

CASE NO.: CA 25/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ERASTUS NGHIHANGAKENWA KEMANYE

APPELLANT

versus

THE STATE

RESPONDENT

CORAM: SIBOLEKA, J *et* SIMPSON, AJ

Heard on: 25 February 2011

Delivered on: 28 March 2011

APPEAL JUDGMENT: SIMPSON, AJ.: [1] The appellant was convicted in the District Court of Grootfontein for attempted murder and sentenced to thirty six (36) months imprisonment of which eighteen (18) months were suspended on the usual conditions. He was unrepresented during his trial.

[2] Mr. Nekongo of Sisa Namandje Inc. represented him before this Court while Ms. Husselman appeared for the respondent. The appeal is against both the conviction and the sentence and this Court appreciates their valuable contributions in this regard.

[3] The grounds of appeal are as follows: "AD

MERITS:

1. The learned magistrate erred on the facts and/or the law in convicting the appellant on the charge of attempted murder.
2. The learned magistrate erred on the facts and/or the law in finding that the appellant had the intention to kill the complainant.

The learned magistrate erred on the facts and/or the law in finding that the appellant did not act in self defense when he fired the shot.

The learned magistrate erred on the fact and/or in law in finding that the State proved a case of attempted murder beyond a reasonable doubt.

AD SENTENCE

5. The learned magistrate erred on the fact and/or law in finding that a custodial sentence was inescapable.
6. The learned magistrate erred on the fact/or law in not properly taking into account the appellant's personal circumstances for purposes of sentence".

[4] When appearing before us, Mr. Nekongo, counsel for the appellant, raised a point regarding the medical examination report which was produced and handed up as an exhibit by the State in the court below. This point was however not stated as a ground and dealt with in the notice of appeal nor was it noted in the amendment to the notice of appeal. The trial magistrate therefore did not have an opportunity to respond to it and neither did the respondents counsel in her heads of argument. It is clear that there was no full compliance

with rule 67(5) of the Magistrates' Court Rules, on this point.

[5] The respondent's counsel argued that the State had proved its case beyond reasonable doubt. It was contended on behalf of the State that when the appellant initially pleaded guilty and was questioned in terms of section 112(1)(b), Act 51 of 1977, a plea of not guilty in terms of section 113 of the Criminal Procedure Act was entered because the appellant disputed the intention to kill. Although private defense was not raised in the court below, it is my view that it could be because the appellant was on his own during the trial.

[6] In stead of discussing each of the four grounds of appeal against conviction separately, I am of the view that it would be appropriate to look at the facts of the matter, which are as follows:

Two groups, the complainant and his friends and the accused and his colleague, Haufiku Pehofelo and one Lanny Weyulu were at Choice Bar. Insults were traded between the two groups and the same later continued to the outside of the bar into the street. It is not clear what brought this about.

The version of the complainant and the second state witness is that after the appellant insulted them for no apparent reason, they walked away to avoid confrontation. Hereafter, they realized that they were being followed by a motor vehicle, from which people got out and started throwing stones at them. According to the complainant and the second state witness, their group picked up stones and threw back at their assailants. When they realized that they were on the losing end, they ran away and their assailants pursued them, resulting in the complainant being struck by a bullet in the back.

The version of the appellant and the 3rd state witness is to some extent the same, in that they both claim that after the exchange of insults at the restaurant, they got out only to be

attacked by the complainant and his companions.

These two witnesses further testified that when the attack on them became worse and the appellant came close to being stabbed with a knife, he fired a warning shot into the air and the complainant and his friends retreated.

After the warning shot was fired the appellant and his friends ran away, while the complainant and his colleagues pursued them. It was during this flight, that the appellant fell down, discharged his firearm and a bullet struck the complainant.

[7] From the above it is very clear that there is merit in all four grounds of appeal against conviction because the same has not been established beyond reasonable doubt.

[8] The facts of the matter gives rise to two mutually destructive or conflicting versions between the two sides. In *Walter Haoeb v The State*, case no CA 64/2004, delivered on the 19/06/2007, Damaseb JP and Muller J stated that:

"Quite clearly, the weighing of the State's case against that of an accused

.....is an improper approach which amounts to a serious misdirection. This

is so because the onus of proving a criminal case against an accused person rests on the State. In contrast, an accused person enjoys a constitutional presumption of innocence pursuant to article 12(1)(d) of the Constitution".

[9] The version of the appellant and his witness in the court *a quo* is reasonably possibly true.

[10] In the result the appeal against conviction should succeed.

[11] The Court makes the following order:

Both conviction and sentence are set aside.

SIMPSON, AJ

I agree

SIBOLEKA, J

ON BEHALF OF APPELLANT:

Instructed by:

TM NEKONGO

Sisa Namandje Inc.

ON BEHALF OF RESPONDENT:

IO HUSSELMANN

Instructed by:

Prosecutor-General