



CASE NO.: CR 09/2011

**IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

THE STATE
and
RAINHOLD IMMANUEL

(HIGH COURT REVIEW CASE NO.: 02/2011)

CORAM: LIEBENBERG, J. et TOMMASI, J. Delivered on:

28.03.2011

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused appeared in the Magistrate's Court, Tsumeb, and pleaded guilty on a charge of assault with intent to do grievous bodily harm. After being questioned pursuant to the provisions of s 112 (1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977), he was sentenced to 12 months imprisonment.

[2] When the matter came before me on review, I directed the following query to the magistrate:

"On the court's questioning what the accused's intention was when he assaulted the complainant, he replied: 'It was anger'. The accused thereby did not admit that he had the intention to cause grievous bodily harm, an element of the offence charged. Therefore, could the court have been satisfied that 'the accused has admitted all the allegations of the offence of assault with intent to do grievous bodily harm'?"

[3] The s 112 (1)(b) questioning by the magistrate was as follows:

"Q: Has anybody persuaded or promised you anything should you plead guilty? A: No.

Q: On the 22/11/2010, were you at or near Oshivelo or at or near Cham-Cham

village in this district? A: Yes. Is (sic)

where I am staying. Q: What did you do to

plead guilty? A: I assaulted someone, my

wife.

Q: It is alleged that you assaulted Lydia Phillipus with fists and a knob-kierie. Do

you dispute that? A: I do not dispute it.

Q: What was your intention to do so? A: I

was anger. (sic)

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

A: Yes.

Q: Where on her body did you beat the Complainant?

*A: On her forehead and on her right side down her eye and then she ran away, I beat her on
her right ribs and she fell down." (Emphasis provided)*

[4] The magistrate in his reply was of the view that anger "*cannot be treated as defence or denial to the element of intention.*" The magistrate, respectfully, misses the point made in the

query namely, whether or not the accused during the s 112 (1)(b) questioning *admitted* having had the intention to cause grievous bodily harm when he assaulted the complainant.

[5] From the answers given by the accused, it is evident that he assaulted the complainant by hitting her with a knob-kierie on her head and ribs. However, in order to be convicted of the offence of assault with intent to caused grievous bodily harm on his plea of guilty, the court was required to question the accused on his state of mind; particularly, whether he acted with *intent* to cause grievous bodily harm. The magistrate was not entitled to infer from the accused's answers that he indeed had the required intent, as the accused's answers on questions by the court do not constitute 'evidence' from which the magistrate could draw inferences regarding elements of the offence not admitted by the accused.¹

[6] Had the accused in this instance stood trial, the court, in its assessment of the evidence, would have been entitled - in the absence of direct evidence - to make inferences regarding the accused person's state of mind during the commission of the assault; by looking at the nature of the weapon or instrument used; the degree of force applied in wielding the weapon or instrument; where on the body the assault was

S v Naidoo 1989 (2) SA 114 (A).

directed at; and the injuries actually sustained, if any. See: *S v Mbela*². Despite the complainant having been struck on the head twice with a knob-kierie and once in the ribs, there is nothing on record regarding the force applied and whether injuries were inflicted.

[7] In *The State v Sylvia Ahveendo*, a judgment I wrote, the following was said at p 2, para [4]:

"Where an accused is charged with assault with intent to do grievous bodily harm, the bodily

harm intended must be "really serious bodily harm" as was said in Director of Public Prosecutions v Smith, [1960] 3 All ER 161 (HL) at 171. What is required is that there must have been the intent to do more harm than inflicting the "casual and comparatively insignificant and superficial injuries which ordinarily follow upon an assault." See: S v Mbelu, 1966 (1) PH H 176 (N). This view is consistent with what was said by this Court in S v Tazama 1992 NR 190 namely that, the fact that a complainant suffers serious injury as a result of an assault is not in itself evidence of the intention to do grievous bodily harm."

[8] Therefore, *in casu*, from the answers given by the accused during questioning by the court *a quo*, it is clear that the accused did not admit that he had acted with the required intent and hence, could not have been convicted on his mere plea of guilty. Had the magistrate - as it appears from his reply - inferred from the accused's answer that he became angry when assaulting the complainant and thus acted with intent to cause grievous bodily harm, then he misdirected himself. In the circumstances, the conviction has to be set aside.

[9] In the result, the Court makes the following order: 1. The

conviction and sentence are set aside.

1966 (1) PH H176 (N).
(Unreported) Case No. CR 05/2010 delivered on 23.04.2010.

2. The matter is remitted to the Magistrate's Court, Tsumeb in terms of s 312 (1) of Act 51 of 1977 with the direction to comply with the provisions of s 112 (1)(b) or to act in terms of s 113, as the case may be.

LIEBENBERG, J

I concur.

TOMMASI, J