HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: CA 33/2012

In the matter between:

IMMS ZAHUPIRAPI KAVARI **APPLICANT**

versus

STATE **RESPONDENT**

Neutral citation: *Kavari v State* (CA 33/2012) NAHCMD 22 (12 October 2012)

CORAM*:* **HOFF J and SIBOLEKA J**

Heard on: **21 September 2012**
Delivered on: **12 October 2012**

Flynote: Criminal law – application for leave to appeal against conviction and sentence.

Criminal law – the applicant failed to satisfy this court that there are reasonable prospects of success on appeal – application dismissed.

Summary: Accused has been charged, convicted and sentenced to eighteen (18) years for murder and four (4) years on attempted murder. The later sentence ordered to run concurrently with the sentence in the first count. Prosecution discharged its burden of proof beyond reasonable doubt.

Held: that for an accused to succeed he must satisfy the appeal court that there are reasonable prospects that the Supreme Court would come to a different conclusion should the application be granted.

Held: that the accused has failed to come up with any such convincing grounds to this court.

Held: that the application for leave to appeal had to be dismissed.

ORDER

The application for leave to appeal against conviction and sentence is dismissed.

JUDGMENT

SIBOLEKA J (HOFF J concurring):

[1] On 11 April 2012 this court dismissed the applicant's appeal against

conviction and sentence by the Regional Court Magistrate, Otjiwarongo. He now applies for leave to appeal against that dismissal to the Supreme Court.

[2] In order to succeed with his application, the applicant must satisfy us that he has reasonable prospects of success on appeal.

[3] In *S v Sikosana* 1980 (4) SA 559 (A) at 562 D-F the court said the following regarding prospects of success on appeal:

"… but the test remains unchanged, and it must be said once more that the application should not be granted if it appears to the learned judge that there is no reasonable prospect of success. … the mere possibility that another court might come to a different conclusion is not sufficient to justify the grant of leave to appeal."

[4] The grounds of appeal are as follows:

- The conviction is not safe, the circumstances are exceptional since the plea was self defence. The applicants fundamental right to a fair trial has been infringed during the course of the trial. The sentence imposed is manifestly severe taking into account mitigating factors submitted:

  In the Regional Court the applicant was represented by Mr Tjitemisa. A plea of not guilty on all charges was tendered with the following

explanation: "…that on the day in question being the 1st of November 2004, the accused did shoot three times in the air to deter or scare a group of people to assault him …"

- This ground is a repetition of what was raised during the appeal against conviction and sentence. It was ruled that based on the evidence before the Magistrate the applicant's defence that he was attacked by a bottle and stone throwing group of people was found to be false. The other part of this ground is vague because it does not explain the infringement itself nor does it state how it indeed happened. The reading of the record of proceedings shows that no such infringement exists. The ground relating to the alleged severity of the sentence is a repetition of what was set out in the appeal against sentence. We were satisfied that there was no failure of justice warranting an intervention by this court in that regard.
- The Honourable judges of appeal erred in law and fact and or misdirected themselves in upholding the decision of the court ac quo that Mr Amadhila was a credible witness of the State where as there is no conclusive evidence on the record as to what the cause of the wounds were:

  This ground is not correct because the report on a Medico-Legal-post mortem examination clearly indicates the cause of death to be gunshot injuries of the abdomen.
- The Honourable judges erred in failing to hold that the State's failure to properly conduct a comprehensible scene of crime plan was an irregularity as it related to visibility, the position of the accused and the victims. This

ground is read with reference to an unnecessary restriction on the counsel's questioning, page 166 line 20 of the record:

Mr Tjitemisa, counsel for the applicant during the trial in the Regional Court was not restricted by the Magistrate in his questioning of any of the State witnesses. What happened was that he informed the court that he will bring an application for an inspection in loco during the defence case which the court said he was free to do. However, when the cross-examination on the applicant was finished, Mr Tjitemisa did not make that application but he instead closed the defence case and the matter ended there.

- The Lordships misdirected themselves for ruling that the issue of pointing out at the scene is irrelevant to the parties or to the applicant for that matter, where as it was done by someone who was under the influence of liquor on the day of the incident and was not even in court to testify:

  Cst. Marshal van Wyk was officially on duty (standby for the weekend). He received the shooting incident report at 23h30, he visited the scene of crime and the hospital to check on the victims receiving medical attention. The applicant formally handed himself for incarceration to this officer and reported to him that it was him who did the shooting, handing over the firearm as well. This officer picked up three spent cartridges at the scene on the street. The next day this officer took the Scene of Crime Officer, Sgt. Hoaeb, he pointed out the scene to him and photos were accordingly taken. A photo plan and key thereto were drawn and Sgt. Harry Hoaeb

confirmed this in is evidence during the trial. It is therefore not correct to say the pointing out was done by someone who was under the influence of liquor and who did not testify in court.

- The Lordships failed to take into account that the possibility that only three shots were fired at the scene cannot be ruled out. The State's burden was not to prove how many shots were fired, but to prove who shot the victims concerned: The State indeed called the ballistic expert William Onesmus Nambahu who testified that the tests he conducted confirmed that the three spent cartridges and the projectile retreaved from the deceased were fired from the pistol the applicant used during the shooting at the time of the incident. The State's burden has thus been discharged resulting in the applicants conviction.
- The Lordships erred in law and on facts in failing to find that the trial court misdirected itself by handing down a conviction based on the States witness's inconsistent evidence:

  This is a repetition of one of the grounds cited during the appeal and we found that there were no inconsistencies and that the applicant was correctly convicted.
- The Lordships erred in the law in failing to elaborate and to give detailed reasons which led them to conclude that the applicant's defence of being attacked by a stone and bottle throwing group of people was false:

This is a repetition of one of the grounds for appeal where it was correctly pointed out that evidence before court clearly showed that there was no attack on the applicant at the time he shot into the group of people.

[5] After carefully assessing the grounds upon which the court's ruling was challenged, I am convinced that there is no reasonable prospect of success that the Supreme Court will come to a different conclusion regarding the conviction and sentence.

[6] In the result, applicant's application for leave to appeal against conviction and sentence is dismissed.

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A M SIBOLEKA
Judge

_____
E HOFF
Judge

APPEARANCES

APPLICANT:	**IN PERSON**
RESPONDENT:	**P S KHUMALO**
	OFFICES OF THE PROSECUTOR-GENERAL