

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**LEAVE TO APPEAL JUDGMENT**

CASE NO.: HC-MD-CRI-APP-CAL-2018/00048

In the matter between:

**JACOBUS HANSE**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral Citation:** *Hanse v S* (HC-MD-CRI-APP-CAL-2018/00048) [2021] NAHCMD 55 (19 February 2021)

**Coram:** USIKU, J et CLAASEN, J

**Heard:** 9 February 2021

**Delivered:** 19 February 2021

**Flynote:** Criminal Procedure – Appeal against conviction and sentence – Appellant convicted of murder with direct intent to kill and sentenced to twenty (20) years imprisonment – Criminal Procedure – Leave to Appeal – Against Conviction and Sentence – Appellant fail to satisfy the Court that there are prospects of success –

Appeal against sentence not pursued by the Appellant in initial appeal – Leave to Appeal refused.

**Summary:** The Appellant was convicted of a crime of murder with direct intent and sentenced to twenty (20) years imprisonment by a magistrate sitting at the Mariental Regional Court. The applicant filed a Notice of Appeal in the High Court against conviction and sentence. However, on 10 June 2020, this honorable court dismissed the appeal against conviction and as the Appellant had abandoned his appeal against sentence the court did not address an appeal on sentencing. Appellant in his letter of appeal stated that he is a layperson and this required more time for him to file his application for leave to appeal and alleging amongst others that he did file an appeal against both conviction and sentence. The Appellant failed to address the grounds for a successful application for leave to appeal to the Supreme Court. His grounds rejected and the application for leave to appeal refused.

*Held* – that the court could not find any prospects of success in the Appellants' application.

*Held* – furthermore, that the application for leave to appeal is refused.

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## ORDER

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In the result, the application for leave to appeal is refused.

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## LEAVE TO APPEAL JUDGMENT

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USIKU, J (CLAASEN, J concurring):

### Introduction

[1] The appellant was charged with the crime of murder in the Regional Court sitting at Mariental. He conducted his own defense and pleaded not guilty but was convicted as charged after a trial and was sentenced to twenty (20) years imprisonment.

[2] Unhappy with the conviction and sentence, the Appellant filled an appeal against his conviction and sentence as meted down in the regional court. The appeal was dismissed by this honorable court. The Appellant now seeks leave to appeal to the Supreme Court on the grounds:

#### Condonation application

[3] The Appellant filed his notice of appeal out of the time prescribed by Rules of court. Pursuant to that, the Appellant filed an application for condonation accompanied by a sworn statement explaining the cause for the delay in filing the notice of the application for leave to appeal timeously. The application was not opposed by the Respondent hence the issue of the late filing of the notice of appeal will not be considered by the court.

#### The conviction

[4] On 30 June 2010, the appellant pleaded not guilty to the charge of murder preferred against him and offered no plea explanation as required by s 115(1) of the Criminal Procedure Act<sup>1</sup> (The CPA). The Respondent then called seven witnesses to testify while the Appellant elected to remain silent but instead, called his biological mother to testify on his behalf.

[5] An eye witness, Theodor, testified that he knew the appellant well. On the evening of 20 March 2007, he was at his house in Maltahohe when the appellant, the deceased and two others came to his house.

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<sup>1</sup> Act 51 of 1977.

[6] He testified that the appellant entered his room, lay on his bed and called the deceased who was in the other room to come to his room. The deceased came to him with a knife in her hand. The appellant then slapped her, grabbed her arms and pulled her out of the room. According to Theodor, the deceased struggled because she did not want to get out with him. She was resisting him.

[7] He further testified that through a hole in the zinc of his room, he saw the appellant strangling the deceased. She fell down to the ground while he was strangling her and kicked her. The witness testified further that he saw the appellant loosening his (shoestrings) shoelaces which he used to further strangle the deceased with. Theodor's evidence was corroborated by the testimony of Breeckorf who was present and saw what happened.

[8] Breeckorf knows the appellant as Lyden, commonly known to his friends as Ado. He testified that he met the appellant, the deceased and Hannah Hanse the same evening at a drinking hole of an Oshiwambo speaking person where they drank homebrew known as tombo. The relevance of Breeckorf's testimony is that it places the appellant on the scene and corroborated the evidence of Theodor, therefore rebutting the appellant's defense of an *alibi*.

[9] The versions of Theodor and Breeckorf were also corroborated by the testimony of the fourth witness. This witness also saw how the appellant assaulted the deceased by slapping and dragging her out of her room.

#### Grounds of appeal

[10] The court has had regard to the heads of argument and to the authorities cited by the Appellant in his heads of argument. It noted that the Appellant in his heads of argument, took to re-addressing the same grounds of appeal as covered in the appeal hearing. It would also appear that the Appellant used this platform for his application for leave to appeal to the Supreme Court as an audience to re-visit his trial, from witnesses to evidence presented before the regional court.

[11] For purpose of this application for leave to appeal, the court noticed that the grounds of appeal in the notice of appeal are verbatim those addressed by this honorable court when judgement in the appeal hearing was dismissed. The grounds in the appellant's main heads of argument are not grounds of appeal. Grounds must and should be set out clearly and specifically in the notice of appeal, not in the heads of argument. (Rule 67(1) Magistrate Court Rules.

[12] The first ground states that the learned magistrate erred in finding the state had proved beyond a reasonable doubt:

- a) that the appellant murdered the deceased with the intent of *dolus directus*;
- b) the learned magistrate erred in finding that the State had proved that the appellant used shoe lace to strangle the deceased.

[13] In the determination of an application for leave to appeal, the test is that the applicant must convince the court, that there are reasonable prospects of success on appeal.<sup>2</sup>

[14] The applicable legal principles in *S v Nowaseb*<sup>3</sup>, where the court stated:

“The judge must ask himself or herself whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal, in other words, whether there is a reasonable prospect that the court of appeal may take a different view... But, it must be remembered, the mere possibility that another court might come to a different conclusion is not sufficient to justify the grant of leave to appeal.”

[15] The courts position in this regard remains unchanged as held by this honorable court when judgement was handed down in the appeal hearing. The magistrate gave cogent reasons for his conclusion drawn from the facts before him. The court found no misdirection in the assessment of the evidence by the learned magistrate.

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<sup>2</sup> *S v Nowaseb* 2007 (2) NR 640 (HC) para 1.

<sup>3</sup> *Supra* 2007(2) NR 640 (HC).

[16] In fact, the evidence that was presented by the Respondent before court was unchallenged as the Appellant failed to testify under oath. The evidence of his witness made no impact on the evidence of the Appellant. The magistrate was correct in rejecting her evidence as false as it was determined she lied to the court. Her evidence about the whereabouts of the Appellant that night was false beyond a reasonable doubt. Therefore, as already pointed out, and in the absence of any irregularities or misdirection apparent from the record, this court has no justification to reject the findings made by this honorable court when it dismissed the appeal.

[17] Ms Jacobs, counsel for the respondent, in arguing in para 2.2 of her heads of argument cites *S v Cesar 1977(2) SA 348(A) at 350E*:

“Application for leave to appeal have been dealt with extensively by this court. Time and again this court has emphasized that an application for leave to appeal under s316 (1) of the Criminal Procedure Act 51 of 1977 should be allowed if the court is satisfied that the accused has a reasonable prospect on appeal. These application are not granted on compassionate ground, to console the accused or simply afford them a further opportunity to ventilate their arguments and, to obtain another judgment in a court of appeal”.

### Conclusion

[18] From the written heads of argument in the appeal hearing as submitted by the applicant’s then counsel filed on 27 February 2020 that the appeal was against the conviction alone and the applicant had abandoned his appeal against sentence in the process and as such the grounds against the sentence will once again be ignored.

[19] The applicant has not shown in his Heads of Arguments that there are reasonable prospects of success. This court did not misdirect or err in dismissing the appeal against conviction of the applicant.

[20] In the result, the application for leave to appeal is refused.

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DN USIKU

Judge

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CM CLAASEN

Judge

APPEARANCES:

For the Appellant:

Jacobus Hanse, Appearing in person

For the Respondent:

S Jacobs

Of the Prosecutor-General's Office

Windhoek