REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPLICATION FOR LEAVE TO APPEAL

Case no: CC 11/2013

In the matter between:

THE STATE **APPLICANT**

and

MOSES HIMELUNDILWA ALFRED **RESPONDENT**

Neutral citation: *S v Alfred* (CC 11 / 2013) [2017] NAHCNLD 64 (06 July 2017)

Coram: TOMMASI J
Heard: 27 June 2017
Delivered: 06 July 2017

Flynote: Criminal Procedure – Application for leave to Appeal - court ought to refuse leave where prospects of success are absent and grant leave where prospects exist after a well-considered conclusion on the facts.

ORDER

The application for leave to appeal is dismissed.

JUDGMENT

TOMMASI J:

[1] The applicant herein is seeking leave to appeal against the sentence imposed by this court. The respondent was convicted of murder with direct intention to kill. He was sentenced to 23 years' imprisonment of which five years' imprisonment were suspended for five years on condition that he is not convicted of murder or any offence involving violence, committed during the period of suspension.

[2] The grounds of appeal are that the learned judge:

1. Over-emphasised the respondent's belief in witchcraft as an extenuating factor and attached little weight to the brutal manner in which the deceased was killed.

2. Over-emphasised the rehabilitation aims of punishment, instead of emphasising the deterrent aim of punishment in dealing with a crime of violence such as this one.

3. Over- emphasised the time spent by the respondent in custody;

4. Erred in law or misdirected herself by finding that the respondent, at the age of 30 years did not come into brush with the law.

5. Erred in law or misdirected herself by failing to attach sufficient weight to the seriousness of the crime of murder, especially the fact that, the respondent had direct intention to murder the deceased.

6. Erred in law by imposing a sentence which is lenient, shocking and unreasonable that no reasonable court would have imposed it.

7. Erred in law and or facts by failing to attach more weight to the fact that the deceased was a vulnerable person and was defenceless.

[3] It is trite that before a court grants leave to appeal the court must be satisfied that that the applicant has reasonable prospects of success on appeal In *S v Ningisa and Others*,[1] Mainga JA, stated the following:

> 'In determining whether or not to grant a convicted person leave to appeal, the dominant criterion is whether or not the applicant will have a reasonable prospect of success on appeal (R v Baloi 1949 (1) SA 523 (A)). From the very nature of things, it is always somewhat invidious for a judge to have to determine whether a judgment which he/she has himself/herself given may be considered by a higher court to be wrong, but that is a duty imposed by the legislature upon judges in both civil and criminal matters. As regards the latter, difficult though it may be for a trial judge to disabuse his/her mind of the fact that he/she has himself/herself found the state case to be proved beyond reasonable doubt, he/she must, both in relation to questions of fact and of law, direct himself/herself specifically to the enquiry of 'whether there is a reasonable prospect that the Judges of Appeal will take a different view. . . . In borderline cases the gravity of the crime and the consequences to the applicant are doubtless elements to be taken into account but, even in capital cases, the primary consideration for decision is whether or not there is a reasonable prospect of success . . . .' (Per Ogilvie Thompson AJA (as he then was) in R v Muller 1957 (4) SA 642 (A) at 645D – H. See also R v Kuzwayo 1949 (3) SA 761 (A) at 765; R v Shaffee 1952 (2) SA 484 (A); S v Shabalala

[1] 2013 (2) NR 504 (SC) at page 507, para 5

1966 (2) SA 297 (A) at 299A – E and R v Ngubane and Others 1945 AD 185 at 186.)' [my emphasis]

[4] It is the task of this court to determine whether, on the findings of fact or conclusions of law involved, there are reasonable prospects that the applicant may succeed on appeal. This court ought to refuse leave where prospects of success are absent and grant leave where prospects exist after a well-considered conclusion on the facts.[2]

[5] This court indeed concluded that the respondent held a genuine believe that the deceased was a witch. The record reflects throughout the accused's belief in witchcraft. As correctly pointed out by Mr Greyling, acting *amicus curiae*, the respondent, from the outset, stated that he assaulted the deceased because she was bewitching him and his family. The applicant at no stage presented any evidence which gainsay the respondent's motivation for committing the offence. On the proven facts the conclusion was justified.

[6] Furthermore it is apparent from the judgment that the court did not attach too much weight to this factor. The need for deterrence clearly ranked higher and more weight was given to this factor. This is evidenced by the following remark by the court: 'Although the court would be justified to attach some weight to this aspect as a mitigating factor, the court is mindful of the fact that it ought to deter others who contemplate killing innocent people whom they believe are bewitching them.'

[7] The applicant's second ground, that the court over-emphasised the rehabilitation aims of punishment, instead of emphasising the deterrent aim of punishment in dealing with a crime of violence such as this one, is primarily premised on the court's conclusion that the respondent has the potential to be rehabilitated. This is reflected in the suspended portion of the sentence. The appellant clearly indicated that he cannot be rehabilitated and that it will not help to lock him up. This clearly reflects a lack of remorse which may be an indication that he may not be susceptible to rehabilitation. The lack of remorse is connected to his deep rooted believe that he was justified to act in this

[2] *S v Ningisa*, supra.

manner. He however is of the view that no one would be able to bewitch him again and despite the irrational reasoning, the court had to consider the possibility that he may not offend again. This is not the only factor which indicated a susceptibility for reform and rehabilitation. The court considered the fact that the respondent was a first offender, his highest level of education is grade 12 and he was running a profitable business before he became ill. These are factors which, despite his current reasoning, point to the fact that he has the “potential” to be rehabilitated.

[9] It is trite that the fact that an accused is a first offender, is a mitigating factor. This was expressed in the following manner: “The accused attained the age of 30 without any brush with the law.” The fact that the court phrased it somewhat differently does not mean that it does not amount to a mitigating circumstance. No convictions were proven against the respondent. That means that the respondent was a first offender.

[10] Mr Greyling submitted that if one considers the time the respondent spent in prison then the actual sentence imposed by the court is almost 28 years’ imprisonment which is an appropriate sentence. This however is not a proper approach to this factor. It is not a mathematical calculation but a factor which the court ought to consider along with other factors to determine whether, cumulatively there are extenuating circumstances. It is evident that the court gave considerable weight to this factor but I believe that this factor along with other mitigating factors were given proper consideration and emphasis.

[11] Proper weight and emphasis were placed on the seriousness of the offence, the violent nature thereof and the vulnerability of the victim.

[12] I am of the considered view that the applicant does not have reasonable prospects to succeed on the grounds raised.

[13] In the result:

1. The application for leave to appeal is dismissed.

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M A TOMMASI

JUDGE

Appearances:

For the Applicant:	Adv Pienaar
Of	Office of the Prosecutor-General
For the Respondent:	Mr Greyling
Of	Greyling & Associates