

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: The State v Geraldus Albertus Rieckert	Case No: CR 22/2024
High Court MD Review No.: 261/2024	Division of Court: Main Division
Heard before: Shivute J et Christiaan J	Delivered on: 26 March 2024
Neutral citation: <i>S v Rieckert</i> (CR 22/2024) [2024] NAHCMD 133 (26 March 2024)	
The order: <ol style="list-style-type: none">1. The conviction is set aside and substituted with one of common assault.2. The sentence is confirmed.	
Reasons for order:	
SHIVUTE J (CHRISTIAAN J concurring): [1] This is a review matter which came before me in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 as amended (the CPA).	

[2] The accused appeared in the Bethanie Magistrate's Court on one charge of common assault. The accused pleaded not guilty and the matter proceeded to trial. The accused after trial, was found guilty of assault with intent to do grievous bodily harm and sentenced to a fine of N\$2 500 or in default of payment, ten (10) months' imprisonment.

[3] When the matter came before me on review, I queried the presiding magistrate on why the accused was found guilty of assault with intent to do grievous bodily harm, while he was charged with and pleaded not guilty to common assault. I went further and asked the magistrate whether it is permissible for the court a quo to substitute a lesser offence for a serious offence.

[4] In reply to the query, the magistrate explains that the accused was found guilty of assault with intent to do grievous bodily harm because count 1 was amended on the charge sheet, but the person who made the amendment did not sign the charge sheet. He further explains that the record of proceedings do not reflect that the State applied for an amendment of count 1 to common assault and that, he was not certain about the amended charge. Additionally, the magistrate asserts that the NAMCIS reflects count 1 as assault with intent to do grievous bodily harm.

[5] The magistrate further replies that the court is not permitted to substitute a lesser offence for a serious offence.

[6] From considering the original record, the charge sheet initially provided for the charge of assault with intent to do grievous bodily harm. However, the State subsequently amended the charge to one of common assault by deleting the words 'with intent to do grievous bodily harm' and replacing it with the word 'common'. The State further in closing submissions, submitted that the accused is charged with common assault as per the amended charge sheet.

[7] The State is *dominus litis*, the Prosecutor General deriving her authority from

Article 88 of the Namibian Constitution and relevant provisions of the CPA. The power to choose the charges an accused will face, thus rests in the hands of the prosecution and not the court.

[8] It is evident from the record that the prosecutor in this matter amended the charge from one of assault with intent to do grievous bodily harm to one of common assault. The court must therefore, restrict itself to the charge preferred against the accused by the prosecutor.

[9] The only circumstance in which the court can find an accused guilty on a charge different to the one put to the accused by the prosecutor, is when the court finds the evidence to exonerate an accused on a charge, but is sufficient to find the accused guilty on a competent verdict, which is a less serious offence, missing some elements of the charge preferred by the prosecutor. In this case, common assault is a competent verdict of assault with intent to do grievous bodily harm.¹ Assault with intent to do grievous bodily harm is not a competent verdict of common assault.

[10] The court in this matter therefore, has no power to convict the accused of the offence of assault with intent to do grievous bodily harm, while he was charged with common assault.

[11] The sentence of a fine of N\$2500 or in default of payment, ten (10) months' imprisonment imposed by the court a quo, remains appropriate in the circumstances.

[12] In the result, it is ordered:

1. The conviction is set aside and substituted with one of common assault.
2. The sentence is confirmed.

¹ Section 266 of the Criminal Procedure Act 51 of 1977.

N N SHIVUTE JUDGE	P CHRISTIAAN JUDGE