



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR: 10/2014

In the matter between:

**THE STATE**

and

**NDEMBERE BERTHOLD KAPIRUKA**

**ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO. 1577/2013)

**Neutral citation:** *S v Kafiruka* (CR 10/2014) [2014] NAHCMD 86 (14 March 2014)

**Coram:** HOFF J and SHIVUTE J

**Delivered:** 14 March 2014

**Summary:** Plea of guilty – magistrate applies provisions of s 112(1)(a) and convicts accused on mere plea of guilty – During mitigation accused indicated that he did not commit act intentionally – In terms of s 113 if court at any stage of the proceedings under s 112 and before sentence is in law not satisfied that the accused is guilty of the offence, the court shall record a plea of not guilty – Magistrate obliged in terms of s 113(1) to enter plea of not guilty and order prosecutor to proceed with the prosecution.

Proceedings under s 112(1)(a) not excluded from the operation of s 113(1) simply because it deals with lesser offences – Provisions of s 113 are preemptory.

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### **ORDER**

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- (a) The conviction and sentence are set aside.
  - (b) The record is returned to the magistrate and she is ordered to enter a plea of not guilty in terms of the provisions of s 113 and ask the prosecutor to proceed with the prosecution.
  - (c) Should the accused person be convicted after trial, the magistrate must in considering an appropriate sentence have regard to the fact the accused has been serving a prison term since 25 October 2013, when sentence was imposed.
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### **JUDGMENT**

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HOFF J (SHIVUTE J concurring):

[1] The accused was charged in the magistrate's court of the crime of assaulting a police officer in contravention of the provisions of s 35 of Act 19 of 1990. The accused pleaded guilty and the magistrate applying the provisions of s 112(1)(a) of Act 51 of 1977 convicted the accused person on his plea of guilty and sentenced him to a fine of N\$3000 or ten months imprisonment.

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

'Could you please provide me with your reasons why this matter was finalised in terms of section 112(1)(a)?

The accused stated that it was not his intention. If the accused had been questioned in terms of section 112(1)(b), and stated that it was not his intention, surely the court would have entered a plea of not guilty.'

[3] The magistrate in her reply referred to the provisions of the Criminal Procedure Act 51 of 1977 as amended to the effect that she exercised her discretion since she was of the view that the offence does not merit punishment of a fine exceeding N\$6000. I do not wish at this stage to discuss in detail the nature of a magistrate's discretion in terms of the provisions of s 112(1)(a) and when such a discretion should be exercised. (See *S v Onesmus*; *S v Amukoto*; *S v Mweshipange* 2011 (2) NR 461 (HC).

[4] However, as was stated in *S v Onesmus* (supra), it is unacceptable where a prosecutor holds the view that a case may be finalised in terms of s 112(1)(a), thereby implying that such an offence is a minor offence, and then when addressing the court on sentence, submits that the offence is of a serious nature.

[5] In the present matter the prosecutor did not ask that the matter be finalised in terms of s 112(1)(a) but it is apparent from the record that the magistrate *mero motu* applied s 112(1)(a) and thereafter imposed a sentence of N\$3000 or ten months imprisonment. It must be stated that the maximum penalty prescribed for a contravention of s 35(1) of Act 19 of 1990 is a fine not exceeding N\$4000 or to imprisonment for a period not exceeding 12 months imprisonment. The sentence imposed by the magistrate was close to the prescribed maximum penalty. Where an alternative imprisonment of ten months are imposed this, in my view, certainly is not a sentence a court would ordinarily impose in respect of a minor offence.

[6] It has recently almost become a mantra when some magistrates are being queried why a case was finalised in terms of s 112(1)(a), to respond that the Criminal Procedure Act, as amended, authorises the exercise of such a discretion, without due regard to the purpose of s 112(1)(a). A consequence of the exercise of this discretion by magistrates is that the number of cases finalised in terms of s 112(1)(a), and which are reviewable, exponentially increase the number of cases that are being sent on review.

[7] I shall now turn to the charge sheet and a portion of the proceedings in the court a quo. It appears from the charge sheet that the assault consisted of the accused grabbing the police officer by the neck which resulted in the police uniform being torn in the process.

[8] In mitigation of sentence the accused stated *inter alia* the following:

'I am asking the police officer to forgive me since it was not my intention.'

[9] Section 113 of Act 51 of 1977 provides as follows:

'If the court at any stage of the proceedings under section 112 and before sentence is passed is in doubt 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 . . . the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: . . .'

[10] Section 113 deals with the correction of a plea of guilty to one of not guilty. The general approach by a court in such an instance is *in favorem innocentiae* and proceedings under s 112(1)(a) are not excluded from the operation of s 113(1).

[11] In *S v Malili and Another* 1988 (4) SA 620 TPD Goldstein J at 623F stated that s 113, which deals with the correction of a plea of guilty, the words 'at any stage' and 'before sentence is passed' are important since it is clear that the section lays down rules which apply *before* and *after* conviction. At 626B it was held that the word 'shall' in the phrase 'the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution' indicates that the provisions of the section are peremptory.

[12] Where in terms of s 112 a court only relies on the plea of guilty by an accused person or his or her admissions, s 113 was intended by the legislature to serve as a safety-valve.

[13] In *Attorney-General, Transvaal v Botha* 1993 (2) SACR 587 (A) at 591 Smalberger JA stated that there is no legal or logical justification for the view that 'the proceedings under s 112' should be limited to proceedings under s 112(1)(b) only.

[14] Smalberger JA at 591b expressed himself as follows:

'The natural meaning of the words embrace *all* proceedings under s 112, ie both under s 112(1)(a) and (b). There is clearly scope for the operation of s 113(1) in respect of both those subsections.'

and continues as follows on 591d-3:

'There is no reason to believe that the Legislature intended to exclude s 112(1)(a) from the operation of s 113(1) simply because it deals with lesser offences. An accused person's right to protection against a wrong conviction is no less important if the offence is a minor than if it is major. In either case there is an equal possibility of an unjustified plea of guilty, and in the case of a minor offence the primary protection afforded by pre-conviction interrogation is lacking. What is more, such a limited interpretation does not conform to the well-known rule of interpretation that the Legislature intends all persons affected by its enactments to be treated equally.'

(See also *S v Nixon* 2000 (2) SACR 79 (WLD); *S v Carter* 2007 (2) SACR 415 (SCA) at 431g-i)

[15] The magistrate stated that she did not record a plea of not guilty because the accused 'regretted a lot of what he did'. This, however, is immaterial. What is relevant is the fact that the accused denied that he had the required intention to commit the offence. The protection afforded by pre-conviction interrogation was lacking and as the magistrate conceded she certainly would have entered a plea of not guilty had she questioned the accused person in terms of the provisions of s 112(1)(b).

[16] In the circumstances the conviction and sentence imposed cannot be allowed to stand. I must mention that it appears from the record that the accused did not pay the fine imposed.

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

- (a) The conviction and sentence are set aside.
- (b) The record is returned to the magistrate and she is ordered to enter a plea of not guilty in terms of the provisions of s 113 and ask the prosecutor to proceed with the prosecution.
- (c) Should the accused person be convicted after trial, the magistrate must in considering an appropriate sentence have regard to the fact the accused has been serving a prison term since 25 October 2013, when sentence was imposed.

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E P B HOFF  
Judge

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N N SHIVUTE  
Judge

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