

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK****REVIEW JUDGMENT**

Case no: CR 54/2017

In the matter between:

THE STATE

and

JULIUS KANYERE**ACCUSED****(HIGH COURT MAIN DIVISION REVIEW REF NO. 1277/2017)****Neutral citation:** S v Kanyere (CR 54/2017) [2017] 236 NAHCMD (22 August 2017)**Coram:** USIKU J and UNENGU AJ**Delivered:** 22 August 2017**Flynote:** Criminal Procedure – Committal of accused for sentence by Regional court – In what cases – Magistrate not satisfied that the proceedings were in accordance with justice – review by the High Court in terms of section 303 – Conviction on charge of assault with intent to do grievous bodily harm substituted with one of assault common – Matter remitted to trial court for sentencing on charge proven.

Summary: The accused appeared in the district court sitting at Mukwe on several charges amongst them assault with intent to do grievous bodily harm. He was found guilty and convicted as charged, whereafter the case was referred to the regional court for sentencing.

The regional court magistrate having found the proceedings not to be on accordance with justice placed on record of proceedings before the High Court judge in terms of section 116 (3) of the Criminal Procedure Act 51 of 1977.

ORDER

- (i) The conviction of assault with intent to do grievous bodily harm is set aside and substituted with a conviction of assault common.
- (ii) The matter is remitted to the trial court with a direction to sentence the accused on a charge of assault common and to deal with the accused according to law.

REVIEW JUDGMENT

USIKU J, (UNENGU AJ concurring)

[1] This matter was sent by the Regional Court magistrate of Rundu after he made an opinion that the proceedings were not in accordance with justice in terms of section 116 3(a) of the Criminal Procedure Act 51 of 1977 as amended.

[2] In a letter addressed to the Registrar of the High Court, the learned magistrate stated. "Kindly place the attached record of proceedings before a judge of the High Court in terms of section 116 3(a) of the Criminal Procedure Act 51 of 1977 with the following comments.

[3] “The accused appeared before the district court of Rundu sitting at Mukwe facing several charges among them assault with intent to do grievous bodily harm count 2. It was alleged that the accused pushed the complainant to the ground as a result of which push the complainant hit with the back of her head against a stone on the ground and got swollen and tender on the point of impact on her head. After a trial the accused was found “guilty as charged” on this charge.

[4] The regional court is of the view that on the evidence on record the appropriate verdict should have been a conviction on the competent verdict of common assault in terms of section 266 (a) of the Criminal Procedure Act 51 of 1977 as there was no evidence or admission that when accused pushed the complainant he intended to cause her grievous bodily harm or that he foresaw the possibility of grievous bodily harm ensuing, nonetheless proceeded with his conducts.”

[5] In view of the circumstances the alleged assault is said to have been occasioned this court shares the same view that intent to cause grievous bodily harm was not proven beyond reasonable doubt as required and hence only the offence of assault common was proven, as a result the conviction of assault with intent to do grievous bodily harm is substituted with the one of assault common.

[6] Section 266 (1) provides as follows: “Assault with intent to do grievous bodily harm. If the evidence on a charge of assault with intent to do grievous bodily harm does not prove the offence of assault with intent to do grievous bodily harm but the offence of

(a) common assault,

(b) ...

(c) ...

the accused may be found guilty of the offence so proven.

[7] Taking into account the view of the learned regional magistrate, the circumstances under which the alleged assault was committed the conviction of assault with intent to do grievous bodily harm is hereby set aside and substituted with one of assault common. The matter is remitted to the district court with a direction that the accused be sentenced afresh and to further deal with the accused according to law.

[8] In the result the following order is made:

- (i) The conviction of assault with intent to do grievous bodily harm is set aside and substituted with a conviction of assault common.
- (ii) The matter is remitted to the trial court with a direction to sentence the accused on a charge of assault common and to deal with the accused according to law.

D N USIKU
Judge

E P Unengu
Judge