

REPUBLIC OF NAMIBIA

NOT REPORTABLE



**HIGH COURT OF NAMIBIA, MAIN DIVISION
JUDGMENT**

CR No: 44/2017

In the matter between:

THE STATE

and

CYPRIAN GOLIATH

HIGH COURT MD REVIEW CASE NO 824/2017

Neutral citation: S v Goliath (CR 44/2017) [2017] NAHCMD 212 (07 August 2017)

CORAM: LIEBENBERG J et SHIVUTE J

DELIVERED: 07 August 2017

ORDER

The conviction and sentence are set aside.

JUDGMENT

LIEBENBERG J: (Concurring SHIVUTE J)

[1] The accused was convicted on his plea of guilty of the offence of assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act 4 of 2003, and sentenced to a fine of N\$2 000 or 8 months' imprisonment.

[2] Though the matter was finalised on 31 October 2016, it was only received in the office of the registrar on 25 July 2017, almost nine months later. The magistrate did not advance any reasons which could possibly explain the delay in having the proceedings reviewed. The delay in submitting the record of the proceedings for review, for reasons to follow, constituted an injustice to the accused as he by now would have fully served the alternative sentence imposed.

[3] Despite the accused having pleaded guilty to the charge he, during the court's questioning in terms of s 112 (1) (b) of Act 51 of 1977, on two occasions said that he did not have the intention to injure the complainant. This notwithstanding, the court continued questioning the accused and in the end was satisfied that he admitted the elements of the offence and convicted.

[4] In response to a query directed to the magistrate as to whether the accused did not raise a defence, the magistrate conceded that it must have slipped his mind and that a blatant mistake was made. For obvious reasons the court should have noted a plea of not guilty and ordered the commencement of trial proceedings.

[5] It is well settled that the primary purpose of questioning the undefended accused in terms of s 112 (1) (b) is to establish whether there is a reliable factual basis for the accused's own belief in his guilt. It serves as a safety measure against mistaken guilty pleas, particularly where the accused is often illiterate and unsophisticated when coming before the court with no legal assistance.

[6] In the present instance the accused never admitted having had the intention to injure the complainant whereby he raised a defence to the charge. In the circumstances the court should forthwith have noted a plea of not guilty, without questioning the accused any further.

[7] In view of the above, the conviction and sentence cannot be permitted to stand and fall to be set aside. Although the review court, in circumstances as the present, is compelled by s 312 (1) of the CPA to remit the matter to the trial court with appropriate directions, it would in my view not be in the interest of justice to give effect thereto as the accused by now had fully served the sentence. I therefore decline to make such order.

[8] In the result, it is ordered:

The conviction and sentence are set aside.

J C LIEBENBERG

JUDGE

N N SHIVUTE

JUDGE