



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 34/2019

In the matter between:

**THE STATE**

v

**JOSEF SHUUYA**

**ACCUSED**

**(HIGH COURT MAIN DIVISION REVIEW REF NO. 502/2019)**

**Neutral citation:** *S v Shuuya* (CR 34/2019) [2019] NAHCMD 127 (30 April 2019)

**Coram:** USIKU J and UNENGU AJ

**Delivered:** 30 April 2019

**Flynote:** Plea – Guilty – Questioning in terms of section 112 (1)(b) of the Criminal Procedure Act, Act 51 of 1977 – Accused not admitting all allegations of the offence charged – Accused charged with offences under the Nature Conservation Ordinance 4 of 1975 – A plea of not guilty entered in terms of section 113 of the Criminal Procedure Act, Act 51 of 1977 – Magistrate acquitted accused persons in terms of section 174 after State’s case – Failure to put accused persons on own defence irregular and a serious misdirection.

**Summary:** Plea of guilty. Questioning in terms of section 112 (1)(b) of the Criminal Procedure Act, Act 51 of 1977. The two accused persons who were charged with offences under the Nature Conservation Ordinance 4 of 1975 pleaded guilty to the charges and were questioned by the Magistrate in terms of section 112 (1)(b) of the Criminal Procedure Act, Act 51 of 1977. However, a plea of not guilty in terms of section 113 was entered by the magistrate in respect of certain counts because the accused did not admit all the allegations in the charges brought against them by the State. After the prosecutor closed State’s case without leading evidence to prove the allegations not admitted by the accused, the magistrate acquitted the accused in terms of section 174 without placing them on own defence despite the accused having admitted some allegations of the offences charged with. On review, the Court set aside the acquittals in terms of section 174 and held that both the magistrate and the prosecutor are ignorant on the provisions of section 113.

Held: Further that the magistrate was wrong in law not to have placed the accused on own defence on the counts where a plea of not guilty was entered in terms of section 113.

Held: Further that the magistrate committed gross irregularity and it was a serious misdirection to acquit in terms of section 174 when some allegations in the charges were admitted by the accused under section 112 proceedings.

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**ORDER**

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### Accused One

1. The conviction and sentence in respect of counts one, two, four and five are in order and are confirmed.
2. The acquittal of accused one in respect of count three is hereby set aside.

### Accused Two

The acquittal of accused two on counts two, three, four and five are hereby set aside.

### The Magistrate

1. The Magistrate is directed to put accused one on his defence in respect of count three and accused two in respect of counts two, three, four and five.
2. It is directed that accused two be served with a notice to appear before court together with accused one on a date to be determined by the Clerk of the Court Karibib.

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## REVIEW JUDGMENT

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### **UNENGU AJ, (USIKU J concurring)**

[1] This matter was submitted for review following the provisions of section 302 of the Criminal Procedure Act.<sup>1</sup>

[2] The two accused who conducted their own defences appeared before the Karibib Magistrate's Court on five main with alternative counts each of offences under the Nature Conservation Ordinance,<sup>2</sup> ranging from illegal hunting of huntable

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<sup>1</sup> Act 51 of 1977.

<sup>2</sup> 4 of 1975 as amended.

protected and specially protected game to possession of the aforesaid game or their meat.

[3] After conviction and sentence, the matter, as already said, was submitted before me for review. A query was directed to the learned magistrate to explain certain errors made during the questioning in terms of section 112 (1)(b) of the Criminal Procedure Act.

[4] In her two pages response to the query, the learned magistrate rumbled over irrelevant issues not explaining errors made by her during the questioning.

[5] On count three, accused one when asked by the court why he was pleading guilty to count three, he answered that he was pleading guilty "because the tortoises is (sic) home."

On a follow up question recorded:

'What do you mean?' Accused one replied: 'I am pleading guilty because these things were found, they are at home.'

[6] When asked how many tortoises were there, the accused answered that he only picked up one. A plea of not guilty in terms of section 113 was entered by the magistrate as a result.

[7] The prosecutor however, decided to close the state's case in respect of count three without leading evidence to prove the number of tortoises found in possession of accused one. That being the case, the learned magistrate, and despite the fact that accused one admitted picking up one tortoise which he kept in his possession at his house found him not guilty and acquitted him in terms of section 174 of the Criminal Procedure Act.

[8] Similarly, in count two, accused two, who admitted hunting one oryx instead of two oryx, was also found not guilty and acquitted in terms of section 174.

[9] In respect of count three, accused two was also found not guilty and acquitted even though he had admitted picking up one instead of three tortoises from the veld which he took home, and with regard to count four and five, accused two admitted killing one oryx instead of two oryx and a sebra.

[10] This is what the learned magistrate has to say in her ruling on the application in terms of section 174 by accused one and two.

'Ruling on section 174 Application:

[1] Accused 1 and 2 were charged with various charges under the Nature Conservation Ordinance 4 of 1975 as per Annexures A, B, C, D, E, F and G.

[2] Accused 1 pleaded guilty to all the charges on 23 November 2018 and when section 112 (1)(b) of Act 51 of 1977 was applied Accused 1 was convicted of Counts 1, 2, 4 and 5. On Count 3 Accused 1 did not admit all the allegations of the charge and thus the plea was amended to not guilty in terms of section 113 of Act 51 of 1977. Accused 2 pleaded not guilty to count 1 and the alternative charge and guilty on all the remaining charges on 23 November 2018. When section 112 (1)(b) was applied to Accused 2 the pleas on Count 2, 3, 4 and 5 were all amended to not guilty in terms of section 113. Accused 1 and 2 are thus applying for discharge in terms of section 174 of Act 51 of 1977 at the close of the State's case in respect to all the charges where pleas of not guilty have been entered. To this end, it is accepted that at the close of the state's case the state must have proven a *prima facie* case upon which a reasonable Court may convict the Accused persons at that point in time. This simply means that the State reasonably needs to show the Court that Accused 1 and 2 had reasonably committed an offence by the time the State closes its case. State thus needs to produce incriminating evidence against the Accused persons and thus the *onus* rest on a balance of probabilities and not beyond reasonable doubt as Accused 1 and 2 have not yet been placed on their defences. I thus look to *State versus Ditshabue* (CC 26/2012) [2013] NAHCMD 261 (20/09/2013) which is law that this *onus* of proof does not shift to the Accused unless it is so removed by legislation and therefore where the state fails to place *prima facie* evidence at the close of its case and hops to plug holes in its case by putting the Accused in the witness box, such practice should not be allowed by the Court. Hence as per *State versus Mathebula & Another* (1997) (1) SACR 10 (W) AT 34J held that where the State fails to prove a *prima facie* case against the Accused at the close of the state case it cannot thereafter base its hope on accused's incriminating himself in his defence thereby supplementing its own lack of evidence

with that of the accused. By effect of the stated authorities I understand that where all of the elements of the offence in question are not reasonably proven by that State this Court is duty bound that an acquittal must follow in terms of section 174 of Act 51 of 1977 irrespective of the truthfulness or reasonableness of the Accused person's version. This is so because then reasonable doubt would exist to sway in favour of Accused 1 and 2 that they had not even committed an offence.

[3] State called no witnesses and lead not evidence and thus the State failed to proof a *prima facie* case against Accused 1 on Count 3 and Accused 2 on Count 1 to 5. It thus remains that State has failed to proof that Accused 1 and 2 had even been involved in the commission of this offences with which they remain charged and thus there is no evidence upon which a reasonable Court can convict the Accused persons on some of the charges at this point in time.

[4] Accordingly there is a danger that if Accused 1 and 2 are placed on their defence they would merely substitute the lack of evidence in the state's case and simply incriminate themselves which defeats the purpose of section 174 of Act 51 of 1977.

[5] Hence this Court rules that:

- (a) ACCUSED 1 IS FOUND NOT GUILTY AND ACQUITTED IN TERMS OF SECTION 174 OF ACT 51 OF 1977 ON COUNT 3.
- (b) ACCUSED 2 IS FOUND NOT GUILTY AND ACQUITTED IN TERMS OF SECTION 174 OF ACT 51 OF 1977 ON COUNT 1 AND ITS ALTERNATIVE, COUNT 2 AND ITS ALTERNATIVE, COUNT 3, COUNT 4 AND COUNT 5. WARRANT OF LIBERATION IS ALSO GRANTED FOR ACCUSED 2 TO BE REALEASED FROM CUSTODY.

ACCUSED 2 STANDS DOWN.'

[11] It is apparent from the ruling of the learned magistrate that both she and the prosecutor do not know what section 113 provides for even though she was quick to apply it.

[12] Section 113 provides for the correction of a plea of guilty and states the following:

'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 was 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 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] Any allegation, admitted by the accused under section 112 proceedings, up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation. And the court shall require the prosecution to proceed with the prosecution.

[14] Nowhere in her ruling is it stated that accused one and two incorrectly admitted the allegation in count three, in respect of accused one and accused two in respect of allegations admitted in counts two, three, four and five for the court not to put them on their defence.

[15] The magistrate is therefore, wrong in law not to have placed them on their defence on the counts indicated above consequently, she committed gross irregularity and it is a serious misdirection.

[16] In the result the following order is made:

#### Accused One

1. The conviction and sentence in respect of counts one, two, four and five are in order and are confirmed.
2. The acquittal of accused one in respect of count three is hereby set aside.

## Accused Two

The acquittal of accused two on counts two, three, four and five are hereby set aside.

## The Magistrate

1. The Magistrate is directed to put accused one on his defence in respect of count three and accused two in respect of counts two, three, four and five.
2. It is directed that accused two be served with a notice to appear before court together with accused one on a date to be determined by the Clerk of the Court Karibib.

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E P Unengu  
Acting Judge

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D N USIKU  
Judge