



CASE NO.: CR 39 /2012

IN THE HIGH COURT OF NAMBIA

In the matter between:

THE STATE

versus

TITUS HAITUMBA (*HIGH COURT REVIEW CASE NO.: B303/2011*)

CORAM: MILLER, AJ *et* PARKER, J

DELIVERED ON: 04 June 2012

REVIEW JUDGMENT

MILLER, A J

[1] When this matter was placed before me for purposes of review, I requested the magistrate to submit reasons for the admission of a document, commonly referred to as a J.88. I have now been provided with the magistrate's reasons.

[2] The accused was charged with the crime of assault with the intent to do grievous bodily harm. He pleaded not guilty to the charge and the matter proceeded to trial.

[3] The complainant, Rachel Hamutenya testified that the accused assaulted her by hitting her with fists, kicking her and strangling her. She showed the magistrate a mark on her forehead sustained during the course of the attack upon her and testified further that she was taken to hospital where she received treatment.

[4] It was during the course of the evidence that the Prosecutor indicated that he wished to hand in from J.88 which purportedly is the report of a medical examination which reflects the injuries she had sustained. The accused indicated that he was "objecting" to the handing in of the document. I understand by that that he was not prepared to admit the contents of the report.

[5] What transpired thereafter is the following and I quote from the case record:

"Do you know anything about this document? Your Worship there is a J88. What can you tell this Honourable Court about it?...The stamp that is appearing here. My name and also if you look on the page where the body parts of a human being are appearing it is also indicated there the different areas where I sustained injuries.

Your worship the State wish to hand in the J88 if the Accused has no objection to that Your Worship. As it pleases the Court.

COURT: Please send over to the accused person. Accused person can you please look at the, I believe last page or 2nd last page. Look at the drawing of the human body. Basically what happened is that the complainant had just confirmed to Court the injuries as per the J88 before you where she sustained those injuries on her body. Do you have any objection if the J88 is given in to Court to show cause to Court as to the injuries and where they were sustained by the Complainant on her body?

ACCUSED: Yes, I am against it, Your Worship.

COURT: What do you object against? That is a medical report compiled by a doctor? Accused listen. Look at the document before you. The purpose it will serve to Court is that it will only show to Court what injuries as she alleges that she sustained as a result of the assault as alleged on her body and where. That is all that that paper will say. Do you have any objections?

ACCUSED: Your Worship (intervention)

COURT: Accused person the Complainant testified that you kicked her, you punch her with fist on her forehead as well as all over her body you kicked her and as a result as she alleges she sustained injuries as those shows on that paper. Do you understand? As per her testimony. Accused can you just cooperate please. I told you, you will be given ample time to come and testify like the Complainant is doing right now to Court and given you version to Court, but however at this point in time it is the Complainant's time to testify. Now I am asking you whether you have any objection if that paper is handed to Court to show cause to Court the injuries as sustained by the Complainant. What do you object on Accused person.

ACCUSED: Your Worship where there it is indicated that, I did not beat her.

COURT: You are disputing that you beat her?

ACCUSED: Your Worship this fist is very big, because if I assault her with this fist I can destroy her, Your worship.

COURT: That is what I am saying Accused person. Be that as it may the Complainant sustained injuries as based on the alleged assault by you. She fell down and you pulled her, you pushed her, you kicked her as she says and because of that she sustained some wounds, injuries that being in her knees, her forehead and so forth and as a result she had to go to the hospital and see a doctor whereby the doctor compiled that report indicating the wounds on her body she sustained. So what are you disputing or objecting to? What are you objecting to?

ACCUSED: Your worship the wounds I am not the one who caused them.

COURT: Regardless. Accused person you must listen. Regardless of whether you are the one or not that is here to be determined. That is only the version of the complainant, but however an assault took place, whether it was by you or anyone and as a result of that assault the complainant sustained injuries on her body as shown on that paper. So that paper once again will only show to Court the wounds or injuries sustained as a result of the assault inflicted that took place on that date. Whether you are the one who inflicted the assault or not is yet to be determined. My question is do you have any objections for the Court to receive that paper to see what injuries as she testified about she sustained as a result?

ACCUSED: Yes, I am against it Your worship.

COURT: State if we pay please adjourn and come and continue with this.

MR. KANDJUMBWA: Before we adjourned does, is the Accused person Oshiwambo speaking? Does he understand?

COURT: Accused do you understand Oshiwambo?

ACCUSED: Yes, I understand, Your worship.

MR. KANDJUMBWA: Then it seems, may the Court adjourn, Your worship until 14h00.

COURT: Accused person the Court will adjourn until 14h00 and the trial will then continue at 14h00. Ms. Rachel please do not discuss the matter with anyone else as you are under oath and you are still coming to testify before Court. You are also warned for 14h00. You may stand down.

COURT ADJOURNS UNTIL 14H00

COURT RESUMES AT 14H00

COURT: State you may proceed.

MR. KANDJUMBWA: As the Court pleases, Your worship. Your worship, the matter at hand is the handing in of the J88 and it seems the Accused person do not understand really, make difference between the allegation that the Complainant is making and the chance that he will be given to state his case to the Court. This is part of what the Accused and the Complainant is doing but I do not know whether, this document was in his hand before we adjourned, Your worship.

COURT: Accused person did you have time to recollect as well digest what has transpired before lunch? Do you understand the purpose of the document before you?

ACCUSED: Yes, I know Your worship.

COURT: What is the purpose?

MR. KANDJUMBWA: Your worship perhaps may, if you explain just to the accused person that what is written in the document does not necessarily mean that that is what he did, but that is what the doctor have observed from the Complainant's body.

COURT: That is what I have been trying. It is what the Complainant is alleging. Not that the Accused person is the one who did that, or committed the allegation. That is just her evidence. Do you still have any objections?

ACCUSED: Yes.

COURT: Accused person do you understand what is going on? I informed you when the testimony started that you should listen attentively to the evidence of the complainant or the witness. So, you do not have to agree with everything she says because you will be given a chance to tell the Court your side of the story. It is what is known as an allegation. It is an allegation. Do you still dispute the document? Accused person then you have to tell the Court the basis of your objection of the document? Accused person if you object the document please raise your grounds for the objection so that we can proceed please. Why are you objecting to the document? And you must bear in mind that that was a document compiled by a professional and not the complainant and there is an oath there that everything contained in that document is correct and true as well. So please raise your grounds for objection so that we can make a determination whether to accept the document or not.

ACCUSED: Your worship I am against it because this complainant assaulted me as well.

COURT: That is not the issue here. Pertaining to that document that is what you fail to understand. As I told you before accused person the testimony of the complainant is the story of the complainant as to what has happened on that date. That she was assaulted, sustained injuries, went to the doctor for treatment and hence the document before you. Now what you must understand is those including that document before you are part of her testimony and are not necessarily to say that you are one who was assaulted her. She is just making those allegations. It is not to say that you are the one who assaulted

her. That is still a determination that has to be made. Now that document will show to Court, only to show to Court as she testified that she sustained an injury on the forehead as well as some wounds on her knees, that is the sole purpose of that document. It is not to say that you are the one who assaulted and so forth. Do you understand that? If you are raising an objection once again please state your grounds for objection so that we give the State time to reply and make determination as regards to the J88.

ACCUSED: Your worship, I am against the document because the other issue I did not raise I was also not shown (intervention).

COURT: Do not raise another issue that is not with regard to the document. Please raise an issue. You know your reasons why you are objecting to that document. Accused do you dispute that the document was compiled by a professional doctor, medical practitioner.

ACCUSED: Your worship I accept that it was compiled by the doctor.

COURT: Do you raise a dispute as to the contents contained in the document?

ACCUSED: Your worship, I am against those indicating where the complainant sustained injuries. Where it is indicating that the complainant sustained injuries.

COURT: So you are saying the complainant did not sustain injuries? As a result of the assault that took place. Be it you or anyone else who inflicted the assault. No just answer please. You said you have objection to the injuries sustained by the complainant.

ACCUSED: Your worship, if she sustain injuries through assault, I did not assault somebody (indistinct) sustained injuries.

MR. KANDJUMBWA: The J88 be handed in as per, so as to proceed. He said he (intervention).

COURT: I will accept the J88 on the basis that the accused person does not raise a reasonable objection against the J88. It is received and marked as Exhibit A. Please bring forward. State you may proceed.”

[6] Inasmuch as the learned magistrate concluded that the document was admissible because the accused’s objection was “not reasonable” that conclusion was wrong. An accused is under no obligation to persuade the court that his objection is reasonable.

[7] In the reasons subsequently provided the magistrate has shifted his ground.

[8] The magistrate now contends that the document was admitted.

“(a) As *prima facie* proof of the issue in terms of Section 212 of Act 51 of 1977 and

(a) To evidence the alleged injuries sustained by the complainant as a result of the assault after due examination by a medical practitioner.”

[9] It has been held since time immemorial that the contents of a report of a medical examination such as the one in question in this case cannot be proved by its mere handing in of the report. **S v Langa 1969 (3) SA 40 (N); S v Nkhomeleni 1986 (3) SA 102 (v).**

[9] That remains the position of this day. In **S v Langa (supra)** the question of the handing in of a J88 report was raised. On p. 42 at paragraph “E” the following passage appears:

“The formal handing in of reports such as that in issue in the present case has been criticised in a number of cases in this Division, see for example, **S v Sithole & Others, 1967 (1) P.H. H170; S v Sithole, 1967 (2) P.H. H292; S v D., 1967 (2) S.A. 537 (N)**. These cases emphasise not only that admissions must be formally made and recorded in terms of sec. 284 (1) of the Code, but also that, when resort is had to this method of affording proof of facts, there should, particularly in cases in which the accused is undefended, be a careful assurance that the accused’s rights should have been fully and most carefully explained to him and that he has understood full well that he is under no obligation whatever to assist the State in establishing the case against him and the process explained and the admissions which he is prepared to make should be recorded. It is, of course, clear that similar care in regard to the form of the admissions made must be observed even where the accused is represented, see the cases of **Serobe and Thomo, supra.**”

[10] I pause to mention that Section 284 of Act 56 of 1955 referred to was the equivalent of Section 220 of Act 51 of 1977 which repealed the 1955 Act.

[11] It follows that the form J88 should not have been admitted.

[12] What remains is to consider whether the evidence adduced, excluding the J88 is sufficient to establish that the accused had an intention to grievously harm the complainant. In my view it is.

[13] This is not a case of an isolated blow with a fist or the odd kick.

[14] The attack upon the complainant was a sustained one clearly intended by the accused to seriously injure the complainant.

[15] I will in the result confirm the conviction and the sentence imposed.

MILLER, AJ

I agree

PARKER, J