

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI  
JUDGMENT

Case no: CA 19/2015

In the matter between:

**THE STATE**

**APPELLANT**

and

**LINEA SIMON**

**RESPONDENT**

**Neutral citation:** *S v Simon* (CA19/2015) [2017] NAHCNLD 18 (3 March 2017)

**Coram:** TOMMASI J and JANUARY J

**Heard:** 26 November 2016

**Delivered:** 03 March 2017

**Flynote:** Criminal Procedure — Discharge of accused at close of State case — In terms of s 174 of Criminal Procedure Act 51 of 1977 — Prosecution has the burden of negating defences such as self-defence when raised in plea explanation in terms of section 115 — Role of credibility of state witnesses

**Summary:** The State appealed against the magistrate's discharge of the respondent in terms of section 174 of the Criminal Procedure Act, 1977 (Act 51 of 1977). The respondent raised self-defence in her plea explanation in terms of section 115. The State adduced evidence that the respondent was a member of a committee who was responsible to oversee the payment of water at a communal tap and that she was lawfully entitled to stop people from drawing water particularly those who failed to pay their accounts. A state witness testified that the complainant was stopped from drawing water and she took it by force. The complainant denied that she had not paid her water bill or that the issue was raised with her. According to her she was beaten and bitten for no reason and whilst being held by the respondent's son. That court held that the state indeed led evidence to support the version by the respondent rather than negating it; and that while the criticism of the magistrate's formulation of her reasons for the ruling is justified, this court arrives at the same conclusion i.e that the State failed to adduce evidence upon which a reasonable court, acting carefully may convict.

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### **ORDER**

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The appeal is dismissed.

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### **JUDGMENT**

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TOMMASI J (JANUARY J concurring):

[1] This is an appeal by the State. The respondent appeared in the district court on a charge of assault with the intent to do grievous bodily harm. The respondent pleaded not guilty and raised a defence of self-defence. The learned magistrate discharged the respondent in terms of section 174 of the Criminal Procedure Act, 51 of 1977. The State's appeal lies against discharge.

[2] It is now established law that a court on appeal may interfere with an order discharging an accused in terms of section 174 of the Act, if the court a quo acted *mala fide* or did not apply its mind. (See *S v Teek* 2009 (1) NR 127 (SC). The State's ground intimate that the learned magistrate failed to apply her mind.

[3] The respondent in her plea explanation in terms of section 115 stated that; the complainant wanted to draw water from a community tap but she was prohibited to do so as she did not pay her contribution; the complainant first strangled the respondent and left with her water container; the complainant returned for a second time and attacked the respondent who then defended herself.

[4] The State called two witnesses namely the complainant, a 44 year old female and another 54 year old female who was present when the incident occurred. It was common cause that: the respondent was responsible to monitor payments for water usage from a communal tap; She was lawfully empowered to stop those who had not paid to draw water; that she was present at the tap in her official capacity; there were other persons present at the tap when the incident occurred; the complainant drew water from the tap against the expressed alternatively tacit wishes of the respondent; that she left with the water and later returned; and that the complainant sustained two open deep wounds on both legs where the respondent had bitten her.

[5] It appears from the evidence that the communal tap was encamped with a fence. According to the complainant the respondent was sitting outside the fence when she arrived. The respondent took her water container from her and put it outside the fence without saying anything. The container was returned to her by someone else but the respondent once again took it from her. They wrestled for it. The respondent managed to get hold of it and she once again placed it outside the fence again. The complainant retrieved it once more and she collected water from the tap. The complainant left after she had filled her container with water.

[6] The complainant further testified that she returned to the tap only to ask the respondent why she had assaulted/bitten her. The complainant described how her hands were held by the respondent's son and how she was beaten with fists on the hip, bitten on the left arm and on both thighs. During her evidence in main the complainant gave the distinct impression that there was only one incident of assault.

[7] During cross-examination however it came to light that the complainant was assaulted twice; once at the water tap and the second time when she returned. During the first assault she was held by respondent's son whilst the respondent beat her with her fist on her mouth. The second assault took place outside the fence and she was once again held again by the son of the respondent and bitten.

[8] During cross-examination the complainant described how her hands were held behind her body; she was standing; the respondent was seated; and the respondent bit her on her thighs. She did nothing as she was being held. It is not clear from the record how the complainant sustained the bite wound on her left arm.

[9] The 2<sup>nd</sup> State witness testified that the respondent blocked the complainant because she did not pay her water bill just like all others who failed to pay. The respondent took the complainant's container but the complainant took water 'by force.' She does not explain the nature of the force which the complainant applied. Having forcefully obtained water she took it to a nearby *cuca* shop and returned.

[10] It is at this point when her testimony becomes confusing. She testified that: the complainant came back inside the fence, the respondent took her container, assaulted and bit her; the respondent's children held the complainant's hand while the respondent hit and bit the complainant. At the same time she said she was standing outside the fence at a car and could not overhear what was said. She however heard the respondent saying to the complainant 'you will not collect water here you do not pay.'(sic)

[11] During cross-examination she testified that the complainant forcefully took water after the assault occurred and that she observed only one fight. She also admitted that she forgot things and that she was drinking 'tombo' that day when she was unable to explain why she contradicted herself by testifying that the complainant first dropped the container filled with water and returned and later testifying that the complainant took the container filled with water after the fight and that she did not return.

[12] The learned magistrate gave the following reasons for her ruling to discharge the respondent:

'There is no prima face case made out against the accused. The complainant is not a credible witnesses (sic) she contradicted herself.

The second state witness contradicted herself or she did not see all what happened at the scene or because she was drunk. It is trite law that an accused person cannot be expected to strengthen the state case. He who alleges ought to prove the allegation'. (sic)

[13] The appellant's grounds of appeal are that the magistrate misdirected herself alternatively erred in law/or facts by:

1. 'failing to apply the correct tests at the close of the state's case namely, is there evidence upon which a reasonable man acting carefully may convict, in her assessment and evaluation of the evidence before her.
2. placing too much emphasis on the credibility of the state witnesses, whilst credibility of state witnesses at the stage of determining the application in terms of section 174 of the Act , credibility plays little or no role at all;
3. Attaching no weight and/or insufficient weight to the evidence of Elise Matheus (complainant) in light of the evidence of the other eye witness such as Selma Damel as well as the J88 medical report.
4. failing to apply a well-established principle of law that an assault of a human being is an action which is prima facie unlawful, to the extent that once it becomes common cause that the accused (respondent) has assaulted the victim in self-defence, an evidentiary burden is place on the accused to rebut the prima facie presumption of unlawfulness. '

[14] In *S v Nakale & others 2006 (2) NR 455 (HC)* at page 466, Muller J remarked that there cannot be a single and all-inclusive formulation in respect of the discharge of an accused in terms of s 174, but it suggested certain guidelines. In *S v Teek 2009 (1) NR 127 (SC)* these guidelines were approved and the court furthermore stated the following in respect of the role credibility plays when considering a discharge in terms of section 174 of the act:

‘Somewhat more controversial is the question whether credibility of the State witnesses has any role to play when a discharge is sought under the section. But the generally accepted view, both in Namibia and in South Africa, appears to be that, although credibility is a factor that can be considered at this stage, it plays a very limited role. If there is evidence supporting a charge, an application for discharge can only be sustained if that evidence is of such poor quality that it cannot, in the opinion of the trial court, be accepted by any reasonable court (see eg *S v Mpetha and Others 1983 (4) SA 262 (C)* at 265; *S v Nakale supra* at 458). Put differently, the question remains: is there, having regard to the credibility of the witnesses, evidence upon which a reasonable court may convict?’

[15] The magistrate in her additional reasons makes further reference to the defence raised by the respondent in her plea explanation. In *S v Shivute 1991 NR 123 (HC) (1991 (1) SACR 656)* the court held that exculpatory statements in such explanations of plea must, as a general rule, be repeated by the accused under oath in the witness-stand for them to have any value in favour of the accused. One possible exception to the general rule is that when a defence is raised in the exculpatory part of an explanation of plea, it may be necessary for the State to negate that defence to the extent of a prima facie case. In *S v Ananias 2014 (3) NR 665 (HC)* the court held that exculpatory statements in explanation of plea in terms of s 115 did not form part of the evidential material before the magistrate and he was accordingly not entitled to treat them as evidential material carrying a great deal of weight unless he found that the state had not placed sufficient evidence before the court capable of negating the defence of self-defence.

[16] The above paragraphs sufficiently answers the last ground of appeal i.e that the learned magistrate failed to apply a well-established principle of law that an assault of a human being is an action which is prima facie unlawful, to the extent that once it becomes common cause that the accused

(respondent) assaulted the victim in self-defence, an evidentiary burden is placed on the accused to rebut the prima facie presumption of unlawfulness. This “principle” was discussed at length in *S v Ryno van Zyl*, an unreported judgment<sup>1</sup> by Mainga J, as he then was. The court made the clear distinction between the case cited<sup>2</sup> and the case at hand by stating the following:

‘What is clear from the judgment above is that in that matter accused did not offer a plea explanation in terms of s115, the State did not have a version at all of how the killing occurred save that the killing had occurred and that the prosecution has the burden of negating defences such as self-defence.’

In this case too, the respondent raised a plea of self-defence and the State had to muster a prima facie case negating the defence so raised.

[17] It appears that the magistrate considered the plea explanation as part of the evidential material. The learned magistrate, at this stage, could not have had regard to the exculpatory remarks in the section 115 plea of the respondent and it is clear that the learned magistrate misdirected herself in this regard.

[18] Can it however be said that the learned magistrate overemphasised the credibility of the witnesses? In order for a court to arrive at a decision whether or not the state adduced evidence upon which a reasonable court, may convict, it must have regard to the cogency of the evidence adduced.<sup>3</sup> In *S v Le Roux* 2000 NR 209 (HC) the court considered issues of credibility. In that case the court concluded that the complainant completely destroyed her own credibility.

[19] The state’s evidence was that the complainant was assaulted and bitten. This was common cause. In view of the defence raised by the respondent, the State was required to adduce prima facie evidence which showed that there was no unlawful attack on the respondent. The state adduced evidence to the effect that the respondent acted lawfully when she stopped the complainant from drawing water. The 2<sup>nd</sup> State witness contradicted the complainant’s version that she was assaulted merely for drawing water. She testified that the respondent was within her rights to

<sup>1</sup> CC37/2008 Delivered on 22 January 2010

<sup>2</sup> *S v Manona*, 2001 (1) SACR 426 TDK p427F

<sup>3</sup> *S v Mpetha and Others*, supra at page 265 “Before credibility can play a role at all it is a very high degree of untrustworthiness that has to be shown”

refuse persons access to the communal tap and that the complainant took water “by force”. This evidence supports rather than negitivate the defence raised by the respondent in her plea explanation.

[20] The State prosecutor did not argue that the 2<sup>nd</sup> witness was a poor witness but merely addressed the court on the strength of the evidence of the complainant. This makes the complainant a single witness despite the many persons who were present at the scene. The complainant however could not give a cogent account of what had happened. Her evidence in chief is completely different from her evidence under cross-examination. The evidence of the both witnesses reached the requisite degree of untrustworthiness that the learned magistrate was justified to take their credibility into consideration at the end of the state’s case. Furthermore it is indeed evident form the respondent’s plea explanation and the cross-examination of the state’s witnesses that there was no reason for the learned magistrate to believe that the defence evidence might supplement the State's case.

[21] I do believe that the appellant’s criticism of the magistrate’s formulation of the reasons for the ruling in terms of s 174 is justified. This court however arrives at the same conclusion i.e that the State failed to adduce evidence upon which a reasonable court, acting carefully, may convict.

[22] In the result the following order is made:  
The appeal is dismissed.

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M A TOMMASI  
JUDGE

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HC JANUARY  
JUDGE

APPEARANCES

For The Appellant:

Mr Gaweseb  
Of the Prosecutor General –Oshakati

For The Respondent:

Mr Greyling  
Of Jan Greyling & Associates