



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 4 /2017

In the matter between:

THE STATE

and

MERVIN ELRICO BUSHBY

ACCUSED

Neutral citation: *S v Bushby* (CR 4 /2017) [2017] NAHCMD 9 (20 January 2017)

Coram: NDAUENDAPO J *et* SHIVUTE J

Delivered: 23 January 2017

ORDER

1. The conviction and sentence are set aside.
2. The matter is remitted back to the Magistrate, in his absence any other Magistrate, to enter a plea of not guilty and to proceed with trial.
3. If the accused is convicted, the court should take into account the sentence already served.

JUDGMENT

NDAUENDAPO, J et SHIVUTE, J

[1] Before me is a review matter. The accused was charged with assault with intent to do grievous bodily harm in the Magistrate court held at Keetmanshoop.

[2] He pleaded guilty and he was questioned in terms of section 112 (1) (b) of the Criminal Procedure Act 51 of 1977 whereupon he was convicted as charged. He was sentenced to twelve months imprisonment of which six months were suspended on the usual condition.

[3] When the matter came before me, I directed the following query to the Magistrate:

'Having regard to the following exchanges:

Court: What happened there that had to (sic) your arrest?

Accused: Brenden Klaasen came and starts fighting, and because he on previous occasion he stabbed me on left side of my eye and my shoulder. He thought he will do the same. I stabbed him and he went home and I also went home.' (My underlining)

Is it not possible that the accused acted in private defence when he stabbed the complainant?

The presiding officer replied as follows:

'The accused person may correctly have acted in private defence, the court did not satisfy itself that the accused person either acted in private defence or whether if he did,

he exceeded the limits to private defence in which matter should have gone for trial to establish such, hence a verdict of not guilty in terms of s 113 of the Criminal Procedure Act, Act 51 of 1977 as amended, should have been returned.'

[4] The concession by the Magistrate is well made and indeed a not guilty verdict should have been entered having regards to the facts of this case.

[5] In the result, the following order is made:

1. The conviction and sentence are set aside.
2. The matter is remitted back to the Magistrate, in his absence any other Magistrate, to enter a plea of not guilty and to proceed with trial.
3. If the accused is convicted, the court should take into account the sentence already served.

GN NDAUENDAPO

Judge

N SHIVUTE

Judge