



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 142/2007

**GREGORY GEORGINA LOUISA**

**APPELLANT**

Versus

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Gregory v State* (CA 142/2007) [2013] NAHCMD 46 (25 February 2013)

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

**Heard:** 19 November 2012

**Delivered:** 25 February 2013

**Flynote:** Grounds of appeal: - Not permissible to introduce new grounds of appeal in heads of argument – Appellant bound by grounds – in the notice of appeal – must confine herself to those.

Self defence: - Determining factor whether appellant reasonably believed – her life was in imminent danger – whether it would be said that a reasonable person in position of appellant would have acted the way she did. – Appellant did not reasonably believe that her life was in imminent danger - appeal dismissed.

**Summary:** Grounds of appeal: - Appellant appealed against conviction of assault on the ground that she acted in self defence. Although there was only one ground of appeal, Counsel for appellant introduced more grounds of appeal in her heads of argument. It is not permissible to introduce new grounds of appeal in heads of

argument. Appellant bound by heads of argument in the notice of appeal and must confine herself to those.

Self defence: - Appellant claimed putative defence. The determining factor is whether the accused reasonably believed that her life was in imminent danger and whether a reasonable person in the accused's position would have acted the way she did. Accused pointed out that she did not know what the complainant's intention was when he bent down. Appellant did not reasonably believe that her life was in imminent danger. Appellant did not act in self defence.

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**ORDER**

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In the result the appeal is dismissed.

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**CRIMINAL APPEAL JUDGMENT**

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SHIVUTE J (MILLER AJ concurring):

[1] The appellant appeared unrepresented in the Magistrate's Court Swakopmund on a charge of assault with intent to do grievous bodily harm. She was convicted of common assault and sentenced to three hundred (N\$300) fine or three (3) months' imprisonment on 30 August 2006.

[2] She wrote a letter titled "Appeal to the court" dated 31 August 2006. It is not clear when this letter purporting to be a notice of appeal was filed with the clerk of court because, it does not bear a date stamp. The appellant was given the opportunity to file an application for condonation for the late filing of the notice of appeal. In her supporting affidavit, she stated that she indeed filed her notice of

appeal on 31 August 2006. It was on the basis of this explanation that we granted condonation and we proceeded to hear the merits.

[3] The appellant appealed against conviction. She was represented by Ms Van Wyk instructed by the Legal Assistance Centre, and Mr Eixab appeared on behalf of the respondent.

[4] From the appellant's letter there is only one ground of appeal namely, that she was not supposed to be convicted because she had acted in self defence.

[5] Although there was only one ground of appeal, counsel for the appellant introduced additional ground's in her heads of argument. It is not permissible to introduce new grounds of appeal in the heads of argument. The appellant is bound by the grounds contained in the notice of appeal and she must confine herself to those.

[6] The events from which the charge arose may be summarised as follows:  
On 17 October 2005 the complainant in this case went to the shop where the appellant works to inquire about the goods in respect of which he deposited some money as a 'lay-buy'. The shop assistant who was in the company of a security guard informed him to wait for the manager who happened to be the appellant.

[7] When the appellant arrived at the shop, it appears she was not pleased by the fact that the complainant was sitting on one of the couches that was in the shop. According to the complainant, the appellant screamed at him and questioned why he was sitting on the couch. She then uttered some unprintable swear words to him. The complainant apologised but the appellant did not respond to the apology.

[8] The complainant inquired about the money he had deposited. After the enquiry, the appellant told him that he could not come to her shop and make noise. She then took a pepper spray and sprayed at him four times.

[9] On the other hand, the appellant testified that the complainant deposited money for a lay-buy for about a year previously. He went to the shop in order to pay off the goods which were on a lay-buy. The appellant explained to him that his lay-buy had expired since lay-buys were allowed to last for three months only. She further explained to him that he could no longer have the goods at a special price. It appears that a misunderstanding arose because the complainant thought he would lose all his money. When the appellant came to the shop, she found the complainant sitting on the couch that was for sale and she told him not sit on it. After the complainant was told to refrain from sitting on the couch, he got up and became a bit aggressive and demanded an apology from the appellant. The appellant declined to apologise. The complainant was standing, still in an aggressive mood and shouting. He asked whether the appellant knew about hell and that the complainant would go to hell because of the issue of the lay-buy.

[10] Complainant did not understand what the appellant was trying to explain to him concerning the lay-buy process. She advised the complainant to leave the shop, and return when he had calmed down. He did not leave. Instead he shouted louder and louder. Appellant told him that he should leave otherwise she was going to call someone. The complainant said that he did not care and bent down a bit. The appellant did not know what he was going to do, she warned him that she had a pepper spray and she would spray him if he failed to stop. The complainant bent down. The appellant did not know whether he was going to sit on the chair or to take something from his socks, she panicked and sprayed the complainant. She did not know what he was going to do but she just had a feeling that he was going to do something.

[11] Through cross-examination the appellant was asked whether she sprayed the complainant whilst he was in the process of bending. She answered that "he sort of bent down and then I, I can't really, it all happened so fast, you know I couldn't point he wasn't really in the bend over position, he could still see me and I could still see him...". She was further asked whether at the time she pepper sprayed the complainant it looked like he was trying to attack her? She then answered: "That is what I mean, I did not know whether he was going to attack me or not."

[12] Hendrina Elizabeth Pearson testified on behalf of the appellant to the following effect:

On the date in issue the complainant argued with the appellant concerning lay-buy goods. Complainant was asked to leave and he became very aggressive. The accused warned him that she would pepper spray him if he did not leave. He got more aggressive and she sprayed him.

[13] Counsel for the appellant argued that the magistrate erred on the facts and in law by not finding that the appellant acted in self defence when she pepper sprayed the complainant and by finding that the appellant could not have reasonably believed that an attack against her was imminent. He did not attach due weight to the possibility that the appellant's testimony was reasonably possibly true and that the state failed to prove beyond a reasonable doubt that the complainant was not concealing a weapon. She further argued that the magistrate misdirected himself in finding that the requisite elements for a private defence had not been met, in that the *onus* of proof rested on the state.

[14] Counsel for the respondent argued that there is no evidence that the complainant attacked the appellant or that he was going to attack her. The complainant stated that she did not know what the complainant had intended to do. He further argued that the appellant was not under imminent attack.

[15] In the present matter the appellant is claiming putative defence. She anticipated that the complainant was going to attack her person. The test for private defence is whether the accused reasonably believed that his life was in danger or that he was using reasonable means to ward off the attack. This is normally an objective test. However, an element of subjectivity is nevertheless present in the process which relates to the persons and circumstances involved in the act.

See *S v Patel* 1959 (3) SA 212 (A) [43] at 123.

The subjective test should be applied to accused's *mens rea* concerning his conduct pertinent in respect of unlawfulness of his conduct in appropriate crimes requiring intention.

[16] Applying the facts of this case to the legal principles set out above the determining factor is whether in the circumstances the appellant reasonably believed that her life was in imminent danger and whether it would be said that a reasonable person in the position of the appellant would have acted the way she did. There was no imminent attack on the appellant and she did not reasonably believe that she was under attack or that her life was in imminent danger. After all, she pointed out that she did not know what the complainant's intention was when he bent down. It was not necessary for the appellant to assault the complainant. There was no imminent attack on the appellant and her action having regard to what happened was not reasonable. Private defence should not be extended to situations where there is no imminent danger and where the attacker does not reasonably believe that she was under attack. It is therefore my conclusion that the learned magistrate correctly rejected the appellant's defence as all the requirements for self defence were not met.

[17] In the result the appeal is dismissed.

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N N Shivute  
Judge

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P J Miller  
Acting Judge

APPEARANCES

APPELLANT: Ms Van Wyk  
INSTRUCTED BY: Legal Assistance Centre

RESPONDENT: Mr Eixab  
Office of the Prosecutor-General

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