REPUBLIC OF NAMIBIA **NOT REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 14/2015

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

And

ROBETH ISAK **ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO. 251/2015)

Neutral citation: *S v Isak (CR 14/2015) [2015] NAHCMD 84 (10 April 2015)*

CORAM: **SHIVUTE J** *et* **MASUKU, AJ**

Delivered on: 10 April 2015

Flynote: The accused was, after pleading guilty in terms of section 112 (1) (b) of the Criminal Procedure Act, convicted and sentenced by the Swakopmund Magistrate's

Court for assault with intent to do grievous bodily harm. The matter came up on automatic review before the High Court and the High Court raised issues regarding the propriety of the conviction on account of the answers returned by the accused during questioning, which revealed potential defences. A query addressed to the trial magistrate evoked an admission that the conviction should not stand. The High Court, five years after the conviction and sentence, set aside the conviction and that held that it is unconscionable in the circumstances to order a fresh trial in view of the fact that the accused would have by now completed serving his sentence.

JUDGMENT

MASUKU A.J.

[1] The accused person was arraigned before the Magistrate's Court in Swakopmund, charged with a single count of assault with intent to do grievous bodily harm. It was alleged in the charge sheet that on 3 November 2009, and at Swakopmund in the District of Swakopmund, the accused wrongfully, unlawfully and intentionally assaulted Lukas Kaulinge by stabbing him with a knife on his hand and hitting him with a glass, with intent to cause him grievous bodily harm.

[2] On 5 November 2009, the accused pleaded guilty to the said offence and the magistrate applied the provisions of section 112 (1) (b) of the Criminal Procedure Act[1]. The learned magistrate put questions to him in order to ascertain the unequivocal nature of the plea of guilty he had tendered and to also satisfy the court that all the elements of the offence had been ineluctably proved. The learned magistrate, after posing questions, listening to and recording the answers returned by the accused in response, was satisfied that the accused's plea was unequivocal and that the elements of the offence had been indubitably proved. He was accordingly found guilty as charged and sentenced to N$2000 or 10 months imprisonment.

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[1] Act 51 of 1977

[3] The matter was then referred to this court on automatic review. It served before Tommasi J. By letter dated 31 January 2011, the learned Judge remarked to the trial magistrate as follows in a query addressed to the trial magistrate:

> 'It appears that the accused is denying that he had the intention to do the complainant grievous bodily harm and he further raised a defense of self-defense although he stated he does not care what happened to the complainant did. The fact that the accused feel (*sic*) that he did something wrong does not necessarily mean that he acted unlawfully if grounds exist that justify his actions. Please indicate why the court was satisfied that the accused admitted all the elements of the crime.'

[4] By letter dated 15 April 2011, the magistrate responded to the learned Judge's query and in particular stated the following at paragraphs 4 and 5 of the letter in reply:

> '4. I therefore acknowledge that in the instant matter accused person admitted assaulting the complainant and that he did wrong but left a doubt whether he admitted all the elements of the offence he was charged with.
>
> 5. I therefore request that the conviction be set aside. Remitting the case back to me will not yield justice as intended accused was convicted and sentenced on 05/11/2009. The matter was sent on review on 21/01/2010. It was received by the Registrar on 08/02/2010. The Honourable Judge (*sic*) remarks are dated 31/01/2011. If the accused did not pay a fine he has already served his sentence.
>
> 6. Thus, the only benefit the accused may have is for criminal record to be scrapped on his name.'

The file was brought to me on 4 March 2015 to make an appropriate order in the circumstances.

[5] A reading of the record shows that the misgivings Tommasi J had regarding the question whether the offence wherewith he was charged had been proved were fully justified. In order to demonstrate this, it is necessary to quote verbatim relevant excerpts from the record of proceedings. In the course of the questioning, the following exchange took place between the trial court and the accused:

> 'Q: Who did you assault?
>
> A: Lukas Kaulinge
>
> Q: How did you assault him?

A: I slightly cut him on the left hand.

Q: it is alleged that you also cut him with a glass on his head, Is that so?

A: Correct.

Q Did you know by doing so you were committing an offence of which you could be punished for it?

A: Correct. I know it but I did not do it intentional (*sic*).

Q: Why did you do it?

A: I did it because I was angry as he said I slept with his girlfriend.

Q: Did anyone force (*sic*) to assault him?

A: He forced me because he beat me first with a brick and I have a wound on my shoulder.

Q: If he assaulted you why did you plead guilty?

A: Because what I did is wrong and do not care what he did.

Q: Did he provoke you that you were defending yourself?

A: No. I did wrong.'

[6] What is plain is that from the answers returned by the accused in response to the questions by the court in the quest to establish the unequivocal nature of the plea of guilty, at least two potential defences were raised by the accused, namely provocation and self-defence. The question then becomes whether the learned magistrate was properly satisfied that a plea of guilty should have followed? It is unnecessary to dwell on this question in the light of the magistrate's mature and measured response to the query raised by the reviewing Judge.

[7] Section 112 (1) (b) (*supra*) was described in *S v Nyanga* [2] as serving twin purposes, 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. . . The second phase of the enquiry amounts essentially to a conclusion of law based on the admissions. From the admissions the

[2] 2004 (1) SACR 198 (C) 201 *b-e*

> court must conclude whether the legal requirements for the commission of the offence have been met. They are 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.'

[8] As indicated above, the questioning yielded answers that cast a doubt regarding whether the accused's actions were unlawful, namely the raising of the two potential defences mentioned above. It was accordingly not proper for the learned magistrate to have convicted after the answers to questions posed suggested that the accused, unrepresented as he was, had possible defences available to him. The concession by the magistrate that the verdict was accordingly not in order is thus comely. In this regard, in *S v Naidoo* [3] it was held that:

> 'It is well settled that the section was designed to protect an accused from the consequences of an unjustified plea of guilty, and 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 not be entered and the matter clarified by evidence.'

[9] In view of the foregoing, it is clear that the court *a quo* did not properly apply the provisions of the said section in this matter. It should have been clear, after the answers from the accused that some of the elements of the offence had not been indubitably accepted by the accused, thus consigning the matter to be properly dealt with at trial and where the viability of the accused's potential defences would be properly examined. The only proper order to issue in the premises, is one setting the conviction aside.

[10] One other question arises immediately from the decision to set aside the conviction and it is this: is this a proper case in which the matter should be remitted to the court *a quo* to have the matter start afresh on the basis of a plea of not guilty? There are a few factors that in my view militate against the propriety of such an order. First,

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[3] 1989 (2) SA 114 (A) 121

the case was finalized a long time ago. This was in November 2009, in so far as the accused is concerned. To now rake dead embers and ignite a flame of a criminal trial some five or so years after the accused has paid his price to the community would be unconscionable.

[11] Second, and most importantly, as properly pointed out by the magistrate, the accused was convicted of the offence and either paid a fine or has already served his sentence. It would amount to him being subjected to double jeopardy to order a re-trial. The provisions of article 14 (2) of the Namibian Constitution are poignant and they guard against such eventualities. The said provision states the following:

> 'No persons shall be liable to be tried or punished again for any criminal offence for which they have already been convicted or acquitted according to law: provided that nothing in this Sub-Article shall be construed as changing the provisions of the common law defences of "previous acquittal" and "previous conviction.'

[12] It is accordingly clear that the court would be visiting manifold injustice to the accused were it to remit the matter for trial as the accused was in this case convicted and has clearly finished serving the sentence. There is no practicable way of ordering him to 'unserve' a sentence that he already has and this is where the concept of double jeopardy comes in, to avoid injustice.

[13] What may be of value to the accused, as the learned magistrate pointed out in her aforesaid letter, in response to the query by the reviewing judge is that an order setting aside the conviction, as should be the case, for the reasons stated above, would benefit the accused in so far as the conviction on his records would have to be expunged. That is reason enough, in my view, to deal with this matter even years after the accused has finished serving his sentence.

[14] I accordingly issue the following order:

14.1 The conviction of the accused returned by the Swakopmund Magistrate's Court on 5 November, 2009 is hereby set aside.

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TS Masuku, AJ

I agree

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N.N. Shivute, J