



CASE NO.: CR 33/2011

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

In the matter between:

THE STATE

and

RONIA ELIAS

(HIGH COURT REVIEW CASE NO.: 253/2011)

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: 28 October 2011

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused is a forty-three year old female who appeared in the Magistrate's Court, Eenhana on charges of assault with intent to do grievous bodily harm and malicious damage to property. The latter charge was however withdrawn at the commencement of proceedings.

[2] The accused pleaded guilty to the first charge and admitted that she assaulted the complainant, a male person, with open hands and that she bit him on his finger. Besides the record only reflecting that the complainant sustained a "bite wound", the seriousness of the injury was not determined and whether it required medical treatment. The cause of the assault was that the complainant owed the accused money which he either refused to repay or him being reluctant to do so.

[3] The accused was convicted on her plea and sentenced to a fine of N\$2 500 or 25 months imprisonment. The fine was not paid and the matter was sent on review in terms of s 302 of Act 51 of 1977.

[4] Section 304 provides that if it appears to the reviewing judge that the proceedings on review are not in accordance with justice, a statement setting forth the reasons for conviction and sentence *shall* be obtained from the presiding officer, provided that where the judge concerned is of the opinion that the conviction or sentence imposed is clearly not in accordance with justice and the person convicted may be prejudiced if the record of the proceedings is not forthwith placed before the Court, the judge may lay the record of the proceedings before the Court *without* first obtaining the statement of the judicial officer who presided over the trial. The present case, in my view, is an instance where the accused would suffer prejudice if the presiding magistrate's statement is first awaited (as she is serving the sentence); hence, the statement from the magistrate should be dispensed with.

[5] The accused pleaded guilty to a charge in which it is alleged that she had the intention to cause grievous bodily harm to the person of the complainant by *“beating him with open hands and biting him on the right arm and finger”*. She only admitted having assaulted the complainant with open hands and that she bit him on the finger, inflicting a “bite wound”. The nature of the wound was not inquired into and whether or not it required medical attention. The court then put the following question to the accused: *“Did you know that by biting the complainant on the finger you may cause him grievous bodily harm?”* to which the accused answered in the affirmative. This satisfied the court that the accused admitted *“all allegations in the charge”* and without inquiring from the prosecutor whether the State accepts the plea, convicted the accused.

[6] I find it surprising that after the accused only admitted to having hit the complainant with open hands and biting him on the finger, that the magistrate continued inquiring from the accused whether she had the intention of causing grievous bodily harm to the complainant. From the accused’s response to the questions asked by the court, the magistrate must already have entertained some doubt as to whether the act admitted to by the accused, was likely to constitute the offence of assault with intent to cause serious injury to the person of the complainant as the accused only slapped the complainant (with an open hand) and bit him on the finger. The fact that the accused answered in the affirmative to the question formulated by the court in legal terms as to whether the accused knew that her act “may cause the complainant grievous

bodily harm”, does not change the position because, even where the accused made the admission, the court was under a duty to ensure through questioning, that the accused does not plead guilty to and admit an offence *she did not commit*. That is the sole purpose of s 112 (1) of Act 51 of 1977. I am further of the opinion that the accused, who is a lay person, in all probability did not comprehend the purview of the question put to her and presiding officers must not only refrain from putting leading questions to lay accused, but must frame the questions in simple terms in order for the accused to fully understand the import thereof.

[7] It seems apposite to repeat what this Court in the recently delivered judgment of *The State v Linea Nuuyoma and The State v Phillipus Epafra*¹ at p3 para [6] said:

“Accused are routinely charged with this offence where the complainant suffered serious injury(ies) where this is not necessarily the only determining factor. The State needs to prove that the accused had the intent to do grievous bodily harm. Serious injuries may be inflicted without the accused intending to cause grievous bodily harm and conversely minor injuries may have been inflicted even though the accused intended to cause grievous bodily harm. The provisions of section 112 (1)(b) affords protection to the unrepresented accused, who through ignorance, believes that he/she is guilty because the complainant suffered injuries even though he/she never intended it.”

¹ Unreported Case No CR 31/2011 delivered on 18.10.2011

[8] From the accused's response to the magistrate's questioning, as it appears from the record of proceedings, I have no doubt that the accused in this instance (only) pleaded guilty to the offence of assault, and that she lacked the required intent to cause serious injury to the person of the complainant. On these admissions the court could not have been satisfied that the accused was guilty of the offence charged and should either have noted a plea of not guilty in terms of s 113, or inquired from the prosecution whether it would accept the lesser plea. The magistrate's omission to act accordingly constitutes a misdirection and the conviction and sentence cannot be permitted to stand.

[9] There is one more issue that deserves comment and that is the sentence imposed by the trial court. The accused informed the court that she was employed and married. No further information was elicited by the magistrate to inquire what her income was and whether the accused would be able to pay the substantial fine the court had in mind. Neither did the court inquire whether the accused would be able to pay the fine in instalments and defer payment, as the court was entitled to do. Instead, a fine was imposed which clearly was beyond the accused's financial means and by so doing, she was effectively given a custodial sentence of twenty-five months. Not only is the alternative imprisonment disproportionate to the fine imposed, but I also find the sentence itself shockingly inappropriate and disturbs one sense of justice when regard is had to the personal circumstances of the accused.

[10] In the result, the Court makes the following order:

1. The conviction and sentence are set aside.
2. The matter is remitted to the trial court in terms of section 312 (1) of Act 51 of 1977 and the court is directed to comply with the provisions of section 112 (1)(b) or to act in terms of section 113, as the case may be, in compliance with the guidelines set out in the judgment.
3. In the event of a conviction the court, when sentencing, must have regard to the sentence already served by the accused.
4. All monies that might have been paid in respect of the fine imposed must be refunded to the accused.

LIEBENBERG, J

I concur.

TOMMASI, J