



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 36/2008

In the matter between:

THE STATE

APPLICANT

v

ARUMUGAM THAMBAPILAI

1ST RESPONDENT

LINDA SHIPALANGA

2ND

RESPONDENT TIMOTEUS SAKEUS

4TH

RESPONDENT

FESTUS SHINDUME

5TH RESPONDENT ONESMUS SHEEHAMA8TH RESPONDENT

Neutral citation: *S v Thambapilai* (CC 36/ 2008) [2018] NAHCMD 307 (27 September 2018)

Coram: SIMPSON AJ**Heard:** 17-18 September 2018**Delivered:** 27 September 2018

Flynote: Criminal law – Leave to appeal – Test – The applicant must satisfy the court that it has reasonable prospects of success should the application be granted.

ORDER

The application for leave to appeal is dismissed.

JUDGMENT

SIMPSON, AJ

[1] This is an application for leave to appeal. The grounds for the application are as follows:

On count 1:

- i. the learned Honourable Acting Judge failed to consider and appreciate that the totality of the evidence proved beyond reasonable doubt that there are specific misrepresentations which formed the core of the claim that were peddled to the Motor Vehicle Accident Fund (MVAF) which misrepresentations resulted in actual prejudice.
- ii. the learned Honourable Acting Judge misdirected himself by inexplicably ignoring or failing to consider evidence which proved that the misrepresentations emanated from the second respondent and were relayed to the MVAF by the first respondent while he knew that they were false.
- iii. that the Acting Judge misdirected himself by failing to consider the bulk of evidence of the witness, Monica Dennis against the respondents which proved that they acted in common purpose to defraud the MVAF.
- iv. that the Acting Judge misdirected himself by failing to draw adverse inferences against the first respondent who selectively produced attendance notes from his office file of the second respondent and critically avoided to produce the attendance notes by Monica Denis.
- v. that the Acting Honourable Acting Judge misdirected himself by failing

to consider and appreciate that the totality of the evidence proved that in the alternative the first respondent had the intention in the form of dolus eventualis.

On count 2 to 6:

- i. that the acting Judge misdirected himself by finding that there is no evidence that the affidavits were prepared without instructions from accused 3.
- ii. that the acting Judge misdirected himself by ignoring the contents of the claim file that was produced as an exhibit. The contents of the correspondence written and signed by first respondent clearly indicate that the first respondent represented to the MVAf that he was acting on the instructions of the 3rd accused.
- iii. the acting Judge misdirected himself by failing to consider the totality of the evidence on all counts, which was tendered by the State proved that in the alternative the first respondent had the intention in the form of dolus eventualis.

On count 7 and 8:

- i. that the acting judge misdirected himself, linking and finding that counts 7 and 8 were interdependent.
- ii. that the acting Judge failed to consider evidence of the witness, Monica Dennis.

On count 9:

- i. that the acting Judge erred by not calling a witness, Anna Hatutale, as the judge was of the view that the evidence of Anna Hatutale was material.

- ii. that the Acting Judge failed to consider the evidence of Monica Denis against the fourth respondent. The fourth respondent did not testify, the Acting Judge ought to conclude that the prima facie evidence available had to become conclusive.
- iii. that the Acting Judge misdirected himself by failing to consider the evidence that the first respondent is the one who completed the MVAF 1 claim form and attached to it documentary evidence which did not support the averments in the claim form.

On count 10 and 11:

- i. that the Acting Judge misdirected himself by inexplicably ignoring or failing to consider and understand the issues which were before it for determination. The learned judge erred in not properly analysing the evidence of Sofia Katilamawe, Jesaya Shivute and Katrina Shivute in conjunction with the contents of the MVAF claim file to find that the first respondent was responsible for the misrepresentations.

On count 12, 13, 14, 15:

- i. that the Acting Judge misdirected himself by finding that Monica Denis was a single witness whose credibility was questionable and that counsel for the first respondent relied on the evidence of Monica Denis's to discredit the other State witnesses as well as the second and fifth respondents.
- ii. that the Acting Judge misdirected himself by failing to consider that the fifth respondent was in agreement with the evidence of Monica Denis regarding the death certificate.
- iii. that the Acting Judge misdirected himself by failing to consider the evidence of Hilma Christians and that of the fifth respondent which stated that Hilma Christians never entered the office of the first respondent nor spoke to him.

- iv. that the Acting Judge misdirected himself by ignoring or failing to consider the evidence of the minor children that they were never told about the payment and that they never benefitted from the payment.
- v. that the Acting Judge misdirected himself by acquitting the respondents on the charges of forgery and uttering whilst there is evidence that both respondents caused affidavits which purported to belong to the deceased, having the fifth respondent affix his thumbprint purporting to be the deceased and then forwarded the documents to the MVAF.

On count 16:

- i. that the Acting Judge misdirected himself by failing to consider the crucial evidence of Monica Denis which proved the participation of the first respondent in the misrepresentations to the MVAF.
- ii. that the Acting Judge misdirected himself in finding the first respondent not guilty on the basis that the state stopped prosecution against the co-accused.
- iii. that the Acting Judge misdirected himself in finding the eighth respondent not guilty on the basis that the accident report was compiled by the eighth respondent for the purposes of the motor vehicle accident claim.
- iv. that the Acting Judge misdirected himself by failing to consider that the evidence of the falsity of the contents of the report regarding the place and scene of the accident, where the claimant was hospitalized, the type of motor vehicle, the entries made in the Accident Report book and the false CR number were all, pointers to the involvement of the eighth respondent to the commission of the offence.

[2] The allegations on the charge sheets was that it was represented to the MVAF that second respondent is unemployed and had no source of income; that the

husband of second respondent earned a salary of N\$ 3050. Whereas in fact, the second respondent was employed by Ministry of Defence and stationed at Grootfontein and that the late husband earned a salary of N\$ 1100.

[3] The state further alleged that the claim for compensation was compiled by accused 1 and 2 and that an affidavit was drawn up by accused 1 and signed by accused 2. The issue that the court had to deal with, was whether accused 1 knew that the information tendered by accused 2 was false. There is no evidence placed before court that accused 1 and 2 knew one another prior to the handling of the claim. There is also no evidence placed before court that accused 1 and accused 2 acted in cahoots.

[4] As also remarked in the judgment, that during the evidence of Monica Dennis, it was put to her that accused 2 made a mistake regarding the earnings of her husband. The manager of Dresselhaus Engineering also stated that accused 2 attended to his office in order get a letter stating the salary earnings, being N\$ 3050 per month. There is evidence before court that during the trial accused 1 made use of the secretaries to assist as interpreters, i.e. Alina Hailonga and Anna Hatuthale. The state failed to call such secretaries to confirm this information.

[5] This is the issue regarding this count and the court is of the view that another court would not come to a different conclusion as the state failed to prove its case beyond a reasonable doubt. When Fanuel Uugwanga testified during cross examination, he stated that he did not adduce evidence that the first respondent prepared the affidavits as stated in the charge sheet. There was also no evidence before this court that the respondent handed over the documents to accused 3, as was stated in the charge sheet. There is also evidence before this court that the contents of the statement was explained to accused 3 before it was commissioned.

[6] There is no evidence placed before this court that the affidavits were prepared without any instructions from accused 3. Fanuel Uugwanga also testified during cross-examination that he had no evidence to conclude that any dishonesty took place in the preparation of the document. It is clear that, what is stated in the indictment and what is stated during evidence under oath, especially during cross-examination is not consistent. The court is therefore of the view that the state failed

to proof a case beyond reasonable doubt and that another court will not come to a different conclusion, taking into account the facts placed before this court.

[7] During the trial proceedings, the state submitted that it did not prove its case on count 7, and even in its application for leave to appeal dated 17 December 2015, no mention was made regarding any misdirections by the Acting Judge. The court will therefore also not entertain the application on count 7.

[8] It is clear from the evidence of Wilhelmina Hypia that there was no theft. As a result, the count of attempt to defeat the course of justice could also not stand. According to the evidence, there was no shortfall and that the cheque for Hypia was paid to her. The evidence also showed that Hypia received the correct amount. There is therefore no way that another court will come to a different conclusion with the same facts (evidence) placed before it.

[9] Regarding count 9, it is clear during cross examination of Monica Dennis, she stated that Anna Hatuthale was interpreting for the first respondent when the fourth respondent came to the office. Fanuel Uugwanga also stated that the first respondent acted through interpreters. The witness, Monica Dennis also stated that the first respondent and the fourth respondent did not connive when the fourth respondent came to their offices.

[10] Evidence before court is clear that Anna Hatuthule was the interpreter between the first and the fourth respondents. This court is of the view that another court will not come to a different conclusion with such evidence placed before it.

[11] Regarding counts 10 and 11, it is clear from the record that there was no evidence placed before this court that the first respondent consulted with Sophia Katilamwe and also no evidence was adduced that the first respondent acted without any instructions. As Fanuel Uugwanga also stated during cross-examination, that the first respondent could place the same reliance as any other person and that there was nothing wrong looking at the commissioning of the said documents. There is also no evidence placed before this court by the state, that the first respondent was present when the documents were commissioned. Fanuel Uugwanga also stated

that there is nothing wrong for the lawyer to prepare the documents and then for the client to take it to the deponents to have it commissioned.

[12] Fanuel Uugwanga also stated that he does not have any evidence that the documents were prepared by the first respondent and he also does not know who in the office of the first respondent prepared the documents. This court is therefore of the view that with such evidence or lack of evidence, another court will not come to a different conclusion.

[13] Regarding counts 12, 13, 14 and 15 is in respect of respondents 1 and 5. Hilma Kristiaan was introduced to the office of the first respondent as the mother of the fifth respondent. There is no evidence placed on record that that first respondent was aware of the true relation between Hilma Kristiaan and the fifth respondent. Hilma Kristiaan admitted going to the office of the first respondent where she was introduced as the mother of the fifth respondent. The interpreter involved amongst these parties was Anna Hatuthale. Again, this person was not called by the state to narrate as to what transpired. Hilma Kirstiaan also stated that after the death of her sister Nango, she took the role of mother for the fifth respondent.

[14] It is clear from the record that the first respondent was under the belief that Hilma Kristiaan was the claimant. With the above facts, this court is of the view that another court will not come to a different conclusion.

[15] Count 16 is in respect of the first and the eighth respondents. It is clear from the record that the claim of David Shikale was already filed with the MVAf when the first respondent became involved with the matter. It is clear from the record that the first respondent did not make any misrepresentations to the MVAf regarding the position of David Shikale as the claim was already submitted to the MVAf. According to the evidence before this court, the eighth respondent is a police officer, who compiled an accident report. According to the witness, Ephraim Iyambo, this accident report was not required for the MVAf. There is also no evidence before this court that the first and eighth respondents acted in common purpose.

[16] In determining whether to grant or refuse an application for leave to appeal, this court will have to be guided by the test as applied in *Nowaseb v S*, case no.

51/2005 delivered on 23 October 2007. The court has to be convinced that there are reasonable prospects of success on appeal if the application for leave to appeal is granted. This court must be convinced that the court of appeal may come to a different conclusion.

[17] The fact that the fourth respondent did not testify can be regarded as conclusive if there is prima facie evidence. However, a witness in court is subject to cross-examination which will test the credibility of such a witness. It is clear from the record that there are several inconsistencies and even if the fourth respondent did not testify, the inconsistencies still stand.

[18] In general it can be said that although the state proved a prima facie case, the same cannot be said regarding proving its case beyond reasonable doubt. In this matter there are several inconsistencies, deviations from statements as well as the absence of a crucial witness. The court is of the view that another court will not come to a different conclusion.

[19] In the result, the application for leave to appeal is dismissed.

A K SIMPSON
Judge

APPEARANCES:

FOR THE APPLICANT: E MARONDEDZE (together with S T KANYEMBA)
Of Office of the Prosecutor General, Windhoek.

FOR THE 1ST RESPONDENT: MR BOTES
Instructed by Thambapilai Legal Practitioners,
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FOR THE 2ND & 5TH
RESPONDENTS: A KAMANJA
Of Amupanda Kamanja Legal Practitioners,
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FOR THE 4TH RESPONDENT: M SIYOMUNJI
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