REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2019/00108

In the matter between:

ENGELHARD ISAACK **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Isaack v S* (HC-MD-CRI-APP-CAL-2019/00108) [2020] NAHCMD 351 (13 August 2020)

Coram: LIEBENBERG J *et* SHIVUTE J
Heard: **5 August 2020**
Delivered: **13 August 2020**

Flynote: Criminal procedure – Appeal – Against conviction and sentence – Defence of private defence – Appellant's version not supported by the evidence – Evaluation of evidence by trial court – No material misdirection – Sentence – Punishment is pre-eminently a matter for the discretion of the trial

court – No misdirection found in sentence of 17 years on charge of murder in circumstances of case.

Summary: After being tried and convicted in the Windhoek regional court on 18 September 2019 on one count of murder, the appellant was sentenced to 17 years' direct imprisonment. He appeals on the basis that the regional court misdirected itself on the evaluation of evidence in finding that the appellant did not act in private defence. The appellant is further disgruntled by the sentence passed by the court.

Held, it is trite that grounds of appeal should not embody arguments or conclusions reached by an appellant and should be specific and clear.

Held further, the evidence though not perfect, is acceptable if the court was satisfied that the witness whose evidence the court relied on, gave an honest account thereof. In any event, evidence by the state in a criminal trial need not prove the guilt of an accused on absolute certainty.

Held further, the court finds that the evidence provided by the medical officer in regards to the number of stab wounds is reliable.

Held further, the version by the appellant is self-contradicting and highly improbably.

Held further, there is no rule in law that the fact there is a fight between the deceased and the accused, in itself, constitutes a defence.

Held further, evidence of the appellants own witness differs markedly on material aspects of the appellant's version of events leading up to the fatal stabbing of the deceased, the assault to his head with the deceased's left hand, the assault to his head with a brick as well as regard his intervention while the deceased and appellant were on the floor.

Held further, crimes like murder generally attract lengthy custodial sentences and the court must endeavour to find a balance between the accused person's blameworthiness and effective sentence.

Held further, sentence of 17 years' imprisonment not considered shocking and inappropriate in the circumstances of the case.

ORDER

1. The appeal against conviction and sentence is dismissed
2. The matter is finalised and removed from the roll.

JUDGMENT

LIEBENBERG J (SHIVUTE J concurring):

[1] The appellant was tried and convicted in the Windhoek regional court on 18 September 2019 on one count of murder and sentenced to 17 years' direct imprisonment. He subsequently lodged an appeal against his conviction and sentence as set out in his Notice of Appeal dated 2 October 2019.

[2] The grounds of appeal as set out in the notice against conviction, challenges the trial court's findings on the basis that it erred in fact and/or in law by finding that the appellant did not act in private defence; by finding that the two state witnesses were reliable and truthful where it is clear that their faculties of observation were impaired/ they did not see the stabbing incident; by finding the appellant stabbed the decreased twice, where in view of the totality of the evidence, the wound on the deceased's back could have been as a result of the fight; by rejecting the appellant's version of events where same was corroborated to large extents by the evidence; by rejecting the evidence of Mr Josef Khiba on material aspects where it was clear and material to the just decision of the case.

[3] The appellant's grounds of appeal against sentence are inter alia: the imprisonment term imposed is shockingly inappropriate; the court overemphasised the seriousness of the offence at the expense of the mitigating facts; and finally, the court erred by not taking into account, the fact that the accused spent 8 months in custody before sentence was passed.

[4] Before dealing with the acceptable grounds of appeal, we take issue with two grounds as set out in the notice. This includes ground 4 against conviction and ground 1 against sentence. These two grounds not only miscarry the requirements of being clear and specific but embody arguments or conclusions reached by the appellant. Rule 67(1) of the Magistrates court rules in peremptory terms[1] require of an appellant to state grounds of appeal clearly and specifically and should not embody arguments or conclusions. The purpose of a ground of appeal is to 'apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues'.[2] With regards to the two grounds raised, these requirements have not been met.

Brief Background

[5] The accused was charged with one count of murder. He pleaded not guilty and in his statement, prepared in terms of s 115 of the Criminal Procedure Act 51 of 1977 (hereafter referred to as 'the CPA'), he indicated that the basis of his defence is private defence. The facts relating thereto are as follows:

'….The accused person denies that he had stabbed the deceased three times, the State is put to the proof thereof. During the fight where the deceased was on top of the accused person, he wanted to hit the accused person with a brick and the accused person grabbed a knife that was on the braai stand, evidence will be led to that effect and during the fight one stab wound was inflicted , as the court pleases…'[3]

[1] *Boois v State* (CA 76/2014) [2015] NAHCMD 131 (8 June 2015) at para. 4.
[2] *S v Gey van Pittius & Another* 1990 NR 35 at 36H. See also, *Boois v State* (CA 76/2014) [2015] NAHCMD 131 (8 June 2015) at para. 5.
[3] Record 16.

(Emphasis provided)

[6] The first state witness, Mr Gabriel Amagola, is the owner of a bar where the incident took place. He stated that the deceased at night was braaing and selling meat. An altercation ensued between the accused and the deceased whereby they wrestled with each other. He witnessed the accused take out a knife from his pocket and observed him stabbing the deceased twice. Although this was at night and visibility being poor, he could see from the appellant's body movements that he stabbed the deceased three times. The second witness, a Mr Axel Pinius, stated that the two men wrestled, during which they fell to the ground and the deceased being on top of the accused. Both the accused and the deceased then stood up. Another person (it later transpired that this person was the defence witness Mr Josef Khiba came in between the two men and took hold of the deceased, separating him from the accused. Moments later, the witness observed two movements by the appellant's raised arm. Crucial to this witness's evidence is that at the time of the stabbing, the deceased was not the aggressor. Both witnesses stated that at the place of the incident it was dark as there was limited visibility from a street light. Both state witnesses stated they did not observe that the deceased picked up a brick. The state further called the medical officer, Dr Guriras who compiled the post-mortem report. She testified that she observed three stab wounds on the deceased, one on the right shoulder, on the left hand and one to the left of his chest. These observations were challenged under cross examination by Mr *Brockerhoff*, however she was adamant that she observed three *stab wounds*; and although suggested by counsel that certain injuries could have been inflicted during transportation of the body and or during the scuffle, these allegations were refuted by the doctor.

[7] The appellant testified in his defence and called one witness, Mr *Josef Khiba*. The appellant's version to the incident was that the deceased initially grabbed him by the neck and pushed him against a cupboard. Moments later the deceased grabbed him by the legs and threw him to the ground, causing him to fall down. The deceased was on top of him and hit him with his left fist and reached for a near laying brick with his right hand. The appellant was

laying on his back with his arms pinned down by the deceased, immobilising his movement. He however managed to loosen his arms from the deceased's grip, but the deceased managed to hit the appellant on his forehead with the brick. After being hit, he turned and saw a knife lying on the ground *next* to the braai stand, which he armed himself with. The deceased wanted to hit him with the brick for the second time, but he blocked this blow, thereby accidentally stabbing the deceased. [4]

[8] The evidence of Mr *Josef Khiba* markedly differed from that of the appellant. He stated that the deceased and the appellant were fighting in that they were hitting *each other*. When they were on the ground the deceased was positioned on top of the appellant, whilst having a stone in hand, wanting to hit the appellant. At this point he intervened and pulled the deceased off the appellant, only then realising that the deceased was stabbed.

[9] The court notes at this stage that the evidence of Mr Khiba, does not support the version by the appellant as regards the assault to his head with the deceased's left hand, the assault and injury to his head with a brick, as well as his intervention when the deceased and appellant were down on the ground. In addition, Mr Khiba suggested that the two were fighting, rather than the appellant simply being pushed against the cupboard by the deceased. The evidence of the appellant also makes no mention of Mr Khiba's intervention.

[10] This court will deal with grounds 1 and 5 together, as the evidence of the defence witness Mr Josef Khiba, is essential to the enquiry whether the magistrate exercised her discretion wrongly in finding that the appellant did not act in private defence. In dealing with the first ground, the court is at a loss at understanding the rationale behind it for reason that it presupposes that, where the court found that there was a fight and that the deceased was the aggressor, then this fact in itself, constituted private defence. This must be criticised as it stands incomplete and unsubstantiated. It would have been

[4] Record 93 – 95.

more prudent, had the appellant drafted this ground more specifically along the requirements of private defence rather than stating it in general terms.

[11] There is no rule of law stating that the fact there was a fight between the deceased and the appellant, in itself, constituted a defence. In addition, there is no rule which exonerates the killer, if the deceased was the attacker. Our law only recognises the specific defence of private defence which sets out very specific requirements. It is trite what the court stated in S v *Naftali* [5]at *303 F – I:*

'(a) The attack: To give rise to a situation warranting action in defence there must be an unlawful attack upon which a legal interest which had commenced or was imminent.

(b) The defence: must be directed against the attacker and necessary to avert the attack and the means used must be necessary in the circumstances……

> …..When the defence of self-defence is raised or apparent, the enquiry is actually twofold. The first leg of the enquiry is whether the conditions and/or requirements of self-defence have been met, which includes the question whether the bounds of self-defence were exceeded. The test here is objective but the onus is on the State to prove beyond reasonable doubt that the conditions or requirements for self-defence did not exist or that the bounds of self-defence have been exceeded.
>
> When the test of reasonableness and the conduct of the hypothetical reasonable man is applied, the Court must put itself in the position of the accused at the time of the attack. If the State does not discharge this onus, the accused must be acquitted.'

[12] The problem the court encounters is that, even if for purposes of this appeal, the finding is made that there was indeed a 'fight' and that the deceased was the aggressor, it will be confined to point (a) as quoted above, which leaves the enquiry in terms of private defence half met, half argued. Moreover, on this court's perusal of the record, the evidence and facts set out therein do not support a conclusion that vitiates a finding on murder. It is

[5] S v *Naftali* 1992 NR 29.

common cause that the appellant admits to having accidentally stabbed the deceased once with a knife, alleging private defence. His version however is not fully supported by the available witnesses. The appellants own witness differed markedly on materially aspects of how the fight started, the assault to his head with the deceased's left hand, the assault and injury inflicted to his head with a brick, as well as regards the intervention by the defence witness while the deceased and appellant were down on the ground. Conversely, the appellant's evidence also did not support how Mr *Khiba* intervened. The direct result of these inconsistencies remain unexplained and thus unreliable, which adversely affects the reasonable possibility that it was true. Had these inconsistencies not existed, it could further have corroborated the appellant's evidence in support of the allegation that his attack was *necessary* in the circumstances, providing corroboration on evidence in support of satisfying requirement '(b)' in *Naftali* (*supra*), this however remains absent. Moreover, the version proffered by the appellant in respect of having stabbing the deceased only once in the chest in his s 115 plea explanation, as well as in his evidence in chief, is not supported by the medical evidence. The doctor's evidence when probed by Mr *Brockerhoff* on the other two stab wounds are as follows:

'So, as a consequence thereof doctor since there is various inferences to be drawn, we cannot with certainty say that it may be a scratch, [or] it may be a stab wound [or] it can be anything? ------ <u>It was a stab wound My Lord</u>.

Okay, you also in the same vein did not specify in this report when or the nature of any of these wounds, be it fresh or old wounds you did not say that? --- I did not say that but I did not also say that they were old wounds

That is what I am saying to you so it may also be that the Deceased may have been stabbed on a previous incident and there was a wound at the back we do not know? ----- <u>If the wound was healing, I would have mentioned it</u> because then it would not a stab wounds then it will be a healing stab wound and I would have mentioned it in your report if it was healing.

……..

You cannot also then speculate and say the deceased was stabbed by the Accused person how many times or whatever you cannot say anything about that? ------- I can only say that there were three stab wounds to the body

……..

So, you cannot exclude with certainty as we are before court today that the accused person in private defence stabbed in the direction of the deceased once which he hit in the chest, you cannot say anything on that? ------ Your worship as I said if the stab wound was post mortem, I would have mentioned that specifically in my report but as I regard it as perimortem I indicated them as three distinct stab wounds. '[6]

(Emphasis Provided)

[13] The appellant's version as regards the number of stab wounds, as can be gleaned from the doctor's evidence, is clearly inconsistent with the medical evidence, as same suggests that the assailant stabbed the deceased more than once. In regards the state's eye witnesses, both testified (*albeit* not perfectly probably due to poor visibility), but unequivocally stated that they saw more than one stabbing motion from the appellant; the first state witness seeing three[7] and the latter,[8] witnessing two. Therefore, the defence witness's evidence not only differed with that of the doctor, it also differed from the evidence of the two state witnesses. On this score, we cannot fault the trial court for rejecting the version proffered by Mr *Josef Khiba* as false. Moreover, when regard is had to the remaining evidence on record, it does not support the contention that the deceased had armed himself with a brick. This decision was ultimately made by the trial court after evaluating the evidence holistically. This court is not convinced that the trial court exercised its discretion in that regard wrongly.

[14] It is further noteworthy to state that the appellant's allegation of private defence falls to be dismissed on the basis that the defensive attack, on the appellants own evidence, was not committed intentionally but accidently or by mistake.[9] This is a pertinent requirement of the defensive act. In other words, one cannot simultaneously act in private defence while at the same time

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[6] Record 82 – 85.
[7] Record 24.
[8] Record 59 and 62.
[9] Record 99.

acting accidentally or by mistake. Having taken all these factors into account, grounds 1 and 5 must fail.

[15] The second ground of appeal attacks the court for finding the two state witnesses reliable and truthful, where it was clear that their 'faculties of observation' were seriously impaired. From our perusal of the record and as depicted in the summary of their evidence above, the witnesses appear to have given an honest account and the best evidence to their disposal. Both witnesses during their evidence in chief stated that it was dark and could only provide facts to the extent of what they saw. In fact, the first state witness did not identify the appellant, *albeit* his identity not disputed in this matter. He stated that the incident happened at the veranda and although there was no light at the veranda, there was a nearby street light. He stated that although visibility was poor to the degree that he could not identify who the person fighting with the deceased was, he could positively see them. [10] The witness further testified that he observed 'three stabbing motions' with a knife which the person took from his pocket. The witness could further observe that the deceased had no weapon in his hands and was simply demanding his money and never assaulted the appellant.[11] The second state witness stated that he observed 'two stabbing movements' and also refuted claims that the deceased was armed with a brick.

[16] The above recollections by the two witnesses are not perfect but speak to more honest accounts than fabricated. This position may have been different had the two witnesses testified to the exact nature of the stabbing, position on the body and force applied in circumstances where visibility was poor. On the contrary, the inconsistencies in the version by the appellant speaks to a dishonest account of the incident, aimed at raising a valid defence for his actions. The evidence relied on by the trial court, though not perfect, is acceptable if the court was satisfied that the witnesses gave an honest account thereof. In any event, evidence by the state in a criminal trial need not

[10] Record 23- 25.
[11] Record 26.

prove the guilt of an accused on absolute certainty. In *S v Ntsele*[12] at 180 D-E (Summary), the Appellate Court held,

'..the onus which rested upon the state in a criminal case was to prove the guilt of the accused beyond reasonable doubt – not beyond all shadow of a doubt. Our law did not require that a Court had to act only upon absolute certainty, but merely upon justifiable and reasonable convictions – nothing more nothing less.'
(Emphasis provided)

Moreover, in *R v Mlambo*[13] the court stated the following:

'In my opinion there is no obligation upon the crown to close every evidence of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such degree of probability is raised that the ordinary reasonable man after mature consideration comes to the conclusion that there exists no reasonable doubt that an accused committed the crime charged. He must be in other words morally certain of the guilt of the accused.'
(Emphasis provided)

We are therefore satisfied that the trial court was not wrong in accepting the evidence of the two state witnesses, despite minor differences in their respective versions which can be attributed to the conditions under which the offence was committed. This ground of appeal similarly fails.

[17] In the third ground of appeal the appellant takes issue with the court finding that the appellant stabbed the deceased twice. His contention is that the second wound to the back of the deceased could have been as a result of the wrestling/fighting. We find that the evidence provided by the doctor in this regard is adequate and reliable in this regard. She was adamant that the three wounds were 'stab' wounds. This evidence is further corroborated by the evidence of the first state witness and, to an extent, by the evidence by the second state witness.

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[12] *S v Ntsele* 1998 (2) SACR 179 SCA.
[13] *R v Mlambo* 1957 (4) SA 727 at 738.

[18] Moreover, the trial court could not be faulted for drawing suspicion from the appellant's evidence. The appellant's statement in terms of s 115 states that he allegedly grabbed a knife that was *on* the braai stand. However, when regard is had to photo 5 in the photo-plan as depicted on p. 172 of the record, to this court's observation, it would be impossible to reach for a knife on *top* of the braai stand, while the appellant was pegged down on the ground. Furthermore, the appellant changed a material aspect of his defence during his evidence in chief, now stating that the knife was no longer on top of the braai stand but 'lying on the ground' next to it.[14] This is a material deviation from his plea explanation and indicative of untruthfulness. Therefore, the magistrate in our view cannot be faulted by drawing a conclusion that the appellant stabbed the deceased twice and we are satisfied that the trial court did not misdirect itself when convicting the appellant as it did.

[19] Having found that the appeal against the conviction fails, this court will now deal with the grounds of appeal against sentence. The two grounds will be taken together for purposes of consideration.

[20] It is trite that the appeal court is limited to interfere with the sentence passed by a lower court only if there are grounds that the trial court exercised its discretion in an improper or unreasonable manner, as punishment is pre-eminently a matter for the discretion of the trial court.[15] These grounds have been set out in *S v Tjiho* [16] at 366A-B:

i) 'The trial court misdirected itself on the facts or on the law;
ii) an irregularity which was material occurred during the sentencing proceedings,
iii) the trial court failed to take into account material facts or overemphasized the importance of the other facts,
iv) 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.'

[14] Record 95.
[15] *S v Rabie* 1975 (4) SA 855 (A) at 857D *S v Pieters* 1987 (3) SA 717 (A) at 727 F-H).
[16] *S v Tjiho* 1991 NR 361 (H).

These have been expounded in recent years to include where the sentence is disproportionate to the gravity of the offence and where the interest of justice dictates interference. [17]

[21] It is settled law that when balancing and harmonising the triad of factors and objectives of punishment during sentencing proceedings, the court need not give equal weight to the respective factors. In this regard, the sentencing court must show that due regard was had to all the factors before court. The sentencing court duly stated and took into consideration the abovementioned objectives and indicated that it should strike a balance between them.[18] The court took mitigating factors in favour of the accused, such as his age and that he was a first offender, into account. It should be borne in mind that crimes like murder generally attract lengthy custodial sentences and the court must endeavour to find a balance between the accused person's blameworthiness and an effective sentence. This court cannot find that the sentencing court committed any irregularities as set out in the law above. We are of the view that, as a major before court convicted of a serious offence in the circumstances of this matter, the sentence of 17 years' imprisonment does neither induce a sense of shock.

[22] Having regard to the ground that the trial court omitted to take into account that the appellant was in custody for 8 months after arrest, it should be noted that according to the record, this was not raised or argued by his counsel during mitigation and sentence. Although no mention was made of this period during the judgment, it does not *per se* mean that the court did not take this into account. There can never be a perfect judgment or ruling, and in this regard we endorse what has been stated in *S v De Beer* [19] where the court stated:

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[17] *Director of Public Prosecutions, Kwazulu-Natal v P* 2006 (1) SACR 243 SCA 254C-F and see *Shifela v State* (CA 9/2014) [2014] NAHCMD 228 (28 July 2014) at para 6.
[18] Record 153.
[19] *S v De Beer*, 1990 NR 379 (HC) at 387I-J.

'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.' [20]
(Emphasis provided)

This court is therefore satisfied that the sentencing court took into account all relevant factors into account in sentencing.

[23] Consequently, the appeal against conviction and sentence falls to be dismissed.

[24] In the result, it is ordered:

1. The appeal against conviction and sentence is dismissed

2. The matter is finalised and removed from the roll.

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J C LIEBENBERG

JUDGE

[20] (See *S v Pillay*, 1977 (4) SA 531 (A) at 534H-535G *and R v Dhlumayo and Others*, 1948 (2) SA 677 (A) at 706).

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N N SHIVUTE

JUDGE

APPEARANCES:

APPELLANT	T P Brockerhoff Instructed by the Directorate of Legal Aid

Windhoek.

RESPONDENT	M Olivier Of the Office of the Prosecutor-General Windhoek