

REPUBLIC OF NAMIBIA

HIGH COURT OF  
WINDHOEK  
REVIEW JUDGMENT



NAMIBIA MAIN DIVISION,

<b>Case Title:</b> <i>The State</i> v <i>Benny Don Don Oeamseb</i>	<b>e No:84/2022</b>
<b>Heard before:</b> Hon. Judge Liebenberg et Hon. Judge Shivute	<b>Division of Court:</b> Main Division
<b>Delivered on:</b> 10 August 2022	
<b>Neutral citation:</b> <i>S v Oeamseb</i> (CR 84/2022) [2022] NAHCMD 400 (10 August 2022)	
<b>The order:</b> <ol style="list-style-type: none"><li>a. The convictions in respect of count 1 of malicious damage to property and count 3 of <i>crimen injuria</i> are confirmed.</li><li>b. The conviction in respect of count 2 of assault by threat is set aside.</li><li>c. The sentence in respect of all counts, since it was taken together for the purpose of sentencing, is set aside.</li><li>d. The matter is remitted to the court <i>a quo</i> in terms of s 312 (1) of the Criminal Procedure Act 51 of 1977 (CPA) and the learned magistrate is directed to question the accused in terms of s 112 (1)(b) of the CPA in order to determine whether the threats of the accused inspired a belief in the complainant that force would have been applied immediately and for the court <i>a quo</i> to sentence the accused afresh in respect of counts 1 and 3.</li><li>e. In terms of count 1 and 3, when sentencing the accused the court should take into account the sentence already served by the accused.</li></ol>	

- f. In terms of count 2, if the court a quo finds the accused guilty on the charge of assault by threat then the court should also consider the sentence already served by the accused.

**Reasons for order:**

SHIVUTE J ( LIEBENBERG J concurring):

[1] This is an automatic review in terms of section 302(1) of the Criminal Procedure Act 51 of 1977, as amended (the CPA).

[2] The accused person was charged and convicted of three counts namely; malicious damage to property, assault by threat and crimen injuria, read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003, in the District Court of Omaruru. The accused was sentenced to 12 months' imprisonment and all three counts are taken together for the purpose of sentencing.

[3] The accused was convicted on the strength of his guilty pleas in terms of section 112(1)(b) of the CPA.

[4] In considering the matter, the reviewing court was not satisfied that the accused admitted all the elements of the crime of assault by threat. A query was then directed to the court a quo as to 'how the Court satisfied itself that the accused admitted all the elements of assault by threat if no question was put to the accused whether his threats inspired a belief that force is immediately to be applied to the complainant?'

[5] The magistrate responded to the query by conceding and stating that it was an oversight on his part.

[6] The offence of assault may be committed in two ways. It can be an unlawful and intentional act or omission;

(a) which results in another person's bodily integrity being directly or indirectly impaired or,

(b) which inspires a fear or belief in another person that force or an impairment of his or her bodily integrity is to take place immediately.<sup>1</sup>

[7] The court a quo failed to question the accused on the aspect as to whether his threats inspired a belief that force is immediately to be applied to the complainant which is the core element of the offence of assault by threat.

[8] There are several judgments in this jurisdiction that give guidance on the proper questioning in terms of s 112(1)(b) of the CPA and echo that magistrates should bear in mind the nature and purpose of the questioning to minimise the risk of an erroneous conviction on a plea of guilty by an unsophisticated accused.<sup>2</sup>

[9] *S v Hoabeb*<sup>3</sup> reiterated the following principle:

‘The primary purpose of questioning the accused in terms of s 112 (1)(b) of the CPA following a plea of guilty, is to safeguard the accused against the result of an unjustified plea of guilty.<sup>4</sup> Moreover, when the court questions the accused it must ensure that s/he admits all elements of the offence in such way that it enables the court to conclude for itself whether the accused is guilty of the offence charged. The accused’s answers must establish an unequivocal plea of guilty. If there is any doubt, a plea of not guilty should be entered.<sup>5</sup> The function of the court is not to evaluate the answers as if it were weighing evidence, neither does it have to decide the truthfulness of the answers or draw inferences therefrom.<sup>6</sup>’

[10] The failure of the magistrate to ask the accused on such an important element of the offence of assault by threat leads to a misdirection and thus the conviction cannot be allowed to stand.

[11] The review court had no issues with the convictions of count 1 and 3, however the sentence since it was taken together in respect of all counts, cannot be permitted to stand and therefore, the sentence must be set aside for the court a quo to deal with the sentencing afresh.

<sup>1</sup> C R Snyman *Criminal Law* 6 ed (2014) at 447-450.

<sup>2</sup> *S v Willemse* (CR 15/2021) [2021] NAHCMD 98 (8 March 2021).

<sup>3</sup> *S v Hoabeb* (CR 36/2018) [2018] NAHCMD 140 (24 May 2018).

<sup>4</sup> *The State v Kandjimi Hiskia Mangundu* (CR 67/2016) [2016] NAHCMD 316 (17 October 2016)).

<sup>5</sup> *S v Combo and Another* 2007 (2) NR 619 (HC).

<sup>6</sup> *S v Kaevarua* 2004 NR 144 (HC).

[12] It must be brought to the attention of the learned magistrate and the prosecutor that the title of the Act referred to in this case is not the Domestic Violence Act as appeared on the record, but the correct name is the Combating of Domestic Violence Act 4 of 2003 and must be referred to as such.

[13] As a result, the order is as follows:

- a. The convictions in respect of count 1 of malicious damage to property and count 3 of crimen injuria are confirmed.
- b. The conviction in respect of count 2 of assault by threat is set aside.
- c. The sentence in respect of all counts, since it was taken together for the purpose of sentencing, is set aside.
- d. The matter is remitted to the court a quo in terms of s 312 (1) of the Criminal Procedure Act 51 of 1977 (CPA) and the learned magistrate is directed to question the accused in terms of s 112 (1)(b) of the CPA in order to determine whether the threats of the accused inspired a belief in the complainant that force would have been applied immediately and for the court a quo to sentence the accused afresh in respect of counts 1 and 3.
- e. In terms of count 1 and 3, when sentencing the accused the court should take into account the sentence already served by the accused.
- f. In terms of count 2, if the court a quo finds the accused guilty on the charge of assault by threat then the court should also consider the sentence already served by the accused.

**N N SHIVUTE**

**J C LIEBENBERG**

<b>Judge</b>	<b>Judge</b>
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