CASE NO.: CR 31 /2011

IN THE HIGH COURT OF NAMIBIA

HELD AT OSHAKATI

In the matter between:

THE STATE

versus

LINEA NUUYOMA

(HIGH COURT REVIEW CASE NO.: 379/2010)

FILLIPUS EPAFRAS

(HIGH COURT REVIEW CASE NO.: 366/2010

CORAM: Liebenberg J *et* Tommasi, J

DELIVERED ON: 18 October 2011

REVIEW JUDGMENT

TOMMASI J [1] The above cited cases came before me on automatic review from the district court for Oshakati and Okahao respectively.

[2] The accused in the first captured case, Linea Nuuyoma, a 44 year old female, was charged with assault to do grievous bodily harm in that she wrongfully and intentionally assaulted Jona Johannes by hitting him and bumping him against a wheelbarrow with the intent to do the said Jona Johannes grievous bodily harm. She pleaded guilty to the charge and the prosecutor requested the magistrate to apply section 112(1)(a) of the Criminal Procedure Act[1]. She was convicted on her plea of guilty in accordance with the provisions of section 112(1)(a). The prosecutor hereafter presented the medical examination report as evidence which reflected that the complainant, a 13 year old boy, suffered a fracture to his left forearm. The prosecutor in his address informed the court that the accused assaulted a neighbour's child whom she suspected of having stolen a cell phone and that she had used extreme force. She was sentenced to pay a fine of N$1000.00 or 6 months imprisonment.

[2] In the case of Fillipus Epafras, the accused, a 21 year old male, pleaded guilty to a charge of arson in which the State alleged that he on 6 October 2010 near Olukulo in the district of Outapi unlawfully and with intent to injure Saimi Nuugwanga in her property, set her immovable property, to wit, her sleeping room valued at N$5000.00, on fire. This similarly was disposed of in terms of section 112(1)(a). No evidence was adduced by the State after sentence. The accused indicated that he was unable to pay a fine but was prepared to do community service. The accused however was not considered a fit candidate for community service and he was sentenced to pay a fine of N$2000.00 or 18 months imprisonment.

[3] I requested the magistrates to explain why the matter was dealt with in terms of section 112(1)(a) given the gravity of the offences the accused were charged with. In the case of Linea Nuuyoma I received the following response from the magistrate:

[1] Act 51 of 1977 as amended

"The court dealt with the matter in terms of section 112(1)(a) as the court was of the opinion that the application of the said section will not result in any injustice to the accused person and also that the case will not carry a substantial sentence having regard to the particulars of the charge as per the charge sheet."

[4] The magistrate in the case of Filipus Epafras conceded, given the recent judgments by this Court that the matter should have been dealt with in terms of section 112(1)(b).

[5] More and more cases dealt with in terms of section 112 (1)(a) are now subject to review since the amendment of s 112 of the Act through s 7 of the Criminal Procedure Amendment Act, 2010, (Act 13 of 2010), which increased the amount specified in section 112(1)(a) from N$300.00 to N$6000.00[2]. Both the accused were unrepresented. In both these cases the magistrates held the substantive rank as magistrate for less than 7 years and a fine of more than N$500.00 was imposed which the accused was unable to pay. This resulted in the alternative imprisonment in excess of three months coming into operation thus making it reviewable in terms of the provisions of section 302[3]. There is however no evidence upon which this Court can determine whether the convictions in the above cited cases were in accordance with justice.

[6] The swift disposal afforded by the application of section 112(1)(a) may result in the accused being wrongly convicted of a serious offence on his/her mere plea of guilty. A real possibility of an injustice occurring exists where the accused is charged with assault with the intent to do grievous bodily harm. Accused are routinely charged with this offence where the complainant suffered serious injury(ies) whereas this is not necessarily the only determining factor. The State needs to prove that the accused had the intent to do grievous bodily harm. Serious injuries may be inflicted without

[2] See The S v Shikale and Others (unreported) Case no CR 08/2011, para 3 for a full discussion.

[3] Of the Criminal Procedure Act, 51 of 1977

the accused intending to cause grievous bodily harm and conversely minor injuries may have been inflicted even though the accused intended to cause grievous bodily harm. The provisions of section 112(1)(b) affords protection to the unrepresented accused who, through ignorance, believes that he/he is guilty because the complainant suffered serious injuries even though he/she never intended it.

[7] The same is applicable where an accused is charged with arson. The court has to be satisfied that the accused had the requisite *mens rea* when he/she committed the offence to exclude the possibility that the fire may have been caused by negligence and furthermore that the property was in fact immovable property.

[8] The magistrate in the matter of Linea Nuuyoma indicated that the particulars of the charge formed the basis for her decision that the offence does not merit a "*substantial*" sentence. The charge sheet merely indicates that the complainant was hit and pushed. There was no indication of any weapon used, the measure of force applied and the part of the body injured. Furthermore, if the magistrate concluded that the assault would not merit a substantial sentence, it begs the question why then was the accused charged with assault with the intent to do grievous bodily harm and not assault. It was only disclosed after the accused was convicted that the assault was perpetrated by the 44 year old accused on a minor of 13 years and that she actually fractured his arm. At this stage the magistrate was in terms of section 112(1)(a) precluded from imposing a sentence of direct imprisonment without the option of a fine.

[9] The case of Filipus Epafras is a classic example of this predicament. After the magistrate convicted the accused it was determined that he would not be able to pay a fine and was not a fit candidate for community service. The magistrate had no other option but to impose a fine with imprisonment

in the alternative. Arson, generally destroys valuable assets and endangers the lives of persons living in the property set alight as well as the premises surrounding it. The fact that this was a sleeping room of a female complainant should have been enough to alert the magistrate that the charge was serious enough to warrant imprisonment without the option of a fine.

[10] If a magistrate does not exercise her/her discretion judiciously the accused may be wrongly convicted or the impression may be created that the courts are imposing lenient sentences for serious offences. The use of section 112(1)(a) should therefore be reserved for minor offences where the risk of substantial injustice to the accused and the administration of justice is not placed in jeopardy.[4] This Court has dealt comprehensively with this issue in *S v SHIKALE ONESMUS, supra* and same need not be rehashed herein.

[11] Although the magistrates were empowered to act in terms of section 112(1)(a) as amended, they still had to exercise their discretion judiciously whenever requested to apply the provisions of section 112(1)(a). I am not persuaded that this was done in the above cited cases and therefore finds the proceedings therein not in accordance with justice.

[12] In the premises the following order is made:

1. The conviction and sentence in the above captured cases are set aside;
2. The cases are remitted to the Magistrate's Court for Oshakati and Okahao with the direction to continue with the proceedings from

[4] See S v Shikale Onesmus and others, supra & S v Aniseb and Another1991 (2) SACR 413 (Nm) at 415g-i (1991 NR 203 (HC)).

the stage of questioning the accused pursuant to the provisions of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977;

3. In the event of a conviction the sentencing court must have regard to the sentence already served.

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TOMMASI, J

I agree.

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LIEBENBERG, J