NOT REPORTABLE

CASE NO: CA 40/2009

IN THE HIGH COURT OF NAMIBIA

MAIN DIVISION

HELD AT WINDHOEK

In the matter between:

MOSES MAPANI **APPLICANT**

and

THE STATE **RESPONDENT**

CORAM: HOFF, J *et* MILLER, AJ

Heard on: 11 April 2012

Delivered on: 28 May 2012

JUDGMENT

Application for leave to appeal

HOFF, J: [1] This is an application for leave to appeal against the dismissal (on 9 July 2010) of an appeal by the applicant in respect of convictions and sentences imposed in the Regional Court. The applicant was found guilty on charges of murder and common assault and sentenced to 17 years imprisonment and one year imprisonment. It was ordered that sentence imposed in respect of the conviction on common assault should run concurrently with the sentence imposed in respect of the conviction for murder.

[2] The applicant filed a notice for leave to appeal against this court's judgment (9 July 2010) dated 19 July 2012.

[3] On 20 January 2012 the application for leave to appeal was struck from the record because clear and concise grounds of appeal were not set out. These grounds of appeal were set out without the assistance of a legal practitioner and the applicant was given an opportunity to file a proper notice of application for leave to appeal.

[4] In spite of the argument on behalf of the State that in the subsequent condonation application the applicant did not give a reasonable explanation for the late filing of his notice for leave to appeal this Court will take into account that the original defective application for leave to appeal appears to have been filed within the prescribed period and in the circumstances condones the subsequent late filing of the notice for leave to appeal.

[5] The applicant had subsequently with the assistance of the Director: Legal Aid obtained the services of a legal practitioner. Mr Namandje who appears on behalf of the applicant now relies only on one ground of appeal which reads as follows:

> "The honourable court, having found that the post-mortem report was rendered inadmissible and that it must be excluded when considering the merits, in absence of any further evidence in particular but not limited to the cause of death, should have consequently found on the available and proved evidence the cause of death of the deceased was not proved by the State. In the alternative the Court erred in the intention to commit murder was not proved."

[6] The evidence presented in the Regional Court was that the co-accused was a passenger in a vehicle driven by the applicant during March 2004. After the co-accused had disembarked at his destination the applicant proceeded with his journey and subsequently discovered that his wallet containing N$1 000.00 was missing. The applicant later returned and made certain enquiries from his co-accused who denied any

knowledge of the missing wallet. The next day the applicant and his co-accused received information that one of the three boys who had assisted them the previous day to kick-start the vehicle of the applicant had taken his wallet. Thereafter the applicant and his co-accused went to search for these three boys. In a village called Linyanti a person by the name of Kavende brought the three boys to the appellant.

[7] What happened subsequently was summarised by this Court (as per Marcus AJ) in the appeal judgment as follows:

> "The first witness called by the State, Fedelis Muchali Mutanikelwa (in the record simply referred to as Muchali) testified that on 18 March 2004 he found three boys sitting at the back of first appellant pick up vehicle with their hands tied with wires. He had been attracted to the scene by the loud noise that was coming from the direction where the pick up was standing. On arrival he saw that the boys were bleeding from their heads and their shirts were covered in blood. He knew all three boys. One of the boys, by the name of Kalaluka, was working for his aunt as a herd boy. According to Muchali both appellants were randomly beating the boys, first appellant with his hands and second appellant was using a sjambok, demanding that the boys return the wallet with the money.
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> Muchali told appellants to stop beating the boys and suggested to take Kalaluka to his aunt's place since he was employed there. Appellants agreed and Muchali then led the group to his aunt's place. On arrival first appellant, who by then had identified Kalaluka as the culprit, told Muchali's aunt that Kalaluka had stolen his wallet and that he would take him away and bring him back as a dead dog unless he returns his wallet. The house where Kalaluka was staying was searched and when the wallet was not found, appellants took Kalaluka away in their pick up.
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> The second witness called by the State was Alfonsina Lukonga Shibonwa the daughter of Muchali's aunt. She testified that she knew the first appellant who was a teacher at Linyanti. She met second appellant for the first time on 18 March 2004, when he came with first appellant to her mother's house accompanied by Muchali, Kalaluka and two other boys. According to her second appellant was holding Kalaluka and first appellant was holding the other two boys. First appellant told them that their herd boy (Kalaluka) had stolen his wallet which contained N$ 1000.00. She then asked Kalaluka whether he had taken the money. Kalaluka did not respond and only shook his head. According to her, first appellant said referring

to Kalaluka as a dog, that he would take Kalaluka with him unless he returned the wallet with its content.

Kalaluka had difficulties to stand and to walk. Second appellant hit him with a sjambok on the back to force Kalaluka to walk. Appellants searched Kalaluka's room but failed to find the wallet. This infuriated first appellant and he loaded the deceased onto the vehicle. On the way to the vehicle second appellant again beat the deceased with a sjambok on the chest. A security guard who was present told first appellant not to take the law into his own hands and to report the matter to the police. Appellants ignored the advice and they took Kalaluka with them in the pick up. Shibonwa recalled that all three boys were visibly frightened when they arrived with the appellants. She saw that Kalaluka was heavily beaten. His shirt was unbuttoned and he had marks on his shoulder and on the back from the whippings with the sjambok.

Second appellant testified that they drove to first appellant's village. On arrival Kalaluka was asked what he was doing at the village. He responded by saying that he had taken first appellant's wallet but had given it to one of first appellant's employees. First appellant then told his workers to take Kalaluka to their sleeping quarters. The following morning they decided to go to look for the worker to whom Kalaluka gave the wallet. First appellant greeted Kalaluka and asked him how he was feeling. Kalaluka responded that he was fine but was still feeling the effect of the assaults of the previous day. As appellants were about to get into the vehicle they saw Kalaluka collapsing. When they looked at him they realised that he had passed away. They decided to take him back to Linyanti.

When they arrived at Linyanti, Shibonwa was busy preparing lunch. She saw first appellant's vehicle return to their house. It drove into the court yard where she and her mother were sitting. According to her first appellant said "I have brought your dead dog, he is here". He opened the back of the vehicle and pulled the body on the legs and dropped it to the ground saying: "Here is your dog I have killed him". She stated that it was Kalaluka's body. Second appellant remained in the vehicle. Shibonwa's mother asked why first appellant was bringing a dead body to her and not taking it to the police. Appellant no 1 responded by saying that since it was her herd boy she should take the body. He then said that he was going to pick up another "dog" that was working for a certain Mafale. Shibonwa and her mother then covered the body with a blanket. According to Shibonwa appellants left and returned with another boy. First appellant ordered the boy to uncover the Kalaluka's body and to look at it. He told the boy that if he did not return his money he would die like him. Appellants then left with the second boy. The police came late in the afternoon to collect the body.

> The last State witness to be called was Sergeant Ostan Minyoi, who was the investigating officer in the case. On 19 March 2004 he received a report concerning an alleged murder at Linyanti. Upon receiving the report he drove to Linyanti village where he interviewed various witnesses, which included Muchali, Alfonsina Shibonwa and her mother. He testified that he personally inspected the body of the deceased. He uncovered the body and saw a body of a male person who had multiple injuries over his body and had sand in his nose. He then asked the scene of crime officer to take photographs. After taking photographs they took the body to Katima Mulilo State mortuary. The following day they arrested appellants at Linyanti village."

[8] Mr Namandje who appeared on behalf of the applicant in this application submitted that since the *post-mortem* report was found to be inadmissible by this Court (in its appeal judgment) that on the admissible and proved evidence the cause of death of the deceased was not proved by the Sate beyond reasonable doubt.

[9] He submitted that this Court in dismissing the applicant's appeal against his conviction on the charge of murder failed to appreciate far reaching impact and effect of upholding the applicant's submission that the *post-mortem* report should not have been admissible. The far reaching effect of holding the *post-mortem* report inadmissible was that the Regional Court's finding regarding the cause of death of the deceased had been wholly discarded and that on this basis neither the intention (to kill) nor the cause of death of the deceased could be said to have been proved beyond reasonable doubt. It was submitted that the cause of death was not known. Mr Namandje submitted that even if this Court were to accept the evidence of the State witnesses that the accused has admitted to have killed the deceased such admission of "killing" was not sufficient to prove beyond reasonable doubt the "clinical and medical cause of death". Mr Namandje submitted that "killing" is a neutral term which does not imply intention to murder and also does not exclude culpable homicide.

[10] The *post-mortem* report which was accepted by the Regional Court magistrate stated that the cause of death of the deceased as head injuries, multiple lacerations and possible suffocation and described the external appearance of the body during the post-mortem examination.

[11] It is trite law that where an accused is charged with murder, the State has the burden to prove beyond reasonable that the accused unlawfully killed the deceased and that the accused had the requisite *mens rea*.

[12] It is not disputed by the applicant (since the applicant did not testify in the Regional Court) that the applicant had with the assistance of his co-accused severely beaten the deceased to the extent that the deceased could not walk or speak and did not deny that the deceased died whilst in the custody of the applicant. It was not disputed that the applicant expressed an intention that he would take away the deceased and would bring him back as a "dead dog". It is not disputed that the next day the applicant unceremoniously off loaded the body of the deceased saying: "Here is your dog I have killed him". It is not disputed that the applicant subsequently went to fetch one of the other boys, ordered the boy to uncover the body of the deceased, and told him that if he did not return his money he would die like the deceased. There is no evidence that the deceased whilst in the custody of the applicant received any medical treatment.

[13] Milton in *South African Criminal Law and Procedure* Vol. 2 third edition at p. 327 states that in the law of murder, causation must relate both to the factual cause (usually tested by the *sine qua non*) and the legal cause (tested by considerations of public policy).

[14] In *S v Mokgethi and Others* 1990 (1) SA 32 (AA) van Heerden AR with reference to legal causation stated at 40D – E that one should guard against a situation that a

perpetrator's liability should not exceed the boundaries of reasonableness, fairness and justice and that these concepts and considerations are not open to closer circumscription. In this regard the Court referred with approval to *Blaikie and Others v The British Transport Commission* 1961 SC 44 at 49 where Lord Justice Clerk Thomson said the following:

> "The law has always had to come to some kind of compromise with the doctrine of causation. The problem is a practical rather than an intellectual one. It is easy and usual to bedevil it with subtleties, but the attitude of the law is that expediency and good sense dictate that for practical purpose a line has to be drawn somewhere, and that, in drawing it, the court is to be guided by the practical experience of the reasonable man rather than by the theoretical speculations of the philosopher".

[15] The question this Court had to consider (in the appeal judgment) was whether the evidence adduced in the Regional Court, with the exclusion of the findings in the *post-mortem* report, proved beyond reasonable doubt that the deceased died as a result of the injuries inflicted upon him by the applicant (and his co-accused).

[16] This Court dealt with the assaults and the nature of the injuries sustained by the deceased as testified by the State witnesses and the fact that the deceased had died whilst he was in the custody of the applicant. In the absence of any explanation by the applicant this Court found that the Regional Court was justified by deducing that the conduct of the applicant in those circumstances caused the death of the deceased.

[17] Regarding the issue of intention, the Regional Court found that the State had proved the requisite *mens rea* in the form of *dolus eventualis*. Similarly this Court considered the utterances of the applicant in the circumstances (referred to *supra*) and was satisfied that the Regional Court magistrate committed no misdirection by inferring, in

the absence of an explanation by the applicant, that the required *dolus* (in contradistinction to *culpa)* had been proved by the State beyond reasonable doubt.

[18] In an application for leave to appeal, the applicant must satisfy this Court that he or she has a reasonable prospect of success on appeal.

[19] In *S v Sikosana* 1980 (4) SA 559 AD Diemont JA referred with approval of *R v Muller* 1957 (4) SA 542 (A) where Ogilvie Thomspon AJA stated that "it is always somewhat invidious for a Judge to have to determine whether a judgment which he has himself given may be considered by a higher court to be wrong; but that is the duty imposed by the Legislature upon Judges in both civil and criminal matters". The Court in *Sikosana* stated at 562D – E that "The *mere possibility* that another Court might come to a different conclusion is not sufficient to justify the grant of leave to appeal" (per Miller JA in *S v Caeser* 1977 (2) SA 348 (A) at 350). What is required is that once a trial Judge has "come to the conclusion that the State has proved its case beyond reasonable doubt he must proceed to consider the case from an objective standpoint and ask himself whether there is not a *reasonable prospect* that another Court might come to a different conclusion". (See *Sikosana supra* at 562H).
(Emphasis provided).

[20] Having regard to the aforementioned test, and having considered this application objectively I am satisfied that there are no reasonable prospects of success on appeal on the ground of appeal raised by the applicant in respect of the conviction on the crime of murder.

HOFF, J

I agree

MILLER, AJ

ON BEHALF OF THE APPLICANT: **MR S NAMANDJE**

Instructed by: **SISA NAMANDJE & CO. INC.**

ON BEHALF OF THE RESPONDENT: **ADV. ESTERHUIZEN**

Instructed by: **OFFICE OF THE PROSECUTOR GENERAL**