

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
REVIEW JUDGMENT

Case Title: The State v Dawid Amib	Case No: CR 103/2022
High Court MD Review No: 815/2022	Division of Court: Main Division
Heard before: Judge Liebenberg <i>et</i> Judge January	Delivered on: 29 November 2022
Neutral citation: <i>S v Amib</i> (CR 103/2022) [2022] NAHCMD 647 (29 November 2022)	
The order: <ol style="list-style-type: none">1. The conviction and sentence are set aside.2. The matter is remitted to the same court in terms of s 312(1) of Criminal Procedure Act 51 of 1977 (the Act) with the direction to further question the accused in terms of s 112 (1)(b) of the Act.3. In the event of a conviction regard must be had to the sentence already served by the accused.	
Reasons for order:	
JANUARY J (LIEBENBERG J concurring)	
[1] The case was submitted from the Katutura Magistrate's Court for automatic review	

in terms of s 302(1) of the CPA.

[2] The accused person was convicted of assault with intent to do grievous bodily harm and assault. The charges were taken together for the purpose of sentence and he was sentenced to three years' imprisonment.

[3] The case was sent with two typed J15 charge sheets and two handwritten J15 charge sheets. One of the handwritten charge sheets reflects the charge as assault by threat. This charge was however deleted. The plea on this charge sheet reflects the plea as guilty on 'count 1 and 2'. The other handwritten J15 charge sheet reflects assault with intent to do grievous bodily harm. No plea was entered. One of the typed J15 charge sheets only reflects the name and address of the accused with no charge and plea whilst the other typed one reflects the charge of assault with intent to do grievous bodily harm with no particulars of the accused.

[4] It is necessary to quote the proceedings reflected in the record in full to emphasise the confusion in the matter: It reads as follows:

'PP: Acc first appearance, may rights be read.

Cst: Rights read.

Acc: I will conduct our defence.

PP: State put charge to accused.

Acc: Plead guilty to count 1.

Plead guilty to count 2.

PP: Matter may be finalized in terms of section 112(1)(b).

Court: Explain section 112(1)(b).

Cst: Do you plead freely and voluntarily.

Acc: Yes.

Cst: Why do you plead guilty?

Acc: I went to find the complainant at the drinking place and I confronted her on why she left the children alone. I slapped her in the face two times and she decided to open a case and I stop her to open the case and kept her at home. I locked her in the room. When I went to look for wood, the complainant went to the police or reserve police and I was arrested. I threatened her, that if she report me, I shall kill her and I locked her in the house and I went to buy food.

Cst: How long did you lock her in the house?

Acc: I locked her up for the whole day

Cst: Do you dispute it happened on 25/4/22?

Acc: I do not dispute.

Cst: Do you confirm it happened at our new stinkwater in Dordabis district?

Acc: Yes I do.

Cst: Do you confirm that you are in a domestic relationship with the complainant?

Acc: Yes I do.

Cst: Did you threatened the complainant?

Acc: Yes, I said if you report me, I will kill her.

Cst: Did you know it was unlawful to assault a person in any way?

Acc: Yes, I knew.

Cst: Did you know that it is wrongful to assault a person?

Acc: Yes, I slap her not to do that again and I threatened her.

Cst: Court is satisfied with the accused plea and accused is found guilty as pleaded.

PP: The accused has previous conviction 3387/2021. Accused had a case of assault by threat and was convicted in 2021 and crimen injuria and was fined.

CSt: Do you confirm the J14?

Acc: Yes.

Cst: Was it against the same complainant?

Acc: Yes.

Mitigation....'

[5] It is clear from the record that the magistrate did not distinguish between the two charges and dealt with them simultaneously. The magistrate also did not direct any question to be satisfied that the charges do not constitute a duplication of convictions. In addition, no question was directed to establish the intention of the accused.

[6] I firstly directed a query to the magistrate to clarify on what charges the accused was convicted of because the charge of assault by threat was deleted and the handwritten J15 charge sheets were incomplete. The review coversheet at that stage only reflected a conviction on count 1 assault with intent to do grievous bodily harm. Secondly, I directed the magistrate to correct the confusion on the review cover sheet and J15 Charge sheets.

[7] The J15 charge sheets and the review cover sheet were in the meantime corrected. The case was resubmitted for review. It is now clear that the accused was convicted and sentenced on assault with intent to do grievous bodily harm and assault by threat. I again directed a query in the following terms:

1. 1. 'Now that the magistrate clarified the previous query, in the absence of questions to clarify whether the assault and threat did not happen at the same time and place, how was the magistrate satisfied that it was not a duplication of convictions?

2. In the absence of a determination of the intention of the accused, how is it justified to convict the accused of assault with intent to do grievous bodily harm where he only slapped the complainant twice in the face?'

[8] The magistrate responded as follows:

1. 'The accused went to look for the complainant, found her, slapped her in the face and took her home where he threatened to her that he want to kill her. The threat to kill her happened at home after she told him, she would report the matter to the police, whereafter he locked her inside the house. My opinion is that these happened at a different time and therefore it is not a duplication of conviction.

2. In my opinion the Accused had an intention to do grievous bodily harm, through to a lesser degree as he had slapped her twice in the face, as she was pregnant. Had he only pushed her or pulled her or slap her once, I would have said its common assault. The accused went with the intention to reprimand the complainant, by slapping her in the face.

3. I would further appreciate guidance from the Honourable Justice in this regard.' (sic)

[9] It is clear that the magistrate inferred from the response of the accused person that he had the intention to assault the complainant with the intention to do grievous bodily harm. The questioning of an accused in terms of s 112(1)(b) of the CPA was dealt with in *S v Shuuvani*.¹ The accused in that case was charged with housebreaking with intent to steal and theft. The magistrate failed to enquire from the accused what his intention was at the time of the breaking in. The magistrate held the view that it could be inferred from his answer as to what he intended doing with the stolen property, that he had the intention of stealing.

¹ *S v Shuuvani* (CR 10/2014) [2014] NAHCNLD 21(20 March 2014).

[10] The magistrate, in this case, did not pose a single question to establish the intention. Further, the answer provided in response on why the accused pleaded guilty does not clarify the issue of whether the charges are a duplication of convictions or not. In our view, the answer indicates that the assault and uttering of the threat was one continuous action. A further misdirection is the manner in which the magistrate dealt with the two different charges by not applying s 112(1)(b) distinctly in relation to each of the charges.² The simultaneous questioning of the accused in terms of s 112(1)(b) was, in our view, not proper. It lead to facts being vague and intertwined as it happened in this case.

[11] When an accused is questioned in terms of s 112(1)(b) of the CPA, the court must ask questions which cover all the elements of the offence to which the accused pleaded guilty. The court is not permitted to draw any inference from the accused's answers when all the elements were not properly covered.³

[12] The court's function is not to evaluate the answers as if it were weighing evidence, or to judge their truthfulness or plausibility. It is simply to interpret them to see whether they substantiate the plea. It relates to what the accused person has said, not what the court thinks of it.

[13] The magistrate misdirected himself when drawing inferences from the accused's answers, from which he concluded that the accused had the intention to permanently deprive the owner from his property. Further, the simultaneous questioning on separate charges is another misdirection.

[14] In the result, it is ordered:

1. The conviction and sentence are set aside.

² See: *The State v Ngundja* (CR 292/2016) [2016] NAHCNLD 98 (1 December 2016).

³ See: *S v Shuuvani* (CR 10/2014) [2014] NAHCNLD 21(20 March 2014).

2. The matter is remitted to the same court in terms of s 312(1) of Act 51 of 1977 with the direction to further question the accused in terms of s 112(1)(b) of the Act.
3. In the event of a conviction regard must be had to the sentence already served by the accused.

H C JANUARY JUDGE	J C LIEBENBERG JUDGE