

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK
REVIEW JUDGMENT



NAMIBIA MAIN DIVISION,

Case Title: <i>The State</i> v <i>Roderick Rooi</i>	Case No: CR 83/2022
Heard before: Hon. Judge Liebenberg <i>et</i> Hon. Judge Shivute	Division of Court: Main Division
Delivered on: 10 August 2022	
Neutral citation: <i>S v Rooi</i> (CR 83/2022) [2022] NAHCMD 399 (10 August 2022)	
The order: <ol style="list-style-type: none">a. The convictions and sentences for counts 1- 4 are set aside.b. The matter is remitted in terms of section 312 of the Criminal Procedure Act 51 of 1977 (CPA) for the accused to be properly questioned in terms of section 112 (1) (b) of the CPA and the court to satisfy itself that the accused is admitting all the elements of the offences.c. When sentencing the accused, the court should take into consideration the portion of the sentences the accused had already served.d. The fines, if paid, are to be refunded to the accused.	
Reasons for order:	
SHIVUTE J (LIEBENBERG J concurring):	

Introduction

[1] The accused was charged in the magistrate's court for the district of Keetmanshoop with one count of (common) assault, two counts of assault by threat and one count of ill-treating an animal, contravening section 2(1)(a) of the Animals Protection Act 71 of 1962, as amended, read with sections 1,2,3,4,7 and 10 of the said Act.

[2] The accused pleaded guilty to all the charges and the court proceeded to question the accused in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA).

[3] The accused was subsequently convicted on all the charges and consequently sentenced as follows:

Count 1: N\$700 or in default 3 months' imprisonment wholly suspended for 5 years on condition that accused is not convicted of common assault committed during the period of suspension;

Count 2: N\$800 or in default 3 months' imprisonment;

Count 3: N\$200 or in default 6 months' imprisonment;

Count 4: N\$800 or in default 3 months' imprisonment.

Sentence on Count 2 and 4 to run concurrently.

Query

[4] The review court observed two issues and directed a query to the trial magistrate. Firstly, how the court satisfied itself that the accused committed the offence of assault by threat in respect of counts 2 and 4. Secondly, with regard to count 3, ill-treating an animal, whether a defense was not raised by the accused, when he said the dog was attempting to attack him.

[5] The magistrate responded by conceding that counts 2 and 4 were not proven as the accused never admitted that the alleged utterance of threats inspired a belief in the complainant that the accused had the means to carry out the threats, neither that the threats were unlawful. In terms of count 3, the magistrate conceded that the accused raised a defense as the accused made mention in the questioning that the dog attacked

him and thus he should not have convicted the accused on count 3.

[6] With regard to count 1, the magistrate stated that although he was not queried on it, he observed that he failed to question the accused on the allegations of unlawfulness and intention and that the questioning leaned more towards assault with intent to cause grievous bodily harm instead of common assault. The magistrate suggested that the conviction and sentence on all counts be set aside and remitted to the trial court to start afresh.

Applicable law

[7] CR Snyman defines assault as the unlawful and intentional applying of force to a person or inspiring a belief in that person that force is to be applied to him or her.¹

[8] I will deal with some of the requirements of assault by threat which relates to the current matter which were not met to prove the offence;

(i) Personal violence: there must be a threat of violence against a person and that is against his or her body.

(ii) Immediate violence: It must be a threat of immediate violence. A mere threat to inflict harm on someone in the future is not sufficient.

(iii) Subjective test: The person who is being threatened must believe that the threat will be carried out by the person who is making the threat and s/he is able to do so.²

[9] In the current case, there was a threat of violence uttered against Paul Cloete and Daisy Rooi's body, however, the threats were not of immediate violence as the accused told Daisy Cloete, while leaving the yard, that he would injure her if he finds her. Further, he told Paul Cloete he would stab him if he finds him in the street. Thus, the requirement of immediate violence is not being met.

[10] The accused was not asked whether his threats inspired a fear or belief in the complainants that his threats will be carried out. As a result, the accused did not admit to

¹ C R Snyman *Criminal Law* 6 ed (2014) at 447.

² C R Snyman *Criminal Law* 6 ed (2014) at 450.

all the elements of the offence of assault by threat.

[11] In *S v Augustu*, 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. 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 Common assault was therefore not proven as the accused did not admit the elements of unlawfulness and intention during questioning.

[12] With regard to count 3, the accused raised the defense that the dog attempted to attack him and, as a consequence, he hit the dog on the head with the wooden stick. With the accused raising that defense, the element of unlawfulness could therefore not be met as the accused's actions, in the circumstances, prima facie, appear to have been justified.

Conclusion

[13] In conclusion, the magistrate could therefore not have been satisfied in the present case that the accused admitted all the elements of the offences in counts 1, 2, 3 and 4. The convictions can therefore not be permitted to stand and should be set aside.

[14] As a result, it is hereby ordered that:

- a. The convictions and sentences for counts 1-4 are set aside.
- b. The matter is remitted in terms of section 312 of the Criminal Procedure Act 51 of 1977 (CPA) for the accused to be properly questioned in terms of section 112 (1) (b) of the CPA and the court to satisfy itself that the accused is admitting all the elements of the offences.
- c. When sentencing the accused, the court should take into consideration the portion

³ *S v Augustu* (CR 24/2021) [2021] NAHCMD 158 (15 April 2021).

of the sentences the accused had already served.

d. The fines, if paid, are to be refunded to the accused.

N N SHIVUTE

Judge

J C LIEBENBERG

Judge