



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

Case no: CR 13/2013

**THE STATE**

Versus

**RODERICK DIERGAARDT**

**(HIGH COURT MAIN DIVISION REF. NO 933/2012)**

**(MAGISTRATE SERIAL NO. :10/2011)**

**Neutral citation:**     *The State v Diergaardt* (CR 13/2013) [2013] NAHCMD 48 (26 February 2013)

**Coram:**       SHIVUTE, J *et* UNENGU, AJ

**Delivered:**    **26 February 2013**

**Flynote:** - S112 (1) (b) Act 51 of 1977 – When court applies s112 (1) (b) – accused raised defence – court should immediately enter a plea of not guilty – not to question the accused further.

**Summary:** - The accused was charged with two counts namely: Assault with intent to do grievous bodily harm and indecent assault. He pleaded guilty to the 1<sup>st</sup> count of assault with intent to do grievous bodily harm and he was convicted as charged. In respect of the 2<sup>nd</sup> count he pleaded not guilty. The magistrate invoked s 112 1 (b) of the Criminal Procedure Act 51 of 1977 in respect of the 1<sup>st</sup> count and convicted the accused as charged. The accused raised a defence that he only assaulted the complainant with an open hand. The court was supposed to enter a plea of not

guilty and not to proceed further to question the accused. The conviction is set aside.

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### **ORDER**

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1. The conviction in respect of the 1<sup>st</sup> count is set aside.
2. The sentence of thirty (30) months imprisonment of which six (6) months suspended for five (5) years on condition accused is not convicted of assault with intent to do grievous bodily harm or indecent assault committed during the period of suspension is set aside.
3. The conviction in respect of the 2<sup>nd</sup> count is confirmed.
4. The accused is sentenced to 18 months' imprisonment of which 6 months suspended for 3 years on condition that the accused is not convicted of indecent assault committed during the period of suspension. The sentence is antedated to 16 March 2011.

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### **REVIEW JUDGMENT**

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SHIVUTE J (UNENGU, A J concurring):

[1] The accused was charged with two counts namely: the offence of assault with intent to do grievous bodily harm and indecent assault. He pleaded guilty to the 1<sup>st</sup> count of assault with intent to do grievous bodily harm and he was convicted as charged. In respect of the 2<sup>nd</sup> count he pleaded not guilty.

[2] The magistrate invoked s 112 (1) (b) of the Criminal Procedure Act 51 of 1977 in respect of the 1<sup>st</sup> count and convicted the accused as charged. In respect of the 2<sup>nd</sup> count evidence was led and the accused was convicted of indecent assault.

[3] The accused was sentenced to 30 (thirty) month's imprisonment of which 6 (six) months suspended for 5 (five) years on condition accused is not found guilty of assault with intent to do grievous bodily harm or indecent assault committed during the period of suspension.

[4] The learned magistrate when she invoked the provisions of s 112 (1) (b) she asked the following questions inter alia:

“Question: Is it correct that you assaulted Hannah – Leigh Orange by beating her with fists?

Answer: No. I beat her with my open hand.

Question: How many times did you beat her with the open hand?

Answer: Three times

Question: Where did you beat her, which part of the body?

Answer: I smacked her on the face.”

[5] I raised the following query with the magistrate:

1. How did the court satisfy itself that the accused intended to do grievous bodily harm on the complainant if he said he only beat her with open hand thrice?
2. The sentence of 30 months imprisonment of which 6 months suspended for 5 years on usual conditions is it imposed in respect of both counts or in respect of one count? If it is in respect of one count which one and what happened to the sentence in respect of the other count?

[6] The record of proceedings was returned to me without the response from the trial magistrate due to the fact that the trial magistrate was no longer in the services of the state as he had returned to his country of origin.

[7] Obviously looking at the questions posed by the learned magistrate and the answers provided by the accused, it could not be said that the accused had an intention to do grievous bodily harm to the complainant because, he only assaulted her with an open hand and not with fists as it was alleged by the state. Immediately the accused indicated that he only assaulted the complainant with an open hand, the magistrate was supposed to enter a plea of not guilty in terms of s 113 and not to have proceeded further with questions.

[8] In determining whether the accused has an intention to do grievous bodily harm this is a factual question which may be determined by the nature of the instrument used, how it was used and on which part of the body it was directed, the persistence of the attack and the injuries suffered although the crime may be committed without the victim having suffered serious injuries. The offence is not to cause serious injuries but the intention to cause serious injuries. In the circumstance I am not satisfied that the accused intended to do grievous bodily harm to the complainant.

[9] I am happy with conviction in respect of the 2<sup>nd</sup> count except the sentence which was imposed. It is not clear in respect of which count the sentence was imposed or whether the two counts were taken together for purpose of sentence. In view of this there is a justification for the reviewing court to interfere with the sentence imposed by the magistrate.

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

1. The conviction in respect of the 1<sup>st</sup> count is set aside.
2. The sentence of thirty (30) months imprisonment of which six (6) months suspended for five (5) years on condition accused is not convicted of assault with intent to do grievous bodily harm or indecent assault committed during the period of suspension is set aside.
3. The conviction in respect of the 2<sup>nd</sup> count is confirmed.

4. The accused is sentenced to 18 months' imprisonment of which 6 months suspended for 3 years on condition that the accused is not convicted of indecent assault committed during the period of suspension. The sentence is antedated to 16 March 2011.

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N N Shivute  
Judge

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E P Unengu  
Acting Judge

