

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: <i>The State v Edward !!Garoeb</i>	Case No: CR 16/2024
High Court MD Review No.: 2037/2023	Division of Court: Main Division
Heard before: Shivute J et Christiaan J	Delivered on: 4 March 2024
Neutral citation: <i>S v !!Garoeb</i> (CR 16/2024) [2024] NAHCMD 79 (4 March 2024)	
Order: <ol style="list-style-type: none">1. The conviction and sentence are set aside.2. The accused is to be released forthwith.	
Reasons for order:	
SHIVUTE J (concurring Christiaan J): [1] This is a review in terms of s 302 of the Criminal Procedure Act 51 of 1977 (the CPA).	

[2] The accused was charged with the crime of assault with intent to do grievous bodily harm. He pleaded guilty to the charge and the court applied s 112(1)(b) of the CPA and found the accused guilty as charged.

[3] Thereafter, the court enquired from the State whether it accepted the plea. The prosecutor indicated that the State would not accept the plea and that it wished to proceed with the trial. He further made an application for admissions made by the accused to be admitted in terms of s 220 of the CPA. The court ruled that admissions made in terms of s 220 were to form part of the record. The trial proceeded and the accused was again convicted and sentenced to six (6) months' imprisonment.

[4] I directed two queries to the magistrate. The first was, what had happened to the first conviction and the second was, what provisions of the law allowed the court a quo to proceed with the trial after it had convicted the accused in terms of s 112(1)(b) of the CPA.

[5] The learned magistrate responded, among other things, as follows:

(i) The court was satisfied with accused's plea of guilt. However, the State did not accept the plea, hence State wanted to lead evidence of the injuries that the minor child sustained in terms of section 25(2) of the Domestic Violence Act 4 of 2003 before sentencing.

(ii) As a result, we proceeded to trial. It came to my attention during the perusal of the court record that I was supposed to indicate that I entered a plea of not guilty in terms of section 113 of the CPA after admitting section 220 of the CPA into the court record. It was an oversight on my side.'

[6] I pause here to observe that the court a quo stated that the accused was charged with assault with intent to do grievous bodily harm read with s 25(2) of the Domestic Violence Act 4 of 2003. There is no Act known as Domestic Violence Act. The correct name of the Act is, Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003).

Magistrates are enjoined to refer to the Act by its correct statutory name and must desist from referring to it as 'Domestic Violence Act.'

[7] Returning to the query, the court a quo rightly conceded that it should have entered a plea of not guilty first before it proceeded with the trial.

[8] However, what transpired during the proceedings was that when the court a quo invoked the provisions of s 112(1)(b) of the CPA, the accused admitted all the elements of assault but not the additional element of the offence of assault with intent to do grievous bodily harm, namely; the intention to do grievous bodily harm as it was not canvassed through questioning. The court a quo only asked the accused whether he intended to cause injury to the complainant and not whether he intended to cause serious injury.

[9] Furthermore, the court enquired from the State if it accepted the plea after it had convicted the accused. The correct procedure, is of course, that the court a quo should have enquired from the State before it pronounced itself that the accused was guilty as charged.

[10] Again, the State prosecutor applied for the admissions made by the accused in terms of s 112(1)(b) of the CPA to be recorded as formal admissions in terms of s 220 of the same Act and the court a quo was misled into making the order as prayed for.

[11] The correct procedure to be followed when an accused pleads guilty in terms of s 112 (1)(b) of the CPA is provided for in the section as follows:

'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 and the prosecutor accepts that plea-

(b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding N\$6000, or if requested there to 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.

Section 112(3) provides as follows:

‘Nothing in this section shall prevent the prosecutor from presenting evidence on aspect of the charge or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.’

[12] Section 113 deals with the correction of a plea of guilty to that of not guilty and provides the following:

‘s 113 if the court at any stage of the proceedings under s 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 or that the accused has incorrectly admitted any such allegation in the charge or that the accused has a valid defence to the charge, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution. Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.’

[13] If the court invokes the provisions of s 112(1)(b) of the CPA and the accused admits only certain allegations and the State wishes to lead evidence to prove the allegations that are not admitted, there is no need for the court to record admissions in terms of s 220 of the CPA. What the court needs to do is to record a plea of not guilty in terms of s 113 of the CPA and to inform the accused that any allegation admitted by the accused up to the stage it recorded a plea of not guilty shall stand as proof in any court of such allegation.

[14] It is also worth mentioning that a plea of not guilty can be entered any time before sentence is passed as per requirements of s 113 of the CPA and the matter may proceed to trial. In that event, the earlier conviction will automatically fall away.

[15] In the present matter, the magistrate did not follow the proper procedure as prescribed above. After convicting the accused, she proceeded with the trial without invoking the provisions of s 113 of the CPA. Thereafter, the accused was convicted as charged and sentenced to six months' imprisonment.

[16] Since the proceedings were riddled with serious irregularities the conviction and sentence cannot be allowed to stand. The irregularities committed are sufficient to vitiate the proceedings.

[17] In the premise, the following order is made:

1. The conviction and sentence are set aside.
2. The accused is to be released forthwith.

N N SHIVUTE JUDGE	P CHRISTIAAN JUDGE