REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-SNA-2022/00003

In the matter between

THE STATE **APPELLANT**

v

MARIA AMUPOLO **RESPONDENT**

Neutral citation: *S v Amupolo* (HC-NLD-CRI-APP-SNA-2022/00003) [2022] NAHCNLD 70 (8 July 2022)

Coram: Munsu AJ *et* Kesslau AJ
Heard: 5 April 2022
Delivered: 8 July 2022

Flynote: Criminal Law- Appeal – Section 174 discharge- test at the close of the state case- Assault- *crimen injuria*- credibility of witnesses – requirements for self-defence – credible evidence- prima facie case.

Summary: The respondent was discharged in terms of Section 174 of the Criminal Procedure Act 51 of 1977 (the CPA) on one count of *crimen injuria* and two counts of contravening Section 35(1) of the Police Act 19 of 1990: Assault on a member of the

police. The charges emanated from an incident that transpired at a Police roadblock. The allegations *inter alia* were that the respondent directed verbal insults to the complainant and/or their mothers and assaulted two police officers by pushing, slapping and throwing with sand. After evidence implicating respondent and relevant to the above charges was led and after the state had closed their case, the court found the respondent not guilty and discharged her in terms of the above mentioned section.

Held; that contradictions in evidence should not be seen in isolation.

Held further; that the plea explanation by the respondent was not repeated under oath and thus had no evidential value.

Held further; that the requirements for private defence to succeed were not presented and tested in court.

Held further; that the state had made out a prima facie case against the respondent.

APPEAL JUDGMENT

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1. The appeal succeeds.
2. The discharge of the respondent, in terms of section 174 of the Criminal Procedure Act 51 of 1977, by the court *a quo* is set aside.
3. The matter is referred back to the Oshakati Magistrates' court to proceed with the defence case alternatively, if the Magistrate is no longer available, to start *de novo*.

JUDGMENT

KESSLAU AJ (MUNSU AJ concurring):

Introduction

[1] The respondent was discharged in terms of Section 174 of the Criminal Procedure Act 51 of 1977 (the CPA) in the Oshakati Magistrates' Court on one count of *crimen injuria* and two counts of contravening Section 35(1) of the Police Act 19 of 1990: Assault on a member of the police.

[2] The charges emanated from an incident that transpired on 6 February 2019 at the Oshiko Police roadblock. The allegations *inter alia* were that the respondent directed verbal insults to the complainant Kambundu Shivute *to wit* 'your mother is stupid, your mother's vagina and anus'. Furthermore that the respondent assaulted two police officers by firstly pushing and slapping Officer Shivute and thereafter throwing him and Officer Lazarus Heinrich with sand.

[3] The respondent, assisted by counsel, pleaded not guilty to all three charges. In her plea explanation she admitted being present on the date and at the place of the incident however denied that she insulted anyone. Regarding the charges of assault the respondent's explanation was that she was physically assaulted by several police officers and therefor acted in private defence by throwing them with sand. The allegations in count 3, that she pushed and slapped officer Kambundu, was not addressed in her plea explanation.

[4] Constable Shivute, who is the complainant on the charges of crimen injuria and assault, testified that, on 6 February 2019 around 03h00 in the morning, a vehicle with two female occupants was stopped at the Oshiko roadblock. The driver had no drivers' licence with her and the respondent, who was a passenger at the time, was sitting with her legs or feet on the dashboard. He observed empty alcohol bottles in the car and enquired. Thereafter the driver was taken to a prefabricated police office, next to the road block, for a traffic ticket to be issued. The respondent followed them to the office. The officer informed the driver that someone must bring her licence to the roadblock, alternatively a licenced driver was needed to drive her car from there. The respondent thereafter started to insult the police officers by firstly referring to their meagre salaries and then adding that their mothers are stupid. The witness said after these words were uttered he was 'feeling bad' and wanted to leave the office. On his way out, while passing the respondent, she pushed him on his arm and when he told her not to do that, it was followed with a slap on his left cheek. He asked the reason for being

assaulted upon which the respondent started throwing sand which hit him in the face and landed on his uniform. The respondent also at this stage insulted them by saying your ‘mother’s vaginas, your mother’s anus’ and you will shit in your anus’’. A struggle ensued to restrain the respondent and they managed to handcuff her. He testified that the insults made him feel that his dignity was taken away and that he ‘was not a person’.

[5] Constable Heinrich, the complainant on the other assault charge, confirmed the evidence of Officer Shivute however added that the respondent was offended after being confronted about the empty liquor bottles in the vehicle. He testified that at the office the respondent started making remarks about police officers earning N$ 9 000 a month which ‘she eats in a day’ and adding that they are stupid as their mothers. He witnessed the pushing and slapping of his colleague. He testified that when confronted about the first attack the respondent started throwing sand at officer Shivute. When they tried to hold the respondent, she threw more sand in the direction of the officers. The witness also testified about the crude insults, referring to their mothers, which was directed to the police. According to his evidence the sand hit him in the face and landed on his uniform. He denied that the respondent was assaulted by the police officers.

[6] Officer Gabriel Nghatanga testified that around 03h00 am officer Shivute arrived in the office with two ladies. He confirmed the insults involving their low income and stupid mothers uttered by the respondent whilst in the office and also the pushing and slapping of Officer Shivute. He did not witness the respondent throwing sand as he only had went out after sand landed on the floor and tables inside the office. He then saw that the hands of the respondent were covered in dust or sand. He denied any police assault on the respondent. The witness could not recall the obscene remarks directed to their mothers testified about by the first two witnesses.

[7] Officer Albertina Shiweda confirmed the time of arrival of the officers with the two ladies in the office. A report was made to her regarding the driver without a driver’s licence and a safety concern because of the respondent travelling with her legs on the dashboard. The witness confirmed that insults were uttered by the respondent and that she was hurt by these words as their mothers were either old or

in some instances deceased. She testified that a particular insult was aimed at her by the respondent saying that the witness is living in a zinc house. The witness furthermore confirmed the pushing and slapping of officer Shivute. She also witnessed sand landing inside the office and thereafter she saw the respondent with dusty hands.

[8] Meriam Nghipukwa confirmed the evidence from the other officers regarding the insults directed to their low income and their parents. She testified that when officer Shivute tried to leave the office the respondent held him on his arm and pushed him outside and then slapped him. She confirmed that sand was thrown into the office and that she afterwards saw the respondent's hands covered in sand.

Grounds of appeal

[9] Leave to appeal was granted to the State in respect of the s174 discharge of the respondent. The grounds of appeal summarized are, that the learned magistrate misdirected himself, alternatively erred in law or fact by: (1) Acquitting the respondent after finding credible evidence that obscene language was used by the respondent; (2) Reasoning that the insults were not directed at the complainant but to all police officers present at the time; (3) Finding that the appellant should have presented evidence to show that the respondent knew the mother of the complainant in order to establish a prima facie case on *crimen injuria*; (4) Acquitting the respondent after finding clear evidence that the state witnesses were thrown with sand; (5) Making a contradictory finding that the witnesses were not assaulted as the sand thrown was not directed at them; (6) Finding that the respondent acted in self-defence when throwing the sand contrary to evidence indicating no attack on the respondent; (7) Ignoring the evidence that the respondent pushed and slapped the complainant Kambundu Ananius Shivute; (8) Paying lip service to the rule that credibility of witnesses plays a limited role unless it was of a very poor quality; (9) Speculating on the existence of provocation to the respondent while no such evidence had been presented and; (10) Wrongly concluding that the fact that the witnesses commissioned each other's statements impinged their credibility and using this fact to justify the discharge of the respondent on all charges.

[10] Counsel for respondent, referring to the matter of *S v Teek*[1], submitted that this court should only interfere with the discharge if it is shown by the appellant that the learned magistrate acted mala fide or did not apply his mind to the level of being grossly unreasonable. The counsel for the respondent furthermore pointed out various contradictions in the evidence presented. Regarding the Section 174 ruling of the trial court, this court was reminded by counsel, that no judgment can ever be prefect and all-embracing and that an appellate court should not anxiously seek to discover adverse reasons to the conclusion reached by the trial court.[2]

[11] Turning to the various charges it was submitted by counsel for the respondent that in respect of the charge of *crimen injuria* the magistrate rightfully considered that the words used were directed at the mothers of the officers; uttered to a group of police officers and not a particular person; that the officers were trained on how to deal with insults; that the officers have been insulted before but never opened cases and; that the insults were of a trivial nature. Counsel submitted that these words are commonly used in today's language and children are taught these concepts at an early age at school. It was furthermore submitted that the fact that their mothers were not known to the respondent was not considered as an element of the crime by the magistrate but rather a value judgment to establish if the complainant should have been injured in his *dignitas*.

[12] Lastly counsel for the respondent submitted that on the charge of assault alleging the pushing and slapping of officer Shivute (Count 3), the respondent was rightfully discharged in that the evidence presented in the court a quo consisted of contradictive versions of the detail of the attack and furthermore that the complainant did not form the opinion that he was attacked or assaulted.

The law

[13] The learned writer Snyman, defines the crime of c*rimen iniuria* as: 'the unlawful, intentional and serious violation of the dignity or privacy of another'. The elements of the crime are listed as the following:

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[1] *S v Teek* 2009 (1) NR 127 (SC)
[2] *R v Dhliwayo and Another* 1948 (2) SA 677 (A)

'(a) the infringement of the dignity or privacy of another (b) which is serious, (c) unlawfulness and (d) intention'.[3]

[14] Snyman furthermore defines assault as:

'Assault consists in any unlawful and intentional act or omission (a) which results in another person's bodily integrity being directly or indirectly impaired, or (b) which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place'. The elements of the offence are listed as the following:

'(a) conduct which results in another person's bodily integrity being impaired (or the inspiring of a belief in another person that such impairment will take place); (b) unlawfulness and (c) intention'.[4]

[15] Section 35 of the Police Act[5] is labelled as 'Interference with members' and Section 35 (1) reads:

'Any person who assaults a member in the execution of his or her duty or functions ….shall be guilty of an offence . . . .' The functions of the police force are defined by Section 13 of the Police Act 19 of 1990 as the following:

'(a) the preservation of the internal security of Namibia; (b) the maintenance of law and order; (c) the investigation of any offence or alleged offence; (d) the prevention of crime; and (e) the protection of life and property'.

[16] The provisions of section 174 of the CPA provides for a discharge at the end of the State's case and reads as follows:

'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 he may be convicted on the charge, it may return a verdict of not guilty.'

[17] In this regard, Liebenberg J, in *S v Lameck*[6] stated the following:

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[3] C R Snyman *Criminal Law* 6 ed (2014) p 461
[4] Ibid p 447.
[5] Police Act 19 of 1990
[6] *S v Lameck* (CC 11/2010) [2019] NAHCMD 347 (18 September 2019)

'The applicable test in an application in terms of s 174 of the CPA is that the court, at the close of the state case, may return a verdict of not guilty if it is of the opinion that there is no evidence upon which a reasonable court, acting carefully, may convict. The credibility of state witnesses is a factor that could be taken into consideration but at this stage, plays a very limited role. Only if the evidence is of such poor quality that it cannot be accepted by a reasonable court, would it support an application for discharge at this early stage of the trial.' The circumstances in each case will be different and each should be decided on its own merits[7].

[18] Contradictions in evidence should be material and it is not uncommon for witnesses to differ in minor respects on the details. Contradictions are not per se an indication that the witness is unreliable[8]. It will depend on the facts of each case and a court must consider the nature of the contradictions, their number, importance and bearing on other parts of the witnesses' evidence.[9] Furthermore such contradictions should not be seen in isolation.[10]

[19] It was submitted by counsel for the respondent that the maxim of *de minimus non curat lex* or 'the law does not concern itself with trivialities' should have been applied[11]. Whether the trifling nature of the act or of the infringement of the law should be regarded as a complete defence or merely a ground for mitigation of punishment depends upon the circumstances of each individual case. Depending on the nature of the charge it may well be that the maxim should not be applied.[12] In casu the alleged insulting remarks cannot be removed from the background of the incident.

[20] Considering the rulings in *S v Ameb*[13] and *Isaac v S*[14], this court will not lightly interfere with findings of credibility and fact of the court a quo as the trial court had advantages which the court of appeal cannot have, namely seeing and hearing witnesses whilst experiencing the atmosphere of the trial, also having the advantage of observing the demeanour and personality of witnesses. Furthermore where the trial

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[7] *S v Nakale and Others* (supra) at page 466, par 26.
[8] *S v Auala* (No 1) 2008 (1) NR 223 (HC)
[9] *S v Hituamata* (CC 09/2015) [2017] NAHCMD 45 (24 February 2017)
[10] *S v Unengu* 2015 (3) NR 777 (HC)
[11] *S v Afrikaner* 2007(2) NR 584 (HC); See also *Tshikongo v S* (CA 18/2017) [2017] NAHCNLD 88 (17 August 2017)
[12] *S v Danster* 1976 3 SA 668 (SWA) (dealing in cannabis);
[13] *S v Ameb* 2014 (4) NR 1134 (HC):
[14] *Isaac v S* [2018] NAHCMD 213 (16 July 2018)

court indicated that it was influenced by the demeanour of the witnesses, the appeal court as a rule is guided by the trial court. The court of appeal will not reject credibility findings of the trial court in the absence of irregularities or misdirection. It is trite law that the function of deciding the acceptance or rejection of evidence falls primarily on the trial court.

Analysis and application of the law

[21] The respondent relied on private defence stating that she was attacked by the officers. In *S v Tjiho*[15] it was ruled that exculpatory statements of an accused does not amount to evidence as it is unsworn and untested. In *S v Shivute*[16] it was said that the version of an accused, as presented during a Section 115 plea explanation, should as a general rule be repeated under oath for it to have evidential value in favour of the accused. The exception to the general rule is that, if a defence is proffered by an accused during the explanation, it should then have to be negated by the State with the presentation of prima facie evidence. Equally in *S v Ananias*[17] it was held that when private defence is proffered during a trial, an accused person cannot be acquitted at the close of the state case as there is the need for the accused to repeat the Section 115 plea explanation under oath for its credibility to be tested under cross-examination unless the court found that the state had not presented sufficient evidence capable of negating the defence of self-defence. In *S v Simon*[18] it was said 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'.

[22] Regarding the charge of *crimen injuria*, the magistrate found that obscene language was used by the respondent however that it was not specifically directed to the complainant but collectively to the group of police officers and therefore was not

[15] *S v Tjiho* (2) 1990 NR 266 (HC)
[16] *S v Shivute* 1991 NR 123 (HC) (1991 (1) SACR 656)
[17] *S v Ananias* 2014 (3) NR 665 (HC)
[18] *S v Simon* (CA19/2015) [2017] NAHCNLD 18 (3 March 2017)

an offence. Only one of the officers made a case, however, each person will react differently to an insult. In that regard the writers Burchell and Milton state as follows:

'It is true that dignitas is the individual's subjective sense of dignity and self-esteem. Since, however, that sense may, and does, vary from individual to individual, it follows that what may be considered insulting to one person would not be thought to be so by another'.[19] The magistrate therefor erred in his reasoning that, for this reason, no prima facie case was established.

[23] The magistrate furthermore misdirected himself when reasoning that the witness testified that it was his mother who was insulted. The magistrate on this point asked officer Shivute 'if it was him that was insulted or his mother' to which he replied 'it is my mother Your Worship, mentioned through me' (emphasis added). The witness thus indicated that his dignity was hurt by the obscenities however the magistrate misinterpreted his answer and then ruled that there is no evidence that the respondent knew the mother of the witness. It is not an element of the offence of *crimen injuria* that, when insulting someone by referring to a third party, the person mentioned should be known to the offender.

[24] Regarding the assault charges the magistrate found that the complainants were thrown with sand hitting their faces and landing on their uniforms. The magistrate however in contradiction ruled that the attack was not *per se* directed at a particular officer. The respondent herself indicated in her plea explanation that the throwing of the sand was directed at the officers. The magistrate thus misdirected himself in this regard.

[25] The magistrate, finding the witnesses unreliable, stated the following: 'as he was denying each and every factor which was in favour of the accused' and that 'all five witnesses were not credible as they are denying an assault on the respondent whilst her warning statement contains such information'. The warning statement of the respondent was not before court and it is therefore unclear on which information the magistrate was relying. Furthermore to argue that the witnesses are lying solely because they are disputing the version of the respondent amounted to a misdirection.

[19] J Burchell and J Milton *Principles of Criminal Law* 2 ed (1994) p 458

[26] The magistrate, referring to Section 174 of Act 50 (sic) of 1971, ruled that it is required at this stage for the State 'to prove its case beyond reasonable doubt'[20] and furthermore described the test applicable as:

'. . . sufficient evidence before court on which a reasonable court acting carefully would convict' (emphasis added). In conclusion the magistrate stated as follows:

'I have considered some of the procedural fatal mistakes that were made in obtaining some additional statements and arrive at the conclusion that no reasonable court acting fearfully confronted with this evidence…' (Emphasis added).'[21] The magistrate thus misdirected himself when applying the test for a discharge in terms of Section 174.

[27] The plea explanation offered by the respondent, admitting throwing sand at the officers in self-defence, was not repeated under oath and thus had no evidential value. The requirements for private defence to succeed were not presented and tested in court.[22] Referring to the profession of the respondent the magistrate ruled that 'a legal practitioner would not do that without provocation and being assaulted'[23] however the evidence presented did not justify such a conclusion. The magistrate prematurely ruled that the throwing of sand would not exceed the boundaries of self-defence whilst completely losing sight of the fact that there was evidence presented of an alleged prior attack on officer Shivute. The magistrate therefor misdirected himself when considering the plea explanation of the respondent as evidence whilst the evidence presented by the State negated the defence proffered.

Conclusion

[28] From the above it is clear that the magistrate misdirected himself on various grounds on both fact and law. This court finds that on all three charges there was a prima facie case made out against the respondent.

[29] In the result it is ordered:

1. The appeal succeeds.

[20] See page 275 of the record of appeal.
[21] See page 288 of the record of appeal.
[22] *S v Lukas* 2014(2) NR 374 (HC)
[23] See page 287 of the record of appeal.

2. The discharge of the respondent', in terms of Section 174 of the Criminal Procedure Act 51 of 1977, by the court a quo is set aside.

3. The matter is referred back to the Oshakati Magistrates' court to proceed with the defence case alternatively, if the Magistrate is no longer available, to start *de novo*.

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E. E. KESSLAU

ACTING JUDGE

I agree,

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D. C. MUNSU

ACTING JUDGE

APPEARANCES:

APPELLANT:	Mr. I. Malumani Office of the Prosecutor General, Windhoek
RESPONDENT:	Mr. P. J. Greyling Greyling & Associates, Oshakati.