REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

REVIEW JUDGMENT

PRACTICE DIRECTIVE 61

Case Title: The State v Simon Gaibeb	**Case No:** **CR 28/2023**
High Court MD Review No:15/2023	**Division of Court:** High Court, Main Division
Coram: Liebenberg J *et* Claasen J	**Delivered:** 16 March 2023
Neutral citation: *S v Gaibeb* (CR 28/2023) [2023] NAHCMD 120 (16 March 2023)	
ORDER: 1. The conviction and sentence on count 1 are set aside. 2. The conviction and sentence on count 2 are confirmed.	
REASONS FOR ORDERS:	

LIEBENBERG J (CLAASEN J concurring):

[1] The matter comes before this court on review from the Magistrate's Court for the district of Maltahöhe. The unrepresented accused pleaded not guilty on two counts being: Count 1: Arson; and count 2: Assault (common), both counts read with the provisions of the Combating of Domestic Violence Act 4 of 2003. After the court heard evidence the accused was convicted as charged and sentenced to three (3) years' imprisonment on count 1 and six (6) months' imprisonment on count 2. The accused is currently serving his sentence.

[2] This is an instance where I deem it necessary to invoke the powers vested in me by virtue of the *proviso* under section 304(2)*(a)* of the Criminal Procedure Act 51 of 1977 (the CPA) which allows a judge to dispense with a statement from the judicial officer who presided at the trial in circumstances where it is obvious that the conviction is clearly not in accordance with justice and that the person convicted will be prejudiced if the record of the proceedings is not forthwith placed before this court for consideration.

[3] Before discussing the merits of the case, it seems necessary to make some general observations regarding the record sent on review. Firstly, the charge annexures in respect of both counts bear the name of a different person than that of the accused tried in this matter. Whereas the name of the complainant is correctly stated in the particulars of the charge, it would appear that the heading of the charge annexure was copied from another matter and not changed to reflect the correct name. When looking at the case register number I am satisfied that the accused in this matter pleaded to the charges and not a certain Heinrich Richter whose name is reflected on the charge annexures. Secondly, on 15 May 2020 the accused was required to plead to the charges

and pleas of not guilty were entered on both counts. The accused thereafter applied for legal aid which prompted several postponements until 12 December 2022 (more than two years later) when the accused abandoned the application and opted to conduct his defence in person. For some inexplicable reason the accused was required to plead on

the same charges for a second time and again pleaded not guilty. Despite the latter proceedings being irregular, I am satisfied that on both occasions the pleas were taken by the same presiding magistrate and that the accused was not prejudiced by the irregular proceedings.

[4] In his plea explanation, the accused disclosed the basis of his defence and said that at the time when the complainant's house caught fire, both he and the complainant were at her brother's house, situated some distance away. He explained that upon hearing that their house was ablaze, they ran there together and he even assisted to extinguish the flames. He therefore, disputes having set the house alight. On the charge of assault, he also disputes having assaulted the complainant.

[5] It is common cause that the accused and the complainant were in a romantic relationship from which one child was born. The couple and three of the complainant's children resided at the complainant's house situated in Blikkiesdorp location, Maltahöhe.

[6] The state's case is entirely based on the testimony of the complainant, Rebekka Hanse, aged 40 years. She testified that on 8 February 2020 she was at her brother's house enjoying herself and consuming alcohol, when the accused arrived at around 21h30 and enquired why she was there and with whom she was drinking. He then hit her with clenched fists in the head twice and, before leaving, said 'Now you will see what will happen'. At 22h15 someone came running to the complainant and reported that her house was on fire. She rushed there and found the whole house ablaze. She saw the accused there as well and he appeared to be distressed. The complainant lost everything inside her house to the fire.

[7] In cross-examination the complainant disputed that the accused was still with her at her brother Ulrich's house when they received the report about the house being on fire; also that the accused ran out in front, only to find their house entirely engulfed in flames. When put to the complainant that, if it was him who had set the house alight, he would

first have removed certain properties like his personal documents, she commented that she knows it was him, although she did not see him do it. She said she believed it was the accused because of what he said after he assaulted her. That summarises the evidence for the state.

[8] The court at this stage of the proceedings considered whether the evidence adduced is sufficient to place the accused on his defence. Despite acknowledging that there was no direct evidence implicating the accused on the charge of arson, the court in particular linked the assault and 'threat' made by the accused (as testified by the complainant) and found same to be sufficiently compelling to place the accused on his defence.

[9] It is evident from the court a quo's reasoning that the conclusion to put the accused on his defence, is solely based on the perceived threat after the assault perpetrated on the complainant. In the absence of any direct evidence as to how the fire started or by whom, the incriminating allegation by the complainant against the accused appears to have been based on the complainant's suspicion. The provisions of s 174 of the CPA states:

'If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which may be convicted on the charge, it may return a verdict of not guilty.'

[10] The guiding principles regarding s 174 are set out and discussed in *S v Teek*[1] and *S v Nakale and others*[2] and need not be rehashed. Suffice to say that 'no evidence'

[1] *S v Teek* 2009 (1) NR 127 SC. Herein the court stated that the word no evidence means no evidence upon which a reasonable court acting carefully may convict.

means no evidence upon which a reasonable court, acting carefully, may convict. The question is whether, regard being had to the credibility of the witnesses, there is evidence upon which a reasonable court may convict?

[11] When applying these principles to the present matter where no evidence has been adduced, albeit directly or circumstantial, except for the suspicion entertained by the complainant implicating the accused as the culprit, it appears to me that the state failed to cross the threshold of adducing evidence upon which a reasonable court may convict. The 'threat' testified about by the complainant may in the circumstances raise suspicion, but, in my view, falls significantly short of establishing evidence on which a court, in the absence of any other factual evidence, may reasonably convict. It should be borne in mind that, at this stage of the trial the credibility of a witness is not considered (except where of such poor quality that it cannot be ignored) and neither may the court draw inferences from the evidence presented; this should only be done at the end after evidence on both sides has been heard.

[12] It is my considered view that, as far as it concerns the charge of arson set out in count 1, the court a quo ought to have discharged the accused instead of placing him on his defence on this count. Failing to do so constituted a serious misdirection, vitiating the outcome of the proceedings in that regard.

[13] If this court is wrong in coming to this conclusion – which I believe is not the case – then the question arises whether the state has proved the accused's guilt on count 1 above reasonable doubt? Although the accused elected to remain silent and without leading any evidence in his defence, the applicable threshold in the assessment of evidence is higher, namely, proof beyond reasonable doubt. The fact that the accused elected to remain silent in the face of evidence of an assault perpetrated on the complainant, who is also the owner of the house that burnt down, is a factor the court was entitled to take into account when assessing the evidence.

[2] *S v Nakale and others* 2006 (2) NR 455 HC.

[14] From a reading of the judgment, it is apparent that the court did take cognizance of the fact that the evidence before it was merely circumstantial and appreciated the fact that no one saw the accused setting the complainant's house alight. The court, however, placed reliance solely on the utterance by the accused to the complainant and found that, owing to the domestic relationship between them, much weight had to be placed on the utterances. This conclusion was reached by way of inferential reasoning where the court looked at the established facts from which it inferred that the accused was the perpetrator.

[15] Though the drawing of inferences from circumstantial evidence is a recognised principle of our law, it is well-settled that there are 'two rules of logic' which must be satisfied and these are, as set out in *R v Blom*[3] at 202 - 203:

'(1) The inference sought to be drawn must be consistent with all the proved facts. If it is notthen the inference cannot be drawn.
(2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.'

[16] In *S v Mtsweni*[4] at 593E-G Smallberger AJA referred with approval to the remarks of Lord Wright in *Coswell v Powell Duffryn Associated Collieries Ltd*[5] where it is stated:

'Inference must be carefully distinguished from conjecture or speculation. <u>There can be no inference unless there are objective facts from which to infer the other facts</u>, which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture …' (Emphasis provided)

[3] *R v Blom* 1939 AD 188.
[4] *S v Mtsweni* 1985 (1) SA 590 (A).
[5] *Coswell v Powell Duffryn Associated Collieries Ltd* [1939] All ER 722 on 733.

[17] Where the court, as in the present matter, is required to draw inferences from circumstantial evidence and, after following the rules laid out in *R v Blom* (supra), absolute certainty is not required. Every component in the body of evidence need not be considered separately or individually to determine what weight it should be accorded. But, the cumulative effect thereof counts to decide whether the accused's guilt has been established beyond a reasonable doubt.

[18] When applying these principles to the present circumstances where the only established facts are that the accused made a perceived threat (without stating what that entails) to the complainant whose house shortly thereafter was ablaze, I have difficulties in coming to the same conclusion that the only reasonable inference to draw therefrom is that it was the accused who set the house alight. As mentioned, the cause of the fire remains unknown and there is no evidence placing the accused in the vicinity of the house. Neither does the accused's utterance suggests that he planned on burning down the complainant's house. In these circumstances there are simply no objective facts from which to infer the other facts sought to be drawn. To do so, in my view, would amount to speculation.

[19] It is for the reasons stated above that I am convinced that the state did not prove the offence of arson against the accused and that the conviction falls to be set aside. In fact, the accused should have been discharged in terms of s 174 of the CPA on count 1 and not have been placed on his defence.

[20] However, with regards to count 2 where the accused is charged with assault, the evidence of the complainant established prima facie evidence which justified the court a quo's decision to place the accused on his defence.

[21] Despite having disputed the complainant's evidence pertaining to an assault perpetrated on her, the accused did not lead evidence to the contrary. There is nothing on record showing that the complainant was not a credible witness when she testified about the assault, hence there is no reason to doubt the credibility of the complainant. To

this end, the guilt of the accused on assault, as set out in count 2, has been proved beyond reasonable doubt and his conviction is accordingly in accordance with justice.

[22] The sentence of six (6) months' imprisonment on count 2 was most probably found appropriate in light of the sentence imposed on count 1. Whereas the latter sentence will now fall away and the accused having already served half of the sentence imposed on count 2, it would in the circumstances not be in the interest of justice to interfere with the sentence on review.

[23] In the result, it is ordered:

1. The conviction and sentence on count 1 are set aside.
2. The conviction and sentence on count 2 are confirmed.

J C LIEBENBERG **JUDGE**	**C CLAASEN** **JUDGE**