

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA, MAIN DIVISION
REVIEW JUDGMENT**

CR NO: 65/2017

In the matter between:

THE STATE

and

PENTRICK GUXAB

**(HIGH COURT MAIN DIVISION REVIEW NO. 1233/2017)
(MAGISTRATE SERIAL NO. 107/2017)**

Neutral citation: S v Guxab (CR 65/2017) [2017] NAHCMD 322 (10 November 2017)

CORAM: SHIVUTE J and SALIONGA AJ

DELIVERED: 10 NOVEMBER 2017

Flynote: **Criminal Procedure** - The purpose of s 112 (1) (b) of the Criminal Procedure Act - to determine whether the accused admits all the elements of the offence - Accused must give an unambiguous plea of guilty - Court cannot draw conclusions from the accused's answers.

ORDER

- a) The conviction and sentence are set aside.
- b) The record is returned to the magistrate in terms of section 312 of the Act and the magistrate is directed to enter a plea of not guilty in terms of s 113 for the matter to be clarified by evidence.
- c) In the event of a conviction, the magistrate in considering an appropriate sentence must have regard to the fact that the accused had already served part of the sentence.

REVIEW JUDGMENT

SHIVUTE J, (SALIONGA AJ CONCURRING)

[1] The accused was convicted of assault with intent to do grievous bodily harm following a plea of guilty after the court invoked the provisions of S 112 (1) (b) of the Criminal Procedure Act 51 of 1977. He was sentenced to 24 (twenty four) months imprisonment of which 6 (six) months are suspended for 5 (five) years on condition that the accused is not convicted of assault with intent to do grievous bodily harm committed during the period of suspension.

[2] I raised a query with the learned magistrate as to how the Court satisfied itself that the accused intended to cause serious injuries if he never admitted to doing so. The magistrate responded that according to him the answers given by the accused were enough to demonstrate that he intended to cause serious injuries. He further stated that the accused admitted that he hit the complainant on the cheek with a broken bottle and that when he hit the complainant his intention was to injure the complainant.

[3] In the matter of S v Naidoo 1989 (2) SA at 114 (A) as well as in S v Nagel 1998 (1) SACR at 218 (O) the court held that:

'The answers given by an accused are not "evidence" from which inferences may be drawn.'

In *S v Mkhize* 1978 (1) SA at 264 (N) 268A-B Didcott J concluded that:

'It is not the function of the court to evaluate the answers as if it were weighing evidence or to judge the truthfulness or plausibility of the answers. The test is what the accused person has said not what the court thinks of it.'

[4] In the present case, the accused never admitted to having an intention to cause serious injury to the complainant, he only admitted to having the intention to cause injury to the complainant. The purpose of s 112 (1) (b) of the Act is to determine whether the accused admits all the elements of the offence, in other words the accused must give an unambiguous plea of guilty. The court cannot draw conclusions from the accused's answers.

[5] The offence of assault with intent to cause grievous bodily harm consists of all the elements of common assault but in addition to that there must be an intention to cause grievous bodily harm. Whether grievous bodily harm is in fact inflicted on the complainant is immaterial in determining liability. It is simply the intention to do such harm that is in question. See *Snyman* 5th Ed Criminal Law at 462.

[6] In light of the above, I cannot agree that the accused was correctly convicted of the offence of assault with intent to cause grievous bodily harm. The conviction entered by the magistrate as well as the sentence imposed cannot be allowed to stand and the record must be returned to the magistrate in terms of s 312 of the Act and the magistrate is directed to enter a plea of not guilty in terms of s 113 for the matter to be clarified by evidence.

[7] In the result, I make the following order:

- a) The conviction and sentence are set aside.

b) The record is returned to the magistrate in terms of section 312 of the Act and the magistrate is directed to enter a plea of not guilty in terms of s 113 for the matter to be clarified by evidence.

c) In the event of a conviction, the magistrate in considering an appropriate sentence must have regard to the fact that the accused had already served part of the sentence.

NN SHIVUTE
JUDGE

J SALIONGA
ACTING JUDGE