CASE NO: CR 225/96

THE STATE versus SOLASTIC MASEKA

1996/11/21

GIBSON J.

Assault with intent to do grievious bodily harm, nature of the offence, nature of the intent some of the factors that help indicate the graver offence, distinguish common assault.

CASE NO.CR.225/96

IN THE HIGH COURT OF NAMIBIA

THE STATE

versus

SOLASTIC MASEKA

(HIGH COURT REVIEW CASE NO. 3407/96)

CORAM: STRYDOM, J.P. et GIBSON, J.

Delivered on: **1996/11/21**

REVIEW JUDGMENT

GIBSON, J.: This is a review.

The accused was charged with the offence of assault with intent to do grievous bodily harm. She pleaded guilty and was questioned in terms of section 112(1) (b) of the Criminal Procedure Act 51 of 1977. She was then convicted and sentenced as follows:

To pay N$500 or 5 months imprisonment of which N$250 or *2%* months imprisonment were suspended for a period of 3 years on condition that accused is not convicted of an offence of assault or assault with intent to do grievous bodily harm committed within the period of suspension.

The facts of the case were that the accused found her live-in lover sitting with another woman, the complainant, in a room. The accused assaulted the complainant. She slapped

her on her face once and bit her thumb. No other evidence was led at the trial as to the extent of the damage or the injuries suffered by the complainant.

After reading the record I was of the view that a charge of common assault rather than the more serious offence of assault with intent to do grievous bodily harm was revealed.

I wrote to the trial magistrate and enquired whether the intent to do grievous bodily harm was proved on the facts of the case. The trial magistrate has now replied and has not been able to convince me that my initial view was wrong.

There are a number of factors which may help in determining whether or not the offence of grievous bodily harm is committed. These factors are the degree of violence used, the part of the body at which the blows or blow is aimed, whether or not any weapon was used and the manner in which the weapon or instrument was used. This list is not exhaustive. Other factors may well be found. Therefore in order to distinguish this offence from the lesser offence of common assault it is essential that the Court inquires from the accused what his intention was, whether he intended to cause serious bodily harm or as is sometimes put, such harm as would seriously interfere with bodily comfort, or find out whether the accused foresaw that serious injury might result from his actions but persisted in the assault. (See S v Dioho. 1983(4) SA 751; S v Maoasa, 1972(1) SA 524.)

In this case the trial magistrate asked the accused the

following questions amongst others:

"Q: Did you beat Loide Johannes and bite her on the 7th September 1996 at house 700, Arandis in the district of Swakopmund?

A: Yes.

Q: Where on her body did you beat her and bit (sic) her?

A: I beat her on the face and bit her on her thumb.

Q: With what did you beat her?

A: With my hands.

Q: How many times did you beat her and bit (sic) her?

A: I clapped her once and I also bit her once.

Q: Did she sustain some injuries?

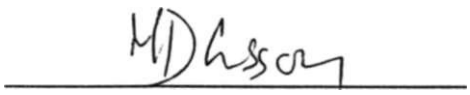
A: I cannot tell as since we fought I never saw her as to know the injuries did she sustained."

The answers given to some of these questions in this short passage do not indicate that a very grave or serious assault happened in this case. The questions put by the trial magistrate do not go anywhere towards establishing what the intention of the accused was, whether, for instance, she foresaw that any serious harm might be occasioned by some of the assault.

In view of the inadequacy of the information obtained by the trial Court, it is impossible to find that there was sufficient evidence to prove beyond reasonable doubt that the accused had the requisite intention for this type of offence.

Therefore it is my view that the conviction for the offence of assault with intent to do grievous bodily harm be set aside. However, the facts have revealed the commission of the lesser offence, that of common assault. Thus there is substituted for the conviction of assault with intent to do grievous bodily harm a conviction for common assault.

The sentence in the circumstances of the offence which I have found proved is far too excessive and induces shock. The sentence is therefore set aside and substituted by a sentence of a fine of $250 (TWO HUNDRED AND FIFTY) or two (2) months imprisonment.



GIBSON, JUDGE

I agree

STRYDOM, JUDGE PRESIDENT