REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2019/00074

In the matter between:

MARTIN SUBEB **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Subeb v S* (HC-MD-CRI-APP-CAL-2019/00074) [2020] NAHCMD 73 (28 February 2020).

Coram: LIEBENBERG J and SIBEYA AJ
Heard: **10 February 2020**
Delivered: **28 February 2020**

Flynote: Criminal Appeal – Non-pathological criminal Incapacity – Principles applicable to Non-pathological criminal incapacity restated – The presumption of sanity endorsed – Medical expert evidence an advantage in the assessment of the mental condition of the accused at time of the commission of the offences but not a must - When the defence of non-

pathological criminal incapacity is raised courts should carefully assess the facts to determine veracity of such defence.

Criminal Appeal – Indecent assault requires touching or holding another indecently– Substitution of the charge possible on appeal where appellant will not be prejudiced thereby - Proof beyond reasonable doubt not proof beyond all doubt - Evidence establishing guilt – Appeal against conviction dismissed.

Summary: The appellant was convicted in the Regional Court held at Otjiwarongo of five counts of rape in contravention of section 2(1)(a) of Act 8 of 2000, one count of assault with intent to do grievous bodily harm, two counts of malicious damage to property and two counts of indecent assault. He was sentenced to five years' imprisonment on each count of rape and a further five years' imprisonment on counts six to ten, taken together for purposes of sentence. Effectively he was sentenced to a term of thirty years imprisonment. He filed an appeal against conviction only. At the heart of the appeal is the determination whether the magistrate erred when she rejected the appellant's defence of non-pathological criminal incapacity and found that the appellant appreciated the consequences of his actions at the time of the commission of the crime.

Held, that the magistrate correctly rejected the defence of non-pathological criminal incapacity as no sufficient foundation was laid down for the defence. A proper evidence basis should be led in substantiation of this defence and truthfulness of the offender is prime in the process.

Held, an appeal court may correct a charge when a person is wrongly charged, provided that such person will not suffer prejudice thereby.

Held, that the appeal against conviction is therefore dismissed.

ORDER

1. The appellant's late filing of the heads of argument is condoned.
2. The convictions on count 9 and 10 are substituted with convictions of public indecency.
3. The appeal against conviction is dismissed.

JUDGMENT

SIBEYA AJ (LIEBENBERG J concurring):

[1] This matter arose from the preparations for a happy and enjoyable night as part of Christmas celebrations. The complainants joined Thomas Kandere to enjoy the celebrations at the farm. In the midst of the enjoyment the appellant allegedly raped two complainants several times, assaulted one of the two complainants with an iron bar, instructed the two complainants to remove their clothing after which he put such clothing on fire. Without a doubt, the gruesomeness of the alleged offences committed was likely to bring about extreme sadness to the complainants.

[2] The appellant was arraigned in the regional court seated in Otjiwarongo on the following ten charges:

2.1 Count 1 – Rape in c/s 2 of Act of 2000 of *Angelika Harases* under coercive circumstances, being the application of physical force and threatening to kill her;

2.2 Count 2 – Rape in c/s 2 of Act 8 of 2000 of *Angelika Harases* under coercive circumstances, being the application of physical force and threatening to kill her;

2.3 Count 3 – Rape in c/s 2 of Act 8 of 2000 of *Angelika Harases* under coercive circumstances, being the application of physical force and threatening to kill her;

2.4 Count 4 – Rape in c/s 2 of Act 8 of 2000 of *Beolite Nanas* under coercive circumstances, being the application of physical force and threatening to kill her;

2.5 Count 5 – Rape in c/s 2 of Act 8 2000 of *Beolite Nanas* under coercive circumstances, being the application of physical force and threatening to kill her;

2.6 Count 6 – Assault with intent to do grievous bodily harm on *Angelika Harases* by hitting her with an iron bar on her forehead;

2.7 Count 7 – Malicious damage to property by burning the clothes of *Angelika Harases*;

2.8 Count 8 – Malicious damage to property by burning the clothes of *Beolite Nanas*;

2.9 Count 9 – Indecent assault on *Angelika Harases* by forcing her to remove her clothes in public;

2.10 Count 10 – Indecent assault on *Beolite Nanas* by forcing her to remove her clothes in public.

[3] He pleaded not guilty to all charges but after evidence was led the appellant was convicted as charged. He was subsequently sentenced as follows: counts 1 – 5 five years' imprisonment each, counts 6 – 10 taken together for purpose of sentencing to five years' imprisonment, effectively sentenced to a total of 30 years' imprisonment.

[4] The appellant, disquieted by the outcome of the proceedings, inevitably lodged an appeal against his conviction within the prescribed time period.

[5] In an attempt to impugn his conviction, the appellant set out the following grounds of appeal:

'1. The learned magistrate erred in law and in facts when she convicted the appellant on counts of rape in respect of complainants Angelika Horases and Beolite

Nanas, as these convictions cannot be sustained in law and or facts and are inconsistent with the evidence presented by the state.

2. The learned magistrate erred in law in rejecting appellant's defence of non-pathological criminal incapacity induced by voluntary intoxication, in counts 1-10, as the appellant had prior to the occurrence of those various incidents consumed large quantities of alcohol.

3. The learned magistrate further erred in law and or facts, when, despite testimonies of Thomas Kandere and Manfred Andreas, as to the quantities of alcohol, consumed by the appellant, that he was still capable of appreciating the consequences of his actions and had acted accordingly.

4. The learned magistrate erred in law in finding that appellant had failed to lay a basis of his state of intoxication when various offences were committed, despite the same having been confirmed by the complainants and the state witnesses.'

[6] Mr. *Siambango* appeared for the appellant while Mr. *Moyo* appeared for the state.

[7] This court, differently constituted, directed the appellant to file his heads of argument on or before 06 December 2019. The appellant only filed his heads of argument on 16 December 2019 and therefore applied for condonation for such late filing of heads of argument. The application for condonation is not opposed by the state. The explanation tendered for the delay in filing the application for condonation is reasonable and condonation will be granted.

[8] The first ground of appeal set out in the notice of appeal can be disposed off without sweat. The appellant's qualm in respect of the first ground is that his convictions cannot be sustained on the evidence presented while failing to elaborate and show in what respect. What appears from this ground is a conclusion of the appellant that the convictions cannot be justified while he does not lay bare the particulars which led him to come to such conclusion.

[9] On the basis of the decision of *S* v *Gey Van Pittius* and Another,[1] the first ground of appeal is a conclusion drawn by the appellant but not a ground of appeal. This court in *S v Kanoge,*[2] relying on the *Gey Van Pittius* matter stated as follows:

'I have given great thought to what he says are the grounds; and having done so, I am firmly of the opinion that, upon the authority of S v *Gey van Pittius* and Another 1990 NR 35, there are no proper grounds before the court. They are all conclusions drawn by the appellant. In S v *Gey van Pittius*, *Strydom* AJP (as he then was) at 36H stated:

"The purpose of grounds of appeal as required by the Rules is to apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues. (See further in this respect the judgment of my Brother *Frank* AJ in the matter of S v *Wellington* (1990 NR 20) and the cases referred to therein.)"'

[10] The first ground therefore does not constitute a ground of appeal, strictly speaking, as it is wanting for lack of sufficient particulars necessary to inform all interested parties as to what the issue is. Resultantly, this court will not ponder on this purported ground of appeal further and same is accordingly rejected.

[11] Grounds 2 – 4 of the notice of appeal can be assessed together, as the appellant complains that the court *a quo* erred, when it rejected his defence of non-pathological criminal incapacity and ultimately convicted him as charged.

[12] During plea proceedings the appellant provided a statement in terms of section 115 of the Criminal Procedure Act[3], where he stated that he lacked the requisite criminal capacity to commit the offences charged, due to intoxication to such an extent that he could not distinguish between right and

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[1] 1990 NR 35 (HC).

[2] (CA 39/2012) [2012] NAHCMD 45 12 October 2012 para 3. See also: Maritz v S (HC-MD-CRI-APP-CAL-2018/00082) [2019] NAHCMD 403 (11 October 2019) para 10 – 11.

[3] Act 51 of 1977.

wrong and could further not recall what transpired. In essence the defence raised by the appellant was that of non-pathological criminal incapacity arising from severe intoxication and that appellant was unable to form the requisite intent to commit the alleged offences.

[13] Amongst the State witnesses was *Angelika Harases* who testified that she knew the appellant as he used to reside with her brother at the same farm. She testified further that on 23 December 2015 she was in the company of *Beolite Nanas*, *Thomas Kandere* and others where they went to Spar Otjiwarongo for shopping. She together with others including the appellant and *Manfred Andreas*, boarded the motor vehicle of *Mac Mccloud* on the way to the farm. While still in vehicle the appellant argued with *Thomas Kandere* (out of jealousy) as *Thomas Kandere* was with her. The appellant and *Manfred Andreas* were offloaded at the main stead while the rest proceeded to the cattle post where, upon arrival, they began to prepare food and consumed alcohol.

[14] *Angelika Harases* further testified that the appellant, together with his friend Manfred Andreas, arrived at the post. *Thomas Kandere*, who was smaller in statue compared to the appellant, appeared to be afraid of the appellant. The appellant and his friend said that they came to collect their wives. Appellant then threatened her that if she refuses to accompany him, then he will injure her. He then became physical with her. It was dark but appellant and *Manfred Andreas* directed them where to go. Upon arrival at the residence of the appellant he slapped and pushed her into a room where they wrestled. He instructed her to undress, failing which he will kill her. Out of fear for her life she complied and undressed herself. He then had sexual intercourse with her while lying on her back. He later stood up and instructed her to change her position while he had sexual intercourse with her from behind. Afterwards he instructed her to again change position by stepping one foot on the wall while he had sexual intercourse with her. *Beolite Nanas* then came to knock on the door; it was dark and appellant searched for the keys, found them and opened the door.

[15] At this stage the complainant dressed up. Appellant then started chasing *Manfred Andreas* with a knife and at that moment she, together with *Beolite Nanas* and the children, locked themselves in, in *Manfred*'s room. Appellant then broke the window with an iron bar in order to gain access to the room, but without success due to the burglar bars on the window. He next proceeded to the door, broke it open with an iron bar and entered the room. He then hit *Angelika Harases* with the iron bar on her forehead and she collapsed. When she regained consciousness, she noticed the appellant wrestling with *Beolite Nanas*. She and B*eolite Nanas* at some point managed to run but the appellant blocked them at the veranda where they had nowhere to run. He instructed her and *Beolite Nanas* to undress themselves which they did and he threw their clothes into the fire. While Angelina Harases remained only with her panty, *Beolite Nanas* totally undressed herself. The appellant then wrestled with *Beolite Nanas,* during which occurrence *Angelika Harases* managed to escape. It was midnight and she ran to the farm house of Mr *Mccloud* for help. In the witness's opinion, the appellant was not heavily intoxicated and he was aware of his actions. She returned to the farm where the appellant resides the next morning in the company of the police officers where they found that the appellant had hidden his clothes in the bush. She saw *Beolite Nanas* coming out of the garage and after the police entered the garage, they came out with the appellant where he was arrested.

[16] *Thomas Kandere* testified that on the day they went to town for their Christmas shopping, he invited the ladies to the farm for Christmas. He confirmed that the appellant and *Manfred Andreas* arrived at the cattle post on horseback. Appellant entered his sleeping room, took a knife and said that he came to look for his wife. Thomas Kandere was frightened. Appellant then took the children with the complainants and left. The next morning the appellant was arrested by the police officers after being found in the garage where the knife was also found. The appellant's two bags were found under a tree. This witness was also of the view that from the actions of the appellant, he knew what he was doing and was aware of the consequences of his actions.

[17] *Beolite Nanas* confirmed that she accompanied *Angelika Harases* to the farm for Christmas celebrations. While in a vehicle on the way to the farm the appellant and *Thomas Kandere* were quarrelling. Also that appellant and Manfred Andreas later arrived at the cattle post in order to take them to the main farm stead. They walked from the post to the farmstead and upon arrival the appellant and *Angelika Harases* went into the room. Later she heard noises emanating from the room sounding like people struggling or wrestling. She corroborated *Angelika Harases's* evidence that they ran into another room where they locked themselves in. Also that appellant approached the room and broke the door with an iron bar, entered the room and hit *Angelika Harases* with the iron bar.

[18] She testified further that appellant instructed her and *Angelika Harases* to proceed to the veranda where he further instructed them to undress. They undressed and then appellant threw their clothes in the fire. She testified further that *Angelika Harases* managed to run away but when she attempted to run, he tripped her and she fell to the ground. He then had sexual intercourse with her by force. When he fell asleep, she stood up and went to the farm house, helplessly as the farm owner was on holiday. The next morning appellant passed by the farm house with a bag and a blanket. He approached her and instructed her to enter the garage where he again had sexual intercourse with her by force. The appellant there after fell asleep and when she stood up, she noticed *Angelika Harases* and the police officers. The appellant was then arrested. She was also of the view that the appellant was not too intoxicated not to know what he was doing.

[19] During cross examination the following exchanges between Mr *Siambango* and the witness appear on record:

> 'you saw the accused was drunk… No he was not that drunk your worship, he was not staggering the way he was walking he was just normal.
> I did not ask whether he was staggering, I am telling you he was drunk when he came there? --- I did not see that he was drunk.'

This relates to the time they arrived back on the farm when dropped off.

[20] *Manfred Andreas* testified that he used to work together with the appellant. They went shopping on 23 December 2015 and thereafter returned to the farm. Appellant rode a horse to the cattle post while saying he was going to get his girlfriend. He testified further that he also took another horse and followed the appellant. At the post the appellant forced *Angelika Harases* to accompany him to the farmstead. From the post they walked the two horses to the farm. Upon arrival the appellant entered the room with *Angelika Harases.* At about midnight the appellant approached him and inquired as to the reason why he did not respond when appellant called him. Appellant grabbed his shirt and tore it. At that moment he observed *Angelika Harases* and *Beolite Nanas* running into his room and closed the door. When he tried to talk to the appellant, appellant threw a burning piece of wood at him where after he ran and stood behind a fence. Appellant returned to the room where the complainants and the children were and forced the door open. He observed the appellant push the two complainants outside and instructed them to undress which they complied with and they remained naked. Appellant then put their clothes on fire. He further observed the appellant having sexual intercourse with *Beolite Nanas* by force where after he dragged her towards the bushes. The next morning, he saw the appellant having his bag with him. Appellant said he remembered that he had a knife the previous night. Manfred was therefore of the opinion that appellant was not too drunk to recall what occurred the previous night as he said that he remembered having a knife then.

[21] The appellant testified that on 23 December 2015 he met the two complainants *Angelika Harases* and *Beolite Nanas* in town. He bought two 5 litres of Overmeer wine and one Castello in the morning and started drinking. Later in the afternoon he got on the motor vehicle together with others destined to the farm. Whilst seated at the back of the vehicle he drank alone from his bottle and got drunk while still on the way to the farm. He was too drunk to remember where he was dropped off. He testified that he could neither recall travelling on horseback to the post where *Thomas Kandere* resided. He cannot recall chasing the complainants around, burning their

clothes or raping them. He recalled that the next day he was woken up by the police inside his employer's garage and does not recall how he ended up there. A question was put to him if he remembered that upon embarking on the vehicle, he began to cause trouble with *Thomas Kandere* as if he was jealous of him for being in the presence of the complainants. To this he responded saying that he could not remember. On a question that when he went to fetch the complainants from *Thomas Kandere* he was already jealous, his response was that he could not remember that.

[22] In cross examination the appellant abruptly changed his version by saying he remembered drinking while on the way to the farm and even remembers that upon his arrival at the farm, he continued to drink and thereafter went to the room to sleep. This material discrepancy in his evidence remained unexplained.

[23] It is well established in our law that the state bears the burden of proof beyond reasonable doubt that the accused had the necessary intention to commit the offences charged. The state is thus required to prove that the appellant acted voluntarily and intended to commit each and every offence levelled against him. In striving to prove the necessary intention, the state is aided by lawful presumptions. One such presumption is the presumption of sanity which assumes that everyone is presumed to be and to have been sane at the time of the commission of the offences.

[24] Botha JA in *S v Kalogoropoulos*[4] stated that:

'The criminal incapacity which is relied on in this case is of the kind which is described in judgments of this court as non-pathological criminal incapacity (see, for example, *S v Laubscher* 1988 (1) SA 163 (A), *S v Calitz* 1990 (1) SACR 119 (A), and *S v Wild* 1990 SACR 561 (A). It has been said that in a case of this kind psychiatric evidence is not as indispensable as it is when criminal incapacity is sought to be attributed to pathological causes. On the other hand, an accused person who relies on non-pathological causes in support of a defence of criminal incapacity is required in evidence to lay a factual foundation for it, sufficient at least to create a reasonable

[4] 1993 (1) SACR 12 (A) 21h-j & 22a.

doubt on the point. And ultimately, always, it is for the court to decide the issue of the accused's criminal responsibility for his actions, having regard to the expert evidence and to all the facts of the case, including the nature of the accused's action during the relevant period.'

[25] The presumption of sanity was discussed by this Honourable court in *S v Rickets*[5] where it was stated that:

'In order to prove that the act was voluntary, the State is entitled to rely on the presumption 'that every man has sufficient mental capacity to be responsible for his crimes: and that if the defence wish to displace that presumption they must give some evidence from which the contrary may reasonably be inferred.[6] The presumption of mental capacity is only provisional as the legal burden remains on the State to prove the elements of the crime, but until it is displaced, it enables the prosecution to discharge the ultimate burden of proving that the act was voluntary. Lord Denning further reasoned that:

"In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity. It is not sufficient for a man to say "I had a black-out".'

[26] This defence has been said to be the easiest of defences which accused persons can raise as a scapegoat to avoid responsibility for their actions. Accordingly, it calls for closer and careful scrutiny to eliminate its possible abuse.

[27] While discussing the defence of non-pathological criminal incapacity, the Supreme Court in *S v Hangue*[7] quoted the following passage with approval from *S v Eadie* 2002 (3) SA 719 (SCA) (2002 (1) SACR 663) para 28 where it was stated that:

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[5] (CC 08/2015) [2016] NAHCMD 30 para 22-23 and *S v Hangue* 2016 (1) NR 258 (SC) 278-9.
[6] An excerpt from the speech of Lord Denning referred to in *Bratty v Attorney-General for Northern Ireland* (1961) 3 All ER 523 at 534. Januarie v S (HC-MD-CRI-APP-CAL-2017/00047) [2019] NAHCMD 329 (06 September 2019) para 30.
[7] 2016 (1) NR 258 (SC) 280-281.

'It is well established that when an accused person raises a defence of temporary non-pathological criminal incapacity, the state bears the onus to prove that he or she had criminal capacity at the relevant time. It has repeatedly been stated by this Court that:

(i) in discharging the onus the state is assisted by the natural inference that, in the absence of exceptional circumstances, a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily;

(ii) an accused person who raises such a defence is required to lay a foundation for it, sufficient at least to create a reasonable doubt on the point;

(iii) evidence in support of such a defence must be carefully scrutinised;

(iv) it is for the Court to decide the question of the accused's criminal capacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused's actions during the relevant period.'

[28] From the above stated authorities it is thus clear that where the accused raises the defence of temporary non-pathological criminal incapacity, the State, in discharging the onus of proving that the accused had the required criminal capacity at the relevant time, is assisted by the natural inference that a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntary. Sound evidence should be led in support of this defence to disprove intent. Evidence or otherwise in support of such defence must thus be carefully scrutinised and, only after having considered all the facts of the case, can the court decide the question of the accused's criminal capacity.

[29] In the assessment of the defence of temporary non-pathological criminal incapacity, the truthfulness of the offender is key. Kumleben JA in *S v Potgieter*[8] emphasised the truthfulness required from the offender who raises this defence in the following terms:

'The reliability and truthfulness of the alleged offender is in the nature of the defence a crucial factor in laying such a foundation. This fact, and hence the need to closely examine such evidence has been stressed in earlier decisions.'

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[8] 1994 (1) SACR 61 (A) 73b

[30] *In casu*, the following proven facts refutes the appellant's defence of non-pathological criminal incapacity:

(i) That while in the vehicle driving to the farm the appellant argued with *Thomas Kandere* out of jealous that Thomas was with the ladies;

(ii) That after being dropped off at the farm where he resides, the appellant over a long-distance rode on horseback to the cattle post, saying he was on his way to get his girlfriend;

(iii) That at the post the appellant took a knife which belonged to *Thomas Kandere;* The same knife found with him the next day when he was arrested;

(iv) On the strength of Manfred's evidence, the appellant in the morning recalled having been in possession of the knife the previous night;

(v) That at the post he threatened the complainants to accompany him, failing which, he would injure them;

(vi) That he loaded the complainants' bags and their children on the horses while they walked to their place of residence in the night;

(vii) That at his residence he wrestled with *Angelika Harases* in the room and had sexual intercourse with her on three consecutive occasions.

(viii) That *Beolite Nanas*, *Angelika Harases* and the children locked themselves in a room but the appellant forced the door open and entered the room;

(ix) That the appellant struck *Angelika Harases* with an iron bar;

(x) That at the veranda he instructed the complainants to undress their clothing;

(xi) That he obtained and threw the clothing of the complainants into the fire;

(xii) That when *Beolite Nanas* attempted to run away, he tripped her after which she fell down and he had sexual intercourse with her;

(xiii) That the next morning he moved his bags of clothes; probably with the intention to leave the farm;

(xiv) That in the morning, upon seeing *Beolite Nanas,* he ordered her into the garage where he again had sexual intercourse with her.

[31] The approach to assessing evidence was eloquently set out in the matter of In *S v Radebe*[9] at 168D-E the court said:

> 'The correct approach is that the criminal court must not be blinded by where the various components come from but rather attempt to arrange the facts, properly evaluated, particularly with regard to the burden of proof, in a mosaic in order to determine whether the alleged proof indeed goes beyond reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis.'

[32] The trial court found that it was established that:

(i) Appellant claimed that the complainants were his wives and intended to keep them for the night;

(ii) Appellant rode on horseback from the main farm stead to the cattle post, and this required a degree of skill and coordinated effort;

(iii) Appellant engaged in five sexual acts, during which, he instructed the complainants to take in different positions;

(iv) Appellant had enough strength to break the door open with an iron bar;

(v) Appellant knew that he had to pack his bags, presumably with intent to flee;

(vi) Appellant was drunk, but was not intoxicated to the extent that the defence of non-pathological incapacity could succeed. Appellant therefore knew what he was doing and appreciated the consequences of his actions.

[33] There is no doubt that the appellant was untruthful in his testimony. By claiming not to recall what transpired, the appellant denied the court the opportunity to have evidence which would have clearly explained his state of mind. In such absence, the court is left with the evidence led including the

[9] 1991 (2) SACR 166 (T). S v Thirion (CC 01/2017) [2019] NAHCMD 375 (30 September 2019) para 20.

behaviour of the appellant before, during and after the commission of the offences. Considering the evidence in totality, there can be no doubt that the conviction of the accused was established beyond reasonable doubt on counts one to eight. It should be remembered that proof beyond reasonable doubt does not mean proof beyond all doubt.

[34] This court can thus not fault the trial court in its conclusion on the evidence led when it rejected the appellant's defence of non-pathological incapacity as being improbable and false.

[35] The particulars of charges of indecent assault set out in counts nine and ten are that the appellant indecently and lasciviously assaulted the complainants by forcing them to remove their clothes in public.

[36] Indecent assault involves unlawfully and intentionally assaulting another by touching or holding such other person in circumstances where the act is indecent or the intention to commit such act is indecent.[10] The appellant did not physically remove the complainant's clothes, nor touch any of them during the ordeal of having to strip naked in the presence of each other, the appellant and *Manfred Andreas*.[11] The evidence is that the appellant instructed the complainants to remove their clothes which instruction they complied with out of fear of being physically assaulted and or being killed. *Manfred Andreas* observed the complainants undress their clothes on the instructions of the appellant and saw their nudity. It thus follows that the charge of indecent assault is not competent on the facts of this matter.

[37] The appellant knew that he was acting unlawfully when he instructed the complainants to undress their clothes. It is apparent from the actions of the appellant that he unlawfully intended to cause the complainants to publicly engage in conduct which depraves their morals or which outraged the public's sense of morals. Public in this context is referred to as one or more persons.[12]

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[10] L and Others v Frankel and Others (29573/2016) [2017] ZAGPJHC 140; 2017 (2) SACR 257 (GJ) (15 June 2017 para 37. CR Snyman, 2nd Edition page 444.
[11] S v Mwiya (CR 37-2014) [2014] NAHCMD 224 (25 July 2014) para 10.
[12] CR Snyman (supra) page 377.

The actions of the appellant falls squarely within the confines of the elements of the offences of public indecency. It is therefore evident that appellant was wrongly charged and convicted with the offences of indecent assault when he should have been charged with the offences of public indecency and accordingly convicted on the evidence led.

[38] In determining whether this court can correct the conviction at this stage of the proceedings we quote a passage from this honourable court in the matter of *S v Saal*[13] where it was stated that:

> '7. Consequently, the issue before this court is whether the accused will suffer any prejudice if the charge is so amended to reflect the correct label. To this end the court shall rely on *S v Goagoseb*[14] where it was stated;
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> ". . .if the body of the charge is clear and unambiguous in its description of the act alleged against the accused. . .the attaching of a wrong label to the offence or an error made in quoting the charge, the statute or statutory regulation alleged to have been contravened, may be corrected on review if the court is satisfied that the conviction is in accordance with justice, or, on appeal, if it is satisfied that no failure of justice has, in fact, resulted therefrom".'

[39] *In casu*, it is clear that the evidence satisfies the elements of the offence of public indecency. Therefore, notwithstanding wrong references to charges nine and ten as indecent assault, the accused will not suffer any prejudice if such charges are corrected to read 'public indecency' as the appellant, when asked to plead, appreciated the case he had to meet.

[40] In the result, it is ordered:

1. The appellant's late filing of the heads of argument is condoned.
2. The convictions on count 9 and 10 are substituted with convictions of public indecency.
3. The appeal against conviction is dismissed.

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[13] (73-2019) 2019 NAHCMD 404 (11 October 2019) para 7.
[14] *S v Goagoseb* (CR 64/2018) [2018] NAHCMD 256 (23 August 2018).

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O S SIBEYA

ACTING JUDGE

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JC LIEBENBERG

JUDGE

APPEARANCES:

APPELLANT:	M K Siambango Directorate of Legal Aid, Otjiwarongo.
RESPONDENT:	E Moyo

Office of the Prosecutor-General,
Windhoek.