

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPLICATION FOR LEAVE TO APPEAL

JUDGMENT

Case No: CC 05-2009

In the matter between:

GERT HENDRIK TITSOL

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *State v Titsol* (CC 05/2009) [2013] NAHCMD 183 (28 June 2013)

Coram: NDAUENDAPO J

Heard: 9 June 2013

Delivered: 28 June 2013

Flynote: Criminal Procedure—Appeal—Application for leave to appeal—No possibility that another court would reach different conclusion—No reasonable prospects of success.

Summary: Applicant was convicted of culpable homicide. As a police officer, applicant failed to take the deceased who sustained injuries whilst in detention to the hospital for medical treatment. Court found that the applicant was negligent and convicted him of

culpable homicide. Disenchanted with the conviction, applicant launched on application for leave to appeal against conviction.

Held, that there are no prospects of success on appeal.

Held further, that there is no possibility that another court may come to a different conclusion. Application dismissed.

ORDER

The application is dismissed.

JUDGMENT

Ndauendapo J

[1] Before me is an application for leave to appeal in terms of section 16 of Act 51 of 1977. This Court convicted the applicant of culpable homicide. The facts in this case can be summarized as follows:

On the night on 31 March 2007, shortly before midnight, the wife of the deceased Margreth Thompson, approached the charge office in Keetmanshoop for assistance as the deceased was apparently troubling her at her house. The applicant, a police officer together with two others was on duty at the time (the other accused were acquitted). The applicant and another police officer attended to the complaint and eventually arrested the deceased and detained him for drunkenness. Contrary to police standing orders, the applicant did not search the deceased properly and he entered the cells with a knife. Moreover, and also contrary to police standing orders, the deceased was locked into a cell with two mentally disturbed persons and Charles Vries, a person detained for domestic violence. Shortly after that a fight erupted between the deceased

and Charles Vries. The deceased attacked Charles Vries with a knife and acting in private defence, (Charles Vries) kicked the deceased. When the police arrived at the cell it was established that the deceased was injured. The deceased was taken by the applicant and another police officer to the hospital for treatment. The nurse on duty requested the applicant to allow the deceased to stay over for observation, but the applicant refused. The nurse then advised him to bring the deceased to the hospital the next morning. The deceased was eventually taken back to the cell. The next morning, the applicant instead of taking the deceased to the hospital, took him back to his house. Later on the deceased was taken to the hospital where he later died.

[2] After hearing evidence the Court convicted the applicant on the basis that he is the one, together with accused 3, who picked up the deceased at the house of his wife after a complaint and before he got into the police vehicle he was not searched by applicant, contrary to the procedure in operational manual. When he was taken to the police station the deceased was not thoroughly searched by applicant. If he was thoroughly searched by applicant, as he claimed, how was it not possible to detect the knife which the deceased had in his socks? There was evidence that applicant did not visit the cell in which the deceased, who was drunk, was kept every 30 minutes as required by the procedure in the operational manual. There were no entries in the OB (Occurrence book) that the deceased was searched, contrary to the operational manual. It was the applicant together with accused 5 (who was on standby) who took the deceased to the hospital. It was applicant who after being advised not only by nurse de Waal, but also by his colleague accused 5 to keep the deceased at the hospital for observation, who refused. According to Deputy Commissioner Visser applicant could have exercised his discretion and allowed the deceased to remain in hospital without being guarded. After all the deceased was well known to applicant and he could not have escaped from hospital to go and harass or trouble his wife because when he was brought to the hospital he could not walk on his own, he was weak and that is why they put him in the wheel chair. Nurse de Waal also testified that the deceased was weak in his body. When applicant took the deceased from the hospital to the police station, nurse de Waal again advised applicant to bring the deceased in the morning to the doctor. He promised to do that, but did not keep his promise. Again when the deceased

was brought from the hospital to the police station, applicant did not make any entry in the OB. In the morning applicant was again advised by witness Hupita, to take the deceased to the hospital. Hupita testified that the deceased was looking very bad and he told applicant that he must take the deceased to the hospital as he was looking bad and "he (referring to the deceased) was going to die anytime'. Instead of taking the deceased to the hospital, he took him straight to his house. Having regard to all that and especially the advice of the nurses and Hupita, applicant should have foreseen the possibility that if the deceased does not obtain medical treatment he will die. After all, the deceased sustained injuries which led to his death while in the custody of the police. There was therefore a legal duty on the police to make sure that the deceased obtained the necessary medical care. In this regard, it was applicant who refused the deceased to be kept at the hospital for observation. It was applicant who after being requested by nurse de Waal to bring the deceased to the doctor the next morning, who failed to do that. It was applicant who after being told by Hupita that the deceased was going to die, because he was looking very bad, failed to take the deceased to the hospital. In my respectful view, applicant should have foreseen the possibility that the deceased may die if he is not taken to the hospital. The conduct of applicant was negligent and his omissions to act by ensuring that the deceased was taken to the hospital, as he should have done, negligently caused the death of the deceased.

[3] The application is based on; inter alia, the following grounds:

- '1 That the honourable court erred in finding that the accused negligently caused the death of the deceased.
2. That the honourable court erred in finding that the state had proved the guilt of the applicant beyond any reasonable doubt.
3. That the honourable court did not correctly apply the test for negligence.'

[4] Mr Mostert appeared for the applicant and Ms Wanternaar for the respondent.

Counsel for the applicant submitted that the applicant has reasonable prospects of success on appeal. Counsel for the state on the other hand submitted that having regard to the findings of the court regarding the conduct of the applicant there are no reasonable prospect of success on appeal and another court will not come to a different conclusion.

[5] When considering an application for leave to appeal, the Court must consider whether there are reasonable prospect of success on appeal

'In S v Nowaseb 2007 (2) NR 640 at 640F-641A Parker AJ, I had this to say concerning application for leave to appeal:

'It has been stated in a long line of cases that in an application of this kind, the application must satisfy the Court that he or she has a reasonable prospect of success on appeal (See, e.g. Rex v Nxumalo 1939 AD 580; Rex v Ngubane and Others 1945 AD 185; Rex v Ramanka 1948 (4) SA 928 (0); Rex v Baloi 1949 (1) SA 523 (A); Rex v Chinn Moodley 1949 (1) SA 703 (D); Rex v Vally Mahomend 1949 (1) SA 683 (D & CLD); Rex v Kuzwayo 1949 (3) SA 761 (A); R v Muller 1957 (4) SA 642 (A); The State v Naidoo 1962 (2) SA 625 (A); S v Cooper and Others 1977 (3) SA 475 (T); S v Sikosana 1980 (4) SA 559 (A). The first ten sample of cases adumbrated above were decided before the coming into operation of the new Criminal Procedure Act, 1977 (Act 51 of 1977) (CPA), but the test remains unchanged. (Sikosana, supra, at 562D).

Thus, an application for leave to appeal should not be granted if it appears to the Judge that there is no reasonable prospect of success. And it has been said that in the exercise of his or her power, the trial Judge (or, as in the present case, the appellate Judge) must disabuse his or her mind of the fact the he or she has no reasonable doubt. The Judge must ask himself or herself whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal; in other words, whether there is a reasonable prospect that the court of appeal may take a different view (Cooper and Others, supra, at 481E; Sikosana, supra, at 562H; Muller, supra, at 645E-F). But, it must be remembered that "the mere possibility that another Court might come to a different conclusion is not sufficient to justify the grant of leave to appeal.' (S v Ceaser 1977 (2) SA 348 (A) at 350E).

'Application for leave to appeal has been dealt with extensively by this honorable court. Time and again this honorable court has emphasized that an application for leave to appeal under section 316 (1) of the Criminal Procedure Act 51 of 1977 should be allowed if the court is satisfied that the accused has a reasonable prospect on appeal. These applications are not granted on compassionate ground, to console the accused or simply afford them a further opportunity to ventilate their arguments and, to obtain another judgment in a court of appeal. S v Nangombe 1991 (1) SA CR 315 (NM) at 352 B-C.'

[6] Having regard to the findings of the court regarding the conduct of the appellant this court is of the view that there are no reasonable prospect of success on appeal, put differently there is no possibility that another court may come to a different conclusion to justify the granting of the application.

In the result I make the following order.

The application is dismissed.

GN Ndauendapo
JUDGE

APPEARANCE:

APPLICANT: MS B WANTERNAAR
OF PROSECUTOR GENERAL OFFICE, WINDHOEK

RESPONDENTS:

MR MONSTERT
ON INSTRUCTIONS OF LEGAL AID, WINDHOEK