

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: The State v Herman Jantjies	High Court Ref Case No: CR 107/2019
	Division of Court: Main Division
Heard before: Honourable Mr. Justice Shivute <i>et</i> Honourable Mr. Justice Sibeya Acting	Delivered on: 12 December 2019
Neutral citation: <i>S v Jantjies</i> (CR 107/2019) [2019] NAHCMD 549 (12 December 2019)	
The order: <ol style="list-style-type: none">1. The conviction and sentence are hereby set aside.2. The matter is remitted in terms of section 312 of Act 51 of 1977 to the Magistrate's Court for the District of Swakopmund where the accused was convicted and sentenced.3. The trial magistrate is directed to comply with the provisions of section 113 of Act 51 of 1977.4. In the event of a conviction, the court in sentencing, must take into account the time that the accused spent in custody during sentencing.5. Pending such appearance in the Magistrates' Court for the district of Swakopmund,	

the accused is to remain in custody.

SIBEYA, AJ and SHIVUTE, J (concurring)

[1] This is a review in terms of section 302(1) of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] The accused was charged in the Magistrate's Court in the district of Swakopmund, with the offence of assault with intent to do grievous bodily harm, in that upon or about the 2nd day of June 2019 and at or near Gambling Bar in the district of Swakopmund, the accused did wrongfully and unlawfully assault Erastus Titus by throwing a bottle in his face with the intent to cause the said Erastus Titus grievous bodily harm.

[3] He pleaded guilty to the charge and the magistrate proceeded with questioning in terms of section 112(1) (b) of the CPA. During questioning the following exchange with the accused appear on record:

'C: Did anyone force, threaten or influence you to plead guilty?

A: No.

C: Are you pleading guilty freely and voluntarily?

A: Yes.

C: Why do you plead guilty?

A: I hit the complainant with a bottle that is why I plead guilty.

C: When did this happen?

A: It was on 2 June 2019, at Gambling Bar, in Swakopmund.

C: Is Gambling Bar in the district of Swakopmund?

A: Yes.

C: Who did you assault?

A: Erastus.

C: Erastus who?

A: I don't know the surname.

C: It is alleged Erastus surname is Titus, as per the charge, would you agree or dispute such?

A: I don't dispute it.

C: What kind of bottle was it that you used to hit Erastus Titus?

A: A beer bottle that had beer in it.

C: How many times did you throw him with the bottle of beer?

A: Once.

C: Where on the body/person of the complainant did you throw the bottle?

A: On his face.

C: Did he sustain serious injuries?

A: Yes, he had a small scar on the forehead.

C: What kind of serious injuries did he sustain?

A: He was bleeding, he was having an open wound.

C: Did you foresee the possibility that by throwing the complainant with a bottle on the face he could be seriously injured?

A: Yes.

C: Was that your intention to cause him serious injuries?

A: Yes, it's correct.

C: Why did you assault the complainant by throwing him with a bottle?

A: He provoked me and I acted in self-defence, he said I am a small boy and he would beat me and he insulted my mother and I got angry.

C: Did the complainant at any time assault or attack you first for you to retaliate.

A: No.

C: Did you know that it was wrong for you to do that, to throw the complainant Titus Erastus with a bottle on his face whilst intending to cause him serious injuries?

A: Yes.

C: Did you know that you could be punished for your conduct?

A: Yes.

C: Did you have any right in terms of the law to throw the complainant Titus Erastus with a bottle on his face?

A: No...

C: Satisfied that the accused admits all the elements to the offence and accused is found guilty as charged.

[4] The magistrate then convicted the accused as charged and sentenced him to 24 months imprisonment of which 24 months wholly suspended for a period of 5 years on condition that the accused is not convicted of assault with intent to do grievous bodily harm committed during the period of suspension.

[5] A query was directed to the trial magistrate to state why she did not enter a plea of not guilty in terms of section 113 of CPA after the accused said that he was provoked and that he acted in self-defence.

[6] The magistrate responded as follows to the query:

'AD1: I agree the accused indicated he was provoked; accused in plea explanation indicated; and I will quote such verbatim 'he provoked me and I acted in self-defence; he said I am a small boy and he would beat me and he insulted my mother; and I got angry'. Then, the court's follow up question to cure all questions that might then arise as to the provocation; was and I quote 'CRT: did the complainant at any time assault or attack you first; for you to retaliate? ACC: No.'

I also considered the possibility of accused having a defence; and I canvassed the following requirement for private defence/and or self-defence; summarized as follows;

1. There has to be threat of personal violence. This implies that once the threat is directed at something other than the complainant's person, it does not constitute assault.
2. The threat has to be one of immediate violence. This qualification of the threat emanates from the definition given by Schreiner J in *Sibanyone* 1940 (1) PH H 67 (T). When the threat is conditional or directed at the future, there will be no assault (compare *Pasfield* 1974 (2) PH H 92 (A); *Miya* 1966 (4) SA 274 (N) 276; Milton 427).

Having then considered the above; the court opined that there were no threat(s) of personal violence towards the complainant; nor threats of immediate violence, the premises on which made such opinion was from the question the court had asked; being whether the complainant at any time assaulted or attacked the accused person first; would have mentioned; at that stage if he was attacked or immediate attack was threatened; this was not the case; hence the court found that the

accused satisfied the elements of the charge; and convicted accused as charged. The court still stands guided by the Honourable Justice.'

[7] This court in the appeal matter of *Geingob v The State*¹ on the purpose of the questioning in terms of section 112(1)(b) of the CPA, stated the following at para 6:

'The primary purpose of the court's questioning is to safeguard the unrepresented accused against an unjustified plea of guilty and to protect him from the adverse consequence of an ill-considered plea (*S v Baron* 1978 (2) SA 510 (C) at 512G). Not only must the questions and answers cover all the essential elements of the offence, but should also be formulated in such a way that the court, from the answers provided by the accused, firstly, is satisfied that the elements of the offence are admitted, secondly, that it is the accused who committed the offence charged. When the accused's answers do not satisfy these requirements and essentially raises a defence, or his answers are open for a reasonable explanation other than guilt, the court should record a plea of not guilty in terms of s 113 of the Act.'

[8] The answer of the accused to the question regarding the reason for the assault was that the complainant provoked him and he acted in self-defence, that he would beat him and e insulted his mother. This clearly suggested a possible defence, which was to be put test during trial.

[9] With regards to the understanding of the wrongfulness of his actions as asked by the magistrate, the answer can be found in the passage said by Van Niekerk J in *S v Erwin Cloete*², where it was stated at para 13 as follows:

'In the absence of clarification of the nature of the argument between complainant and his cousin, the admissions made by accused on further questions thereto by the magistrate that accused knew that his conduct was wrongful, that he could be punished for his conduct and that he did not have any right to act in the manner that he did were of no value as the accused was asked to pass judgment on himself. That in my view is precisely what s 112(1)(b) is designed to avoid.'
(my emphasis)

¹ CA 87/2014) [2014] NAHCMD 19 (06 February 2015).

² High Court Review Case No: [469/2010] [CR 76/2010].

[10] I endorse the remarks of Van Niekerk J in the above-mentioned case that the legal conclusions as to the unlawfulness and the wrongfulness of the accused's conduct are mere value judgment and thus cannot detract from the fact that the accused's answers suggested a possible defence. It follows therefore that the magistrate should have entered a plea of not guilty whereby evidence could be led and the defence led could be ventilated to determine the guilt or innocence of the accused.

[11] In the premises the magistrate could not have been satisfied that the accused admitted all the elements of the offence and therefore the consequent conviction and sentence cannot be allowed to stand. This court is of the view that justice will best be served if proceedings commence proceed before another magistrate. This court therefore find it inappropriate to remit the matter in terms of section 312 of Act 51 of 1977 to the same magistrate.

[12] In the result, it is ordered that:

1. The conviction and sentence are hereby set aside.
2. The matter is remitted in terms of section 312 of Act 51 of 1977 to the Magistrate's Court for the District of Swakopmund where the accused was convicted and sentenced.
3. The trial magistrate is directed to comply with the provisions of section 113 of Act 51 of 1977.
4. In the event of a conviction, the court in sentencing, must take into account the time that the accused spent in custody during sentencing.
5. Pending such appearance in the Magistrates' Court for the district of Swakopmund, the accused is to remain in custody.

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