



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR: 58/2013

In the matter between:

THE STATE

and

JACOBUS PIETERS

ACCUSED

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1058/2013)

Neutral citation: *State v Pieters* (CR 58/2013) [2013] NAHCMD 272 (04 October 2013)

Coram: HOFF J and GEIER J

Delivered: 04 October 2013

Summary: Some of the objectives of questioning an accused person in terms of the provisions of s112(1)(b) of Act 51 of 1977 which must be borne in mind by magistrates are the following:

- (a) to protect an accused, especially the unrepresented or illiterate accused, against an ill-considered plea of guilty which can result in prejudice to such an accused person;
- (b) firstly to establish the factual basis for the plea of guilty, and secondly, the legal basis for such a plea – In the first phase of the enquiry, the admissions

made may not be added to by other means such as a process of inferential reasoning – The second phase amounts essentially to a conclusion of law based on the admissions;

- (c) the section must be applied with care and circumspection and on the basis that where an accused person's responses to the questioning suggest a possible defence or leave room for a reasonable explanation other than the accused's guilt, a plea of not guilty should be entered;
- (d) it is vitally important that the distinction between facts and conclusions drawn therefrom be born in mind when s 112(1)(b) is invoked especially in cases in which generic legal concepts such as reasonableness, negligence and recklessness constitute an essential ingredient of the offence charged.

There are also a number of basic principles governing the questioning in terms of s 112(1)(b) amongst others:

- (i) section 112(1)(b) does not entitle the court to cross-examine or to badger an accused person;
- (ii) a court must only establish the attitude of the accused in respect of each allegation in the charge sheet;
- (iii) it is not the function of the court to try to persuade an accused person that he/she is wrong if he or she denies an allegation;
- (iv) a court is not entitled to ignore the accused's denial because it thinks that it is not well-founded;
- (v) an accused person need not to justify or substantiate such denial;
- (vi) an accused must not be nudged to admit an allegation in the charge sheet; and
- (vii) a court must bear in mind the right of an accused person in terms of our Constitution to be presumed innocent as well as the right to a fair trial before an independent and impartial court.

ORDER

- (a) The conviction and sentence in respect of count 1 (culpable homicide) are set aside.
- (b) The record is returned to the control magistrate who must assign a magistrate to further deal with the matter.
- (c) The magistrate so assigned must in respect of the first count enter a plea of not guilty in terms of section 113 of Act 51 of 1977 and request the prosecutor to lead evidence.
- (d) The conviction in respect of the count 2 is confirmed but the sentence is set aside.
- (e) The assigned magistrate must impose sentence afresh in respect of count 2.

JUDGMENT

HOFF J (GEIER J concurring):

[1] The accused was convicted of the crimes of culpable homicide and driving a motor vehicle without a driver's licence in contravention of the provisions of s 31(1(a)) of the Road Traffic and Transport Act 22 of 1999. In respect of the conviction of culpable homicide the accused was sentenced to three years imprisonment and in respect of the conviction for driving without a driver's licence to a fine of N\$2000 or five months imprisonment. The sentences were ordered to run concurrently.

[2] I directed the following query to the presiding magistrate:

'Please provide me with your reasons for convicting the accused in respect of count 1 in view of the allegation that someone else grabbed the steering wheel prior to the vehicle overturning.

Please provide me with for reasons for imposing the maximum fine in respect of count 2 in view of the fact that the accused was a first offender.

[3] I subsequently received reply from the Head of Office, Mr Endjala informing me that the presiding magistrate is no longer attached to the magistracy and that she is abroad for further studies.

[4] The accused had pleaded guilty to both charges and was subsequently questioned by the magistrate in respect of count 1. Count 2 was disposed of in terms of section 112(1)(a) of Act 51 of 1977.

[5] During the questioning in terms of s 112(1)(b) the accused admitted having been the driver of a pickup motor vehicle on a gravel road which had been involved in an accident, killing one of the passengers.

[6] The accused explained that an oryx 'jumped into the road in front of the car' which caused him to lose control of the motor vehicle and explained further that 'the gentleman who was sitting next to me grabbed hold of the steering wheel as I was struggling with the steering wheel and this is when the car fell and rolled, it overturned'. The passenger who was seated in the loading box was thrown off the vehicle and killed.

[7] The magistrate hereafter continued to question the accused as follows:

'Court: Do you agree or disagree that as a result of you losing control of the vehicle you were negligent?

Accused: Yes, Your Worship.

Court: And do you agree or disagree that as the result of your negligent (sic), Aloysius Witbeen was then killed in the accident.

Accused: Yes, Your Worship.

Court: Did you have the intention to kill Aloysius Witbeen?

Accused: No, Your Worship.

Court: Do you agree or disagree that as a result of your action the consequence was the death of the Complainant (sic) of Aloysius Witbeen in this matter?

Accused: No, Your Worship.

Court: Explain your answer.

Accused: It was an Oryx that jumped into the road.

Court: But did the Oryx lose control of the vehicle or was the Oryx in control of the vehicle?

Accused: I was the driver of the motor vehicle Your Worship.

Court: As the driver of a motor vehicle is it not your duty you ensure that you exercise that necessary control over the vehicle to ward of any dangers there off?

Accused: It is my responsibility, Your Worship.

Court: Once again I ask you the question that as a result of your actions or conduct and that I mean by you losing control of that vehicle it is ultimately what led to Aloysius been thrown out of that vehicle and consequently his death. Do you agree or disagree with that?

Accused: That is correct Your Worship.

Court: And do you agree or disagree that as a result of your action you negligently then killed him?

Accused: Yes Your Worship.'

[8] This is a good example of how questioning in terms of s 112(1)(b) should not be done.

The purpose of questioning in terms of section 112(1)(b) of Act 51 of 1977

[9] It appears from the case law that there is more than one objective with questioning an accused person in terms of s 112(1)(b).

[10] In *S v Baron* 1978 (2) SA 510C at 512G it was held (per van Winsen J) that the questioning under s 112(1)(b) is an important part of the legal process and was introduced to protect an accused – especially the unrepresented or illiterate

accused – against an ill-considered plea of guilty and that in the application of s 112(1)(b) there is much room for misunderstanding which can result in prejudice to an accused person.

[11] In *S v Nyanga* 2004 (1) SACR CPD at 201b-e Moosa J stated the purpose of s 112(1)(b) as follows:

‘Section 112(1)(b) questioning has a twofold purpose: firstly, to establish the factual basis for the plea of guilty and, secondly, to establish the legal basis for such a plea. In the first phase of the enquiry, the admissions made may not be added to by other means such as a process of inferential reasoning. (*S v Nkosi* 1986 (2) SA 261 (T) at 263H-J; *S v Mathe* 1981 (3) SA 664 (NC) at 669E-G; *S v Jacobs* (supra at 1117B)). The second phase of the enquiry amounts essentially to a conclusion of law based on the admissions. From the admissions the court must conclude whether the legal requirements for the commission of the offence have been met. They are the questions of unlawfulness, *actus reus* and *mens rea*. If the court is satisfied that the admissions adequately cover all the elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty. (See *S v Lebokeng en ‘n Ander* 1978 (2) SA 674 (O) at 675G-H; *S v Hendricks* (supra at 187b-e; *S v De Klerk* 1992 (1) SACR 181 (W) at 183a-b; *S v Diniso* 1999 (1) SACR 532 (C) at 533g-h).’

[12] In *S v Naidoo* 1989 (2) SA 114 (A) at 121F Botha JA stated with reference to s 112(1)(b) 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 suggest a possible defence or leave room for a reasonable explanation other than the accused’s guilt, a plea of not guilty should be entered and the matter clarified by evidence’.

[13] Horwitz AJ in *S v De Klerk* 1992 (1) SACR 181 a case dealing with the negligent loss of a fire-arm in contravention of s 39(1)(j) of the Arms and Ammunition Act 75 of 1969 (applicable then in the Republic of South Africa) cautioned at 183a-b that it ‘is vitally important that this distinction (between facts and conclusions drawn therefrom) be born in mind when s 112(1)(b) of the Criminal Procedure Act is invoked, not only in the instant case but in all cases in which generic legal concepts

such as reasonableness, negligence and recklessness, constitute an essential ingredient of the offence charged'.

Basic principles governing questioning in terms of section 112(1)(b)

[14] There are a number of principles in this regard but it is necessary to refer only to some which are applicable in this case. Firstly, s 112(1)(b) does not entitle the court to cross-examine an accused person.

[15] In *S v Jacobs* 1978 (1) SA 1176 (C) at 1177 C Grosskopf J remarked that under s 112(1)(b) a court must only establish the attitude of the accused to each allegation in the charge sheet. It is not the function of the court to try to persuade an accused person that he is wrong if he denies such an allegation. Furthermore, the court is not entitled to ignore the accused's denial because it thinks that it is not well-founded. It can come to such conclusion only after evidence has been heard.

[16] An accused does not have to admit any allegation in the charge sheet and if an accused denies an allegation such an accused need not justify or substantiate such denial.

[17] Donen AJ in *S v Williams* 2008 (1) SACR 65 (C) at paragraph 17 confirmed that s 112(1)(b) does not authorise cross-examination and badgering by a judicial officer in order to obtain admissions.

[18] Secondly, leading questions should as far as possible be avoided. In *S v Balatseng* 2005 (2) SACR 28 BD Mogoeng JP (with Nkabinde J and Hendricks J concurring) found that it appeared from leading questions by the presiding judge that an undefended accused had been nudged to admit that he had shot the deceased.

[19] Thirdly, in questioning an accused person in terms of s 112(1)(b) a court should bear in mind the right of an accused person, in terms of the Constitution, to be presumed innocent as well as the right to a fair trial before an independent and

impartial court. (See *S v Williams* (supra) paragraph [5]; Article 12 of the Namibian Constitution).

The questioning by the presiding magistrate

[20] In view of the purpose of the principles governing questioning in terms of s 112(1)(b) (referred to aforementioned) the questioning by the magistrate is tantamount to cross-examination and a badgering of the accused person. The magistrate simply abandoned her judicial function and took over the role of the prosecution. The magistrate furthermore ignored a possible defence to negligent driving raised by the accused namely that the accused faced with a sudden emergency (the alleged appearance of the oryx in the road).

[21] A driver is at all times required to take reasonable care and use reasonable skill but it is trite law that a driver who finds himself in a position of imminent danger cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger.

[22] The magistrate should at this stage, when the accused intimated a sudden emergency, have entered a plea of not guilty in terms of the provisions of s 113 of Act 51 of 1977.

[23] The accused however, during the questioning, alluded to something much more than a sudden emergency, by stating that the gentlemen who sat next to him grabbed the steering wheel as he was trying to get the motor vehicle under control.

[24] This in essence in my view places the element of *actus reus* in dispute. This was an additional reason for entering a plea of not guilty.

[25] The magistrate furthermore continuously questioned the accused about his negligent conduct requiring the accused to agree or disagree with that. This is a generic term which should be avoided when questioning an accused person (See *De Klerk* (supra)). Did the accused understand the term negligent? It was the duty of

the magistrate in the first instance to establish the factual basis for the plea of guilty including negligence. The accused was unrepresented. The fact that the accused agreed (if one has to assume that he in fact agreed thereto) that he was negligent is of no value. The accused was really asked to pass judgment on himself. (See *S v Diniso* (supra) at 533).

[26] Another pitfall of leading questions put to the accused as formulated by the magistrate is that an indeterminable answer is often the result, as in this case. The question by the magistrate: 'Do you agree or disagree' (that you were negligent) elicited the reply 'Yes Yourship'. The uncertainty is to which question did the accused reply? Did he agree that he was negligent or did he disagree? The magistrate simply assumed that he had agreed that he was negligent.

[27] In view of what I have stated afore-mentioned in respect of the conviction for culpable homicide the hearing of the accused person was unfair in the sense that the magistrate was not impartial and the conviction should be set aside.

[28] In respect of the sentence imposed for count 2 (ie driving a motor vehicle without a driver's licence). The maximum penalty was imposed. It is common cause that the accused was a first offender. In my view the magistrate misdirected herself by imposing the maximum prescribed penalty in the circumstances and the sentence should be set aside.

[29] In the result the following orders are made:

- (a) The conviction and sentence in respect of count 1 (culpable homicide) are set aside.
- (b) The record is returned to the control magistrate who must assign a magistrate to further deal with the matter.

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- (c) The magistrate so assigned must in respect of the first count enter a plea of not guilty in terms of section 113 of Act 51 of 1977 and request the prosecutor to lead evidence.
- (d) The conviction in respect of the count 2 is confirmed but the sentence is set aside.
- (e) The assigned magistrate must impose sentence afresh in respect of count 2.

E P B HOFF
Judge

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H GEIER
Judge