

CASE NO.: CR 47/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

BENNY NEKONGO AND BERENDT OWOSEB

[HIGH COURT REVIEW CASE NO.: 662/2010]

CORAM: NDAUENDAPO, J et SIBOLEKA, J

Delivered on: 2010 AUGUST 24

REVIEW JUDGMENT

SIBOLEKA, J.:

[1] The two 18 year old accused persons appeared in the District

Magistrate Court at Mariental on the following charges:

Count 1: In that upon or about the 30th day of May 2009 and at or near

Aimablaagte in the district of Mariental the accused did

unlawfully and with the intention of inducing submission by force use violence or threats of violence against Jacobus Frey by stabbing him with a knife and did unlawfully and with intent to steal, take certain goods, to wit cash of N\$ 150,00 socks (one pair) handkerchief valued (N\$20,00) the property or in the lawful possession of the said Jacobus Frey.

Count 2: Attempted Murder

In that upon or about the 30th day of May 2009 and at or near Mariental in the district of Mariental the accused did unlawfully and intentionally attempt to kill Jacobus Frey by repeatedly stabbing him with a knife in his chest and in his back.

[2] They pleaded not guilty and at the close of the State's case accused no. 1 was discharged in terms of section 174 of Act 51/77. Accused no. 2 was convicted on both counts. This Court finds the conviction to be in accordance with justice and will not be tempered with.

[3] Accused no. 2 was sentenced as follows:

"Sentence:

The Court sentences you to three (3) years imprisonment, of which one (1) year is suspended for five (5) years on condition that you are not convicted of robbery, committed during the period of suspension. This is for count one only."

"Sentence for count 2 will be suspended, pending review."

[4] In my view, this Court has inherent jurisdiction to review a conviction that is not followed by a sentence.

In *Rex v Ngcongco* 1943 NPD 158, at 159, Selke, J quoted with approval a passage from *Johannesburg Consolidated Investment Co. v Johannesburg Town Council* 1903 T.S., III, at p.l 17, wherein Innes C.J., said the following about the wideness of the Court's powers of review:

"So employed the expression 'review' seems to mean 'examine' or 'take into consideration'. And when the Court of law is charged with a duty of examining or considering a matter already dealt with, by an inferior court and no restrictions are placed upon its so doing, it would appear to me that the powers intended to be conferred upon it are unlimited. In other words it may enter upon and decide the matter *de novo*. It possesses not only the powers of a Court of review in the legal sense, but it has the functions of a Court of appeal with the additional privileges of being able, after setting aside the decision arrived at by the lower tribunal, to deal with the whole matter upon fresh evidence as a Court of first instance."

The Court went further and stated that:

"Now if these be the powers possessed by this Court ... then it seems to me that they are ample to permit of the Court now correcting or setting aside the proceeding before the Magistrates Court although no sentence has been passed upon the accused by that Court."

In a covering letter explaining the reason for not sentencing the accused on the second count as well, the Magistrate stated:

"Review case no: 23/ 10 *The State u Benny Nekongo and 1 other* The Magistrate realized only during sentencing that the accused got convicted on duplicated charges: I am of an opinion that the conviction

for count one will stand, and count two will be a duplication. The accused is therefore sentenced for count one only and sentencing for count two is suspended pending the outcome of the Review (Sec 304A of the CPA) of this case."

The facts of this matter are briefly as follows: The incident took place at Takarania location in Mariental. On the day in question the complainant was on his way home from Ry en Kryshop at night. With the help of some light shining from the other side, he noticed accused no. 2 and another unknown person coming running towards him from behind. He was tackled and his legs were kicked underneath out as a result of which he fell down. While lying on the ground his socks and forty four dollars was taken away from him. During the encounter the complainant was kicked in the stomach, stabbed with a knife on the head, eye, mouth, twice on the chest, on the right and back of the neck, legs, and also twice on the buttocks.

In *S v Grobler and Another* 1966(1) SA 507(A), two robbers went to rob a cafe. The one armed with a pistol entered the premises where he shot and killed the owner of the cafe and wounded his son on the thigh and the back of the head. This robber then took the money from the cash box and jumped into a get away car driven by his co-robber and they drove away. They were charged and convicted on murder and robbery. The one who shot and killed the owner of the cafe was sentenced to death on both counts while the driver of the get away car received ten years for robbery and life imprisonment for murder.

[5] On the question whether there has been an improper splitting of charges, the Court found that the robbers had not been convicted or sentenced twice for the same offence.

[6] It is my considered view that it would have been appropriate for the Magistrate to sentence the accused on all counts he has been convicted and then send the matter

for review.

[7] In the Courts' view it is a misdirection for the Court below to state that 'sentence on count no. 2, will be suspended pending review' because that sentence is also subject to review. The accused ought to have been sentenced on all counts on which he has been convicted before the matter is sent for review.

[8] In the result the Court makes the following order:

(a) The conviction of accused no. 2 on both counts is confirmed.

(b) The matter is remitted to the Magistrate for completion, that is, to sentence the accused on the second count as well.

SIBOLEKA, J

I agree

NDAUENDAPO, J