CASE NO.: CR 08/2011

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

1. SHIKALE ONESMUS
(HIGH COURT REVIEW CASE NO.: 27/2011)
2. PIRATUS AMUKOTO
(HIGH COURT REVIEW CASE NO.: 28/2011)
3. JUNIAS MWESHIPANGE
(HIGH COURT REVIEW CASE NO.: 68/2011)

CORAM: DAMASEB, JP *et* LIEBENBERG, J.

Delivered on: 30.03.2011

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The above-captured cases are review cases emanating from the same court, and have all been finalised by the same presiding officer in terms of s 112 (1) (a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), hereinafter

referred to as ‘the Act’. In respect of the first two mentioned cases, queries were directed to the magistrate inquiring from him whether he, when exercising his judicial discretion to finalise both cases involving crimes of housebreaking with intent to steal and theft of goods (valued at N$286.50); and theft of N$1 500 in cash, respectively, considered the crimes committed to be ‘minor crimes’, justifying its expeditious disposal in terms of s 112 (1) (a) of the Act. The third case came on review subsequent thereto, and raises the same concern. In the latter, the accused was convicted of theft of a cell phone (valued at N$1 049) on his bare plea of guilty.

[2] In respect of all three cases fines were imposed ranging between N$800 or 8 months imprisonment; and N$1 000 or 8 months imprisonment. In each case the accused persons were unable to pay the fines, failing which they now have to serve the alternative imprisonment of eight months. The sentences became reviewable in terms of s 302 (1), despite same having been imposed under s 112 (1) (a) of the Act – something I find anomalous and, in my view, inconsistent with the aims of s 112 (1) (a).

[3] This untenable situation was brought about by the amendment of s 112 of the Act through s 7 of the Criminal Procedure Amendment Act, 2010, (Act 13 of 2010), which came into operation on 30 August 2010; whereby the amount of N$300 specified in s 112 (1)(a), has now been increased to N$6 000 without, at the same time, increasing the reviewable fines specified in s 302 (1)(a)(ii) of the Act. Thus, depending on the period for which a judicial officer has held the substantive rank of magistrate (less or more than seven years), fines exceeding N$500 or N$1 000 respectively, are still subject to review under s 302 (1) of the Act. This unfortunate situation has largely

rendered the review procedure meaningless; as a review judge is now required to endorse a certificate that the proceedings are in accordance with justice, in circumstances where the proceedings would merely reflect the conviction and sentence subsequent to the plea of guilty, dealt with in terms of s 112 (1)(a) of the Act. Thus, in criminal cases finalised in terms of s 112 (1) (a) where reviewable fines are imposed (exceeding the respective amounts stated in the Act), the function of the review judge pertaining to the conviction – in my view, thé crucial part of the review – has almost become obsolete; and the function of a review judge, in these circumstances, nothing more than rubberstamping. It can hardly be said that the judge is in a position to decide whether the proceedings – as far as it concerns the conviction – is in accordance with justice as he/she is required to do when reviewing proceedings in terms of s 302 of the Act.

[4] Section 112 (1) of the Act was amended to read as follows:

> "*(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does nor merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding N$6 000, convict the accused in respect of the offence 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$6 000; or*
>
> (ii) *Deal with the accused otherwise in accordance with law;*

(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine exceeding N$6 000, or if requested thereto by the prosecution, question the accused with reference to the alleged facts of the case in order to ascertain whether the accused admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his plea of her plea of guilty of that offence and impose any competent sentence."

[5] From the wording of ss (1) of s 112 it is clear that the presiding officer is authorised to convict an accused on his bare plea of guilty where he or she is of the opinion that the offence in question does not merit certain kinds of punishment; or a fine exceeding N$6 000. The presiding officer therefore has a discretion which must be exercised judiciously. This discretion will mainly be influenced and determined by the circumstances of any particular case and the information available to the presiding officer, allowing him or her to form an opinion. It seems to me that in order to make a judicial discretion at all possible, there has to be *sufficient information* before the court to rely on, which would enable it to reach a decision as to the procedure to be followed. Whereas the court in most instances would have very little information to decide on, besides what is alleged in the charge, it would be useful for the presiding officer to request the prosecutor to give a short summary of the State's case if the court is uncertain whether or not it should question the accused in terms of s 112 (1) (b). At the plea stage the prosecutor has more information of the offence allegedly committed and the circumstances surrounding the commission of the crime, than what the court would have; therefore the court is obliged to question the accused about the alleged facts, if the prosecutor directs such request to the court in terms of s 112 (1)

(b). This would normally occur when the case involves a serious offence or when the accused has previous convictions, obviously, unknown to the court. Although the courts often would be guided by the prosecutor's attitude to the appropriateness of summary disposal of a case, it must be borne in mind that it ultimately remains the *court's decision,* a discretion that must be exercised *judiciously.* This decision should not be made lightly – more so, where a heavy fine of up to N$6 000 can now be imposed upon an accused's bare plea of guilty. Therefore, when the court is in doubt about the seriousness of the transgression, questioning about the alleged facts in the charge should be done.

[6] In deciding the course, the presiding officer will be guided by (i) the nature and the seriousness of the offence (*S v Phundula*[1]); (ii) the possibility of compulsory sentences; and (iii) the particulars in the charge. When considering the particulars with the view of disposing of the case expeditiously, the judicial officer is required to look for indications that the offence is not of a serious nature. Only relatively minor offences should be dealt with under s 112 (1) (a) and in *S v Aniseb and Another*[2], Hannah AJ (as he then was), remarked as follows:

> *"The policy behind s 112 (1) (a) is clear. The Legislature has provided machinery for the swift and expeditious disposal of minor criminal cases where the accused pleads guilty. The trial court is not obliged to satisfy itself that an offence was actually committed by the accused but accepts his plea at face value. The accused thus loses the protection afforded by the procedure envisaged in s 112 (1) (b), but he is not exposed to any really serious form of punishment. The court may not pass a sentence*

[1] 1978 (4) SA 855 (T) at 859.
[2] 1991 (2) SACR 413 (Nm) at 415g-i (1991 NR 203 (HC)).

of imprisonment or any other form of detention without the option of a fine or whipping and any fine imposed must not exceed [N$300]" (Emphasis provided)

[7] The words of the subsection are similar to those of its predecessor[3] and it seems clear that the Legislature's intention from the onset has been that an accused could be convicted on his bare plea of guilty, but this procedure should be reserved for cases considered to be 'minor', 'trivial' or 'not serious'. Should an accused in the past erroneously pleaded guilty on a charge considered not to be serious, and the case was finalised under s 112 (1) (a), then he was not at risk of any severe punishment; because the maximum fine that the court could impose at the time, was only N$300; excluding a sentence of imprisonment or any other form of detention.

[8] At present, because of the amendment of s 112 of the Act, this is no longer the case, for the maximum fine has been increased to N$6 000. This ultimately brought about an increased risk that an accused could now be fined far beyond his means, resulting in him having to serve the alternative imprisonment; which often are lengthy terms. The reason for this is because of the legal principle that there should be a *relation* between the fine imposed and the alternative imprisonment. In other words, an increase in fines would impact on the alternative imprisonment as there should be a relation between the two. See: *S v Smith*[4]*; S v Bokbaard*[5]*; The State v Benjamin Mbwale*[6]. In *Smith* it was said:

"*Imprisonment as an alternative to a fine serves a twofold purpose. It should be aimed at inducing the offender rather to pay the fine than to serve the imprisonment*

[3] Section 258 (1) (b) of Act 56 of 1955.
[4] 1990 (2) SACR 363 (C).
[5] 1991 (2) SACR 622 (C).
[6] (Unreported) Case No. CR 31/2010 (HC) delivered on 19.11.2010.

> *so imposed and, on default of payment of the fine, to serve as the punishment. As far as the determination of the term of the alternative imprisonment is concerned, it is difficult to make that determination as if the imprisonment was the only punishment which was being imposed. Where a fine is imposed, imprisonment is ex hypothesi inappropriate and would not have to be imposed at all if payment of the fine was ensured or could be readily enforced by execution (s 288 (1)(a) of the Act). Alternative imprisonment is therefore primarily a mechanism for collecting the fine, but the officer imposing sentence should naturally bear properly in mind the possibility that the fine will not be paid and that the imprisonment will have to serve as an (inappropriate) punishment. The imprisonment should therefore be just severe enough to make failure to pay the fine problematical."* (Emphasis provided)

[9] The three cases at hand are good examples where none of the accused persons were financially in the position to pay the fine, or able to do so with the assistance of family and friends; therefore each having to serve the alternative term of eight months imprisonment. Piratus Amukoto informed the court that he was unable to pay a fine – that notwithstanding, he was sentenced to N$1 000 or 8 months imprisonment.

Shikale Onesmus is seventeen years of age and a scholar and said he would be able to raise N$300 – he was sentenced to N$800 or 8 months imprisonment.

Junias Mweshipange earns N$300 per month and was sentenced to N$1 000 or 8 months imprisonment.

In another case finalised in terms of s 112 (1)(a) and which came before this Court on review, an alternative sentence of two years imprisonment was imposed in default of payment of a fine of N$4 000 (an instance where the accused was wrongly convicted of arson). In effect, all the above mentioned accused were sentenced to lengthy custodial sentences *on their mere pleas of guilty*.

[10] I have no doubt in my mind that the Legislature never intended changing the ambit of s 112 (1) (a) when increasing the maximum fine whereby accused persons,

on their mere pleas of guilty, are given excessive fines and expected to raise money far beyond their means; failing which, in the majority of cases, resulting in lengthy custodial sentences being served. This untenable situation is brought about when presiding officers wrongly invoke the provisions of s 112 (1) (a) in order to swiftly dispose of cases without having proper regard to the *nature* of the offence and the *particulars of the charge*.

[11] It seems to me that since the amendment became operative, the particulars of the offences allegedly committed, are now largely ignored; or given insufficient consideration by presiding officers when exercising their discretion whether or not to invoke the provisions of s 112 (1) (a); and that the emphasis is *only* on the fine that could be imposed to a maximum of N$6 000. In other words, the reasoning seems to be that, irrespective of the nature and particulars of the alleged offence, a severe fine, would be justified, even though the accused would be unable to pay the fine and therefore has to serve a custodial sentence. It is because of this approach that cases involving crimes such as housebreaking with intent to steal; theft; assault with intent to cause grievous bodily harm; and, even arson, are lately finalised in terms of s 112(1)(a) of the Act. As earlier stated, the provisions of s 112(1) (a) apply *only* to those cases involving offences considered to be minor; where the accused can be taken on his word to have committed the crime - without the court having to satisfy itself by questioning the accused in terms of s 112(1) (b) that an offence was committed and that it was the accused who committed it.[7] Specific provision is made in the Act to deal with guilty pleas involving serious offences in terms of s 112 (1) (b) and presiding officers should fully understand the distinction between the two

[7] *S v Nyambe* 1978 (1) SA 311 (NC) at 312.

subsections and the ambit of each, when exercising their judicial discretion during a plea of guilty.

[12] The presiding magistrate in the three review cases under consideration invited the Court to give guidelines on the applicability of s 112 (1)(a) as, in his view, a sentence of a fine of N$6 000 can hardly be seen to be applicable in cases involving 'minor offences'; that the section permits penalties suitable to 'serious offences'; that there is no clear distinction to which offences or circumstances the section applies; and presiding officers may differ in opinion on which offences are deemed to be minor offences for which fines are considered suitable punishment in terms of the Act.

[13] The guidance sought by the magistrate was to a large extent provided in *S v Aniseb (supra)* where the Court considered two South African decided cases which deal with the interpretation of s 112 (1)(a), namely, *S v Mia*[8] ; *S v Cook*[9] and quoted with approval, a passage from *Mia*, where Miller J at 719C-E said :

> *"It is true that s 258(1) (b) [s 112 (1) (a)] ought not to be invoked, as a general rule, in a case of theft or in any common-law offence which is not trivial, but there is no justification for holding that it is never to be invoked in a case of theft. Section 258(1) (b) [s 112(1)(a)] does not in terms limit its applicability to minor statutory contraventions nor do any of the decisions, so far as I am aware, lay it down as a rigid rule of practice that that section is never to be invoked in a case of a common-law offence. In enacting s 258(1)(b) [s 112 (1)(a)] the Legislature clearly had in mind trivial and petty offences and was concerned to enable such offences, whatever they*

[8] 1962 (2) SA 718 (N).
[9] 1977 (1) SA 653 (A).

might be, to be dealt with swiftly and expeditiously. (R v Vabaza 1948 (2) SA 451 (E).)"

Hannah AJ in *Aniseb* at 416d-e, whilst referring to the *Cook* case (*supra*) stated:

"…reference was also made to an offence of a trivial nature, the Court holding that the presiding magistrate had a duty to decide whether the offence was of such a trivial nature that it met the requirement of the proviso in s 258(1) (b)." (Emphasis provided)

And further at 416e-g:

"I respectfully agree with Miller J that s 258(1)(b), and its successor, s 112(1)(a), can be invoked not only in the case of a minor statutory contravention, but also in the case of a common-law offence such as theft or common assault. In R v Vabaza (supra) Gardiner J gave as examples of such cases theft of apples by a schoolboy and an assault consisting of a light box on the ear. However, it can seldom be said that a crime such as housebreaking with intent to steal and theft is a minor offence. There may be exceptional circumstances which would render it so, but in the general classification of crime it ranks quite high in degree of seriousness."

[14] From the above cited cases it is clear that certain offences should not – and in my view cannot – be identified or listed for disposal in terms of s 112 (1) (a) of the Act, as the basis for deciding to do so is not *only* determined by the sentence that can be imposed, but more specifically, by the *particulars in the charge*. For example: In one case it may be appropriate to summarily dispose of a case involving the offence of

theft, justifying a small fine; compared to another, where theft was also committed, but in circumstances where a sentence in excess of the maximum of N$6 000 is called for. In the latter instance the presiding officer has to appreciate the different circumstances between the two cases, and exercise his or her judicial discretion accordingly. Here the required procedure is not determined by the *sentence* that could be imposed, but by the *particulars of the charge*.

[15] Despite the maximum fine being increased substantially, presiding officers should guard against indiscretionate summary disposal of cases – whilst rightly acting within the law in terms of section 112 (1)(a), but at the same time, compromising an accused person's Constitutional right to a fair trial. In my view, the presiding officer, when exercising his or her judicial discretion, must decide whether or not the nature of the offence and the particularity thereof are such that the accused can be convicted on his mere plea of guilty without further elucidation; disposing of the safety measure against injustice flowing from an unjustified plea of guilty. I find the remarks made in *Hiemstra's Criminal Procedure* on point and apposite, where the learned author states the following at 17-3:

> *"In **S v Addabba; S v Ngeme; S v Van Wyk** 1992 (2) SACR 325 (T) it was pointed out, with respect, correctly, that, especially where accused are unrepresented or unsophisticated and the envisaged sentence is not trifling, it is not only desirable but necessary for the fair administration of justice that the magistrate conduct an inquiry as if it were a case under section 112 (1) (b). The presiding officer must assess judicially which procedure should be followed. As the court stressed in **Addabba**, the current procedure is still aimed at petty cases. It must also be remembered that a conviction without any evidence or other objective information about the accused's*

> *guilt means that the accused's opinion on the matter is accepted by the judicial officer, and that many accused are helpless illiterates who may lack sufficient understanding of the consequences."*

These remarks underscore the need for presiding officers to approach a plea of guilty by an unrepresented accused with the view and aim of dispensing fair justice; and not to dispose of the case expeditiously simply because the Act allows such procedure.

[16] Returning to the three cases at hand, I am unable to see how crimes such as housebreaking with intent to steal and theft; and theft of goods valued at more than N$1 000, can be considered to be 'minor offences'. In *Aniseb* it was made clear that even where the amount allegedly stolen was relatively small, this does not detract from the seriousness of the crime itself. In all three cases, there is nothing apparent from the particulars of the respective charges indicating that these were minor offences, justifying its summary disposal in terms of s 112 (1)(a). It seems that the magistrate was guided by the prosecutor's opinion that these matters should be disposed of in summary fashion; without the court exercising its judicial discretion independently from the prosecutor's view.

[17] What I find most surprising and conflicting is that although the prosecutor held the view that these cases could be finalised in terms of s 112 (1)(a) – thereby implying that they were minor offences – he, when addressing the court on sentence, submitted that the offences were of *serious* nature. What boggles the mind is, how can the same offence at the stage of pleading be considered to fall in the category of crimes classified as 'minor offences', but when it comes to sentence, the same offence (on the very same facts), is elevated to a 'serious crime'? Prosecutors are reminded that

they are officers of the court; and as such under a duty to serve the interests of justice. Had the prosecutor representing the State in these cases been serious, then he would not have intimated to the court to invoke the provisions of s 112 (1) (a); but instead, would have insisted that s 112 (1) (b) be applied, where the court was obliged to do so in terms of the Act. However, as stated hereinbefore, the final decision lies with the presiding officer who must exercise a judicial discretion, not the prosecutor.

[18] In my judgment the magistrate, presiding over the three cases dealt with herein, failed to exercise his discretion judiciously, in that he failed to properly apply his mind to the provisions of the subsection. In these circumstances the convictions and sentences cannot be permitted to stand.

[19] In the result, the Court makes the following order:

1. The judgment and sentences in the following cases are set aside: *The State v Shikale Onesmus; S v Piratus Amukoto; S v Junias Mweshipange.*
2. These cases are remitted to the magistrate with a direction that it be dealt with afresh from the stage of plea.
3. In the event of a conviction the sentencing court must have regard to the sentence already served.

LIEBENBERG, J

I concur.

DAMASEB, JP