



“ANNEXURE 11”
Practice Direction 61
IN THE HIGH COURT OF NAMIBIA

Case Title: THE STATE vs JOHANNES HAINGURA LIKERA ACCUSED	Case No: CR 32/2023 Division of Court: High Court, Main Division
Heard before: Honourable Lady Justice Usiku et Claasen J	Date of hearing: 17 March 2023
	Delivered on: 17 March 2023
Neutral citation: <i>S v Likera</i> (CR 32/2023) [2023] NAHCMD133 (17 March 2023)	
COURT ORDER	
<ol style="list-style-type: none">1. The conviction and sentence is hereby set aside. 2. The matter is remitted to the trial magistrate in order to question the accused further with regard to the element of intent so as to satisfy herself that all the elements of the offence had been admitted. Upon conviction and sentence the trial court must consider the term of imprisonment the accused person has so far served.	
JUDGMENT	

D USIKU J (CLAASEN J concurring)

[1] The matter before me is an automatic review from the Magistrate's Court in terms of s 302 of the Criminal Procedure Act 51 of 1977 as amended.

[2] The accused was charged with assault with intent to do grievous bodily harm read with the provisions of the Domestic Violence Act, Act 4 of 2003. He was convicted and subsequently sentenced to 18 (eighteen) months' imprisonment on 6 January 2023.

[3] On first consideration of the review, the following query was directed to the learned magistrate:

'How did the learned magistrate satisfy herself that the accused intended to cause grievous bodily harm if there was no question asked pertaining to the accused's intention to cause grievous bodily harm? Can the learned magistrate kindly explain?'

[4] The learned magistrate responded as follows:

'During the questioning, the accused answered positively that he knew that by kicking the complainant, she can sustain serious injuries and secondly in spite of knowing this, he proceeded to assault the complainant by kicking her. Therefore, the inference that the court drew from the accused's knowledge is that the accused foresaw the possibility of him causing the complainant grievous bodily injury and despite that foreseeability he proceeded to assault the complainant. Which therefore cured any doubt in the courts' mind and thereby being satisfied that the element of *intent (in terms of dolus eventualis) was established.*

I, however, stand guided by the Honourable review Judge and leave it in the hands of the court.'

[5] Accused pleaded guilty to the charge and thereafter the court proceeded questioning accused in terms of s 112 (1) (b) of Act 51 of 1977 as amended. During the questioning of the accused by the magistrate, the magistrate did not establish accused's intent to do

grievous bodily harm, since the state alleges that the accused's intention was to do grievous bodily harm. This is an essential element and it was not covered in the magistrate's questioning. Although the accused had admitted assaulting the victim, he never stated that it was his intention to do grievous bodily harm.

[6] In *S v Uirab*¹ it was held as follows:

'It is trite that in questioning the accused, the court should do more than simply restate the charge and ask the accused whether he or she admits the allegations in the charge.'

[7] Section 112 (1) (b) of Act 51 of 1977 questioning has a twofold purpose, namely to establish the factual basis for the plea of guilty and to establish the legal basis for such plea. From the admissions, the court must conclude whether the legal requirements for the commission of the offence have been met. These include questions of unlawfulness, *actus reus* and *mens rea*. The court can only satisfy itself if all the admissions adequately cover all the elements of the offence.²

[8] The purposes of s 112 (1) (b) of Act 51 of 1977 questioning was further explained in *S v Naidoo*³ as follows:

'The purpose of questioning is to safeguard the unrepresented accused against the result of an unjustified plea of guilty, something the magistrate in this case would not have realised from the way he had formulated his questions. By asking the accused whether his actions were 'wrongful and unlawful' presupposes that he had legal knowledge which, bearing in mind that the accused was a layperson, was probably lacking. From the afore-going it is evident that questioning of the accused must be applied with care and circumspection.'

[9] As the court never established the intention of the accused at the time he assaulted the victim, this court is not satisfied that the accused admitted all the elements of the offence charged and as such the conviction could not be allowed to stand. In the

¹ *S v Uirab* (CR 23-2015) [2015] NAHCMD 183 (06 August 2015).

² *S v Kaninab* (CR 75/2016) [2016] NAHCMD 356 (11 November 2016).

³ *S v Naidoo* 1989 (2) SA 114 (A) at 121E.

meantime, this matter is remitted to the trial magistrate in order to question the accused further with regard to the element of intent so as to satisfy herself that all the elements of the offence had been admitted. Upon conviction and sentence the trial court must consider the term of imprisonment the accused person has so far served.

[10] In light of the reasons above, I make the following order:

1. The conviction and sentence are hereby set aside.
2. The matter is remitted to the trial magistrate in order to question the accused further with regard to the element of intent so as to satisfy herself that all the elements of the offence had been admitted. Upon conviction and sentence the trial court must consider the term of imprisonment the accused person has so far served.

D USIKU JUDGE	C CLAASEN JUDGE