



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: CC 31/2019

In the matter between:

THE STATE

and

GAVIN GAWANAB**ACCUSED****Neutral citation:** *S v Gawanab* (CC 31/2019) [2023] NAHCMD 203 (17 April 2023)**Coram:** D USIKU J**Heard:** 27 and 28 March 2023**Delivered:** 17 April 2023

Flynote: Criminal Procedure – Application in terms of s 174 of the Criminal Procedure Act, 51 of 1977 – Accused’s discharge at the closure of the State’s case – Test whether there is *prima facie* evidence on which a reasonable court may convict – Section 174 meant to relieve the trial court from conducting futile trials – Courts required to weigh up all evidence when considering such applications – Section 174 application partially succeed.

Summary: At the closure of the state's case the defence sought an application in terms of s 174 of the Criminal Procedure Act 51 of 1977, as amended in order to have the accused discharged alleging that the state had failed to lead credible evidence against the accused upon which a reasonable court may convict. The accused denied all the allegations as set out in the indictment and made no disclosure of the basis of his defence. The state led evidence of several witnesses in order to prove its case. It must be noted that apart from the complainants, there were other state witnesses who testified in respect of the several counts, the accused was charged with. In total, the accused stood charged with 23 counts. It is trite that whether to discharge an accused at the end of the state's case or not, is a decision that requires the exercise of the court's discretion, which discretion must be exercised in a judicial manner. It is thus the court's duty to consider the evidence in totality and not in isolation. When considering that, at this stage the court has the duty to exercise its discretion. The court is of the view that when considering the charges preferred against the accused in respect of counts 1, 2, 3, 15, 19, 20, 22 and 23 a *prima facie* case has been established. However, there appears to be no evidence upon which a reasonable court acting carefully may convict the accused in respect of counts 4, 5, 7 and 8.

ORDER

1. Section 174 application partially succeeds in respect of counts 4, 5, 7 and 8.
2. However, the court is of the view that when considering the charges preferred against the accused in respect of counts 1, 2, 3, 15, 19, 20, 22 and 23 a *prima facie* case has been established.

RULING IN TERMS OF SECTION 174 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

USIKU J:

[1] This court has a task to determine whether the accused, who stood charged with several counts, in particular counts 1, 2, 3, 4, 5, 7, 8, 15, 19, 20, 22 and 23 upon which this application is brought could be discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977, as amended (the CPA) initiated at the closure of the state's case.

[2] At the closure of the state's case after the state presented evidence from about 62 witnesses, the defence applied for the accused's discharge in respect of the above counts. Asserting that the evidence on those counts did not warrant the accused person to be put on his defence or that the state did not lead evidence upon which a reasonable court acting carefully may convict. The state opposed the application.

[3] Ms Nyoni appeared on behalf of the state while Mr Siyomunji represented the accused.

The charges

Count 1: Attempted murder

[4] In that upon or about 26 October 2018 at or near Satan Stocht Farm in the district of Windhoek, the accused did wrongfully and unlawfully assault Mercia Nenne Katjipu by strangling her with intent to murder her.

Count 2: Assault with intent to do grievous bodily harm

[5] In that upon or about 26 October 2018 at or near Satan Stocht Farm in the district of Windhoek the accused did wrongfully and unlawfully assault Mercia Nenne Katjipu by cutting her with a knife with intent to cause the said Mercia Nenne Katjipu grievous bodily harm.

Count 3: Contravening section 2(1)(a) read with section 1,2(2), 2(3), 3, 5, 6 and 7 of act 8 of 2000 – Rape

[6] In that upon or about 26 October 2018 at or near Satan Stocht Farm in the district of Windhoek the accused hereinafter called the perpetrator did wrongfully, unlawfully and intentionally commit or continue to commit a sexual act with Mercia Nenne Katjipu, hereafter called the complainant by inserting his penis into the vagina of the complainant under coercive circumstances, and the coercive circumstances are that:

- (a) The complainant was below the age of 14 years and the perpetrator was more than 3 years older than her.
- (b) The perpetrator applied physical force to the complainant.

Count 4: Assault

[7] In that upon or about 29 September 2018 at or near Satan Loch Farm in the district of Windhoek the accused did wrongfully and unlawfully assault Sara Ramina by grabbing her waist tightly and dragging her giving her then, there and thereby inflicting certain wounds, injuries or hurts.

Count 5: Contravening section 2(1)(a) read with section 1,2(2), 2(3), 3, 5, 6 and 7 of act 8 of 2000 – Rape

[8] In that upon or about 29 April 2017 at or near Tanzania Street, Havana in the district of Windhoek the accused hereinafter called the perpetrator did wrongfully, unlawfully and intentionally commit or continue to commit a sexual act with Maureen Uri-Khos, hereafter called the complainant by inserting his penis into the vagina of the complainant under coercive circumstances, and the coercive circumstances are that:

The perpetrator applied physical force to the complainant.

Count 7: Robbery

[9] In that upon or about 29 April 2017 at or near Tanzania Street, Havana in the district of Windhoek the accused did unlawfully and with the intention of forcing her into submission did assault Maureen Uri-Khos by stabbing her with an arrow and

beating her with his fist and unlawfully and with intent to steal money that was in her bra, the property of or in the lawful possession of the said Maureen Uri-Khos.

[10] And that the aggravating circumstances as defined in section 1 of Act 51 of 1977 are present in that the accused was before, during or after the commission of the crime in possession of a dangerous weapon, namely an arrow.

Count 8: Assault with intent to do grievous bodily harm

[11] In that upon or about 29 April 2017 at or near Tanzania Street, Havana in the district of Windhoek the accused did wrongfully, unlawfully and intentionally assault Magdalene Skrywer by stabbing her with an arrow with intent to cause the said Magdalene Skrywer grievous bodily harm.

Count 15: Housebreaking with intent to contravene section 2(1)(a) read with sections 1, 2(2), 3, 5, 6 and 18 of Act 8 of 2000 read with Section 1, 3 and 21 of the Combating of Domestic Violence Act, Act 4 of 2003 and contravening section 2(1)(a) of Act 8 of 2000 – House Breaking with intent to rape and rape – Domestic Violence

[12] In that or about 26 September 2015 and at or near Karasburg Street, Havana in the district of Windhoek, the accused hereinafter called the perpetrator did wrongfully, unlawfully and intentionally commit or continue to commit a sexual act with Promise Gawanas, hereinafter called the complainant, who is his niece, by inserting his penis into the vagina of the complainant under coercive circumstances, and the coercive circumstances are that:

- (a) The complainant was below the age of 14 years and the perpetrator was more than 3 years older than her; and/or
- (b) The perpetrator applied physical force to the complainant.

Count 19: Assault with intent to do grievous bodily harm

[13] In that or about 14 May 2013 and at or near Oas Farm in the district of Windhoek, the accused Gavin Gawanab did wrongfully, unlawfully and intentionally

assault Salonika Oxurus by hitting her with a stick on the neck, kicking her and throwing her on the ground with intent to cause the said Salonika Oxurus grievous bodily harm.

Count 20: Attempted murder

[14] In that or about 14 May 2013 at or near Oas Farm in the district of Windhoek the accused Gavin Gawanab did wrongfully and unlawfully assault Salonika Oxurus by strangling her with intent to murder her.

Count 22: Attempted murder

[15] In that or about 22 December 2012 at or near Satanslo, Daan Viljoen in the district of Windhoek the accused Gavin Gawanab did wrongfully and unlawfully assault Shakira Sonia Xoagus by strangling her with intent to murder her.

Count 23: Attempting to contravene section 2(1)(a) read with 1, 3, 4, 5, 6, 7 and 8 of the Combating of Rape Act, 8 of 2000 and read with section 18 of the Riotous Assemblies Act, 17 of 1956 – Attempted Rape

[16] In that on or about 22 December 2012 and at or near Oas Farm in the district of Windhoek, the accused Gavin Gawanab hereinafter called the perpetrator did wrongfully, unlawfully and intentionally attempt to commit or continue to commit a sexual act with Shakira Sonia Xoagus, hereinafter called the complainant by undressing the complainant of her panty in order to commit a sexual act with her under coercive circumstances, and the coercive circumstances are that:

- (a) The complainant was less than 14 years of age and the perpetrator was more than 3 years older than her and/or
- (b) The perpetrator applied physical force to the complainant; and or

Alternatively

Indecent Assault

[17] In that on or about 2 September 2016 and at or near Karasburg Street, Havana in the district of Windhoek, the accused Gavin Gawanab did wrongfully unlawfully, indecently and lasciviously assault Shakira Sonia Xoagus by forcing her to undress herself of all her clothes.

[18] The state set out the following summary of substantial facts in accordance with s 144 3(a) of the Criminal Procedure Act.

In respect of counts 1, 2 and 3

[19] The complainant and her friends were walking from Otjomuise location towards farm Satan Stock. Along the way the perpetrator who was also walking in that bushy area forced the complainant and other girls to separate from the boys. He then carried the complainant into the bush where he assaulted and strangled her. The perpetrator also raped the complainant.

In respect of count 4

[20] The complainant and her husband were coming from a party at night. The perpetrator escorted them home. When they reached their residence, her husband fell asleep. The complainant went out of the house to relieve herself. The perpetrator followed her, grabbed her and dragged her into the bush. The complainant was saved by neighbours who responded to her screams.

In respect of counts 6, 7 and 8

[21] The complainants were walking home at night. The perpetrator who is known to them came running from behind them. He stabbed the complainant Maureen Urikhos with an arrow and punched her with fists. The perpetrator also raped the complainant and robbed her of money that was in her bra. The perpetrator stabbed the complainant Magdalene Skrywer with an arrow.

In respect of counts 15

[22] The complainant's mother and the perpetrator are siblings. The aunt of the complainant went out of the house to attend to an altercation that was going on in the neighbourhood. The complainant was left in a room that was locked. The perpetrator broke into the room, strangled and raped the victim who is the complainant.

[23] According to the complainant's mother, the accused offered to look after the complainant who was sleeping in Petrina's room, while she went to sell meat. Upon returning, as they approached Petrina's room, they heard someone screaming. Anna informed her that her daughter was raped. She entered the room in which she left her daughter sleeping, and found her lying on the bed in a pool of blood. She further testified that she held her daughter and started crying while her daughter was uttering words saying "uncle Gavin".

[24] Diana Naruses is the accused's niece. She testified that upon their return from Dolam, they stood outside the flats where Petrina resides as they were deciding on where to go and drink. She explained that accused was also present. She further explained that Petrina indicated that she is going to put the complainant to bed, as the complainant was about to sleep. The complainant's mother wanted to take her home, however, the accused person interrupted by demanding that she must just let her sleep in Petrina's room.

[25] Upon returning from the bar, as they were walking through the passage to Petrina's room, she heard a door being opened, as thereafter she saw the accused person exiting from the room and jumped over the fence. She further added that although it was night time, there is a street light nearby hence she was able to recognise the accused person. As she entered the room in which they left the complainant sleeping, she observed the complainant naked and was lying in a pool of blood. The blood was coming from her private parts.

[26] Petrina Gamiseb testified that she took the complainant to her room because she indicated to her that she wanted to sleep. She thereafter locked the room. In the meantime an altercation occurred in the street and they went to witness it. Upon their return, she saw the accused coming out of her room and started to run. She shouted "Gavin" but accused continued to run and jumped over the fence. She then entered her room and found the complainant crying. As there was no electricity, she

switched on her cell phone torch and after she saw the complainant, ran outside screaming.

[27] Anna Gawanas's evidence corroborate the version of Petrina with regard to the fact that the complainant was put to bed by her. Also that upon approaching petrina's room she saw the accused coming out of Petrina's room, the accused ran away and jumped over the fence.

In respect of counts 19 and 20

[28] The complainant Salonika Oxurus and 2 siblings were tending cattle when the perpetrator accosted them. The perpetrator threatened to stab the complainants Hildegard Oxurus and Moses Oxurub if they say anything. He then pulled the complainant Salonika Oxurus from the donkey she was riding and carried her to the bushes. The perpetrator assaulted this complainant and undressed her. She was rescued by people from the neighbouring farm.

[29] Hildegard Oxurus testified that, whilst they were on their way to the water point with the complainant, the accused appeared from the bushes and asked whether they have seen donkeys. They indicated that they haven't seen any. As they arrived at the water point, accused person appeared again and started touching the complainant on her breasts. Thereafter, they started throwing stones at him. Accused person grabbed the complainant and started beating her with a root from of a tree and chased them with a knife. She further testified that, accused uttered words "come and I will stab your vaginas". Accused also threw the complainant with a stone. She thereafter fell to the ground and accused demanded her to undress herself. He started chasing them again and the complainant went to the nearby residence to seek for assistance.

[30] Moses Oxurub testified that accused opened his knife and forced the complainant to have sexual intercourse with him. He hit the complainant on the neck with the root. Moses Oxurub got a stick and hit the accused on his back. The accused ran away.

[31] No medical evidence was presented to corroborate her version. According to Dr Moongo, she did not observe any abrasions on the body. There were no open wounds, neither fractures nor dislocations indicated. She further explained that, there was soft tissue injury to the right side of the neck and on the right shoulder which suggest that the complainant was indeed injured.

In respect of counts 22 and 23

[32] The perpetrator called the complainant into a shack and closed the door. He undressed her of the panty and also undressed himself. The complainant was rescued by neighbours who heard her crying.

[33] It is common cause that the accused denied all the allegations levelled against him by the state and as a result the state had to lead evidence in order to prove its case.

[34] In its effort to prove the charges preferred against the accused person, in total the state led evidence of about 62 witnesses. Such evidence will be necessary in the assessment of the application for a discharge of the accused in respect of the counts referred to.

[35] Maria Balie testified that they heard a child crying from Nikkie Balie's house, who is the father of the complainant. As they were approaching the house, she threw a stone at the door, and the door opened. After the door opened, the complainant came out followed by the accused person. She asked him what he has done to the child and the accused replied "nothing". Accused person picked up his clothes from the bed, jumped through the window and ran away. She further observed that, the accused was wearing a blue underpants and the complainant was not wearing an underwear.

[36] Sarafina Balie's evidence corroborates Maria Balie's evidence in that they each indicated that they indeed heard a child crying from Nikkie Ballie's house and found the complainant and the accused coming out of the house. Thereafter, accused person jumped out of the window.

[37] Brian Balie testified that while they were playing with 2 other younger boys at the complainant's father's house, accused person instructed them to call the complainant and tell her to go get sweets from the accused. After the complainant went to the accused, they were further instructed by him to go and buy tobacco at Keirob leaving the complainant and the accused alone. On their way back from Keirob, they could hear someone screaming and as they approached the house, they noticed a lot of people in front of the house.

[38] The legal position with regard to s 174 application

Section 174 of Act 51 of 1977 reads:

'If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any other offence of which he may be convicted on the charge, it may return a verdict of not guilty.'

[39] The word no evidence was interpreted in our courts in several cases. In the matter of *S v Nakale and Others*¹, where it was stated that "No evidence" mean no evidence upon which a reasonable court acting carefully may convict. The same interpretation was endorsed 3 years later by the Supreme Court in *S v Teek*².

[40] In an unreported judgment of this court *S v Katanga*³, the importance of section 174 was discussed and stated as follows at para [8] and [10]:

'[8] Section 174 is crucial in our criminal justice system as it reminds courts that, the main purpose of the CPA is to strive for orderly and fair criminal justice. The sections obliges courts, at the closure of the state case, to assess the evidence led thus far and determine if it is of such nature that a reasonable court acting carefully may convict on the charge or any other offence. The court is under strict obligation to observe and protect the accused's right against self-incrimination, which is inclusive of the right to remain silent coupled with the right to be presumed innocent...

¹ *S v Nakale & Others* 2006 (2) NR 455 (HC).

² *S v Teek* 2009 (1) NR 127 (SC).

³ *S v Katanga* (CC 23/2018) [2020] NAHCMD 21 (06 February 2020).

[10] Section 174 is, in addition to protecting the rights of the accused, further aimed at relieving a trial court of the burden of proceeding in a machine-like manner with a futile trial when it is apparent that there is no evidence on which a court might convict. The court should therefore not shy away from cutting off the trail of such a superfluous process where it is clear that there exists no evidence at the end of the state case on which a reasonable court acting carefully may convict the accused of the offence charged or any other charge.'

[41] The question whether to discharge the accused at this stage or not therefore is a decision that lies squarely within the discretion of the trial court which discretion must be exercised judiciously.

[42] It has been restated time and again that the witnesses' credibility at this stage of the proceedings plays a very limited role. In the case of *S v Mphet and others*⁴, the court set out the role of credibility at this stage as follows:

'In my view the cases of Nortje, Boucher and Naidoo correctly held that credibility is a factor that can be considered at this stage. However, it must be remembered that it is only a very limited role that can be played by credibility at this stage of the proceedings. If a witness gives evidence which is relevant to the charges being considered by the court then that evidence can only be ignored if it is of such poor quality that no reasonable person could possibly accept it. This would really only be in the most exceptional case where the credibility of a witness is so utterly destroyed that no part of his material evidence can possibly be believed. Before credibility can play a role at all it is a very high degree of untrustworthiness that has to be shown.'

[43] From what was stated in the above case, when a court considers an application in terms of s 174, it must assess the evidence and determine whether there is no possibility of a conviction without the accused testifying and providing incriminating evidence. In the absence of such evidence at the closure of the state's case, an accused must be discharged.

[44] With the above legal principles in mind I am obliged to consider the evidence that was led in the course of the trial.

⁴ *S v Mphet & Others* 1983 (4) SA 262 (c) at 265 D-E.

[45] I intend to deal with the counts as dealt with by the defence and the state during their submissions.

Counts 1, 2 and 3

[46] On 26 October 2018 the complainant in these counts was treated at the Katutura state hospital by a medical doctor who described her condition of clothing as being dirty and blood stained. Her clinical findings were that the complainant had blood on the vulva and her perineum had a tear. She described the examination as difficult due to pain. The complainant was found to be very emotional, crying non-stop. The doctor's conclusion was that her physical findings were in conformity with sexual assault.

[47] The evidence presented by several state witnesses is that the complainant was raped by a man who accosted her along the Daan Viljoen road with her friends whilst they were on their way to the farm.

[48] Whereas the complainant did not know her assailant prior to the date of the incident, her testimony is that she was taken into the bushes by a man who twisted her neck and grabbed her by the throat. She was told to remove her clothes and her private part was cut whereafter she was told to lay down on the ground after which the man raped her. Her version of being grabbed and taken into the bush was corroborated by her friends with whom she was. She confirmed to have been taken to hospital on the same date and that she was hospitalised for 2 weeks. Her assailant had tattoos on his arms, which another state witness Lorenzo, also confirmed.

[49] Martha Gawanas testified that he knew the accused through her son who is the accused's friend. Accused used to visit at her house. She also knew the complainant because of their marital relationship with her father. The complainant's mother is a sister to her husband.

[50] On a date she could not recall, after knocking off, she went to the Daan Viljoen road in search of a lift. Whilst there a group of children, 4 girls and 2 boys

arrived at the roadblock. As the roadblock was being managed by the police, they called the children and asked them where they were going. Amongst the children she recognised the complainant and the other four. The children informed the police that they were on their way to farm Satan's Clof. Martha greeted the children after which the police asked her whether they could allow them to proceed or not. Upon Martha's permission, the police allowed the children to proceed whilst she remained seated at the road block.

[51] In the meantime, accused arrived walking along the footpath and went towards the tarred road in the direction of the farm. Though she did not speak to the accused, who stood at a distance of ± 25 metres from her, she was able to recognise him. Shortly thereafter, 3 young girls came towards the road block running. Two boys also came running towards the road block. Upon enquiry about the whereabouts of the complainant, the girls informed Martha that she was taken by a tall man light in complexion wearing a pink t-shirt and blue shorts. A report was then made to the police.

[52] Together with the police officer and the driver who had a private vehicle, she assisted in the search for the complainant. One of the 2 boys also drove with them.

[53] Whilst driving, they met the complainant and immediately the driver stopped the vehicle. The complainant ran towards the vehicle and recognised Martha calling out her name. She related to her that she was raped and cut on her thigh. Martha held the complainant on her lap. As they drove further, she saw and recognized the accused coming towards the road moving in the direction of Windhoek.

[54] When the complainant turned and saw the accused, she informed Martha that he was the one who raped her, whereafter she fainted and collapsed in Martha's arms.

[55] The police called out the young man in reference to the accused and asked him to get closer because they wanted to ask him for something. Accused turned around and started to run away. Warning shots were fired but accused did not stop whereafter the police drove back towards the roadblock.

[56] Upon arrival at the road block, the complainant was placed on the stoep and covered with a blanket to wait for a police vehicle. A police vehicle arrived, whereafter Martha and the complainant were taken to the police station.

[57] Later on, Martha accompanied the police to search for the accused on the farm. The accused was not found on the farm. Thereafter the police had a conversation with his grandparents informing them why accused was being sought for by the police. The police then left for Windhoek.

[58] On a later date, Martha received a text message informing her about the arrival of the accused at his residence. This information was shared with the police whereafter the farm was again visited.

[59] The Police positioned themselves and moved towards the residence but accused could still not be found. Another residence was visited where accused was seen but immediately when he saw the police he again ran away. Warning shots were fired however accused managed to run away. Accused was not arrested on that date again and the police returned to Windhoek.

[60] Again another text message was received by Martha and police were contacted after which the farm was visited for the third time, but accused still could not be found.

[61] Having failed to arrest accused on the farm, his sister's house in Havana location was visited by the police, still accused could not be arrested at that house. He was later on sighted at the Havana four way towards Goreangab bus stop but again managed to run away.

[62] A female police officer who attended to the victim at the road block confirmed the injuries on the victim's private part, she was the one that took the victim to hospital. Medical evidence presented confirms the injuries sustained by the complainant.

[63] Based on the evidence in the medical report, a *prima facie* case has clearly been established in respect of the rape as well as the assault charges. Accused merely denied the charges. The complainant maintained that she was held on her neck and strangled before she was cut on her private part and raped in the bushes.

[64] It was defence's contention that Exhibit "YY" totally exonerates the accused person on a charge of rape due to lack of DNA of the accused person having been found in any samples taken from the rape kit, and the clothes of the complainant. Not all cases of sexual assault turn on DNA evidence. Evidence from a medical officer can be key in cases of sexual assault. The injuries on the complainant can be seen as one of the most significant pointers to a sexual assault. The presence of injuries as documented makes it more difficult to assert that there was consent especially in this case where the victim is a minor. In my view, the accumulated evidence showing injuries and violence on the complainant, corroborates the victim's account of an attack. This appears to disprove the accused's version of not having met the complainant on the date in question. Accordingly, accused has a case to answer in respect of the counts referred to.

Count 4

[65] Apart from the complainant Sara Ramina, there was no other evidence to corroborate her version. She admitted that at the time of the incident they were attending a party and had consumed alcohol. Thus there appears to be no evidence upon which a reasonable court acting carefully may convict. As a result the accused must be discharged on this count.

Counts 5, 7 and 8

[66] In respect of the 8th count, the complainant Magdalena Skrywer testified that she was stabbed with a spear on the left shoulder blade after which the accused proceeded to chase after Maureen Uri-khos. She was able to identify the accused because there were street lights which made her to see clearly as events unfolded. No medical evidence was presented to corroborate her version. She however testified that Maureen was very drunk that night. She was stabbed with a spear but

did not go for medical treatment at a hospital. The reason being that the injuries she sustained were not of such a serious nature. Another state witness Lora Norases also known as Zelda testified that during April 2017, Maureen Uri-khos arrived at her house naked and dusty. She reported to her that she was raped by the accused person.

[67] After the rape report was made, Zelda contacted a police officer she knew at Wanaheda police station. The police officer responded to her that she was off duty where after she contacted another police officer. The victim, Maureen Uri-khos was later on handed to the police and was taken to the hospital. The crime scene was visited and items of clothing were recovered. Zelda confirmed to have seen Magdalena Skrywer during the night when Maureen reported to her that she was raped. She was able to make the observations on the victim because of the spray lights which were on and could see clearly. When regard is had to the manner under which Maureen appeared and reported rape, one cannot rule out that a sexual assault could have been committed against her.

[68] According to the report on medico-legal examination, the complainant Maureen Uri-khos reported to the doctor who examined her that the wound on her right thigh was as a result of a fall to the ground. The doctor documented it on the medical report compiled on the 29 April 2017, which was handed in and marked as Exhibit "J". There were no other injuries or wounds observed on her body. As a result thereof, I find no *prima facie* case having been established as there appears to be no evidence in respect of the charge of assault with intent to cause grievous bodily harm when considering the allegations that an arrow was used in the commission of the offence. Thus, on that score there appear to be no evidence upon which a reasonable court acting carefully may convict.

[70] Moving on to the charge of robbery in respect of the 7th count, the complainant was a single witness. She was said to have been under the influence of alcohol at the time, which could have affected her recollection of events. Her testimony was not corroborated by any other witness. To that end this court is not satisfied that a *prima facie* case was established to require the court to put the accused on his defence in respect of that count.

[71] In the result, I make the following order:

1. Section 174 application partially succeeds in respect of counts 4, 5, 7 and 8.
2. However, the court is of the view that when considering the charges preferred against the accused in respect of counts 1, 2, 3, 15, 19, 20, 22 and 23 a *prima facie* case has been established.

D N USIKU
Judge

APPEARANCES:

FOR THE STATE:

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FOR ACCUSED:

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Of Siyomunji Law Chambers
Windhoek