REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CRI-APP-CAL-2022/00006

In the matter between

GERHARD CLOETE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Cloete v S* (HC-MD-CRI-APP-CAL-2022/00006) [2022] NAHCMD 318 (27 June 2022)

Coram: Usiku J *et* Claasen J
Heard: **06 June 2022**
Delivered: **27 June 2022**

Flynote: Criminal procedure – Appeal against conviction – Obstructing or resisting a member of police in execution of duty – Failure to put critical aspects of defence version to state witnesses in cross-examination. Appeal dismissed.

Summary: The appellant was convicted of contravening section 35(2)(*a*) of the Police Act 19 of 1990. He was sentenced to pay a fine of N$1 000 or three months' imprisonment. He paid the fine and appealed against both conviction and sentence.

Members of the police were investigating a case of hunting of protected game species and had arrested relatives of the accused. The police had gone to the family farm to search certain vehicles reasonably suspected to have been used in the commission of the offense. The state's version is that during that exercise the accused obstructed the police in their duty and insisted that it's an unlawful search as there was no search warrant and that the owner of the vehicles consented to the search. The defence version was that there was no consent and that one of the officers was the aggressor. He alleged that he pulled the appellant on his jacket. This which was not put to the state witnesses during cross-examination and it only surfaced during the defence case.

Held – A police official may conduct a search without a search warrant in certain specified circumstances as prescribed in s 22 of the Criminal Procedure Act 51 of 1977 namely if there is consent to the search or the police on reasonable grounds believes that a search warrant will be issued and that a delay in obtaining such warrant would defeat the object of the search.

Held further – The issue of consent by the owner was not disputed by the appellant during cross-examination. The defence' version that it was in fact the police official who was the aggressor when he pulled the appellant on his jacket was not put to the state witnesses during cross-examination.

Held furthermore – That the position on cross-examination as set out by Hoffmann and Zeffert endorsed that if a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts which he intends to prove in contradiction, so as to give the witness an opportunity for an explanation. Similarly, if the court is asked to disbelieve a witness, he should be cross-examined on the matters which will make his evidence unworthy of credit.

ORDER

1. The appeal is dismissed.
2. The matter is regarded finalised and removed from the roll.

APPEAL JUDGMENT

D Usiku J (Claasen J concurring)

[1] The appellant was charged in the Magistrate's Court of Windhoek, sitting at Dordabis, for the offence of resisting and obstructing a police officer in contravention of s 35(2)(*a*) of the Police Act 19 of 1990. After trial he was convicted and sentenced to pay a fine of N$1 000 or three months' imprisonment. He paid the fine. The appellant thereafter lodged an appeal against his conviction and sentence.

[2] The appellant appeared in person and the respondent was represented by Mr Nyau. The respondent initially had raised a point *in limine,* however he later abandoned it. The parties proceeded to argue the appeal.

Grounds of appeal

[3] The appellant raised four grounds of appeal in his Notice of Appeal. These grounds were formulated in a longwinded manner. As such, the court requested him to

simplify each of the grounds, and he complied. The first ground of appeal centred around the legality of the search, (a) as there was no search warrant. In the second ground the appellant contends that (b) there was no consent by the owner of the vehicles (his brother) for the police to search the vehicles. The third ground of appeal postulates that (c) the court erred in finding that he resisted or obstructed the police. According to him, he did nothing of the sort. The fourth ground of appeal was a conclusion drawn by the drafter, and the appellant abandoned it. We return to grounds one to three.

Arguments on the merits

[4] The first ground of appeal contends that it was an unlawful search operation because the police were not in possession of a search warrant. The second ground is concerned with the absence of the owner's consent to search the vehicles. These issues are related and will be dealt with together.

[5] Mr Cloete argued that at the time of the search there was no search warrant. According to him the second state witness searched the Chevrolet and found nothing suspicious. He contended that the search was done when the owner was not even present. He further argued that the owner never gave consent as 'Stinkwater' is not public property but private property that belongs to the Cloetes. He further argued that there was no need for the search to be conducted because there was no reasonable suspicion that a crime had been committed. He also had an additional argument on ground two namely that the respondent failed to call the witness Simon Cloete (the owner of the vehicles) and that he as the appellant did not have an opportunity to cross-examine this witness.

[6] Counsel for the respondent on the other hand argued that searches without warrants are regulated by s 22 of the Criminal Procedure Act 51 of 1977 (the CPA). Police officers are allowed to do searches in the absence of a search warrant, for example where there might be a delay in obtaining a search warrant, and where there is

a fear that the evidence might be destroyed. The respondent submitted that there would have been a delay in obtaining a search warrant as there is no Magistrate's Court in 'Stinkwater' (which is about 90 km outside of Windhoek), and that if they were to obtain a warrant, they feared that the evidence could have been destroyed. In response to the complaint that the appellant was unable to cross-examine Simon Cloete, counsel for the respondent argued that the appellant called Mr Simon Cloete as his witness, as such the state did not find it necessary to call him as a state witness.

[7] It is common cause that indeed there was no search warrant at the time. Sergeant Kawoko testified that they were investigating a case of hunting of protected species, docket no. CR 11/06/2020 relating to an 'Eland' carcass that was found. The police had information that two vehicles (a Chevrolet and a Toyota Double Cab D4D) were found in the field, these vehicles were the property of Mr Simon Cloete. It was for that purpose that they visited 'Stinkwater' on 19 June 2020. Officer Kawoko testified that Mr Simon Cloete was informed that which vehicles might have been used in the commission of the offense. Thereafter the officer requested permission to search the vehicles. Officer Kawoko gave evidence that: 'Mr Cloete said its fine we can search the cars'.[1] The appellant arrived and retorted that the cars cannot be searched without a warrant. It was then that the drama unfolded that led to the appellant being arrested in this matter.

[8] Officer Kawoko's reason as to why the police had no search warrant at the material time indicated as follows:

'Because of the distance, I could not come to Windhoek and the evidence I needed it might have been destroyed if I came to Windhoek.'[2]

[9] In respect of the consent issue, Officer Gregor Limon and state witness Barend Beukes, a farmer who was working at a commercial company in Gobabis corroborated the evidence by Sergeant Kawoko on that point, that indeed Mr Simon Cloete gave his

[1] Page 11 of NAMCIS record.
[2] Page 12 of NAMCIS record.

consent for them to search the vehicles. Furthermore, the issue of consent was not disputed by the accused or his counsel when they cross-examined the state witnesses. That is categorically clear from the court record as well as the reasons for judgment by the magistrate. The aspect of lack of permission was only belatedly introduced during the defense' case.

[10] The importance of proper cross-examination on the material issues cannot be underestimated, and much of this matter turns on that. This court endorses the position as set out in In *S v Luis,*[3] where it was stated that:

'In *S v Lukas* (*supra*) this Court (per Gibson J, with Mtambanengwe J concurring) quoted the following passage from Hoffman and Zeffert, *The South African Law of Evidence* 4 ed at 461: "If a party wishes to lead evidence to contradict an opposing witness, he should first cross-examine him upon the facts which he intends to prove in contradiction, so as to give the witness an opportunity for explanation. Similarly, if the court is to be asked to disbelieve a witness, he should be cross-examined upon the matters which will be alleged make his evidence unworthy of credit." '

[11] Turning to the argument by the appellant that it was an unlawful search as there was no warrant, s 22 of the CPA finds application and reads as follows:

'A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20 -
(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
(b) if he on reasonable grounds believes -
(i) that a search warrant will be issued to him under paragraph (a) of section 21 (1) if he applies for such warrant; and
(ii) that the delay in obtaining such warrant would defeat the object of the search.'

[3] *S v Luis* 2005 NR 527 (HC) 531 – 532.

[12] Incidentally, the court asked the appellant if he was aware of any situations wherein it is not necessary to obtain a search warrant. He referred the court to the same provision. It essentially amounts to a concession that indeed there are instances where a search can be conducted without a search warrant, albeit in retrospect.

[13] The stance by the state clearly was that the owner consented to the search. That was not disputed when that evidence was led by three different state witnesses on this aspect. It was what the magistrate relied on. Even if there was no consent, a police officer in any event qualifies under s 22(*b*) of the CPA to conduct a search as Officer Kawoko described a situation wherein subsection (*b*) would apply where a police officer believes that he will obtain a search warrant should he apply for one but there will be a delay in obtaining same. On that basis the appeal stands to fail in respect of both grounds.

[14] Before moving away from ground two, there was an argument by the appellant that he could not cross-examine Mr Simon Cloete. Mr Simon Cloete was called by the appellant as a defence witness and thus the appellant could not have cross-examined his own witness, unless he was a hostile witness which was not the case herein. This argument by the appellant is a misguided notion and does nothing to strengthen the appellant's case.

[15] The third ground of appeal raised by the appellant was that the magistrate erred in fact when she found that there was resistance or obstruction on the part of the appellant. The appellant argued that he did not in any form resist or prevent the police from conducting a search of the vehicle. He also argued that he never touched the police officer.

[16] It was the respondent's contention that the line of questioning of the appellant in the court a quo showed that there was obstruction. Indeed, the record of proceedings bears evidence that there was physical resistance by the appellant. The respondent argued that there was no dispute that some form of physical contact between the

appellant and Officer Kawoko occurred. The respondent stated that the state witnesses corroborated each other, in that the appellant pulled and grabbed Sergeant Kawoko and was rude and unruly.

[17] In that regard Sergeant Kawoko's evidence was that:

> 'The accused was standing in front of me blocking me then I decided that I am going to the car as we got permission from the owner but he pulled me on the left arm and said I will not search the car'.[4]

Throughout the trial and during examination in chief, Sergeant Kawoko maintained that the appellant obstructed or resisted as he conducted the search as well as grabbed and pulled him. That evidence was corroborated by the state witnesses.

[18] The defence witnesses had divergent versions as to the physical scuffle that forms the subject matter of the case. Their version was that it was in fact police officer Kawoko who grabbed the appellant first. Mr Simon Cloete testified that the appellant was telling Officer Kawoko that he cannot arrest minor children without their parents. In response to that Officer Kawoko grabbed the appellant on the jacket and told him that he was under arrest. When asked what the appellant had done, he responded: 'He let go of Kauko and said I will do it myself.'[5] Defence witness Mr Lionel Cloete confirmed the material part that Sergeant Kauko called the appellant to the side and that was done by holding the accused on the jacket.[6] Another defence witness Ms Biolora Cloete testified that it was Sergeant Kawoko who had grabbed the appellant. The appellant attested to the same fact of Sergeant Kawoko having grabbed him by the jacket and the chest and told him he is going to arrest him.[7]

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[4] Page 11 of NAMCIS record.
[5] Page 89-90 of the transcribed record.
[6] Page 114 of the transcribed record.
[7] Page 161 of the transcribed record.

[19] As regards to the type of actions that are punishable under this offense in *Criminal Law*[8] it is stated that:

'A variety of acts are made punishable by this subsection, namely resisting the police, hindering or obstructing them, and interfering with them. The words "hinders" or "obstructs" would obviously include cases in which there is physical contact between X and a police official, but it is incorrect to limit the meaning of these terms to such cases. These words may also refer to cases in which, although X had not physically acted against the police, his behaviour makes it more difficult for the police to carry out their duties. Whether X's act amounts to hindering or obstruction depends upon the circumstances of each particular case.'

[20] Finally, the fact that Officer Kawoko was the attacker who physically grabbed the appellant by his jacket and violated him never surfaced during the state's case and in cross-examination. Surely that was a material part of the defence. None of the police officials or Mr Beukes were confronted with that information. It was an afterthought. On that basis, the magistrate accepted the state's evidence on this aspect as it was proven that the appellant interfered and hindered the police in the execution of their duties and functions when he pulled the police officer and acted unruly towards the officer and rejected the defence's version.[9]

[21] In these premises, we find that the magistrate did not err in law or fact when she convicted and sentenced the appellant.

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

1. The appeal is dismissed.
2. The matter is regarded finalised and removed from the roll.

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[8] C R Snyman *Criminal Law* 5 ed at 351.
[9] See *S v Luis* (supra).

D N USIKU
Judge

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C M CLAASEN
Judge

APPEARANCES

APPELLANT:	Mr G Cloete In person, Windhoek
RESPONDENT:	Mr F Nyau Office of the Prosecutor-General, Windhoek