REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: **CA 25/2014**

In the matter between:

STEPHANUS ANDREAS BAREND GYSBERTUS VAN ZYL	**1ST APPELLANT**
ETIENNE ODENDAAL	**2ND APPELLANT**
GEORGE FREDERICK MAARTENS	**3RD APPELLANT**
ESTELLE OBERHOLZER	**4TH APPELLANT**

And

THE STATE

Neutral citation: *Van Zyl v The State* (CA 25-2014) [2016] NAHCMD 246 (05 September 2016)

Coram: **HOFF, J et SHIVUTE, J**
Reserved: **18 May 2015**
Delivered: **05 September 2016**

Summary: In terms of the common law the infliction of corporal punishment on a learner by a teacher, where such punishment is moderately administered with a view to correct, discipline or educate, is not unlawful since it is justified.

Parents may delegate their power of chastisement to teachers, but persons *in loco parentis*, such as teachers, have original authority or power to discipline, independent from delegated authority.

The power to chastise a learner may be invalidated through contract or by means of statutory law.

Primary rule of interpretation in construing a statute is to use the ordinary meaning of the words unless such an approach would lead to some absurdity, inconsistency, hardship or anomaly which words from the context of the enactment as a whole a court is satisfied the legislature could not have intended.

Onus on State to prove the commission of crime of common assault beyond reasonable doubt including the element of *mens rea*, and in particular knowledge of unlawfulness of the crime.

The ground upon which corporal punishment was inflicted is an important element in determining the state of mind of the person inflicting the punishment and the reasonableness of the punishment with due regard to the particulars circumstances of each one.

Court of appeal may in rare instances where presiding officer in court *a quo* misdirected him or herself, arrive at its own conclusion unassisted by any finding the court *a quo* may have made.

ORDER

1. The appeal against conviction and sentence succeeds.

2. The conviction as well as the sentence is set aside.

JUDGMENT

HOFF, J:

[1] The appellants were convicted in the Magistrate's Court, Windhoek (Luderitz Street) on charges of common assault and each sentenced on 13 June 2013 to a fine of N$ 2000 or 1 year imprisonment. This appeal lies against both the convictions and sentences.

A. The charges

[2] The accused persons were arraigned on the following charges of common assault:

Count 1 – in respect of appellant no. 4

In that on or about the 5th day of February 2010 and at or near Windhoek, in the district of Windhoek, the said accused did wrongfully and unlawfully assault Andreas van Eck

by hitting him with a wooden stick (6 strokes) and did thereby cause him wounds and/or injuries.

Count 2 – in respect of appellant no. 2.

In that on or about the 18th day of February 2010 and at or near Windhoek in the district of Windhoek, the accused did wrongfully and unlawfully assault Andreas van Eck by hitting him with a stick (1 stroke) and did thereby cause him some wounds and/or injuries.

Count 3 – in respect of appellant no. 4

In that upon or about the 4th day of March 2010 and at or near Windhoek in the district of Windhoek, the said accused did wrongfully and unlawfully assault Andreas van Eck by hitting him with a stick (2 strokes) and did thereby cause him some wounds and/or injuries.

Count 4 – in respect of appellant no. 1

In that on or about the 5th day of March 2010 and at or near Windhoek in the district of Windhoek, the said accused did wrongfully and unlawfully assault Andreas van Eck by hitting him with a stick (1 stroke) and did thereby cause him some wounds and/or injuries.

Count 5 – in respect of appellant no. 3

In that on or about the 15th day of March 2010 and at or near Windhoek in the district of Windhoek, the said accused did wrongfully and unlawfully assault Andreas van Eck by hitting him with a stick (2 strokes) and did thereby cause him some wounds and/or injuries.

[3] The appellants pleaded not guilty to these charges. The complainant was Mr Leonard Ewald van Eck who laid a complaint in respect of his son Andreas van Eck who was 14 years old at the time of the alleged assaults.

B. The evidence on behalf of the prosecution

[4] It is common cause that Mr Leonard van Eck (the complainant) who is the biological father of Andreas van Eck (the learner) applied to Windhoek Gymnasium Private School (the school) for the learner's admission to the school for the year 2009. This application was approved. In a letter dated 18 July 2008 (Exhibit A) addressed to the complainant and his wife, a document (the code) dealing *inter alia,* with a code of conduct, disciplinary procedures and the drug policy of the school was attached. The parents were required to peruse this document and to sign it.

[5] The complainant confirmed that he perused the code of conduct; signed the code; and handed it in at the office of accused no. 1, who was the principal of the school. The complainant testified that he signed a code containing a number of transgressions regarded as 'tickable offences' which he gave to the learner to read and who in turn became aware of those offences.

[6] It is not disputed that the respective accused persons administered the strokes on the learner and on the dates reflected in the charge sheets. It is also common cause that no incidents involving the leaner occurred during the year 2009 when the learner was first enrolled for grade 9.

[7] On 5 February 2010, the learner came home and informed the complainant that he got 4 out of 10 for a test and received six strokes with a wooden stick administered by Ms Oberholzer (appellant no. 4), three strokes on each hand. The complainant testified that he was angry and phoned appellant no. 4, who informed him that she was doing it for years and that there was nothing the complainant could do about it. According to the complainant, they (presumably the complainant and his wife) subsequently went to see the acting principal, a Ms Verdoes, and in the presence of appellant no. 4 pointed out that what the learner was punished for was not a serious offence, nor a less serious offence, and could not even be regarded as a tickable offence, and furthermore that no provision was made in the code for corporal punishment for that specific transgression. Complainant testified that appellant no. 4 informed them that corporal punishment was a method which worked for her, whereupon he retorted that they do not want the learner to be hit ‘because that was not on the form’ (presumably referring to the code). Complainant testified that he regarded the punishment received by the learner as an assault because corporal punishment was not referred to in the code.

[8] On 18 February 2010, complainant’s wife got an sms from appellant no. 4 informing her that she (appellant no. 4) had ‘just beaten up’ the learner again because his mother did not sign the test (in which the learner got 4 points out of 10). The complainant pointed out that it was the first time that this had occurred (ie failure to sign a test), and that in terms of the code, such a failure will only become a tickable offence after the third occasion. He testified that he was shocked when he received the information of the punishment, again said that he regarded the punishment as an

assault, and that they as a family did not know what to do at that stage. The complainant testified that he went inter alia to the Ministry of Education in order to ascertain why the school 'has the right to beat the children'. It is not clear from the record whom the complainant went to see and what the result of his visit was. The complainant then testified about a conference he attended at a lodge where 'the inspectors of education' stated that it (corporal punishment) is illegal. Complainant expected that the school should adhere to the code, since it was a contract between himself and the school. The complainant testified that he subsequently wrote a letter to appellant no. 4 in which he told her that corporal punishment was illegal because it does not appear in the code. He never received a reply.

[9] On this occasion (referred to in paragraph 8) Mr Odendaal (appellant no. 2) administered one stroke on the buttocks of the learner in front of the class. The complainant testified that there was a visible mark on the learner's buttocks (blue in colour). The stroke was administered whilst the learner had his pants on.

[10] On 4 March 2010, the learner got 8 out of 10 marks and was beaten again by appellant no. 4 two strokes on his hands. The complainant stated that there was no provision in the disciplinary policy of the school which provided for such punishment for getting eight out of ten marks in a test. Complainant testified that he went to see the principal Mr van Zyl (accused no. 1) in his office. Appellant no. 4 was present. He asked whether the school had a policy on corporal punishment but received no answer. Complainant testified that if there were such a policy he wanted to see it in writing. According to the complainant he asked Ms Rieckerts, the managing director of the school, telephonically about their policy on corporal punishment, but never received any policy in writing.

[11] The next day, 5th of March 2010, they (presumably complainant himself and his wife) were informed that appellant no. 1 hit the learner one stroke on his buttocks in his

office because the learner completed an English essay on an A4 page instead on an ‘A4 workbook’. The teacher, Ms Mans, sent the learner to the principal for punishment. The mark was visible on the learner’s buttocks. The complainant testified that he again wrote a letter, spoke to accused no. 1, and again phoned Ms Rieckerts about a policy which he did not receive. Subsequently, complainant went to the office of appellant no. 1 and warned appellant no. 1, that that was the last incident. Appellant no. 1 then promised that they would not hit the learner again if that was the wish of the complainant.

[12] On 15 March 2010, the complainant was at Ferreira’s (Nursery) when he received a phone call and was informed that a ‘very unfortunate incident happened’. The learner was caught by appellant no. 1 hiding in a toilet (together with four other boys) because the learner had forgotten to bring his PT shirt to school. According to complainant appellant no. 1, during their conversation informed him that he (appellant no. 1) had asked Mr Maartens (appellant no. 3) ‘to sort out this whole thing,’ because appellant no. 3 was the PT teacher. According to the complainant, appellant no. 1 informed him that the learners (those without their PT clothes) were given a choice to either receive their punishment in appellant no. 1’s office, or there in the gymnasium and that they chose the latter. The learners received two strokes with an unknown object.

[13] The complainant testified that he informed appellant no. 1 that the appellant had known how they felt about corporal punishment and complainant wanted to know why it happened again, whereupon appellant no. 1 apologised. The complainant stated that after school at 13h00 he took the learner to a doctor for a medical examination. The doctor prepared a report. Thereafter they went to an Afrikaans newspaper publisher. When the incidents were published ‘it was a big problem at school’. A few days later the learner was removed from the school by the complainant. The complainant testified that he opened a criminal case against the teachers because he wanted to know why some schools may administer corporal punishment and other schools may not, and that this only a court may decide.

[14] A document with the heading 'DISCIPLINARY CODE' which forms part of Exhibit A reads as follows:

'A) DISCIPLINARY CODE:

New regulations

The aim of the disciplinary system is to create an ordered and structured environment, not to create anxiety or fear with our learners. Learners and teachers will continuously be trained to ensure that each learner knows that he/she must take responsibility for his/her actions and take punishment when he/she transgresses. The teachers must utilize the disciplinary system to encourage and motivate the learners to cooperate in a respectful manner. Every teacher keeps a Disciplinary Record Sheet, on which applicable ticks are made. The record sheet is summarized once a week, whereafter it is submitted to the Educational Director. The evaluation of and discussions on the Disciplinary Record Sheets where necessary, will solely be at the discretion of the Educational Director, and may assisted by the Management team.

After three trivial ticks, the parent will receive a Disciplinary Informative Letter, which needs to be signed by the parent/guardian for notification and sent back to the Educational Director. After having received a Disciplinary Informative Letter, the learner will start with a clean slate. When the leaner has another three ticks on his/her Disciplinary Record Sheet, the learner will receive a verbal warning in writing. The parents again need to sign the documentation and send it back to the Education Director. A compulsory parent and learner meeting will also be scheduled with the Educational Director where the behavioural problems, possible solutions and the way ahead will be discussed. Once more the learner will have the opportunity to start with a clean slate. After the next three ticks, the learner will receive a written warning whereafter the learner's disciplinary record will be referred to the Disciplinary Committee, assisted by the Educational Director.
However, when a learner who has received punishment in the Educational Director's office and has been able to refrain from any ticks for at least one month, the learner will start with a clean

slate. If a learner has received no ticks at all for a whole term, the learner will receive a surprise at the end of the term. A learner who has received no ticks at all for a whole year, will be rewarded a good behavior certificate at the prize-giving ceremony.

Should a learner or parent have any complaints regarding the application of the disciplinary code, this should be communicated with the Educational Director.

A serious offence may result in an immediate investigation and/or written warning by the Educational Director, and may be referred to the Disciplinary Committee of the Board of Directors. Also, once a learner has received three punishments in the course of a year, it indicates habitual, unsatisfactory behavior. This will also be referred to the Disciplinary Committee of the Board of Directors, assisted by the Educational Directors. Any transgression or offence liable to a court decision, will result in an immediate suspension until the court outcome. If the court finds the learner guilty, the learner will be expelled immediately. If the court finds the learner innocent, the case will be handled according to normal disciplinary procedures.

The Disciplinary Code and Code of Conduct will be reviewed at the end of each year, and adjustments made where applicable, to be applied with the commencement of the following school year.

The following transgressions are regarded as Tickable Offences:

- Homework not done
- Disruptive: Rows/Class
- Disrespect: Teacher/fellow-learner/administrative staff/cleaners
- Talkative
- Disobedience towards teachers/prefects/administrative staff/cleaners
- Backchatting
- Trivial bullying/fighting
- Foul and/or vulgar language
- Vandalism
- Truancy (bunking of class)

- Littering
- Late-coming for school/classes (2x)
- Test not signed (2x)
- No P.E. clothes/Books at home (3x)

The following transgressions are regarded as a Serious Offence:

- Serious disrespect and/or assault of a teacher/fellow-learner/administrative staff/cleaner
- Disrespect towards teachers
- Disruptive in class
- Vandalism
- Possession and/or handling of a dangerous weapon on the school premises
- Theft
- Violence, bullying or fighting
- Immoral conduct
- Use/possession of drugs or any illegal substance in school or after school hours
- Bringing the school into disrepute
- Any form of pornography.'

[15] Another document which appears to be also part of Exhibit A with the heading: 'TEACHING A NEW LIFESTYLE, BUILDING A BETTER FUTURE' with a subheading 'DISCIPLINE AND CODE OF CONDUCT' reads as follows:

'Discipline is an important aspect in order to maintain good order and cooperation at school. The Directors will apply the disciplinary code and code of conduct very strictly in order to ensure a well-structured, well –disciplined environment at Windhoek Gymnasium. The discipline is enforced in a respectful manner, rather than an autocratic manner.'

[16] The complainant was during examination in chief shown a document and was requested to identify it. The complainant identified the document as a newsletter from

the school. This newsletter was received by the court and marked as Exhibit B and reads as follows:

'**WINDHOEK GYMNASIUM PRIVATE SCHOOL**

COMMENTS AND BOARD POLICY ON CORPORAL PUNISHMENT

Issued 22 April 2010

- The majority of parents indicated that they fully support the system of corporal punishment.
- Some parents do feel that they do not want corporal punishment to be administered to their children.
- A child must learn to take responsibility and be accountable for his/her actions.
- Corporal punishment at our school is seldom applied, only as a matter of last resort and done in a responsible manner.
- Order and discipline is vital in any school. Parents generally want their kids to be well-disciplined.
- Learners come from different backgrounds and homes. At the school however, all learners are subject to the same degree of discipline, despite their different upbringing.
- Slack discipline from learners has a negative effect on the academic, sport and social progress of disciplined learners.
- The responsible administration of corporal punishment by a private school is not against any law in Namibia. The same goes for corporal punishment administered responsibly by parents. For the time that the learner is in the care of the school, the teachers act as their guardians.
- Feedback from parents, regarding any matter at Windhoek Gymnasium, is encouraged.
- Different schools follow different practices with regard to various matters. Parents have a choice to enrol their children in a school that best agrees with their convictions.

- Corporal punishment is only to be administered as a last resort and on boys only. It is only to be administered by the Rector of the Secondary School and the Principal of the Primary School. Teachers must be creative in their approach to punish ill behaviour or disobedience by learners.
- Corporal punishment is more effective than the expulsion of learners from the School or other forms of punishment that have a negative long term effect on children.
- The Board will not hesitate to act against teachers who exceed the boundaries of reasonableness. Likewise, the Board will use its power to protect teachers who are unjustly accused by parents of misconduct.
- Before corporal punishment is applied, the parents must be notified about the transgression. Their approval must be obtained beforehand.
- Alternative punishment will be enforced by the School where parents do not give consent for corporal punishment.
- Any parent who objects to corporal punishment being applied to his child, should notify the school in writing.'

This newsletter was personally received by the complainant.

[17] The complainant testified that at no time *prior* to the administration of corporal punishment on the learner had there been any communication to him from the school. The complainant stated that he had never at any stage given any authority or consent to the school to administer corporal punishment on the learner. The complainant testified that he regarded corporal punishment as inhuman and degrading and that there was no reason why he would have given such permission to the school, namely to administer corporal punishment in respect of the learner.

Cross-Examination

[18] It was put to the complainant during cross-examination that each time after corporal punishment had been administered, someone from the school phoned him to inform him about it, and thus logically, were open to him, and that those who administered the corporal punishment did not know they were doing something wrong. The complainant expressed an opinion but could not gainsay this statement.

[19] It was put to the complainant that the Supreme Court in a case[1] did not decide the issue of corporal punishment in private schools or the right of a parent to chastise a child. The complainant did not answer the question directly, but wanted to know if that was the case, why the school did not embody such policy in their original disciplinary code but instead drafted a new policy on corporal punishment after the last incident.

[20] It was put to the complainant that he had informed appellant no. 4 as follows: 'treat Andreas exactly the same as the other children', when the complainant at that stage had already known that corporal punishment was being administered. The complainant replied that he could not promote something illegal by saying that the learner should be treated in the same way. Complainant testified that he wrote a letter stating that it was illegal. The complainant also bemoaned the fact that the learner had been victimised by appellant no. 4 when she informed the class: 'This is the son of parents who do not want him to get a hiding' or words to that effect.

[21] The complainant was informed by counsel that appellant no. 4 had been using a stick of about 20 cm (shorter than a ruler) for the past 23 years, as a way of dealing with learners and had during that time never assaulted a single learner. It was put to the complainant several times that on the 5th of March 2010 when he had a meeting with appellant no. 1, an agreement was reached, that no corporal punishment would be inflicted on the learner in future. The complainant replied that he did not regard the

[1] *Ex parte Attorney-General: In re Corporal Punishment by Organs of State* 1991 NR 178 (SC).

discussion as an agreement because promises made previously were not kept, and that if there were an agreement he would have preferred it to be in writing.

[22] The complainant was informed by counsel that the next day, on 6 March 2010, appellant no. 1 had a meeting with all the teachers informing them that the learner may not in future receive corporal punishment. At this occasion appellant no. 3, the PE teacher, was not present and was unaware of this instruction. The complainant could not dispute this. The complainant admitted that when the learner was enrolled he was aware of the fact that the teaching at the school would be based on Biblical and Christian principles. The complainant was informed by counsel that in terms of Article 21(1)*(c)* of the Namibian Constitution all persons have the right to freedom to practice any religion and to manifest such practice, and that Biblical or Christian values allow corporal punishment. The complainant strongly disagreed that those values allow corporal punishment.

[23] The complainant was referred to an e-mail[2] sent on 8 March 2010 in which he *inter alia,* stated: 'on a positive note my son is very happy in Gymnasium . . .'. This was apparently said after the incidents on 5 February, 18 February, 4 March and 5 March. The complainant explained that what he meant was that the learner *was* very happy prior to these incidents.

[24] It was pointed out to the complainant that he wrote a number of letters complaining about other matters but not in one of these letters did he complain specifically about corporal punishment. The complainant conceded this, but replied that he *discussed* the issue of corporal punishment with the teachers. It was put to the complainant that he was not so much upset about the corporal punishment itself, but that it was unfair to get corporal punishment for eight marks out of ten. The complainant disagreed.

[2] P 605 of the record.

[25] It was further put to the complainant that when he enrolled the learner at the school he knew that the learner would be disciplined and that he 'accepted' it. The complainant replied that he did not accept it, stating that he knew that it was 'illegal' but the school was telling him that it was legal[3].

[26] It was pointed out to the complainant that after the incident of 5 February, he (the complainant) did not approach the school shortly thereafter and that the teachers must have thought that since he had been informed about the corporal punishment and had not been complaining, complainant was giving his permission for corporal punishment to be administered. The complainant disagreed and replied that even after he had been at the school, the beatings continued. The complainant further testified that he went to see a number of persons (not attached to the school) in order to get their views on corporal punishment in schools.

[27] The complainant was referred to an e-mail in which he stated: 'We already told you what our view is on corporal punishment and until such time that the teachers get their work on a professional level and on the right standard we stand by that view.' It was put to the complainant that his view then was that until the teachers got their act together he would not allow corporal punishment. The complainant replied that it was possible that the sentence was constructed 'in a wrong way', but that he was against corporal punishment.

[28] It was further put to the complainant that the first time he nearly exploded and went 'to lawyers and papers and court' was *after* what had happened on 15 March 2010 when appellant no. 3 by mistake administered corporal punishment, and that the complainant did so because he was disappointed that the agreement had been breached. The complainant disagreed. The complainant also questioned the reason (in

[3] P 141 of the record.

spite of the agreement) why appellant no. 1 had told appellant no. 3 to 'sort out' the situation when appellant no 1 had known that the learner was involved (in a transgression).

[29] It was put to the complainant[4] that corporal punishment administered 'with love in order to direct, in order to help, in order to discipline with the necessary biblical values' is permissible in a private school, that he knew that the school was administering corporal punishment; and that he had delegated his authority to do so to the school.[5] The complainant disagreed.

[30] It was put to the complainant that at the beginning of the school year in 2009 (which complainant admitted himself and his wife had attended), at the first meeting every teacher was given an opportunity to speak and on this occasion appellant no. 4 said that she administers corporal punishment. Complainant replied that he never heard it, adding that appellant no. 4 was not a teacher at the school during 2009.

[31] The complainant stated that he could not recall hearing appellant no. 4 saying that, but if he did hear it he would have thought that it was a joke. The complainant denied hearing that appellant no. 2 in 2009 said that he administers corporal punishment.

[32] It was pointed out that the school started off in the year 2007 as a primary school and that the disciplinary code was drafted with primary school learners in mind. The complainant was referred to p 24 of exhibit D where the following appears: 'However, when a learner who has received punishment in the Educational Director's office and has been able to refrain from any ticks for at least a month, the learner will start with a clean slate'. The complainant was asked whether the 'punishment' referred to did not include corporal punishment. The complainant replied that punishment could include for

[4] P 185 of record, lines 5-8.
[5] P 188, lines 6-9.

example ‘detention’ but not corporal punishment since if it was a reference to corporal punishment it must have been in writing[6]. It was the view of the complainant that it cannot be expected of him to ‘read between the lines’.

[33] The version of the appellant no. 2 was put to the complainant namely that learners (boys) were sent to him, the boys admitted their fault, appellant no. 2 asked them whether he should phone their parents, the boys agreed simultaneously to receive corporal punishment and they each received one stroke on the buttocks. The complainant could not dispute this version because he did not according to himself enquire from the learner what had happened on that occasion.

[34] The version of appellant no. 3 was put to the complainant namely that the learner and four other boys bunked PT class, that appellant no. 1 had asked him to address the issue, the learners admitted that they were at fault, they were given a choice to either go to the office of appellant no. 1 or the matter be dealt with there and then, and that the learners preferred corporal punishment. The complainant testified that the learner had informed him that he (ie the learner) ‘just kept quiet’ on that occasion.

[35] The version of appellant no. 3, namely that he would not have chastised the learner had he known about the announcement by appellant no. 1, on 5 March 2010 was put to the complainant. The complainant could not deny it.

[36] The version of appellant no. 4 was put to the complainant, namely that appellant no. 4 sent an sms to Ms van Eck informing her that the learner had received corporal punishment since his test had not been signed by the mother, that appellant no. 4, received a positive reply from Ms van Eck namely: ‘it is okay with me’; that during a subsequent meeting with Ms van Eck, Ms van Eck was asked whether she wanted appellant no. 4 to punish the learner in a different way and received no response from

[6] P 211 of the record.

Ms van Eck; that she subsequently received an e-mail from complainant accusing her falsely of propagating corporal punishment and that she apologized to the learner the next week informing him that if his parents did not want him to be subjected to corporal punishment, she would not do that. The complainant responded by saying that corporal punishment is illegal, and that the school should 'stick to' their code. Ms van Eck did not testify.

[37] The complainant was referred to an e-mail written by him and addressed to appellant no. 1, in which he stated the following on the second page:

> 'Whatever your policy on discipline is, we don't interfere in any manner. We understand that you have a major task and [that you] must maintain a certain policy. Then also the most important of all please give me a decisive answer about your control methods in respect of the checking of homework and classwork'.

[38] It was pointed out to the complainant that by 22nd February 2010 he had known that the school administered corporal punishment, but regarded other matters as more important. The complainant replied that the 'discipline' he referred to was the document contained in the contract which he signed[7], and in which no reference had been made to corporal punishment.

[39] Andreas van Eck, the learner, testified that the first occasion he was 'beaten' was in the Physical Science class by appellant no. 4 because he got 4 marks out of 10 in a test. He received six strokes on his hands with a wooden stick. The rest of the learners were present in class.

[40] He testified that he was angry because he got beaten for poor performance and that it was the first time that he was beaten at school because of mistakes made by him.

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[7] P 292/293 of the record.

At home his parents asked him about it and he confirmed that it had happened. His parents were angry.

[41] The second incident occurred ‘in the corridor in front of the Physical Science class’. He was beaten by appellant no. 2 on his buttocks. He was not sure how many strokes he received but thought it was one stroke with a wooden stick. He testified that the rest of the class could see the beating. It was shameful to be beaten in front of the class. He was angry. His parents were shocked and angry.

[42] The third incident was again in the Physical Science class. He received 80% in a test and was beaten two times on his hands with a wooden stick by appellant no. 4. He could not understand why he got beaten for getting 80%. At home his parents asked him about the beating and he confirmed it.

[43] On the fourth occasion he was beaten because he wrote his English assignment on a paper and not in a book. He was beaten by appellant no. 1 inside his office. He was together with other learners from his class. He was given one stroke on his buttocks with a wooden stick. At home his parents asked him about the beating which he confirmed.

[44] The last incident occurred when he did not bring his ‘physical education clothes’. He was afraid to be beaten and went to hide in a toilet. He was beaten two strokes with a ‘hard plastic’ by appellant no. 3. At home his parents asked him whether he was beaten and he confirmed it. He was taken to a medical practitioner ‘somewhere in Eros’, on the same day.

[45] The witness testified that he had been aware of ‘the rules and regulations’ of the school which he had received at the beginning of the year. The transgressions for which he had been beaten for were not reflected in that book.

[46] During cross-examination this witness testified that he was happy at the school before the beatings started. It was put to the witness that appellant no. 4 will testify that at the beginning of the year she instructed the learners to write in their own handwriting that it is required to get full marks in tests. This witness replied that he could not remember such instruction.

[47] It was put to the witness that appellant no. 4 had informed the class that if one did not get full marks one would get ‘a slap on the hand’ for each mistake, and that they should in such an instance inform their parents about it. The witness denied that he was informed about it.

[48] The witness confirmed that he was not the only one who had been beaten in the class by appellant no. 4.

[49] The witness could not remember whether he took the book (exhibit D, Diary for 2010), with him when he went to the police station to lay charges.

[50] A salient feature of the answers given during cross-examination by this witness was that he could not remember a number of events, and what had been said and by whom.

[51] Thea Seefeldt, a Director of Education testified about the fact that Windhoek Gymnasium Private School received a per capita subsidy from the Ministry of Education since 2010. During cross-examination certain sections of the Education Act No. 16 of 2001 (The Act) were referred to *inter alia* s 49(5)*(c)* which provides that the Minister (responsible for basic education) may grant aid to private schools by providing teachers who are staff members of the Ministry to such private schools. The witness confirmed that this happens in practice. The witness confirmed that teachers other than those

referred to in s 49(5)*(c)* of the Act, are not public servants. This witness was also referred to the definition of ‘staff member’ in the Act, namely a ‘staff member’ as defined in the Public Service Act. The witness was also referred to the provisions of s 51 and s 56, and the argument that the reference to ‘official duties’ in s 56 refers only to those teachers employed by a public school. It was then contended that the provisions of s 56(1) which prohibits the administration of corporal punishment are not applicable to those teachers employed by private schools. The witness expressed her view on this argument but as was pointed out by counsel, and correctly so, that argument was for the magistrate to decide.

[52] Subsequent to an unsuccessful application for a discharge of the accused persons in terms of the provisions of s 174 of the Criminal Procedure Act 51 of 1977, the appellants were called to testify.

C. Evidence on behalf of the defence

[53] The first witness called by the defence was Reverend Schalk Pienaar from the Dutch Reformed Church who read from a document, prepared by himself, with the heading: ‘Corporal Punishment – A Biblical Understanding’. This is not an affidavit, but an article which contains references to translations of various Bibles, references to dictionaries, references to certain commentaries, and an appendix. This article concludes that discipline, including corporal punishment, is necessary in the upbringing of children, though qualified by the motive and purpose of administering corporal punishment. This document was received as Exhibit P.

[54] It is important to state that the testimonies of all the witnesses called by the defence including the appellants, save for the testimony of Mr Martin Lazarus Shipanga, appear from an incomplete reconstructed record.

[55] The second witness was Mr Albert de Klerk employed as a teacher at the school. He testified about questionnaires conducted during the year 2012. These documents were received by the court and marked Exhibit Q. The target group of the questionnaire was boys in Grades 8 – 12 enrolled at the school.

[56] The third witness Daniel Christiaan Jordaan, a qualified medical doctor testified in respect of observations of another medical practitioner, Dr Yvette Mostert, whose observations had been reduced to writing. This document was marked as Exhibit R. It appears that the testimony of this witness mainly related to 'psychological trauma' which may or may not be suffered by an individual who had received corporal punishment.

[57] The fourth witness called on behalf of the defence was appellant no. 1. He was the rector at the school. An affidavit deposed to by the appellant was received and marked Exhibit S by the magistrate.

[58] This affidavit deals, amongst other issues, with the incident on 5 March 2010 (ie the beating of the learner by the appellant), the subsequent meeting with the complainant and his wife, and the agreement reached that no corporal punishment would be inflicted upon the learner in future at the school.

[59] It is not disputed that when this agreement had been communicated to all the teachers at the school that appellant no. 3 was absent.

[60] Excerpts from Exhibit S read as follows:

> '4. On or about 5 March 2010 Mrs Mans, who is a teacher at Windhoek Gymnasium, sent few learners, including Andreas Van Eck, to my office to be disciplined for not completing their homework as requested. I disciplined the learners, including Andreas Van Eck by giving each of them two strokes on their buttocks.

5. I informed the parents about the transgression and the resulting punishment of two strokes on their buttocks. Whereas some of the parents, including the parents of Andreas Van Eck, were not happy with the incident as well as a few other matters, a meeting was held between Mrs Mans, the parents concerned and myself in any offence on or about 5 March 2010. During the meeting, certain agreements were reached, *inter alia*, that no corporal punishment would be inflicted upon Andreas in future at the school.

6. This agreement was communicated to all the teachers by way of an oral announcement. However, when the aforesaid oral announcement was made, Mr Maartens was not present.

7. On or about 15 March 2010 while I was busy with a guidance tour with intended parents, I found five boys hiding in the cloak room who were suppose to attend a physical education lessons with Mr Maartens, one of the teachers at Windhoek Gymnasium. While I was busy confronting the learners, Mr Maartens arrived and I requested him to address the matter and thereafter bring the learners to my office.

8. After a while Mr Maartens reported to me that he inflicted corporal punishment on the five boys, including Andreas Van Eck. Mr Maartens inflicted corporal punishment on Andreas Van Eck while being unaware of the aforesaid agreement with the Van Eck parents and the announcement that was made in respect thereof. Mr Maartens was persuaded by the boys, including Andreas Van Eck, to inflict corporal punishment on them rather than sending them to my office.

9. When Mr Maartens reported the incident to me, I informed Mr Maartens about the aforesaid agreement with the Van Eck parents and that I would personally contact Mr Van Eck to apologise for and explain the incident. I thereafter phoned Mr Van Eck, whereupon he thanked me for informing him and stated that he would inform his wife accordingly.

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13. According to the Christian faith, schools are traditionally seen as an extension of the right and duty of the parents to train their children. The objective of the Christian school, including Windhoek Gymnasium, is to uphold parental authority by operating *in loco* parentis. In other words, the parents retain the basic authority in the training of their children, but for practical reasons this authority can be transferred to the school for the period of time that the learner spends there.

14. In Namibia, the inflicting of corporal punishment in government schools are declared unconstitutional and unlawful and in conflict with article 8 of the Namibian Constitution. Windhoek Gymnasium is a private school. The infliction of corporal punishment in school is not a criminal offence.

15. In terms of the common law, parents and persons in loco parents for example guardians, headmasters of schools, teachers and housemasters) have, by virtue of their authority over children, the power to administer punishment to them for the purpose of education and correction. The power to discipline of persons *in loco parentis* is an original authority and not delegated parental authority. A parent or a person in loco parentis may delegate the power to discipline to another person. A person on whom a power to chastise is conferred, has a discretion whether or not to punish, including whether corporal punishment should be administered or not. This discretion must of course not be exercised in an unreasonable manner. The purpose of punishment must be to correct the child.

16. When I, as well as certain other teachers at Windhoek Gymnasium, inflicted corporal punishment on Andreas Van Eck, we did so with the purpose to discipline, educate and correct his behaviour. The type of corporal punishment inflicted upon him was more than moderate and reasonable in the circumstances. Apart from the aforesaid and the authority I, as well as all other teachers concerned, have in terms of the common law as persons *in loco parentis* over Andreas to chastise him, Mr and Mrs Van Eck delegated their authority to chastise Andreas to us from the moment Andreas became a learner at Windhoek Gymnasium and thereby accepted the school's rules, regulations and policies.'

[61] The appellant testified that at the beginning of every year a parents' meeting is held where the teachers explain certain issues and also inform the attendants that corporal punishment is being administered in certain cases. This also occurred in the years 2009 and 2010.

[62] The appellant confirmed that he had two meetings with the complainant, the last of which occurred on 5 March 2010.

[63] The appellant confirmed that after appellant no. 3 had administered corporal punishment on 6 March 2010 he phoned the complainant and apologised for not keeping his promise and invited complainant to the school. The appellant stated that had it not been for that error there would have been no case before court.

[64] The appellant testified that the chairperson of the school board had obtained a legal opinion to the effect that according to the common law the teachers have permission to administer corporal punishment.

[65] The reconstructed cross-examination is of such a nature that at some parts the reader has to second guess the questions asked by the prosecutor.

[66] The appellant during cross-examination conceded that the code (exhibit B) was not in existence prior to 22 April 2010.

[67] In re-examination the witness testified that after the first incident the complainant did not ask him (ie appellant) why corporal punishment had been administered and stated as follows[8]:

> 'It is fine with them as long as responsible way.'

[8] P 478.

[68] It appears that this was the view of the appellant himself.

[69] The fifth witness called by the defence was appellant no. 2. This witness deposed to an affidavit which was received and marked Exhibit T by the magistrate. Excerpts from this exhibit read as follows:

> '2. On or about 18 February 2010 Mrs Oberholzer, who is a physical science teacher at Windhoek Gymnasium, sent five grade 9 boys, including Andreas Van Eck, to me to be disciplined for not having their test books signed by their parents as requested.
>
> 3. On this particular day Mr Van Zyl, who is the secondary school Rector, was absent from school due to medical reasons. Mr Van Zyl delegated his disciplinary duties to me for the duration of his absence.
>
> 4. I asked the boys whether they were at fault and they all acknowledged that they were at fault.
>
> 5. I thereupon complimented them for being honest by admitting their fault and asked them whether I should phone their parents. They replied in a choir, with one voice, requesting me whether it could not be settled there and then. The boys said that they prefer corporal punishment. I asked them how many strokes and they answered one. I thereafter gave each of them one stroke on their buttocks.
>
> 6. Everything happened in a good spirit. We all shook hands thereafter, the boys apologized for the transgression and they left my office.
>
> 7. When I inflicted corporal punishment on Andreas as aforesaid, I did so with the purpose to discipline, educate and correct his behaviour. The type of corporal punishment inflicted upon him was more than moderate and reasonable in the circumstances. Apart from the aforesaid and the authority I have in terms of the common law as a person *in loco parentis* over

> Andreas to chastise him, Mr and Mrs Van Eck delegated their authority to chastise Andreas to me from the moment Andreas became a learner at Windhoek Gymnasium and thereby accepted the school's rules, regulations and policies. Furthermore, Mrs Oberholzer also delegated her authority to chastise Andreas to me.

[70] The appellant testified that if one of the learners had refused corporal punishment he would have phoned the parents, and that he would not have done it against the will of a learner.

[71] He testified during cross-examination that there were two classrooms between his classroom and that of appellant no. 4 and that learners in the class of appellant no. 4 could not have seen the administration of corporal punishment, since it was administered inside his classroom.

[72] The appellant stated that he believes in corporal punishment as an effective method to change behavior irrespective of whether or not such corporal punishment was part of the ‘rules’, and regarded the Bible as his ‘guideline’.

[73] The appellant denied that the punishment imposed was in violation of Article 8 of the Namibian Constitution.

[74] The appellant testified that he asked the learners in a group which option they chose to which they answered in a choir and afterwards asked each learner individually how many strokes should be administered and each one said only one stroke, including the learner.

[75] The appellant admitted that he was familiar with the ‘rules and regulations described in the Education Act’, and that he continued to inflict corporal punishment.

[76] The sixth witness called by the defence was appellant no. 3. An affidavit deposed by the appellant was received and marked as exhibit ‘U’ by the magistrate. Excerpts of this exhibit read as follows:

> ‘2. On or about 15 March 2010, at the end of my physical education lesson, I moved to the cloak room with my learners and found Mr Van Zyl, who is the secondary school Rector at Windhoek Gymnasium, busy questioning five grade 9 boys, including Andreas Van Eck, who were suppose to participate in my aforesaid physical education lesson but who, instead, decided to hide in the cloak room during the course of the lesson. When I arrived, Mr Van Zyl requested me to address the matter and thereafter, to take the boys to his office.
>
> 3. I thereupon questioned the boys. The boys', including Andreas Van \/ Eck, explanations were that they did not bring along their human movement clothes and decided to hide in the cloak room during the course of the lesson. While they were hiding, Mr Van Zyl did a guidance tour through the school with intended parents and found them in the cloak room whilst their fellow learners were busy with the lesson.
>
> 4. They admitted that they were at fault for not bringing their clothes and for not reporting to me to explain their predicament and that they should not have hidden in the cloak room.
>
> 5. The boys, including Andreas Van. Eck, requested me to punish them and not to take them to Mr Van Zyl's office. In order to build a relationship with the boys but at the same time not allow them to get away with their transgressions, I decided that it would be sufficient for me to punish them there and then. I gave each of them two strokes on their buttocks. This all happened in good spirit.
>
> 6. Afterwards, I reported everything to Mr Van Zyl whereupon Mr Van Zyl informed me about the meeting with the Van Eck parents on or about 5 March 2010 and the agreement that corporal punishment will not be inflicted on Andreas in future. At the time, I was not aware of this agreement with the Van Eck parents. I was not present when an

announcement to this effect was made by Mr Van Zyl. Mr Van Zyl informed me that he will phone Mr Van Zyl to apologize and explain the incident. If I knew that Mr and Mrs Van Eck revoked the delegation of their parental authority to chastise, I would have refused Andreas's request to be chastised.

7. When I inflicted corporal punishment on Andreas as aforesaid, I did so with the purpose to discipline, educate and correct his behaviour. The type of corporal punishment inflicted upon him was more than moderate and reasonable in the circumstances. Apart from the aforesaid and the authority I have in terms of the common law as a person *in loco parentis* over Andreas to chastise him, Mr and Mrs Van Eck delegated their authority to chastise Andreas to me from the moment Andreas became' a learner at Windhoek Gymnasium and thereby accepted the school's rules, regulations and policies.'

[77] During cross-examination the appellant was asked whether he knew that minors could not give consent to which the appellant replied that they (the boys) knew that they did something wrong by hiding in the cloak room and that was a major transgression. He testified that the group had been warned on a previous occasion.

[78] The appellant confirmed that he was unaware of the agreement between the learner's parents and the school, ie that no corporal punishment should in future be administered on the learner.

[79] The seventh witness called by the defence was appellant no. 4. An affidavit deposed to by the appellant was received and marked as Exhibit V by the magistrate. Excerpts from this exhibits read as follows:

'2. On or about 18 February 2010 I sent five grade 9 boys, including Andreas Van Eck, to Mr Etienne Odendaal, who is also a teacher at Windhoek Gymnasium private school, to be disciplined for not having their test books signed by their

parents as requested. I would have sent the boys to Mr Van Zy, who is the secondary school Rector, but on this particular day Mr Van Zyl was absent from school due to medical reasons.

3. After I have sent the boys to Mr Odendaal, I sent a sms test message to Mrs Van Eck, Andreas Van Eck's mother, saying: "Andreas test book not signed, sent to Odendaal. I received a positive reply from Mrs Van Eck. However, Mr Van Eck replied saying that I should rather send the teachers to Mr Odendaal and leave his son alone. I have sent a similar sms text message to the parents of the other boys sent to Mr Odentaal. When the boys returned from Mr Odendaal's office, they were all giggling.

4. Mrs Van Eck came to see me the same day after school in the presence of Mrs Verdoes, who is also a teacher at Windhoek Gymnasium. During this meeting I asked Mrs Van Eck whether she wanted me to rather punish Andreas in a different way. She did not reply to my question.

5. The next week I apologized to Andreas and told him that if his parents want me to treat him different from the rest of the learners, I would do that. Andreas agreed. Mr Van Eck subsequently sent me an e-mail in which he falsely accused me of propagating corporal punishment. I did not reply to this e-mail.

6. Another week or two passed. Mr and Mrs Van Eck demanded a meeting. I was informed that Mr and Mrs Van Eck only wanted to see the mathematics teacher. Mr Van Zyl informed me that. Mr Van Eck did not want to see me at all, in fact he had no problem regarding me or physical science. I, however, insisted to be part of that meeting because of the e-mail he sent me.

7. During that meeting Mr Van Eck acknowledged the way in which I tried to improve results or making it better for the learners, since physical science is such a difficult subject. Mr Van Eck even stated that when he was an accounting teacher he used to inflict corporal punishment on his learners with a pair of compasses.

8. I was shocked, because all of a sudden everything was fine. I once again asked Mr and Mrs Van Eck if they wanted me to punish Andreas in a different way that they would approve. Mr Van Eck clearly stated: "No! Andreas wants to be part of the class and to be treated like the rest of the class. Whatever punishment, Andreas wants to be part of it". Mr Van Eck clearly confirmed delegation of parental authority to chastise his son.

9. On or about 4 March 2010 my learners wrote a simple homework test that consisted of 10 science formulas. Andreas got 8/10. All learners had to obtain 10/10, since the test consisted out of basic formulas that they should know from the top of their heads. I gave all learners, including Andreas, who did not obtain 10/10 two strokes each on their palms. This incident happened after Mr Van Eck personally informed me that he wants his son to be treated the same way as the other learners in the class.

10. When I inflicted corporal punishment on Andreas as aforesaid, I did so with the purpose to discipline, educate and correct his behaviour. The type of corporal punishment inflicted upon him was more than moderate and reasonable in the circumstances. Apart from the aforesaid and the authority I have in terms of the common law as a person *in loco parentis* over Andreas to chastise him, Mr and Mrs Van Eck delegated their authority to chastise Andreas to me from the moment Andreas became a learner at Windhoek Gymnasium and thereby accepted the school's rules, regulations and policies.'

[80] During cross-examination the appellant confirmed that after sending a sms to the mother of the learner, her reply was 'thank you'.

[81] The appellant testified that the learners have a choice for under performing, namely, they either have to sit during break 'writing out mistakes' or receive corporal punishment.

[82] Prior to her employment at Windhoek Gymnasium she had been employed at Pioniers Boys School and HTS, public schools where administering corporal punishment was allowed at that stage.

[83] When asked whether she was aware that corporal punishment is against the law the appellant replied that she was not so aware whilst at Windhoek Gymnasium but was so aware prior to her employment at Windhoek Gymnasium.

[84] The last witness called on behalf of the appellants was one Martin Lazarus Shipanga, aged 82 years. He testified that he worked for more than 15 years as a teacher in the 'education department', and that after obtaining independence in 1990 he was the first director of education in Namibia. During the year 1991 he retired from the Ministry of Education but 'stayed on until 1993 in the education department'. Thereafter he was asked to serve on a commission with Judge Strydom and Professor Totemeyer. The witness testified that he was involved in 'general discussions' when the new Education Act came into force.

[85] This witness was referred to s 56 of the Education Act dealing with corporal punishment and asked whether the intention was to make it applicable to private schools, to public schools, or to all schools. The witness did not give a direct answer, but referred to outside funding in respect of private schools.

[86] The witness was asked whether it was the intention that a teacher in a private school could be disciplined by government officials. The witness replied that prior to independence the private schools and government schools were not funded 'from the same source'.

[87] The witness was asked, at the stage when he was director of education, what he believed how discipline was to be achieved at schools. He replied, with reference to biblical teachings, by administering corporal punishment.

[88] The witness referred to a number of members of Parliament (former as well as serving) who had been his students and who had received corporal punishment.

[89] During cross-examination the witness confirmed that he was 'involved' in writing s 56 of the Education Act dealing with corporal punishment. The witness confirmed that that section abolished corporal punishment in all 'government schools'.

[90] This witness was called to confirm the contention that the provisions of s 56 are not applicable to teachers employed by private schools (except those teachers provided by the Ministry of Education to private schools). It is thus appropriate to have regard to the testimony of this witness during cross-examination where the following (verbatim) exchange appears[9]:

'Now I mention earlier when I started questioning you I mention (inaudible) and I mention specific reason because it was a form of ruling that separated people you are aware of this? . . . Katutura Your Worship still exist.

Exactly, I agree. Now I will put this question to you if other (inaudible) can get its main (indistinct), the separation of (indistinct), the distribution of rules that are (indistinct) to some people but not to others. Would you not agree with me that section 56 according to you will not be the same thing, that punishment can only be done in public schools and not in private schools is that not a kind of (indistinct)? . . . No.

Why are you saying that? . . . I said up to today changes are still taking place and I said I cannot stand for some of the changes which is still taking place not.

Let me ask you of your opinion now as we are standing here, would you agree with the law at that stage in this particular case section 56 that state that corporal punishment may only be administered on children who are in government school that it may not be administered on children in private school. Would you agree with such a thing? Or I will give you a second alternative, would you agree with the rule or law that says that corporal punishment should be abolish across the border? . . . If that is the case Your Worship, then I am going to agree with you.

[9] P 509 line 5 – p 510 line 7.

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What are you going to agree with me between the two because I need (inaudible) that is abolish across the borders in all schools or that is just only for government schools but private schools can still continue . . . Your Worship I cannot dispute that it can be done.'

[91] It is, in the first instance, obvious that the word 'borders' should read 'board'. Secondly, the replies by the witness demonstrates the undesirability of compound questions. It is not clear to which question the witness agreed with in his reply, and not clear what this witness had agreed to. It is also not clear from the last answer of the witness whether or not s 56 applied to teachers employed in public schools only. In my view the testimony of this witness did not unequivocally support the contention on behalf of the appellants that the Legislature intended the provisions of s 56 to be applicable only to teachers employed in public schools.

[92] In view of the fact that a part of the record is missing[10], it cannot be established whether there was any further cross-examination or any re-examination.

D. Mode of presentation of evidence by defence

[93] Before I proceed to the next topic I deem it appropriate to comment on the method of presenting evidence by counsel appearing on behalf of the appellants in the court *a quo*. Prepared statements made by the appellants to police officers, reflecting their respective versions in respect of the allegations of assault, were confirmed by the appellants, and tendered as evidence, (Exhibits, S, T, U, V).

[94] Section 161(1) of Act 51 of 1977 provides as follows:

'A witness at criminal proceedings shall, except where this Act or any other law expressly provides otherwise, give his evidence *viva voce*.'

[10]See p 510 line 15 – 16.

[95] The testimonies of all witnesses at a criminal trial must normally be given orally. The exceptions[11] are not applicable in this case. The magistrate allowed these exhibits without comment and neither did the prosecutor object thereto. These were also not instances where the witnesses were required to refresh their memories from the documents. A witness cannot simply hand in a document and say that it represents his or her evidence. This is an improper and alien procedure in a criminal trial.

[96] Du Toit *et al* in *Commentary on the Criminal Procedure Act*[12] state the following:

'Our law displays a strong bias in favour of the principle of orality. The preference for *viva voce* evidence as opposed to preserved memory found in written form is a marked characteristic of the common-law evidentiary system, where great faith is placed in cross-examination as a means of exposing falsehood.'

[97] In *S v Adendorff*[13] at the close of the State case counsel for the appellant informed the magistrate that he had 'for the convenience of the court' prepared a memorandum during consultation with his client and 'with the court's leave' proposed that his client should read it into the record. Hefer JA[14] remarked that this 'was an entirely improper procedure which should not have been sanctioned'. This statement was eventually read into the record by counsel. The Court of Appeal stated the following[15]:

'The accused said there was nothing he wished to add to the statement. The result was that the court was deprived of the benefit of hearing him give evidence-in-chief and had no means of assessing the accuracy of his confirmation. This might have been of less importance if

[11]See ss 212, 213 & 222 of Act 51 of 1977.
[12]Revision Service 52, 2014 at 22 – 59.
[13]2004 (2) SACR 185 (SCA).
[14]At para 20.
[15]At para 20.

the prosecutor had made a serious effort to test the reliability of the statement. But he did not do so. The magistrate was well aware that the evidence of the appellant was controversial throughout and that the prosecutor was probably ill-prepared. He abrogated his duty by submitting to counsel's agreement on the procedure which was adopted.'

[98] In the present matter, the magistrate equally abrogated her duty by allowing the afore-mentioned exhibits to be tendered as evidence.

E. The grounds of appeal

[99] The following grounds of appeal are enumerated in the notice of appeal:

'The grounds of appeal are that the learned Magistrate erred on the law and/or the facts to convict appellants of the charges levelled against them in that:

1. The chastisement of Andreas van Eck did not constitute an assault in law, more particularly in that:

1.1 The learned Magistrate ("she") did not have regard to and/or ignored appellants', the private school's, the learner's ("Andreas van Eck") and his parents', right to agree, and/or to allow appellants to discipline Andreas van Eck in accordance with their fundamental freedom as envisaged in article 21 (1) (c) of the Constitution of the Republic of Namibia. She further failed to take this Constitution provision into consideration when she interpreted the legislative provisions referred to below.

1.2 She erred in rejecting appellants' defence that the judgment of the Supreme Court of Namibia in the matter of ***Ex parte Attorney-General: In Re Corporal Punishment by Organs of State 1991 NR 178 (SC)*** is not applicable to private schools, more particularly in that:

(a) The aforesaid case's name speaks for itself. It refers to *"punishment by organs of State"*.

(b) The former Chief Justice himself, in the said judgment, stated that:

"Whatever the position might be in cases where a parent has actually delegated his powers of chastisement to a schoolmaster, it is wholly distinguishable from the situation which prevails when a schoolmaster administers and executes a formal system of corporal punishment which originates from and is formulated by a governmental authority. Such a schoolmaster does not purport to derive his authority from the parent concerned who is in no position to revoke any presumed 'delegation'."

(c) In the matter of ***S v Sipula 1994 NR 41 (HC)*** the High Court of Namibia held that the ***In Re Corporal Punishment*** case referred to above:

"envisaged only in position of corporal punishment by judicial and quasi-judicial authority which are organs of State as stipulated by the constitutional question posed by the Attorney General. That is the reason why eg. corporal punishment in private schools was not discussed."

1.3 She erred in rejecting appellants' defence that the parents of Andreas van Eck consented to their child receiving moderate corporal punishment. The learned Magistrate could not reject this defence of appellants as the State did not prove that Mr and Mrs van Eck did not hear the announcement at the meeting in the beginning of the School year (i.e. that corporal punishment is administered --'at Windhoek Gymnasium), more particularly because:

(a) Second appellant inter *alia* testified that a loud speaker was used when he stated to all parents present at the meeting (at which meeting the parents of Andreas van Eck was also present) that corporal punishment is administered at Windhoek Gymnasium.

(b) This (a) was confirmed by first appellant.

(c) On Andreas van Eck's father's own version, he was present at the said meeting. He must have heard this announcement and he clearly agreed with it. That much is patent from his subsequent conduct, particularly because Mr and Mrs van Eck did not complain initially when the teachers informed them that Andreas van Eck received corporal punishment from time to time. The letters and e-mails handed in as exhibits during the hearing clearly confirm that they did not complain initially about him receiving corporal punishment. They complained only about school work and other issues.

1.4 She erred in rejecting appellants' defence that Andreas van Eck himself willingly and voluntarily consented to the corporal punishment he received in circumstances where:

(a) All appellants testified that, before Andreas van Eck received corporal punishment, he was given an option and he chose corporal punishment.
(b) Second appellant testified that Andreas van Eck could choose to receive corporal punishment or that his parents be phoned.

(c) Third appellant testified to the same effect although the option given differed.

(d) Fourth appellant testified that Andreas van Eck was given the choice of corporal punishment or writing out during break.

(e) First appellant testified that he asked the children, including Andreas van Eck, whether they were guilty and whether they were willing to accept their punishment.

(f) The State did not challenge these version of appellants during cross-examination to an extent that the learned Magistrate could have rejected their said versions. There is no basis on which appellants' versions could have been rejected beyond reasonable doubt.

(g) The only attempt during cross-examination to move away from this aspect was to put appellants that Andreas van Eck could not consent thereto because he was not 21

years old at the time. The law could not have been quoted more wrongly. The law is that it is only necessary for the person giving consent "*to have full legal capacity to act"*. The State did not prove that Andreas did not possess such capacity by giving evidence that Andreas van Eck was not *"sufficiently developed intellectually to appreciate the implications of his conduct or was under the influence of alcohol or drugs which impede the function of his brain or that he did not know what he was consenting to"*.

1.5 The learned Magistrate, in essence, held that section 56 of the Education Act 16 of 2001, as amended, is applicable to private schools and that the said section wiped out any defence appellants may have had in common law. The learned Magistrate clearly erred in doing so because the language of section 58 does not repeal the common law at all, and, indeed, section 56 is not applicable to private schools, as:

(a) (The Education Act referred to above makes provision for government employees to be seconded to private schools. Then follows section 56. However, section 56 is only applicable to teachers who administer corporal punishment in their *"official capacity".* What the Education Act clearly does is also to prohibit teachers, who are government employees, but who were seconded to private schools, to administer corporal punishment at such private schools *"in their official capacity".* This is made clear by simply referring to two dictionaries.

Oxford Advances Learner's Dictionary of Current English: 5TH Ed: Page 804:
***"official** a person who holds a public office, eg in national or local government: government officials the officials of a political party."*

The law Lexicon: 2ND Ed: Page 1353:

***"official duty** official duties are the duties imposed on officers of the government."*

1.6 The learned Magistrate, in essence, held that the common law of Namibia does not provide for the fact that a teacher holds the power of chastisement *(in loco parentis)* in its original form or that it can be delegated. The common law still determines that:

"At common law parents and persons in loco parentis (such as teachers and housemasters) have, by virtue of their authority over children, the power to administer corporal punishment. A person possession the authority to chastise may delegate such authority to another. A teacher has an original power to chastise – it did not depend on an implied delegation by parents."

The above common law principles, was not, (even in government schools), abolished. Parents of children in government schools may still delegate despite section 56 of the Education Act.

1.7 The learned Magistrate, in essence, erred in finding that all appellants acted with knowledge of unlawfulness (*mens rea*), while the State failed to prove this beyond reasonable doubt.

(a) The State clearly did not show that appellants could have had *mens rea* until the meeting (on which it was agreed between first appellant and Mr van Eck (senior) that no corporal punishment *"should be given to Andreas van Eck anymore"*) took place.

(b) Mr and Mrs van Eck clearly brought all appellants under the impression that Andreas van Eck should be treated like all the other children.

(c) There is no evidence on record that any teacher other than third appellant gave corporal punishment to Andreas van Eck after the agreement referred to in paragraph 1.7 (b) above.

(d) The State furthermore did not challenge in cross-examination third appellant's version that he was not present when first appellant informed all the teachers about the said agreement. He also had no *mens rea*.

(e) Appellants were advised by their school board chairman that they could give corporal punishment.

(f) In all the circumstances *"there was no proof of knowledge of unlawfulness"*.

1.8 The learned Magistrate erred when she, in essence, held that, the State proved beyond reasonable doubt that the punishment which Andreas van Eck received was not done within reasonable bounds and not with a motive to correct and discipline.

1.9 The learned Magistrate erred in not rejecting both Messrs van Eck's versions (i.e. father and son).

2. The learned Magistrate erred in finding that the State proved beyond reasonable doubt that first appellant unlawfully and intentionally applied force, directly or indirectly, to Andreas van Eck in that, on or about 5 March 2010 and at or near Windhoek in the district of Windhoek, first appellant wrongfully and unlawfully assaulted Andreas van Eck by hitting him with a stick (1 stroke) and thereby caused him some wounds and/or injuries as alleged in the charge sheet.

3. The learned Magistrate erred in finding that the State proved beyond reasonable doubt that second appellant unlawfully and intentionally applied force, directly or indirectly, to Andreas van Eck in that, on or about 18 February 2010 and at or near Windhoek in the district of Windhoek, second appellant wrongfully and unlawfully assaulted Andreas van Eck by hitting him a stick (1 stroke) and thereby caused him some wounds and/or injuries as alleged in the charge sheet.

4. The learned Magistrate erred in finding that the State proved beyond reasonable doubt that third appellant unlawfully and intentionally applied force, directly or indirectly, to Andreas van Eck in that, on or about 15 March 2010 and at or near Windhoek in the district of Windhoek, third appellant wrongfully and unlawfully assaulted Andreas van Eck by hitting him with a stick (2 strokes) and thereby caused him some wounds and/or injuries as alleged in the charge sheet.

5. The learned Magistrate erred in finding that the State proved beyond a reasonable doubt that fourth appellant unlawfully and intentionally applied force directly or indirectly, to Andreas van Eck in that, on or about 4 March 2010 and at or near Windhoek in the district of Windhoek, fourth appellant wrongfully and unlawfully assaulted Andreas van Eck by hitting him with a stick (2 strokes) and thereby caused him some wounds and/or injuries as alleged in the charge sheet.

6. The learned Magistrate erred in finding that the State proved beyond reasonable doubt that fourth appellant unlawfully and intentionally applied force, directly or indirectly, to Andreas van Eck in that, on or about 5 February 2010 and at or near Windhoek in the district of Windhoek, fourth appellant wrongfully and unlawfully assaulted Andreas van Eck by hitting him with a wooden stick (6 strokes) and thereby cause him some wounds and/or injuries as alleged in the charge sheet.

7. The learned Magistrate erred in rejecting the evidence tendered by appellants *in toto* without any basis in law and/or fact to do so.

8. All appellants were charged with assault — assault common. For them to have been found guilty thereof they must have had the unlawful intent with knowledge of unlawfulness to interfere with the bodily integrity of Andreas van Eck. As illustrated above, the State did not prove any of these elements.

9. The State prosecutor converted the criminal trial into a misconduct enquiry as envisaged in section 56 of the Education Act and the learned Magistrate, in essence, erred in accepting that approach. It is significant that the government never instituted any disciplinary charges against any of the appellants. It is simply because section 56 of the Education Act does not give government (Ministry of Education) the power to institute disciplinary proceedings against teachers in private schools.

10. The State *inter alia* relied on a certain circular which was apparently forwarded to private schools. This circular was however never handed in as an exhibit during the hearing. Mr Shipanga, in his evidence, was emphatic on the circular. This circular was however only

forwarded to government schools. Yet, the learned Magistrate accepted the version of the State.

11. Appellants did not receive a fair trial as envisaged in article 12 of the Constitution of the Republic of Namibia, in that appellants were not tried by a competent court. The learned Magistrate is, with due respect, not intellectually competent to provide an article 12 fair trial (of the Constitution of the Republic of Namibia) and should not have been allowed to preside over criminal charges against any of the appellants. She has no intellectual ability to:

11.1 appreciate the applicable law;

11.2 apply facts to the law;

11.3 make credibility findings;

11.4 understand the concept *"beyond reasonable doubt"*.

11.5 make interlocutory rulings/findings;

11.6 listen to argument (during argument for section 174 discharge she said to appellants' counsel that he *"may continue to argue, I am busy with something"* or words to that effect (presumably administrative work);

11.7 comprehend any argument; and/or

11.8 show respect for appellants and their rights (she did not inform appellants that she was not available for scheduled hearings and she did not complete her judgments as scheduled and when she was not ready to deliver judgment, she was not forthcoming, but said that it was too dark to give judgment, while it was stark daylight).

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12. It will be submitted on behalf of appellants that where the record shows that a judicial officer is not competent, the court can simply disregard his/her findings and determine the issues with reference to admissible evidence on record. This should be done in terms of article 25 of the Constitution of the Republic of Namibia. Once such finding is made, the matter should be referred to the Magistrate's Commission. It is in the public interest to do so. With respect, it will be submitted that the learned Magistrate has displayed such degree of incompetence that, *prima facie* at least, she should be charged by the Magistrate's Commission.

13. In sentencing appellant, the learned Magistrate failed to take into account or take into account adequately that:

13.1 all appellants were first offenders;

13.2 all appellants were teachers who acted in the course and scope of their duties as teachers and in the interest of society in disciplining Andreas van Eck; and/or

13.3 Andreas van Eck did not sustain any wounds and/or injuries.

14. The sentence is so unreasonable that no reasonable court would have imposed it. How, in the circumstances of this case, N$2 000.00 or 1 year imprisonment could be the correct sentence, defies logic and is shockingly disproportionate.'

F. <u>The judgment of the Court *a quo*</u>

[100] Subsequent to the submissions by defence counsel as well as submissions by counsel on behalf of the State on 15 May 2013, the matter was postponed for judgment which was given on 13 June 2013.

[101] In this judgment the four charges were repeated, the testimonies of all the witnesses were summarized, and the magistrate continued as follows[16]:

'Having now all the Evidence at hand from the State as well as from the Defense and having also had submission from both parties before judgment, the Court has now to look at all the Evidence presented before this Court, regardless of what quality it is. Is it corroborated? Is it contradicted? Was the Evidence tested under oath? I mean during cross-examination, or left untested, is so, why? For example, how the Exhibits received assists the Court. Or testimony of each Witnesses 30 whether from, the Defense, or from the State, e.g. during cross-examine of Witness No 1 by the Defense representative, the Court receive Exhibit D where Martin Ashikoto of Ondonga Tribal Authority 1977 (2) SA Law Report at page 294 (a-d). This Martin Ashikoto removed an eye of a habitual thief who claimed to be justified in accordance with the native Owambo. He also receive the Supreme Court judgment which dealt with corporal punishment and it was held that it was unconstitutional. And also Article 8(b) of our Constitution. How this will assist the Court in decide the case either in favour of the State or against the State. Also the third State Witness who is a director at Khomas Region who testified that the private school fall within the capital funding of the government budget and the corporal punishment is not excluded in private school. In other words there is no exceptional to the general rule relating to corporal punishment in schools in Namibia. That was the testimony of that third Witness for the Prosecution. Then during the hearing of this matter, there was no dispute about the identities of the 4 teachers. The dates the incident happened, the venue, part of the assault - where it was directed on Junior's body, number of strokes, however the State was left to prove whether the Accused acted with knowledge of unlawfulness and was it within reasonable bounds motive to correct and discipline Andreas. The State, during the submission before judgment, the State requested the 4 Accused to be placed, to be found guilty as charged, and the reasons were all placed on record. Among those reasons are; Andreas was a minor at the time: He could not make a choice. The case cited by the State, presided over by the 4 Accused person Defense representative, the diary received by the parents of Andreas which outline the expectation of behavior

[16]Pp 548 line 19 – 552 line 13 of the record.

or directing what is expected from a learner. The Court is now confronted with various versions where the 4 Accused denied having inflicted the stroke to Andreas in bad faith, instead of correcting and disciplining Andreas. Andreas was a minor by that time and Andreas's parents who enrolled him in the school were not happy about that kind of punishment. And then if Accused one is of the view that that kind of corporal punishment is exceptionally to their school, why did he has to apologise when it happened again? After the staff were informed by him that Andreas' parents do not want him to receive that type of punishment. And then he is now relying that during the year, at the beginning of the year function an announcement was made at that function, which informed the parents that corporal punishment is administered at Gymnasium School. And as Witness No 1 for the State was negative about that, and then it was put to him that the loud speaker was loud enough that anyone in the hall could hear the announcement. Or why second Witness for the Defense testify that he does not practice that, he is a teacher at that school for twelve and a half years, in other words he is the longest teacher serving in that school than other teachers. Okay, we also, the diary, which Witness No 1 for the State was referring all his answer, as to whether is it in the diary or is not written in the diary, because he consider that the diary is the one to guide him, or to guide Andreas. And as the Defense continue cross-examining him, he maintain that either it is in the diary or it is not in the diary and he prefer that the diary was the guiding rules to guide Andreas as well as them. And this diary was handed in as Exhibit 'D'. Okay then having said that, or the above, has the State proved its case beyond reasonable doubt as required by law? As there is no duty on the Accused person to assist the State in any manner. It is the sole duty of the State to prove the case and the proof required is that of beyond reasonable doubt. That is, did the State prove that on the 5th February 2010 Accused No 4 wrongfully and unlawfully assault Andreas Van Eck by hitting him with a wooden stick? That was six strokes. And the reason were that because he got 4 out of 10. And then each point lost, he has to receive a stroke. Also did the State prove that on the 5th March, the month later, Accused No 4 did wrongfully and unlawfully hitting Andreas with a stick 1 times? Also on the 18th day of February 2010, did the State prove that Accused No 2 wrongfully and unlawfully assault Andreas by hitting him with a stick 1 times? Also on the 4th March 2010, did the State prove that Accused No 4 did wrongfully and unlawfully assault Andreas 2 times with a stick? Also did the State prove that on the 5th March 2010, Accused No 1 did wrongfully and unlawfully assault and/or hit Andreas with a stick 1 times? That is now the question left before this Court, as to whether the State has proved

the case as required by law and as to whether the explanation given by the 4 Accused person is a reasonable explanation which the Court can accept. Their explanation that it was not done in bad faith, it was done in such a way to discipline the learner. It was done in order for, when it is done then the teacher receive a response or a positive result. The Court is not satisfied with that explanation or that Defense for the 4 Accused person and therefore reject their explanation and that the Court accept the explanation from the State and therefore the Court is satisfied that the State has proved its case beyond a reasonable doubt and the 4 Accused person are found guilty as charge and convicted accordingly.'

G. The submissions on behalf of the appellants on appeal

[102] All four appellants in their statements and in their testimonies stated that in terms of the common law, parents and persons *in loco* parentis (for example guardians, headmasters of schools, teachers and housemasters) have, by virtue of their authority over children, the power to administer punishment to them for the purpose of education and correction. The power to discipline of persons *in loco parentis* is original authority and not delegated parental authority. A parent or person *in loco parentis* may delegate the power to discipline to another person[17]. It was the appellants' defence that the parents consented to the learner receiving moderate corporal punishment.

[103] It was submitted by Mr Heathcote that the complainant in this matter delegated the power to administer corporal punishment on the learner to the school, the complainant being aware of the policy of the school on corporal punishment, never in writing objected to such a policy. It was submitted that the learner himself, on all five occasions, consented to corporal punishment.

[104] It was submitted that where the school implements Christian moral education, the appellants have a fundamental freedom as envisaged in Article 21(1)*(c)* of the

[17]Extract from Exhibit S.

Constitution of the Republic of Namibia which provides that all persons shall have the right of freedom to practice any religion and to manifest such practice.

[105] It was submitted by Mr Heathcote that the magistrate in essence held that s 56 of the Education Act 16 of 2001, as amended, is applicable to private schools and that the said section wiped out any defence the appellants may have at common law; that the magistrate erred in doing so because the language of s 56 does not repeal the common law at all; s 56 is not applicable to private schools as the Education Act makes provision for government employees to be seconded to private schools and s 56 is applicable to teachers who administer corporal punishment in their 'official capacity'; that the Education Act prohibits teachers who are government employees, but who were seconded to private schools, to administer corporal punishment at such private schools 'in their official capacity'. It was submitted that this must be the case with reference to two dictionaries regarding the meaning of the word 'official'.

[106] The Oxford Advanced Learners Dictionary at Current English 5th ed p 804 describes official as 'a person who holds public office, eg in national or local government: government officials the officials of a political party.

[107] The *Law Lexican* 2nd Ed – p 1353:

> 'official duty official duties are the duties imposed on officers of the government.'

[108] It was submitted that a private teacher at a private school can never act in a government capacity. It was submitted that the provisions of s 56 do not criminalise the infliction of corporal punishment in schools. It was submitted that the magistrate erred in finding that the judgment of the Supreme Court of Namibia in the matter of Ex parte

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Attorney-General: *In Re Corporal punishment by Organs of the State*[18] is applicable to private schools.

[109] It was submitted that the magistrate erred in finding that all the appellants acted with knowledge of unlawfulness since the State did not prove beyond reasonable doubt that the appellants could have had the required *mens rea* until the meeting on which it was agreed between the first appellant and the complainant that no corporal punishment should be administered to the learner anymore, took place.

H. The submissions on behalf of the respondent on appeal

[110] Ms Moyo raised a point *in limine*, to the effect that paragraphs 1.9, 2, 3, 4, 5, 6 and 7 are no grounds of appeal. This Court was referred to relevant case law[19] in support of her submission. I shall now deal with the point raised *in limine*.

[111] Rule 67(1) (a) of the Magistrates' Courts Rules provides as follows:

'A convicted person desiring to appeal under s 103(1) of the Act, shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based . . .'

[112] Diemond J in *S v Horne*[20] with reference to Rule 67 of the Magistrates' Courts Rule stated the following:

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[18] 1991 NR 178 (SC).
[19] *S v Grey von Pittius and Another* 1990 NR 35; *S v Wellington* 1991 NR 20 at 20H-J; *Godfried Kuhanga and Another v The State* unreported High Court judgment in Case No. CA 57/2002 delivered on 18 November 2004; *S v Horne* 1971 (1) SA 630 (C) at 631G-632A.
[20] 1971 (1) SA 630 (C) at 631H-632A.

'The Rule provides in simple unambiguous language that the appellant must lodge his notice in writing in which he must set out "clearly and specifically" the grounds on which the appeal is based. He must do this for good reason. The magistrate must know what the issues are which are to be challenged so that he can deal with them in his reasons for judgment. Counsel for the State must know what the issues are so that he can prepare and present argument which will assist the Court in its deliberations, and finally, the Court itself will wish to be appraised of the grounds so that it can know what preparation, if any, it should make in order to guide and stimulate good argument in Court. These advantages may well be frustrated where the appellant uses the blanket phrase – "against the weight of evidence and bad in law". '

[113] This Court in *S v Wellington*[21] approved this *dictum* of Diemond J in *Horne.*

[114] Strydom AJP, in *S v Gey van Pittius and Another*[22] remarked that grounds to the effect that "the magistrate misdirected himself in finding that the State has proved its case beyond reasonable doubt and that he misdirected himself in rejecting the evidence of the appellants and their witnesses" are not grounds of appeal at all "but are conclusions drawn by the draftsman of the notice without setting out the reasons or grounds thereof"[23]'

[115] The grounds referred to in paragraphs 2, 3, 4, 5 and 6 of the notice of appeal are repetitions of the wording of the allegations levelled against the appellants save for the addition to the effect that the learned magistrate erred in finding that the State proved those allegations beyond reasonable doubt.

[116] Grounds 1.9 and 7 are similar to the grounds warned against in *Gey van Pittius* and are conclusions drawn by the draftsperson of the notice of appeal.

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[21] 1990 NR 20 (HC).
[22] 1990 NR 35 (HC) at 36F-G.
[23] See also *S v Kakololo* 2004 NR 7 (HC) at 9H-I; *Godfried Kuhanga and Another versus The State*, case no. CA 57/2002 delivered on 18 November 2004.

[117] In *Godfried Kuhanga* this Court, with reference to relevant authorities, held that the consequence of dealing with a notice which does not comply with the provisions of rule 67 is that it is not a valid notice of appeal, is no notice of appeal at all, is a nullity, and does not have any force or effect.

[118] Grounds 1.9, 2, 3, 4, 5, 6 and 7 in the notice of appeal of the appellants are no grounds of appeal and shall be regarded as *pro non scripto*. I shall consider only the remaining grounds of appeal.

[119] In respect of the merits and grounds of appeal Ms Moyo is in agreement that s 56 does not criminalize the imposition of corporal punishment but makes the infliction of such punishment an act of misconduct.

[120] I agree with the submissions that the prohibition contained in s 56 does not amount to criminal conduct, but may lead to administrative action, such as the initiation of disciplinary proceedings[24].

[121] Section 56 is distinguishable from the provisions of s 10 of the South African Schools Act 84 of 1996 which prohibits corporal punishment and provides for a criminal sanction, (a sentence which could be imposed for assault).

[122] Ms Moyo submitted that the provisions of s 56(1) are applicable to public schools as well as private schools, since 56(1) must be read in conjunction with s 56(2).

[123] Section 56(2) provides as follows:

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[24]S 51 of the Education Act provides that subject to the Labour Act 6 of 1992, 'the power to appoint, transfer or dismiss teachers to or from posts on the establishment of a private school except teachers referred to in s 49(5)*(c)* – (a) vests in the owner or controlling body of the school; S 49(5)*(c)* refers to teachers who are staff members of the Ministry and who are seconded to a private school.

'For the purposes of the Labour Act 16 of 1992, misconduct contemplated in subsection (1) constitutes a valid and fair reason for any disciplinary action.'

[124] The argument is that teachers who are employed by the State (Ministry of Education) in terms of the provisions of the Public Service Act 13 of 1995 are not subject to the Labour Act but subject to the Public Service Act. Subsection (2) was included by the Legislature to cover those teachers or employees at private schools. It was submitted that if this were not the case, there would have been no necessity for the Legislature to have included the provisions of the Labour Act in respect of the issue of corporal punishment on learners. Teachers or persons employed at a private school are not subject to discipline by the Ministry of Education as they are privately employed. It was submitted that to interpret s 56 differently would result in an absurdity in that the children enrolled at State schools are protected against this invasive type of punishment, yet those enrolled in private schools are not. It was submitted that s 56 is applicable to private schools, it follows that no amount of consent, either from the learner personally or his parents can nullify the prohibition contained therein.

[125] The argument was developed that the common law position is in conflict with the statutory provisions of the Education Act, that Article 66(1) of the Constitution is applicable[25], and therefore the common law cannot provide the appellants with a valid defence in law.

[126] It was submitted that 'official duties' does not only refer to someone 'employed in a capacity within Government'. A person acts in an official capacity, it was submitted, by virtue of the office that person holds at a particular time. With reference to an Oxford Dictionary Ms Moyo submitted, that official capacity refers to 'proper office or authority',

[25]Article 66(1) of the Constitution provides that: 'Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.'

and that a person performs official duties in any office as long as such person is performing whatever duties ‘in the realms of the mandate’ of such office.

[127] Ms Moyo criticised the code of conduct received by the complainant when he enrolled the learner at the school. She questioned the fact that corporal punishment was not categorically mentioned in the code despite the fact that corporal punishment is the most invasive form of punishment to the bodily integrity of a person.

[128] It was submitted that the parents of the learner never, on the evidence presented, gave informed consent in respect of corporal punishment in respect of the learner.

[129] In respect of the defence that the learner himself gave permission for corporal punishment it was submitted that the learner being 14 years old at that stage could not have been able to enter into an agreement which was prejudicial to his interests in respect of an issue of which he had no complete information. It was submitted that the age of majority as provided for in the Age of Majority Act 57 of 1972 is 18 years and that this was the main reason why the school did not sign any enrolment agreement with the learner personally.

[130] It was finally submitted that the magistrate after evaluating all the evidence before her committed no misdirection by rejecting the defences of the appellants.

[131] This Court is not required to pronounce itself on the question whether or not corporal punishment administered in private schools are in violation of the provisions of Article 8(2) (b) of the Constitution of Namibia which prohibits cruel, inhuman or degrading treatment or punishment.

[132] This Court is also not required to decide or to express any views in respect of the power of parents in terms of our common law to administer punishment to their children for the purpose of education and correction including corporal punishment.

I. Evaluation of the evidence and consideration of the grounds of appeal

[133] Mr Heathcote was very critical of the judgment of the magistrate to such an extent that he submitted that the appellants did not receive a fair trial as envisaged by Article 12 of the Constitution of Namibia since the appellants had not been tried by a competent court.

[134] He submitted that the magistrate made no credibility findings and this misdirection and other misdirections justifies this court to consider the evidence afresh on appeal.

[135] In *S v Katjingisua*[26] Mtambanengwe AJ (with whom Damaseb JP concurred) referred with approval to what was said by Leon J in *S v Singh*[27] in respect of the approach by a court where there is a conflict of fact:

'Because this is not the first time that one has been faced with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore the defence witnesses, including the accused must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and defence witnesses but also to applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of accused has been established beyond reasonable doubt. The best

[26] 2005 (3) NCLP 26.
[27] 1975 (1) SA 227 (NPD) at 228F-H.

indication that a court has applied its mind in the proper manner in the above-mentioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.'

[136] Mtambanengwe AJ also referred with approval to the dictum of Davis AJA in *Rex v Dhlumayo and Another*[28] where the following appear:

'It may be as I have just said, that in an extreme case, an appellate court may have to decide the matter, and arrive at its own conclusion one way or the other, purely on the record, unassisted by any finding which the trial judge may have made. That is undeniably a difficult task, but it may have to be faced. It is evident of course, that in such a case the *onus* may become all-important. Thus in a criminal appeal (with certain well-known exceptions), where there has been a misdirection of this kind, unless upon the record the appellate court is satisfied that the guilt of the accused has been proved beyond reasonable doubt upon the record before it, it must perforce allow the appeal.'

[137] In the proceedings in the court *a quo* the magistrate failed to analyse the evidence, she failed to make any credibility findings, she did not give reasons why she impliedly accepted the testimonies of the State witnesses neither did she give reasons why the testimonies of the appellants and other defence witnesses had been rejected. The magistrate also did not deal with the submissions by counsel on behalf of the accused persons.

[138] The approach expressed in *S v Katjingisua*[29] in respect of the evaluation of evidence was totally disregarded by the magistrate and amounted to a misdirection which justifies this Court to interfere in the conclusion reached by the magistrate.

[28] 1948 (2) SA 677 AD at 703.
[29] 2005 (3) NLP 26 per Mtambanengwe AJ concurred by Damaseb JP.

[139] In the notice of appeal reference is made to the matter of *Ex Parte Attorney-General: In Re Corporal Punishment by Organs of State*, and it is contended that the magistrate erred in finding that this judgment is applicable to private schools. It is apparent from the judgment[30] that the magistrate merely referred to the Supreme Court judgment in which it was held that corporal punishment was unconstitutional. She did not express any specific view, namely whether or not she relied on it as authority that the corporal punishment administered to the learner was therefore unconstitutional. It serves no purpose and it does not make any sense by just mentioning a decided case without stating the relevance of such a decided case in the context of the evidence presented to Court.

[140] Nevertheless, if it is to be implied that the magistrate did rely on the said case as authority for rejecting the appellants' defence then she was clearly wrong. Broadly stated, the constitutional question referred to the Supreme Court by the Attorney-General was to determine whether the infliction of corporal punishment by or on the authority of any organ of the State was in conflict with Article 8 of the Constitution. Mahomed AJA answered as follows[31]:

'Whatever the position might be in cases where a parent has actually delegated his powers of chastisement to a schoolmaster, it is wholly distinguishable from the situation which prevails when a schoolmaster administers and executes a formal system of corporal punishment which originates from and is formulated by a governmental authority. Such a schoolmaster does not purport to derive his authority from the parent concerned who, is in no position to revoke any presumed 'delegation'. I am accordingly of the view that any corporal punishment inflicted upon students at Government schools pursuant to the provisions of the relevant Code issued by the Ministry of Education, Culture and Sport would be in conflict with art 8(2)*(b)* of the Namibian Constitution.'

[30]P 549 lines 6-8.
[31]At p 196F.

[141] This judgment prohibited corporal punishment administered in State schools only and clearly was not concerned with the situation which prevailed in private schools.

[142] One of the defences of the appellants was that the power to discipline of *persons in loco parentis* is an original authority and not delegated parental authority. It seems to me quite surprising that so much time was spent on cross-examining the complainant to discredit him with the view to prove that complainant and his wife initially consented (by default) to the infliction of corporal punishment on the learner. If it is accepted that the appellants as persons *in loco parentis* had original authority or power to discipline, the question whether the parents consented to such punishment, logically becomes superfluous.

[143] It must be stated that the complainant shortly after the first incident did in fact complain verbally about the infliction of punishment on the learner. It is also not disputed that the complainant did not take any definitive action until after the last incident, and an impression might have been created (to an objective observer) that although he had disapproved of such punishment, he did not initially had the courage of his convictions to demonstrate in a more concrete fashion his disapproval.

[144] The testimony of the complainant was ambivalent in some aspects. On the one hand the complainant testified (on more than one occasion), and this view was conveyed to teachers at the school, that the infliction of corporal punishment was illegal *because it does not appear in the code*. On the other hand the complainant regarded the infliction of corporal punishment as inhuman and degrading punishment and unconstitutional.

[145] It is not apparent from the record what the complainant's view would have been had the code (subsequently issued on 22 April 2010) been included in the documents the complainant had perused prior to registering the learner in the year 2009.

[146] What the complainant succeeded to achieve by laying criminal charges against the appellants, was to jolt the schoolboard into action in drafting a code of conduct applicable to learners and teachers at the high school, a code which the complainant had lamented for quite some time to be provided to him.

[147] It was submitted that if it were not for the misunderstanding which occurred on 15 March 2010 (the last incident), there would have been no trial. That may indeed be the case, but the underlaying complainant has its origin much earlier in history – in the absence of any relevant and meaningful code of conduct addressing the administration of corporal punishment in respect of high school learners.

[148] I deem it appropriate at this stage to consider the ground of appeal advanced in paragraph 1.5 of appellants' notice of appeal to the effect that the learned magistrate erred in holding that s 56 of the Education Act 16 of 2001, as amended, is applicable to private schools and that the said section wiped out any defence the appellants may have had in common law.

[149] If the provisions of s 56 are indeed applicable to private schools it will certainly in effect invalidate any consent which could have been given by parents or by other persons *in loco parentis*, to headmasters or to teachers. Section 56 in such an instance also nullifies the common law position that headmasters and teachers have original authority to chastise learners

[150] Section 56(1) reads as follows:

'A teacher or any other person employed at a state school or hostel or private school or hostel commits misconduct, if such a teacher or person, in the performance of his or her official

duties imposes or administers corporal punishment upon a learner, or causes corporal punishment to be imposed upon a learner.'

[151] I have referred to the respective submissions by counsel regarding the interpretation of this section and do not agree with the contention that this section finds application only in respect of teachers employed by the Ministry of Education, but who have been seconded to private schools.

[152] The provisions of s 56(1) must be considered in view of the context of the Education Act as a whole in order to determine legislative intention. A starting point in the process of interpretation must start with the ordinary grammatical meaning of words.

[153] Schreiner JA[32] stated the following in this regard:

'. . . . whichever of the two lines of approach is adopted since, in the end, the object to be attained is unquestionably the ascertainment of the meaning of the language in its context. But each has its own peculiar dangers. While along the line approved by Lord GREENE there is the risk that the context may in a particular case receive an exaggerated importance so as to strain the language used; along the other line there is the risk of verbalism and consequent failure to discover the intention of the law-giver. The difference in approach is probably mainly a difference of emphasis, for even the interpreter who concentrates primarily on the language to be interpreted cannot wholly exclude context, even temporarily; and even the interpreter who from the outset tries to look at the setting as well as the language to be interpreted cannot avoid the often decisive first impression created by what he understands to be the ordinary meaning of the language. Seldom indeed is language so clear that the possibility of differences of meaning is wholly excluded, but some language is much clearer than other language; the clearer the language the more it dominates over context, and *vice versa*, the less clear it is the greater the part that is likely to be played by the context.'

[32] *Jaga v Dönges, N.O. and Another* 1950 (4) SA 653 (A) at 664B-F.

[154] The context of legislation may also encompasses the object or purpose of an Act[33], and what mischief it intended to address. In this regard it may be necessary to see what the law was prior to the promulgation of the Act.

[155] I shall now consider some sections of the Education Act other than s 56(1). I shall first have regard to some definitions in the Act:

‘ “private school” means a school which is established and maintained at the owner’s expense, and is registered in terms of section 42.
“state school” means a school established under section 33.
“school means an establishment or place or that part of an establishment or place in which basic education is provided.
“learner” means any person who is registered and receiving basic education or a course of study in terms of this Act. It should be apparent that the word “learner” is expressed in a general and unqualified form.
(It is my comment).
Section 2 reads as follows:

‘2’ Determination of basic education policy and control of system and activities

(1) The Minister must -

(a) determine the national policy on basic education and ensure that consultations with such consultative bodies established for this purpose in terms of this Act or any other law, or such organizations as the Minister may recognize for this purpose, are undertaken prior to the determination of policy;

(2) secure the effective co-operation of all public and private bodies concerned with education in formulating and implementing the national policy on basic education in terms of this Act.

(3) . . . .

[33] *Rossouw v Sachs* 1964 (2) SA 551 (A); *Deitenbach v Coronation Trust (Pty) Ltd* 1971 (3) SA 659 (SWA) at 662.

(4) . . . .'

[156] The National Advisory Council on Education in terms of s 3 includes persons nominated by private schools. The Regional Education Forums established in terms of s 4 consists inter alia of two persons representing private schools in the region.

157] In terms of the provisions of sections 2, 3, and 4 the interests of private schools are not only catered for by the establishment of consultative bodies, but may also provide input in respect of the determination of a national policy on basic education.

[158] Section 82 provides as follows:

'This Act applies to basic education and related matters, and to all schools, classes, programs and other places in which educational activities, to which this Act applies, are performed.'

[159] The wording of this section is clear and unambiguous – the Act applies to *all schools*. This includes private schools. If this is the case then 'official duties' cannot bear the meaning attached to it by the appellants. 'Official duties' in my view must be interpreted to mean duties in the official capacity as a teacher at a school. Words in dictionaries may be helpful and instructive in the interpretation of words used in Acts of Parliament, but are not to be taken to be authoritative exponents of those words[34].

[160] Margo J expressed the position as follows in *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd*[35]:

'Dictionary definitions of a particular word are very often fundamental importance in judicial interpretation of that word in a statute or in a contract or in a will. Nevertheless, the task

[34] *S v Mngadi and Others* 1986 (1) SA 526 (N) at 529F-G.
[35] 1984 (3) SA 834 (w) 846F-H.

of interpretation is not always fulfilled by recourse to a dictionary definition, for what must be ascertained is the meaning of that word in its particular context, in the enactment or contract or other document.'

Diemond JA said in this regard[36]:

'The Courts can, and do make frequent use of standard dictionaries to determine the meaning of words and phrases (*Schmidt Bewysreg* at 148), and I am prepared to accept counsel's submission that Parliament had knowledge of relevant books and their contents. But dictionaries do not always provide the answer to the problem of construction.'

[161] Nicholas J in *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka*[37]said this:

'A dictionary meaning of a word cannot govern the interpretation. It can only afford a guide. And where a word has more than one meaning, the dictionary does not, indeed it cannot, prescribe priorities of meaning. The question, is, what is the meaning applicable in the context of the particular document under consideration.'

[162] Courts may make use of presumptions of interpretation as guidelines or principles in assisting in the process of interpretation of provisions in documents and in legislation. One such a presumption is the presumption that the Legislature does not intend to make any provision which is futile, nugatory, unnecessary or meaningless.

[163] It was submitted by Ms Moyo, and in my view correctly so, that the provisions of s 56(1) must be read in conjunction with the provisions of s 56(2). It was submitted in this regard that since teachers employed by the Ministry of Education are not subject to the Labour Act[38] but subject to the provisions of the Public Service Act, s 56(2) was

[36]*S v Collop* 1981 (1) SA 150(A) at 161E-F.
[37]1980 (2) SA 191 (T) at 196E – a full bench decision.
[38]Act 6 of 1992.

enacted to cover the conduct of those teachers or employees employed by private schools.

[164] If this were not the intention of the Legislature in my view s 56(2) would otherwise be unnecessary or meaningless. I agree with the submission that to interpret s 56 differently would result in an absurdity[39] that learners enrolled at state schools are protected against invasive punishment, yet those enrolled at private schools are not.

[165] This interpretation in my view is underscored by the presumption that an enactment applies to general and not to particular instances and the presumption that the Legislature intends to promote the public good.

[166] On this point of public good, I endorse what Sachs J said in *Christian Education South Africa v Minister of Education*[40]:

'I do not wish to be understood as underestimating in any way the very special meaning corporal correction in school has for the self-definition and ethos of their religious community in question. *Yet their schools of necessity function in the public domain so as to prepare their learners for life in the broader society*. Just as it is not unduly burdensome to oblige them to accommodate themselves as schools to secular norms regarding health and safety, payment of rates and taxes, planning permissions and fair labour practices, and just as they are obliged to respect national examination standards, so it is not unreasonable to expect them to make suitable adaptations to non-discriminatory laws that impact on their codes of discipline. The parents are not being obliged to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously. What they are prevented from doing is to authorise teachers, acting in their name and on school premises, to fulfil what they regard as their conscientious and biblical-ordained responsibilities for the

[39]In *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129 it was held that a primary rule of interpretation in construing an Act of Parliament is to use the ordinary, grammatical meaning of the words used unless such an approach would lead to 'some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a Court of law is satisfied the Legislature could not have intended'.
[40]2000 (4) SA 757 (CC) at para 51.

guidance of their children. Similarly, save for this one aspect, the appellant's schools are not prevented from maintaining their specific Christian ethos.'
(Emphasis added).

[167] It was submitted on behalf of the appellants that the Legislature subsequent to the judgment of the Supreme Court in the matter of *Ex Parte Attorney-General: In Re Corporal Punishment by Organs of State* intended to confirm that the decision affects only public schools, hence the reference to 'official duties'.

[168] For the reasons already mentioned I am of the view that in addition to being applicable to public schools the provisions of s 56(1) are also applicable to private schools. In my view a more compelling argument is that because the aforesaid Supreme Court judgment did not address the issue of corporal punishment at private schools, the Legislature intended to normalise the prohibition of corporal punishment in all schools including private schools. In my view the provisions of s 82 clearly support such an intention by the Legislature.

[169] I find myself unable to agree with the ground of appeal that the magistrate misdirected herself by finding that the provisions of s 56 are applicable to private schools.

[170] The effect of s 56 is that no amount of consent either from the parents or from the learner himself can nullify or invalidate the prohibition contained in s 56(1).

[171] Regarding the submission that the learner himself gave consent, I agree with the submission by Mr Heathcote that in order to give consent does not mean that one has to have full legal capacity to act, as contended on behalf of the respondent, but sight should not be lost that consent with regard to bodily infringements, must not be *contra bonos mores,* ie must be permitted by the legal order, and that consent to bodily injury

or the risk of such injury is normally *contra bonos mores*[41]*,* unless the contrary is evident eg in cases of participation in lawful sporting activities or medical treatment.

[172] In view of my finding in respect of the applicability of provisions of s 56(1) to private schools and in view of the common law position that bodily infringements are normally unlawful, the 'consent' given by the learner would have been *contra bonos mores*.

[173] It is my view apposite to refer to a passage in the *Christian Education* case (supra) where Ruttledge J of the US Supreme Court stated in *Prince v Massachusetts*:

> 'And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interests in youth's well being, the State as *parens patriae* may restrict the parent's control . . . .
> (The) State has a wide range of powers for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction . . . .
> The State's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities . . . .'

[174] Prior to *In Re Corporal Punishment* there existed in State schools a 'system of corporal punishment . . . regulated by a formal Code formulated and administered by a Government Ministry'[42]. In view of the meaning afforded to the provisions of the Education Act (supra) in support of the conclusion reached that s 56 is applicable to all schools I wish to refer to and support (with due regard to the different provisions of the respective legislations) what Sachs J said in the *Christian Education* case[43] where the following appears:

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[41]*Bester v Calitz* 1982 (3) (SA) (OPD) at 878B; *Neethling Law of Personality Second Edition* p 100.
[42] In Re Corporal Punishment at 196D-E.
[43]At para 50.

'Parliament wished to make a radical break with an authoritarian past. As part of its pedagogical mission, the Department sought to introduce new principles of learning in terms of which problems were solved through reason rather than force. In order to put the child at the centre of the school and to protect the learner from physical and emotional abuse, the Legislature prescribed a blanket ban on corporal punishment. In its judgment, which was directly influenced by its constitutional obligations, general prohibition rather than supervised regulation of the practice was required. The ban was part of a comprehensive process of eliminating State sanctioned use of physical force as a method of punishment. The outlawing of physical punishment in the school accordingly represented more than a pragmatic attempt to deal with disciplinary problems in a new way. It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of *all children*.' (Emphasis provided).

[175] I am alive to the presumption that the Legislature does not intent to alter the existing law (common law and statutory law) more than is necessary. This is a rebuttable presumption (as are all other presumptions). It is settled law that an act of Parliament or a regulation may supercede the common law[44]. In view the provisions of the Education Act referred to, I hold the view that the Legislature clearly intended, alternatively the inference is such that one can come to no other conclusion that the legislature intended to alter the common law position in respect of corporal punishment administered by teachers in any school within the Republic of Namibia.

[176] Mr Shipanga who was called with the aim to testify about the underlaying purpose of the Education Act, in my view failed to enlighten the trial court on this aspect.

[177] Reports of commissions of enquiry may be used as an external aid in the interpretation of statutes, to the extent of ascertaining the mischief aimed at by the legislature.

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[44] *R v Scheepers* 1915 AD 337; *S v Meeuwis 1970* (4) SA 532 (TPD) at 534; Article 66(2) of the Namibian Constitution.

[178] Corbett JA, in *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*[45] remarked as follows:

'In my view, our Courts too are entitled, when construing the words of a statute which are not clear and unambiguous, to refer to the report of a judicial commission of enquiry whose investigations shortly preceded the passing of the Statute in order to ascertain the mischief aimed at, provided that there is a clear connection between, on the one hand, the subject-matter of the enquiry and recommendations of the report and, on the other hand, the statutory provisions in question.'

[179] There was certainly no report of the commission, referred to by Mr Shipanga, received as evidence during the proceedings in the trial court. It is also not known what were the recommendations (if any), and whether those recommendations had indeed been accepted by Parliament.

[180] The testimony of Mr Shipanga is particularly unhelpful in order to ascertain the intention of the Legislature by enacting, in particular, s 56 of the Education Act, and does not assist the appellants in regard to their contention that s 56 is applicable to State schools only.

J. Did the State prove beyond reasonable doubt that the appellants had the required knowledge of unlawfulness of their respective acts?

[181] The defence of the appellants was that their conduct was not unlawful in terms of our common law since corporal punishment was administered for the purpose of 'education and correction' and therefore justified.

[182] In terms of the common law the position was stated thus[46]:

[45] 1986 (2) SA 555(A) at 562I-563A.

'The relationship of teacher and pupil justifies the infliction of moderate and reasonable corporal punishment where necessary for the purpose of correction and discipline, and that a Court of law will only interfere where, in its opinion, the flogging or corporal punishment administered, whether by a parent or by a schoolmaster, on the body of the son or the pupil, is unduly severe or unreasonable.'

[183] The case for the appellants was also that they had been advised by the chairperson of their schoolboard, after he had obtained legal advice, that they may administer corporal punishment.

[184] Knowledge of unlawfulness means that an accused is aware that his or her conduct constitutes a crime and, such conduct is not covered by a ground of justification. If an accused is unaware of the unlawfulness of his or her conduct such unawareness excludes the required intention. The onus in this matter was on the State to prove beyond reasonable doubt that the appellants had known that the law forbids the infliction of corporal punishment on pupils, and that such punishment constituted a *crime*. The test is a subjective one.

[185] A common feature in respect of all the appellants' testimonies is that in each instance the conduct (administration of corporal punishment) is admitted; that the corporal punishment inflicted was more than moderate and reasonable in the circumstances; that they acted *in loco parentis* as well as with the permission of the parents of the learner; that they acted with the purpose to discipline, educate and correct behavior, and that their conduct was justified and therefor not unlawful.

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[46] *Rex v Scheepers* 1915 AD 337 per Innes CJ. See also *R v Janke and Janke* 1913 TPD 382; *R v Le Maitre and Avenant* 1947 (4) SA 616 (c); *Hiltonian Society v Crofton* 1952 (3) SA 130 (A); *Du Preez v Conradie and Another* 1990 (4) SA 46 (BGD) at 51-52.

[186] A relevant factor in the determination whether or not a person acted with knowledge of unlawfulness in respect of his or her conduct is the motive of the person inflicting the punishment[47]. Steenkamp J, in *Lekgathe* said the following[48]:

'The ground upon which corporal punishment is inflicted is an important element in determining the state of mind of the person inflicting the punishment and the reasonableness of the punishment with due regard to the particular circumstances of each case.'

[187] In order to determine the question whether the State proved the required knowledge of unlawfulness by the appellants[49], I shall consider the testimonies of the appellants, *as they appear on record*, together with the other relevant evidence presented in the court *a quo*[50].

[188] There are other facts which are either not seriously in dispute or not shown to be rejected as not reasonably possibly true, namely, that at the beginning of each school year (including the year 2009) parents of learners at a meeting were informed that teachers administers corporal punishment at the school[51]; that after each incident, referred to in the charge sheets, the complainant or his wife had been informed by teachers, of the infliction of corporal punishment on the learner as well as the reason therefor; that corporal punishment inflicted was in accordance with Christian or biblical values; that the complainant laid a criminal charge only after the last incident; that the chairperson of the schoolboard had obtained a legal opinion to the effect that in terms of the common law teachers are justified to administer corporal punishment; and that the

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[47]*S v Lekgathe* 1982 (3) SA 104 BSC at 109B.
[48]At 109E.
[49]See grounds of appeal paragraphs 1.7 and 8.
[50]In *S v Ntuli* 1975 (1) SA 429 (A) at 436F Holmes JA stated: 'Dolus consists of intention to do an *unlawfu*l act' (Emphasis in original text).
See also *S v Campher* 1987 (1) SA 940A at 955E: 'Knowledge of unlawfulness is an *elementum essentiale* of culpability (dolus) (freely translated); *S v De Oliveira* 1993 (2) SACR 59 (A) at 63h-64a; *S v Blom* 1977 (3) SA 513 (A) at 529H.
[51]Although the complainant denied hearing this from the teachers (or thought that it was a joke if he had heard it) it could not seriously be disputed by the complainant. Complainant did not attend the meeting in the year 2010.

agreement reached between appellant no. 1 and complainant and his wife on 5 March 2010 had been communicated to all the teachers, except appellant no. 3.

[189] In addition to the aforementioned facts the individual appellants testified in a nutshell as follows: Appellant no. 1 testified (in re-examination) that after the first incident the complainant did not ask him why corporal punishment had been inflicted and was under the impression that corporal punishment was in order (with complainant and his wife) as long as it was done in a responsible way.

[190] Appellant no. 2 testified that if one of the learners had refused corporal punishment he would not have administered it against the will of a learner.

[191] Appellant no. 3 testified that he was unaware of the agreement reached on 5 March 2010 between appellant no. 1 and complainant and his wife, and had he known that the 'delegation of their parental authority to chastise' had been revoked he would have 'refused Andrea's request to be chastised'.

[192] Appellant no. 4 testified about a meeting she attended with Mr and Mrs van Eck, and appellant no. 2 during which meeting she asked the complainant, in view of a previous sms received by her from him, whether he wanted her to punish the learner in a different way to which he clearly stated: 'No! Andreas wants to be part of the class and to be treated like the rest of the class. Whatever punishment, Andreas wants to be part of it'.

[193] According to her Mrs van Eck also approved to the infliction of corporal punishment after the appellant had sent her an sms.

[194] It appears from the evidence that the appellants administered corporal punishment in spite of the provisions of the Education Act.

[195] The factors referred to in paragraphs 185, 186, 188, 189, 190, 191, 192, 193, 194, 196, 197, 198 and 199 are cumulatively, in my view, indications of conduct compatible with an absence of knowledge of unlawfulness on the part of the appellants.

[196] One of the indications referred to above is the fact that legal advice had been obtained regarding the unlawfulness or otherwise of administering corporal punishment. It is not apparent from the record who had advised the chairperson of the schoolboard, but nevertheless, Van Dijkhorst J held in *S v Claasens*[52], that a 'client should be entitled to rely on the legal advice which he has obtained from an attorney or an advocate, unless there are indications that the advice might be unreliable, such as for example, the advice is obviously absurd or where the lawyer who is consulted is clearly out of his depth. The postulate set out in *S v Waglines (Pty) Ltd and Another* 1986 (4) SA 1135 (N) at 1146A-G that lawyers and even Judges differ from one another on the law and that in the legal profession the adage *quot homines tot sententiae* applies so that the client cannot accept as correct all legal advice which he has obtained, goes too far and cannot be accepted. It depends on the specific circumstances of each case whether or not the client should place a question mark over the legal advice he has obtained'.

[197] It has not been shown during cross-examination that the appellants acted unreasonably by heeding such legal advice.

[198] Not one of the appellants had during cross-examination in any way been discredited in respect of their testimonies that they lacked the required *mens rea* to commit the crime of assault.

[199] The fact that the appellants had been aware of the provisions of the Education Act, including s 56, does not detract from the lack of such intention, simply because s

[52] 1992 (2) SACR 434 (T) at 440a-d (concurred by Curlewis AJP).

56 does not criminalise the administration of corporal punishment, or put different, the fact that the appellants may have exposed themselves to administrative action (disciplinary proceedings) by possibly contravening the provisions of s 56, cannot transform into knowledge of criminal conduct.

[200] In respect of the last ground of appeal I may just remark that where the competency of a presiding officer or the fairness of a trial is questioned it is within the right of an aggrieved party to appeal, which is precisely what the appellants had done in this matter. In view of my finding in respect of the lack of knowledge of unlawfulness on the part of the appellants, I need not express any views on the competency of the magistrate or on the fairness of the proceedings.

[201] It is settled law that the State must prove the commission of a crime beyond reasonable doubt and that an accused person has no burden to prove his or her innocence.

[202] In *S v Van Der Meyden*[53] Nugent J stated:

> 'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it.'

[203] The nature of the evidence before the magistrate primarily concerned the state of mind of the respective appellants when inflicting corporal punishment.

[53] 1999 (1) SACR 447 (WLD) at 449j-450(a).

[204] In my view this is one of those rare instances referred to in *Rex v Dhlumayo* (supra) where the court of appeal had to arrive at its own conclusion, unassisted by any finding the court *a quo* may have made, and in view of the misdirections referred to, this court 'must perforce allow the appeal'.

[205] In my view the State failed to prove that the appellants when administering corporal punishment on the learner had the required *mens rea* for the commission of the crime of assault. The State failed to prove beyond reasonable doubt that the appellants acted with the required knowledge of unlawfulness of their conduct. The conviction therefore stands to be set aside.

[206] In the result the followings orders are made:

1. The appeal against conviction and sentence succeeds.

2. The conviction as well as the sentence is set aside.

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E P B Hoff

Judge

N N Shivute

Judge

APPEARANCES

APPELLANTS:	R Heathcote SC (with him B de Jager) Instructed by Van Der Merwe-Greeff Andima Inc., Windhoek
RESPONDENT:	C Moyo Office of the Prosecutor-General, Windhoek