REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title: *The State v Rodrico Ixulu*	**Case No:** CR 33 /2021
High Court MD Review No: 668 / 2021	**Division of Court:** Main Division
Heard before: Mr Justice Liebenberg *et* Lady Justice Claasen	**Delivered on:** 10 May 2021
Neutral citation: *S v Ixulu* (CR 33 /2021) [2021] NAHCMD 216 (10 May 2021)	

It is hereby ordered that:

a) The conviction and sentence imposed on count one are set aside.
b) In respect of count one, the matter is remitted in terms of section 312 of the Criminal Procedure Act 51 of 1977 for the accused to be questioned in terms of section 112 (1)*(b)* of the Act to establish jurisdiction, intent and the nature and extent of the assault.
c) If convicted on count one, the accused should be sentenced afresh, taking into

account the period the accused has already completed doing community service.

d) The conviction on count two is confirmed.

e) On count two, the accused to be sentenced afresh, taking into consideration the provisions of section 112 (1)*(a)* of the Criminal Procedure Act 51 of 1977.

Reasons for the order:

[1] The accused, being 17 years of age, appeared in the Magistrate's Court for the district of Karibib, held at Usakos on a first count of assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act 4 of 2003, and a second count of *crimen injuria*. Both counts were committed at Usakos in the district of Karibib on against the same complainant.

[2] The accused pleaded guilty to both charges and in respect of count one the court proceeded to question the accused in terms of section 112 (1)*(b)*, while on count two the court convicted the accused on his mere plea of guilty in terms of section 112 (1) *(a)* of the Criminal Procedure Act 51 of 1977.

[3] The accused was subsequently convicted on count one. Both counts were taken together for purposes of sentencing and the accused was consequently sentenced to 2 years' imprisonment, wholly suspended for 12 months on condition that the accused is to perform 300 hours of community service at the Usakos Police Station, starting 24 November 2020 and further, on condition that the accused undergoes anger-management therapy with local social workers.

[4] In a query directed to the learned magistrate, an observation was noted that the accused was convicted on count one on his plea of guilty to a charge of assault with intent to do grievous bodily harm, despite the magistrate having failed to question the accused on the date and jurisdiction of the alleged offence and further, where the

accused specifically denied having acted with intent. The particulars of the charge is that he hit the complainant 'several times with a baton' while the accused admitted having struck the complainant on her arm with a bottle. His admission thus differs materially from what is alleged in the charge and was not clarified during the court's questioning.

[5] The learned magistrate was also asked if a custodial sentence is a competent sentence in the circumstances where the court convicted the accused on count two in terms of section 112 (1)*(a)* of the CPA, but imposed a custodial sentence when both counts were taken together for sentencing purposes.

[6] In response, the learned magistrate conceded that the court erred by imposing a custodial sentence where the accused has been convicted on count two in terms of section 112 (1)*(a)* of the Criminal Procedure Act 51 of 1977. Also, that the court erred by not asking the accused questions to establish intent and jurisdiction in respect of count one. The concessions are properly made.

[7] Relevant to the questioning of the accused in respect of count one, section 112 (1)*(b)* provides that, where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea – the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding N$6 000, or if requested thereto by the prosecutor, question the accused with reference to the *alleged facts* of the case in order to ascertain whether the accused admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.

[8] In *S v Augustu*[1] it was held that 'the primary purpose of questioning the accused in terms of s 112 (1)*(b)* of the CPA following a plea of guilty is to safeguard the accused against the result of an unjustified plea of guilty.[2] Moreover, when the court questions the accused, it must ensure that he admits all the elements of the offence in such a way that it enables the court to conclude for itself whether the accused is guilty of the offence charged. The accused's answers must establish an unequivocal plea of guilty. If there is any doubt, a plea of not guilty should be entered.'[3]

[9] When the provision and purpose of section 112 (1) *(b)* is taken into consideration, it can be concluded in the present matter that the court erred by failing to pose questions to the accused in order to determine (a) the nature of the assault and his intention to do grievous bodily harm and (b) the date and place where the alleged crime was committed in order to determine the jurisdiction of the court. In light of these shortcomings, the learned magistrate could not have been satisfied that the accused admitted the allegations in count one to which he pleaded guilty. The conviction of the accused in the absence of such questions and answers from the accused to establish intent and jurisdiction is therefore an irregularity upon which the conviction should be set aside.[4]

[10] Section 112 (1)*(a)* provides that where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and (a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding N$6 000, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and - (i) impose any competent sentence, *other than imprisonment* or any other form of detention without the option of a fine or a fine exceeding N$6 000; or (ii) deal with the accused otherwise in accordance with law.

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[1] *S v Augustu* (CR 24/2021) [2021] NAHCMD 158 (15 April 2021).
[2] *S v Kandjimi Hiskia Mangundu* (CR 67/ 2016 2016) NAHCMD 316 (17 October 2016).
[3] S v Combo and Another 2007 (2) NR 619 (HC).
[4] See *S v Onesmus* 2011 (2) NR 461 (HC).

[11] It is evident from the provisions of the section 112 (1)*(a)* of the Act that the court was not permitted to impose the sentence of 2 years' imprisonment, suspended on conditions as determined by the learned magistrate on count two when taking the counts together at sentencing. The two sections provide distinct limitations on the nature of the sentence that may be imposed, and the sentence imposed on count two does not comply with such limitations.[5]

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

a) The conviction and sentence imposed on count one are set aside.
b) In respect of count one, the matter is remitted in terms of section 312 of the Criminal Procedure Act 51 of 1977 for the accused to be questioned in terms of section 112 (1)*(b)* of the Act to establish jurisdiction, intent and the nature and extent of the assault.
c) If convicted in respect of count one, the accused should be sentenced afresh, taking into account the period the accused has already completed doing community service.
d) The conviction on count two is confirmed.
e) On count two, the accused to be sentenced afresh, taking into consideration the provisions of section 112 (1)*(a)* of the Criminal Procedure Act 51 of 1977.

J C LIEBENBERG **JUDGE**	**C CLAASEN** **JUDGE**

[5] See *S v Onesmus* 2011 (2) NR 461 (HC).