REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 75/2012

In the matter between:

THE STATE

and

KAUPASANEUA TJIPETEKERA

Neutral citation: *The State v Tjipetekera* (CR 75/2012) [2012] NAHCMD (11 September 2012)

Coram: VAN NIEKERK J and MULLER J

Flynote: Criminal procedure – Plea – Plea of not guilty on "main" charge and plea of guilty on alternative charge – Magistrate questioning accused in terms of section 112(1)(b) of Criminal Procedure Act 51 of 1977 on both charges – Plea of not guilty entered – After trial accused convicted on "main" charge on admissions made during questioning – Questioning irregular – Magistrate should have applied section 115 to "main" charge and section 112(1)(b) to alternative charge taking care not to use admissions made during section 112(1)(b) proceedings to convict on "main" charge – Conviction and sentence set aside.

Summary: The accused was charged with a count of housebreaking with intent to steal and theft and an alternative charge of possession of stolen property. He pleaded not guilty to the housebreaking charge, but guilty to the alternative charge.

At the request of the prosecutor the magistrate questioned the accused in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977 ("CPA") on both charges. The accused admitted all the elements of the housebreaking charge, except that he stole a certain amount of cash as alleged in the charge sheet. The magistrate entered a plea of not guilty in terms of section 113 of the CPA. The State called the complainants who testified only on the money and the amount. The accused did not testify. The magistrate convicted the accused on the housebreaking charge on the strength of the complainant's evidence and the admissions the accused made during the section 112(1)(b) proceedings.

On review the magistrate conceded that the accused was convicted in an irregular manner. The conviction and sentence were set aside and a warrant of liberation issued for the accused's release from prison. In order to assist with the preparation of reasons for the reviewing judges' decision, the matter was referred to oral argument on the following question: "What is the proper procedure the magistrate should have followed with regard to accused no 2's plea of not guilty to count 1 and the plea of guilty to the alternative count?"

Held, the magistrate should have applied section 115 to count 1 and section 112(1)(b) to the alternative charge, taking care not to use any admissions made on the alternative count to convict the accused on count 1.

REASONS FOR JUDGMENT

VAN NIEKERK J (MULLER J concurring):

[1] Two accused were charged in the magistrate's court with a count of housebreaking with the intention to steal and theft as well as an alternative count of possession of stolen property. Accused no 1 pleaded not guilty to both charges and accused no 2 pleaded not guilty to the charge of housebreaking, but guilty to the alternative charge. This judgment concerns only accused no 2 who will hereafter be referred to as 'the accused'.

[2] After plea the state prosecutor said the following:

> *'PP: May court apply S115 of CP Act ito accused one and apply section 112(1)(b) iro accused 2 for both*.'

[3] The magistrate obviously understood that she should apply section 112(1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977), ('the CPA') to both charges as the following was recorded:

> *'Crt: Applies section 112(1)(b) to accused two in respect of main count and alternative'*.

It should be noted that the prosecutor did not specify that the first charge was indeed a 'main count'. The magistrate on own initiative labeled it as a 'main count'.

[4] Thereupon the magistrate questioned the accused, who admitted all the elements of the housebreaking charge, except the theft of the money. The prosecutor was asked whether the limited plea was accepted. It was not and a plea of not guilty was entered. The accused confirmed in terms section 220 of the CPA that 'he took the things' cited in the charge sheet.

[5] After a postponement of the case against the accused it resumed with a trial during which the complainant testified only on the aspect of the money that was stolen and the amount. He was not cross-examined and the State closed its case. The accused remained silent.

[6] Only the prosecutor made submissions on the merits, but the accused again remained silent. The magistrate's judgment was the following: (unedited)

> *'This is a case of housebreaking with intent to steal and theft. The accused person pleaded guilty and admitted all the essential elements but disputed the money and a plea of not guilty was entered. The elements which were admitted were admitted in terms of section 220 of the Criminal Procedure Act. The state called complainant who testified on the value of money his evidence was undisputed by accused and as such the accused is the person who broke and took all the property mentioned on the charge sheet and now found him guilty as charged.'*

[7] From the judgment on sentence it is clear that the magistrate sentenced the accused for a conviction of the housebreaking charge to a fine of N$2000.00 or 12 months imprisonment.

[8] The matter came on review to this court on 20 February 2009. The following query was addressed to the magistrate on 22 February 2009 in terms of the accused:

> *'Accused no 2 pleaded not guilty to the charge of housebreaking and guilty to the alternative charge of contravening Section 6 of Ordinance 12 of 1956. On which basis was he questioned in terms of section 112(1)(b) on the housebreaking count?'*

[9] In her reply received on 27 March 2009 the magistrate conceded that she erred. She said:

> *'The magistrate conceded (sic) that it was an error which is seriously regretted. For there was no basis of proceeding it in terms of section 112(1) (b) when accused pleaded not guilty. May the conviction and sentence be set aside so that the matter will proceed to trial'.*

[10] This court set aside the conviction and sentence of the accused on 15 April 2009 and issued a warrant of liberation for his immediate release. In the order we indicated that reasons for our decision would follow.

[11] In preparation of the reasons we requested an opinion of the Prosecutor-General on the proper procedure the magistrate should have followed with regard to the accused's plea of not guilty to count no.1 and the plea of guilty to the alternative count. In our request we referred the Prosecutor-General to the commentary by authors of two authoritative works on criminal procedure, namely Hiemstra's Criminal Procedure by Kruger (p17-13) and Commentary on the Criminal Procedure Act by Du Toit et al (P17-4 to 17-4A), as well as an article on this subject by J. H. Kok – "Die

miskenning van die aard van die alternatiewe aanklag" which appeared in THRHR 1988 (51) 79.

[12] Ms Jacobs of the office of the Prosecutor-General provided an opinion on 7 May 2009, for which we express out thanks. However, not entirely satisfied by the submissions contained therein, we referred the following question to oral argument:

> *'What is the proper procedure the magistrate should have followed with regard to accused no 2's plea of not guilty to count 1 and the plea of guilty to the alternative count?'*

[13] The matter was set down on 31 May 2010. On this occasion Mr *Barnard* from the Society of Advocates of Namibia appeared *amicus curiae* for the accused and Ms *Jacobs* for the State. Both counsel submitted comprehensive heads of argument in advance and amplified those heads by oral argument in court. We again express our gratitude for their industry and assistance.

[14] Although counsel differed in their approach to the issue, both agreed that the magistrate committed an error in convicting the accused on the count of housebreaking and that the conviction should be set aside. As mentioned before, that had already been done on 15 April 2009. Clearly this should have been done as the accused was prejudiced when he was questioned as if he had pleaded guilty on the housebreaking count, whereas he had pleaded not guilty. Furthermore, although a plea of not guilty had been entered, the admissions he made during the section 112(1)(b) questioning were used to convict him in the end. Although the complainant testified, the testimony was led only on a limited issue, namely the money that was

stolen. It was not a case where the complainant testified on all the elements of the crime.

[15] In order to consider the arguments on the question posed by the Court, it is necessary to bear in mind the provisions of section 112(1)(b) of the CPA which state, *inter alia*, that where –

> "an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea ..... the [presiding judicial officer] shall, ...if requested thereto by the prosecutor, 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 or her plea of guilty of that offence and impose any competent sentence." [My omissions and insertions]

[16] Mr *Barnard,* with reliance on the cases of *S v Peter* 1996 (2) SACR 212 (C) and *S v Langa* 1985 (3) SA 833 (N), submitted that the purpose of section 112 is the protection of the accused by obliging the court to ask questions after a plea of guilty to ensure that an accused indeed meant to plead guilty. This obligation, he submitted, only arises after the plea of guilty has resolved the issues between the State and the accused. He further submitted that where the charge sheet contains several alternative charges, a plea of guilty to one of the alternatives and not guilty to the other does not constitute "a plea of guilty to the offence charged" as meant in section 112(1)(b). The reason for this is that, by virtue of section 6(b) of the Interpretation of Laws Proclamation, 1920 (Proclamation 37 of 1920), words in the singular also include the plural. If I understand the submission correctly, where there

is a reference in section 112 to “the offence charged”, this must be read to be “the offences charged” in cases where the charge sheet contains a charge with an alternative charge. This submission is based on a passage in the *Peter* case (at 216*e-i*):

> “Where there are several offences charged in the alternative it is not apparent that a plea of not guilty to one charge but guilty to another is a plea of guilty ' to the offence charged'. It may be remarked that s 112(1)(b) refers in the singular number to 'the offence charged', but if the section is to be read so that the singular comprehends the plural, then a plea of guilty on one only of several charges would not be a plea of guilty 'to the offences charged' and questioning on the plea of guilty by the magistrate would not be authorised by the subsection in such a case. Indeed, if the intention of the section, as seems to be the case, is that the presiding judicial officer is required to embark upon a questioning of an accused on her plea of guilty only when that plea has resolved the issues between the State and the accused which are raised by the charge or charges in the charge sheet, then a plea of not guilty on one such charge, but of guilty on another alternative charge, leaves the issues on the charge to which the accused has pleaded not guilty unresolved. The intention is that in such a case the prosecutor may continue with the prosecution on the charge which is disputed and accordingly a questioning by the presiding magistrate on the alternative charge to which the accused has pleaded guilty is not necessary nor authorised by the section. The trial should proceed and the accused's right to remain silent, having pleaded to the charges, should not be encroached upon.”

[17] Relying on the abovementioned cases and also on *S v Tladi* 1994 (1) SACR 174 (NK) at 178*b-c* Mr *Barnard* submitted that section 112(1)(b) must be applied only when (i) an accused pleads guilty to a competent charge and the prosecutor accepts that plea; or (ii) where there is a charge with alternative charges and the accused pleads guilty to all the charges; or (iii) where there is a charge with one or more alternatives and the accused pleads guilty to one of the alternatives and the

prosecutor pertinently accepts that plea. He submitted that where the accused pleads guilty to one of the alternative charges and not guilty to the other alternative charges, the provisions of section 112(1)(b) find no application. If I understood him correctly he also submitted that where there is a charge with one alternative, as in this case, and the accused pleads not guilty to the charge, but guilty to the alternative, section 112(1)(b) finds no application unless the prosecutor first accepts the plea.

[18] Ms *Jacobs*, on the other hand, urged us not to follow *Tladi*'s case and to embrace the views expressed in Hiemstra's Criminal Procedure (*supra*) and Kok (*supra*) on the matter, which I do, having considered all the submissions and the various cases on the point. In Hiemstra's Criminal Procedure, p17-13 the following is stated (the omissions and insertions are mine):

> "**Competent verdicts and alternative charges** - The provisions in Chapter 26, which provide for 'competent verdicts', mean that the charges mentioned in that chapter have tacitly included within themselves a number of alternative charges The alternative charges are usually (but not necessarily) less serious than the specified charge. They do not have to appear on the charge sheet because they are by law tacitly included. The genuine alternative charge, on the other hand, is expressly stated on the charge sheet. Although competent verdicts show characteristics of alternative charges, the distinction between them should be borne in mind. The introductory words to section 112(1) apply to both: an alternative charge is an 'offence charged' while a competent verdict is 'an offence of which [the accused] may be convicted on the charge'. Only the latter, however, is qualified by the words 'and the prosecutor accepts that plea'. (Apart from the fact that an alternative charge is clearly an offence charged, there is no comma after 'charge'.) A plea of guilty to an alternative charge therefore does not have to be accepted by the prosecutor before the mechanism of the subsection comes into operation. In such a case section 115 applies to the main charge and section 112 to the alternative on which a guilty plea was noted.

After completion of the proceedings in terms of section 115 with regard to the main charge, the prosecutor can consider the state's position afresh or, in terms of subsection (1)(*b*), request questioning with regard to the alternative, and then decide what to do. The difference procedures allow the prosecutor the opportunity to learn more about the accused's side of the case before deciding. If so inclined the prosecutor perseveres with the prosecution on the main charge, irrespective of the result of the questioning regarding the alternative. If the state proves the accused's guilt on the main charge, the accused is convicted; if the state does not succeed in doing that, conviction on the alternative is still possible, either as a result of the questioning in terms of section 112(1)(*b*) or after a plea of not guilty has been noted in terms of section 113 and guilt proved. A correct decision is made possible in this matter. Should the prosecutor, after the section 115 proceedings in terms of section 112(1)(*b*), decide that a conviction on the alternative is appropriate, he or she can, of course, no longer by virtue of the state's power as *dominus litis* limit the ambit of the dispute (*S v Sethoga …..* [1990 (1) SA 270 (A) 274I-275G]). However, the prosecutor can indicate that the state no longer insists on the alternative and close the state's case on the main charge. If the questioning made section 113 applicable, the prosecutor has the discretion either to attempt to prove the alternative or close the state's case.

The presiding officer must, when there is a plea of not guilty to the main charge but guilty to an alternative, ensure that the accused's right to remain silent on the charge to which a plea of not guilty has been recorded is not infringed by questioning on the other charge. In 1988 (51) *THRHR* 79 Kok discusses two cases (*S v Molele* 1978 (2) SA 668 (O) and *S v Langa* 1985 (3) SA 833 (N)) in which the accused pleaded not guilty to dealing in dagga but guilty to an alternative charge of possession. In each case, even though no plea was accepted, the magistrate questioned the accused in terms of section 112(1)(*b*), then, as a result of the replies given by the accused during the questioning, brought out a finding of guilty on dealing. Kok supports the setting aside of the convictions on review, but on slightly different grounds. Be that as it may, the core of the problem is that care was not taken to ensure that section 115 proceedings with regard to the one charge did not overlap with the section 112(1)(*b*) proceedings in respect of the other. Keeping the border in place will protect the accused's rights and at

> the same time also acknowledge the prosecutor's procedural position of power in respect of properly formulated alternative charges.
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> The prosecutor is, however, in the case of a plea of guilty to a competent verdict, obliged to decide at that stage whether the plea is to be accepted – which in terms of the decision in *S v Ngubane* ……[1985 (3) SA 677 (A) at 683] entails that the prosecutor limit the *lis* accordingly. Should the prosecution fail to prove the competent verdict, the accused goes scot-free. The distinction between a plea of guilty to a true alternative charge and one to a competent verdict is therefore important. And important distinction appears from the fact that when there is a main charge which is withdrawn, or when there is an acquittal, all the competent verdicts also fall away (*R v M* 1959 (3) SA 332 (A) at 335H). A true alternative, on the other hand, does not fall away automatically in the same manner. A competent prosecutor will bear the distinction in mind when drafting the charge sheet. An alternative charge is based on slightly different facts and is formulated by the prosecutor as a safety precaution, depending on what the state can prove."

[19] The author Kok (supra) at p84-85 stresses the distinction between a competent verdict and an alternative charge when section 112 is applied. He refers to section 83 of the CPA, which empowers the prosecutor to charge an accused in the alternative only in certain specific circumstances, namely:

> "[i]f by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved ....."

[20] He mentions that this section has effect at the start of the trial and that is primarily has a bearing on the formulation of charges. Kok further makes the point that the doubt or uncertainty which compels the prosecutor to charge an accused in the alternative does not suddenly disappear as soon as the accused pleads guilty to an alternative charge. It can be that the prosecutor is not at all sure that he can succeed in proving that the accused is guilty of the main charge or the alternative

charge. A plea of guilty to the alternative charge only means that the accused thinks he is guilty of the offence included in the alternative charge, but it cannot contribute much to removing the prosecutor's doubt or uncertainty. It can also be that the prosecutor had been sure all along that he would succeed in proving the alternative charge, but did not have the same certainty regarding the main charge. Should the accused in such a case plead guilty to the alternative charge, this would not remove the prosecutor's doubt or uncertainty in regard to the main charge. Kok is of the view that it is evident from section 83 that it cannot be required from a prosecutor to indicate immediately after the accused has pleaded guilty to an alternative charge whether he accepts the plea or not. I respectfully agree with this view and prefer not to follow the case of *S v Tladi (supra)* in which, in my respectful view, the underlying nature of and reason for an alternative charge, is not properly considered.

[21] Kok (at p 85-86) uses an example to illustrate how the matter of different pleas to alternative charges should be approached. In my view the reasoning is very useful to assist in gaining clarity on the matter (the translation is mine):

> "Suppose an accused is charged with offence A, alternatively offence B and suppose the accused pleads not guilty to A and guilty to B. If the prosecutor for whatever reason accepts the plea of guilty to B, he thereby limits the *lis* with the accused to B and whatever happens further, the accused can no longer be convicted of A (cf *S v Ngubane* .....[1985 (3) SA 677 (A) 683E-F]). If the doubt or uncertainty as meant in section 83 of the Act still exists after the accused has pleaded (usually this will be the case), the prosecutor does not have to accept the plea of guilty, but it does not mean that he thereby indicates that the plea of guilty can be ignored.
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> Section 115 of the Act should then be applied in relation to A. Even if it is accepted that the application of section115 is not peremptory, ...it is suggested that, to obviate evidentiary problems such as occurred in *S v Molele supra* and *S v Langa supra*, section 115 should always be applied in a

> case such as this where an accused is charged in the alternative. If the accused exercises his right to silence in relation to the main charge to which he pleaded not guilty, no "admissions' which he later makes during the section 112(1)(b) questioning should be used to prove the main charge. After section 115 has been complied with, section 112(1)(b) is applied in relation to B. If the court is satisfied that the accused is guilty of B, the accused is not at that stage convicted of B, because it may be that the court may later also be satisfied of the accused's guilt on A and A might be a more serious offence than B or fit in best with the facts ..... After the questioning in terms of section 112(1)(b) in relation to B evidence is presented in relation to A. If A is proved, the accused may be convicted thereof without any further reference to B. If A is not proved or if it is apparent that B fits in best with the facts or is a more serious offence than A, the accused is convicted of B. That the accused need not be convicted of B immediately after questioning in terms of section 112(1)(b), is a necessary consequence of the fact that the accused is charged in the alternative. A conviction after questioning in terms of section 112(1)(b) is in any event not peremptory as appears from the words "may ..... convict the accused on his plea of guilty" in the said section. If the court after questioning of the accused in respect of B enters a plea of not guilty in terms of section 113 of the Act, the proceedings of course continue – subject to the provisions of section 113 – normally as if the accused pleaded guilty to A as well as B from the beginning. It is possible that the uncertainty or doubt which compelled the prosecutor to charge the accused in the alternative is removed after the application of section 115 and section 112(1)(b). The prosecutor can, for example, be sure after questioning that he will not succeed in proving A. Should it also further be apparent that the court is already satisfied that the accused is guilty of B, the prosecutor can decide not to persist with A. Strictly speaking he can however no longer at this stage make his stance known in terms of section 112(1)(b) by accepting the plea of guilty to B, because that section does not provide for a plea acceptance after questioning. The prosecutor should in such a case merely close the State's case."

[22] Kok (at p 84, 86-87) correctly, in my respectful view, stresses with reference to the cases of *S v Evans* 1981 (4) SA 52 (K) and *S v Daniëls* 1983 (3) SA 275 (A) that the magistrate should keep the section 115 and section 112 proceedings separate

and not use the admissions obtained during the section 112 proceedings to convict the accused on the charge to which he pleaded not guilty. The magistrate should therefore make it clear to the accused when he/she is acting in terms of section 115, as it is required to indicate that the accused is not obliged to give any plea explanation or to answer any questions. Indeed, since the advent of the Constitution the trend is, in spite of a plea of guilty, to explain to an accused that it is not obligatory to answer any questions under section 112(1)(b).

[23] The author concludes by saying:

> ”It should ……. be borne in mind that a main and alternative charge each contains an offence charged which must be treated as such; that, as far as possible, section 115 in respect of one charge should be applied before section 112 in relation to another charge; and that any allegation which an accused makes during section 112(1)(b) proceedings cannot merely serve as an admission of a fact which is relevant in relation to the charge to which he pleaded not guilty – the decisions in *S v Molele supra, S v Evans ….* and *S v Daniëls supra* should be borne in mind.”

[24] Finally then, to answer the question posed by the Court in short: the magistrate should have applied section 115 to count no. 1 and section 112(1)(b) to the alternative charge, taking care not to use any admissions made on the alternative charge to convict the accused on count no. 1. Prosecutors and magistrates are urged to study for their own benefit the reasoning of the authors as set out above.

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Van Niekerk

Judge

Muller

Judge

APPEARANCE

For the accused (*amicus curiae*): Mr P C I Barnard

For the State: Ms H F Jacobs

Office of the Prosecutor-General