

**CASE NO.: CR 57/07**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**THE STATE**

versus

**KAUNDA MATUNDI**

**(HIGH COURT REVIEW CASE NO.: 148/07)**

**CORAM: VAN NIEKERK, J et SILUNGWE, AJ**

Delivered on: 2007-03-29

**REVIEW**

**JUDGMENT:**

**VAN NIEKERK, J:** [1] The accused in this matter pleaded guilty to a charge of assault with intent to do grievous bodily harm. The questioning in terms of section 112(1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977) went as follows:

"Q: Have been influenced by anyone to plead guilty.

A: No.

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Q: What exactly did you do that has made you plead guilty?

A: We altercated with complainant and exchanged words and I got stick and struck him on top of his head once sometime in January 2006.

Q: Did you know that by beating him on the head you were doing something unlawful.

A: Yes it was just out of anger.

Q: Was the complainant injured.

A: Yes, he had a cut on the head and bled.

Q: Did you know that by striking him on the head he would be injured.

A: Yes I did but I just failed to control my temper.

Q: How many times did you strike him?

A: Once.

Court satisfied that accused pleads guilty to all essential elements.

VERDICT: - Guilty as Pleaded"

[2] I asked the learned trial magistrate whether the accused admitted that he intended to injure the complainant grievously. The magistrate concedes that this aspect is an essential element of the offence and that he should have questioned the accused on this to establish whether the accused admitted this element. In this regard I refer the learned magistrate to the following cases: *S v Tazama* 1992 NR 19 (HC); *S v Henury* 2000 NR 101 (HC); *S v Goeieman* 1993 NR 225 (HC); *S v Johannes Hangula* (unreported) High Court Review Case No. 232/2004 dated 27/9/04.

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[3] I also queried the wording of the suspended sentence imposed. It read as follows:

"5 months in prison wholly suspended for 3 years on condition accused does not commit an offence involving assault and for which he is sentenced to a term imprisonment."

[4] The magistrate agrees that the sentence should expressly provide for an assault committed within the period of suspension. In my view a clearer formulation would have been as follows:

"5 (five) months imprisonment wholly suspended for 3 (three)

years on condition that the accused is not convicted of an offence involving an assault and for which he is sentenced to imprisonment without the option of a fine, committed within the period of suspension."

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

1. The conviction and sentence are set aside and the matter is remitted to the magistrate in terms of section 312(1) of the Criminal Procedure Act, 51 of 1977 with the direction that

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the magistrate complies with section 112(1)(b) of the said Act.

2. Should the magistrate convict the accused again and impose the same sentence, the guidance on the formulation of the sentence must be followed.

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**VAN NIEKERK, J**

I agree

**SILUNGWE, AJ**