
**CASE NO.: CR 01/2012**

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

In the matter between:

**THE STATE**

**and**

**PIUS FERDINAND**

*(HIGH COURT REVIEW CASE NO.: 91/2010)*

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

Delivered on: 20 January 2012

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**REVIEW JUDGMENT**

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**LIEBENBERG, J.:** [1] In this matter the accused appeared in the Magistrate's Court Tsumeb on a charge of contravening section 35 (2) (a) of Act 19 of 1990. In the charge it is alleged that the accused *assaulted* the complainant, being a police officer, by *"grabbing him on the neck and shoulder and wrestling with the said Cst. Andian"*. Subsection (2) (a) of the

section, however, does not refer to an assault perpetrated on a member of the force, but rather to a somewhat different offence i.e.

> *"(2) Any person who-*
>
> *(a) resists or wilfully hinders or obstructs a member in the execution of his or her duty or functions, or a person assisting a member in the execution of his or her duty or functions; or … shall be guilty of an offence."*
>
> (emphasis provided)

[2] Whereas the accused, when pleading guilty to the charge, admitted having grabbed the complainant on his neck and shoulder and wrestled with him, his actions constituted an *assault* under the Act and the charge preferred against the accused should have read in contravention of section 35 (1)(a) of Act 19 of 1990 (Police Act) and not section 35 (2)(a). In view of the accused having pleaded guilty to, and admitted having assaulted the complainant, the accused was not prejudiced by the conviction, despite the wrong section being cited in the charge.

[3] Upon conviction the accused was sentenced to eight months imprisonment, subsequently whereto the matter was sent on review. On April 13, 2010 a query was directed to the magistrate pertaining to the conviction and from the magistrate's date stamp appearing on the covering letter dated 01.07.2011, it would appear that the matter received no attention for a period of one year and three months. Despite the magistrate being requested to furnish reasons explaining the conviction in view of the accused not being questioned as to whether or not the assault against the complainant was

committed whilst exercising his powers or performing official duty, the following brief response was received five months later:

> *"1. Your Receiving Judge, this element was not covered during the Section 112 (1)(b) questioning based on or caused by human error.*
> *2. Should it causes a gross regularity, the conviction and sentence may be quashed."* (sic)

Not only is the magistrate's response most unhelpful, but also comes at a time when the accused has already served the sentence in full – a year and eight months after the matter was finalised – which clearly defeats the purpose of review; meant to protect the accused against proceedings which are not in accordance with justice. Hence, the outcome of the review under consideration is accordingly purely academic.

[4] In order to sustain a conviction on a charge of contravening section 35 (1) of Act 19 of 1990 it must be shown that the assault on the member took place in the execution of his/her duty or functions. This is an element of the offence and whereas the magistrate in this instance during his questioning in terms of section 112 (1)(b) of Act 51 of 1977 failed to ascertain this fact, the accused could not have been convicted of assault under section 35 of the said Act. Accordingly, the conviction cannot be permitted to remain standing.

[5] In these circumstances the Court is obliged to remit the matter to the trial court in terms of section 312 of the Criminal Procedure Act 51 of 1977 with the

direction to comply with the provisions of section 112 or to act in terms of section 113. In this instance it would again cause the accused to be brought before the court for questioning or to be subjected to a trial - depending on the outcome of the questioning. In the event of a conviction, the accused is due to be punished (again) in circumstances where he has already served his sentence and in my view, any sentence that may be imposed subsequently – even if it were to be a totally suspended sentence – would be unjust and a failure of justice. I consider the circumstances of this case to be exceptional and such, that it, despite the peremptory terms in which section 312 is couched, would not be in accordance with justice to give compliance thereto. I accordingly decline to remit the matter to the trial court in terms of section 312 of Act 51 of 1977.

[6] In the premises, the conviction and sentence are hereby set aside.

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**LIEBENBERG, J**

I concur.

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**TOMMASI, J**