REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: The State v Abniel Hauwanga	**Case No:** CR 126/2023
High Court MD Review No: 752/2023	**Division of Court:** High Court, Main Division
Coram: Liebenberg J et Christiaan AJ	**Delivered:** 16 November 2023
Neutral citation: *S v Hauwanga* (CR 126/2023) [2023] NAHCMD 743 (16 November 2023)	
ORDER: 1. The conviction is amended to read: The accused is convicted of the offence of attempted murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003. 2. The sentence is confirmed but amended to read: Twenty four (24) months'	

imprisonment wholly suspended for a period of five (5) years, on condition that the accused is not convicted of the offence of attempted murder and/or assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act 4 of 2003, committed during the period of suspension.

REASONS FOR ORDERS:

CHRISTIAAN AJ (LIEBENBERG J concurring):

[1] This is a review in terms of s 302(1) of the Criminal Procedure Act 51 of 1977 (the Act). The accused was charged in the magistrate's court for the district of Grootfontein, on a count of attempted murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003. He pleaded not guilty and the matter proceeded to trial. The record of proceedings reflects that he was convicted of assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act 3 of 2003, but the review cover sheet reflects that he was convicted of attempted murder read with the provisions of the Combating of Domestic Violence Act 3 of 2003.

[2] When this matter came before me on review, a query was directed to the trial magistrate. The query covered a number of aspects. Firstly, I asked whether the accused was convicted with the offence of attempted murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003, as reflected on the charge annexure, the charge sheet and the review cover sheet, or assault with intent do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act 4 of 2003, as reflected in the first paragraph of the court's judgment.

[3] Secondly, I asked whether the accused was committed for mental observation as directed by the court at the accused's first appearance, what the outcome was and how the court satisfied itself with the mental condition of the accused, before proceeding to trial.

[4] Lastly, the magistrate was asked whether the condition of suspension is not too vague.

[5] A lengthy reply was received, which I will summarise. In his response, the magistrate concedes that the accused was wrongly convicted of assault with the intent to do grievous bodily harm and should have been convicted of attempted murder read with the provisions of the Combating of Domestic Violence Act 3 of 2003 and that it was an oversight on his part.

[6] Regarding the aspect relating to the mental condition of the accused, the magistrate explains that the accused was never committed to a mental facility. The magistrate's view was that he was not satisfied that the situation required or justified an enquiry into mental illness or criminal capacity. He further explained that he did not observe anything to indicate that the accused was not following the proceedings and was thus fit to stand trial. The accused conducted his defense properly and was well behaved during the proceedings.

[5] The magistrate conceded that the suspended portion of the sentence is vague.

Is the conviction of the accused consistent with the evidence proven?

[6] The record of proceedings reflect that the accused was charged with the offence of attempted murder, to which he pleaded not guilty. The accused was convicted of assault with intent to do grievous bodily as reflected in the first paragraph of the court's judgment, after evidence was led. When the matter came on review, the review cover sheet reflected that the accused is convicted of attempted murder read with the provision of the Combating of Domestic Violence Act 4 of 2003. A query was directed to the magistrate to explain the inconsistency and he explained that the accused should have been convicted of attempted murder and not assault with intent to do grievous bodily harm, and that it was an oversight on his part. The magistrate requested the court to amend the

conviction of assault with intent to do grievous bodily harm as reflected in his judgment to that of attempted murder.

[7] In the matter of *S v Nakale*, Salionga J, quoting from *S v Van der Meyden* 1999 (1) SACR 447 (W) stated the following:

'What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence.'

[8] The judgment of the magistrate in the opening paragraphs refers to the accused being charged with assault with intent to do grievous bodily harm, whereas the accused was charged with attempted murder read with the provisions of the Combating of Domestic Violence Act. The accused pleaded not guilty to the offence of attempted murder and evidence was led. The judgment reflects the following in the final paragraphs:

'The court is satisfied that the state has proved its case beyond a reasonable doubt thus the accused is found guilty as charged.'

[9] From the evidence on record, there is evidence that the intention of the accused was an attempt to murder the complainant. Furthermore on the circumstantial evidence, the only reasonable inference is that the accused had the intention to murder the complainant. Therefore one can safely conclude that, the evidence presented in court and the reasoning advanced by the court, informing the decision to convict, the conclusion reached, is accounted for by the evidence. Therefore, I am satisfied that that was an error on the part of the magistrate. This in my view, is not an irregularity that can prejudice the accused in any way, nor vitiate the proceedings. However, I wish to state that in the interest of the administration of justice, it is the ultimate responsibility of the magistrate, to make sure that errors like these are avoided at all cost.

[10] The conviction will therefore be amended to read attempted murder, read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

Mental illness and/ or criminal capacity of the accused

[11] The magistrate reasoned that there was no need to investigate mental illness and criminal capacity on the part of the accused person. The record of proceedings reflects that the accused on his first appearance, carried himself in a manner that suggested he suffers from a mental illness and/or defect and that he is not capable of understanding the proceedings, so as to make a proper defense. The record reflects that the accused came to court in an undressed state and refused to put on clothes and continuously made comments and was uncontrollable. The court made an order that the accused be committed for mental observation. The matter was then postponed for the mental observation of the accused. The accused returned to court on several occasions without a report on his mental illness and/or capacity.

[12] When the matter came before the magistrate after several postponements, the accused informed the court that he wished to finalise the matter and that there is no need for him to be committed for mental observation. The magistrate in his view, confirmed this view after he made his own observations that the accused is capable of understanding the proceedings and abandoned the mental observation of the accused, and as a result, proceeded with the trial.

[13] Section 77(1) of the Criminal Procedure Act as amended (the Act) stipulates that:

'If it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.'

[14] In a similar vein, s 78(2) of the Act provides that:

'If it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect not criminally responsible for the offence charged, or if it appears to the court at

criminal proceedings that the accused might for such a reason not be so responsible, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.' (Emphasis provided).

[15] In *S v Mokie*[1], it was held that where there is a reasonable possibility that an accused suffers from a mental illness or disorder the trial court is obliged to order an investigation in terms of s 78(2) and s 79 of the CPA.

[16] The correct procedure the learned magistrate should have applied after the finding the court made that the accused is fit to stand trial, was to send the matter on special review, for this court to set aside the order that was made on 7 January 2020, ordering it to be sent for special review. However, in this matter it is clear that the mental observation of the accused was abandoned and therefore, it will serve no purpose to revert this matter to the magistrate to send the accused for mental observation.

[17] In my view, it is clear that the decision to proceed in the absence of a mental observation report, was not prejudicial to the accused. The record makes plain that the accused was capable of understanding the proceedings so as to make a proper defense. The court's failure to send the matter for special review, under the circumstances would not, vitiate the trial in its entirety.

Sentence

[18] There was a problem with the sentence that was imposed, as the conditions that were imposed were vague and inappropriate. The condition of suspension reads:

'Twenty four (24) months imprisonment of which twenty four (24) months are suspended
For a period of five (5) years on condition that the accused is not convicted of any form of violent crimes, committed during the period of suspension.'

[19] This court has in numerous cases pronounced itself on the formulation of

[1] *S v Mokie* 1992 (1) SACR 430 (T).

suspended sentences where the conditions read that an accused should not commit 'a similar offence' or 'committed as charged'. The condition of suspension is too wide and is bound to lead to uncertainty and mis-interpretation.[2]

[20] I echo what was stated recently in *S v Armstrong*[3] that it is an essential requirement of a suspensive condition that it must be formulated in such a way that it does not cause future unfairness or injustice. This is because non-compliance with a condition of a suspended sentence has consequences for an accused. The imposition of suspensive conditions should be done with a proper consideration of the circumstances of the accused and the relevant facilities where the accused is to fulfil the suspensive conditions. For this reason, the condition of suspension stands to be amended.

[21] For the foregoing reasons, it is ordered as follows:

1. The conviction is amended to read: The accused is convicted of the offence of attempted murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003.
2. The sentence is confirmed but amended to read: Twenty four (24) months' imprisonment wholly suspended for a period of five (5) years, on condition that the accused is not convicted of the offence of attempted murder and/or assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act 4 of 2003, committed during the period of suspension.

P CHRISTIAAN **ACTING JUDGE**	**J C LIEBENBERG** **JUDGE**

[2] *S v Simon* 1991 NR 104 (HC); *Hiemstra's Criminal Procedure*, Issue 2 at 28-79 to 28-80.
[3] *S v Armstrong* (CR 60/2020) [2020] NAHCMD 380 (27 August 2020).