

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

REVIEW JUDGMENT

<b>Case Title:</b>  The state v Kolele Haikoondo	<b>Case no:</b> CR 38/2023
	<b>Division of Court:</b> High Court, Northern Local Division
<b>Heard before:</b> Honourable Lady Justice Salionga J et  Honourable Justice Kessler J	<b>Delivered on:</b> 2 November 2023

**Neutral citation:** *S v Haikoondo* (CR 38/2023) [2023] NAHCNLD 115 (2 November 2023)

COURT 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.
3. Upon conviction and sentence the trial court must consider the term of imprisonment the accused person has so far served.

## JUDGMENT

SALIONGA J (KESSLAU J concurring)

[1] This is an automatic review matter 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 a fine of N\$1500 or 6 months' imprisonment on 13 January 2023.

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

'Accused was charged with the offence of assault with intent to do grievous bodily harm and not causing injury to the complainant. How did the learned magistrate satisfy herself that the accused admitted all the elements of the offence if no question of his intention was asked? Explanation was also requested why it took 7 (seven) months to send the record on review.

[4] The learned magistrate responded as follows:

'Although the intention was not asked, to direct a panga to the victim is obvious to cause grievous bodily harm, hence pangas falls under dangerous weapon and did inflicted injuries. The case was not submitted within 7 days as required, our office did not had admins to type our records.'

[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, 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 which 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. Thus for the magistrate to state that to direct a panga to the victim is obvious was to cause grievous bodily harm as the panga falls under dangerous weapon is not the correct reflection or interpretation of the law.

[6] The issue to be determined by this court is whether all the elements of the offence had been admitted by the accused sufficiently, for the magistrate to find that the offence has been proven beyond reasonable doubt and return a guilty verdict thereon.

[7] Liebenberg J stated the following in *S v Pretorius*<sup>1</sup>

'It is trite that when an accused pleads guilty to a charge, a court is under a duty to satisfy itself that the accused admits the definitional elements of an offence. The invoking of s 112 (1) (b) of the CPA, following a plea of guilty, acts as a safeguard against the result of an unjustified plea of guilty. The accused's answers must establish an explicit plea of guilty. Moreover, where a court finds any doubt in the answers that an accused gives during s 112 (1) (b) questioning, a plea of not guilty should be entered. It should further be noted that during this stage of proceedings the court cannot evaluate, decide the truthfulness of, or draw inferences from the accused's answers. The court is duty bound to enter a plea of not guilty where the accused's answers suggest a possible defence.'

[8] 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.<sup>2</sup>

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

<sup>1</sup> *S v Pretorius* (CR 45/2019) [2020] NAHCMD 258 (29 June 2020)

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

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

'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.'

[10] 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 meantime, this matter has to be 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.

[11] For the reasons stated 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.
3. Upon conviction and sentence the trial court must consider the term of imprisonment the accused person has so far served.

<b>J. T. SALIONGA</b> <b>JUDGE</b>	<b>E. E. KESSLAU</b> <b>JUDGE</b>