

**REPUBLIC OF NAMIBIA**

NOT REPORTABLE



**HIGH COURT OF NAMIBIA, MAIN DIVISION**

**JUDGMENT**

**CR No: 28/2017**

In the matter between

**THE STATE**

and

**JOSEF GERTZE**

**HIGH COURT MD REVIEW CASE NO 1459/2016**

*Neutral citation: S v Gertze (CR 28/2017) [2017] NAHCMD 121 (21 April 2017)*

**CORAM: LIEBENBERG J et SHIVUTE J**

**DELIVERED: 21 April 2017**

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**ORDER**

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1. The conviction and sentence are set aside.
2. The matter is reverted to the trial court in terms of s 312(1) of Act 51 of 1977 with the direction to note a plea of not guilty and to bring proceedings to its natural conclusion.
3. In the event of a conviction the trial court in sentencing must have regard to any part of the sentence already served by the accused.

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**JUDGMENT**

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LIEBENBERG J: (Concurring SHIVUTE J)

[1] The accused was convicted on a plea of guilty on a charge of assault with intent to do grievous bodily harm and sentenced to a fine, partly suspended. There is no indication on the record that the fine was paid subsequent thereto.

[2] When the matter came on review I directed a query to the trial magistrate enquiring whether the conviction was in accordance with justice as the accused, when asked why he assaulted the complainant, replied that he could not remember as he was drunk. In the magistrate's replying statement it is conceded that the court should have noted a

plea of not guilty in view of the accused's answer, and implores the court to set aside the conviction and sentence and revert the matter to the trial court.

[3] It is trite that the primary purpose of questioning the unrepresented accused in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 is to safeguard the accused against the result of an unjustified plea of guilty. If it becomes evident from the accused's answers that he in fact wants to advance a defence or excuse, then a plea of not guilty must be noted. In the present instance the accused said he was drunk and could therefore not explain why he assaulted the complainant, from which it must have been clear to the court that the accused raised the defence of lack of criminal responsibility due to intoxication. By continuing to question the accused the court misdirected itself as a plea of not guilty should have been noted and the prosecution required to prove the charge against the accused. The conviction and sentence therefore fall to be set aside.

[4] In the result, it is ordered:

1. The conviction and sentence are set aside.
2. The matter is reverted to the trial court in terms of s 312(1) of Act 51 of 1977 with the direction to note a plea of not guilty and to bring proceedings to its natural conclusion.
3. In the event of a conviction the trial court in sentencing must have regard to any part of the sentence already served by the accused.

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**J C LIEBENBERG**

**JUDGE**

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**N N SHIVUTE**

**JUDGE**