REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX-TEMPORE JUDGMENT

Case no: CA 34/2013

In the matter between:

THE STATE **APPELLANT**

and

GERSON ANANIAS **RESPONDENT**

Neutral citation: *S v Ananias* (CA 34/2013) [2014] NAHCMD 82 (10 March 2014)

Coram: PARKER AJ and UNENGU AJ
Heard: **10 March 2014**
Delivered: **10 March 2014**

Flynote: Criminal procedure – Appeal – Statement by accused in terms of s 115 of Criminal Procedure Act 51 of 1977 – Exculpatory statements therein must as a general rule be repeated under oath to have evidential value, except possibly, when a defence is raised in such exculpatory statement, in which event the State may have to negative such defence – Court held further that exculpatory statements in explanation of plea do not form part of the evidential material.

Summary: Criminal procedure – Appeal – Statement by accused in terms of s 115 of Criminal Procedure Act 51 of 1977 – Exculpatory statements therein must as a general rule be repeated under oath to have evidential value, except possibly, when a defence is raised in such exculpatory statement, in which event the State may have to negative such defence – Court held further that exculpatory statements in

explanation of plea do not form part of the evidential material – In instant case learned magistrate of Regional Magistrate's Court accorded exculpatory statement in respondent's plea explanation evidential value and relied heavily on it – On the strength of that the learned magistrate found proven the respondent's defence of self defence or/and private defence – Court found that on the authority of *S v Shivute* 1991 NR 123 and *S v Tjiho* (2) 1990 NR 266 (HC) the learned magistrate erred on the law – Court found further that the State had placed sufficient evidence before the court to satisfy the requirement of 'one possible exception on the general rule' laid down in *S v Shivute* and in that event the learned magistrate should have put the respondent on his defence on the main count of culpable homicide.

ORDER

(a) The appeal succeeds.

(b) The decision of the learned magistrate granting the respondent's s 174 (of the CPA) application is set aside.

(c) The matter is remitted to the Regional Court, Karasburg, for the respondent to be tried *de novo*.

JUDGMENT

PARKER AJ (UNENGU AJ concurring):

[1] The genesis of the present proceedings is this. The respondent was charged before the Regional Magistrate's Court, Karasburg, on one count of culpable homicide. After the State closed its case the accused applied for a discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977 ('the CPA'). After hearing arguments the learned magistrate of the Regional Magistrate's Court granted the application. Subsequently, the Prosecutor-General, for the State, successfully

applied for leave to appeal in terms of the CPA. The present proceeding is the hearing of the appeal.

[2] In its notice of appeal, the appellant sets out main points of appeal which the appellant intended to argue, based on the appellant's averment that the learned magistrate 'misdirected himself, alternatively erred in law and/or on the facts'. The appellant also set out alternative main points based on the appellant's contention that if the court found that 'there only existed evidence at the end of the State's case on a competent charge, then the Learned Regional Magistrate's (Court) magistrate also erred in law and/or on (in) the facts'.

[3] The respondent opposes the appeal, it would seem, and his counsel, Mr McNally, has filed 'main heads of argument' for which we are grateful. Mr McNally submits that the respondent went after the deceased but, '[W]hat happened when he caught up with the deceased is a matter of dispute'. We do not agree. It is clear from the record that the learned magistrate accepted the evidence – and we have no good reason to fault his finding – that the respondent hit the deceased with a glass on the deceased's cheek, and as a direct result of such attack on the person of the deceased the deceased sustained serious injuries and that those injuries were not inflicted by someone else. This led to the learned magistrate to conclude that '[T]here is a possible cause of death that immediately comes to mind when looking at the testimony of the State witnesses. That is the continuous refusal by the deceased to be taken to the hospital in Karasburg after he was injured'.

[4] On these accepted facts, I respectfully accept Mr McNally's submission that the issue to be determined by the court in this proceeding is this: 'Did the deceased's refusal to be taken for medical treatment constitute (an) *novus actus interveniens* – Interrupting the causal chain between the wound he (the deceased) sustained, and his eventual death?' Thus, Mr McNally relies on the learned magistrate's conclusion that 'the continuous refusal by the deceased to be taken to hospital in Karasburg after he was injured' constitutes *novus actus interveniens*. Mr McNally then launches into a torrent of cases to support his series of arguments, among others, that 'the wounding was not in itself lethal or was no longer lethal at the relevant time'. He then

argues, ‘It is respectfully submitted (it is) one thing to say that an accused person who intentionally inflicts a dangerous wound (on another person) cannot be heard to complain of negligent or insufficient medical treatment. It is quite another to deliberately, resolutely and steadfastly refuse medical attention that is readily available’. Counsel concludes, ‘It can never be the state of law that an easily treatable wound, that is deliberately left untreated, cannot be a *novus actus interveniens*’.

[5] With the greatest deference to Mr McNally, counsel misses the point. Counsel’s reliance on the cases cited to support his submission that ‘the wounding was not in itself lethal or was no longer lethal at the relevant time’ is misplaced. The evidence cannot account for such submission. We, therefore, accept the submissions of Mr Eixab, counsel for the appellant on the point. In this regard, we rehearse what the court found and concluded in the application for leave to appeal at paras 8 and 9 of *State v Ananias* (CA 34/2013) [2013] NAHCMD 238 (6 August 2013):

‘[8] … From the record it is clear that the magistrate accepted the evidence that the respondent hit the deceased with a glass on the deceased’s cheek, and as a direct result of such attack on the person of the deceased the deceased sustained serious injuries and that those injuries were not inflicted by someone else. The magistrate concludes that ‘[T]here is a possible cause of death that immediately comes to mind when looking at the testimony of the state witnesses. That is the continuous refusal by the deceased to be taken to hospital in Karasburg after he was injured’. But there is no evidence, particularly medical evidence, placed before the regional magistrates’ court to have established that death occurred because of the deceased’s initial refusal to be taken to hospital. On the contrary, the evidence points to one irrefragable direction, namely, that the injuries that the respondent inflicted upon the deceased were lethal. The injuries were inflicted – according to the Report on A Medico-Legal Post-Mortem Examination (Exh “E”) – on the left side of the deceased’s face. Thus, the glass used by the respondent to attack the deceased cut the “facial artery left mandible” which sent the deceased into “hypovolemic shock” which in turn led to an acute loss of blood, resulting in death. The certificate of post-mortem examination (Exh “C”) does not state that the “hypovolemic shock” and the acute loss of blood was as a result of the deceased’s initial refusal to be taken to the hospital in Karasburg.

'[9] Thus, there is no evidence establishing that the deceased's initial refusal to be taken to hospital constituted an event that qualifies as *novus actus interveniens* so that the infliction of the serious injuries on the deceased that were lethal can no longer be regarded as the cause of death of the deceased … .

'… this is not a case where the evidence establishes that if the deceased had initially consented to being taken to hospital that would undoubtedly have saved his life. The deceased's conduct was not capable of breaking the causal chain between the inflicting of the lethal wounds on the deceased and the death of the deceased at the hands of the respondent. For these reasons I find that the magistrate's observation and conclusion to the effect that the deceased's initial refusal to be taken to hospital "is a possible cause of death" is a serious misdirection on the law and the facts.'

[6] It is with firm confidence that we hold that nothing has changed to persuade this court to accept Mr McNally's submission on the point under consideration in the present proceeding. Mr McNally's submission can be rejected on another basis. Counsel says further that the deceased's refusal initially to be taken to hospital is an 'unreasonable conduct' and it is at the same level as the reasonable conduct of the deceased in *S v Tembani* 2007 (1) SACR 355 which counsel referred to the court. There, the deceased was shot twice by the appellant and she ended up in hospital where she received inadequate and negligent medical care. We do not see how the facts in the instant case show that the conduct of the deceased in the instant case "is at the same level as the unreasonable conduct of the deceased in *Tembani*".

[7] In any case, in Namibia, in terms of arts 7 and 8 of the Namibian Constitution the right to freedom of individual autonomy or personal autonomy is guaranteed to every individual. An individual is entitled to exercise his or her discretion to refuse treatment and accept the consequences of his or her decision. A competent adult is generally at liberty to decide whether he or she would accept medical treatment, even if a refusal might risk permanent injury to his or her health or even lead to premature death, and regardless of whether the reasons for the refusal were rational or irrational, unknown or even non-existent (*Ex parte Chingufo: In re Semente v Chingufo* 2013 NR 328).

[8] Thus, the deceased in the instant case was at liberty to refuse medical treatment initially in pursuance to his exercise of his basic human right to freedom of individual autonomy or personal autonomy. And it cannot seriously be argued, as Mr McNally does, that the exercise of the right was unreasonable or it 'is something quite out of the ordinary'. It is not out of the ordinary for an individual to act in pursuance of the enjoyment of a basic right guaranteed to him or her by the Constitution. In any case, the irrefragable fact that remains on the evidence is, as we have mentioned previously, that the injuries that the respondent inflicted on the deceased were lethal. And the certificate of post-mortem examination (Exh 'C') does not state that the 'hypovolemic shock and the acute loss of blood' were as a result of the deceased's initial refusal to be taken to the hospital in Karasburg. There was, therefore, no evidence establishing that the deceased's initial refusal to be taken to hospital constituted an event that qualifies as *novus actus interveniens* so that the infliction of the serious injuries on the deceased that were lethal could no longer be regarded as the cause of death of the deceased. It is, therefore, a serious misdirection on the part of the learned magistrate on the law and on the facts that the refusal of the deceased initially to go to the hospital constituted *novus actus interveniens*.

[9] Further, the learned magistrate, without having any evidence placed before him by the respondent found that the respondent could on the basis of the exculpatory parts of his plea explanation rely on self defence and or private defence and succeed in his s 174 application. For that, the appellant contends that at the close of the State case there existed no evidence to support a defence of private defence and/or self defence, and that the State had placed sufficient prima facie evidence before the court pointing in the direction of an attack by the respondent on the deceased in retaliation for the trouble the deceased had caused at the respondent's shebeen, which the learned magistrate referred to as the deceased's 'harassing spree', which we have enquired into previously. We, accordingly, accept Mr Eixab's characterization of the respondent's attack on the deceased as revenge and retaliatory attack. In his s 115 plea explanation, the respondent raised a defence of self-defence and/or private defence, as we have intimated previously, and in his s 174 ruling the magistrate stated that the respondent was entitled to defend his

property as the deceased's 'harassing spree' had the effect of driving away the respondent's customers. It is our view that when such defence is proferred during a trial, an accused person cannot be acquitted at the close of the State case as there is the need for the accused to repeat his s 115 plea explanation under oath and for its credibility to be tested under cross-examination. (*S v Shivute* 1991 NR 123 (HC) and *S v Tjiho* (2) 1990 NR 266 (HC)) We see that Mr McNally accepts the principle in *S v Shivute* – though not in so many words – except that, in his submission, counsel says that the State overlooked an extract from O'Linn J's judgment at 127C, namely, 'One possible exception to the general rule is that when a defence is raised in the exculpatory statements in explanation of plea, it may be necessary for the State to negative that defence to the extent of a prima facie case'.

[10] In this regard, it is worth noting this crucial point. There is nothing on the record indicating that when he accepted the respondent's exculpatory statements of his explanation of plea and treated them as evidential material and accorded them a great deal of weight, the learned magistrate indicated that he had found that the State had not negatived the respondent's defence to the extent of prima facie case. Indeed, what appears clearly on the record is that the learned magistrate, as we have found previously, treated the exculpatory statements of the respondent's explanation of plea as evidential material and put a great deal of weight on it, disregarding *S v Shivute* and *S v Tjiho* without justification; and yet 'evidence' consists essentially of oral statements made in court under oath or affirmation or warning. Furthermore, *S v Tjiho* tells us that exculpatory statements in explanation of plea do not form part of the evidential material. And as to the exception to the general rule enunciated in *S v Shivute*; we find, in any case, that on the record the State had placed sufficient evidence before the lower court capable of negativing the defence of self defence and/or private defence in the exculpatory statements to the extent of prima facie case.

[11] As to the s 174 application; Mr McNally argued that in deciding to grant the application the learned magistrate exercised a discretion and he exercised it judicially as he applied his mind, and not arbitrarily. That may be so. But we have demonstrated previously that the learned magistrate erred on the law and on the

facts; and in our view, it was an error of such a kind as to entitle the court to interfere, even if, as Mr McNally submits, the commission of the offence occurred some eight years ago.

[12] In virtue of the aforegoing, we underline the point that the learned magistrate granted the s 174 application solely on the principle of *novus actus interveniens* and, '[F]urther', on the defence of self defence. We have demonstrated that the learned magistrate erred on the law and on the facts on the issue of self defence. We have also shown that he misdirected himself or erred on the law and on the facts as respects the application of *novus actus interveniens*. It is our view, therefore, that the State placed sufficient evidence before the lower court on which a reasonable court can convict. (*S v Kapika and Others* (2) 1997 NR 290 (HC)) Thus, on the evidence placed before the court the learned magistrate should, accordingly, have put the respondent on his defence on the main charge of culpable homicide. His decision to grant the s 174 application is, accordingly, wrong, as we have said.

[13] Based on all these reasoning and conclusions, the appeal succeeds; whereupon, we make the following order:

(a) The appeal succeeds.

(b) The decision of the learned magistrate granting the respondent's s 174 (of the CPA) application is set aside.

(c) The matter is remitted to the Regional Court, Karasburg, for the respondent to be tried *de novo*.

C Parker

Acting Judge

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Acting Judge

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APPEARANCES:

APPELLANT	J E Eixab Of Office of the Prosecutor-General, Windhoek
RESPONDENT:	P McNally Of Lentin, Botma & Van Den Heever, Keetmanshoop c/o Delport Attorneys, Windhoek