NOT REPORTABLE

CASE NO.: CA74/2009

IN THE HIGH COURT OF NAMIBIA

HELD AT OSHAKATI

In the matter between:

GEHARD SHEEFENI NANGOLO **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **LIEBENBERG J & TOMMASI J**

Heard on: 25 February 2011

Delivered on: 23 September 2011

APPEAL JUDGEMENT

TOMMASI J: [1] This is an appeal against conviction. The appellant withdrew his appeal against sentence. The appellant was charged with having unlawfully and intentionally killed Mandume Nambedi by stabbing him with a knife on 20 March 2001. The appellant was convicted and sentenced to fifteen (15) years imprisonment.

[2] The appellant lodged a notice of appeal which he drafted without the assistance of a legal practitioner. Mr Kishi, appointed *amicus curiae* for the appellant, filed an amended notice of appeal and an application for condonation for the late filing of the notice of appeal, the amended notice of appeal and the heads of argument. Mr Shileka appearing on behalf of the respondent raised two points *in limine* namely:

(a) that the appellant's original notice does not comply with the provisions of rule 67(1) of the Magistrate Court Rules in that it does not clearly and specifically set out the grounds; and that the subsequent amended grounds are therefore a nullity as no original grounds exist; and

(b) that no reasonable explanation was advanced for the late filing of the heads of argument.

[3] It is established practice that counsel appointed *amicus curiae* is not required to file heads of argument. The latter point *in limine* is therefore dismissed.

[4] The appellant raised the following grounds in his original notice of appeal:

The magistrate erred by:

1. *Convicting the appellant as the evidence does not support a finding of guilty;*
2. *Accepting evidence of witnesses that were not on the scene;*
3. *Relying on witnesses who did not corroborate one another;*
4. *Allowing inadmissible evidence of witnesses that did not witness the murder*
5. *Failing to call his witnesses;*
6. *failing to call the doctor as a witness*
7. *convicting the appellant whilst no sketch plan was produced by the police of the scene of the crime*
8. *Finding that the State proved its case beyond reasonable doubt as there was an element of doubt.*

[5] The afore-mentioned grounds, save for the grounds numbered 1 and 8, given the fact that the accused was not assisted by a legal practitioner, comply with the requirements of rule 67(1) of the Magistrate Court Rules and this point *in limine* is accordingly also dismissed.

[6] The amended notice was filed shortly before the matter was heard and the appellant applied for condonation for the late filing thereof. The presiding magistrate had left the magistracy by the time the appellant noted his appeal and did not give a statement in terms of rule 67(3) of the Magistrate's Court Rules. It follows logically that the amendment could not have been in terms of rule 67(5) of the Magistrate's Court rules which only make provision for an amended notice of appeal once the magistrate has furnished his statement. This Court has however a discretion to grant the appellant leave to amend his original grounds of appeal. The amended notice of appeal does not introduce any new grounds of appeal. The magistrate gave a fully reasoned judgment and having left the magistracy, would in any event not be available to respond to the amended grounds. Respondent filed heads of argument in response to the amended grounds. Having considered the above factors and the absence of prejudice to the respondent, the appellant was allowed to argue the appeal on the amended grounds only insofar as it complied with the requirements of Rule 67(1) of the Magistrate's Court Rules.

[7] When the Court has to consider the application for condonation for the late noting of the appeal the Court should exercise its discretion judiciously by:

> *"…a consideration of all the relevant facts. Factors such as the degree of non-compliance, the explanation for the delay, the prospects of success, the importance of the case, the nature of the relief, the interests in finality, the convenience of the court, the avoidance of unnecessary delay in the administration of justice and the degree of negligence of the persons responsible for non-compliance are taken into account. These factors are interrelated, for example, good prospects of success on appeal may compensate for a bad explanation for the delay"*

(S v VAN DER WESTHUIZEN 2009 (2) SACR 350 (SCA) at 353c-d; S v Mohlathe 2000 (2) SACR 530 (SCA) at 535g-536a)

[8] The appellant in his affidavit explained that he was under severe stress and that he had no legal representative to assist him. He after some time opened up to the other inmates and was assisted by fellow inmates to draft the appeal. This is a poor explanation for the delay of more than a year. The appellant was not represented during his trial and indeed drafted his notice of appeal without the assistance of a legal representative. The magistrate explained to the appellant that he should lodge an appeal within 14 days but advised him further that *"it does not necessarily mean that after fourteen (14) days, you can no longer prepare your grounds of appeal and send them to the Registrar of the Court."* This explanation is, to say the least, confusing. Rule 67(1) of the Magistrate Court Rules provides that the appeal should be noted within fourteen days and it should be lodged with the clerk of the court, not the registrar of this Court.

[9] The amended grounds of appeal (summarized) are as follow:

The learned magistrate erred in law or in fact by:

1. *finding that the State proved its case of murder beyond reasonable doubt notwithstanding that there was no evidence adduced suggesting that the appellant had dolus directus or dolus eventualis.*

2. *by finding that the evidence of the state witness corroborated the evidence of one another as the evidence by the various witnesses contradicted one another and that the witnesses were unreliable.*

3. *failing to consider the totality of the evidence adduced by both parties by ignoring the evidence of the appellant which was corroborated by the State witnesses.*

4. *That the testimony that the deceased was stabbed later in the cuca shop is full of flaws which is indicative that it was fabricated. The bang and bare-chest claims were fabricated possibly during the preparation for trial. There were no statements in line with what they informed the police.*

5. *The methods of the police investigations were questionable and biased toward the appellant. The appellant demanded that statements be produced and the court a quo failed to assist the appellant in this respect.*

The latter two grounds do not comply with Rule 67(1) of the Magistrate's Court Rules as it does not set out clearly and specifically the ground on which the appellant rely. For this reason these two grounds are struck.

[10] The appellant pleaded not guilty to the charge and stated that he was acting in self defense in his plea explanation. He did not dispute the fact that he stabbed the deceased and that the deceased died as a result of the stab wound to his chest. The only issues placed in dispute were the unlawfulness of the attack and whether or not he had the requisite intent to kill.

[11] The State adduced the following evidence: On 20 March 2001, at around 21H00 the deceased was outside the *cuca* shop of one Walaula in the company of Helvi. The appellant approached them and took issue with the deceased talking to Helvi who according to the appellant was related to him. The appellant threw a blow at the deceased who in turn retaliated. Walaula and another person separated the two. The appellant hereafter left and it is not clear whether he was "*escorted"* by Walaula or whether he left the *cuca* shop on his own. The deceased entered the *cuca* shop. The appellant returned shortly thereafter bare-chested; entered the *cuca* shop and stabbed the deceased. Maria was the only other person present inside the bar at the time of the stabbing. She saw the appellant beating the deceased on his chest. The deceased staggered a little, sank down to his knees and died in this position. The appellant fled the scene and was arrested on 22 March 2001.

[12] The medical doctor testified that she examined the deceased and found a wound, consistent with a stab wound, penetrating the chest wall, left upper lung, the pericardium (*a sac enclosing the heart*) and the main pulmonary vein. She testified that once the main pulmonary artery is ruptured, death would occur almost immediately.

[13] The appellant testified that he was with his friends earlier the day and they met the deceased and his friends. The deceased and his friends hurled insults at them calling them "*stubborn*" and started beating the appellant. A friend of the appellant stopped them from further beating the appellant. The deceased who had a shotgun at the time, instructed his friends to leave the appellant, promising to deal with him later.

[14] That evening, the appellant arrived at the *cuca* shop of Walaula. He was attacked by the deceased and his friends when he approached Helvi to ask her for her empty glass. Two of his friends came to his assistance and one Kahombo handed him a knife. Two of the assailants disappeared after he was given the knife. The deceased however kept coming and he stabbed/threw a knife at him. The friends of the deceased chased them (the appellant and his friends) from the *cuca* shop with sticks. He later met up with Kahambo in the bushes and returned the knife to him. He did not know the deceased prior to the incident.

[15] The court *a quo* called Kahambo at the insistence of the appellant to testify how the knife was recovered. This witness testified that he had used the knife to fix a watch earlier that day. He left the knife on the ground and the appellant picked it up and kept it. The appellant returned it to him later that evening. It was not clear from his evidence whether it was returned before or after he became aware that the deceased was stabbed. The knife was seized by the police from his home in the presence of the appellant.

[16] All three grounds concern the evaluation of the evidence by the court *a quo* and is based purely on fact. It is trite law that the appellate Court should be reluctant to upset the findings of fact of the trial court. [See *S v SIMON 2007 (2) NR 500 (HC*) and the principles enunciated in *REX v DHLUMAYO AND ANOTHER 1948 (2) SA 677 (A)*]

[17] The court *a quo* was faced with two mutually destructive versions of what had transpired that evening at the *cuca* shop. Logic dictates that only

one of these two versions could be true. The court *a quo* rejected the version of the appellant as false and accepted the version of the State as he found the State witnesses to be credible. The court *a quo* reasoned that the appellant had returned to the *cuca* shop to exact revenge; used a lethal weapon; and he struck the deceased at a "*most life threatening part of the human body*". The court *a quo* was thus satisfied that the State had proven beyond reasonable doubt that the appellant had direct intention to kill the deceased.

[18] Counsel for the appellant submitted that the witnesses, Walaula, Helvi and Kajamo were not credible witnesses given the contradictions in their testimony and furthermore that the appellant's version was largely ignored by the court *a quo.*

[19] The court *a quo* examined the evidence of Helvi and Walaula in respect of what they witnessed outside the *cuca* shop and found that "*Walaula Kulaumone corroborated the evidence of Helvi substantially".* He further considered the evidence of Maria who saw the appellant beating the deceased on the chest inside the *cuca* shop together with what Helvi and Walaula observed from outside the *cuca* shop and concluded that "*The witnesses corroborated each other in material respects*." He was satisfied that: *Walaula, Helvi and Maria told the court the truth of what they witnessed"* and that they were credible witnesses since: *"the court could not find something in their testimonies, which may make their credibility questionable."*

[20] The amended grounds pointed out some of the contradictions. Most of those pointed out refer to evidence not material or relevant to the issue under consideration. The contradictions pointed out by the appellant in respect of the persons who were present outside the *cuca* shop, particularly the friends of the deceased, are however of some significance for reasons I will return to later.

[21] The fight outside the *cuca* shop was material to establish the unlawfulness of the conduct of the appellant and his intention. If the

deceased was stabbed outside the *cuca* shop, then his version that he acted in self defense could be reasonably possibly true. If however the deceased was stabbed inside the *cuca* shop, then it would be supportive of the State's case that the appellant returning to the *cuca* shop with the direct intention to stab the deceased. Both Walaula and Helvi testified that: they observed the deceased and the appellant fighting outside the *cuca* shop; that the appellant left the vicinity of the *cuca* shop and returned later bare-chested; that he entered the *cuca* shop and exited shortly thereafter; that the deceased died shortly thereafter. The court *a quo* thus correctly concluded that they corroborated one another "*substantially.*"

[21] However the evidence of the State witnesses implicating the accused cannot be viewed in isolation. The court *a quo,* rejected the version of the appellant without stipulating reasons why he did so. The only indication that the court *a quo* entertained the evidence of the appellant was when he commented as follow on the evidence of Kahamo:

> "*It may be possible that the knife was given to him (appellant) at the scene of the scuffle between him and (the) deceased but for sure, that is not the moment that he was stabbed.*

Not only did the court *a quo* entertain the possibility that the version of the appellant i.e that Kahamo handed him a knife during the fight, could be reasonably possibly true, but also indicated that it did not find the evidence of Kahamo credible.

[22] The conclusion reached by a court on the facts has to account for all the evidence and none of it may simply be ignored. [See *S v VAN DER MEYDEN 1999 (S) SA 79 A*] It appears *ex facie* the judgment that the evidence implicating the appellant was viewed by the court *a quo* in isolation to determine whether the State had proven its case beyond reasonable doubt. The Court is mindful that "*no judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered*". However, the fact that no reasons were advanced in the judgment of the court *a quo* for rejecting the evidence of the appellant; and the emphasis placed on the evidence implicating the appellant, is just cause for the complaint that the evidence was not evaluated in its totality. Given the omission by the court *a*

quo to give reasons for rejecting the evidence of the appellant, this Court may consider the totality of the evidence in order to arrive at its own conclusion whether the State succeeded to discharge its onus.

[23] The appellant testified that there was an altercation earlier that morning where he was beaten by a friend of the deceased and that a threat was made. This evidence was uncontested and it should be accepted that there was already some tension brewing between these two groups. (Appellant together with his friends; and the deceased and his friends).

[24] It was common cause that the appellant arrived at the *cuca* shop with at least three of his friends. The appellant testified that the deceased was in the company of his friends including one Naminidi. Walaula testified in his evidence in chief that the deceased arrived alone whereas Helvi testified that the deceased was accompanied by Namindi. Walaula under cross-examination, reluctantly conceded that the friends of the deceased arrived during the fight while he was separating the appellant and the deceased. They furthermore also differed when describing the exact words of the appellant before he attacked the deceased. Walaula, in his evidence in chief testified that he escorted the appellant from the *cuca* shop after he had separated the appellant and the deceased but under cross-examination testified that he had "*chased him away*". Helvi and Walaula contradicted one another in respect of the persons who separated the appellant and the deceased. Helvi, contrary to the evidence of Walaula, testified that Walaula remained at the *cuca* shop and that the appellant and his friend left on their own.

[25] Kahambo denied that he was with the appellant at the *cuca* shop. The court *a quo*, to my mind correctly concluded that Kahambo's evidence in respect of the knife was unreliable. Kahambo was unable to satisfactorily explain how his knife ended up with the appellant and how he regained possession thereof. The appellant's version of how he came to posses the knife at the material time is uncontroverted and in the absence of any reliable evidence adduced by the State, should be accepted as reasonably possibly true.

[26] The evidence of Helvi and Walaula was less than candid in respect of what transpired outside the *cuca* shop that evening. The State thus presented no reliable evidence of the fight outside the *cuca* shop. The version of the accused that a fight took place outside is therefore reasonably possibly true.

[27] This however does not necessarily mean that the deceased was stabbed outside as testified to by the appellant. The State adduced the evidence of a single witness, Maria who gave direct evidence that the appellant stabbed the deceased inside the *cuca* shop. Her evidence should therefore be approached with caution. According to Maria the deceased entered the *cuca* shop and ordered a drink. She described what followed hereafter as follow:

> "*While I was about to say: "here is the glass" a person came in, he came running inside, this person was only wearing a short trouser and he was bare-chested and he hit the person in the chest and then ran away again, out.*

[28] She identified the person who beat the deceased as the appellant. She testified that she did not see a knife in the appellant's hand. According to her the deceased, "*hit his back against the zinc plate and then the person started bending down or going down until he got seated*" or was "*kneeling down*". The appellant when cross-examining this witness asked her how it was possible that he could have stabbed the deceased when she testified that the deceased was standing with his back toward the entrance. In response hereto the witness just re-iterated that it was the appellant who entered the *cuca* shop and after the question was repeated, she responded that "*as I was also busy there in the corner, he just came in and he found the other one holding a pole there and then he just hit the person in the chest*". This was clearly not a direct answer to the question posed to her.

[29] Walaula and Helvi testified that they saw the appellant entering the *cuca* shop being bare-chested whilst Kahambo testified that he saw him later that evening without his shirt and shoes. The appellant disputed that he returned to the *cuca* shop and/or that he was bare-chested.

[30] Walaula testified that when he entered the *cuca* shop the deceased walked towards him. When the deceased was about to reach him, he went backwards and slowly sank down on his knees with blood coming from the left side of his chest. Helvi testified that she just saw the deceased had died while seated. The police officer who arrived at the scene later that evening testified that he saw a person who had died on his knees leaning on the zinks. This evidence corroborates Maria's evidence.

[31] The appellant's version of the actual stabbing in short was as follow: During the fight he fell down. Kahambo came to his assistance and handed him the knife at the same time. Two of the deceased's friends disappeared and only the deceased remained. The deceased kept on coming saying "*you boy, what did we tell you already during the day"*? He asked them "*brothers why are you beating me*?" The deceased kept on beating him with fists and kicked him causing his watch to fall. He did not do anything else, but threw the knife. Right hereafter he testified that he stabbed the deceased. The deceased staggered back; held onto a corrugated iron; and went inside the *cuca* shop. When cross-examined he testified that the deceased turned and started going inside and he then got seated inside. This confirms the place the deceased died and the position he was found to have died as testified by the State witnesses.

[32] The police officer testified that he recovered a watch and shoes "*a distance far from where the incident took place*". The appellant put it to the witness that he seized these items from his home. The appellant however testified that the deceased kicked off his watch whereafter he stabbed the deceased. A reasonable inference to be drawn from these facts is that the deceased kicked off the watch of the appellant some distance from the *cuca* shop. It is improbable that the appellant threw the knife at the deceased as he retained possession thereof. Given the medical evidence that death would ensue almost immediately, it is unlikely that the deceased had walked some distance whilst a vital artery was ruptured.

[33] The evidence of Maria, despite some shortcomings, was corroborated in all material respects by other witnesses. Her version as to how the deceased died is consistent with the evidence of the doctor that death would occur almost immediately if the pulmonary artery is ruptured. This Court is satisfied that the truth has been told by this witness.

[34] The only reasonable inference to be drawn from the fact that the deceased was stabbed inside the *cuca* shop is that the appellant, who had been beaten by the deceased on two occasions returned to the *cuca* shop with the direct intention to stab the deceased when he no longer posed a threat. There is therefore no merit in his defense that he was acting in self defense. The appellant's fatal attack on the deceased was thus without justification and as such, unlawful.

[35] Having reached the same conclusion as the court *a quo* after having considered the totality of the evidence adduced, I see no reason to disturb the conclusion of the court *a quo* that the appellant had direct intent to kill the deceased for the reasons stated by the trial court and that he did so unlawfully. There are no reasonable prospects that the appellant would succeed on appeal.

[36] In the premises the following order is made:

1. the application for condonation for the late noting of the appeal is dismissed.

2. the appeal is accordingly struck off the roll

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Tommasi J

I concur

Liebenberg J