

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

APEAL JUDGMENT

Case no: CC 26/2012

In the matter between:

FRIEDA KALUKUMWA

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Kalukumwa v State* (26/2012) [2017] NAHCNLD 14 (21 February 2017)

Coram: CHEDA J

Heard: 16.11.2015; 08.02; 04.07; 11.11.2016; 30.01; 07.02; 20.02.2017

Delivered: 21 February 2017

Flynote: In an application for leave to appeal, applicant must satisfy the court that he/she has reasonable prospects of success on appeal. The granting of leave should not hinge on a mere possibility that another court might come to a different conclusion.

Summary: Applicant was convicted of murder with legal intent and was sentenced to 30 years imprisonment. She applied in person for leave to appeal against both conviction and sentence. Mr. P Greyling argued this appeal *amicus curiae* and abandoned the appeal against sentence. The grounds for appeal were that the court had misdirected itself by relying on a single witness, and that the court had concluded that there was enough circumstantial evidence against her. The application was dismissed as there were no reasonable prospects of success.

ORDER

1. Application for leave to appeal against conviction is dismissed.
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JUDGMENT

CHEDA J:

[1] Applicant an adult woman was convicted of murder with legal intent on the 28 September 2015 to 30 years' imprisonment. It is this conviction and sentence to which she noted an application for leave to appeal. Applicant had noted this application in person.

[2] Mr. P. Greyling, later came on board in the proceedings to represent her *amicus curiae* of which the court is grateful. *Amicus curiae* is a process where a legal practitioner assists a litigant as a friend of the court.

[3] Advocate Wamambo appeared for and on behalf of the respondent. At the beginning of this application, Mr. Greyling submitted that he was not going to pursue the question of sentence passed as he was of the view that the court's finding that applicant murdered the deceased with legal intent and considering the current authorities regarding sentences in the circumstances, the said sentence was in line

with the sentences passed by these courts. What, therefore, remains is for this court to determine this application on the basis of the wrong conviction.

[4] Mr. Greyling argued that the court misdirected itself by believing the evidence of one Indileni Kanghono [hereinafter referred to as “Indileni”] in particular that:

- a) She stated that children were always crying at applicant’s home; and
- b) she had witnessed applicant assaulting deceased in the field.

[5] It was further his submission that the court did not properly apply the principles with regards to circumstantial evidence. It is on that basis that the court erred by finding applicant;

- a) to be a liar;
- b) that applicant was unwilling to explain what had transpired;
- c) that there is no evidence, as to how the deceased met her death;
- d) by finding that defence witnesses were untrustworthy;
- e) by believing that applicant wanted to bury the deceased before the police came in order to conceal her crime;
- f) by finding that applicant systematically assaulted the deceased; and
- g) by finding applicant guilty of murder with legal intent.

[6] This was the gist of his submission.

[7] On the other hand Adv. Wamambo argued that Indileni was an honest witness who did not seek to exaggerate her evidence, she stuck to what she knew. With regards to applicant’s evidence, he submitted that applicant did not send for the police, but, it was Indileni who did. He further argued that this witness was telling the truth when she stated that children were always crying at applicant’s house.

[8] Applicant under cross-examination stated that she was going to call a witness who would testify that she was not in the field on the day in question. However, she did not do so. This I find astonishing for someone who had raised an alibi to destroy evidence of her consistent unlawful conduct. This would have been an opportunity

for her to discredit Indileni's evidence. Unfortunately she let that opportunity filter through her fingers.

[9] Advocate Wamambo, not in many words, argued that there are no prospects of success on appeal. Mr. Greyling made very forceful submissions and the court is grateful for his well-researched arguments.

[10] This being an application for a leave to appeal, the courts apply the test which has been applied since time immemorial, see *R v Nxumalo* 1939 AD 580; *R v Ngubane and Others* 1945 AD 185; *S v Cooper and Others* 1977 (3) SA 475 (T) *S v Sikosana* 1980 (4) SA 559 and emphatically laid down in *S v Nowaseb* 2007 (2) NR 640 (HC) where Parker J at para 1 & 2 ably stated:

“(1) .. It has been stated in a long line of cases that in an application of this kind the applicant must satisfy the court that he/she has a reasonable prospect of success on appeal (see, for example, *R v Nxumalo* 1939 AD 580; *Rv Ngubane and others* 1945 AD 185; *R v Ramanka* 1948 (4) SA 928 (O); *R v Baloi* 1949 (1) SA 523 (A); *R v Chinn Moodley and Another* 1949 (1) SA 703 (D); *R v Vally Mohame* 1949 (1) SA 683 (D); *R v Kuzwayo* 1949 (3) SA 761 (A); *R v Muller* 1957 (4) SA 642 (A); *S v Naidoo* 1962 (2) SA 625 (A); *S v Cooper and Others* 1977 (3) SA 475 (T); *S v Sikosana* 1980 (4) SA 559 (A);. The first 10 sample of cases adumbrated above were decided before the coming into operation of the new Criminal Procedure Act 51 of 1977 (CPA), but the test remains unchanged. (*S v Sikosana supra* at 562D).

(2) This, an application for leave to appeal should not be granted if it appears to the judge that there is no reasonable prospect of success. And it has been said that, in the exercise of his or her power, the trial judge (or, as in the present case, the appellate judge) must disabuse his or her mind of the fact that he or she has no reasonable doubt as to the guilt of the accused. 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 (*S v Cooper and others supra* at 481E; *S v Sikosana supra* at 562H; *R v Muller supra* at 645E-F). 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' (S v Ceaser 1977 (2) SA 348 (A) at 350 E)." (emphasis added)

[11] In this jurisdiction, as laid down in S v Nowaseb (supra) the enquiry is whether applicant has reasonable prospects of success on appeal. If the answer is in the positive, he/she must be granted leave, whereas, if it is in the negative then it should be dismissed. The authorities have gone further and adopted a restricted approach in that the grant of leave to appeal should not hinge on a mere possibility that another court might come to a different conclusion. If the court before whom the application is made is of the view that the appeal court may take a different view, it should grant leave as that on its own is a reasonable prospect of success.

[12] The granting of leave to appeal will follow as a result of applicant satisfying the court that in light of the evidence before the court it has reasonable prospects of success on appeal, see Mukuwe v The State CC 08/2009 (delivered on 06/06/2011) where Liebenberg J at para 3 stated:

"(3) It is well established that the proper test to be applied in applications of this kind is that the applicant must satisfy the court that there is a reasonable prospect of success on appeal. (R v Ngubane and Others, 1945 AD 185 at pp 186-7, R v Baloi, 1949 (1) SA 523 (AD) at pp 524-5). In S v Ceaser 1977 (2) SA 348 (A) at 350E Miller J. emphasised that the mere possibility that another court might come to a different conclusion is not sufficient to justify the grant of leave to appeal. Only where the court is satisfied that the applicant has shown that he or she has reasonable prospects of success, will leave be granted." (emphasis added)

[14] Mr. Greyling argued that the court erred by relying on the evidence of Indileni who was a single witness and that there was no direct evidence that applicant was seen fatally assaulting the deceased.

[15] In that regard, it is his argument that the court should not have relied on the evidence of Indileni. Further, that the court should not have relied on circumstantial evidence as the requirements laid down in R v Blom 1939 AD 188 were not fulfilled.

[16] In my view, applicant's conviction was based on circumstantial evidence and this was carefully canvassed and the conclusion was that respondent had proved the guilty of applicant beyond reasonable doubt. Indileni although a single witness, the court was alive to the dangers posed by such evidence, it nonetheless cautioned itself in relying on the evidence of a single witness. The court was satisfied that she was a credible witness and she did not seek to exaggerate her evidence.

[17] She was not interested in unnecessarily incriminating applicant. She merely stuck to what she had observed and nothing more. She was, therefore, a credible witness who was not shaken or broken down by cross-examination.

[18] In an application of this nature, the onus is on the applicant to satisfy the court before whom the leave for application is made that it has reasonable prospects of success on appeal.

[19] Looking at the submissions by Mr. Greyling, I am not satisfied that applicant has reasonable prospects of success on appeal. As pointed out earlier on, a mere possibility that another court may come to a different conclusion will not suffice. The evidence led in court is such that applicant's prospects of success on appeal are completely shut.

[20] In my view, there is no way the evidence led during the trial can point anywhere else other than directly towards the guilt of applicant in the circumstances. The fact that applicant was a poor witness admits of no doubt. She was evasive and refused to shed light as to how deceased sustained all those injuries while in her custody.

[21] The Doctor who carried out the post-mortem concluded that in his opinion the death was due to trauma on the deceased's head which was as a result of external force and not a fall. This is consistent with the circumstances surrounding all the proved facts. The inference drawn excluded every reasonable inference except the only one which the court drew.

[22] As argued by Advocate Wamambo that applicant's chances of success on appeal are non-existent, I agree with him that a reasonable court, looking at all the facts and thinking independently cannot fail to uphold this conviction.

[23] It is for that reason that I hold the view that applicant has failed to satisfy the court that it has reasonable prospects of success on appeal. In the result the conclusion of the court is that:

Order:

Application for leave to appeal against conviction is dismissed.

M Cheda
Judge

APPEARANCES

APPLICANT : P. Greyling
Of Greyling & Associates, Oshakati

RESPONDENT: N. Wamambo
Of the Office of the Prosecutor-General, Oshakati