

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

Case no: CR 31/2018

In the matter between:

THE STATE

v

DAVID SIMOBE KALONDA

ACCUSED

(HIGH COURT MAIN DIVISION REF. NO. 345/2018)

(MAGISTRATE SERIAL NO. 13/2018)

Neutral citation: *S v Kalonda* (CR 31/2018) [2018] NAHCMD 117 (2 May 2018)

Coram: SHIVUTE, J et SALIONGA, AJ

Delivered: 2 May 2018

Flynote: Criminal procedure – Review – Questioning in terms of section 112(1)(b) of the Criminal Procedure Act – Questions and answers are to establish the factual and legal basis for such plea – Questions must cover essential elements of the offence – In instant case questions were inadequate – Intent was not established – Magistrate could not have been satisfied to the guilt of accused.

ORDER

1. The conviction and sentence are set aside.
2. The matter is remitted to the Magistrate and he is directed to properly apply the provisions of s 112(1)(b) of the Criminal Procedure Act, Act 51 of 1977 and to thereafter dispose of the matter in accordance with the law.
3. The Magistrate is further directed to sentence the accused with due regard to any period of imprisonment already served by the accused.

REVIEW JUDGMENT

SALIONGA, AJ (SHIVUTE, J concurring)

[1] The accused was charged with assault with the intent to do grievous bodily harm in the Katima Mulilo Magistrate's court. He pleaded guilty and was questioned in terms of s 112(1)(b) of the Criminal Procedure Act, Act 51 of 1977 and sentenced to a fine of N\$3000 (three thousand Namibia dollars) or 8 (eight) months imprisonment.

[2] When I received the record on review, I requested the magistrate to explain how did the court satisfy itself that accused intended to cause grievous bodily harm if no question was asked in that regard.

[3] The learned Magistrate in his reply conceded that the accused person was not asked what his intention was at the time of the incident. That was an oversight on his part due to lack of experience but he has since learned the correct line of questioning. He requested the proceedings to be set aside and the matter be remitted back to him.

[4] Assault with intent to do grievous bodily harm is proven when all essential elements are established. All elements of an assault apply to this crime. However, in addition there must be intent to do grievous bodily harm. When applying section 112 (1) (b) of Act 51 of 1977, the presiding officer should ensure that accused admits all the elements of the offence. It is immaterial whether accused in fact inflicted bodily harm on the complainant, it is the intention to do grievous bodily harm that is relevant. (See C R Synman *Criminal Law* 6th Edition, at p 453)

[5] In the instant case, accused admitted to having assaulted the complainant on the neck with a bottle. Nowhere on record was the accused asked if he intended to cause serious injury to the complainant. The magistrate conceded to that and his failure to establish the accused's intention is fatal. The offence the accused is charged and convicted with is 'assault with the intent to do grievous bodily harm and not causing injuries to the complainant.'

[6] In the light of the above, the conviction and sentence cannot be allowed to stand and the following order is made:

1. The conviction and sentence are set aside.
2. The matter is remitted to the Magistrate and he is directed to properly apply the provisions of s 112(1)(b) of the Criminal Procedure Act, Act 51 of 1977 and to thereafter dispose of the matter in accordance with the law.
3. The Magistrate is further directed to sentence the accused with due regard to any period of imprisonment already served by the accused.

J T SALIONGA
Acting Judge

N N SHIVUTE

Judge