

Case Title: <i>The State v Lukas Natangwe Thomas and 2 Others</i>	Case No: Case No. HC-MD-CRI-APP-SLA-2018/00039
High Court MD: Application for leave to appeal in terms of section 310 of Act 51 of 1977	Division of Court: Main Division
Heard before: Mr Justice Liebenberg	Delivered on: 18 March 2019
Neutral citation: <i>S v Thomas</i> (HC-MD-CRI-APP-SLA-2018/00039) [2019] NAHCMD 55 (18 March 2019)	
<ol style="list-style-type: none"> 1. Condonation of applicant's non-compliance with the rules is granted. 2. Applicant's application for leave to appeal is granted. 	
Reasons for order:	
<p>LIEBENBERG J,</p> <p>This is an application by the State in terms of s 310 of the Criminal Procedure Act 51 of 1977 (the Act) in which the State (applicant) seeks leave to appeal against the acquittal of all three respondents in terms of s 174 of the Act at the close of the State case. Whereas the application has been filed outside the prescribed time limit of 30 days provided for in the Act, condonation is sought in a separate application. The application is supported by the affidavit of Mr Muhongo, explaining on oath what led to the late noting of the application for leave to appeal. I find the explanation reasonable and acceptable. What remains to be decided are the prospects of success on appeal.</p> <p>I am satisfied that the provisions of ss 310(3) and (4) had been satisfied and that the respondents were duly informed of their rights and to lodge written submissions in opposition of both applications if they so wish. To this end only third respondent lodged written submissions in opposition of the application for leave to appeal.</p>	

The respondents appeared in the Walvis Bay magistrate's court on two counts. First and second respondents were jointly charged in count 1 with housebreaking with intent to steal and theft, while in count 2 all three respondents were charged with the offence of theft by false pretence. They all pleaded not guilty to the charges and the matter proceeded to trial in which each respondent conducting his own defence.

On count 2 the complainant gave evidence about the sale of a jackpot machine valued at N\$65 000. He was the owner of the machine. Acting on an advertisement placed by the complainant, he received a phone call from an unknown person claiming to be in Henties Bay and who was interested in buying the jackpot machine. It was agreed that someone would be sent to view the machine. Third respondent arrived and, after having been satisfied, made a phone call where after he started negotiating the price on behalf of the unknown buyer. When an agreement was reached, the banking details were provided to third respondent who, in turn, passed it on to the unknown buyer. Upon receipt of a deposit notification by cell phone from the bank, delivery took place and the jackpot machine was dropped off at a house identified by third respondent. Shortly thereafter third respondent and the jackpot machine disappeared from that place. The complainant only subsequently discovered that the transfer of the money was not done by electronic fund transfer (EFT), but that a cheque was deposited into the said account which later turned out to have been stolen from Namport. Third respondent in his defence disputed having been part of the deal testified on by the complainant.

The evidence of the complainant was corroborated in material respects by two witnesses. Two other witnesses the State intended calling were not available at court at that stage and the investigating officer testified on the unavailability of these persons, the one studying in South Africa while the other was hospitalised. His evidence was supported by letters handed in, explaining the absence of the said witnesses. On the strength of his testimony there were reasonable prospects of the witnesses being available for court in the near future. The matter was then postponed for almost two months.

With commencement of proceedings on 30 May 2018, the record of the proceedings reflects that, according to the prosecutor, the court made a ruling that the State will not be allowed to call a witness who is not in the country. In view thereof, the prosecutor decided to no longer call the other witness who had been in a car

accident and bed ridden for seven weeks, as it was pointless, given the court's stance on the witness who was studying in South Africa. The prosecutor then closed the State's case.

The magistrate thereafter *mero moto* moved for an application in terms of s 174 on behalf of the respondents which was successful and led to the discharge of all three respondents. In coming to his conclusion, the magistrate reasoned that the complainant did not know who he contracted with over the phone. Further, that it had not been established that the complainant was the owner of the jackpot machine, or that he was in lawful possession thereof. Lastly, that the high value of the jackpot machine had not been proved ('explained').

The grounds on which the application for leave to appeal is based are threefold:

- a) That the court disregarded the evidence of the complainant who testified that he was the owner of the jackpot machine, corroborated by two further witnesses;
- b) That the value of the jackpot machine was not an element of the offence and at that stage an irrelevant consideration for purposes of the s 174 application; and
- c) That the court's refusal to afford the applicant the opportunity to call further available witnesses constituted a misdirection.

Having perused the statement filed by the third respondent, I am satisfied that any argument advanced therein merely supports the conclusions reached by the court *a quo* and adds no weight to the court's reasoning. Neither does it show that the grounds of appeal are without merit.

From a reading of the record it is evident that the conclusion reached by the court below in the s 174 application, is not supported by the evidence adduced. The complainant's uncontroverted evidence is that he was the owner of the jackpot machine and there is no basis in law for the court to have ignored this evidence. Neither was the value of the jackpot machine of any significance for the determination of the s 174 application. To find that the lack of proof as to its value weakened the State case, constituted a misdirection.


As for the failure to afford the applicant the opportunity to call further witnesses who were not available at court, there is nothing on record reflecting the ruling or reasons by the court when delivering the ruling – only the mere say-so of the prosecutor. The duty to give reasons for coming to this conclusion lies with the presiding officer and without any being provided, it begs the question whether the court exercised its discretion

judiciously. Whereas the circumstances of the particular witnesses were already before court explaining their absence, the court should have re-evaluated the situation and only when satisfied that it would not have been in the interest of the administration of justice not to postpone proceedings any further, refuse the application. As stated, there is nothing on record showing that the court followed this approach.

For the aforesaid reasons I have come to the conclusion that there are indeed prospects of success on appeal.

In the result, it is ordered:

1. Condonation of applicant's non-compliance with the rules is granted.
2. Applicant's application for leave to appeal is granted.



J C LIEBENBERG

JUDGE