



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

Case no: CR 23/2012

In the matter between:

THE STATE

and

JOHANNES PETRUS TITUS

ACCUSED 1

TOMAS HAFENI

ACCUSED 2

High Court NLD review case ref no; 94/2012

Neutral citation: *The State v Titus* (CR 23/2012) [2012] NAHCNLD 2
(26 October 2012)

Coram: TOMMASI J and LIEBENBERG J

Delivered: 26 October 2012

Flynote: Criminal Procedure - Special review in terms of Section 304 (4) - proceedings not in accordance with justice although matter not subject to automatic review - Plea of guilty — Questioning in terms of s 112(1)(b) of Criminal Procedure Act, 1977 (Act 51 of 1977) – Magistrate failed to ascertain if accused admit all allegations of charge – Review – the court has a discretion to order remittal in terms of section 312 of the Act where same would result in an injustice

Summary: The accused appeared in the district court with another co-accused on a charge of assault with the intent to cause grievous bodily harm and sentenced to

pay a fine of N\$1000.00 or six months imprisonment. The matter was submitted for automatic review in respect of the sentence which the court imposed on his co-accused. The court noted that the magistrate failed to ascertain whether the accused had admitted all the allegations of the offence he was charged with and queried the magistrate. The magistrate conceded that she erred and requested that the matter be remitted to district court. The court held that it would result in an injustice if the matter is remitted given the fact that six months had already lapsed since the date on which the sentence was imposed. The conviction and sentence were consequently set aside. The conviction of accused 2 was in accordance with justice and confirmed.

ORDER

1. The conviction and sentence of accused 1 are set aside
2. The conviction and sentence of accused 2 are confirmed;

JUDGMENT

TOMMASI J (LIEBENBERG J concurring):

[1] This matter came before me on automatic review from the magistrate's court for the district of Eenhana. Both accused were charged with two counts of housebreaking with the intent to steal and theft (count 1 and 2) and assault with the intent to do grievous bodily harm (count 3). Accused 1 pleaded not guilty to the count 1 and 2 and guilty to count 3. Accused 2 pleaded guilty to count 1 and 2 and not guilty to count 3.

[2] Accused 1 was questioned in terms of section 112(1)(b) of the Criminal Procedure Act, 1977 (Act 51 of 1977) in respect of count 3 and accused 2 in respect of count 1 and 2. The State led no evidence hereafter and closed its case. Accused 1

was convicted on count 3 and sentenced to N\$1000 or six months imprisonment. Accused 2 was convicted on count 1 and 2 and sentenced to N\$300 or 90 days imprisonment in respect of count 1 and on count 2 to 36 months imprisonment of which 12 months were suspended for five years on the usual conditions.

[3] The conviction and sentence in respect of accused 2 is in accordance with justice and will be confirmed. The sentence of accused 1 is not subject to review in the ordinary course in terms of section 302 of the Act as the magistrate held the substantive rank of magistrate for a period for longer than seven years. However, since the sentence of accused on count 2 was subject to review, the record of the proceedings against both accused was placed before me. Whilst reviewing the sentence imposed in respect of accused 2, I noted that the magistrate, when questioning accused 1 failed to determine whether he had the requisite intention to cause grievous bodily harm to the complainant. The questioning did not even establish an intention to assault the complainant. The magistrate in an attempt to ascertain unlawfulness asked the accused the following question: 'Did you know that the law does not allow you to assault anybody whatsoever?' This question clearly does not correctly state the law. There may be justification such as private defense which may render the act lawful. There was therefore no indication that the accused admitted that he had acted without any justification.

[4] I requested the magistrate to indicate whether she was satisfied that accused was guilty of the offence to which he pleaded guilty. The magistrate pointed out that the matter was not reviewable but conceded that accused 1 did not admit that he intended to do the complainant grievous bodily harm. The magistrate requested that this matter be remitted to the magistrate court in order for her to comply with the provisions of section 112(1)(b) of the Act.

[5] This court cannot simply ignore the failure of the magistrate to exercise her judicial discretion in terms of the provisions of section 112(1)(b) of the Act when she convicted accused 1 when he clearly did not admit all the elements of the offence he was charged with. The court is empowered in terms of the provisions of section 304(4) of the Act to review a sentence which is not subject to review in the ordinary

course in terms of section 302 if it has been brought to the its notice that the proceedings in which the sentence was imposed were not in accordance with justice,

[6] Under these circumstances this court should remit the matter to magistrate to comply with the provisions of section 112(1)(b) of the Act in terms of the provisions of section 312 of the Act. This however would not serve any purpose and would merely amount to a further injustice being perpetrated¹. The accused were sentence on 25 April 2012. The accused would by now have served six months imprisonment if he did not pay the fine. Justice would be best served if the conviction and sentence of accused 2 are set aside. The conviction and sentence of accused 2 are in accordance with justice and should be confirmed.

[7] In the result the following order is made:

- (a) The conviction and sentence of accused 1 are set aside; and
- (b) The conviction and sentence of accused 2 are confirmed

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MA Tommasi
Judge

JC Liebenberg
Judge

¹ See: The State v Thomas Sheelekeni Patric (unreported) Case No. CR11/2012 delivered on 16.03.2012; The State v Muyambu Kativa (Unreported) Case No CR 14/2012 delivered on 22 March 2012; S v Mshengu 2009 (2) SACR 316 (SCA)