CASE NO.: CR 10/2011

IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI

In the matter between:

THE STATE

and

(1) AYESHAANTU ANGOLO GABRIEL IYAMBO
(2) SHEELEKENI MPUGULU
(3) JOHANNES JOHANNES

(HIGH COURT REVIEW CASE NO.: 43/2011)

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: 13 April 2011

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The three abovementioned accused appeared in the Magistrate's Court, Okahao on several charges to which they all pleaded guilty. Accused no. 1 was convicted for housebreaking with intent to steal and theft;

supplying ammunition (c/s 32 (1)(a) of Act 7 of 1996); and possession of ammunition (c/s 33 of Act 7 of 1996) ("the Act") whilst his co-accused were only convicted of the charges contained in counts 2 and 3, respectively. The convictions of each of the accused followed on their mere pleas of guilty as the case was disposed of in terms of s 112 (1)(a) of the Criminal Procedure Act, 1977 ("the CPA"). In respect of each count fines were imposed which none of the accused were able to pay; resulting in accused no's 1 and 3 each having to serve six months imprisonment and accused no.2, one year imprisonment. First accused was fifteen years of age at the time of committing the offences and his co-accused twenty-one and twenty years, respectively.

[2] When the matter came on review, a query was directed to the presiding magistrate pertaining to the matter having readily been disposed of, despite the charges seemingly being serious in nature, and the desirability of the procedure adopted by the court *a quo*; to advance reasons why, in view of the young age of accused no. 1, a pre-sentence report compiled by a social worker was not requested; and the possible duplication of convictions in respect of the charges the accused were charged with.

[3] In a well-reasoned reply the magistrate explained why he approached the case in the manner he did and in the end concedes that he erred by doing so; and, in the light of the judgment recently delivered in this Court[1], he now appreciates that he should rather have applied the provisions of s 112 (1)(b) of the CPA. Regarding the court's failure to request a pre-sentence report, the magistrate stated that he was unfamiliar with such procedure, but in future would give compliance thereto. As for the

[1] *The State v Shikale Onesmus and Others* (unreported) Case No. CR 08/2011

duplication of convictions in respect of accused no's 1 and 2, this, the magistrate conceded, was a misdirection on his part. The magistrate is commended for the sound and to the point argument presented in his reply.

[4] In the *Shikale Onesmus* case (*supra*), delivered on 30 March 2011, this Court gave clear directions regarding the approach the court should adopt when faced with a plea of guilty that may be finalised in terms of s 112 (1)(a) of the CPA and there is no need to repeat what already has been stated therein. It would suffice to say that the offence of housebreaking with the intent to steal and theft should not be disposed of on the mere plea of guilty of an accused and more so, when the accused is a juvenile, as in this case. The presiding officer has a discretion to either invoke the provisions of s 112 (1)(a) or (b), which discretion must be exercised judiciously with full regard to the *particulars* of the charge brought against the accused and not only having in mind the sentence that may be imposed under s 112 (1)(a), namely, N$6 000. In the present case there is no justification for having the matter disposed of in terms of s 112 (1)(a), and by so doing, the court *a quo* misdirected itself. The court ought to have realised that, before it was a fifteen year old child who pleaded guilty to an offence for which a custodial sentence is *usually* imposed; secondly, by invoking the provisions of s 112 (1)(a) and imposing the subsequent fine, that the chances of the accused being able to pay such fine were virtually none. By so doing, the court must have realised that, by imposing a fine notwithstanding, he was actually sending a young child to prison for a period of six months and without satisfying himself that there was no alternative course. In this instance, the court clearly did not exercise its discretion judiciously and neither did it act according to what was in the best interest of accused no. 1, a juvenile offender.

[5] The same applies to the other charges preferred against all three the accused persons who were convicted on their mere pleas of guilty – despite a possible duplication of convictions. Add thereto that count 2 is flawed in that it does not constitute a crime in respect of second and third accused (discussed later herein). Had the magistrate given proper consideration of the charges and the particulars of the respective offences contained in the charges; and invoked the provisions of s 112 (1) (b) of the CPA as he should have done, then these material mistakes in all probability would not have occurred. In respect of count 2 accused no's 2 and 3 has been charged with the unlawful "*supply to another person to wit:* ***Sheetekeni Mpungulu*** *and* ***Johannes Johannes*** *not being a licenced dealer in ammunition…*" whilst the accused are the very same persons referred to in the charge. This implies that they committed the offence *against themselves*! Hence, the convictions on all the counts cannot be permitted to stand.

[6] It seems necessary to briefly refer to an issue touched on by the magistrate in his reply namely, that before deciding to proceed with a matter in terms of s 112 (1)(a), he usually would 'informally' question the accused – especially when the accused is young or unsophisticated – to satisfy him that the accused understands the charge and admits the elements of the offence pleaded guilty to. Thereby the magistrate would ensure that the accused is indeed guilty and only thereafter would he apply the provisions of s 112 (1)(a). He claims to have adopted this practice in the present case, despite the record being silent in that respect.

[7] Section 67 (3)(a) of the CPA specifically deals with the keeping of a record of the proceedings and in peremptory terms states the following:

> *"The court shall keep a record of the proceedings, whether in writing or mechanical, or shall cause such record to be kept, and the charge-sheet, summons or indictment shall form part thereof."*

In *S v Haibeb*[2] it was held that it is the duty of the presiding officer in a criminal trial to keep a proper record and to minute the proceedings in a clear and intelligible manner.

[8] The magistrate concedes that no provision is made in the CPA for the procedure he has adopted. He is discouraged to continue doing so, as this practice is not only irregular, but could lead to the setting aside of the proceedings subsequent thereto on the basis that the record is incomplete and incapable of being assessed in order to determine whether same is in accordance with justice. In any event, the time that the magistrate was hoping to save by expeditiously finalising the matter under s 112 (1) (a), was most probably taken up by the 'informal questioning' of the accused – something that, from the outset, should have been done through questioning in terms of s 112 (1)(b) of the CPA.

[9] The courts, as a matter of principle, in the process of sentencing young offenders, would require a pre-sentence report compiled by a social worker in which the background of the offender is set out, which often provides valuable information to the court for a better understanding as to why the offence was committed by the

[2] 1994 (1) SACR 657 (Nm) at 663i-j

accused at such a young age. Failure to obtain such report does not mean to say that the court committed any misdirection when sentencing a young offender without it. However, the need for a pre-sentence report has been stressed repeatedly and increasingly by the courts and, as a matter of common sense, dictates that the sentencing court should be even more fully informed regarding the person of the juvenile offender.[3] Therefore, although not statutory required, pre-sentence reports should be requested by the court as a matter of course, in cases involving young offenders convicted of serious offences.

[10] I turn now to consider the possible duplication of convictions in respect of the first accused being convicted of theft (of ammunition) and possession of the same ammunition at the same time; and whether first and second accused were correctly convicted on counts 2 and 3.

The magistrate concedes that he did not apply his mind properly to the charges preferred against the accused and lost sight of the fact that the crimes were closely related and are based on the same facts; that accused no.1 should not have been convicted of theft *and* unlawful possession of ammunition at the same time; also, that convictions on counts 2 and 3 amount to a duplication of convictions. On the limited information before the court it would appear that there is reason to believe that there was a duplication of convictions in respect of some of the accused.

[11] From the outset it must be said that it is impractical and virtually impossible to formulate a single and exhaustive test for determining whether there is 'splitting of charges' or put more correctly, a 'duplication of convictions'.[4] The courts over the

[3] *S v Adams* 1971 (4) SA 125 (C) at 126G-H
[4] *S v Prins and Others*, 1977 (3) SA 807 (A)

course of time developed two practical aids and in a judgment of the Full Bench of three judges of this Court in the case of *The State v Moses Seibeb and Edward Eixab*[5] Hannah J, said the following:

> *"Where a person commits two acts of which each, standing alone, would be criminal, but does so with a single intent, and both acts are necessary to carry that intent, then he ought only to be indicted for, or convicted of, one offence because the two acts constitute one criminal transaction. This is the* ***single intent test****. If the evidence requisite to prove one criminal act necessarily involves proof of another criminal act, both acts are to be considered as one transaction for the purposes of a criminal transaction. But if the evidence necessary to prove one criminal act is complete without the other criminal act being brought into the matter, the two acts are separate criminal offences; this is the* ***same evidence test****."* (emphasis added)

See also: *S v Grobler*[6]*; S v Gaseb and Others*[7].

[12] The application of certain useful guidelines may assist the court in arriving at a fair and just result:

Firstly, the court must consider the substantive differences (if any) between the defined elements of the various offences (by looking at the definition of the crimes respectively) the accused has been charged with (*S v Grobler (supra)* at 512A). If there are no such differences or when the elements of the one offence will also include all the elements of the other, a conviction of the most inclusive or most serious should follow.

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[5](Unreported) CR 81/97 and CR 82/97
[6] 1966 (1) SA 507 (A)
[7] 2001 (1) SACR 438 (NSC)

Secondly, regard being had to the definition of the offences and the formulation thereof in the indictment, the court will determine whether the evidence necessary to establish one of the charges will equally also prove commission of one or more of the other and if so, *"the criminal conduct imputed to the accused constitute in substance only one offence which could have been properly embodied in one all-embracing charge"* (per Wessels, JA in *Grobler* at 523B) and the accused should only be convicted on one charge.

If the evidence shows that the imputed conduct of the accused constitutes a continuous transaction with a single intent, it may be indicative that the accused has in effect only committed one offence in substance. It should be borne in mind that these guidelines are not rules of law and, should their application still leave an inconclusive or unsatisfactory result, the court should be guided by its experience and sense of fairness.[8]

[13] When applying the guidelines set out hereinabove to the present case, the court *a quo* must have regard to the elements of the respective charges and the answers given by the accused when questioned in terms of s 112 (1)(b) of the CPA; and only thereafter would it be in the position to conclude whether or not there was a duplication of convictions.

[14] There remains however one further aspect for consideration, and that is where the prosecutor in this instance stopped the prosecution against accused no's 2 and 3 *after* they had pleaded on counts 1 and 2, respectively, *without* the consent of the Prosecutor-General. Section 6 of the CPA is clear that in such an instance the prosecution cannot be stopped without the required consent and reads:

[8] *S v Davids*, 1998 (2) SACR 313 (C) at 316D

"An attorney-general [Prosecutor-General] or any person conducting a prosecution at the instance of the State or any body or person conducting a prosecution under section 8, may –

(a) *before an accused pleads to a charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge;*

(b) *at any time <u>after an accused has pleaded</u>, but before conviction, stop the prosecution in respect of that charge, in which event the court trying the accused <u>shall</u> acquit the accused in respect of that charge: Provided that where a prosecution is conducted by a person other than an attorney-general [Prosecutor-General] or a body or person referred to in section 8, the prosecution <u>shall not be stopped</u> unless the [Prosecutor-General] or any person authorised thereto by the [Prosecutor-General], whether in general or in any particular case, has <u>consented</u> thereto."* (emphasis added)

[15] In the present case there is nothing on record showing that the prosecutor, when he decided not to proceed with some of the charges on which the accused already pleaded, had the required consent from the Prosecutor-General to stop the prosecution as it did in respect of accused no's 2 and 3, and the stopping is accordingly void.

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

1. The convictions and sentences imposed on all the accused persons in respect of counts 1, 2 and 3 are hereby set aside.
2. The matter is remitted to the Magistrate's Court Okahao with the direction to continue with the proceedings from the stage of

questioning the accused pursuant to the provisions of s 112 (1)(b) of Act 51 of 1977; and to follow the guidelines set out in this judgment.

3. In the event of a conviction regard should be had to the sentence already served by the relevant accused.

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LIEBENBERG, J

I concur.

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TOMMASI, J