

REPUBLIC OF NAMIBIA

UNREPORTABLE



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case No: HC-MD-CRI-APP-CAL-2019/00083

IN THE MATTER BETWEEN:

ALOIS GARISEB

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Gariseb v S* (HC-MD-CRI-APP-CAL-2019/00083 [2020] NAHCMD 300 (20 July 2020))

Coram: SHIVUTE, J et CLAASEN J

Heard: 15 May 2020

Delivered: 20 July 2020

Flynote: Evidence – Discrepancies in witness statements – Does not necessarily mean that deliberate lies were told to the court – Contradictions per se’ do not lead to the rejection of a witness’ evidence – It may be indicative of an error – Function to

decide on acceptance or rejection of evidence falls primarily within the domain of the trial court – Court a quo did not misdirect itself in convicting the appellant

Criminal Procedure – Appeal against Sentence – Interference by Court of appeal – Sentence is pre-eminently a matter for trial court – interference is only justified where the trial court exercised its discretion improperly – sentence imposed on each count is not shockingly inappropriate nor does it induce a sense of shock – Court a quo’s discretion properly exercised – Appeal against sentence dismissed

ORDER

(a) The appeal against conviction and sentence is dismissed.

(b) The appellant is informed that he has a right to apply for leave to appeal to the Supreme Court in terms of s 311 read with section 316 of the Criminal Procedure Act 51 of 1977 within 14 days if he is aggrieved by the decision of this court.

APPEAL JUDGMENT

SHIVUTE J (CLAASEN J concurring):

Introduction

[1] The appellant appeared in the Regional Court sitting at Gobabis on one count of murder and one count of possession of a firearm without a licence – contravening section 2 read with sections 1, 38(2) and 39 of Act 7 of 1996 as amended. He was convicted of both counts as charged. He was sentenced to 19 years’ imprisonment on the 1st count and 4 years’ imprisonment in respect of the 2nd count. The appellant was aggrieved by both conviction and sentence hence this appeal.

[2] Counsel for the respondent raised a point in *limine* that the appellant filed his notice of appeal out of time. The appellant was sentenced on 14 March 2019. His notice of appeal was signed on 18 March 2019. However, there is no date stamp on the notice of appeal indicating when it was received by the clerk of court.

[3] The appellant explained that his notice of appeal was filed on 27 March 2019 with the clerk of court at the Gobabis Magistrate's Court. A copy was served to the Office of the Prosecutor – General at Gobabis Magistrate's Court. He had proof of service. Counsel for the respondent rightly conceded that the notice of appeal was indeed received by the Prosecutor-General on 27 March 2019.

[4] With the concession by the respondent, it follows that the appellant did not file his notice of appeal out of time. The fact that the clerk of court did not put a date stamp on the notice of appeal cannot be held against the appellant. We will therefore, proceed to deal with the merits.

Grounds of appeal

Conviction

[5] With regard to conviction on the *first count* the appellant's grounds of appeal may be summarised as follows:

The court erred in law and on facts by:

- (a) Accepting the evidence of Mr Jacob Khainaseb who is a family member of the deceased and tried to falsely implicate the appellant.

- (b) Accepting the evidence that the incident took place in the Old Damara Location, Freedom Square, instead of New Building, Freedom Square.

- (c) Relying on the evidence of Mr Khainaseb that the deceased was standing very close to him when the appellant pulled out a firearm and shot at the deceased, ignoring evidence from eye witnesses namely; State witness Stephan Khoeseb and defence witness August Garoeb who saw the deceased coming from inside the shebeen at the time the firearm went off. They again saw him running back to the shebeen.
- (d) Accepting the evidence of Mr Khainaseb who is a single witness as far as his version regarding the position of the deceased at the time he was shot is concerned. Furthermore, it was disputed that the witness was at the main gate at the time the incident took place.
- (e) Rejecting the appellant's version that the shot went off accidentally at the time the deceased, the appellant and a tall boy who is light in complexion were having an altercation over the pistol.
- (f) Making a finding that the fact that the appellant buried the firearm after the incident is an indication that the appellant was the one who shot the deceased.
- (g) Finding that the appellant was guilty because he failed to challenge the medical evidence.
- (h) Accepting the version of Mr Franz Konjuk who is a family member of the deceased and who was not present when the incident took place.
- (i) Relying on hearsay evidence from Chief Inspector Gawie Jantjies who told the court that the appellant shot the deceased because of the appellant's bicycle that was taken from certain boys in a robbery. The court also erred by relying on the evidence of the Chief Inspector when he testified that he had informed the appellant of his legal rights and that the appellant opted to remain silent.

[6] With regard to the *second count*, it was contended that the court misdirected itself by convicting the appellant as he was not formally arrested in respect of the second count. Furthermore, the learned magistrate misdirected himself by convicting the appellant for not applying for the licence because, the firearm entered the country during the war.

Sentence

[7] As regards sentence, the ground of appeal is that the court misdirected itself by imposing a sentence that is inappropriate and which induces a sense of shock.

Merits of the appeal

[8] Having summarised the grounds of appeal, we will now deal with the merits of the case. The appellants' defence *inter alia* is that the deceased was shot accidentally after the shot went off at the time the appellant, the deceased and one tall, light in complexion boy were having an altercation over the pistol.

[9] Mr Khainaseb, the first witness who was called by the state, testified that whilst they were at the shebeen where the incident took place they were approached by the appellant. The appellant first pushed one Rowan who did not react. From there, the appellant went to the witness and asked him about the dagga to which he had allegedly sent the witness. The witness was surprised because the appellant never sent him to obtain dagga. After that, the appellant went to the deceased who was standing close to the witness and pulled out his pistol and shot the deceased without any exchange of words. The deceased ran back to the bar. Thereafter, the appellant rode his bicycle and left.

[10] The witness was confronted during cross-examination with the statement he gave to the police. The point of criticism was that he was being untruthful and he deviated from his statement because he testified that the appellant pushed his bicycle to

Tsarageibes Bar. The appellant further argued that Mr Khainaseb was contradicted by State witness Mr Khoeseb and defence witness Mr Garoeb who testified that the bicycle was not pushed by the appellant at the time he came to the shebeen or bar, but that it was pushed by Mr Garoeb.

[11] Although Mr Khainaseb was contradicted by Mr Khoeseb and Garoeb regarding the issue of who came pushing the bicycle at the scene, he never deviated from his statement. What he testified in court is what was contained in the statement he gave to the police. Furthermore, the issue concerning who was pushing the bicycle is not a material factor that goes to the core of the question that must be determined by this court. We therefore find no merit in this argument.

[12] Another point of criticism by the appellant was that Mr Khainaseb testified that the appellant went close to where the deceased was standing, whilst Mr Khoeseb and Mr Garoeb testified that the deceased came from the shebeen and was not standing with the first State witness. Counsel for the respondent on the other hand argued that the deceased was at some point not together with the appellant and the witness as he had gone into the shebeen. Counsel for the respondent again argued that there was no discrepancy in the evidence of Khainaseb, because Khoeseb and Garoeb testified that the deceased was shot when he moved towards the appellant.

[13] Although Khainaseb testified that the deceased was in the shebeen at one stage, it cannot be said that there was no discrepancy in the State's case in this regard. The version of Khainaseb was contradicted by Khoeseb when he testified that the deceased came out of the shebeen and went to the place where the appellant was standing, then he heard a gunshot. After he was shot, the deceased ran back to the shebeen. The version of Mr Khoeseb was corroborated by the version of Mr Garoeb, the appellant's witness. We therefore find that Mr Khainaseb could be mistaken in this regard.

[14] The appellant argued that the deceased was shot when the appellant and the tall boy, light in complexion, were wrestling over the pistol. However, all the three witnesses

who saw what happened said there was no wrestling or altercation and that the deceased was shot without even any exchange of words. We therefore, find that the appellant's argument in this regard has no merit.

[15] In *S v Auala* 2008 (1) NR 223 (HC) at 233 it was held that:

'It is not uncommon that witnesses, when testifying, differ from one another in minor respects instead of relating identical versions to the court. There can be various reasons explaining this phenomenon and it does not necessarily mean that deliberate lies were told to the court. Contradictions per se do not lead to the rejection of a witness' evidence as it may simply be indicative of an error.'

[16] The appellant furthermore argued that Khoeseb and Konjuk were not at the scene. Counsel for the respondent counter argued that Konjuk never testified that he witnessed the shooting. We pause to observe that the version of Khoeseb as to what transpired at the time of the incident was corroborated by Garoeb and the trial court made a credibility finding that the versions of Khoeseb and Garoeb were satisfactory and reliable. There can be no basis to interfere with that finding. It is trite law that the function to decide on acceptance or rejection of evidence falls primarily within the domain of the trial court. (*S v Slinger* 1994 NR 9 (HC) at 10E)

[17] The appellant again argued that Khainaseb was mistaken regarding the location where the commission of the offence took place when he testified that it took place in the New Location whereas it actually occurred at the Old Location. Counsel for the respondent rightly argued that Khainaseb never testified that the incident took place at the New Location. This criticism of Khainaseb's evidence is also misplaced.

[18] It was again a point of criticism by the appellant that, the court erred by accepting the evidence of Khainaseb and Konjuk who falsely implicated the appellant because they were related to the deceased. On the other hand counsel for the respondent argued that the information that Khainaseb was related to the deceased was never forced out of him. He informed the appellant in cross-examination when the appellant

asked him whether Khainaseb was related to the deceased. It is not borne out by the evidence that when Khoeseb and Konjuk testified they had an ulterior motive to incriminate the appellant. The court accepted their evidence because they were found to be credible witnesses. We therefore find no misdirection on the part of the court *a quo* in this regard.

[19] One of the appellant's grounds of appeal is that the court misdirected itself by relying on the evidence of Khainaseb who is a single witness and who testified that he saw the appellant going to the deceased, pulling out his gun and shooting the deceased. Counsel for the respondent argued that there is no dispute that the deceased was shot by a firearm that was in possession of the appellant. The firearm was also recovered from the appellant. No evidence was led that the firearm was in possession of anyone else apart from the appellant, before and after the deceased was shot. The post-mortem report also indicates that the deceased was shot with a firearm at point blank range.

[20] Looking at the record, when the court *a quo* convicted the appellant it did not only convict the appellant based on Khainaseb's version only. There was evidence from Khoeseb and Garoeb that corroborated his evidence that it was indeed the appellant who shot the deceased. All three witnesses disputed the appellant's version that the appellant and the deceased were wrestling over the pistol. We are therefore satisfied that the court *a quo* exercised its discretion judiciously and judiciously.

[21] The court *a quo* was also criticised that it misdirected itself because it made the finding that the fact that the appellant buried the firearm after the deceased was shot was an indication that the appellant is the one who shot the deceased. Furthermore, that the court took into consideration that the appellant raised self-defence when he did not do so. The court in its judgment stated that the appellant testified, amongst other things, that he was met by the tall, light in complexion boy who happened to be the deceased. That boy had sold the appellant the pistol in issue earlier on. The deceased was interested in getting his firearm back because there was a balance that the

appellant did not pay. As the appellant was leaving, deceased grabbed him and pulled the pistol out of his pocket. The appellant managed to get hold of the deceased's arms and they wrestled for the pistol. It was at that stage that the pistol went off accidentally, fatally injuring the deceased. The appellant further testified that he told the third State witness, Mr Konjuk, that he accidentally shot the deceased.

[22] We pause here to state that Mr Konjuk testified that he was not present when the actual shooting took place. However, he was on the way back to the crime scene when he heard a gunshot. He met with the appellant and the appellant said he had just shot a boy. When Konjuk went in the bar he found the deceased was already shot and was lying on top of the bench.

[23] From the appellant's testimony, the court *a quo* rightly concluded that the appellant was postulating two different propositions namely private defence and lack of intention. The court made a finding that these defences could not be availed to the appellant. The deceased could not have acted in self-defence because he was not under imminent attack and the other requirements of self-defence were not met. Furthermore, the trial court concluded that the shot could not have gone off accidentally under the circumstance, because no jostling for the firearm between the appellant and the deceased had taken place. According to the eye witnesses, there was no altercation and the firearm was discharged without any exchange of words. The court then asked a rhetorical question, namely if ever the deceased was accidentally shot, why would the appellant hide the firearm that was used to kill the deceased by burying it in his chicken run? It was therefore, not the court's finding that the fact that the appellant buried the firearm was an indication that he was the one who had shot the deceased. Even assuming that the court had made this finding, it is a relevant factor in the consideration of the conspectus of the evidence before the trial court. We are therefore not persuaded that the learned magistrate misdirected himself. The argument is undoubtedly unmeritorious and is rejected.

[24] Another ground raised by the appellant was that he was convicted due to his alleged failure to challenge the medical evidence. This argument cannot be correct as no such finding was made by the court *a quo*.

[25] The appellant takes issue that the learned magistrate relied on hearsay evidence from Chief Inspector Gawie Jantjies who told the court that the appellant shot the deceased because of the appellant's bicycle that was allegedly taken in a robbery, the victims of which were certain boys. In the same vein, the court *a quo* was criticised for accepting Chief Inspector Jantjies' evidence that he had informed the appellant of his rights and that the appellant opted to remain silent. According to the court *a quo*'s judgment, Chief Inspector Jantjies found the appellant at Epako Police Station. He explained to the appellant his rights to get a legal representative of his own choice or to apply for legal aid. He also explained that the appellant had a right to remain silent. At that stage the appellant decided to remain silent. The appellant was transferred to Gobabis Police station that same day on 22 April 2016.

[26] Whilst the appellant was at Gobabis Police Station he approached Chief Inspector Jantjies that he wanted to talk to him. Chief Inspector Jantjies declined to talk to him that day and offered to talk to him on the next day, the 22nd April 2016. He again informed the appellant of his rights as earlier stated. Despite all the warnings, the appellant decided to tell Chief Inspector Jantjies what had happened. He led the Chief Inspector to Canaan Location where the firearm in issue was retrieved from underground in the chicken run. The firearm did not have a licence.

[27] The appellant willingly and voluntarily pointed out the firearm after he was informed of his rights to legal representation and the right to remain silent. The previous day he opted to remain silent but the following day he waived his rights and pointed out the firearm. It was also not an issue during the trial that the appellant informed Chief Inspector Jantjies that he wanted to hand over the pistol to him. Counsel for the respondent rightly argued that although the appellant was trying to distance himself from the possession of the pistol when he testified that the light in complexion boy also

ran back with the pistol, he contradicted himself when he said he went to his house and left the pistol without explaining how it came in his possession again from the light in complexion boy. We therefore find that the appellant's argument in this regard is misplaced.

[28] With regard to the second count, it is common cause that the appellant was found in possession of a firearm. The firearm had no licence. The appellant was aware that the firearm had no licence and that he needed to get one. His argument that he did not apply for a licence because the firearm entered the country legally during the war is not a valid defence in law. Again, his argument that he was not arrested in respect of this count, this has no merit because the appellant was arrested in respect of both counts. The court *a quo* did not therefore, misdirect itself when it convicted him on this count as well.

Sentence

[29] Although the appellant's notice of appeal indicated that he was appealing against sentence on both counts counsel for the State pointed out that the appellant addressed the court in respect of the second count only. The appellant's grounds of appeal in respect of sentence were that the sentence was inappropriate and induced a sense of shock. When sentencing the appellant, the learned magistrate took in consideration that the appellant was convicted of murder with direct intent. The deceased was 17 years old whose young life had been lost unnecessarily. The right to life is a fundamental right. The offence committed was serious. The court took into account the interest of society as well as the personal circumstances of the appellant. The appellant was not a first offender. The time he spent in custody and the consideration that he did not show any remorse were also taken on board.

[30] The penalty for contravening section 2 read with sections 1, 38 (2) and 39 of Act 7 of 1996 of the Arms and Ammunition Act as provided for by section 38(2) (b) is a fine not exceeding N\$40 000 or imprisonment not exceeding 10 years. Counsel for the State correctly argued that this sentence falls within the jurisdiction of the court *a quo*.

[31] Sentence is pre-eminently a matter for the trial court and a court of appeal would only be entitled to interfere with the sentence where the trial court exercised its discretion improperly. (*S v Van Wyk* 1993 NR 426 SC at 447G)

[32] The learned magistrate has exercised his discretion properly when he sentenced the appellant. We are of the view that the sentence imposed on each count is not shockingly inappropriate nor does it induce a sense of shock. The principles that warrant an appeal court to interfere with the sentence do not find application in this case. It follows that the appeal against sentence can also not succeed.

Order

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

(a) The appeal against conviction and sentence is dismissed.

(b) The appellant is informed that he has a right to apply for leave to appeal to the Supreme Court in terms of s 311 read with section 316 of the Criminal Procedure Act 51 of 1977 within 14 days if he is aggrieved by the decision of this court.

NN Shivute
Judge

CM Claasen
Judge

APPEARANCES:

APPELLANT: Mr Alois Gariseb (In person)
Windhoek

RESPONDENT: Ms Ethel Ndlovu
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