

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

CRIMINAL APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2018/00070

ANTHEA ARNOLD

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Arnold v S* (HC-MD-CRI-APP-CAL-2018/00070) [2019] NAHCMD 279 (9 AUGUST 2019)

Coram: **LIEBENBERG, J e t SHIVUTE, J**

Heard: 21 June 2019

Delivered: 9 August 2019

Flynote: Criminal Procedure – Appeal – Conviction and Sentence – Appellant convicted of murder — No prospects of success on appeal – No misdirection on the part of magistrate convicting the appellant and in imposing the sentence – The approach to evidence of a single witness in murder cases restated.

Criminal Procedure – A court on appeal will not interfere with factual findings of the trial court in the absence of irregularities or misdirection by the trial court.

Held that, the defence of private defence is not available where there is evidence demonstrating that the attack was over.

Held, further that, there are no prospects of success as the sentence imposed is not inappropriate, neither does it induce a sense of shock.

Summary: The appellant was convicted of murder in the Regional Court sitting at Windhoek. She was sentenced to seventeen (17) years' imprisonment. She noted an appeal against both conviction and sentence. Appeal dismissed as the post mortem report proved that the appellant was not being attacked by the deceased at the time when she shot him.

ORDER

The appeal against conviction and sentence is dismissed.

CRIMINAL APPEAL JUDGMENT

SHIVUTE, J (LIEBENBERG, J concurring):

[1] The appellant was convicted of murder in the Regional Court sitting in Windhoek and was sentenced to seventeen (17) years' imprisonment.

[2] The appellant appealed against both conviction and sentence. She was represented by Mr. Tjombe and Mr. Olivier appeared on behalf of the respondent.

[3] In the Notice of Appeal, the appellant enumerated six main grounds on which the appeal against conviction is founded and one ground of appeal against sentence. These grounds generally relate to three main issues namely;

i. the court a quo erred in its assessment of the evidence and thus drew negative inferences against the appellant,

ii. the court a quo erred in accepting that the appellant was the author of exhibit C (a note found in the deceased's house),

iii. the learned magistrate erred in applying the requisite test for proof beyond a reasonable doubt in criminal proceedings and in not finding that the State had failed to disprove the defence of self-defence.

Conviction

[4] The grounds of appeal primarily focus on the trial court's evaluation of the evidence presented by the State. The approach to adjudicating on an appeal focusing on the trial court's evaluation and assessment of evidence has been addressed in *Isaac v S*¹ where the court stated as follows:

“Whereas a court of appeal does not have the same advantages as the trial court to have observed and heard all the witnesses and being steeped in the atmosphere of the trial, it should be very slow to interfere with the trial court's evaluation of the evidence. A court of appeal will not reject credibility findings of the trial court in the absence of irregularities or misdirection committed by that court. It is trite that the function of deciding on acceptance or rejection of evidence primarily lies with the trial court.² And even where there is a misdirection, it must be shown to be material, as not every misdirection will enable the court of appeal to disregard the findings of the trial court.”

¹ [2018] NAHCMD 213 (16 July 2018)

² *S v Ameb* 2014 (4) NR 1134 (HC).

[5] The court in *R vs Dhlwayo and Another*³ aptly summarised the approach a court of appeal must adopt when considering a judgment of a lower court, the court stated as follows;

“An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered”

[6] The approach to determining whether an accused person who causes the death of another is guilty of murder in circumstances where that person is the sole witness to the death is summarised in the judgment of *S v Steynberg*⁴ where the court held that;

‘When an accused causes somebody’s death by means of an unlawful assault and only the accused is able to explain the circumstances of the fatal assault, but he gives an explanation which is rejected as false, then the Court can make the inference that the accused committed the said assault with the intention to kill rather than with any other less serious form of *mens rea*.’

[7] The Supreme Court in *S v Shaduka*⁵ when considering the single evidence of an accused considered *Steynberg supra* when setting out the approach to be adopted where the only evidence available is the evidence of an accused person and the deceased died by means of a gunshot wound, the court held that;

‘It is in that respect the facts of *Mlambo* case are different from this case, where the cause of death is known to be the gunshot wound. This is an appropriate case *where* the *Mlambo dictum* per Malan JA above finds application. In fact, like in the matter of *S v Steynberg*, 1983 (3) SA 140 (A) this matter too, is an example of the facts and circumstances where the approach of Malan JA in *Mlambo*’s case is pertinent:

‘It amounts to this: when an accused causes somebody’s death by means of an unlawful assault and only the accused is able to explain the circumstances of the fatal assault, but he gives an explanation which is rejected as false, then the court can make the inference that the accused committed the said

³ 1948 (2) SA 677 AD at pages 705 – 706

⁴ 1983(3) SA 140 (AD) at 147 C-D

⁵ [2017] NASC (13 December 2012)

assault with intention to kill rather than with any other less serious form of mens rea. In this manner, an accused's false account of the circumstances of the assault can result in the accused being found guilty of the more serious crime of murder rather than the lesser offence of culpable homicide.'

[8] The application of such an approach can often produce satisfactory and correct results. However, the application thereof obviously does not mean that, when an accused gives a false explanation about a fatal assault he perpetrated on someone about which he alone is able to give evidence, the inference must be made that the accused had the intention to kill the deceased. Malan JA also didn't put it like that: one must be mindful of the qualifying words "in suitable cases" which appear in the *Mlambo* case dictum. In the nature of things it is generally impossible to devise an exhaustive formula according to which it can be judged whether or not the said approach can thus be applied. It depends on the special circumstances of each case. The nature and extent of the accused's lies are of major importance.

[9] In addition, all the other factors which, from the evidence, appear to be relevant to the adjudication of the question whether the inference that the accused had the intention to kill is justified, should be brought to bear; and this adjudication is undertaken with due observance of the established rules of logic in connection with circumstantial evidence as formulated in *R v Blom* 1939 AD 188 at 202-3.

[10] Where the *Mlambo* case dictum is fittingly applied, there is no room for the notion that the conviction serves in retribution for the accused's false evidence. For the proper adjudication of a trial case, the trial court has to rely on the evidence adduced. In a criminal trial the testimony of the accused himself can be a material and significant component of the entire evidential material; and the acceptance or non-rejection of the accused's testimony can be decisive in his acquittal or conviction of a lesser crime than the one on which he stands trial. However, when the accused's testimony is rejected as false, the trial court, in its decision of the matter has to manage without the said aid.

[11] In short, proper application of the *Mlambo* case dictum merely means that the accused cannot complain about the fact that because of his own untruthfulness the trial court cannot give him the benefit of the possibility (viz. that he used violence on the deceased with any other intention than killing him, or even with a harmless

intention) that is not based on any acceptable information (evidence)... It is with these considerations in mind that the evidence in the current case must be approached." (sworn translation of the judgment per Hoexter JA at 147- 148).

[12] I endorse this interpretation on the application of the *Mlambo* dictum. The circumstances of this case fall squarely within its sweep and, in my view, it should have been adopted by the trial Court.

[13] The appellant testified in the court a quo that she was in a motor vehicle sitting in the front passenger seat .The deceased was also in the vehicle sitting in the driver's seat. She testified that the deceased told her to move to the back seat and thereafter she moved to the back seat and sat in the middle part of the backseat and the deceased remained sitting in the driver's seat. The deceased then moved to the front passenger seat. The testimony of the appellant was that the deceased was quarrelling with her and he turned and faced her and slapped her on her face. She testified that she tried to cover her face and did not know how many times deceased slapped her. When she lifted up her head, she realised that the deceased had a gun in his hand and she quickly grabbed for it and fired the shot that killed the deceased.

[14] The appellant does not dispute that she shot and killed the deceased, she states that she shot him in private defence. After appellant fired the gunshot, she testified that the deceased was sitting on the left front passenger seat. This is the only evidence available in relation to the shooting of the deceased.

Private defence

[15] The appeal can only succeed if the grounds of private defence were met before the trial court. I therefore briefly address the test for private defence and whether the grounds for private defence were established. The test for private defense is whether the accused reasonably believed that her life was in danger or reasonably believed that she was using reasonable means to ward off the attack. This is normally an objective test. However, an element of subjectivity is nevertheless present in the process which relates to the persons and circumstances involved in the act. There must be an attack in progress which the appellant was defending herself against.

See *S v Patel*⁶.

See also *S v Naftali*⁷

[16] Applying the facts of this case to the legal principles set out above, the determining factor is whether in the circumstances the appellant reasonably believed that her life was in imminent danger and whether it could be said that a reasonable person in the position of the appellant would have acted the way she did.

[17] The post mortem report indicates that the deceased was shot at close range at a distance of less than 15cm on the right paravertebral aspect of the mid back. The cause of death as per the post mortem report was a 'close range gun-shot injury to the back'. The diagram attached to the post mortem report shows a gunshot wound to the center of the deceased's back⁸. This evidence was uncontroverted and is diametrically opposed to the testimony proffered by the appellant. The deceased at the time he was shot, based on the post mortem report, was not facing the appellant but had turned his back fully to the appellant. The defense of private defense is not available where an attack has ceased. The only inference that can be made is that the deceased was shot by the appellant with his back facing the appellant and therefore no attack was continuing.

Exhibit C

[18] It is common cause that a note was found inside the house, the English portion reads 'I did because he infected me with Aids and feels nothing about it'. In testimony, Dr Ludik, a handwriting expert found that he could not exclude the appellant as the author of the note. This court has the benefit of the full record on appeal. The deceased and the appellant were in a relationship from 2003 to 2007. During mitigation the appellant testified that she found out in 2004 that she was HIV positive. The inference relied upon by the learned magistrate is on these facts a reasonable inference that this court cannot interfere with. It is reasonable to infer that the note was written by the person who shot the deceased. I therefore find that the inference by the learned magistrate was sound in the circumstances.

⁶ 1959 (2) SA 212 (A) at 223

⁷ *S v Naftali* 1992 NR 299 (HC).

⁸ Record page 340

[19] On 9 February 2018 prior to sentence being passed by the court a quo the appellant, whilst represented legally by Ms. Tomas, indicated that the judgment of the learned magistrate was 101% correct and reflected what happened. She further admitted that she wrote exhibit C. The appellant additionally handed in an affidavit attested before a commissioner of oaths which confirmed what she did. As I have indicated, on appeal the court has the whole record of proceedings and is entitled to rely on any evidence contained in the record. I find that the admissions which were made in the presence of counsel gives detail as to how and why the killing of the deceased occurred and confirmed the court's findings. I accordingly dismiss the appeal against conviction as having no merit.

Sentence

[20] The appellant appeals against sentence on the basis that the learned magistrate erred by failing to properly apply factors to be taken into consideration and over emphasizing deterrence and retribution factors over the personal circumstances of the appellant. The approach to an appeal against sentence was set out as follows in *S vs Tjiho*⁹:

'The appeal court is entitled to interfere with a sentence if:

- (a) the trial court misdirected itself on the facts or on the law;
- (b) an irregularity which was material occurred during the sentencing proceedings;
- (c) the trial court failed to take into account material facts or that emphasised the importance of other facts;
- (d) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by a court of appeal.'

[21] In *Shikulo v State*¹⁰ the court held that an appeal court could only interfere with the sentence imposed by the trial court if the alleged misdirection was of such a nature, degree or seriousness that it shows directly or indirectly that the trial court did

⁹ 1991 NR 361 (HC) at 366A-B

¹⁰ [2016] NAHCMD 35 (24 February 2016)

not exercise its discretion or exercised its discretion improperly or unreasonably. I must therefore, consider not just whether there was a misdirection but rather whether the misdirection was of such a degree of seriousness as to demonstrate that the trial court did not exercise its sentencing discretion judiciously. I do not find that to be the case and accordingly find that the sentence imposed by the trial court was imposed after the proper exercise of discretion by the trial court. In my respectful view the sentence imposed is neither inappropriate, nor does it induce a sense of shock.

Conclusion

[22] In the result, the court is not satisfied that there are prospects of success on appeal and the appeal is dismissed.

N N Shivute
Judge

JC Liebenberg
Judge

APPEARANCES

APPELLANT:	Mr Norman Tjombe
INSTRUCTED BY:	Tjombe-Elago Inc

RESPONDENT:

Mr Marthino L Olivier

Office of the Prosecutor-General

