



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

APPEAL JUDGMENT

Case No: HC-NLD-CRI-APP-CAL-2018/00012

In the matter between:

SHOOMBE NANGHENDA

1ST APPELLANT

TITUS NKANDI

2ND APPELLANT

EINO SHIVOLO

3RD APPELLANT

SIMANEKA AMAKALI

4TH APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Nanghenda v S* (HC-NLD-CRI-APP-CAL-2018/00012) [2019] NAHCNLD
61 (13 June 2019)

Coram: JANUARY J *et* SALIONGA J

Heard: 12 February 2019

Delivered: 13 June 2019

Flynote: Criminal Procedure – Appeal – Conviction and sentence – Two charges of assault with intent to do grievous bodily harm – Single witness – Competent and credible – No misdirection or irregularity – Conviction and sentence confirmed on charge one – Second charge – complainant testified in chief – Not available for cross-examination – Magistrate considered and evaluated evidence – irregularity – conviction and sentence set aside.

Summary: The appellants were convicted on two charges of assault with intent to do grievous bodily harm. First appellant appeals against conviction and sentence of the first charge. All four appellants appeal against the conviction of the second charge. The complainant in the first charge was a single witness. He was a competent and credible witness. His evidence was satisfactory in all material aspects. No misdirection or irregularity was committed by the magistrate in evaluating the witness's evidence with the totality of evidence. The conviction and sentence on count one are confirmed.

ORDER

1. The first appellant's appeal against conviction and sentence on charge one is dismissed;
2. The appeal against the conviction and sentence on charge two succeeds in relation to all four appellant;
3. The conviction and sentence on charge two are set aside;
4. The order for the sentences to run cumulatively/consecutively is set aside;
5. The appellants who paid fines on charge 2 must be refunded.

APPEAL JUDGMENT

JANUARY J (SALIONGA J concurring);

Background

[1] The appellants' were convicted in the district court of Oshakati on 2 (two) charges of assault with intent to do grievous bodily harm. The first, third and fourth appellants were respectively sentenced on charge 1 with a fine of N\$6000 or in default of payment 30 months imprisonment. On charge 2, they were respectively sentenced with a fine of N\$5000 or in default of payment 24 months imprisonment.

[2] The prosecution proved a previous conviction of assault with intent to do grievous bodily harm against the first appellant. He was sentenced to 30 months imprisonment on the first charge and 24 months imprisonment on the second charge. The magistrate ordered: 'the sentences on counts 1 & 2 are to run cumulatively (consecutively) and not concurrently in respect of all the accused persons.'

[3] The appellants were partly represented in their trial in the court a quo by Ms Shailemo. At some stage they ran out of funds and decided to conduct their own defences. They are represented in this court by Ms Amupolo. The respondent is represented by Mr Mudamburi.

[4] The first appellant appeals against his conviction and sentence on both charges whereas the second, third and fourth appellants appeal against the conviction on the second charge only.

The grounds of appeal

[5] The first appellant's grounds of appeal are:

'The learned magistrate erred on grounds of fact and/or law;

1. By not attaching due weight on the material discrepancies and contradictions in the evidence of the complainant in count one, more specifically as to how he was allegedly assaulted by the appellant;
2. By not treating the complainant herein as a single witness whose evidence should be approached with caution;
3. By not drawing a negative inference from the State's failure to call available witnesses such as the bar ladies who were present at the time and/or the investigating officer;

4. By concluding that the appellant's version that he did not assault the complainant is not reasonably possibly true;
5. By concluding that the requirements of common purpose where (sic) met and as a result, appellant acted in common purpose with those that assaulted the complainant.'

[6] The appeal ad charge 2 in respect of all four the appellants' is as follows:

'The learned magistrate erred on grounds of fact and or law in that, although she correctly stated that evidence of the complainants must be subjected to cross-examination, she failed to afford the appellants a chance to cross-examine the complainant on this count, thereby allowing the evidence of the said complainant to be admitted uncontested and in so doing, the learned magistrate violated the appellants' right to a fair trial as contemplated by article 12 of the Constitution of the Republic of Namibia.'

[7] The appeal against the sentence of first appellant is based on the following grounds:

1. 'The learned magistrate failed to aid the unrepresented appellant in mitigation and as such, failed to lobby information from the appellant which would have assisted her in coming to an appropriate sentence;
2. The learned magistrate erred on the ground of fact and/or law by not taking into account the personal circumstances of the appellant;
3. The learned magistrate over-emphasized the effect of the appellant's previous conviction and by so doing, sentenced the accused harshly;
4. The sentence imposed by the learned magistrate is unjustified and shocking and no reasonable court would have imposed it.'

Condonation

[8] The appellants filed their notices of appeal out of time contrary to rule 67(1) of the Magistrate's Court Rules. The respondent however did not oppose the application for condonation and we consequently granted condonation in view also of the

concession by the respondent. The respondent conceded to the submission by the appellants that the conviction on charge 2 cannot stand because there was no cross-examination of the complainant.

[9] I agree because I am of the view that the learned magistrate misdirected herself by considering and evaluating the uncontested evidence of the second complainant where there was no cross-examination. It is tantamount to failure to allow cross-examination which is a gross irregularity.¹ This conviction and sentence stand to be set aside in relation to all the appellants.

Charge 1

[10] Charge 1 alleges that the appellants assaulted Nashongo Timoteus lipinge by beating him with a sjambok, punching him, kicking him and slapping him with intent to do the said Nashongo Timoteus grievous bodily harm.

[11] The complainant in charge 1 testified how he was assaulted. He identified the appellants who assaulted him. He testified that he was driving a motor vehicle after having stopped at a cuca shop for a passenger to buy drinks. Whilst driving the witness noticed another motor vehicle following him. This vehicle overtook and put on hazard lights. The complainant stopped his motor vehicle. The other vehicle also stopped and 6 persons including a security guard with a shotgun disembarked. The shotgun was pointed by the security guard at the complainant and he was instructed to go back to the cuca shop where he previously stopped.

[12] The complainant adhered to the instruction and went back to the cuca shop. He was confronted by the first appellant and eventually slapped by him. As a result the complainant lost his balance and fell down to the ground. According to his evidence the other appellants joined in and assaulted him. An accused who was initially also part of the trial as accused 4, had in the meantime absconded. This accused handed a sjambok to first appellant who used it to beat the complainant. The sjambok was interchanged between the first appellant, third appellant and the person that absconded' to beat the complainant. The second and fourth appellants assaulted the complainant

¹ See: *S v Wellington* 1990 NR 20; *S v Shikudule* (CR 17/2015) [2015] NAHCMD 126 (5 June 2015)

only with fists. He showed visible longitudinal downward scars on his back, left arm and shoulder. A J88, medical examination report of the complainant corroborates the injuries.

[13] Ms Amupolo submitted that the complainant's evidence is unreliable because there are contradictions in his evidence in court and his witness statement made to the police. In amplification she highlighted that the complainant did not mention in his statement about an agreement between him and a certain Mr Shitambi regarding the purchase of a motor vehicle and car parts. Further that it does not appear in his statement how many persons disembarked from the other motor vehicle. The complainant also stated in his statement that he was beaten with an empty bottle whereas in his testimony he did not mention that. There was further a discrepancy in relation to an allegation of theft by false pretences committed by a person who was with the complainant. In conclusion Ms Amupolo submitted that the complainant was very inconsistent and constantly contradicted himself.

[14] Mr Mudamburi submitted to the contrary that the appellant's submissions are without merit; that the complainant clearly testified how he was assaulted; that there are no material discrepancies in complainant's evidence; that the complainant's evidence was left unchallenged; that there is no evidence that the bar ladies witnessed the assault; they were inside the bar whereas the assault took place outside the bar; there is no evidence that the investigating officer witnessed the assault(s).

[15] Ms Amupolo's contention that the magistrate failed to allow cross-examination of the second complainant is not correct. (my emphasis) The correct position is that the magistrate misdirected herself to consider and evaluate the unchallenged evidence of a witness who did not avail himself for cross-examination. On perusal of the record of proceedings, it is evident that the second complainant finalized his evidence in chief where after the case had to be postponed because of lack of time. On one of the subsequent dates of postponement, the complainant in count 2 did not turn up although he was warned for court. He was eventually arrested but the case could not continue as the magistrate was not available. The case was there after postponed numerous times because not all the appellants and the complainant in charge 2 were before court on the dates for continuation of the trial.

[16] The case commenced on 31 May 2016. Eventually the public prosecutor closed the State's case in the absence of the complainant in charge 2 on 02 October 2017 where after the appellants testified in their defence.

Single witness

[17] The complainant in count 1 is indeed a single witness. 'The evidence of the single witness need not be satisfactory in every respect. The evidence could safely be relied upon even where it had some imperfections, provided the court could find even though there were some shortcomings in the evidence of the single witness, the court was satisfied that the truth had been told.'²

[18] I have repetitively perused the record with the evidence in chief and cross-examination of the complainant in charge one. I could not find any material contradiction, unsatisfactory evidence or imperfection in the evidence and cross-examination of the witness. On the fact that some portions of his evidence do not appear in the witness statement, the witness stated that he informed the police and could not shed light why it is not noted down. In my view it is a notorious fact that a police officer may only note down what he or she may consider relevant for a case. The explanation is therefore plausible.

[19] The discrediting of a witness who deviated from a previous statement should be limited to instances where there was a material deviation from a previous statement made by the witness after acknowledgment of the content as being correct. Deviations shown to exist must not be evaluated in isolation. To enable the court to decide whether or not the truth had been told, despite some contradictions, regard must also be had to the rest of the witness's evidence, considered against the totality of evidence presented.

[20] In my view the evidence of the single witness is clear on all material aspects. He was a competent and credible witness. Consequently the magistrate did not misdirect herself by evaluating his evidence with the totality of the evidence.

[21] Failure by the state to call a witness did not *per se* justify any adverse inference against the state case. Justification to do so would depend on the circumstances of the case. On the present facts there was no basis for drawing any adverse inference from

² See: *S v Unengu* 2015 (3) NR 777 (HC)

the state's failure to call a witness. It remained open to the defence to call the witness once the state decided not to do so. In this case there is no evidence or any indication that the persons alleged who should have been called by the State witnessed the assault.

[22] I do not find any merit on the grounds raised by the appellant in relation to the conviction on charge 1.

Sentence *ad* charge 1

[23] It is by now established law that sentencing is pre-eminently within the discretion of the trial court. This court of appeal has limited power to interfere with the sentencing discretion of a court *a quo*. A court of appeal can only interfere;

- when there was a material irregularity; or
- a material misdirection on the facts or on the law; or
- where the sentence was startlingly inappropriate;
- or induced a sense of shock; or
- was such that a striking disparity exists between the sentence imposed by the trial Court and that which the Court of appeal would have imposed had it sat in first instance in that;
- irrelevant factors were considered and when the court *a quo* failed to consider relevant factors.³

[24] The first appellant testified in mitigation. He was 30 years old, single and has no children. He was unemployed although he is a builder and earned a salary of N\$3000. His only asset is his home to the value of N\$5000. He schooled to grade 10 but failed it.

[25] The first appellant has a previous conviction dated 19 December 2014 for assault with intent to do grievous bodily harm. He was sentenced to a fine of N\$4000 or 2 years imprisonment. The offence in this appeal was committed on 28 January 2016 about one year and a month after the previous conviction. In my view, the magistrate was correct to attach the necessary weight to the previous conviction as she did.

³ *S v Kasita* 2007 (1) NR 190 (HC); *S v Shapumba* 1999 NR 342 (SC) at 344 I to 345A; *S v Jason & another* 2008 NR 359 at 363 to 364G

[26] I do not find any irregularity or misdirection in the sentence. The sentence is in my view not shocking or inappropriate.

[27] In the result:

1. The first appellant's appeal against conviction and sentence on charge one is dismissed;
2. The appeal against the conviction and sentence on charge two succeeds in relation to all four appellants;
3. The conviction and sentence on charge two are set aside;
4. The order for the sentences to run cumulatively/consecutively is set aside;
5. The appellants who paid fines on charge 2 must be refunded.

H C JANUARY

JUDGE

I agree,

J T SALIONGA

JUDGE

Appearances:

For the Appellant: Ms M M Amupolo
Of Amupolo & Co Inc., Ongwediva

For the Respondent: Mr J Mudamburi
Of Office of the Prosecutor-General, Oshakati