



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
LEAVE TO APPEAL JUDGMENT**

Case No: CA 15/2015

In the matter between:

THE STATE

APPLICANT

and

BENSON MWAHIRI KARIBO

RESPONDENT

Neutral citation: *S v Karibo* (CA 15/2015) [2017] NAHCNLD 60 (14 July 2017)

Coram: JANUARY J

Heard: 06 October 2016

Delivered: 14 July 2017

Flynote: Criminal Procedure – leave to Appeal – Acquittal – Another Court may come to different conclusion – Prospects of success.

Summary: The respondent was acquitted on charges of: Contravening section 35(2)(a) read with sections 32, 35(5), 46, 49 and 51; alternatively contravening section 34(a) read with sections 32, 46, 49, and 51 of the Anti-Corruption Act, Act 8 of 2003; Contravening section 16 read with section 1 of the Prevention of Organised Crime Act, Act 29 of 2004; Two charges of obstructing or defeating of justice. The magistrate found flaws, inconsistencies and contradiction in the witnesses for the State and found the version of the respondent to be reasonably possibly true. There are indeed flaws in the State's case. This court however finds that despite that another court may come to a different conclusion and there are reasonable prospects for success on appeal evaluating the evidence as a whole. Leave to appeal is accordingly granted.

ORDER

1. The application for leave to appeal succeeds;
 2. Leave to appeal against the acquittal is granted.
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LEAVE TO APPEAL JUDGMENT

JANUARY J

[1] The State applied for leave to appeal in this matter to appeal in terms of section 310 of the Criminal Procedure Act, Act 51 of 1977 (the CPA). The application relates to the acquittal of the respondent on charges of;

Count 1: Contravening section 35(2)(a) read with sections 32, 35(5), 46 , 49 and 51; alternatively contravening section 34(a) read with sections 32, 46, 49, and 51 of the Anti-Corruption Act, Act 8 of 2003 – Corruptly giving gratification to an agent as an inducement not to publish the smuggling of migrants in a newspaper.

Count 5: Contravening section 16 read with section 1 of the Prevention of Organised Crime Act, Act 29 of 2004; Smuggling, participating and/or aiding or abetting the smuggling of a migrant, one **John Okenna** or enabling such migrant to unlawfully remain in Namibia for the respondent to obtain directly or indirectly a financial or other material benefit.

Counts 7 and 8: Attempting to defeat or obstruct the course of justice in that the respondent after his arrest on the abovementioned charges unlawfully and with intent to defeat the course of justice, telephonically requested Petrus Mogotse Ambrosius and Ephraim Ndingi Chaka respectively and whilst they were State witnesses to change their cell phone numbers, delete received cell phone numbers and to inform other potential witnesses to do the same. It is further alleged that the respondent made the request knowing that an investigation was conducted by the police. He further informed the witnesses that the police were on their way approaching them.

[2] At the close of the State's case the applicant conceded that the respondent might be acquitted in terms of section 174 of the CPA on counts 2, 3, and 4. He was acquitted on these counts. The State further conceded at the close of the defence case that the respondent should be acquitted on count 6 as a result of which he was also acquitted.

[3] The facts that are proven are briefly that the respondent was renting three rooms in Oshikango from a specific person. Respondent stayed in one room, a friend of the respondent was staying in another room and the third room was occupied by different foreign nationals frequently. Person would stay there for 2 to 3 days, move out and the room was then occupied by other foreigners. Respondent also paid for rooms rented out by another State witness where he brought customers often to. The customers could not properly communicate even in English.

[4] There was at a stage exchanges of cell phone numbers between the respondent and some State witnesses residing in Katima Mulilo. Some of the witnesses were taxi drivers who collected foreigners from within Zambia or at the Wenela border post and according to them, on instructions from the respondent, arrange for these migrants to be transported to Oshikango. One of the witnesses referred to himself as a loading master.

My understanding is that he arranges for transport of persons from an Engen Service Station in Katima Mulilo and sometimes arranged for transport and accommodation of foreigners, some of them received from taxi drivers, in Katima Mulilo. The witness goes by the nickname of Ziggy. This witness does not know the respondent personally but stated that he only knows him from telephone conversations. According to the witness he received calls from the respondent from time to time to assist persons with transport to Oshikango. This witness at one time received N\$600 into his bank account from the Respondent for his services. In cross-examination the witness confirmed that in his witness statement another N\$4 000 was paid into his account of which N\$3 400 was used by the persons accommodated or transported. N\$ 600 of this amount was for the witness.

[5] This witness testified that he once received a call from the respondent stating that he was in custody. Respondent requested him to change his cell phone number and requested taxi drivers who brought persons for transport to also change their cell phone numbers because investigators might get hold of them including the witness.

[6] A petrol attendant from Engen Katima Truck Stop confirmed the arrival of four foreigners with the number of Ziggy. They were looking for transport to Oshikango. Ziggy, the loading master, collected them from the service station. Another petrol attendant from Otavi also testified that two foreigners arrived with a truck and that he assisted them to phone to Oshikango and that he eventually assisted them to arrange for transport to Oshikango.

[7] A witness going by the nickname Chaka, a taxi driver, testified that he knows the respondent and Ziggy. He met with the respondent at Wenela border post and knows him as Benson Karibo. Ziggy is a loading master in Katima Mulilo. The respondent was with two other persons. The witness transported the respondent and two persons into town. On the respondent's request he handed his cell phone number to the respondent. The witness thereafter received various calls from the respondent to assist in transporting persons from Wenela border post and to arrange transport for them to Oshikango. He assisted several times to transport persons and arranged transport to Oshikango. The witness lastly received calls from the respondent informing him that he

was in custody and requesting the witness to change his cell phone number as there were police officers coming for investigation.

[8] Another taxi driver received a phone call from a person identifying himself as Benson staying at Oshikango. This witness met four persons at the Wenela border post. The persons could not speak any Namibian language. The witness was handed a small paper with a Namibian MTC cell phone number. When he called the number a person identifying himself as Benson answered and requested the witness to take the persons to a bus station going to Ondangwa, Oshakati or Oshikango. The witness took the persons to a bus station.

[9] Mutoka John Okena testified. He is a Nigerian citizen and illegally entered Namibia through the Wenela border post. He does not have a valid passport. He was accompanied by about nine other foreigners without any valid documents. They were offloaded in front of the border post and they walked around the border post, crossed the Zambezi River by walking under a bridge. After crossing illegally this witness and others were collected by a taxi and transported to a filling station in Katima Mulilo. At the filling station the witness boarded a truck and travelled to Otavi.

[10] One person from the group called the respondent from Otavi who told them to look for a mini-bus. They found a driver of a mini-bus who eventually took them to Oshikango Hotel. One of them again called the respondent who arrived with a motor vehicle. The respondent paid the taxi fare for the transport to the driver of the mini-bus. It was the first time that the witness met the respondent. This witness testified that the respondent facilitated accommodation well knowing that they were illegal immigrants. The respondent requested money to take the persons to Angola.

[11] In Oshikango, the respondent warned the migrants not to walk around as he knew that they did not possess valid documents to be in Namibia. He paid for the food of the migrants. At one time the respondent was paid money from Nigeria by bank transfer. The witness did not have money and was struggling. At some point in time he went to Windhoek and stayed with a certain Arina. He wanted to go back to Nigeria but

did not have the money. The witness on advice of Arina then disclosed the matter to Informante newspaper.

[12] A witness who was at the time a journalist of the Informante newspaper testified that she and another person, Max, investigated and did the article on human smuggling involving the respondent. Her source of information was Arina. They travelled to Oshikango and found foreigners. They interviewed one, some of the foreigners ran away and others could not communicate in an understandable language. Max called the police.

[13] The police came and did their investigation where after they summonsed the respondent. The respondent afterward called the journalists and showed them a car dealership claiming it to be his business and denying human smuggling. The respondent invited them to his home and handed two bottles of wine and N\$700 to the journalist for them not to publish the information in the Informante. The respondent informed the journalist that he wanted to give them more money not to publish the article. The following day the police was informed about the bribery matter and they set up an undercover operation/trap. The respondent handed Kentucky fried chicken and money, N\$600 and US\$200 to this witness for the article about human smuggling not to be published.

[14] Arina testified that she knows the respondent since 1999. She confirmed the evidence of John Okena of having stayed with her in Windhoek. She confirmed that John Okena had financial problems and could not return to Nigeria. She contacted the journalist from Informante newspaper.

[15] Two of the police officers who were participating in the undercover operation/trap testified. They confirmed the operation and the meeting between the respondent and the journalist who received the bribe money. They however, did not eye witness the handing over of the money. On a tip off from the journalist, they approached the motor vehicle of the respondent wherein he and the journalist did the transaction. The respondent was then arrested.

[16] The respondent testified in his defence. He confirmed that he rented rooms in Oshikango. He confirmed that he knows the witness John Okena but denied that he arranged for accommodation or transport. The respondent further testified that all the allegations about human smuggling are a fabrication by Arina and John Okena. He confirmed taking the journalist to his car dealership and also to his house where he offered them drinks. He gave them wine. He offered them transport money. He denies bribery. He further confirmed that he met with the journalist and bought Kentucky fried chicken for her. He confirms the meeting with the journalist and the handing over of money. Respondent knows Ziggy and Chaka.

[17] The learned magistrate gave extensive reasons why he found the respondent's version as reasonable possibly true. He identified flaws, contradictions and improbabilities in the State's case. I agree with the magistrate that there are flaws in the testimonies of the different witnesses but do not consider those as material when evaluating the evidence as a whole. I find that another court may come to a different conclusion and that there are prospects of success on appeal.

[18] In the result:

1. The application for leave to appeal succeeds;
2. Leave to appeal against the acquittal is granted.

H C JANUARY
JUDGE

Appearances:

For the Applicant:

Adv Muhongo

Of Office of the Prosecutor-General

For the Respondent:

Mr Nyambe

Of Shikongo Law Chambers