

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CR 03/2013

In the matter between:

THE STATE

and

AMUTENYA TOBIAS KUHATUMWA

High Court NLD Review Case Ref No.: 48/2013

Neutral citation: *The State v Kuhatumwa* (CR 03/2013) [2013] NAHCNLD 11
(07 March 2013)

Coram: LIEBENBERG J and TOMMASI J

Delivered: 07 March 2013

Flynote: **Criminal Procedure** – Charge defective – Date (month and year) during which alleged offence committed not mentioned in charge – Section 84 of Act 51 of 1977 requires – Accused must be informed of the case the State brings against him.

Summary: The accused was convicted in terms of s 112 (1)(a) on his plea of guilty on a charge of assault (by threat). The charge was defective in respect of the date in that the month and year was omitted. The court could not have convicted the accused on his plea of guilty on a defective charge. Conviction and sentence set aside.

ORDER

The conviction and sentence are set aside.

JUDGMENT

LIEBENBERG J (TOMMASI J concurring):

[1] The accused was arraigned in the magistrate's court of Okahao, in the district of Outapi, on a charge of assault by threat. He was convicted on his plea of guilty in terms of s 112 (1)(a) of the Criminal Procedure Act, 51 of 1977 (the Act), and sentenced to a fine of N\$1 000 or 3 months' imprisonment, wholly suspended on condition of good conduct.

[2] The matter was sent on review by a magistrate other than the presiding magistrate under cover of a letter in which he explains the delay in sending the matter on review; also mentioning that the trial magistrate was no longer in the services of the magistracy.

[3] Upon considering the proceedings it appeared to me that same are not in accordance with justice in that the charge is defective. Though the court under s 304 (2)(a) of the Act is obliged to obtain from the judicial officer who presided at the trial, a statement setting forth the reasons for conviction, this is no longer possible in view of the magistrate's departure. In the absence of such statement the proceedings are reviewed as it appears from the record.

[4] Besides the defective charge, the learned magistrate in the cover letter also pointed out that the sentence appearing on the last page of the record differs from the sentence recorded on the charge sheet as regards the alternative imprisonment to the fine imposed ie 3 months opposed to 6 months' imprisonment. In the light of the conclusion I had come to, the conflicting alternative sentences apparent from the record of the proceedings have become irrelevant.

[5] The charge to which the accused pleaded and was subsequently convicted of on his plea of guilty is defective, in that it lacks particularity as to the time the alleged offence was committed. The annexure in which the charge is set out makes no mention of the month or the year during which the alleged offence was committed and only refers to the date as the "14th".

[6] Section 84 of the Act provides for the essentials of a charge and reads:

'(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

(3) ...' (emphasis provided)

[7] It is well established that for an accused person to be afforded a fair trial, he/she must be informed of the case the State wants to advance against him/her. In the absence of a (proper/complete) date mentioned in the charge, the accused, when asked to plead, could not have known when the alleged offence had been committed; an essential element of the charge thus not disclosed to him in the charge. This defect in the charge should immediately have been realised by both the prosecutor and the magistrate the moment the charge was read out in court. It does not appear from the manner in which the charge was formulated that this is an instance where the alleged offence was committed on a date “unknown to the prosecutor” as provided for in s 84 (2) as this is not alleged in the charge.

[8] The defect in the charge is such that it invalidates the charge which, as a result of the guilty plea tendered and subsequent conviction, could not be cured by the leading of evidence. The accused therefore could not have been convicted on the charge put to him and the conviction stands to be set aside.

[9] I am satisfied that this is not an instance where the provisions of s 312 of the Act find application; hence the matter need not be remitted to the trial court.

[10] In the result, the conviction and sentence are set aside.

JC LIEBENBERG
JUDGE

MA TOMMASI
JUDGE