REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: The State v Jonas Kamutumwa	**Case No:** CR 104/2023
High Court MD Review No:1372/2023	**Division of Court:** High Court, Main Division
Coram: Liebenberg J *et* Shivute J	**Delivered:** 16 October 2023
Neutral citation: *S v Kamutumwa* (CR 104/2023) [2023] NAHCMD 651 (16 October 2023)	
ORDER: 1. The conviction and sentence on count 3 are confirmed. 2. The conviction and sentence on counts 1 and 2 are set aside and the matter is remitted to the court *a quo* to deal with the matter in accordance with the law.	
REASONS:	
LIEBENBERG J (SHIVUTE J concurring):	

[1] Before court is a review emanating from the Magistrate's Court for the district of Katima Mulilo where the accused was arraigned on charges of; assault with intent to do grievous bodily harm; assault on a member of the police; and, a contravention of s 34(3) read with sections 1, 24, 26, 27, 28, 29, 34(2),34(3) and 35 of the Immigration Control Act 7 of 1993 – found in Namibia without being in possession of a permit.

[2] The accused pleaded guilty on counts 1 and 3 and was convicted on his guilty plea. As far as count 2 is concerned, the accused made certain admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977 (the CPA) and was thereafter convicted. He was sentenced to N$2000 or 3 months' imprisonment for each count.

[3] When the matter came on automatic review, a query was directed to the court *a quo* pertaining to whether or not – considering that the accused raised a defense – it was not compelled to enter a plea of not guilty at that stage; and, whether or not the correct procedure was followed as regards count 2 before convicting the accused.

[4] In response, the magistrate concedes that as regards count 1, the accused did indeed raise a defense and that the matter should have been dealt with in terms of s 113 of the CPA. He further concedes that following the admissions in terms of s 220 of the CPA, the correct procedure was not followed.

[5] During the court's questioning in terms of s 112(1)*(b)* as far as count 1 is concerned, the court *a quo* posed the question: 'What exactly did you do to the complainant?' to which the accused responded: 'I assaulted him with a stick on his head. Complainant is the one who assaulted me first. In fact, it was his stick which he wanted to use on me. I simply disarmed him.'

[6] Following the convictions on the guilty pleas in respect of counts 1 and 3, the matter was postponed for trial. On the trial date, the accused intimated that he wished to make admissions in respect of count 2 which he did. It was following these admissions that the court pronounced itself as follows: 'Court satisfied that accused admits the elements in the charge and thus finds you guilty as charged.' The accused's rights to

mitigation before sentence were then read to him and he was sentenced.

[7] Regarding count 1, it is clear from the accused's answer that he raised a defense and the law explicitly provides the procedure a court should invoke when such an instance arises. This position has been elucidated as follows in *S v Pieters*[1] at 828B – H:

'[10] In *S v Baron* 1978 (2) SA 510 (C) 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 198 (C) 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 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 – I; *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*. These are conclusions of law. 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.)" '

[8] The authorities are trite and the sentence and conviction in count 1 cannot be allowed to stand and must be set aside.

[9] As far as the admissions in count 2 are concerned, the magistrate rightly makes a concession that the correct procedure was not followed. It was stated in *S v April*[2] that the proper approach to record formal admissions from an unrepresented accused is that,

[1] *S v Pieters* 2014 (3) NR 825 (HC).
[2] *S v April* (CR 140/2022) [2022] NAHCMD 670 (8 December 2022). See *S v Mavundla* 1976 (4) SA 713 (N.P.D).

immediately when it becomes apparent that the accused wishes to make formal admissions, the court a quo must explain to the accused that the effect of making a formal admission is to relieve the state of the burden of proving the admitted facts by evidence, and that the accused is not compelled to assist the prosecution in proving its case. This notwithstanding, what should have been done after the admissions were made was for the state to be afforded an opportunity to close its case and for the accused to be put on his defence considering that he admitted sufficient allegations in the charge establishing a *prima facie* case against him.[3] It would seem that as soon as the magistrate was satisfied that the accused had admitted all the elements of the offence, that that spelled the end of the matter. Hence, the finding of guilty and, subsequently, sentencing of the accused.

[10] Similarly to count 1, the conviction and sentence on count 2 can therefore not stand and must be set aside.

[11] In the result, it is ordered that:

1. The conviction and sentence on count 3 are confirmed.
2. The conviction and sentence on counts 1 and 2 are set aside and the matter is remitted to the court *a quo* to deal with the matter in accordance with the law.

J C LIEBENBERG **JUDGE**	**N N SHIVUTE** **JUDGE**

[3] *S v Kakulubelwa* (CR 97/2019) [2019] NAHCMD 521 (28 November 2019).