

IN THE HIGH COURT OF NAMIBIA

In the matter between:

FRITZ HERMAN

APPELLANT

and

THE STATE

RESPONDENT

CORAM: SHIKONGO, A.J.

Heard on: 2005.07.21

Thereafter Delivered *Ex Tempore* on: 2005.08.15

APPEAL JUDGMENT

SHIKONGO, A.J.: The Appellant, Mr Fritz Herman in this appeal was found guilty of four counts of bribery and was convicted and sentenced to four years imprisonment, two years

of which were suspended for a period of five (5) years. Both the appellant and the

respondent filed Heads of Arguments for and against the appeal in respect of both sentence and conviction. Mr Maritz appearing for the appellant *amicus curiae* from the onset conceded the appeal.

Following the previous postponement or rather the adjournment of the appeal on the previous date of appearance, I considered the possibility of notwithstanding the concession of the appeal by the appellant's representative, to write a judgment on the merits of the appeal. However, upon a perusal and studying of the evidence preferred by the State in support of its charges against the accused person who is now the appellant herein I changed my mind. It was rather clear, that to proceed accordingly, I will be indulging in an exposition of mundane and proven facts in respect of a record which is rather voluminous and representing altogether, I think more than eight hundred pages with several witnesses let in support of the charges against the accused and which, as it turned out, are now conceded by Mr Maritz. As a result, I have resolved to restrict my adjudication of this appeal to

considering basically the essential aspects of the case, specifically with reference to the question whether the State in fact proved its case against the

appellant in the court *a quo* beyond any reasonable doubt, and pursuant thereto, the question whether the concession of the appeal by counsel for the appellant was well tendered and advised. It is mainly for the above reasons that this judgment, though delivered on a date subsequent to the actual date of appeal, is being delivered in a *ex tempore* fashion, so as not to detain its inevitable outcome unnecessarily longer.

Following my perusal of the evidence tendered in the Court *a quo*, as well as the findings of the presiding officer in that Court, I can state that I am satisfied that the concession on behalf of the appellant is in fact well advised and well tendered under the circumstances. This is especially so, if one takes into account the following as emerging from the record, specifically with regard to the testimony of the witnesses and the evidence tendered by the State in proving the charges against the accused persons: In this regard and with reference to count one which relates to bribery, the appellant it emerged from the evidence in the Court *a quo*, in

fact issued the complainant, one Mr Eslon Tjiungua a learners licence without any test, and that followed only after appellant received

N\$300,00 as well as a cow. He later instructed according to the evidence, a certain Constable Thomas who was his subordinate to issue the driver's licence.

With regards to count three where a gentleman Mr Jefta Hipose was the complainant, the evidence in this regard confirmed that the appellant in fact also issued this complainant with a learners licence without any test, and also only after he has received from the complainant an amount of N\$300,00 as well as a cow as in the first instance.

With regard to count five, it is clear from the evidence tendered in the Court *a quo* that the appellant in this case issued the complainant one, Alexander Herungua with a learners licence and this was also done without the said complainant having undergone any test and with a slightly increased amount being N\$600,00 as opposed to the N\$300,00 paid by the first two complainants. With regard to count seven, this transaction is

altogether different according to the evidence preferred by the State. The complainant in respect of this count is one Ericson Shapumba who paid the

appellant an amount of N\$850.00 for the driver's licence to be issued to him. But it appears that in this case, he changed his mind and as a result never received the driver's licence. He decided also not to proceed with the transaction under these circumstances and for the reasons as emerging from the record and which are not relevant for a determination on this issue.

The appellant in the court *a quo* countered the above evidence *inter alia* with what he referred to as discrepancies between the evidence of the witnesses tendered on behalf of the State. Upon a close perusal for a consideration of what is referred to as discrepancies, it is my finding that such are inconsequential and does not in any way impact on the ultimate finding of the presiding officer in the court *a quo*. What is of more significance, is the fact that the evidence of the State witnesses in respect of the counts I have just referred to for most part, as also conceded by Mr Maritz for the appellant, had remained uncontested and

undisturbed in any material respect by the testimony on behalf of the appellant.

In view of above and in the absence of any credible explanation in respect of the charges that were brought against him when he was

afforded an opportunity to reply thereto, I have no doubt in my mind that the appellant is in fact guilty beyond any reasonable doubt and was correctly convicted in the court *a quo* in respect of the said charges. In this regard, I can just maybe in passing refer to authority cited by the State in regard to the responsibility of the presiding officer in the court *a quo*. In this regard, I was referred to the case of *Annama v Chetty and Others* which is a 1946 AD case at page 157 where the following citation is referred to:

“The duty of coming to a conclusion in the first instance rests on the judge in the court *a quo* and the advantages he had of seeing and hearing the witnesses throws the responsibility of making use of these advantages on his shoulder.”

As I have already concluded that I am satisfied upon a consideration of the evidence adduced in the court *a quo*, that the presiding officer did not misdirect himself in any way on the factual evidence tendered before him, I do not propose to interfere with his finding of guilt in respect of the accused person.

Although not entirely clear from the notice of the appellant, it also seems that the appeal was directed against the sentence.

As

regards sentence, it is trite law that sentence is pre-eminently a matter for the discretion of the presiding officer in the court *a quo* and in the absence of any misdirection and any irregularity vitiating such discretion, an appeal court will not interfere. Similar sentiments are contained in a case cited on behalf of the State in support of its opposition against interference with the sentence, and that is from the case *S v Tjiho* 1991, a Namibian Law Reported matter at 364 G-I. It reads:

“This discretion is a judicial discretion and must be exercised in accordance with judicial principles. Should the trial Court fail to do so, the appeal Court is entitled to, not obliged to, interfere with the sentence. Where justice requires it, appeal Courts will

interfere, but short of this, Courts of appeal are careful not to erode the discretion accorded to the trial Court as such erosion could undermine the administration of justice. Conscious of the duty to respect the trial Court's discretion appeal Court have over the years laid down guidelines which will justify such interference."

I have already remarked and concluded that nothing in the record I have perused, suggests a miscarriage and/or an irregularity which will necessitate interference with the exercise of the discretion in

relation to sentence by the presiding officer in the court *a quo*. That being the case, as in the case of the conviction, I similarly do not propose in regard to sentence to interfere. Consequently, and taking into account the concession of the appeal, both in respect of conviction and sentence, which I found to be well advised by Mr Maritz, **the appeal against conviction and sentence is dismissed.**

What remains is for the Court to express its appreciation for the very helpful heads of arguments by the State and the submissions made in opposition of the appeal. Likewise, Mr Maritz, the Court's appreciation is recorded for your appearance

amicus curiae as well as your exposition of the facts on which you correctly, as was found, based your concession with regard to the appeal and for which the Court is indebted.

SHIKONGO, A.J.

ON BEHALF OF THE APPELLANT

Mr

Maritz

Instructed by:

Amicus

Curiae

ON BEHALF OF THE RESPONDENT

Ms

Jacobs

Instructed by:

Office of the Prosecutor-

General