

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
REVIEW JUDGMENT

Case no: CR 4/2017

THE STATE

and

FILLEMONT NAMTEWA

ACCUSED

(High Court Case no. 154/2017)

Neutral citation: *The State v Namtewa* (CR 4 /2017) [2017] NAHCNLD 49
(13 June 2017)

Coram: TOMMASI J *et* JANUARY J

Delivered: 13 June 2017

Flynote: Criminal procedure —Plea—Questioning in terms of s 112(1)(b) Criminal Procedure Act 51 of 1977 — assault with intent to do grievous bodily harm - magistrate required to be satisfied that the accused admits all the elements of the offence — no question posed to determine the element of intent — Answers given by accused not constituting 'evidence' under oath (see *S v Thomas* 2006 (1) NR 83 (HC)).

ORDER

1. The conviction and sentence are set aside;
2. The case is remitted to the magistrate and he/she is directed to properly apply the provisions of s 112(1)(b) of the Criminal Procedure Act, 1977, and to, thereafter, dispose of the matter in accordance with law.
3. The magistrate is further directed, in the event of the accused's conviction, to sentence the accused with due regard to any period of imprisonment already served by the accused pursuant to the conviction set aside in para 1 of this order.

JUDGMENT

TOMMASI J (JANUARY J CONCURRING):

[1] This case is before us on automatic review. The accused was charged with assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act, 4 of 2003. The accused pleaded guilty and having been questioned in terms of s 112 (1)(b) was convicted and sentenced to 2 years imprisonment.

[2] The accused was sentenced on 27 April 2017 and the record of proceedings were received by this court on 9 May 2017.

[3] The following questions and answers relating to the assault were recorded during the questioning in terms of s 112(1)(b):

“Q: Why are you pleading guilty to the charge?

A: Because I stabbed my sister with a knife on her hands and feet;

Q: Did you stab her on 18/03/17 at Onelago village in the district of Oshakati?

A: Yes

Q: How many times did you stab her on her hands?

A: Once

Q: And on her feet?

A: It was once

Q: Did she sustain any injuries?

A: Yes

Q: Where?

A: She was injured on her hands and her feet because she had stab wounds.

Q: Why did you stab your sister, the complainant?

A: because she insulted me and she bring her boyfriend in the house.

Q: Is that the only reasons why you assaulted her?

A: Yes

Q: Did you know that you what you were doing was wrong and unlawful?

A: Yes I knew it.

Q: Was the complainant treated?

A: Yes she was treated at Oshakati hospital.'

[4] There is not a single question posed to the accused to determine what his intention was. This matter is almost on all fours with *S v Thomas* 2006 (1) NR 83 (HC). The headnote reads as follow:

'The answers given in an enquiry in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 do not constitute 'evidence' under oath from which the court can draw inferences regarding the guilt of the accused. Section 112(1)(b) requires of a court in peremptory language to question the accused with reference to the alleged facts of the crime in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty. It may only convict the accused on account of such a plea if it is satisfied on the basis of such answers that the accused is indeed

guilty. Unless the accused has admitted to all the elements of the offence, he or she may not be convicted merely on account of his or her plea - except, of course, in the case where s 112(1)(a) applies.'

[6] The learned magistrate could not have been satisfied, on the strength of the answers given, that the accused admitted all the elements of the offence he was charged with. In view of the omission of the learned magistrate to question the accused on the element of intention, the conviction cannot stand. We find that the proceedings are not in accordance with justice and the matter should be remitted to the district court in terms of the provisions of s 312 of the Criminal Procedure Act, 51 of 1977 for the magistrate to properly apply the provisions of s 112 (1)(b) of the same Act.

[7] I pause to mention that there was also no compliance with s 25 of the Combating of Domestic Violence Act, 4 of 2003 and no reason is advanced on the record why it was not possible for the court to comply with the provisions thereof. The district courts are reminded that section 25 of the Combating of Domestic Violence Act directs that: 'The court must, if reasonably possible and within a reasonable time, notify the complainant or the complainant's next of kin, if the complainant is deceased, of the time and place of sentencing in a case of a domestic violence offence against the complainant.' [my emphasis]

[8] In the result the following order is made:

1. The conviction and sentence are set aside;
2. The case is remitted to the magistrate and he/she is directed to properly apply the provisions of s 112(1)(b) of the Criminal Procedure Act, 1977, and to, thereafter, dispose of the matter in accordance with law.
3. The magistrate is further directed, in the event of the accused's conviction, to sentence the accused with due regard to any period of imprisonment already served by the accused pursuant to the conviction set aside in para 1 of this order.

MA TOMMASI J

Judge

HC JANUARY

Judge