

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**APPEAL JUDGMENT**

Case No.: CA 02/2017

In the matter between:

**ALBERTINA HANGULA**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Hangula v S* (CA 02/2017) [2017] NAHCNLD 123 (8 December 2017)

**Coram:** TOMMASI J and JANUARY J

**Heard:** 14 November 2017

**Delivered:** 8 December 2017

**Released:** 22 January 2018

**Flynote:** Appeal – Criminal Procedure – Questioning in terms of s 112(1)(b) Criminal Procedure Act 51 of 1977 - Answers given by accused not constituting 'evidence' under

oath *S v Thomas* 2006 (1) NR 83 (HC) - Appellant did not admit intention to do grievous bodily harm and court could not have been satisfied that appellant was guilty – Magistrate ought to have recorded a plea of not guilty in terms of s 113.

Criminal Procedure – Sentence – irregular admission of photographs into evidence – court instructed photographs to be taken and admitted same into evidence without affording the appellant the opportunity to object to the admissibility and to challenge the content thereof – magistrate observed 3 year old victim under undisclosed circumstances – impartiality of magistrate questionable and right to fair trial violated – failure of justice has in fact resulted from such irregularity – vitiating not only in the sentencing procedure but the entire trial – Conviction and sentence set aside.

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### ORDER

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1. Condonation is granted for the late noting of the appeal.
  2. The appeal is upheld and the conviction and sentence are hereby set aside.
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### JUDGEMENT

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**TOMMASI J** (January J concurring):

[1] This is an appeal against conviction and sentence. The appellant was charged with assault with intent to cause grievous bodily harm. She pleaded guilty and was convicted on her plea of guilty after questioning in terms of section 112(1)(b). She was sentenced to 5 years' imprisonment. The appellant was unrepresented in the proceedings in the court *a quo*.

[2] The appellant, represented by Mr Nyambe, filed a substantive application for condonation and same was opposed by Ms Nghiyoonanye, counsel for the respondent.

[3] The appellant stated in her founding affidavit that her right to appeal was explained to her but she was in a state of shock since she did not expect a sentence of five years' imprisonment. She consulted with her family members and asked for their assistance to obtain the services of a private legal practitioner. Her family eventually secured the services of her current legal practitioners during December 2016 who could not attend to the matter at the time as the offices were closing for the festive holidays. The notice of appeal was filed on 17 January 2017 approximately 3 months and 17 days after sentence was imposed.

[4] Ms Nghiyoonanye submitted that the explanation tendered by the appellant is not acceptable and cited the unreported case of *S v Titus* (CA 73/2011) [2012] NAHC 121 delivered on 14 March 2012. In that case the appellant proffered the same explanation i.e. that he was waiting for funds to become available to instruct private counsel. The appellant failed to pursue the option of applying for Legal Aid. In that case however the delay in noting the appeal was over 12 months and Ndauendapo J remarked as follow on page 4, para 3

'In any event, there are no prospects of success on appeal which many 'tip the scale' in his favour to grant the condonation.'

The facts in that case are distinguishable from the facts in this case. The delay occasioned is shorter and having had regard to the grounds raised by the appellant this court is of the view that there are reasonable prospects that she may succeed. The court, having considered these factors, is satisfied that the appellant has shown good cause for the granting of condonation herein.

[5] The crux of the appellant's grounds of appeal in respect of the conviction is that the magistrate ought not to have convicted the appellant on her plea of guilty given the responses given to the questions by the magistrate.

[6] The appellant was charged with assault to do grievous bodily harm in that she on 13 September 2016 unlawfully and intentionally assaulted the victim by beating her with a stick all over her body which resulted in her right arm being fractured and being bruised all over her body with the intent to do the victim grievous bodily harm. The record reflects that the victim was three years old at the time. The appellant was questioned as follow in terms of section 112(1)(b) of the Criminal Procedure Act:

'Q Were you influenced or forced to plead guilty?

A No

Q On 13 September 2016 were you at or near Onampengu village in this district of Ondangwa?

A Yes

Q What did you do to plea guilty?

A I took a little wep (sic) and assault a child

Q What was your intention to do that?

A My intention (was) to assault the child. She went out from the house and I went to look for her.

Q Where on her body did you beat the child?

A To the body, buttocks legs and at the back.

Q It is alleged that you beat Albertina litana on her arm (right) and it fractured. Do you dispute that?

A No, when I was beating her on the buttocks, she put her arm there and I beat her.

Q Do you know that your act was wrong unlawful and you can be punished?

A Yes'

[7] No medical report was handed into evidence. The magistrate in his statement in terms of Rule 67 of the Magistrate's Court Rules, maintained that no error was made and he was satisfied that there was an assault on the victim in a 'barbaric manner as it can clearly be seen in the photos attached to the record as exhibits'.

[8] Section 112(1)(b) provides for the questioning of an 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. In *S v Thomas* 2006 (1) NR 83 (HC) the headnote reads as follow:

'The answers given in an enquiry in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 do not constitute 'evidence' under oath from which the court can draw inferences regarding the guilt of the accused. Section 112(1)(b) requires of a court in peremptory language to question the accused with reference to the alleged facts of the crime in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty. It may only convict the accused on account of such a plea if it is satisfied on the basis of such answers that the accused is indeed guilty. Unless the accused has admitted to all the elements of the offence, he or she may not be convicted merely on account of his or her plea - except, of course, in the case where s 112(1)(a) applies.' [my emphasis]

I respectfully agree with the approach followed and conclusion reached in this matter.

[9] It is evident from the questions and answers given above that the learned magistrate could not have been satisfied that the appellant admitted that she had the intent to do grievous bodily harm and moreover the magistrate could not infer from the appellant's answers that she had the requisite intent. The learned magistrate ought to have recorded a plea of not guilty in terms of section 113 in view of the answer given by the appellant in response to the question what her intention was.

[10] The appellant raised two grounds of appeal in respect of the sentence i.e. that: (a) the sentence was too severe and inappropriate in view of the appellant's personal circumstances; and (b) the learned magistrate failed to consider other appropriate forms of punishment. In view of the issue raised next the court deemed it not necessary to deal with these grounds.

[11] Mr Nyambe, in his heads of argument raised the point that the magistrate committed an irregularity by introducing the photographs into evidence in an unprocedural and prejudicial manner. Ms Nghiyoonanye submitted that it was not raised as a ground of appeal; that the magistrate was entitled in terms of section 112(3) to accept the photographs into evidence for purposes of determining an appropriate sentence; and that it was in any event not a vitiating irregularity.

[12] The appellant was convicted on 23 September i.e. 10 days after the incident and pleaded guilty shortly after the incident occurred. No previous convictions were proven. During mitigation the appellant informed the court that she has two minor children aged 8 years and one month old respectively. She testified that there is no one at home to take care of her children. The State called the mother of the victim who informed the court that she was informed that the child fell from a tree. The appellant, according to this witness was the paternal aunt of the victim. She testified that the victim needed a further assessment of the fractured arm and that she still has scars on her cheeks, arms and buttocks. After the State addressed the court, the following is recorded:

'Court to adjourned for a while the court wanted the victim to be taken pictures on the marks of the assault to consider an appropriate sentence under the circumstances, accused in custody.' (sic)

The matter was thereafter postponed to 26 September 2016 for sentencing.

[13] On 26 September the matter was postponed to 30 September for sentence and for the photographs of the victim to be taken. The complainant was warned and the appellant was remanded in custody. On 30 September 2016 the court, without hearing any evidence or calling the witness who took the photographs, proceeded to sentence the appellant. The learned magistrate stated the following in the reasons for sentencing:

'Accused pleaded guilty to the offence of assault grievous bodily harm and was questioned by the court in terms of section 112(1)(b) and after the submission on aggravating circumstances and the evidence under oath from the biological mother of the child (victim) the court observed scares (sic) on the body of the child and the court arranged for the victim to be

taken in consideration the gravity under which this offence was committed. The pictures were taken today the 30/09/16 in A court in the watchful eyes by the court Orderlies.'

[14] Section 112(3) provides as follow:

'Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.'

This section does not empower a magistrate to introduce evidence in aggravation without affording the accused the opportunity to cross-examine the witness. It is not clear under which circumstances the magistrate was able to observe the scars since the victim was not called to testify in court. The only inference is that the magistrate observed the scars on the body of the victim outside court. It is furthermore not known when the magistrate had sight of the 'body' of the victim i.e. was it before the trial commenced or during. The photographs were taken on the day the appellant was sentenced.

[15] The procedure adopted is unprocedural, highly irregular and extremely prejudicial to the appellant. It violates the fundamental principles of affording an accused a fair trial. The magistrate's partiality is questionable, the magistrate failed to introduce evidence procedurally; and the magistrate denied the appellant an opportunity to object to the admissibility or to challenge the correctness of the evidence adduced.

[16] This court is empowered to review matters which are not in accordance with justice and which are brought to the notice of the court.<sup>1</sup> The sentencing proceedings are not in accordance with justice and it is my considered view that failure of justice has in fact resulted from such irregularity. The appellant is entitled to a fair hearing by an independent, impartial and competent Court<sup>2</sup> and the irregularity which occurred herein not only tainted the sentencing procedures but the entire trial.

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<sup>1</sup> See provisions of section 304 (4) of the Criminal Procedure Act, 51 of 1977 T

<sup>2</sup> Article 12(1)(a) of the Namibian Constitution.

[17] In the circumstances this court has no alternative but to set aside both the conviction and sentence.

[18] In the premises the following order is made:

1. Condonation is granted for the late noting of the appeal.
2. The appeal is upheld and the conviction and sentence are hereby set aside.

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**MA TOMMASI**

**JUDGE**

I agree

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**H C JANUARY**

**JUDGE**



Appearances:

For the Appellant:

Mr Nyambe

Instructed by Legal Aid, Oshakati

For the Respondent:

Adv Nghiyoonanye

Of Office of the Prosecutor-General, Oshakati