CASE NO.: CR 76/10

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE **APPELLANT**

and

ERWIN CLOETE **RESPONDENT**

HIGH COURT REVIEW CASE NO: 469/2010

CORAM: **VAN NIEKERK J *et* BOTES, AJ**

Delivered on: October 26, 2010

REVIEW JUDGEMENT

Botes AJ.:

[1] The accused was arraigned and convicted in the magistrate court Katutura, Windhoek on a charge of assault with intent to do grievous bodily harm.

[2] The accused pleaded guilty to the charge and was subsequently questioned by the magistrate in terms of s 112(1)(b) of the Criminal Procedure Act, 1977.

[3] During the questioning, accused admitted that he stabbed the complainant, one Hans Swaartbooi once with a screw driver in the back.

[4] When the magistrate questioned the accused as to the reason why he stabbed the complainant, the following emerges from the record, the contents of which are quoted *verbatim.*

> *"Q: Why did you stab Hans Swaartbooi with a screw driver on the back?*
>
> *A: The complainant and my cousin were having an argument and I wanted to defend my cousin.*

[5] No further questions were directed by the magistrate to clarify the nature of the argument and whether the accused in the circumstances could have acted in the defence of his cousin - private defence - and/or whether the accused, at the time of the commission of the offence could have reasonably believed that he was acting in the defence of his cousin and that he was entitled to do so.

[6] The accused was unrepresented during the trial. After conviction the accused was sentenced to three (3) years imprisonment of which one (1) year is suspended for five (5) years on condition that accused is not again convicted of assault with intent to do grievous bodily harm, committed during the period of suspension.

[7] As a result of the sentence imposed and the accused being unrepresented, the case was sent on automatic review to the High Court of Namibia.

[8] After receipt and perusal of the record, the reviewing judge requested the trial magistrate to indicate whether it was correct to convict the accused in the light of his statement that he wanted to defend his cousin.

[9] The material portion of the magistrate's reply to the reviewing judge's query, reads as follows:

> *"3. Snyman, Criminal 5th ed (2008 at pg 103) writes that: "A person acts in private defence and her act is unlawful; if she uses force to repel an unlawful attack which has commences or is immediately threatening, upon her or somebody's life, bodily integrity, property or other interests which deserves to be protected, provided the defensive act is necessary to protect the interest threatened is directed against the attacker and is reasonably proportioned to attack. (my underlining for emphasis)*
>
> *4. In the case under review, there was no unlawful attack on accused's cousin, cousin and complainant just had an argument.*
>
> *5. The act of the accused to stab the complainant was not reasonably proportioned to the alleged argument.*
>
> *6. In the light of the above, I was justified that still in the light of the statement by the accused, it was still correct to convict him."*

[10] It has been repeatedly stated that s 112(1)(b) was *"designed to protect an accused -and especially an uneducated and undefended accused - from the adverse consequences of an ill considered plea of guilty (S v Baron 1978 (2) SA 510 (C) 512 G. This is also clear if s 112 is read with s 113, The court is required in peremptory language to go behind the plea by asking questions (S v Mkhize 1978 (1) SA 464 (N) 267 (N). The questions and answers must at least cover all the essentials elements of the offence which the State in the absence of a plea of guilty would have*

been required to prove. (S v Mkhize (supra)) "[1]

[11] In *S v Naidoo,* Botha JA remarked as follows with reference to s 112(1)(b);

> *"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 suggests a possible defence or leave room for a reasonable explanation other that the accused's guilt, a plea of not guilty should be entered and the matter clarified by evidence."*[2]

[12] The answers of the accused that there was an argument between his cousin and the complainant and that he wanted to defend his cousin, clearly suggests the existence of a possible defence or left room for a reasonable explanation other than the accused's guilt.

[13] In the absence of clarification of the nature of the argument between complainant and his cousin, the admissions made by accused on further questions thereto by the magistrate that accused knew that his conduct was wrongful, that he could be punished for his conduct and that he did not have any right to act in the manner that he did were of no value as the accused was asked to pass judgment on himself. That in my view is precisely what s 112(1)(b) is designed to avoid.

[14] Comrie J, in *S v Diniso*[3] said the following in respect of legal conclusions extracted from an accused during questioning: *"What the accused was called up to admit or deny was a legal conclusion, namely, "a right to disobey". It is trite law that s 112(1)(b) contemplates admissions of fact. An admission of law is unhelpful, since the admission may be unfounded. Thus the bare admission by an accused, charged with contravening s 102 of the Road Traffic Act, 29 of 1989, that he drove negligently, is of no assistance because the accused may be wrong. So too here, the accused's admission that he had "no right to disobey " the maintenance order was of no value, even if he believed that he understood the unrecorded explanation of s 11(3)."*

[15] In *S v Witbooi* it was stated that the object of s 112(1)(b) is defeated if admissions of "unlawfulness" and "intent" are obtained in the absence of admission of facts which support a finding of "unlawfulness and intent".[4] A court in employing s 112(1)(b) therefore should avoid a procedure in terms of which the accused is merely asked to confirm his plea by making a series of admissions in respect of each element of the offence.[5] The magistrate should have elicited <u>factual</u> information from the accused to determine if there is a basis for his plea of guilty.

[16] The legal conclusions of the accused in the present matter as to the unlawfulness of his conduct,

1 Du Toit, et all, *Commentary on the Criminal Procedure Act*, p 17 - 4 A

2 1989 (2) SA 114 (A) at 121 F. This legal position is embraced by our courts. In *S v Goagoseb*, 1995 NR 165 (HC) Hannah J, with reference to *S v Mkhize (supra)*, said that: *"It must be remembered that the accused was being questioned in terms of s 112(1)(b) of Act 51 of 1977 and the test is what the accused has said, not what the court thinks of his answers."* In a similar vein, Maritz J, as he then was, in *S v Thomas*, 2006 (1) NR 83 (HC) said that: *"The answers given in an inquiry 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 of 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 indeed is 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 - except, of course, in the case where s 112(s)(a) applies".* See also *S v Kauvarua*, 2004 NR 114 (HC)."

3 1999 (1) SACR 532 (C) on p 533

4 1978 (3) SA 590 (T). In S v De Klerk 1992 (1) SACR 181 (W) it was pointed out that it is vitally important for judicial officers to distinguish between facts and conclusions drawn from facts - particularly so when generic legal concepts such as reasonableness, negligence and recklessness constitute essential ingredients of the offence charged.

5 S v Mokoena 1982 (3) SA 967 (T) on 968; Van der Merwe *Handleiding tot Artikels 112 en 115 van die Strafproses Wet* (1980) 16 to 17 and, Van Wyk 1979 *The Magistrate* 173. See also Du Toit et all, supra at p 17- 4 C

as well as his knowledge thereof therefore cannot detract from the fact that the accused's answers suggest a possible defence or leave room for a reasonable explanation, other than the accused's guilt.

[17] In my opinion, the magistrate, on the available facts, without the necessary clarification and/or evidence as to the nature of the argument between the complainant and the accused's cousin, could not have concluded with any measure of certainty that the accused correctly admitted all the elements of crime alleged, especially the elements of unlawfulness and *mens rea*. No factual basis, in any event, exists on the record from which the magistrate could have arrived at the conclusions recorded in paragraphs 5 and 6 of his response.

In the premises I am not satisfied that the accused admitted all the elements of the offence, as a result of which, the following order is made:

1. The accused's conviction of the crime of assault with intent to do grievous bodily harm and the sentence imposed in the magistrate's court, Katutura, Windhoek under case no. A4178/2008 are set aside.

2. The case is remitted to the magistrate and he/she is directed to properly apply the provisions of s 112(1)(b) of the Criminal Procedure Act, 1977, and to, thereafter, dispose of the matter in accordance with law.

3. The magistrate is further directed, in the event of the accused's conviction, to sentence the accused with due regard to any period of imprisonment already served by the accused pursuant to the conviction set aside in para 1 of this order.

4. As the trial magistrate has been transferred, the matter may be heard by another magistrate.

BOTES, AJ

I concur.

VAN NIEKERK, J