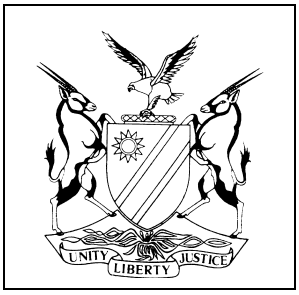

CASE NO.: CR 19/2009

IN THE HIGH COURT OF NAMIBIA HELD
IN OSHAKATI

In the matter between:

THE STATE

and

PETRUS VALOMBOLA

(HIGH COURT REVIEW CASE NO.: 72/2009)

***CORAM*: LIEBENBERG, AJ *et* SHIVUTE, AJ**

Delivered on: 01 June 2009

REVIEW JUDGMENT

LIEBENBERG, A.J.: [1] Accused appeared before the Oshakati Magistrates' court on charges of assault with intent to do grievous bodily harm and malicious damage to property. He pleaded guilty on both charges and subsequent to his conviction the following sentences were imposed: "Count 1 – N$ 600-00 or 6 months imprisonment; Count 2 – N$ 600-00 or 6 months imprisonment. Sentence run concurrently."

[2] On review the following query was directed to the magistrate:

> *"1. On count 1 the accused is charged with the offence of assault with the intent to do grievous bodily harm. The magistrate only questioned the accused on assault but convicted him "as charged". Please explain.*
> 2. *On count 2 the accused is charged with malicious damage to property i.e. a hut; a bed; two bed sheets and a birth certificate. Accused stated that he removed the bed and bed sheets before setting the hut alight. Please explain how the accused then could have been convicted "as charged".*
> 3 *The accused admitted having set on fire complainant's hut. Was the hut not an immovable structure in which case the accused should have been charged with arson? Should the magistrate not have questioned in that regard instead of accepting that it only amounted to malicious damage of property?*
>
> *If arson was committed, would the sentence imposed still be appropriate?*
> 4 *Despite the accused informing the court before sentence that he cannot pay a fine, fines were imposed on both charges. Please provide reasons why this was done.*
> 5 *On what authority was it ordered that fines or imprisonment as alternative to the fines should run concurrently?"*

[3] The magistrate responded as follows:

> *"The accused pleaded guilty to both charges i.e. Assault with intent to do grievous bodily harm and malicious damage to property.*
> *Accused was convicted of assault with intent to do grievous bodily harm and that was the charge the accused stand in and as such he is guilty as charged.*
> *On count 2 the record is very clear that accused is charge with malicious damage to property and as such he was convicted accordingly. The properties were destroyed.*
> *On the issue of whether the hut is immovable or not, the hut can be change any time. A hut can be transfer from one place to another.*
> *Accused can not be convicted of arson because a hut is not immovable property. Even if accused informed the court that he can not afford to pay (a)*

fine, the court should consider (a) fine in case a friend or relative comes t (o) pay, can still have the chance to do so.
I hope my finds and sentence is in order, and be confirmed."(sic)

[4] It has to be said that from the manner in which the magistrate responded to the query, it is evident that he is clearly incapable of understanding the query directed to him and the issues he was expected to deal with, despite all his years of experience as magistrate. Furthermore, he simply ignored par 5 of the query.
In the circumstances it seems necessary to remind the magistrate that he has a legal duty to comply with the provisions set out in section 304 (2) (a) of the Criminal Procedure Act, 1977 (Act 51 of 1977), namely:

"(2)(a) If, upon considering the said proceedings, it appears to the judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he shall obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting the accused and for the sentence imposed, and shall thereupon lay the record of the proceedings and the said statement before the court of the provincial division having jurisdiction for consideration by that court as a court of appeal." (emphasis added)

Despite the short comings in the magistrate's reply I have decided not to refer the matter back to the magistrate for further reasons and will therefore consider the proceedings as it is.

[5] In count 1 the accused was charged with assault with the intent to do grievous bodily harm and the charge was drawn that "the accused did wrongfully, unlawfully and intentionally assault Hilja Valombola by beating her with fists and by kicking her *with intent to do* Hilja Valombola *grievous bodily harm.*" In order to convict the accused as charged, the magistrate through his section 112(1)(b) questioning, had to be satisfied that the accused not only pleaded guilty, but also that he admitted having had the intention, not only to assault, but to assault *with the intent to do grievous bodily harm to the*

complainant. Not a single question was put to the accused regarding the intent he had when assaulting the complainant. The following questions were instead asked:

"Q – It alleged that on 20/3/05 and at or near Onawa in the district of Oshakati you did wrongfully and unlawfully and intention assault complainant Hilya Valombola is that correct?

A - Yes

Q - You beat her with fists and kicking?

A - Yes" (sic)

The accused's answer on the first question merely confirms the magistrate's question about what is *alleged* in the charge and he therefore did not admit having committed the offence as such. The accused's admission that he had beaten the complainant with fists and kicked her also does not imply that he had acted with the intent to do grievous bodily harm. Because intent to do grievous bodily harm is an element of the offence for which the accused was charged, the magistrate had to cover it through his questioning of the accused and could not simply have assumed that the accused acted with the required intent.

[6] From the aforementioned it is clear that although not all the elements of the offence had been admitted by the accused, the magistrate wrongly convicted the accused. The conviction on count 1 thus, cannot be permitted to stand.

[7] Regarding count 2 the accused was charged with malicious damage to property for having "wrongfully, unlawfully and in (sic) maliciously damage(d) a sleeping hut, a bed, two bed sheets, one birth certificate…"

The magistrate's section 112(1)(b) questioning was in the following terms:

"Q – It is alleged that on 20/3/08 and at or near Onawa in the district of Oshakati you did wrongfully, unlawfully and maliciously damage 2x bed sheets one birth certificate to the value N$ 1 000-00 is that correct?

A – No. I remove the bed, 2 x bed sheet.

Q – What happen with sleeping huts?

A – I remove the goods and set the hut on fire."

Notwithstanding the answers given by the accused that the goods were first removed from the hut before he had set it alight, the magistrate convicted the accused "as charged"; in other words, that he had also damaged those goods mentioned in the charge which clearly, was not the case. This is a misdirection on the part of the magistrate as the accused did not admit all the allegations contained in the charge, necessitating interference by this Court.

[8] In response to the Court's question whether the hut was not an immovable structure and whether the accused should not have been charged with arson, the magistrate replied that *"the hut can be change any time. A hut can be transfer from one place to another. Accused can not be convicted of arson because a hut is not immovable property."* In the light of the magistrate not putting a single question to the accused about the structure itself, I find it surprising that the magistrate is now in the position to make such statement. Although there are indeed huts that can be dismantled, there are also, on the contrary, huts that are permanent and which *cannot* be dismantled and shifted elsewhere. That explains the need why the magistrate had to question the accused in that regard and to establish whether the offence of arson had not been committed, instead of simply *assuming* that it was not a permanent structure.

[9] The accused in mitigation before sentence informed the court that he was unemployed; single without children; and that he could not afford to pay a fine as there was no one to turn to for assistance. This notwithstanding, the magistrate decided to impose substantial fines on the accused which he obviously, was unable to pay. The reason advanced by the magistrate for having imposed fines is that *"even if accused informed the court that he can not afford to pay fine, the court should consider fine in case a friend or relative comes t(o) pay, can still have the chance to do so."* (sic)

Other than what the accused had stated in mitigation (above) no enquiry was made into the accused's ability to pay a fine or that he would receive any financial assistance from friends and family. It would therefore be wrong to simply assume that someone will come to his rescue and on that basis,

impose a fine. Once the sentencer has come to the conclusion that a fine will be appropriate, the *quantum* thereof has to be determined with regard to the seriousness of the offence committed; the statutory penalty clause (if applicable); and the ability of the accused to pay the intended fine. Although it is not necessary, as the magistrate correctly stated, that the fine should fall within the accused's declared means, the court however, has to *investigate the accused's means* and has to take into consideration whether family and friends are willing in helping the accused pay the fine. This, the magistrate clearly failed to do and misdirected himself by simply assuming that to be the case.

[10] Fines of N$ 600 or 6 months imprisonment were imposed on both counts where after it was ordered that *"sentence run concurrently"*. Because the magistrate failed to respond to this aspect of the query directed to him, the magistrate's intention by making such order is unknown.

[11] The wording of the provision which is at present contained in section 280(2) of the Criminal Procedure Act,1977 (Act 51 of 1977) has not been altered since it was enacted as section 342(2) of the Criminal Procedure Act 31 of 1917 and thereafter as section 333(2) of the Criminal Procedure Act 56 of 1955. Decisions on the interpretation of sections 342 (2) and 333 (2) would therefore also be relevant to the interpretation of section 280 (2) of the present Criminal Procedure Act 51 of 1977.

[12] Imprisonment as alternative to a fine in the past was found to be excluded from the provisions of section 280(2) (*R v Rahme* 1933 TPD 5; *R v Kubheka* 1944 NPD 57; *S v Bouwer* 1977 (2) SA 444 (O)).
The following passage from the *Kubheka* case *(supra)* clearly sets out the reasoning which led that court to come to the conclusion it did:

"Section 342(2) of Act 31 of 1917 authorises a Court to direct that punishment 'when consisting of imprisonment' shall run concurrently. There is no authority to direct punishment consisting of fines to run concurrently, or to direct a punishment of a fine to run concurrently with a punishment consisting of imprisonment, or vice versa. My own opinion is that the section was intended to cover two or more

sentences consisting solely of imprisonment and that it has no application when one or more of the sentences consists of imprisonment as an alternative to a fine. I hold this opinion notwithstanding a certain dictum, apparently to the contrary, in R v Sitebe 1934 AD 56 at 58. And I hold it for the, to me, very strong reason that in the case, for instance, of two punishments each consisting of £1 fine or 14 days' imprisonment, a direction that the alternative periods of imprisonment should run concurrently would have the curious effect of placing the accused, if he paid one of the fines, in the same position as if he had paid neither, for he would still have to serve the 14 days' imprisonment as an alternative to the unpaid fine. Yet he could escape liability for both the fines by serving the one period of 14 days' imprisonment"
The learned judge held the view that the result would be absurd and that the Legislature could hardly have intended this; furthermore, that it did not appear to follow necessarily from the wording of the subsection.

[13] After the *Kubheka* case there is a line of cases which hold that, in terms of section 280(2), a court may only direct that two or more sentences shall run concurrently if those sentences are sentences of imprisonment only, thereby excluding imprisonment as an alternative to a fine.

[14] However, since then it has been held that imprisonment as alternative to a fine is also included under section 280(2) (*S v Lalsing* 1990 (1) SACR 443 (N); *S v Mngadi* 1991 (1) SA 313 (T)).
In the *Lalsing* case the Court (Full Bench) held that 'the section does not say that imprisonment has to be the only form of punishment in the sentence. It is therefore competent for a Court to direct, in terms of s 280(2) that sentences of a fine with an alternative of imprisonment run concurrently or that such a sentence run concurrently with a sentence of imprisonment without the option of a fine. Such direction would have effect only on the imprisonment portion of the sentences, inasmuch as the words "such punishments" refer back to "punishments when consisting of imprisonment", leaving the fines cumulative. In order to avoid possible imbalances between the total fines and the (concurrently running) periods of imprisonment, the Courts could alleviate the situation by reducing the fine to be imposed in respect of each of the convictions' (Headnote)

[15] I respectfully find the Court's reasoning in the *Lalsing* case artificial and the interpretation given to the provisions of the subsection too wide. To read 'imprisonment as alternative to a fine' into the subsection, does not in my view, correctly give effect to the meaning of the subsection, as the subsection only refers to *imprisonment as punishment* and not to *fines* or *imprisonment as alternative to a fine.* Had that been the Legislature's intention then one would have expected the section to be worded differently in order to provide for such possibility.
The correctness of the Lalsing case is not beyond doubt (see Terblanche *"Saamloop van strawwe*" 1990 25 TM 66 AT 73).

[16] I find the view taken in the *Kubheka* case convincing and in accordance with the wording of subsection (2) of section 280 of Act 51 of 1977 namely, that a court can only direct two or more sentences of *imprisonment* to run concurrently and not fines or imprisonment as alternative to a fine.

[17] Therefore, in the present case the fines could not have been directed to run concurrently and the direction stands to be struck.

[18] In the result, the following order is made:

1. The conviction and sentence imposed on count 1 are set aside.
2. The conviction and sentence imposed on count 2 are set aside.
3. The court's direction that the sentences run concurrently is struck.
4. The matter is remitted to the magistrate in terms of section 312 of the Criminal Procedure Act, 1977 with the direction to comply with the provision in question or to act in terms of section 113, as the case may be.
5. In sentencing afresh, the court must have regard to that portion of the sentence the accused had already served.

_____(Signed)

LIEBENBERG, A.J.

I concur.

_____(Signed)

SHIVUTE, A.J.