Case No.: CR 67/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

STEFANUS BARAKIAS

[HIGH COURT REVIEW CASE NO.: 906/2008]

CORAM: PARKER, J et SILUNGWE, AJ

Delivered on: 2008 June 16

REVIEW JUDGMENT:
PARKER, J.:

[1] The accused was charged before the Swakopmund Magistrate's Court with assault with intent to do grievous bodily harm. The accused pleaded not guilty; he was tried, convicted as charged and sentenced accordingly.

[2] The only evidence adduced by the State was that of the complainant, a 14-year old boy, Usiel Kamuhake. The record shows that after the public prosecutor informed the trial court that the accused had pleaded not guilty to the charge, the following is recorded immediately thereafter:

Usiel Kamuhake : (ADMONISHED)

[3] There is nothing in the record to show that the learned magistrate examined the child witness, the complainant, to be satisfied that he did not understand the meaning and religious sanction of an oath. Besides, there is nothing in the record to show that the learned magistrate questioned the complainant on *voire dire*; that is, the magistrate did not admonish the complainant to speak the truth.

[4] The evidence shows that the complainant and his friends were riding a bicycle back and forth in the street in front of the accused's house. The accused's children told their mother that the complainant and his friends usually bullied them and called

them names. The accused was called by his wife from the house; he came and seized the bicycle. By then the complainant had already run away, but his older friends remained. The accused put the bicycle in his yard and told the complainant's friends to go and call their parents so that he could complain to them that their children often bullied and insulted his children.

[5] The accused's evidence is that he could not have stabbed the complainant because the complainant never entered his yard and so he could not have touched him, let alone stabbed him. The following cross-examination-evidence in the record (quoted verbatim) is significant; for it confirms in material respects the accused's testimony that he could not have stabbed the complainant because the complainant never entered his yard:

> Accused: I do not have anything for that child to stab him for such a child Your Worship. The child have to say the truth, his truth as to where he did get injured.
>
> Complainant: The man grabbed me and he stabbed me, that is the truth.
>
> Accused: Now, where did I find you to get hold of you to stab you, you were not in my yard, where did I find you to stab you?
>
> Complainant: Yes I was not in your yard, but I went and I returned. You were standing in your yard and I was standing on the other side of the yard. And you were standing with your children.
>
> Accused: You were not in my yard or at my yard. You were far on the road from my yard. You jump off from the bicycle and you ran away. You were standing far from my yard.
>
> Complainant: I was there at your yard, I did not went far, I only went a little bit and then Papan, Timoteus said no just come back and I came back.
>
> Accused: The distance where you run was far and just say the truth because I did not touch you, as you stand there I did not touch you.
>
> Complainant: It is not true, I was not far, you stabbed me.
>
> P/P: No further questions.
>
> NO FURTHER QUESTIONS BY ACCUSED.
>
> Court: Anything in cross-examination?
>
> RE-EXAMINATION BY MR. PROSECUTOR: Just a (indistinct) questions, (indistinct) when you was stabbed?
>
> Complainant: He was inside the yard and I was outside the yard.
>
> P/P: No further questions Your Worship.
>
> NO FURTHER QUESTIONS BY MR. PROSECUTOR.

[6] Thus, the totality of the evidence clearly shows inexorably that the complainant never entered the accused's yard where the accused was; and so it was humanly impossible for the accused to have touched him, let alone stab him.

[7] It is inexplicable that the State did not call any of the accused's friends who were present to say whether the complainant entered the accused's yard. The accused's evidence was that after the complainant had run away, he told the complainant's friends who had remained behind that he was keeping the bicycle until they fetched heir parents, because he wanted to have a word with them. Added to all this is the accused's evidence that he and his wife and another lady who went to the same church as the complainant's father went to see the complainant's father. They asked the complainant's father to bring his son for them to see where it was alleged the accused had stabbed him; but the complainant's father refused to do that; his only response was that "we are going to talk at Court."

[8] The learned magistrate relied on the testimony of the complainant that he showed to the court a scar on his left arm, indicating where he had been stabbed by the accused. The complainant had told the court that he went to the hospital where his wound was stitched. There is not a phantom of credible evidence that the scar was left by the stabbing by the accused. Although the complainant testified that he was treated in a hospital, the name of the hospital is not in the record; neither is there a medical report to support the complainant's allegation that he received stitches for his wound. Indeed, there was no credible evidence before the learned magistrate that the accused stabbed the complainant. It follows that, in my opinion, there was not a grain of credible evidence proving the guilt of the accused beyond reasonable doubt.

[9] I find that there is not a scintilla of truth in what the complainant said in court. The learned magistrate's judgment does not give any reason why he accepted the complainant's evidence and rejected that of the defence witnesses. The way the learned magistrate treated the evidence of the complainant and that of the defence witnesses when there was a conflict of fact between the evidence of the State witness and that of the defence witnesses offends the well-tested approach that has been laid down in a long line of cases, e.g. *S v Singh* 1975 (1) SA 227; *S v Appelgrein* 1995 NR 118, *S v Engelbrecht* 2001 NR 224; *S v Petrus* 1995 NR 105; *Nowaseb v The State* Case No. CA 51/2005 (Unreported). The correct approach was laid down in *Singh* supra and it has been followed in a long line of cases by this Court such as the cases cited above. Leon J stated in *Singh* at 228F-H thus:

> … it would perhaps be wise to repeat once more how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the Sate witnesses and that of the accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in such a case is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court could be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.

[10] For all the above reasons, I have not a shadow of a doubt that the proceedings were not in accordance with justice. The conviction cannot therefore be allowed to stand.

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

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Parker, J

I agree.

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Silungwe, AJ