



"REPORTABLE"

REPUBLIC OF NAMIBIA

CASE NO.: CR 85/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

PAUL TASEB & 7 OTHERS

(HIGH COURT REVIEW CASE NO.: 595/10)

CORAM: VAN NIEKERK, J et BOTES, AJ

Delivered on: 9 November 2010

REVIEW JUDGMENT

VAN NIEKERK, J [1] In this matter three of the seven accused pleaded guilty in the magistrate's court at Mariental to a charge of assault with intent to commit grievous bodily harm. During the section 112(1)(b) questioning in terms of the

Criminal Procedure Act, 51 of 1977, the following exchanges were noted down:

"SECTION 112(1)(B) IN RESPECT OF ACCUSED 5

"Court: Did anyone threaten you to plea guilty?

Accused: No.

Court: Did anyone promise you anything to plead guilty?

Accused: No.

Court: Do you plea guilty out of your free will?

Accused: Yes.

Court: On 16/01/10, the day you are accused of have committed the offence, where were you?

Accused: At the Police cells in Mariental.

Court: What did you do wrong on that day?

Accused: I admit that I assault the complainant.

Court: Where did you assault the complainant?

Accused: In the cells.

Court: Why did you do that?

Accused: When the complainant come in, I asked him why he was detained. He gave me the name of the deceased he killed and I asked him if he know that the person is my relative, I then beat him.

Court: How did you beat him?

Accused: I beat him with a broom on his buttocks.

Court: Did you know that a broomstick can injure a person seriously?

Accused: Yes.

Court: Still you used the broomstick to beat the complainant?

Accused: Yes.

Court: Was that your intention to cause serious injury to complainant?

Accused: No.

Court: Did the complainant sustain any serious injuries?

Accused: Yes.

Court: Did you know it was wrong by law to beat someone with a broomstick?

Accused: Yes.

Court: Were you at you sound and sober senses when you beat him?

Accused: Yes.

Court: Any defence to offer?

Accused: No.

Court is satisfied that you admitted to all allegations of the offence and finds you accordingly guilty as charged.

SECTION 112(1)(B) IN RESPECT OF ACCUSED 7

Court: Do you wish to answer the questions?

Accused: Yes.

Court: Did anyone threaten you to plea guilty?

Accused: No.

Court: Did anyone promise you anything to plea guilty?

Accused: No.

Court: Do you plea guilty out of your free will?

Accused: Yes.

Court: On 16/01/10, the day you are accused of have committed this offence,

where were you?

Accused: At the police cells in Mariental.

Court: Can you tell the court what happened on that day which you pleaded guilty for?

Accused: I plead guilty on an assault charge.

Court: When did the assault take place?

Accused: In the cells.

Court: You assaulted
who?

Accused: The complainant.

Court: How did you assault the complainant?

Accused: With my fists and a broom.

Court: Where did you beat him?

Accused: On the buttocks with a broom and then with fists in his stomach.

Court: Did he sustain injuries?

Accused: Yes.

Court: Was that your intention to cause serious injuries to the complainant?

Accused: No, just to keep quiet. [quiet?]

Court: You know that a broomstick can injure a person seriously? Accused: Yes.

Court: Still you proceed to beat him with a broomstick? Accused: Yes.

Court: Why did you do that?

Accused: I felt bad. He killed my school friend.

Court: Did you know that it was wrong and punishable by law to do that?

Accused: Yes.

Court: Were you at your sound and sober senses when you beat the complainant?

Accused: Yes."

[2] On review I asked the trial magistrate whether accused 5 and 7 admitted that they assaulted the complainant with intent to commit grievous bodily harm. In his reasons the learned magistrate states that the accused both admitted using a broom stick to assault the accused and also admitted that using a broom stick can cause a serious injury to a person against whom such assault is directed. He is of the view that the accused had *dolus indirectus* and therefore he convicted them.

[3] Intention in the form of *dolus indirectus* is not relevant here. That comes into play, eg where an accused plans to murder a person sitting inside a room by shooting at him through a closed window. His goal and desire is to kill the person inside a room. However, he realises that if he carries out his plan, he will of necessity also break the glass of the window, although he does not particularly want to achieve this result. If he then nevertheless decides to go ahead and executes his plan, he has *dolus directus* to kill the victim and *dolus indirectus* to cause malicious damage to property with respect to the window.

[4] I suspect that what the magistrate was intending to refer to was *dolus eventualis*, as opposed to *dolus indirectus*. *Dolus eventualis* is a form of intention which would exist if an accused directs his will to achieving a certain result, but foresees that if he takes steps to achieve this result he may cause another result

and nevertheless goes ahead, not caring whether the foreseen result actually ensues. Adapting the above example the point may be illustrated as follows: The accused plans to murder the victim inside the room by shooting him through the window. He does not know if the window is closed or not, but he foresees that it might be closed and that if he shoots, he will damage the glass. Although he foresees the possibility of the window being closed, he reconciles himself to this possibility and nevertheless pulls the trigger, thereby killing the deceased. As it turns out, the window was indeed closed and the glass is damaged. He then has *dolus directus* in respect of the murder and *dolus eventualis* to maliciously damage to window.

[5] Returning to the section 112(1)(b) questioning, accused no. 5 clearly stated that he did not intend to cause the complainant serious injuries. The magistrate should have entered a plea of not guilty at that stage of the process. The fact that the accused admitted that the complainant did in fact sustain serious injuries is neither here nor there, especially taking into consideration that there were seven accused who allegedly assaulted him.

[6] As far as accused no 7 is concerned, the accused stated that he did not intend to cause serious injuries to the complainant, but that he hit the complainant only, as I understand it, that he should keep quiet. The learned magistrate proceeded further in an attempt to establish whether the accused perhaps had intention in the form of *dolus eventualis* by asking the accused "You know that a broomstick van injure a person seriously?" and "Still you proceed to beat him with a broomstick?"

[7] As I stated above, *dolus eventualis* is essentially made up of two legs. The first is the foresight of a reasonable possibility that a certain result may ensue and the second is the accused's reconciliation with this possibility. (See in this regard

Snyman, Criminal Law, 4th ed. 182 and 183). Questions should be asked to establish whether the accused admits such reconciliation to the result, e.g. "*At the time, did you reconcile yourself to the possibility that you could/ might injure the complainant seriously?*" or "*Did you accept at the time that if you acted this way that you could/ might injure the complainant seriously?*" or a more open ended question like "*If you foresaw the possibility of serious injuries resulting from your actions, why then did you nevertheless hit/beat the complainant?*" and then follow up with further questions, depending on the answers. In this regard it is vital to understand that the "why" question is not so much aimed at determining solely the motive or reason for hitting or beating the complainant, but that it is aimed at obtaining some factual information from which the questioner may determine whether the accused admits that at the time of the commission of the offence there was a reconciliation with the foresight of grievous bodily harm.

[8] In my view the magistrate's question "*You know that a broomstick can injure a person seriously?*" is, strictly speaking, irrelevant. The question should not be what the accused knows now (at the time of the questioning), but what he knew then (at the time he hit the complainant). The question should therefore be posed in the past tense, i.e. "*Did you know.....?*" The question "*Still you proceeded to beat him with a broomstick?*" appears to be an attempt to establish whether the accused accepted or reconciled himself with the possibility of injuring the complainant seriously, but does not go far enough, as the learned magistrate appeared to realize, as he then asked "*Why did you do that?*" While this question could evoke a response which confirms that the accused did accept or reconcile as aforesaid, (e.g. "*I beat him because I was angry and I wanted to hurt him badly/seriously*"), it could also, as in this case, evoke a response which explains the accused's motive or the background to the events ("*I felt bad. He killed my*

school friend"). This answer should therefore have been followed up by a question such as, "*When you felt bad, did you hit him without caring whether you would injure him seriously?*" The fact is that ultimately the questions posed by the magistrate did not elicit answers which were sufficient to establish a basis upon which he could have been properly satisfied that the accused admits all the allegations in the charge.

[9] Unfortunately the review was submitted to the High Court late and my query also reached the magistrate late as he has been transferred. By now the accused have served their sentences. I shall therefore not act in terms of section 312 of the Criminal Procedure Act by remitting the matter to the magistrate to comply with section 112(1)(b). I accordingly merely set aside the convictions and sentences of accused no. 5 and 7.

VAN NIEKERK, J

I agree.

BOTES, AJ