

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

CRIMINAL APPEAL JUDGMENT

Case no: CA 42/2017

ALFEUS HAFENI

APPELLANT

versus

THE STATE

RESPONDENT

Neutral citation: *Hafeni v S* (CA 42/2017) [2019] NAHCMD 458 (7 November 2019)

Coram: SHIVUTE, J *et* RAKOW, AJ

Heard: 20 September 2019

Reasons: 7 November 2019

Flynotes: Criminal – Appeal against conviction and sentence – Appellant failing to clearly raise grounds for appeal against sentence – Failure thereof to comply with rule 67(1) of the rules made under the Magistrate’s Court Act 32 of 1944 – Court finding no misdirection on the part of the court a quo to justify interference with its decision.

ORDER

The appeal against conviction is dismissed.

CRIMINAL APPEAL JUDGMENT

RAKOW, AJ (SHIVUTE, J concurring):

INTRODUCTION

[1] The appellant, together with a co-accused, were charged in the Windhoek Regional Court on one count of robbery with aggravating circumstances and one count of contravening s 33(a) of Act 19 of 1990 in that they impersonated members of the Namibian Police. The appellant was convicted on a count of robbery whilst his co-accused was acquitted and both of them were acquitted on the charge of impersonating a member of the Namibian Police.

[2] The appellant was sentenced to 15 years' imprisonment on 14/3/2017 and filed his own appeal against the conviction and sentence on 22/3/2017. He indicated that he wished to appeal against the conviction and sentence and then set out the grounds of appeal as follows:

- a) The learned magistrate erred in fact and in law by holding that the State has proven its case beyond reasonable doubt.
- b) The learned magistrate misdirected herself on facts that the appellant was never taken for identification parade (*sic*) during the investigations.
- c) The learned magistrate erred on both law and facts in holding that the State has proven the appellant guilty beyond reasonable doubts (*sic*) when the State witnesses could not identify the appellant.
- d) The learned magistrate failed to take into account that the deposit slips found on the appellant possession was generated from selling of livestock (Cattle).
- e) The learned magistrate erred on facts in holding that state witnesses identified the appellant as the well-spoken one which misdirected the court.

[3] The appellant, who was the first accused in the trial in the court a quo, is represented by Mr. Siyomunji whilst the State is represented by Mr. Moyo. In the Regional Court, the appellant was represented by Mr. Kenaruzo.

[4] From the notice of appeal, it can be summarized that the appellant appealed against the identification findings made by the magistrate as well as a finding in relation to certain deposit slip found at the premises of the appellant that linked him to the commitment of the charged offence.

POINTS IN LIMINE

[5] The State raised a point *in limine* in their heads of argument in that there is no appeal against sentence before court, although the appellant stated in his notice of appeal that he wished to appeal against the conviction and sentence, he omitted to set out clearly and specifically the grounds upon which he based his appeal against sentence in his notice of appeal.

[6] From the reading of the grounds of appeal, it is clear that no specific ground was raised addressing the appeal against sentence. In doing so, the appellant did not comply with rule 67(1) of the rules made under the Magistrate's Court Act 32 of 1944, with respect to an appeal against sentencing. And more specifically, that it did not set out *clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based*. There is therefore no appeal against sentence in this matter.

APPEAL AGAINST CONVICTION

[7] The charge against the appellant related to a robbery incident that took place on 20 February 2012 at Erf 19, Frederic Griese Street, Klein Windhoek, which was the house of the Vieira family. A large amount of cash was stolen (about N\$200 000), jewelry, a laptop and a number of cell phones. The total value of the stolen property was N\$ 548 000.00.

[8] The first State witness called was Cecilia Vieira. She is the wife of the home owner and testified that the appellant and his co-accused came to their house and presented themselves as immigration officers on 14 February 2012 and again on 20

February 2012, the date of the robbery. The appellant was asking her about the whereabouts of her children and she testified that he was well spoken in English. She further testified that the appellant and his co-accused were in her presence for some time on the 20th of February 2012. She indicated that she remembered their faces very well. She said the reason for this is because they have been with her twice and when she talks to people she looks at their faces very well.¹ She went on to describe them in detail, including what they wore and how they held themselves.² She testified also that they came to her house on both occasions in the same City Golf and that she asked her son Claudio to take down the number of this vehicle when they were there on the 14th of February 2012.

[9] The next witness was Manuel Claudio Gonzales Vieira, the son of the first witness. He testified that the appellant and his co-accused came to his house on 20/2/2012. He testified that the appellant and his co-accused came to the house on three occasions. Initially, the gentlemen visited his house and the appellant indicating that he was looking for his father. He told him that his father was not there and they informed him they will return. The second time, they again came and he phoned his mother who then came home. She instructed him to record the registration number of the vehicle they arrived in, a black City Rocks Golf, which he then did on his phone. The registration was N70942W. He saw this vehicle again outside their house on the day of the robbery. The third time he saw them was when they robbed their house. He saw them when he opened the gate for them.

[10] The third witness called by the State was Immanuel Paredo Vieira. He was called by his son Giovanni to come and meet with some alleged immigration officials. He identified them as the two accused before court. He proceeded and explained how they were robbed of their personal belongings as well as that accused 2 was threatening him with a gun. He testified that he recognized the appellant and his co-accused as it was still day light when they came to his house and he works with a lot of people and recognized them.

[11] The witness called next was Luciano Vieira. He is also a member of the Vieira family and returned home at about 18h00 on 20 February 2012 when he found the black City Golf parked outside their yard. He went looking for his parents and

¹ See page 73 of the record lines 4 – 14; page 89 line 10 – 20.

² See page 92 of the record lines 13 – 20.

when he entered their room, was confronted by accused 2 who was holding a pistol. He was pulled to the bathroom and tied up by the appellant. The appellant was also asking him questions regarding foreign exchange. He remembered both persons clearly as they came face to face.

[12] David Alfeus testified that he is the brother to the appellant. He is the owner of the Golf which was in the possession of the appellant since 2011 when he bought it. The registration was N70942W. This vehicle is registered as a dark blue vehicle but he indicated that it can look black.

[13] The evidence of the investigating officer was partly reconstructed. The investigating officer used the registration number provided by one of the sons of the Vieira couple to trace the ownership of the City Golf. He contacted David Alfeus who directed him to his brother, who is the appellant. The police found both appellant and accused 2 at Pick 'n Pay, Wernhill, where a Black City Golf was pointed out to him as being the vehicle of the appellant with the registration no. N70942W. The appellant was asked to take the investigating officer to his room and found deposit slips of five different transactions to the total value of N\$ 15 560, in different bank accounts and a Nampost account on 22 February 2012. Some of these accounts belonged to him and some to family members. The appellant never informed the investigating officer that the money that he deposited, was money received from a certain Johannes Itolwa, his uncle, which was proceeds from his cattle which was sold. He intended to use it towards the purchasing of a motor vehicle. The investigating officer indicated that if he was told about this, he would have verified the information. He approached the appellant and his co-accused to participate in an identification parade but they refused.

[14] The appellant testified that he left work on 20 February 2012 at 17h02 and took a taxi home. He confirmed that he was using his brother's City Golf with registration N70942W. He was the only person driving this vehicle during the month of February 2012. He further indicated that he was selling meat for an additional income. He asked his uncle Johannes Itolwa to sell his cattle in the beginning of January 2012 and got the money from him for the cattle in cash. It was N\$17 000. He initially intended to buy a vehicle with the money and later realized that he was spending the money and eventually only had N\$13 000 left. He further testified that he loaned N\$4500 of this money to his younger brother and that he was given

N\$3000 by Bonifatius to deposit in the account of a certain Elina, whom he did not know. Johannes Itolwa sadly passed away in 2015 and Bonifasius was never called to come and give evidence. The remainder of the money was paid into accounts in his name. He could not satisfactorily explain why he split the deposits between his accounts.

[15] The Magistrate dealt in her judgement fully with the evidence presented to her in the matter. She found that there were enough opportunities for the witnesses to observe their attackers and that the visibility was good. They came to the house of the family on more than one occasion. She indicated in her judgement that she was convinced that the appellant was one of the perpetrators. He was further linked to the incident with the vehicle that was noted on two separate occasions at the scene.

[16] It was argued that, as there was no identification parade, not much could be said about the reliability of the witness' identification of the appellant. From the reasons provided by the Magistrate, it is however clear that the Court considered the identification of the appellant by a number of witnesses and that it was reliable. In *S v Mthetwa*,³ the test for evidence of identification was formulated as follows by Holmes JA:

' (b)ecause of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest; the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities'.

[17] When evaluating the evidence and determining the issue of proof beyond a reasonable doubt, one must address all the evidence simultaneously. Judge Liebenberg in *S v Britz*⁴ explained it as follows:

³ 1972 (3) SA 766 (A).

⁴ 2018 (1) NR 97 (HC) at [42].

‘The adequacy of proof in a criminal case is whether the evidence establishes the guilt of the accused beyond reasonable doubt. If there is a reasonable possibility that the accused’s innocent explanation or alibi which he has proffered might be true, then he is entitled to be acquitted. This would obviously imply that a reasonable possibility has to exist that the evidence which implicates the accused, might be false or mistaken. All the evidence must simultaneously be assessed and not by a process of piecemeal reasoning. ‘

When this approach is followed in the current matter, it is clear that the witnesses called by the State, although some imperfections in minor aspects of their evidence, were found credible witnesses by the Magistrate.

[18] In the matter of *Thomas v S*,⁵ an unreported judgement delivered by Tommasi J, it was said:

‘ (t)he court of appeal can only reject the conclusion of the trial court on a factual question if it is convinced that the conclusion was also wrong. ‘

[19] It is therefore found that there is no justification for the court to interfere with the decision of the learned magistrate as we find no misdirection on the *court a quo*’s part to vitiate the proceedings.

[20] In the result the following order is made:

The appeal against conviction is dismissed

E Rakow
Acting Judge

N N Shivute
Judge

⁵ CA 67/2010 delivered on 26 November 2012.

APPEARANCES

APPELLANT:

Mr M. Siyomunji
Siyomunji Law Chambers

RESPONDENT:

Mr. E. Moyo
Office of the Prosecutor-General