



HIGH COURT OF MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 23/2013

In the matter between:

THE STATE

And

KENDANDEI GHAD TJIVIKUA

ACCUSED

(HIGH COURT MAIN DIVISION CASE NO 549/2012)

Neutral citation: *The State v Tjivikua*(CR 23/2013) [2013] NAHCNLD 83 (28 March 2013)

Coram: NDAUENDAPO J et UEITELE J

Delivered: 28 March 2013

ORDER

1. A plea of not guilty in terms of s 113 of the Criminal Procedure Act 51 of 197 is entered and the prosecution is required to proceed with the trial.

2. The matter is hereby remitted back to the Katutura magistrate court to comply with s.113 of Act 51 of 1977.

JUDGMENT

NDAUENDAPO J (UEITELE J concurring):

[1] Before me is a review case. The accused appeared in the magistrate's court Katutura on a charge of failing to safeguard a firearm in contravention of section 38 (1) (j) read with section 1, 3 (8), (2) and 39 of Act 7 of 1996 as amended. The allegations being that 'upon or about the 10th day of December 2010 at or near Windhoek in the district of Windhoek the accused did wrongfully and unlawfully fail to safeguard an arm in his lawful possession, to wit 1 X BRNO Pistol calibre 32/7.655 serial No J62000 when such was not carried on his person or was not under his direct control'.

[2] The accused who was not represented pleaded guilty and was questioned by the magistrate in terms of section 112 (1) (b) of Act 51 of 1977. The magistrate was satisfied with the answers given and convicted the accused. He was sentenced to pay a fine of N\$3000 or six months imprisonment.

[3] When the matter came before me, I directed the following query to the magistrate: 'on what basis was the magistrate satisfied that the accused admitted guilt on all the elements of the offence having regard to the following exchanges between the magistrate and accused:

"Question would you say, based on your actions on 10 December 2010, that you employed proper measures to safeguard the pistol?"

Answer: *yes* '

The magistrate replied to my query as follows: “with respect to the query I must concede that the answer of the accused also had me in a bit of doubt. However, I went back to the preceding questions and answers, particularly the circumstance under which the accused lost the firearm. Allow me to quote, “I placed it on top of the vehicle with other luggage. I do not know if it fell off.....I had it on my body and then put it on top of the vehicle I think. I then drove without removing it from the top of the vehicle. It may have fallen off. I do not know for sure” Despite admitting not doing what is expected of him by law in the event that the firearm is not carried on his person or under his direct control in conjunction with his conduct the time of losing the arm the accused still opined that he employed proper measures to safeguard the arm. In the opinion of the court the view held by the accused is subjective. However, for the offence that the accused was charged with fault in the form of negligence will surface (sic). The conduct of the accused is to be viewed objectively. Would the reasonable man, if he found himself in the same circumstances as the accused, have acted in any other manner? After having applied the reasonable man (sic) test the court found that the accused acted in a negligent manner at the time that he lost the arm, considering his reason of events on the premise the court was satisfied of the accused person’s guilt and convicted him accordingly’. (My underlining)

[4] The legal position

In *S v Ntlakoe 1995 (1) SACR 629 (0)* the court held that:

Head note:

‘when an accused pleads guilty to an offence and the court is in doubt as to whether the accused is in law guilty of the offence to which he has pleaded guilty, or is satisfied that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation, or that he has a valid defence to the charge, the court is obliged in terms of S 113 of the criminal Procedure Act 51 of 1977 to record a plea of not guilty and to require the prosecutor to proceed with the prosecution.

In *S v Nyanga 2004 (1) SA CR 198 C 201 b-e Moosa J* observed 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) of 263 H-I, S v Mathe 1981 (3) SA 664 (NC) at 669 E_G* .'

The second phase of the enquiry amounts essentially to a conclusion of law based on 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*. These are conclusions of law. If the court is satisfied that the admissions adequately cover all these elements of the offence, the court is entitled to convict the accused on the charge to which he pleaded guilty'.

In *S v Mkhize 1978 (1) SA 264 (N) 268 A-B Didcott J* concluded that it is not the function of the court to evaluate the answers as if it were weighing evidence or to judge the truthfulness or plausibility of the answer. The 'test 'is what the accused person has said, not what the court thinks of it'. (my underlining)

[5] The accused told the court that 'I placed it on top of the vehicle with other luggage. I do not know if it fell off. I had it on my body and then put it on top of the vehicle I think. (Underlining)

The accused also told the magistrate that he employed proper measures on the day the pistol got lost, to safeguard the pistol. That is clearly not an admission of an essential element of the offence. For the magistrate to say 'the accused still opined that he employed proper measure to safeguard the arm' and that in the opinion of the court the view held by the accused is subjective' and that the conduct of the accused is to be viewed objectively' is clearly wrong. The court must determine whether the accused consciously (subjectively), intended to plead guilty. It is what the accused said – therefore it is subjective and not objective as the magistrate opined. Fault in the form of negligence is an essential element of the offence and I am not satisfied that the accused admitted that element.

[6] In the result, the conviction and sentence are set aside and substituted with the following order:

1. A plea of not guilty in terms of s 113 of the Criminal Procedure Act 51 of 197 is entered and the prosecution is required to proceed with the trial.
2. The matter is hereby remitted back to the Katutura magistrate court to comply with s.113 of Act 51 of 1977.

GN NDAUENDAPO
JUDGE

SF I UEITELE
JUDGE