in terms of section 112(1)(*a*) and section 112(1)(b) where magistrate satisfied that accused has a valid defence – Sentence – formulation thereof improper.

Summary: The accused was convicted in the magistrate's court of malicious damage to property (count 1) after questioning in terms of section 112(1)(*b*) and of assault by threat (count 2) in terms of section 112(1)(*a*). The answers given by the accused in response to questions by the magistrate in terms of s112(*b*) on count 1 alluded to a possible defence of incapacity due to intoxication. The date, place and

complainant in count 2 were the same as in count 1. The magistrate, not having been alive to the fact that the accused was raising a defence in respect of count 1, did not clarify either from the accused himself or the prosecutor whether these incidents were related. A strong possibility therefore exists that the same defence would have been raised by the accused in respect of count 2 before sentencing. The magistrate would have been entitled under those circumstances to record a plea of not guilty despite the fact that the accused had been convicted after his plea in terms of s112(1)(*a*). The provisions of s113(1) equally applies to a conviction in terms of s112(1)(*a*). Conviction of both counts found not to be in accordance with justice and set aside. The accused was sentenced to serve one sentence concurrently. Such a sentence is not in accordance with justice. The matter remitted to the magistrate in terms of s312 and directed to proceed on both counts in accordance with the provisions of s113(1).

ORDER

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1. The conviction and sentence on both count 1 and 2 are set aside;
2. The case is remitted in terms of section 312 of the Criminal Procedure Act, 51 of 1977 to the Magistrate's Court of Oshakati and the court is directed to act in terms of section 113(1) in respect of both counts 1 and 2;
3. Where the fine has been paid, the accused is to be refunded;
4. In the event of a conviction the court, when sentencing the accused, ought to take into consideration the term of imprisonment already served by the accused.

REVIEW JUDGMENT

TOMMASI J (LIEBENBERG J concurring):

[1] This matter is before me on automatic review. The accused was convicted of malicious damage to property (count 1) and assault by threat (count 2) in the magistrate's court for the district of Oshakati. He was sentenced as follow: "For the purpose of sentencing count 1 and 2 to run concurrently. Fine N$700 or three months imprisonment in default of such payment."

[2] I directed the following queries to the magistrate:

"(i) What is meant by "for the purpose of sentencing count 1 and 2 to run concurrently? and (ii) Did the accused admit that he appreciated the wrongfulness of his actions and that he had the requisite intention to damage the door when questioned in respect of count 2."

[3] The particulars of count 1 were that the accused on 5 January 2012 at or near Ohakweenyanga wrongfully, unlawfully and maliciously broke or damaged the door of his mother's house, valued at N$400, with the intent to injure her in her property. In count 2 he was charged with having assaulted his mother by threat, on the same day and place, by threatening to kill her.

[4] The accused pleaded guilty to both charges. The State prosecutor requested the magistrate to act in terms of s112(1)(*b*) in respect of count 1 and to act in terms of s112(1)(*a*) in respect of count 2.

[5] The magistrate convicted the accused of assault by threat on his mere plea of guilty.

[6] The accused was hereafter questioned in terms of section 112(1)(*b*) in respect of the charge of malicious damage to property. The following is an extract of the record:

"Q Why did you break the door?

A I was drunk, really don't know why I did it."

and

"Q Did you have any right to break the door?

A I don't know. It was my first time doing it.

Q Did you know that it was wrong and unlawful to break someone's door?

A I don't (know) what was on my mind "

[7] From the above answers given by the accused it appears he was raising incapacity caused by intoxication as a possible defence, which is a valid defence in law. Moreover the accused specifically stated that he had no knowledge of the fact that his conduct was unlawful. This notwithstanding, the magistrate was satisfied that the accused was guilty of malicious damage to property whereas the magistrate ought to have recorded a plea of not guilty in terms of s113(1).

[8] The magistrate in his response conceded that the elements of intention and wrongfulness were not established. The conviction on this count therefore is not in accordance with justice.

[9] The two offences happened on the same date and place and was perpetrated against the same person. Although the magistrate had already convicted the accused on count 2, he could still have recorded a plea of not guilty if it came to his attention that the accused may have a valid defence to the offence, provided that this was before sentencing.

[10] In the head note of Attorney-General, Transvaal v Botha[1] Smalberger JA stated as follow:

"On a literal interpretation of ss 112(1) and 113(1) (and there is nothing to detract from such an interpretation) 'the proceedings under s 112' commence at the point where 'an accused at a summary trial in any court pleads guilty to the offence charged'. It is this plea of guilty which brings the provisions of s 112(1) into operation and leads the presiding judicial officer to act under either s 112(1)(a) or s 112(1)(b), depending upon the opinion which he forms. The natural meaning of the words embrace all proceedings under s 112, ie under both s 112(1)(a) and (b). There is clearly scope for the operation of s 113(1) in respect of both those subsections. This can be illustrated by the following example. An accused pleads guilty as charged to assaulting a complainant by slapping him once in the face. The presiding judicial officer is of the opinion that the offence only merits a fine (within the permissible limits) and convicts the accused in terms of s 112(1)(a). During the accused's address in mitigation of sentence it appears that he slapped the complainant in self-defence (private defence). If the judicial officer concerned is satisfied that the accused has a valid defence to the charge, he is obliged by s 113(1) to enter a plea of not guilty. There is no reason to believe that the Legislature intended to exclude s 112(1)(a) from the operation of s 113(1) simply because it deals with lesser offences. An accused person's right to protection against a wrong conviction is no less important if the offence is minor than if it is major. In either case there is an equal possibility of an unjustified plea of guilty, and in the case of a minor offence the primary protection afforded by preconviction interrogation is lacking."[my emphasis]

This interpretation relate to section 113 as it was prior to the amendment to the Criminal Procedure Act, 51 of 1977 in South Africa and at a time when the wording thereof was identical to the current wording of the Criminal Procedure Act, 51 of 1977, in our jurisdiction. I respectfully agree with this interpretation.

[11] In terms of s112(3) the magistrate may, for the purpose of sentencing, put questions to the accused. The relationship between the two counts would have been important for the purpose of determining an appropriate sentence given the similarities. The accused during mitigation informed the court as follow: "I recall what I

[1] 1993 (2) SACR 587 (A) at page 590J-591A-E

did it was because of alcohol". The accused made no distinction between the two counts and further questioning would certainly have clarified the issue. The magistrate however was not alive to the fact that the accused raised a possible defence to count 1 and consequently did not consider that the same may have been applicable to count 2.

[12] The conviction in respect of count 2 are similarly not in accordance with justice and should be set aside.

[13] The court may only order sentences to run concurrently in instances where the accused is convicted in a trial of two or more offences or is under sentence or undergoing sentence in another offence. In such instance separate sentences are ordered to run concurrently. In this instance only one sentence was imposed and ordered to run concurrently. The manner in which the sentence was formulated is for these reasons not in accordance with justice.

[14] In the result the following order is made:

1. The conviction and sentence on both count 1 and 2 are set aside;
2. The case is remitted in terms of section 312 of the Criminal Procedure Act, 51 of 1977 to the Magistrate's Court of Oshakati and the court is directed to act in terms of section 113(1) in respect of both counts 1 and 2;
3. Where the fine has been paid, the accused is to be refunded;
4. In the event of a conviction the court, when sentencing the accused, ought to take into consideration the term of imprisonment already served.

MA Tommasi

Judge

JC Liebenberg

Judge