

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case No.: CA 43/2017

In the matter between:

NGHIHADELWA REONARD KABOI

1st APPELLANT

NGHIFINWA JOSEFA NGHIKOMONANYE

2nd APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Kaboi v S* (CA 43-2017) [2017] NAHCNLD 121 (5 December 2017)

Coram: TOMMASI J

Delivered: 5 December 2017

Released: 8 December 2017

Flynote: Appeal – Criminal Law – Assault with intent to do grievous bodily harm – Intention – Factors such as instrument used; degree of force; part of the body and nature of injuries are to be borne in mind. Criminal Procedure – Medical Report – Medical jargon difficult to understand – The magistrate has a duty to ensure that the unrepresented accused understands the nature and import of the medical report although admissible into evidence and *prima facie* proof of injuries sustained.

Summary: The appellants were convicted of assault with intent to do grievous bodily harm and sentenced to 18 months imprisonment. The appellants and a colleague, whilst performing their duties to impound stray animals, were stopped by the complainant from executing their duty. An argument ensued and the complainant was assaulted. There was no indication that the learned magistrate applied caution when considering the testimony of the complainant. This court considered the finding of fact and concluded that it was proven that an assault was perpetrated by both appellants but had to determine whether the State proved beyond reasonable doubt that the appellants had the intention to do grievous bodily harm.

The notes recorded by the medical doctor who compiled the report reflected that blood was found in the peritoneum with jejunal mesenteric tear which was repaired. The court held that although the medical report was admissible and *prima facie* proof of injuries sustained, the magistrate had a duty to explain the nature of the injuries to the unrepresented accused alternatively to summon the district surgeon to explain it to the accused and the court. The court disregarded the facts contained in the medical report due to the magistrate's failure to explain the nature of the injuries as they appear in the report.

The court considered the fact that it was not known how many times the complainant was kicked; whether or not first appellant was wearing shoes at the time; there was no evidence as to the force which was used; and there was no acceptable evidence in respect of the injuries suffered. The court held that the State failed to prove that the appellants had the intention to do grievous bodily harm. The conviction of assault with the intent to do grievous bodily harm was substituted with a conviction of common assault.

ORDER

1. The appellants are granted condonation for the late noting of the appeal;

2. The appeal of both appellants against conviction succeeds partially in that the conviction of assault with the intention to do grievous bodily harm is substituted with a conviction of common assault;
3. The sentences imposed on both appellants are set aside and substituted with the following sentence:

10 months and 23 days (i.e. time served);
4. The sentence is ante-dated to 11 January 2017; and
5. The immediate release from imprisonment of both the appellants is ordered in this matter.

JUDGEMENT

TOMMASI, J

[1] This is an appeal against conviction and sentence. The appellants were convicted of assault with the intent to do grievous bodily harm in the district court of Eenhana.

[2] The appellants filed their notice of appeal outside the time period provided for by the rules of the Magistrate's Court for the noting of an appeal and applied for condonation. The appellants provided an acceptable explanation for the late noting of the appeal and I was persuaded that the appellants had reasonable prospects of success. The matter was thus heard on the merits.

[3] The appellants raised the following grounds of appeal:

- '1. the accused persons were unrepresented and the trial court failed to guide them in their defense;
2. the accused persons were convicted on a single witness' evidence without the trial court observing the ground rules on single witnesses;

3. the complainant was unable to identify his assailants and the trial court relied on the identification finished in court;
4. the medical report, which allegedly informs the seriousness of the assault was not interrogated and treated with caution;
5. the sentence was not in accordance with law as it ignores the current High Court guidelines and decision on incarceration; ‘

[4] The facts which form the background to the convictions are briefly as follow: The appellants and one other person impounded cattle and were driving them to the Municipal kraal. As they were herding the cattle into the kraal, the complainant tried to stop them from doing so. First appellant asked him if he was drunk. An argument ensued and according to the complainant the first appellant without reason, held him by the neck, kicked his ankles causing him to fall down and kicked him on his buttocks. An unknown person kicked him on the side of his kidneys and ran away. He later on during the day collapsed and was taken to the hospital the next day where he was operated on.

[5] According to the first appellant, he did not touch the complainant, he merely pointed at him. During cross-examination he admitted having held the complainant by his arms. Second appellant admitted to having slapped the complainant. Both testified that the complainant insulted them. They called a witness, the third person who was with them when the incident occurred. According to him the complainant came to them as they were impounding the cattle telling them to stop putting the cattle in the kraal. He was shouting abuse at them. First appellant held the complainant informing him to leave. Second appellant slapped the complainant and he fell to the ground. He pulled both appellants from the complainant and the complainant left without being further assaulted.

[6] The medical report reflects a tender area on the right hand side and a surgical incision on his abdomen. The following notes were recorded: ‘Patient became dizzy and was fainting. Referred to Oshakati Intermediate Hospital where a laparotomy was done and blood was found in the peritoneum with jejunal mesenteric tear which was repaired.’

[7] The learned magistrate in his judgement accepted that the complainant had undergone surgery. Some discrepancies in the testimony of the defense witnesses were

considered and the learned magistrate concluded that the injuries the complainant sustained were caused by the appellants. The learned magistrate found them guilty of assault with the intent to do grievous bodily harm.

[8] The first ground of appeal fails to give particulars of the learned magistrate's failure to guide the appellants in their defense. It thus fails to comply with the Rule 67(1) of the Magistrate's Court Rules and for this reason I shall disregard same. The aforementioned rules clearly stipulate that the grounds ought to be clear and specific. In any event the only apparent failure by the learned magistrate is discussed below.

[9] The complainant was a single witness and in terms of s 208 of the Criminal Procedure Act, an accused may be convicted of any offence on the single evidence of any competent witness. It is trite law that the court ought to treat the evidence of such a witness with caution. The learned magistrate did not record that it had warned itself of the inherent dangers of relying on the evidence of a single witness and it is not apparent from the judgment that such cautionary approach was taken. Given this omission the court ought to revisit the findings of fact to determine whether the conclusion arrived at was correct.

[10] The complainant, by his own admission tried to interfere with appellant's execution of their duties to impound the cattle. His averment that the assault was unprovoked in light of this fact is implausible. It is more likely that he was argumentative or even insulting as per the testimony of the appellants. He was furthermore clearly not in a position to see who was assaulting him at all times. His version may therefore be accepted only insofar as it is corroborated. His version that he was assaulted is corroborated by the appellants and their witness. The dispute is simply whether 1st appellant assaulted him and the role second appellant played in the assault.

[11] First appellant's denial that he assaulted the complainant is not supported by his witness as there is a clear indication that he was warded off by this witness. The magistrate, in my view, correctly rejected the version of the appellants given the contradictions and the implausible version of first appellant's that he did not touch the complainant. Second appellant, by his own admission slapped the complainant.

[12] The complainant's testimony that first appellant grabbed him on the neck, kicked him on the ankles causing him to fall and kicking him on the buttocks rings true. The

complainant however did not state how many times he was kicked on the buttocks. The evidence does not support an inference that one of the appellants kicked him on the side of his kidneys as the available evidence suggests that they were pulled away from the complainant and did not run away as described by the complainant; neither is there any indication that this unknown person formed part of the appellants' group.

[13] The evidence adduced supports a finding that the two appellants assaulted the complainant. The State bears the onus to prove beyond reasonable doubt is that the appellants intended to cause the complainant grievous bodily harm.

[14] In *S v Henury* 2000 NR 101 (HC) Maritz J as he then was, at page 102 B – D, stated the following:

'Whether or not an accused has acted with such intent is not always capable of easy determination. Before a conviction on such a charge may follow, the Court must be satisfied that the State has proven beyond a reasonable doubt that the accused had an intent 'to do more than inflict the harm and comparatively insignificant and superficial injuries which ordinarily follow upon an assault. There must be proof of an intent to injure and to injure in a serious respect' (per Miller J in *S v Mbelu* 1966 (1) PH H176 (N). He further observed that the following factors may provide a guide to the accused's state of mind: 'they are, first, the nature of the weapon or instrument used; secondly, the degree of force used by the accused in wielding that instrument or weapon; thirdly, the situation on the body where the assault was directed, and fourthly, the injuries actually sustained by the victim of the assault'.

[15] Kicking and slapping of the complainant is not *per se* indicative of the appellants' intention to do grievous bodily harm. The complainant did not indicate how many times the first appellant kicked him on the buttocks or what force he used to kick him. It is furthermore not known whether his feet were shod.

[16] This brings me to the appellants ground of appeal that the medical report, which allegedly informs the seriousness of the assault was not interrogated and treated with caution.

[17] In *S v Boois* 2004 NR 74 (HC) Hannah J, at page 78 A – F, when considering the import of an agreement by unrepresented accused's to admit the facts contained in a medical report' stated the following:

'What it comes to is that, in the case of medical reports, a certain degree of informality has crept into our procedure when applying s 220. Words such as 'with the consent of the accused', 'with the leave of the accused', 'no objection by the accused' are frequently used instead of 'admitted by the accused'.

However, there is a limit to the degree of informality, especially when an accused is unrepresented, as was the position in the present case. As was said by Harcourt J in *S v Langa* 1969 (3) SA 40 (N) at 42F:

"when resort is had to this method of affording proof of facts, there should, particularly in cases in which the accused is undefended, be a careful assurance that the accused's rights should have been fully and most carefully explained to him and that he has understood full well that he is under no obligation whatever to assist the State in establishing the case against him and the process explained and the admissions which he is prepared to make should be recorded."

In *S v Nkhumeleni* 1986 (3) SA 102 (V) Van der Spuy AJ, having referred to *S v Langa*, said, at 107C:

"In other words the contents of the report should be put to the accused and he should be asked whether he admits the facts in the report and if he does not admit one or more of the facts, then the district surgeon should testify upon them."

My conclusion is fortified by the fact that many persons are not trained in the medico-legal field and that their "admission" really means nothing at all and it is pointless to say that a report is being handed in "with the consent of the accused". It should be explained to an accused in lay terms exactly what the findings of the district surgeon were and whether he admits or denies those findings. If the Court is unable to translate medico-legal terminology into simple lay terms because these are not clear from a medico-legal report, then the district surgeon should in any event be called to explain his report. [emphasis provided]

[18] Section 212(7A)(a) of the Criminal Procedure Act relaxed the requirements for admissibility of any document purporting to be a medical record prepared by a medical practitioner who treated or observed a person who is a victim of an offence with which the accused in criminal proceedings is charged. Such a document is not only admissible

but also *prima facie* proof that the victim concerned suffered the injuries recorded in that document. In *S v Eiseb* 2014 (3) NR 834 (SC) Mainga JA indicated at page paragraph 11 the following:

'I have good reason to believe that ss (7A)(a) has its origin in the previous abuse of s 212(4)(a), particularly by some defence lawyers. Many a time, before the enactment of ss (7A)(a), the defence would invariably object to the admission of a medical report even when there was nothing questionable in the report, thus resulting either in the exclusion of the report or in a conviction of a lesser offence, when it was apparent from evidence aliunde that the accused committed the offence. This occurred mostly when the medical practitioner (the author of the report) was a foreign national who had in the meantime returned to his/her country of origin. Our trial process clung to the practice of excluding the medical report in the absence of the author, upholding the strict evidential rule at the expense of justice. The legislature has closed that avenue with the enactment of ss (7A) (a).'

[19] It is settled law that the medical report may be admissible and that it constitutes *prima facie* proof that the victim suffered the injuries recorded in the document. What is disconcerting however is the failure by the learned magistrate to explain the contents of this document to the unrepresented appellants? The report contains medical jargon which is not easily understood. Even though the medical officer who compiled the report is not available the district surgeon would be well placed to explain such jargon to the court and the accused. The failure by the magistrate to ensure that the appellants understood the nature of the injury prejudiced the appellants in the conduct of their defense. It cannot be said that the appellants, being unrepresented knew or ought to have known the nature of the facts they placed out of dispute by admitting to the contents of the report.

[20] Moreover, the report does not indicate whether the injuries sustained are consistent with an assault. The court *a quo* certainly was not qualified to make such an inference. It is evident that the court relied on this report to convict the appellants of assault with the intention to do bodily harm.

[21] This court given the prejudicial nature of the admission into evidence of the report, must exclude it when considering whether the State had proven that the appellants had the requisite intention.

[22] Having considered the proven facts, this court is unable to conclude that the appellants had direct intent or that they foresaw the possibility of the complainant sustaining serious injury. In light of this conclusion this court cannot uphold the district court's conviction of assault with the intent to do grievous bodily harm but conclude that there is sufficient evidence to convict the appellants of common assault which is a competent verdict. Given the change in the conviction I am of the view that the time the appellants already served to be an appropriate sentence.

[23] In the result the following order is made:

1. The appellants are granted condonation for the late noting of the appeal;
2. The appeal of both appellants against conviction succeeds partially in that the conviction of assault with the intention to do grievous bodily harm is substituted with a conviction of common assault;
3. The sentences imposed on both appellants are set aside and substituted with the following sentence:

10 months and 23 days (i.e. time served);
4. The sentence is ante-dated to 11 January 2017; and
5. The immediate release from imprisonment of both the appellants is ordered in this matter.

MA TOMMASI

JUDGE

APPERANCE:

For the 1st and 2nd Appellant:

Mr Shakumu

Of Kishi Shakumu & Co. Inc.,

For the Respondent:

Ms Nghiyoonanye

Office of the Prosecutor –General
Oshakati