

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

REVIEW JUDGEMENT

Case Title: The State and Ugwanga Willem Antindi 1 st Accused Joseph Ananias 2 nd Accused	Case no: CR 47/2023 Division of Court: Northern Local Division
Heard before: Honourable Mr. Justice Munsu, J <i>et</i> Honourable Mr. Justice Kessler J	Delivered on: 05 December 2023
Neutral citation: <i>S v Antindi</i> (CR 47/2023) [2023] NAHCNLD 134 (05 December 2023)	
The order: <ol style="list-style-type: none">1. The orders in respect of the counts of theft and escaping from lawful custody are confirmed.2. Accused 1's conviction on contravening section 35(1) of the Police Act, 19 of 1990 is set aside and substituted with a conviction of contravening section 35(2) (b) of the Police Act, 19 of 1990 – Threatening a member of the police.3. The sentence of a fine of N\$ 2000 or 8 (eight) months imprisonment is confirmed.	
Reasons for the order:	
MUNSU, J (KESSLAU, J concurring):	

[1] This matter came on automatic review in terms of section 302 of the Criminal Procedure Act 51 of 1977 (the CPA). The accused were both arraigned on a charge of theft. Accused 1 was further arraigned on a charge of assault on a member of the police in contravention of section 35(1) read with sections 1 and 13 of Act 19 of 1990 (the Act). Accused 2 was further arraigned on a charge of escaping – common law.

[2] The court *a quo's* findings and orders in respect of the charge of theft and escaping from lawful custody are in order. Suffice to say that both accused were acquitted on the charge of theft due to insufficient evidence. The evidence in respect of that charge was that the complainant who opened a case of theft of a cell phone left his cellphone in his bar and went out to get some stock. Upon his return, he could not find the cellphone. Accused 1 and 2 were questioned and a case was opened. There was no direct evidence linking any of the accused to the cellphone. In addition, the evidence was that there were also other individuals in the bar, including the bar attendant. The evidence against accused 2 in respect of the charge of escaping from lawful custody was that, after accused 2 was arrested on the charge of theft and taken to the police station, he then ran away from the police station and despite the police's efforts to trace him, they could not manage. Accused 2 was subsequently arrested when the police went to his residence at around 04h00 am and found him sleeping. Upon conviction, he was sentenced to 9 (nine) months imprisonment.

[3] The issue is in respect to the charge of assault on a member of the police.

[4] I enquired from the learned magistrate as follows:

'Accused 1 was also charged with assault on a member of the police in contravention of s 35(1) of the Police Act, 1990. The evidence was that the accused threatened to kill a member of the police. Such conduct seems to be covered under s 35(2) (b). However, the accused was convicted of assault on a member of the police, which presupposes a conviction under s 35(1).'

[5] The learned magistrate replied as follows:

'I concede that the evidence on count 3 was that accused 1 threatened to kill a member of the police. Such conduct is indeed covered under s 35(2) (b) of the Police Act 19/1990. Therefore the accused should have been charged and convicted under s 35(2) (b) and not s 35 (1) of the

said Act.’

[6] The charge reads as follows:

‘In that upon or about the 26 day of May 2022 at or near Onayena Police Station in the district of Ondangwa the accused did wrongfully and unlawfully assault a member of the Namibian Police, to wit warrant Kambonde Anna in the exercise of his/her powers or in the performance of his/her duties or functions by threatening then and there to kill the officer who was taking a statement as part of her duties.’

[7] The evidence of witnesses was that accused 1 threatened to kill the complainant, a member of the police. At the time of the threat, the complainant was on duty and had informed accused 2 (a suspect on a charge of theft) that she was going to obtain his fingerprints. However, accused 2 was persuaded by accused 1 not to allow the complainant to obtain his finger prints. Accused 1 then threatened that should he see the complainant (police officer) at Onikwa village, he would kill her. The evidence was that the complainant felt threatened by the words uttered by accused 1 because she did not know him, but realised that accused 1 knew that she used to work in the area of Onikwa, which was true.

[8] Section 35 of the Act reads as follows:

‘Interference with members

35. (1) Any person who assaults a member in the execution of his or her duty or functions, or a person assisting a member in the execution of his or her duty or functions, shall be guilty of an offence and liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.

(2) Any person who –

(a) resists or wilfully hinders or obstructs a member in the execution of his or her duty or functions, or a person assisting a member in the execution of his or her duty or functions; or

(b) in order to compel a member to do, or to abstain from doing, any act concerning his or her duties or functions, or on account of such member having done or abstained from doing such

an act, ~~threatens or suggests the use of violence against~~, or restraint upon, such member or any of his or her relatives or dependants or any other person, or threatens or suggests any injury to the property of such member or any of his or her relatives or dependants or any other person, shall be guilty of an offence and liable on conviction to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.'

[9] It follows that the section under which the accused was convicted was the wrong one. Considering that the conduct the accused was convicted of is a crime under the Act; this court has the power to amend the charge and to confirm the conviction as there would be no prejudice to the accused. As such, the conviction of contravening section 35(1) will be substituted with a contravention of section 35(2) (b) of the Act.

[10] In the result, it is ordered as follows:

1. The orders in respect of the counts of theft and escaping from lawful custody are confirmed.
2. Accused 1's conviction on contravening section 35(1) of the Police Act, 19 of 1990 is set aside and substituted with a conviction of contravening section 35(2) (b) of the Police Act, 19 of 1990 - Threatening a member of the police.
3. The sentence of a fine of N\$ 2000 or 8 (eight) months imprisonment is confirmed.

Judge(s) signature	Comments:
MUNSU, J.	NONE
KESSLAU, J.	NONE