REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case Title:	**Case No:**
The State v Lazarus Van Neel	CR 88/2023
High Court MD Review No:	**Division of Court:**
2145 / 2022	Main Division
Heard before:	**Delivered on:**
January J *et* Usiku J	7 August 2023
Neutral citation: *S v Van Neel* (CR 88 /2023) [2023] NAHCMD 478 (7 August 2023)	

It is hereby ordered that:

1. The conviction and sentence of the accused in respect of count two is confirmed.

2. The discharge of the accused, in terms of s 174 of the Criminal Procedure Act 51 of 1977, as amended in respect of count one, by the court *a quo* is set aside.

3. The matter is remitted to the Grootfontein Magistrates' court to start de novo in respect of count one before another magistrate.

Reasons for the order:

January J (D Usiku J concurring)

[1] The case was submitted from the Grootfontein Magistrate`s Court for automatic review pursuant to s 302 (1) of the Criminal Procedure Act 51 of 1977 (CPA).

[2] The accused was charged with one count of Assault with Intent to do Grievous Bodily Harm read with the provisions of the Domestic Violence Act 4 of 2003, "in that upon or about 05th day of September 2022 and at or near Otavi in the district of Grootfontein, the accused did wrongfully, unlawfully and intentionally assault Dorothea Van Neel by chopping her with an axe on her face (just above the eye) with intent to cause the said Dorothea Van Neel with whom the accused was in a domestic relationship as defined in section 1 of Act 4 of 2003, grievous bodily harm. The accused is the son of the complainant".

[3] The accused was further charged with a second count of Assault by threat read with the provisions of the Domestic Violence Act 4 of 2003, "in that upon or about the 05th day of September 2022 at or near Otavi in the district of Grootfontein, the accused did unlawfully and intentionally assault Dorothea Van Neel by threatening to kill her thereby causing the said Dorothea Van Neel with whom the accused was in a domestic relationship as defined in section 1 of Act 4 of 2003, to believe that the said accused intended and had the means forthwith to carry out his threat. The Accused is the son of the complainant".

[4] The accused pleaded as follows:

> 'I understand the charge on count 1. I am guilty but did not chop her with an axe. I only hit her with a hand and I have a witness that can be called when I hit her. I had a ring and that is what caused the injury. And for count 2, I am guilty.'

[5] The public prosecutor thereafter requested the court to question the accused in respect of only count two in terms of section 112(1)(b) of the CPA. The magistrate did not note anything further in respect of the first count of assault with intent to do grievous

bodily harm. Whereas the accused pleaded guilty on count one, it was incumbent on the magistrate to apply section 112(1)*(b)* on that plea as well. This was not done. It is clear from what the accused stated in addition to his plea of guilty that he did not admit the allegation of assault with an axe.

[6] The magistrate should have entered a plea of not guilty in terms of s 113 of the CPA which in peremptory terms stipulates as follows:

> **'113 Correction of plea of guilty**
>
> If the court at any stage of the proceedings under section 112 and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty or is satisfied that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.' (my emphasis)

[7] The magistrate simply adhered to the prayers of the public prosecutor, i.e. to apply s 112(1)*(b)* in respect of count 2 only, omitting to apply sections 112(1)*(b)* and 113 of the CPA in respect of the first count, not entering a plea before postponing the matter for trial in respect of count one and thereby misdirecting itself. Likewise, another misdirection was committed in relation to count one to acquit the accused in terms of section 174 of the CPA. The magistrate sentenced the accused to a fine of N$1000 or four months imprisonment on count two.

[8] This court has no qualms with the conviction and sentence of the accused in respect of count two and this conviction and sentence will be confirmed.

[9] During the trial, the state called the complainant, who testified that she and the accused were engaged in a fight. She testified that one Elia attempted to break up the fight when the accused drew an axe. The accused injured both Elia and herself. The

complainant testified that Elia was chopped on the face by the axe, where after she too was chopped by the accused with the axe. The complainant testified that, prior to being chopped with the axe by the accused, she took a mop and broom to hit the accused, but that Elia stopped her. She testified further that the accused actions, were not an accident and that he had the intention to chop her.

[10] I directed a query to the magistrate to explain on what basis the accused was acquitted in terms of section 174 of the CPA when the complainant testified that the accused chopped her with an axe and she was not injured by accident.

[11] The magistrate responded in an unnecessary long response, quoting portions from the record of proceedings in an attempt to justify her finding. She in essence stated that the intention to injure or cause grievous bodily harm was not clearly established. Further, that there was insufficient evidence in relation to the injury and not proven where on the body the injury was sustained. Finally, she stated that the remainder of the evidence revealed nothing about the elements of the offence that the accused was charged with.

[12] It is not clear what more evidence the magistrate required. The complainant testified that she sustained an open wound and had to receive stitches at the clinic. During the trial, there was an attempt to hand up a J88 medical examination report but it was abandoned by the prosecution because it seemed to be not relevant to the proceedings and the complainant in addition, did not identify it. The evidence of the complainant was not challenged in cross-examination.

[13] Be that as it may, it is a notorious fact that an axe, when used as a weapon, is a lethal instrument. Any court may take judicial notice of that fact. Throwing or chopping a person with an axe, one directly intents, otherwise foresees that it may cause serious bodily harm irrespective on where on the body it is aimed. In these circumstances the acquittal of the accused on the first count of assault with intent to do grievous bodily harm cannot be allowed to stand.

[13] In the result:

1. The conviction and sentence of the accused in respect of count two is confirmed.

2. The discharge of the accused, in terms of s 174 of the Criminal Procedure Act 51 of 1977, as amended, in respect of count one by the court *a quo* is set aside.

3. The matter is remitted to the Grootfontein Magistrates' court to start de novo with the trial in relation to count one before another magistrate.

H C JANUARY **JUDGE**	**D USIKU** **JUDGE**