



CASE NO.: CA 47/2010
NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

TANGENI SHIKONGO

APPELLANT

and

THE STATE

RESPONDENT

CORAM: SWANEPOEL J et MILLER AJ

Heard on: 01 July 2011

Delivered on: 28 July 2011

APPEAL JUDGMENT

MILLER, AJ.:

[1] The appellant was convicted by the learned magistrate Mr. Nangula of the following crimes:

- 1) Robbery with aggravating circumstances as defined in Section 1 of Act 51 of 1977.
- 2) Housebreaking with the intent to steal and theft.

3) Assault with the intent to do grievous bodily harm.

[2] The learned magistrate imposed the following sentences:

Count 1: 24 Months imprisonment

Count 2: 24 Months imprisonment

Count 3: 18 Months imprisonment

The learned magistrate directed that the sentence imposed were to run consecutively.

[3] The facts found proved by the learned magistrate upon which the convictions were based can be summarized as follows:

[4] At 5h20 on 17 February 2005 the complainant, Mr. Carstens was asleep in the bedroom of his home in Walvis Bay. He was awakened at that time by the fact that somebody bumped against his bed. This person he identified as the appellant. The appellant threw some objects through a window that had been opened. Thereafter the appellant jumped to the outside through the same window. The objects which the appellant threw to the outside were a cell phone, a school uniform, strap lights and a knife which belonged to the complainant. The complainant gave chase and caught up with the appellant in the street. The complainant then struck the appellant with his fist. At that stage a second person, who the complainant identified as the appellant's co-accused in the trial arrived on the scene and stabbed the complainant once with a knife, inflicting an open wound to the complainant's back. The complainant thereupon returned to his home and was taken to hospital to receive medical treatment. The goods removed from the complainant were not recovered.

[5] The notice of appeal raised a number of grounds attacking the conviction. However when this matter was called before us there was no appearance on behalf of the appellant which in the ordinary course would have resulted in the appeal being struck

from the roll. We raised however with Mr. Moyo who appeared for the State whether the facts found proved supported the convictions on the robbery and assault charges. Mr. Moyo candidly and correctly conceded that the State does not support those convictions.

[6] In our view the facts found proved does not even remotely establish the necessary elements to sustain the robbery charge. Put plainly no robbery took place.

[7] As far as the assault charge is concerned the issue is whether the appellant who did not himself stab the complainant, made common cause with his co-accused to assault the complainant. Even though such an inference is possible, it is by no means the only possible inference.

[8] We therefore, in the exercise of this courts inherent power of review, made the following order:

- 1) That appellant's convictions in respect of the count of robbery with aggravating circumstances and the count of assault with intent to do grievous bodily harm is set aside, as are the sentences imposed.
- 2) In respect to the count of housebreaking with intent to steal and theft, both the conviction and sentence are confirmed.

MILLER AJ

I agree

SWANEPOEL J

ON BEHALF OF THE APPELLANT

NO APPEARANCE

ON BEHALF OF THE RESPONDENT

MR. MOYO

INSTRUCTED BY

OFFICE OF THE PROSECUTOR GENERAL