



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 72/2013

In the matter between:

THE STATE

and

ROBERT VAN WYK**ACCUSED**

(HIGH COURT MAIN DIVISION REVIEW REF NO.: 702/2013)

Neutral citation: *S v van Wyk* (CR72-2013)[2013]NAHCMD 315 (1 November 2013)**Coram:** HOFF J and UNENGU AJ**Delivered:** 1 November 2013

Flynote: Criminal Procedure – Review – Questioning by Magistrate in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977 – Charge sheet alleging stabbing complainant with bottle on left eye – Accused admitting hitting complainant with bottle on the left side of face – Verdict of guilty as charged inconsistent and inappropriate. Criminal Procedure – Record of proceedings contains facts and factors of theft and drink and drive cases – Conviction and sentence set aside.

Summary: The accused charged with assault with intent to do bodily harm pleaded guilty, questioned by the magistrate in terms section 112(1)(b) of the Criminal Procedure Act 51 of 1977. The accused person admitted hitting the complainant with a bottle on the left side of the face while the charge sheet alleges

that the accused stabbed complainant with the bottle on the left eye – Thus a verdict of guilty as charged is inconsistent with the facts admitted by the accused. Further, the record of proceedings contains facts and factors of theft and drink and drive cases. Magistrates have a duty to keep records of proceedings they are conducting with care and proper to reflect the correct minutes of proceedings taking place before them. Conviction and sentence set aside due to errors and irrelevant information in the record of proceedings.

ORDER

1. The conviction and sentence are set aside.
2. The State may accept the plea of guilty on the facts admitted by the accused in which instance the accused will be convicted of assault with intent to do grievous bodily harm; or
3. If the State does not accept a plea of guilty on the facts admitted by the accused, evidence should be led to prove stabbing as alleged in the charge sheet.

JUDGMENT

UNENGU AJ (HOFF J concurring):

[1] This matter was submitted before me for automatic review. The accused who was not legally represented at the trial, was charged with the offence of assault with intent to do grievous bodily harm.

[2] He pleaded guilty to the charge against him and was questioned¹ by the magistrate, convicted and sentenced to a period of eighteen (18) months

¹ In terms of section 112(1)(b) of the Criminal Procedure Act 15 of 1977

imprisonment, which sentence was wholly suspended for a period of five (5) years on the usual conditions.

[3] Upon reading the record of proceedings, I observed the proceedings to appear to me not in accordance with justice and directed the following query for the attention of the presiding magistrate;

'REVIEW CASE NO.: SWK-CRM 1942/2013

HIGH COURT REF. NO.: 702/2013

MAGISTRATE SERIAL NO.: REV 50/13

THE STATE vs ROBERT VAN WYK

The Honourable Reviewing Judge remarked as follows:

- “1. Is the verdict of guilty as pleaded returned by the learned magistrate consistent with the admissions made by the accused during the questioning in terms of section 112 (1) (b) of the Criminal Procedure Act 51 of 1977?
2. This record of proceedings contains facts and factors concerning theft and drink and drive – explain why.
3. Your urgent reply is appreciated.’

[4] The presiding magistrate replied as follows;

‘I concur with the learned Justice that the accused is charged with Assault with intent to do grievous bodily harm, the error that the court noted is that the reasons for sentence is flawed with pieces that the court extracted from various other cases for ease of expediting (sic) the matter, in the process I do agree I overlooked the fact that I had to properly proof read what I had placed and copied onto court record, and I failed in so doing, however I pray that the sentence still stand as is.’

[5] With her reply, the magistrate never answered the query directed to her in both paragraphs 1 and 2.

[6] The magistrate, after questioning the accused as indicated above, noted that she was 'satisfied accused admitted all allegations of the charge' and returned a verdict of 'guilty as charged'.

[7] The annexure to the charge sheet reads as follows:

'That the accused is/are guilt of the crime of Assault with intent to do grievous bodily harm. In that upon or about 27 April 2013 and at or near Erambo Bar, Mondesa, in the district of Swakopmund the accused did wrongfully, unlawfully and intentionally assault Frans Bock by stabbing the complainant with a broken bottle on the left eye with intent to cause the said Frans Bock grievous bodily harm'. (Emphasis added).

[8] During the questioning of the accused by the magistrate, the following, amongst others, transpired:

'Q: were you forced, threatened or intimidated by any person to plead guilty to this charge?

A: No

Q: why do you plead guilty what did you do?

A: I hit the complainant with a whole bottle, only once on the left side of his face very hard, and the bottle broke on the complainant's face.' (Emphasis added)

[9] No question was asked by the magistrate on the allegation of assault on Frans Bock by stabbing him with a broken bottle on the left eye. The accused, however, admitted assaulting the complainant by hitting him with a whole bottle once on the left side of his face very hard causing the bottle to break on his face. Therefore, the verdict of guilty as charged is inappropriate in the circumstances. However, nothing prevented the public prosecutor from accepting the facts admitted by the accused in which case a verdict of 'guilty assault with intent to do grievous bodily harm' would have been perfect.

[10] The magistrate also failed to enquire from the public prosecutor whether the state would accept the facts admitted by the accused or would lead oral evidence to prove the allegation in the charge that he stabbed the complainant with a broken bottle on the left eye – which is more serious than hitting. Therefore, in my view, the verdict of 'guilty as pleaded' returned by the magistrate is inconsistent with the admissions made by the accused during the questioning and cannot be allowed to stand.

[11] With regard the issue in paragraph 2 of the query that the record of proceedings contains facts and factors concerning theft and drink and drive, also has not been addressed and explained properly by the magistrate, apart from conceding that errors occurred due to her failure to properly proofreading what she had placed and copied onto the court record.

[12] The prosecutor in his address before sentence, on a charge of assault with intent to do grievous bodily harm, said the following:

'offence is serious and prevalent, aggravating items were stolen from retail shop, was (sic) recovered and handed back to the owner'. (Emphasis added).

[13] On her part, the magistrate when sentencing the accused said, amongst others, the following:

'worse is the fact that theft is a crime committed out of sheer greed as opposed to need – accused wanted to permanently deprive the owner of his bicycle; and message must be clear that drinking and driving will not be tolerated, as it is number one factor contributing to road accidents during holiday seasons.'

[14] Scamped work like this from a senior magistrate with a rank of a principal magistrate is not only regretted but also reprehensible. Magistrates have a duty to keep records of proceedings of trials they are conducting with care and proper to reflect the correct minutes of the proceedings taking place before them. However, proceedings conducted carelessly, like the present one, will produce a record full of

errors and irrelevant information which may result in both the conviction and sentence imposed be set aside on review and the perpetrator, who deserves a punishment for his conduct, to walk away a free person. However, in the present matter, the accused cannot punishment.

[15] In the result and in view of the reasons above, I make the following order:

1. The conviction and sentence are set aside.
2. The State may accept the plea of guilty on the facts admitted by the accused in which instance the accused will be convicted of assault with intent to do grievous bodily harm; or
3. If the State does not accept a plea of guilty on the facts admitted by the accused, evidence should be led to prove stabbing as alleged in the charge sheet.

PE Unengu
Acting

E Hoff
Judge