



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 61/2016

In the matter between:

JOSEPH SHONALE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Shonale v S* (CA 61/2016 [2017] NAHCNLD 35 (25 April 2017))

Coram: JANUARY, J and TOMMASI, J

Heard: 17 March 2017

Delivered: 25 April 2017

Flynote: Criminal Procedure – Appeal – Conviction and sentence – Plea of guilty – Questioning in terms of section 112(1)(b) of Act 51 of 1977 – When questioning an accused in terms of this section, Court must be satisfied that accused admits all elements of offence before finding an accused guilty

Summary: The appellant was convicted on five charges of assault with intent to do grievous bodily harm and a charge of crimen injuria on his pleas of guilty. The magistrate questioned the appellant and thereafter recorded that he was satisfied that the appellant was guilty. The questioning did not cover the element of intention to do grievous bodily harm. The appellant answered to the question of what his intention was that it was because he was angry. This does not cover the intent to do grievous bodily harm. His intention on the charge of crimen injuria was also not properly covered by questioning and answers given. The court also failed to notify the complainant or her next of kin to exercise their right to express their views in relation to sentence as is provided for by section 25 of the Domestic Violence Act, Act 4 of 2003. The convictions and sentences are set aside and the matter is remitted to the magistrate in terms of section 312 of the CPA.

ORDER

1. The appeal against conviction and sentence is upheld;
2. The conviction and sentence are set aside;
3. The matter is in terms of section 312 of the CPA remitted to the magistrate to further question the appellant in compliance with the provisions of section 112(1)(b) of the CPA, and if he is not satisfied after questioning that the appellant is guilty, to deal with the matter in terms of section 113 of the CPA.

APPEAL JUDGMENT

JANUARY, J (TOMMASI, J CONCURRING)

[1] The appellant in this matter was arraigned in the Magistrate's court, Ondangwa on five charges of assault to do grievous bodily harm read with the provisions of the Domestic Violence Act, Act 4 of 2003 and one charge of *crimen injuria* also read with the provisions of the domestic violence act. The appellant was not legally represented and pleaded guilty to the charges.

[2] The magistrate questioned the appellant in terms section 112(1)(b) of the Criminal Procedure Act, Act 51 of 1977 (the CPA) and convicted him on his pleas of guilty. The appellant was sentenced to an effective term of 77 months' imprisonment on all the counts. The appellant timeously filed a notice of appeal against sentence only. Mr J Greyling is representing the appellant in this court *amicus curiae* and Ms Amupolo is representing the respondent. Both counsel filed substantive heads of argument for which I am grateful. Both counsel are *ad idem* that the learned magistrate could not have been satisfied that the appellant is guilty from his questioning and answers provided by the appellant. They submitted that the matter must be remitted to the magistrate's court to further question the appellant in terms of section 112(1)(b) of the CPA to satisfy himself whether the appellant is guilty or not.

[3] The allegations are respectively as follows:

- i. That during a day in March 2014 the appellant wrongfully, unlawfully intentionally and maliciously assaulted his girlfriend, Ndilimeke Petrus, by beating her with a panga on her shoulder while she was pregnant with intent to do her grievous bodily harm.
- ii. That during a day in October 2015 the appellant wrongfully, unlawfully, intentionally and maliciously assaulted his girlfriend, Ndilimeke Petrus by

beating her with a fist on the forehead, pouring water on her and throwing sand on her body with intent to do her grievous bodily harm.

- iii. That during a day in November 2015 the appellant wrongfully, unlawfully, intentionally and maliciously assaulted his girlfriend, Ndilimeke Petrus by beating her with a dry stick on her thighs and back with intent to do her grievous bodily harm.
- iv. That on or about the 02nd December 2015 the appellant wrongfully, unlawfully, intentionally and maliciously assaulted his girlfriend, Ndilimeke Petrus by beating her with an axe handle on the face with intent to do her grievous bodily harm.
- v. That on or about the 07th December 2015 the appellant wrongfully, unlawfully, intentionally and maliciously assaulted his girlfriend, Ndilimeke Petrus by beating her with an axe handle on her buttocks and back with intent to do her grievous bodily harm.
- vi. That on or about 02nd December 2015 the appellant wrongfully and intentionally injure, insult and impair the dignity of his girlfriend, Ndilimeke Petrus by swearing at her using obscene language, to wit that she is a stupid whore.

[4] The record reflects the following;

'Questioning by Court

Q: Do you understand the charges against you?

A: Yes.

Q: During March 2014, were you at or near Omeya Village in this district?

A: Yes.

Q: It is alleged that you beat Ndilimeke Petrus with a panga on her shoulder while she was pregnant, do you dispute that?

A: No.

Q: Is it correct that Ndilimeke Petrus is your girlfriend?

A: Yes.

Q: Do you know that your act was wrong, unlawful and you can be punished?

A: Yes.

Q: What was your intention to do that?

A: We argued and I got angry and beat her. (sic)

Q: Do you know that a panga is a dangerous weapon?

A: Yes.

Q: During October 2015, were you also at the same village in this district?

A: Yes.

Q: It is alleged that you beat Ndilimeke Petrus your girlfriend with a fist on her forehead, poured her with water and threw sand on her body, do you dispute that?

A: No.

Q: What was your intention to do that?

A: Just because of arguments.

Q: Why did you do all these on her?

A: Because of anger.

Q: Did you know that your act was wrong, unlawful and you can be punished?

A: Yes.

Q: During November 2015, were you at or near Omeya Village in this district?

A: Yes.

Q: It is alleged that you beat Ndilimeke Petrus your girlfriend with a dry stick on her thighs and at the back, do you dispute that?

A: No.

Q: What was your intention to do that?

A: I beat her after I got angry.

Q: Do you know that your act was wrong, unlawful and you can be punished?

A: Yes.

Q: On the 02.12.15 were you at or near Omeya Village in this district?

A: Yes.

Q: It is alleged that you beat your girlfriend with an axe handle on her face, do you dispute that?

A: No.

Q: Do you know that you caused her grievous bodily harm?

A: Yes.

Q: What was your intention to do that?

A: Just because of anger.

Q: Do you know that your act was wrong, unlawful and you can be punished?

A: Yes.

Q: On the 07 12.15 were you at or near Omeya Village in this district?

A: Yes.

Q: It is alleged that you beat your girlfriend Ndilimeke Petrus with an axe handle on her buttocks and back, do you dispute that?

A: No.

Q: What was your intention to do that?

A: I got angry.

Q: Do you know that your act was wrong, unlawful and you can be punished?

A: Yes.

Q: On 02.12.15 were you at or near Omeya Village in this district?

A: Yes.

Q: It is alleged that you insult your girlfriend Ndilimeke Petrus by saying that she is a stupid whore, do you dispute that?

A: No.

Q: Do you know that you degraded her dignity as a human being and you injured her in person?

A: Yes.

Q: Do you know that your act was wrong unlawful and you can be punished?

A: Yes.

Court: The court is satisfied that accused has admitted all the allegations for the offences he is charged with and convicts him accordingly.'

[4] Section 112(1)(b) of the CPA provides that:

'112 Plea of guilty

(1) 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 on the charge and the prosecutor accepts that plea-

(a) ...

(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\$6 000, or if requested thereto 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. (my emphasis)

[Para (b) substituted by sec 9(b) of Act 31 of 1985 and by sec 7 of Act 13 of 2010.]'

[5] It is evident that when the magistrate questioned the appellant on all charges of assault with intent to do grievous bodily harm on what his intention was by assaulting the complainant that he responded that it was because of anger. These answers do not in the least satisfy the crime of common assault nor the element of intent to cause grievous bodily harm nor could the magistrate infer that the appellant intended to inflict grievous bodily harm. I agree with Maritz J (as he then was) where he stated in *S v Minithika*¹ as follows:

'Whilst the court may usually infer an accused's state of mind from evidence about the nature of the weapon or instrument used; the degree of force used by the accused in wielding that instrument or weapon: the situation on the body where the assault was directed and the injuries actually sustained by the victim of the assault (see: *S v Mbelu* 1966 (1) PH H176 (N), the answers given by an accused in the course of a section 112(1)(b) inquiry do not constitute "evidence" on oath from which such inferences may be drawn. (See *S v Naidoo* 1989(2) SA 114 (A) and *S v Nagel* 1998 SACR 218 (O). "The test is what the accused person has said, not what the court thinks of it." Compare also *S v Nkosi*, 1986 (2) SA 261 (T).'

[6] The answers of the appellant that he acted as he did because of anger, in my view, suggests a possible defence of provocation as 'provocation may be one of the circumstances

¹ Case no. 57/2005, unreported, delivered 26/05/2005 at p4

in which the accused may be incapable of formulating the necessary intent to do grievous bodily harm² likewise as in the case of *S v Minithika* referred to above.

[7] The answer of the appellant on the questioning of *crimen injuria* in my view also does not establish the intent to injure and insult. Simple questions like; ‘Why did you insult the complainant?; What did you want to achieve with the insulting or bad words?; What was your intention of using that foul or bad words?’; for example could have solved the issue.

[8] I respectfully agree with Hoff J (as he then was) where he dealt with the purpose of section 112(1)(b) in *S v Pieters*³ with reference to case law as follows:

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

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

[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:’

D “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

² Milton, *South African Criminal Law and Procedure* Vol 1 (3rd Ed) at p433

³ 2014 (3)NR 825 at 828 B-J

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.)”

[12] ‘In *S v Naidoo* 1989 (2) SA 114 (A) at 121F – G 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 (W), a case dealing with the negligent loss of a firearm 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 type of case but in all cases in which generic legal concepts, particularly concepts such as reasonableness, negligence and recklessness, constitute an essential ingredient of the offence charged.”

[9] The questioning by the learned magistrate does not cover the element of intent to do grievous bodily harm and the magistrate could not have been satisfied that he is indeed guilty. The case therefore stands to be remitted for further and proper questioning in compliance with section 112(1)(b) of the CPA or the entering of a plea of not guilty in terms of section 113 of the CPA.

[10] Section 25 of the Combating of Domestic Violence Act, Act 4 of 2003 provides;

‘25 Complainant's submission in respect of sentence

(1) The court must, if reasonably possible and within a reasonable time, notify the complainant or the complainant's next of kin, if the complainant is deceased, of the time and place of sentencing in a case of a domestic violence offence against the complainant.

(2) At the time of sentencing, the complainant, the complainant's next of kin, if the complainant is deceased, or a person designated by the complainant or the complainant's next of kin has the right to appear personally and has the right to reasonably express any views concerning the crime, the person responsible, the impact of the crime on the complainant, and the need for restitution and compensation.

(3) A complainant, or the complainant's next of kin, if the complainant is deceased, who is unwilling or unable to appear personally at sentencing has the right to inform the court of his or her views on an appropriate sentence by means of an affidavit.'
(my emphasis)

[11] The complainant was called at the commencement of the case before the plea proceedings to testify in relation to her attitude of bail for the appellant. The complainant testified that she was not opposed to the granting of bail. She wanted the case to be withdrawn. She did not at all testify in relation to sentencing. At the sentencing the peremptory provisions of section 25 above mentioned was not complied with nor does it appear why the complainant or her next of kin was not notified about sentencing and her right or the right of her next of kin to appear and express their views concerning the crime and or the appellant. In my view this is another misdirection and an additional reason why the matter should be remitted to the magistrate to comply with the provisions of the act.

[12] In the result:

1. The appeal against conviction and sentence is upheld;
2. The conviction and sentence are set aside;
3. The matter is in terms of section 312 of the CPA remitted to the magistrate to further question the appellant in compliance with the provisions of section 112(1)(b) of the CPA and, if he is not satisfied after questioning that the appellant is guilty, to deal with the matter in terms of section 113 of the CPA.

H C JANUARY
JUDGE

M A TOMMASI
JUDGE

APPEARANCES:

For the Appellant:

Mr Jan Greyling Jnr. (*Amicus Curiae*)**Of Jan Greyling & Associates**

For the Respondent:

Adv. Amupolo

Of Office of the Prosecutor-General