

**REPUBLIC OF NAMIBIA**

NOT REPORTABLE



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

**CR No: 90/2018**

In the matter between:

**THE STATE**

v

**RIVALDO HARASEB**

**ACCUSED**

**(HIGH COURT MD REVIEW CASE NO 1751/2018)**

*Neutral citation: S v Haraseb (CR 90/2018) [2018] NAHCMD 380 (28 November 2018)*

**CORAM: NDAUENDAPO J et LIEBENBERG J**

**DELIVERED: 28 November 2018**

**Flynote:** Criminal procedure – Rights of the accused – Accused unrepresented – Mere explanation of rights insufficient – Court has the duty to assist accused during cross-examination to clarify issues, formulate questions and put across his/her defence – Court drawing adverse inference from accused’s failure to cross-examine complainant on material aspects constitutes serious misdirection.

Criminal procedure – Review – Accused convicted of assault with intent to do grievous bodily harm – Court relied on single evidence of complainant – Accused’s defence of private defence rejected – Evaluation of evidence – Evidence as a whole in a muddle, unclear and confusing – Court selective in accepting evidence of defence witnesses favourable to the State while simultaneously rejecting evidence of witnesses corroborating accused’s evidence – Evidence not to be considered in isolation and independently when assessing credibility of witnesses – State failed to prove accused committed offence beyond reasonable doubt – Court ought to have reached same conclusion – Conviction set aside.

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**ORDER**

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The conviction and sentence are set aside.

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**JUDGMENT**

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LIEBENBERG J: (Concurring NDAUENDAPO J)

[1] This is a review in terms of section 304 of the Criminal Procedure Act emanating from the accused's conviction in the magistrates' court for the district of Karibib on a charge of assault with intent to cause grievous bodily harm. He was thereafter sentenced to three (3) years' imprisonment.

[2] In view of the conclusion reached herein, I declined to first obtain a statement from the presiding magistrate as provided for in s 302(2)(a) of the Criminal Procedure Act 51 of 1977 as, in my opinion, the accused would be prejudiced if the record of the proceedings are not laid before the review court instantly.

[3] At the onset it must be said that the evidence adduced during the trial is not only conflicting in material respects, but incoherent and confusing to the point where it is hard to follow. This was likely brought about by the fact that the witnesses at 02:00 am were on their way home from the club, and evidence presented about the accused and the complainant both having been 'very drunk'.

[4] The accused pleaded not guilty and stated that he did not intend stabbing the complainant. He claimed that he was first stabbed by the complainant and seemed to have raised private defence as a defence.

[5] The State relied on the single evidence of the complainant while the accused testified in his own defence and, in addition, called two witnesses. At the close of the trial the magistrate found in favour of the State.

[6] On the accused's narrative of events leading up to him being stabbed twice with a knife on his upper shoulder, he claims to have been stabbed by the accused

unexpectedly, whilst talking to one of the ladies in their company. He said he thereafter ran about 400 – 500 m to fetch a knife which he then used to stab the complainant. A struggle then ensued between him and one lady who tried to disarm the complainant. She was cut on her hand in the process. The complainant's brother then came to his assistance and whilst talking to him, the accused arrived and started throwing stones at them. The complainant was hit in the mouth with half a brick. He thereafter proceeded to the clinic.

[7] In cross-examination the unrepresented accused only questioned the complainant on his interaction with the lady and without putting questions to him about the stabbing incident or the defence raised by the accused. Though the court explained to the accused his rights, there is nothing on record showing that the magistrate in any way assisted the accused, or that he was reminded of the duty to challenge all evidence that is in conflict with his own.

[8] On the accused's version he was busy talking to his girlfriend (Lucrecia) when the complainant intervened and started an argument with the accused. According to the accused they exchanged blows before the complainant stabbed him once on his upper-arm with a knife. As the complainant was about to turn around, the accused stabbed him twice on the upper-shoulder. Although Lucrecia Harases's (second defence witness) evidence differs in some respects from that of the accused, it corroborates his evidence in respect of the complainant having arrived at the scene with a knife in his hand and that he stabbed the complainant first. The complainant then ran away. She did not testify about the accused having stabbed the complainant as one might have expected of her to have observed, if it happened as the accused said immediately after he got stabbed. They followed the complainant but she fell behind and then accompanied one Benelisa to the clinic. Benelisa is the girl who got injured when she tried to disarm the complainant. Lucrecia however did not testify about an incident between the complainant and Benelisa during which she got injured and, on this score, it also differs from the complainant's evidence.

[9] Natasha Hamases is the third defence witness and on her evidence the complainant came up to where they were and reported that he was stabbed. The next moment the accused came running to the complainant and stabbed him where after he ran off. She later caught up with the accused and asked him why he had done it, to which he responded that he had earlier been stabbed by the complainant for no reason. He also showed her the wound on his upper arm where he was stabbed. This would suggest that the accused was stabbed first. The complainant then turned up where they were and threw one stone at the accused which he dodged. The accused then took the same stone and threw it back at him. It is not clear as to whether this was the time the complainant was hit in the mouth.

[10] It is common cause that both the complainant and the accused got stabbed with a knife by one another. What was in dispute was whether the complainant first stabbed the deceased or whether it happened *vice versa*. Also the circumstances under which the complainant was hit in the face with half a brick thrown at him, allegedly by the accused.

[11] Before considering whether the trial court's assessment of the evidence was proper and in accordance with justice, there is one issue that deserves consideration and that is whether the accused was afforded a fair trial?

[12] It is settled law that it is no longer sufficient for a presiding officer to merely inform the unrepresented accused of his/her rights, but also to assist the accused when he/she experiences difficulty during cross-examination by clarifying the issues, formulating the questions, and putting his/her defence properly to the witnesses. Furthermore, where the accused fails to cross-examine a witness on a material issue, the presiding officer should question the witness in order to reduce the risk of a failure of

justice.<sup>1</sup> In the present instance the magistrate had a duty to assist the unrepresented accused to put his defence to the complainant and to help him formulate questions on issues that were inconsistent with his defence. Failing to do so later on caused some difficulty to the accused in cross-examination when asked to explain why he did not challenge the complainant's evidence on material issues, to which he replied that he was in too much of a hurry (during cross-examination) and did not appreciate what he was required to do. When dealing with a layman, not too much should be read into the accused's failure to put his defence across properly or to cross-examine State witnesses thoroughly.<sup>2</sup>

[13] In light of the foregoing, it is my considered opinion that the magistrate's failure to assist the unrepresented accused constituted a serious misdirection; moreover where the court in the end drew an adverse inference from the accused's failure to put his defence to the complainant during cross-examination. This undoubtedly impacted on the accused's credibility during the court's assessment of the evidence and, ultimately, the verdict. For this reason alone, the conviction should not be permitted to stand as the accused was not afforded a fair trial.

[14] Next I turn to the trial court's assessment of the evidence.

[15] What the court *a quo* was faced with were two mutually destructive versions and a case that comes to mind is *S v Britz*<sup>3</sup>, where the court dealt with mutually destructive evidence. In that case the accused raised an alibi defence while the State witness placed the accused at the scene of the crime. The court stated that following:

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<sup>1</sup> *S v Simxadi* 1997(1) SACR 169 (C).

<sup>2</sup> *S v Mngomezulu* 1983(1) SA 1152 (N) at 1153E-F.

<sup>3</sup> *S v Britz* CC 02/2017 (2017) NAHCMD 326 (16 November 2017) at para 36.

' . . . where a court is presented with mutual destructive versions, it is a rule of practice that the court must have good reason for accepting one version over the other and should consider the merits and demerits of the State and defence case. Furthermore, the evidence presented by the State and the defence must not be considered in isolation as an independent entity when assessing the credibility of the witnesses and the veracity of their versions. The approach the court must follow is to take into account the State's case and determine whether the defence's case does not establish a reasonable hypothesis.'

This much the trial court recognised in its assessment of the evidence adduced and found both versions could not be true, and the one had to be rejected. The accused's explanation was thus rejected.

[16] The court's reasoning as to the accused's defence was that it had to be rejected as his version about the preceding exchange of blows between him and the complainant was not observed by Lucrecia Harases. Also that he had exceeded the bounds of self-defence when he stabbed the complainant at the time he had turned his back on him. In other words, the threat had no longer existed when he stabbed the complainant from behind.

[17] In an attempt to figure out what *probably* happened, the court ventured into the unknown and strung together pieces of evidence which in the end led to the accused's conviction. Whilst in some respects relying on the evidence of the two defence witnesses to point out inconsistencies in the accused's evidence, the court in the process conveniently disregarded evidence favourable to, and corroborative of, the accused's version. Lucrecia's evidence that the complainant approached them whilst already armed with a knife is material and supportive of the accused's defence that he was stabbed first. The testimony of Natasha Hamases was rejected on the basis that her behaviour towards the accused on the night was not consistent with that of the reasonable family member. This witness *inter alia* said she was present when the complainant threw a stone at the complainant but that it did not hit him. Furthermore, on

her version the accused was already injured when he stabbed the complainant; evidence that supports the accused's explanation.

[18] There can be no doubt that the court's attempt to speculate as to what actually happened on the night in question, is because the evidence on both sides is muddled up, unclear and confusing to the extent that it seems impossible to determine with any certainty what had actually happened. That includes the single evidence of the complainant. As mentioned, the court was selective in relying only on certain pieces of evidence from defence witnesses that are favourable to the State, while disregarding material evidence in conflict with the complainant's version. It found that Natasha Hamases corroborated the evidence of the complainant in that the accused threw half a brick at the complainant. However, the court completely ignored the fact that she also testified about the complainant having thrown a stone at the accused while the complainant denied this. Furthermore, the court chose to ignore the fact that the complainant stabbed the accused first, as testified by the accused and Lucrecia Harases.

[19] In the premise it is evident that the court *a quo* selected certain evidence while disregarding material evidence, an approach not in line with the above cited case which states that all the evidence should be considered as a whole and not to be viewed in isolation.

[20] Despite the testimonies of the witnesses being in a muddle, the court *a quo* accepted the version of the State as being true and correct and found that the accused first stabbed the complainant twice with a knife, and thereafter proceeded to throw half a brick at him, hitting him in the face. The complainant furthermore gave single evidence and although the court was entitled to convict on the evidence of a single witness, it ought to have warned itself of the inherent dangers of relying on the single uncorroborated evidence of the complainant. It should further be mentioned that the



single evidence of the complainant was not corroborated in material respects by any of the witnesses that testified. Add thereto the undisputed evidence about the complainant and the accused both having been very drunk.

[21] For the foregoing reasons, I have come to the conclusion that the State failed to prove beyond a reasonable doubt that the accused was guilty of the offence of assault with intent to cause grievous bodily harm, and that the trial court ought to have come to the same conclusion, had it followed the correct approach in its evaluation of the evidence.

[22] In the result, the conviction and sentence are set aside.

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J C LIEBENBERG

JUDGE

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G N NDAUENDAPO

JUDGE