REPUBLIC OF NAMIBIA

CASE NO. CA 96/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THOMAS FILLEMON
Applicant

and

THE STATE
Respondent

CORAM: **VAN NIEKERK, J et SIBOLEKA, J**

Heard: 7 November 2011

Delivered: 20 January 2012

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK, J: [1] The applicant was convicted in the Regional Court on a charge of murder. A second accused was acquitted, whereas a third was convicted of robbery with aggravating circumstances. The applicant was sentenced to 15 years imprisonment of which 4 years were suspended for 5 years on condition of good behavior.

[2] The applicant appealed against the conviction. On 16 March 2011 this Court dismissed the appeal. On 7 November 2011 the applicant moved his application for leave to appeal to the Supreme Court against our judgment. The applicant appears in person and was allowed to argue the merits of the application, condonation for a slight delay in lodging his application having been granted. This the applicant did mainly by reading out the notice of application for leave to appeal. Mr Kuutondokwa appears for the respondent and opposes the application.

[3] It is trite that an applicant in a matter like this must show reasonable prospects of success on appeal. This means that this court will refuse to grant the application of there is no chance of success on appeal or if this court is satisfied beyond reasonable doubt that the appeal will fail. (*R v Ngubane* 1945 AD 185 at 186-7).

[4] The first ground on which the applicant relies was also previously raised during the appeal. It is that the conviction is "against the evidence and against the weight of the evidence." In the appeal judgment it was stated that this ground of appeal is too vague to be considered. It was further explained with reference to authority why this is so and what is expected of an appellant. The applicant obviously did not take heed of this explanation. I shall not repeat it.

[5] The second ground for this application is that the Court should have upheld the appeal on the basis that the magistrate erred by finding that

the State had proved the applicant's guilt beyond reasonable doubt. This ground is also vague as no further details are given of specific misdirections. I agree, with respect, with FRANK, AJ that this ground of appeal means nothing more than that the conviction is against the weight of evidence and bad in law (see *S v Wellington* 1990 NF 20 HC 22G) and therefore falls foul of the same criticism as the previous ground.

[6] The same goes for the third ground of appeal, which is that the magistrate did not properly analyze or evaluate the evidence. As was stated in *S v Gey van Pittius* 1990 NR 35 HC 36F-I, this is not a ground of appeal at all but a conclusion drawn by the draftsman of the notice without setting out the reasons or grounds therefor. It does not inform either the State, the magistrate or this Court of the grounds on which the judgment is attacked.

[7] The fourth ground is that the magistrate erred in failing to disregard the pointing out which is unconstitutional. Again, no details are given specifying the precise complaint. In any event, there is no indication of any breach of applicant's constitutional rights during the pointing out. It should also be emphasized that during the trial the applicant was represented by a lawyer who did not challenge the evidence by Deputy Commissioner Visser that the applicant pointed out certain spots which placed him at the scene of the crime. Furthermore, applicant's innocence was not strenuously put in issue during the trial. The main thrust of the

applicant's case in the court *a* quo was that he was at most guilty of culpable homicide.

[8] Two further grounds of the application are related. The one is that there is no forensic proof that the blood observed at the scene of crime and on the knife which the applicant had in his possession on the day of the crime was indeed the blood of the deceased. It is so that there was no forensic evidence led on this score, but this is itself not fatal. There is sufficient other evidence from which it may be deducted beyond a reasonable doubt that the blood at the scene must have been the deceased's blood, e.g. it was not disputed that he was killed at the scene by a knife wound to the throat which injured the jugular vein. As far as the knife is concerned, it is not necessary for a conviction to conclude that the blood on the knife was indeed that of the deceased. Nevertheless, the evidence that the applicant on the evening of the day of the murder asked his friend to keep the knife with him until he should ask for it again, tends to show that he had a guilty state of mind.

[9] A further ground for leave to appeal is that there was no corroboration of the circumstantial evidence. Again, the applicant did not specify what circumstantial evidence he has in mind. This ground is also too vague to consider in any meaningful way. Besides, there is no general rule that circumstantial evidence should be corroborated.

[10] Another complaint is that the magistrate "failed to find out that the appellant has used his constitutional right to be silent during the proceedings in the court a quo". What is intended to be conveyed is not clear. The fact of the matter is that both the magistrate and this Court were clearly aware that the applicant closed his case without presenting any evidence. That is indeed his constitutional right. But he had a case to answer on the evidence presented by the respondent. In the absence of any contrary evidence by him or any witness called on his behalf, the inference by the learned magistrate as upheld by this Court was that the appellant acted with intention in the form of *dolus eventualis* when he inflicted the deadly wound and that he is guilty of murder. The applicant has advanced no reasons whatsoever why the magistrate or this Court's reasoning on this aspect should, on reasonable grounds, be considered to be faulty.

[11] Another ground of appeal is that this Court erred by disregarding that the second accused was unrepresented when he pointed out certain points at the scene. This complaint is ultimately irrelevant as far as the appellant is concerned for the reasons set out in the appeal judgment and may be ignored.

[12] The last ground of appeal is that this Court erred by finding that none of the initial appeal grounds raised had any merit. The applicant does not set out any basis on which this complaint may be assessed.

Therefore this ground is too vague to be considered in any meaningful way.

[13] Before us the applicant submitted that the magistrate erred by taking into consideration the pointing out by accused no 2 to convict the appellant. That is indeed so, but for the reasons fully set out in the appeal judgment I am satisfied that despite this irregularity, there is sufficient other admissible evidence to support the appellant's conviction on the charge of murder beyond a reasonable doubt.

[14] For the reasons advanced above I agree with State counsel that there are no reasonable prospects of success on appeal. The application is refused.

[15] For the benefit of the applicant I attach to this judgment an annexure in which his rights in regard to petitioning the Chief Justice are explained.

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VAN NIEKERK, J

I agree.

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SIBOLEKA, J

Appearance for the parties

For the appellant: In person

For the State: Mr J Kuutondokwa

Office of the Prosecutor-General