

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

CR NO.: CR 16/2016

In the matter between:

THE STATE

and

GABRIEL ROBERT NGUNDJA

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO.: **292/2016**

Neutral citation: *The State v Ngundja* (CR 292/2016) [2016] NAHCNLD 98 (1 December 2016)

Coram: **JANUARY J and TOMMASI J**

Delivered: 1 December 2016

Flynote: Criminal procedure — Plea of guilty — Questioning in terms of section 112(1) (b) of the Criminal Procedure Act — Questioning of two charges simultaneously — Improper and a misdirection — Criminal procedure — Plea — Plea of guilty on two charges and not guilty on one charge — Sentencing on two charges and postponing

remaining charge for trial — Irregular proceeding — Trial not to be dealt with in piecemeal fashion — Might become necessary during course of trial to change guilty plea to not guilty — Not possible after sentencing — Criminal Procedure Act of 51 of 1977, section 113. Sentence — Several offences — Taking of counts together for purposes of sentence — Should only be done in exceptional circumstances.

Summary: The accused in this matter pleaded guilty on a charge of Assault with intent to do grievous bodily harm and two charges of Housebreaking with intent to steal and theft. The allegations are that the crimes were committed on different dates. There is no indication that the crimes are interrelated whatsoever. The magistrate questioned the accused in terms of section 112(1)(b) simultaneously on both charges of housebreaking and treated the two charges as one. The accused was convicted on the crimes of housebreaking to steal and theft and the case was postponed for trial on the Assault with intent to do grievous bodily harm and sentencing for the housebreaking. The magistrate dealt with the charges piecemeal, imposed one sentence on the housebreaking charges and postponed the case for trial on the Assault GBH charge. This court found misdirections. The convictions and sentence are set aside. The matter is remitted to the magistrate to properly deal with it.

ORDER

1. The convictions and sentence are set aside.
2. The case is remitted to the magistrate to apply section 112(1)(b) of the CPA properly; to separate the charges; to question the accused in relation to the charges separately and not to intertwine the elements and allegations and;
3. The magistrate is directed to proceed with the trial and finalize it in relation to the charge of Assault GBH in respect of which a plea of not guilty was entered in terms of section 113 of the CPA;

4. Sentencing on all the charges should only be imposed at the end of the case.

JUDGMENT

JANUARY, J and TOMMASI, J (concurring)

[1] The accused in this matter was charged in the magistrate's court Eenhana on charges of; 1. Assault with the intent to do grievous bodily harm (Assault GBH) committed on 30 May 2015; 2. Housebreaking with intent to steal and theft committed on 22 March 2016 and; 3. Housebreaking with intent to steal and theft committed on 25 September 2015. The accused pleaded guilty on all three charges and was questioned pursuant to the provisions of section 112(1) (b) of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] After questioning a plea of not guilty was entered in respect of the Assault GBH charge. The accused disclosed possible self-defence. The accused was convicted for both the housebreaking charges. The learned magistrate questioned the accused simultaneously for charges 2 and 3 whereas the allegations in the charges do not reflect any connection in relation to dates, places and circumstances. Charge 2 alleges that the incident occurred on or about 22 March 2016 at or near Ontune-Okongo in the district of Eenhana with reference to a complainant, Kishi Salom Ndalipeyele. Charge 3 alleges that that incident occurred on or about 25 September 2015 at or near Okongo in the district of Eenhana with reference to a complainant Hamukoto Josef Tuhafeni. Clothes to the value of N\$4060.00 were stolen in the incident of 22 March 2016 and clothes valued N\$6629.99 were stolen in the incident of 25 September 2015. In both incidents rooms were broken into.

[3] The simultaneous questioning of the accused in terms of section 112(1)(b) was in my view not proper. It lead to facts being vague and intertwined. From the questioning it is for instance not clear which room was broken into, how and when. I

need to mention that the annexures to the charge sheet setting out the charges are numbered charge 1, Assault with intent to do grievous bodily harm. The word “count” is deleted and substituted with charge. Both the annexures setting out the housebreaking charges reflect count 1 and 2 respectively. It is not clear why this is so.

[4] It seems that the prosecutor regarded the charges of housebreaking as sub-charges to what he labelled charge 2. He labelled the housebreakings counts 1 and 2 under the umbrella of Charge 2. I suspect that this might be a reason why the magistrate questioned the accused simultaneously for the charges of housebreaking. The record reflects in respect of the housebreaking charges as follows;

Charge 2:

Count 1 and 2

“Q: Has anyone threatened you or persuaded you to plead guilty?”

A: No.

Q: Why are you pleading guilty?

A: Because I did something wrong.

Q: What is that, that you did wrong?

A: I stole.

Q: What is it that you stole?

A: The items that were mentioned.

Q: Is it all the items that you stole?

A: Yes.

Q: Do they belong to you?

A: Some belong to Kishi Salon and some to Tuhafeni.

Q: Do you know Tuhafeni’s full name?

A: All I can recall is Joseph Hamukoto.

Q: How did you steal these items?

A: I broke the padlock then I went inside.

Q: Where was that?

A: A room in Okongo.

Q: Who stay at that room?

A: Tuhafeni himself.

Q: When you broke the padlock and went inside the room, what did you want to do inside there?

A: I wanted to go and steal maize meal but I saw the other items and took them.

Q: Do you remember the date when you did this?

A: 2015 but I don't remember the date.

Q: State is claiming you stole the items for Kishi Salon on 22 March 2016 {(the charge alleges 2015) my observation} and that you stole the items for Tuhafeni on 25 September 2016. What do you say to that?

A: I'm not disputing the dates.

Q: The state is also alleging that the value for the items you stole is as follows: for Tuhafeni – N\$6629.99 for Kishi Salon N\$ 4060.00 what do you say to that?

A: I am not disputing on all the values.

Q: Did anyone give you permission to go into the room and take the items?

A: No one.

Q: Did you know that by entering the room and taking items that belong to other people that this was wrong, unlawful and that you may be punished for it by a court?

A: Yes, I knew.

CRT: Court is satisfied that all the elements of the offence have been met. Accused is found guilty on count 1 as well as count 2 second charge.

PP: 20 June 2016 sentencing on charge 2 and trial charge 1 objecting to bail, items not recovered.

CT: Remanded 20 June 2016 sentencing on Sec [(sic) second] charge and trial first charge. In custody. Advised of right to formal bail.”

It is clear from the questioning above that the magistrate also dealt with the 2 housebreaking charges under one umbrella of the second charge or charge 2. In other words he regarded them as one charge. This is clear from the record where the magistrate states: “Remanded 20 June 2016 sentencing Sec. charge and trial first charge.”

[5] One of the guidelines crystalizing over the years in our courts emphasizes that the taking together of charges for purpose of sentence is undesirable and should only be adopted by lower courts in exceptional circumstances. 'Exceptional circumstances' may be present where the charges are closely connected similar in point of time, place or circumstance.¹ One of the reasons is that it might create difficulty on appeal or review when some but not all charges are set aside.

[6] At sentencing it becomes clearer that the magistrate regarded the two housebreakings as one charge. It is nowhere indicated that he took the sentences together for the purpose of sentence and although there is no indication from the charges that they are connected in time place or circumstances, in other words exceptional circumstances justifying it to be taken together for the purpose of sentence, a sentence of N\$2700 or 7 months imprisonment on charge 2 was imposed. The conduct of the learned magistrate amounted, in my view, to a misdirection.

[7] There is also another misdirection in that the case was postponed for sentencing and trial for the Assault GBH charge to 20 June 2016. On the 20 June 2016 the public prosecutor simply continued with sentencing proceedings without continuing with the

¹ See: S v Akonda 2009 (1) NR 17 (HC) at 17 H - I

trial on the charge where a plea of not guilty was recorded in terms of section 113 of the CPA. This resulted that the magistrate dealt piecemeal with the case and sentenced the accused on the housebreaking charges without adjudicating the case on the charge of Assault GBH. The trial of the accused on the charge of Assault GBH was then postponed to 05 December 2016.

[8] I agree with Liebenberg J with whom Hoff J (as he then was) concurred where they stated in *S v Maasdorp* 2015 (4) SA 1109 (HC) at 1110 H – J and 1111 A - E

“[5] The procedural piecemeal approach adopted by the trial magistrate in the present instance is not provided for in the Act and must be discouraged. A court, when faced with more than one charge, should not dispose of the charges one by one. Only after all the evidence adduced has been heard — albeit only in respect of some of the charges — the court should pronounce itself on the accused's guilt or otherwise. Where the court, as in this instance, is not satisfied that the accused intended pleading guilty to one or more of the charges and enters a plea of not guilty in respect thereof, whilst satisfied that pleas of guilty on other charges are proper, it should refrain from proceeding to sentence in respect of those charges the accused stands convicted of. This is necessary simply because certain facts, until then unknown to the court, may come to light during the trial, compelling the court to enter a plea of not guilty in terms of s 113 in respect of a count the accused was convicted of. When the court has already passed sentence on some of the charges, it can no longer invoke the provisions of s 113. For example: where the accused is convicted and sentenced on one or more charges and when the state leads evidence on the charges he pleaded not guilty to, it emerges that the accused, by reason of incapacity, cannot be convicted. In such instance, the court, realising that the accused incorrectly admitted guilt to the charges convicted of, has no power to review and overturn its earlier conviction because it had already passed sentence. The provisions of s 113 may only be invoked before sentence is passed.

[6] There is also another reason relating to sentence. Where the accused is sentenced on multiple charges the court must have regard to all the circumstances of the case and not only to some. Charges are often closely related to time and place and where mitigating or aggravating evidence, relevant

or crucial for the determination of a suitable sentence only emerge during the trial, it would constitute an injustice per se not to have regard thereto. Sentence should therefore best be left to the end when the court has before it all the circumstances relating to each charge that would assist in arriving at a proper sentence.”

[9] The convictions and sentence stands to be set aside for the abovementioned reasons.

[10] In the result:

1. The convictions and sentence are set aside.
2. The case is remitted to the magistrate to apply section 112(1)(b) of the CPA properly; to separate the charges; to question the accused in relation to the charges separately and not to intertwine the elements and allegations and;
3. The magistrate is directed to proceed with the trial and finalize it in relation to the charge of Assault GBH in respect of which a plea of not guilty was entered in terms of section 113 of the CPA;
4. Sentencing on all the charges should only be imposed at the end of the case.