CASE NO.: CR 637/05

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

Versus

MAX KARENGA

[HIGH COURT REVIEW CASE NO.: 1556/06]

CORAM: MULLER, J *et* PARKER, J

Delivered on: 2007 January 25

REVIEW JUDGMENT

PARKER, J.:

[1] The accused was charged with attempted rape in contravention of s 2 (1) (a) of the Combating of Rape Act 2000 (Act No. 8 of 2000) (the Act) (Count 1), assault by threats (Count 2), and common assault (Count 3). The accused pleaded guilty to the offence of attempted rape, but pleaded not guilty to the last two counts. The learned magistrate applied s 112 (1) (b) of the Criminal Procedure Act 1977

(Act No. 51 of 1977 (CPA) and thereafter convicted the accused on his plea of guilty, and sentenced him to 20 years' imprisonment because the learned magistrate found that the offence was committed under coercive circumstances within the meaning of s 2 of the Act.

[2] The accused was not found guilty on Counts 2 and 3 on the basis of the rule against a duplication of convictions which prevents a person from being convicted and sentenced twice on the basis of the same culpable facts.

[3] I asked the learned magistrate the following questions:

(1) Didn't the learned magistrate take it into account the fact that the offence was an attempt tending to show substantial and compelling circumstances within the meaning of s. 3 (2) of Act No. 8 of 2000?

(2) Upon what basis did the learned magistrate find that the convicted and sentenced person came under the purview of s. 3(1) (b) (ii) of Act No. 8 of 2000?

[4] The learned magistrate's response is that the court misdirected itself "because the Act does not create an offence of attempted rape." Consequently, in his view, the accused person should have been charged with the common law offence of attempted rape. He proceeds to admit that in view of the misdirection the sentence of 20 years' imprisonment "be set aside and be substituted with a sentence of 4 years imprisonment."

[5] In view of the observation made by the learned magistrate that the Act does not create the offence of attempted rape, I wish to state the following: It is true that the Act does not create the offence of attempted rape. Nevertheless, in the present case, if the accused person had been charged with the offence of rape under the Act, and the proceedings did not prove the commission of rape but proved an attempt to commit the offence, the accused could be found guilty of an attempt to commit rape under the Act in virtue of s 256 of the CPA, albeit the Act does not expressly provide for the offence of attempted

rape. But in the instant case, the accused person was charged with the offence of attempted rape under the Act, which is bad in law; and s 256 of the CPA cannot be invoked. The charge ought to have been amended to the effect that the accused person was charged with the common law offence of attempted rape.

[6] Courts of appeal and review courts are competent to amend charge sheets if the accused person could not possibly be prejudiced by it.[1] From the record, I am satisfied that on being questioned in terms of s 112 (1) (b), the accused person admitted the allegations in the charge of attempted rape and was properly found guilty of the offence of attempted rape to which he had pleaded guilty, although under the Act. I find that an amendment of the charge sheet by this Court *qua* review court to make the offence a common law offence cannot possibly prejudice the accused person in any way. I also find that to return the matter to the learned magistrate with instructions to cause the charge sheet to be amended and to conduct a new trial will indubitably be a waste of time and money, and will occasion grave prejudice to the accused person.

[7] That being the case, I make the following orders:

(1) The charge sheet is amended as follows:

Count 1

That the accused is guilty of the common law offence of attempted rape in that on or about 26

[1] S v Grey 1983 (2) SA 536 at 539B; *Du Toit* (2006), p 14-24.

December 2005 at or near Municipal Camp in the district of Omaruru in the central division, the accused did unlawfully and intentionally attempt to have sexual intercourse with A, aged 24 years, without her consent.

(2) The conviction of attempted rape under the Act and the sentence imposed are set aside.

(3) The following are substituted therefor:

The accused is found guilty of the common law offence of attempted rape and sentenced to three years' imprisonment, antedated to 21 June 2006.

(4) The decision to discharge the accused person on Counts 2 and 3 is confirmed.

_____

Parker, J

I agree.

_____

Muller, J