



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case no: CR 22/2012

In the matter between:

THE STATE

and

WAHENGO JOSEPH**ACCUSED****High Court NLD review case ref no: 225/2011****Neutral citation:** *The State v Wahengo* (CR 22/2012) [2012] NAHCNLD 1
(26 October 2012)**Coram:** LIEBENBERG J and TOMMASI J**Delivered:** 26 October 2012

Flynote: Criminal Procedure – Plea of guilty — Questioning in terms of s 112(1)(b) of Criminal Procedure Act, 1977 (Act 51 of 1977) — When questioning an accused in terms of this section, court must be satisfied that accused admits all elements of offence before finding an accused guilty.— Review – the court has a discretion to order remittal in terms of section 312 of the Act where same would result in an injustice

Summary: The accused pleaded guilty in terms of section 112(1)(b) of the Act but did not admit that he assaulted the complainant with the intention to do her grievous bodily harm. The magistrate, after having been requested to provide reasons for conviction, replied after almost a year and conceded that he had erred to convict the accused. The court held that the magistrate could only convict if he was satisfied that

the accused was indeed guilty of the offence to which he pleaded guilty and that a remittal would result in an injustice.

ORDER

The conviction and sentence are set aside.

REVIEW JUDGMENT

TOMMASI J (LIEBENBERG J concurring):

[1] This matter came before me on automatic review from the district court of Oshakati. The accused was convicted of assault with the intent to do grievous bodily harm and sentenced to pay a fine of N\$700 or in default of such payment to two months imprisonment.

[2] The magistrate was requested to give reasons why he was satisfied that the accused had admitted during questioning in terms of section 112(1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977) that he had the requisite intention to do the victim grievous bodily harm. The accused admitted the following: he assaulted the complainant by hitting her once with his fist below her left eye; the blow caused swelling to the area around the eye; he hit her because she refused to go home; he had no right to hit her; and that he knew that it was unlawful to assault the complainant but stated that he was under the influence of alcohol. Not only did the accused not admit that he had the intention to do the complainant grievous bodily harm but appeared to have raised a possible defence that he lacked the capacity to appreciate the wrongfulness of his conduct due to the consumption of alcohol. The magistrate should have noted a plea of not guilty in terms of section 113 of the Act.

[3] The magistrate, correctly, conceded that he had erred. In terms of section 112(1)(b) the magistrate may only convict if he or she is satisfied that the accused is guilty of the offence to which he or she has pleaded guilty. The magistrate could not have been so satisfied where the accused did not admit all the allegations contained in the charge,

[4] The conviction of the accused of assault with the intent to do grievous bodily harm is therefore not in accordance with justice and stands to be set aside.

[5] Section 312 of the Act provides that where a conviction and sentence under section 112 are set aside on review on the ground that any provision of subsection (1)(b) or subsection (2) of that section was not complied with, or on the ground that the provisions of section 113 should have been applied, the review court shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 113, as the case may be.

[6] The accused was sentenced on 6 September 2011 and the matter was received by this Court for review on 19 September 2011. This court requested reasons for the conviction which reasons were furnished to this court almost one year later on 23 August 2012. There is no indication on the record that the accused had paid the fine and it must then be assumed that the accused had already served the two months imprisonment.

[7] To remit the matter to the magistrate's court at this late stage would result in an injustice. The review procedure is essentially designed to safeguard an accused against an unjust conviction and sentence. To this end section 303 of the Act provides that the clerk of the court should, within one week remit the record and remarks, if any, of the magistrate to the registrar who should lay it before a judge in chambers as *soon as possible*. It defeats the entire purpose of the review process if this court is not placed in a position to ensure that the unrepresented accused has been convicted and sentenced in accordance with justice. This court has already

indicated¹ that it retains the discretion not to order a remittal if the circumstances of the case are such that the remittal would result in an injustice.

[8] I am of the view that it would be inappropriate under these circumstances to remit this matter to the magistrate's court. The conviction and sentence are therefore set aside.

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MA TOMMASI
Judge

JC LIEBENBERG
Judge

¹The State v Thomas Sheelekeni Patric (unreported) case no CR11/2012 delivered on 16 March 2012; The State v Muyambu Kativa (unreported) case no CR 14/2012 delivered on 22 March 2012; Also see S v Mshengu 2009 (2) SACR 316 (SCA)