



CASE NO.: CR 26/2010

**IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

THE STATE

and

UUGWANGA KAMBWITI

(HIGH COURT REVIEW CASE NO.: 266/2010)

CORAM: LIEBENBERG, J. *et* TOMMASI, J.

Delivered on: October 06, 2010.

REVIEW JUDGMENT

LIEBENBERG, J.: [1] The accused was convicted in the Magistrate's Court, Okahao on a charge of assault with intent to do grievous bodily harm and sentenced to a fine of N\$1000-00 or 10 months imprisonment.

[2] Whereas the magistrate gave comprehensive reasons for convicting the accused; and this judgment to be delivered as a matter of urgency for the reasons given herein, I do not deem it necessary to request additional reasons from the magistrate.

[3] The accused was detained in the Okahao police cells when he allegedly assaulted the complainant, who was a police officer on duty, by stabbing him with an unknown object with the intent to cause him grievous bodily harm. The complainant sustained a cut on the chin which required medical treatment. Despite none of the State witnesses testifying that a weapon was used by the accused during the assault, the magistrate, relying on the medical report and chin wound, was satisfied that the State succeeded in proving the accused's guilt and convicted him accordingly.

[4] The State tendered the evidence of three witnesses viz. the complainant, sergeant Maritha Shihongo and Anna Kakwambi; both police officers and colleagues of the accused.

According to the complainant he came upon the accused fighting a young boy in the cells; which incident he went to report to the shift commander (sergeant Shihongo), who accompanied him back to the cells. Complainant testified that after he opened the door he remained standing and without knowing what happened next, he "just found (him)self in a pool of blood". He went on to say that he just felt a blow on his chin and supposed that the accused was having an object in hand (explaining the cut wound). He denied having provoked the accused in any manner. In cross-examination the accused had put it to the complainant that he tried to stab the accused with a knife, which he denied. On the complainant's version this incident must have been witnessed by other detainees as well as sergeant Shihongo.

[5] Surprisingly, sergeant Shihongo said that she had sent the complainant to the cells whereafter he returned and *reported* that he was assaulted by the accused when he *tried to open* the cell door. She specifically said that she was *not present* when the complainant was "stabbed" and that the accused denied having assaulted the complainant. When assessing the evidence given by these two witnesses, the contradiction in their respective versions was not dealt with in the trial court's judgment; from which it may be inferred that it was never considered. Whereas the complainant gave single evidence the discrepancy in the State case would, in the

absence of a reasonable explanation, have sufficed to cast doubt in the court's mind as to the credibility of the complainant and the reliability of his evidence. The court, in its assessment of the single evidence given by the complainant, should have followed a cautious approach; which it clearly failed to do. More so, where the State failed to call any of the other persons present in the cell and who must have witnessed the incident. This was left for the accused, being able to call only one of his fellow detainees, also contradicting the complainant's version.

[6] I regard this to be a serious misdirection by the court *a quo*; for had it made a cautious assessment of the evidence given by the complainant, it could not have been satisfied that he told the truth – especially in the light of the contradictions therein and him giving single evidence.

[7] The involvement of the investigating officer, Kakwambi, only relates to the warning statement taken by her from the accused and which was handed into evidence by agreement. After the accused was informed of his rights as *per* the warning statement, it was recorded that the accused preferred to give his statement to the police; however, immediately thereafter the words “*before court of law*” appear, albeit crossed out. Because of the ambiguity, the magistrate, in my view correctly, decided not to rely on the statement at all. The accused, in any event, did not incriminate himself in his warning statement. On the contrary, it shows consistency in the accused's claim of innocence from the outset.

[8] The accused elected not to give evidence and called as witness, a fellow detainee, Nangolo Johannes, who narrated a different version about what transpired in the cells on that day. According to him the accused remained sleeping when the complainant came to wake them up in the cell. He then pulled on the accused and thereafter beat him with fists on the neck; whereupon the accused pushed him away, resulting in the complainant hitting himself against the wall. The complainant later returned with a knife wanting to stab the accused, but was deterred by sergeant Shihongo, who had locked the cell door.

[9] The witness Johannes stood his ground under cross-examination and was not discredited in any way. In fact, the magistrate relied on one aspect of his evidence,

namely, that the accused had *pushed* the complainant and that he in the process sustained an injury on his chin. In his view, this contradicts the accused's claim in his plea explanation to the effect that he did not assault the complainant. In his judgment the magistrate failed to explain why he disregarded the *rest* of Johannes's evidence regarding the assault perpetrated on the accused. From the evidence it is clear that the pushing of the complainant came as a result of the attack lodged on him by the complainant. The attack on the complainant was unlawful and in the circumstances, the accused was entitled to defend himself against his attacker. This he did by pushing him away; resulting in the complainant injuring himself in the process. The trial court found that Johannes's evidence as such was in "conflict" with the accused's defence; namely, that he did not "assault" the complainant. By denying that he *assaulted* the complainant, he merely said that he was not guilty of an *unlawful* attack on the complainant – not that he did "nothing" to him as interpreted by the court. The crime of "assault" requires an unlawful act, which the accused never admitted to. Thus, there was no *conflict* between the accused's defence and what his witness had testified. The trial court furthermore took into account that the accused opted to remain silent and failed to "clarify the discrepancy in the defence case" – clearly misdirecting itself on that point.

[10] The above mentioned misdirections amount to irregularities which vitiate the entire proceedings; hence, the conviction must be set aside.

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

LIEBENBERG, J

I concur.

TOMMASI, J