



NOT IMPORTANT

CR 86/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

CHARLES DAVID EICHAB

(HIGH COURT REVIEW CASE NO.: 1689/2010)

CORAM: Muller, J et Botes, AJ

DELIVERED ON: 03/11/2010

REVIEW JUDGMENT

BOTES, AJ

[1] The accused, a first offender, was arraigned and convicted in the magistrates court Katutura, Windhoek on a charge of assault with intent to do grievous bodily harm.

[2] The accused pleaded guilty to the charge and after questioning by the magistrate in terms of section 112(1) (b) of the Criminal Procedure Act, Act 51 of 1977 was convicted as charged.

[3] The accused was sentenced to N\$600.00 (six hundred Namibian Dollars) or 6 (six) months imprisonment on the 31st of May 2010.

[4] Despite already having been sentenced on 31 May 2010 the record was only received by the Registrar of this court on 26 October 2010 for review. Due to this inordinate delay I have decided not to direct enquiries to the magistrate to advance reasons, if any, why the accused was convicted of assault with intent to do grievous bodily harm and not on common assault only.

[5] The relevant and material portion of the proceedings conducted in terms of section 112(1) (b) reads as follows:

"CRT: It is alleged that you assaulted Rosie Van Der Byll, do you agree or dispute it?

ACC: I agree.

CRT: It is further alleged that you beat him with clenched fists in the face. Do you agree or dispute this?

ACC: I agree.

CRT: How many times did you beat him with your fists?

ACC: I beat him once and then he fell backwards.

CRT: Did you know it is wrong and unlawful to assault another person and that, if arrested, you could be punished for your action by a competent court of law?

Acc: I knew it was wrong.

CRT: Why did you assault Mr. Van Der Byll?

ACC: The complainant slapped me in the face after we quarrelled. I got angry and beat him with a clenched fists.

CRT: Did the complainant sustain any injuries as a result of the assault?

ACC: He had a bruise on his right cheek and there was blood flowing from the cut that he sustained on the cheek."

[6] It is obvious from the admissions reflected on the record that accused admitted hitting the complainant once in his face with clenched fists after being provoked, resulting therein that complainant sustained a bruise and cut to his cheek.

[7] No admission was sought by the magistrate as to the force of the blow nor as to the nature of the injuries sustained. The magistrate also did not enquire whether the accused admits that in perpetrating the assault, he intended to inflict grievous bodily harm on the complainant.

[8] Snyman, *Criminal Law*, fourth ed, p 435 describes the difference between assault with intent and common assault as follows:

"All the requirements for an assault set out above apply to this crime, but in addition there must be intent to do grievous bodily harm. Whether grievous bodily harm is in fact inflicted on Y is immaterial in determining liability³⁷ (though it is usually of great importance for the purposes of sentence). It is simply the intention to do such harm that is in question. Whether X in fact had intent to do grievous bodily harm is a factual question. Important factors which may indicate that X had such an intention are, for example, the nature of the weapon or instrument used, the way in which it was used, degree of violence, the part of the body aimed at, the persistence of the attack, and the nature of the injuries inflicted, if any.³⁸"

[9] In my view the admissions made by accused does not form an acceptable basis from which an inference can be drawn that the accused in hitting the complainant once with clenched fist(s) in complainants face intended to inflict grievous bodily harm on the person of complainant. The magistrate therefore only should have convicted the accused on common assault or should have made further enquiries in an effort to establish whether the accused in fact admits the necessary form of intent.

[10] For the above reasons the following order is made

1. The conviction of the accused on assault with intent to do grievous bodily harm is set aside.
2. The accused is convicted of the offence of common assault.

3. The sentence originally imposed is set aside and substituted with the following sentence. The accused is sentenced to N\$300.00 (three hundred Namibian Dollars) or 3 (three) months imprisonment. The sentence is antedated to 31/05/2010.

BOTES, AJ

I agree.

MULLER, J