

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: CC 115/1990

In the matter between:

THE STATE

APPLICANT

and

LUKAS HAUSIKU

RESPONDENT

Neutral citation: *S v Hausiku* (CC 15/1990) [2014] NAHCMD 88 (20 January 2014)

CORAM: DAMASEB, JP

Heard on: 20 January 2014

Delivered on: 20 January 2014

ORDER

Leave to Appeal against the sentences imposed by me on 25 September 1990 is hereby granted.

JUDGMENT (ex tempore)

Damaseb, JP (on behalf of LEVY, J) : [1]The original cover and certain original documents relating to the criminal case number 115 of 1990 of the State v Lukas Hausiku which was heard by me on 25 September 1990 has been submitted to me together with my note book containing brief contemporaneous notes made by me at the time of hearing. There is also a written Application for leave to appeal against sentence.

[2] The Accused was charged with (1) murder, (2) robbery with aggravating circumstances as defined in s 1 of Act 55 of 1977, (3) theft, (4) contravention of s 48(1) (a) of Act 8 of 1959 escaping from lawful custody.

[3] The Registrar of the High Court has asked me to provide a written Judgment and Sentence in order for the matter to be set down in respect of an Application for Leave to Appeal. He also informs me that the original judgment given in court together with the Sentences imposed at the time are inaudible in the mechanical recordings.

[4] A Judge is obliged to give his judgement which includes the verdict and sentence and once only subject to the right to correct certain errors which need to be considered here. It sometimes happens that the court record is lost or the mechanical recording in respect thereof is faulty and the record is required by the Court of Appeal for some reason or other. The Court of Appeal can instruct the *court a quo* to reconstruct the record. In such circumstances the *court a quo* may find it necessary to seek the assistance of counsel for the State and counsel for the defence. The Judge *a quo* has,

however, no right to take the initiative and reconstruct the record even if reconstruction pertains only to the judgment of the case and or sentence.

[5] In the instant case no such instruction has come from the Supreme Court and I refrain from giving a second judgment and sentencing the Applicant herein afresh. However, I am by law obliged to conclude the matter which originated with me while I was on the bench.

[6] An Accused is legally entitled to apply for Leave to Appeal against his conviction and or his sentence. This is so despite the lapse of time period provided by rules of court. In as much the Supreme Court can grant condonation where the Application is out of time, the Application can be made at any time during the currency of the Sentence. I am, therefore, entitled to give a ruling in respect of this matter and I proceed to do so.

[7] The primary source of any judgement be it the original or a reconstructed one is the Judge's note book read with the official cover on the Judge's Clerk and or Registrar inscribes and records as to what has transpired as well as documentary evidence duly proved. An examination of these sources reveals the following certain points: When the Applicant was charged with the aforesaid crimes on the 25th of September 1990 he was represented by Advocate Grobler while Mr Walters, the present Acting Prosecutor General, appeared for the State. The Applicant pleaded guilty to the crimes as charged and handed in a written and comprehensive plea explanation, a plea explaining his reasons for pleading guilty. That written plea explanation is on record.

[8] The State had led evidence and handed in a post-mortem report supported by photographs. After the State's case the defence gave no evidence whatsoever. No witnesses were called by the defence and the Applicant also did not testify. This is clear from my note book. The official cover referred to above makes it clear that on 25

September 1990 Applicant was found guilty of the crimes of which he was charged. The note book makes it clear that Advocate Grobler addressed the court in mitigation and Mr Walters' replied thereto. The cover records the verdict of the court on 25 September 1990 as guilty of the crimes charged and the sentences which the court imposed.

[9] The Applicant now request leave of the *court a quo* to appeal against the sentences which were imposed. Had the Applicant at the time of sentence or thereafter while I was on the bench applied for Leave to Appeal against sentence I would have granted such leave.

[10] I accordingly rule that without a direction from the Supreme Court. I am not entitled to give a second judgment including sentence but I also rule that in the circumstances of this particular case there is sufficient on record to constitute a valid judgment including the sentences without a transcription having to be made or a record reconstructed accordingly subject to whatever instructions may come from the Supreme Court and subject to the Supreme Court granting Condonation for failure to comply with the rules of court.

[11] I grant the Applicant Leave to Appeal against the sentences imposed by me on 25 September 1990.

Signed H W LEVI
retired Judge of the High Court of Namibia.

APPEARANCE

APPLICANT

OF

DF SMALL

OFFICER OF THE PROSECUTOR GENERAL

RESPONDENT

IN PERSON