CASE NO.: CA 63/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between

RUDOLF RITTMAN
APPELLANT

versus

THE STATE
RESPONDENT

CORAM: **DAMASEB, JP *et* SIBOLEKA, J**

Heard on: **2010 September 27**

Delivered on: **2010 October 12**

APPEAL JUDGMENT:

SIBOLEKA J:

[1] The 70 year old appellant appeared before the District Magistrate Court at Rehoboth on a charge of assault with intent to do grievous bodily harm. He was represented by Mr. Van Vuuren. He pleaded not guilty and through his legal representative made the following plea explanation in terms of section 115 of the Criminal Procedure Act 51/77:

> "Accused accept / admit that he assault the complaint. Once with an empty beer bottle on the left jaw. He request for it to be recorded as a formal admission in terms of section 220 of the CPA. The basis of his defence is that he acted in self defence is and on defence of his property as well as his clients."

[2] At the end of the trial he was convicted as charged and he now appeals against that conviction on the following grounds:

> "1. The learned Magistrate erred in law or fact in finding that the threat to appellant's property or interest was not imminent at the time when the accused hit the complainant.
> 2. The learned Magistrate erred in law or in fact to find that the accused exceeded the boundaries of self defence."

[3] The facts of this matter are briefly as follows:

The complainant's wife in the Court below drove to Echo Service Station to fill up to go to Otjiwarongo or Rundu. Some meters away

from the fuel pump the car switched off and she could not get it to start. Her husband (the complainant) who was also in the car at the time, (and intoxicated) jumped in the driver's seat and drove up to the fuel pumps. There he did not switch off the engine as it is usually done for safety reasons. This car had some exhaust problems and as the complainant stood there he revved it so much until the sparks came out of the exhaust. The appellant heard this noise and came in front of the shop to see what was going on. It was a busy Sunday afternoon, customers came to settle their petrol dues, people were walking around and children came to buy some sweets. There were also cars parked in the vicinity.

[4] Listening at the heavy noise and the fact that the complainant was intoxicated the appellant's son phone the police, who did not arrive there and then. It is not clear from the evidence whether the car filled up or not and neither could the complainant testify how much was paid for petrol. His wife could only suggest it could be for N$100,00 but was not sure. The appellant and the Manager of the Service Station testified that no petrol was put in the car. This was despite the fact that the Manager asked one of the attendants to help quickly so that the car can leave the premises.

[5] The complainant’s wife testified that the car pulled off at a high speed and turned only once, thereafter parked at the bottle store. Between the Service Station and the shop there is an open gravel space. It was here that the complainant started spinning according to the appellant and the Manager. In the process, he nearly drove into another vehicle.

[6] According to the appellant who has an artificial leg, found no other way to stop the complainant other than to throw a bottle at his car to see if he will get him to stop, which he did and the car stopped. The complainant, his wife and another lady on board alighted to see the damage. He found that the rear screen of his car was broken. This find, coupled with the fact that he was still intoxicated from the previous days drinking, made him become very angry and approached the appellant.

[7] State witnesses testified that it was the appellant who approached the complainant with two bottles in his hands. The appellant and the Manager of the Station denied that. According to them, it was the complainant who after seeing the damage to his vehicle angrily approached the appellant saying:

> “… you are fucked now. I will fuck you.”

The appellant could not run away to avoid the attack as he has an artificial leg. He believed that the complainant was about to assault him, he picked up an empty beer bottle, and hit him once on the left jaw. The complainant sustained an open wound.

[8] It is trite that an accused would be entitled to an acquittal on the ground that he acted in self defense if there appeared a reasonable possibility on the evidence that he has been unlawfully attacked, and had reasonable grounds for thinking that he was in danger of serious injury. That the means used in self defense were not excessive in relation to the danger and that the means used were the only (or least dangerous) to avoid the danger. (See *Rex v A. H. Wood* 1946 A.D 331 at 340)

[9] It is the view of this Court that the appellant indeed acted in self defense and or that of his property as well as his clients when he assaulted the complainant. The learned Magistrate stated in his judgment that the onus of proof lay on the appellant. This was a misdirection because the onus of disproving justifiable defense rests on the prosecution. (See *R v Patel* 1959(3) SA 121 A.D at 123 H). We are satisfied on the totality of the evidence that the State failed to prove beyond reasonable doubt that the accused did not genuinely believe that he was acting in self-defence and that he was not exceeding the

bounds of self-defence when he assaulted the plaintiff. The appellant was therefore entitled to an acquittal.

[10] The learned Magistrate further stated in his judgment that unless the defence "addressed" him "more", no eminent threat against the property of the appellant, his clients, his bodily integrity or any other recognized interest in law had been proved. After this finding he went further to say that at the time the appellant assaulted the complainant, the threat to his legally recognized interest was not eminent and he had thus exceeded the limits of private defence. This was also a misdirection on the part of the learned Magistrate, because the appellant could not have exceeded the limits of private defence which the same Court has already ruled he did not have.

[11] In the result, the appeal succeeds and the conviction is set aside.

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SIBOLEKA J

I agree.

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DAMASEB JP

ON BEHALF OF THE APPELLANT: MR. VAN VUUREN

INSTRUCTED BY: KRUGER, VAN VUUREN & PARTNERS

ON BEHALF OF THE RESPONDENT: ADV. KONGA

INSTRUCTED BY: THE OFFICE OF THE

PROSECUTOR-

GENERAL