



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

Case No.: CA 46/2017

In the matter between:

THE STATE

APPELLANT

and

SUSANNE HOFF

RESPONDENT

Neutral citation: *S v Hoff* (CA 46/2017) [2017] NAHCMD 203 (31 July 2017)

Coram: SIBOLEKA J

Heard on: 24 July 2017

Delivered on: 31 July 2017

Flynote: Criminal law – Application for leave to appeal – prospects of success on appeal abundant, hence application not opposed – leave granted.

Summary: The respondent had persistently requested a certain male person or another person that could be found to kill or injure her husband such that if he is not killed he should at least be a wheel chair bound person. The killer alerted the victim and a police trap was set up. The initial payment was done to speed up the process and another was later effected, when the appellant was informed about the final execution of her wish, which she believed to have happened. An arrest was effected on her. The crime of attempted conspiracy to commit murder has been proved beyond reasonable doubt. The requirements of the competent verdict of the statutory crime as embodied in section 18(2)(a) of the Riotous Assembly Act, Act 17 of 1956 were fully complied with.

Held: The crime of attempted conspiracy to commit the crime of murder was committed.

ORDER

In the result I make the following order:
The application for leave to appeal is granted.

JUDGMENT

SIBOLEKA, J:

[1] This is an application for leave to appeal by the State.

[2] The ground of the notice of the application are as follows:

“A. AD CONVICTION:

1. The learned magistrate misdirected herself, alternatively erred in law and/or in fact when she convicted the Respondent of the charge of attempted murder, more particularly by;
 - 1.1 failing to apply her mind to the circumstances of the case and consider the evidence which was led by the State which proved beyond a reasonable doubt that the Respondent attempted to contravene section 18(2)(a) of the Riotous Assemblies Act, 17 of 1956 by attempting to conspire to commit a crime of murder with Willibard Malima and/or Fanuel Haiduwa and/or Jakonia Shipepe
 - 1.2 making a finding that the fact that Willibard Malima and/or Fanuel Haiduwa and/or Jakonia Shipepe were not in agreement with her plan to kill the deceased meant that there was no attempt to conspire to commit the crime of murder in terms section 18(2)(a) of the Riotous Assemblies Act, 17 of 1956 whereas section 256 of the Criminal Procedure Act 51 of 1977 makes provision for an accused to be convicted of an attempt to commit the offence charged if the evidence in the criminal proceedings does not prove the commission of the offence charged but proves an attempt.
 - 1.3 convicting the Respondent of attempted murder which is a competent verdict of murder whereas the Respondent had not been charged with the common law offence of murder
 - 1.4 convicting the Respondent of the competent verdict of attempted murder the common law crime of murder wherein the facts proved that the Respondent attempted to conspire to commit the crime of murder in contravention of section 18(2)(a) of Act 17/1956

[3] The Respondent appeared in the Regional Court, Windhoek on the following charge:

“C/S 18(2)(a) of the Riotous Assembly Act, Act 17 of 1956 Conspiracy to Commit a Crime of Murder.

Count 1 (in respect of accused 1)

In that upon or during 17 November 2011 up to 30 November 2011 and at or near Windhoek in the district of Windhoek and in the Regional Division of Namibia the said accused did wrongfully and unlawfully conspire with another person, to wit Willibard Malima and/or Fanuel Haiduwa and/or Jakonia Shipepe to aid or procure the commission of or to commit an offence at common law or against a statute or statutory regulation, to wit to murder and or harm Egbert Eugene Hoff, now therefore the accused did commit the offence of conspiring to commit murder”.

[4] In the Court below the appellant was represented by the same counsel as in this application namely Ms. Schimming-Chase. He pleaded not guilty to the charge and after trial he was convicted of attempted murder which is the competed verdict on the common law crime of murder. It is on the basis of this conviction that this application was brought before this court.

[5] The facts of the matter in the application before court is briefly that the appellant solicited help from another person to kill or harm her husband. She discussed the execution of the plan with the killer and showed him where he should hide his body. The initial payment was made to speed up the process. Instead of executing the job as agreed, the killer informed the appellant's husband about the plot to end his life. The police were also alerted and a trap was put in place. The appellant was informed that her husband has accordingly been killed as she had directed. She believed that indeed her husband was no more and another payment was done upon which the appellant was eventually arrested and charged.

[5.1] At the end of the trial the Regional Court Magistrate came to the conclusion that since death did not ensue it was appropriate to convict the appellant on attempted murder, which is a competent verdict on the common law crime of murder.

[6] It is my considered view that the conviction is not correct because the appellant was charged with a statutory offence of contravening section 18(2)(a) of the Riotous Assembly Act, Act 17 of 1956: Conspiracy to commit the crime of murder.

[7] At the hearing of the application Mr Olivier relied on the South African Supreme Court of Appeal Case with similar facts: *David Malisela Kekana vs The State*¹.

[8] In this matter the appellant's co-employee got a post for which the former had also applied for. The appellant got angry and secured the services of a killer to murder his successful co-employee. He offered him R3 000. Instead of executing the job the killer informed the victim about the plot to kill him and the police were alerted. In the meantime the killer contacted the appellant saying the victim has been killed, and an arrest was effected on him. The Regional Court convicted the appellant on the charge of conspiracy to commit murder. On appeal the High Court altered the conviction to one of attempted conspiracy to commit murder.

[9] During the hearing of this matter before court both Mr Olivier and Ms Schimming-Chase were in agreement that the appellant was incorrectly convicted.

¹ David Malisela Kekana vs The State Case No. 58/11 ZA SCA delivered on 25 May 2012.

[10] I agree with the view of both counsel that the appellant was not correctly convicted. It is on that basis that the application for leave to appeal should be allowed.

[11] In the result I make the following order:

The application for leave to appeal succeeds.

A M SIBOLEKA
Judge

APPEARANCES

APPLICANT : Mr. M. Olivier

Instructed by Office of the Prosecutor-General, Windhoek

RESPONDENT : Ms. Schimming-Chase

Instructed by Ellis Shilengudwa Inc.