

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

APPEAL JUDGMENT

Case no: CA 32/2014

In the matter between:

**STATE**

**APPELLANT**

v

**JESAYA TULONGA NAKWAHONGA**

**RESPONDENT**

**Neutral citation:** *S v Nakwahonga* (CA 32/2014) [2018] NAHCNLD 94  
(4 September 2018)

**Coram:** TOMMASI J and JANUARY J

**Heard on:** 4 April 2018

**Delivered:** 4 September 2018

**Flynote:** Appeal —State — Against discharge — Learned magistrate erred by finding that the assault on the complainant was justified due to 'drunkenness and provocative manners of complainant- Acquittal; set aside.

**Summary:** Both counsel for the appellant and respondent were ad idem that the magistrate erred when he found that although the respondent assaulted the complainant that he was justified in doing so because of the drunkenness and provocative manners of the complainant. The court held that an assault has been perpetrated and the respondent ought not to have been acquitted. The acquittal was set aside and substituted with a conviction of assault common.

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### ORDER

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1. The appeal against the acquittal is upheld;
2. The acquittal is set aside and substituted with a conviction of assault, common.
3. The matter is remitted to the magistrate's court of Tsumeb for sentencing by another magistrate.

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### JUDGMENT

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TOMMASI J (JANUARY J concurring):

[1] The respondent was charged with assault with the intent to do grievous bodily harm in that he punched and kicked the complainant in her face and all over her body. The respondent pleaded not guilty and opted not to make a statement in terms of section 115 of the Criminal Procedure Act. He was acquitted and discharged. The appellant now appeals against the acquittal.

[2] The appellant took issue with the magistrate's failure to take crucial evidence of the complaint's injuries into consideration, and the conclusion that the complainant was drunk and acted in an offensive manner without any supportive evidence to that effect.

[3] The background facts may be summarized as follow: the complainant came home late from a night out. She found her sister and the respondent, her cousin, at home. She saw the respondent had in his possession a cellular phone which she bought for her grandmother. She confronted him about it and he assaulted her. The assault took place in the house and in the street. Her sister and a neighbor corroborated her version of the events. She sustained a laceration on her lip and photos depicted severe swelling of her lip and bruises around her eyes.

[4] The respondent's version was that the complainant came from a club and started insulting him for eating a watermelon she bought for her grandmother. He assaulted her because she wanted to grab a cellular phone belonging to their grandmother from him. The complainant, according to him, followed him outside the house with two knives. He however failed to confront the complainant with this version and this fact was not corroborated by other eyewitnesses. He admitted to having slapped her twice.

[5] The learned magistrate in his judgment found that the respondent confessed to slapping the complainant twice because he was provoked. The learned magistrate further found that the complainant was assaulted by the respondent 'due to her drunkenness and provocative manners'.

[6] It is evident that the learned magistrate erred in law. Provocative manners and drunkenness is not a lawful justification for the crime of assault. Counsel for the respondent correctly conceded that the acquittal ought to be set aside.

[7] It is common cause that an assault was perpetrated on the complainant. The only question is whether the State succeeded to prove that the respondent intended to do the complainant grievous bodily harm.

[8] The version of the respondent is not plausible and ought to be rejected as an afterthought. The evidence of the complainant is corroborated by an eyewitness. This court is satisfied that the respondent pushed the complainant, slapped her more than once, tripped her and hit her with a fist in her face more than once. The assault was directed mainly to the face of the complainant and the accused used his fists to cause swelling and bruising to the complainants face. The proven facts do not warrant an inference that the respondent intended to do the complainants grievous

bodily harm. The respondent may therefore be convicted of assault common which is a competent verdict on the charge of assault with the intention to do grievous bodily harm.

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

1. The appeal against the acquittal is upheld;
2. The acquittal is set aside and substituted with a conviction of assault, common;
3. The matter is remitted to the magistrate's court of Tsumeb for sentencing by another magistrate.

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MA Tommasi  
Judge

I agree

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H C January  
Judge

