



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
APPLICATION FOR LEAVE TO APPEAL

Case no: CC 03/2012

THE STATE

APPLICANT

and

MORDEKAI MUTILIFA

1ST RESPONDENT

SAMOKA SYLVESTER SAMOKA

2ND RESPONDENT

MWETWILYELA TIMOTHEUS

3RD RESPONDENT

TIMOTHY MUYAPEKWA

4TH RESPONDENT

Neutral citation: *S v Mutilifa* (CC 03/2012) [2017] NAHCNLD 91 (12 September 2017)

Coram: TOMMASI J
Heard: 16 June 2017
Delivered: 25 August 2017
Reasons released: 12 September 2017

Flynote: Criminal procedure – Application for leave to appeal – Court to consider whether there are reasonable prospects of success – Reasonable prospects as defined in *S v Ackerman en 'n Ander* and approved in *S v Ningisa & others* – Court found no reasonable prospects that applicant would succeed either on the finding of fact or on the law.

ORDER

1. The application for leave to appeal the discharge of all four accused on the charge of murder and the resultant wholly suspended sentence of three years' imposed on the first respondent for assault with the intent to do grievous bodily harm, a competent verdict on a charge of murder, is refused.

SENTENCE

TOMMASI J:

[1] This is an application by the State in terms of section 316A (1) (a) of the Criminal Procedure Act for leave to appeal. The State appeals the discharge of all four respondents on a charge of murder and the wholly suspended sentence of three years imposed on the first respondent for assault with intent to do grievous bodily harm, a competent verdict on murder. The application was opposed by all four respondents. All four respondents were charged with murder.

[2] The court gave its ruling on 25 August 2016 and undertook to release the reasons. What follows are the reasons for the court's ruling to dismiss the application for leave to appeal.

[3] It is trite that this court, when considering whether or not to grant leave to appeal ought to consider whether there are reasonable prospects of success; and that the judge must disabuse his/her mind of the fact that he or/she has no

reasonable doubt as to the guilt or the innocence of the accused. In *S v Ningisa & others*¹ Mainga JA cited with approval the following from *S v Ackerman en 'n Ander*²:

'(A) reasonable prospect of success means that the Judge who has to deal with an application for leave to appeal must be satisfied that, on the findings of fact or conclusions of law involved, the Court of Appeal may well take a different view from that arrived at by jury or by himself and arrive at a different conclusion'

[4] In the application for leave to appeal the applicant raised 20 grounds in respect of their intended appeal against conviction. They premise of these grounds are essentially that the court erred in the factual findings, made conclusions reached as well as the application of those facts to the law. I shall first consider whether there are reasonable prospects of success on the grounds raised by the applicant in respect of the discharge of all four respondents on the count of murder. The applicant's heads of argument conveniently groups the 20 grounds of appeal into subheadings. I shall likewise consider the grounds as per those headings.

The link between the crime and the third respondent (ground 2.1; 2.2 and 2.3; 2.4 and 2.5)

[5] The court concluded that the officer in the blue uniform was third respondent despite the fact that not all the witnesses identified him at the identification parade. Mr Matota, counsel for the applicant reasoned that the court contradicted itself by finding that the officer in blue uniform described by the state witnesses to have assaulted the deceased was indeed the third respondent and having done so incorrectly discharged him.

[6] There are two factual issues. The first factual issue is the identity of the third respondent and the second factual issue is whether he is guilty of murder. The purpose of the identification parade is to identify the accused and it cannot be said that the court failed to take into consideration the identification parade when the court was satisfied that the identity of the third respondent was satisfactorily proven.

¹ 2013 (2) NR 504 (SC)

² 1973 (1) SA 765 (A) at 766H

[7] The issue which the court found was not proven beyond reasonable doubt is whether the conduct of third respondent amounted to murder or any of the competent verdicts. The State had to prove this fact by means of credible evidence.

[8] The witnesses who testified about what transpired in the open area not only contradicted each other in respect of the number and severity of blows but also the part of the body which the third respondent allegedly assaulted. One of the witnesses even testified that the officer in blue uniform did not assault the deceased but merely pushed him down. These are material contradictions.

[9] The court was in a position to observe these witnesses and it is evident that the court was alive to its duty to assess the nature and number of these contradictions. The fact of the matter is that the contradictions made it unsafe for the trier of fact to rely on it for a conviction. The court carefully considered the material contradictions. More contradictions were highlighted by counsel for third respondent.

[10] The court, based on the many material contradictions between the testimonies of the various state witnesses concluded that the State failed to prove beyond reasonable doubt that there was an assault on the deceased by third respondent i.e that he unlawfully and intentionally assaulted the deceased.

[11] For these reasons I am of the considered view that there are no reasonable prospects that the applicant would succeed on these grounds.

Liability of the second and fourth respondents (Ground 2.6 – 2.10)

[12] The applicant submitted that the court erred by finding that sergeant Tjiramba exaggerated or inaccurately or untruthfully recorded what the second respondent reported to her regarding the assault perpetrated by the first respondent on the

deceased, without any legal/actual basis for such a finding. The factual basis for this conclusion is contained in paragraph 14 of the court's judgment. There is a major difference between "minimum force" and her evidence in court regarding the report she received from second respondent. The conclusion is thus fact based.

[13] The applicant further raised the ground that the court erred in law by finding that it is not clear what more was expected of the second respondent, who witnessed the assault being perpetrated on the deceased by the first and third respondents, bearing in mind that members of the police have a duty of care, to fight crime and to protect life; and that the second and fourth respondent, though they did not take part in the assault of the deceased, while he was being assaulted by the first and Respondents, the second and fourth respondents could have been convicted on one of the three basis, namely:

'(a) Upon the basis that they participated in the assault in circumstances where they ought to have foreseen the resultant death;

(b) Upon the basis that they associated themselves with either the fatal assault although taking no part in it (that on the basis of common purpose); and

(c) Upon the basis that they omitted to prevent the assault where there had been a duty upon them to do so.'

[14] The fact of the matter is that there was a material difference between the evidence of the charge office personnel and the inmates concerning the presence of second and fourth respondent. In order for the State to rely on this reasoning it had to prove that second and fourth respondent had witnessed the event. The failure by the inmates to place the second and fourth respondent at the scene whilst the charge office personnel saw them leaving the charge office and entering the open space could mean one of two things: (1) one of the groups lied about their presence (2) that the charge office personnel were truthful about their presence but that the inmates did not see them near the scene of the crime.

[15] The court, in the absence of second and third respondents' testimony, accepted the evidence of the charge office personnel that they were present in the

open area. Their failure to testify meant that this evidence was undisputed. The court thus took into consideration their failure to testify.

[16] Being in the open area does not *per se* mean that they had seen the event. They were not seen near the scene by the witnesses inside the open area. There was no evidence upon which the court could infer that fourth respondent had witnessed or even that he ought to have been able to witness the assault. There was no evidence of his participation in the assault.

[17] The court inferred from the testimony of Tjiramba that second respondent reported the assault by first respondent, that second respondent had seen the kick by first respondent. Her evidence in this regard was undisputed.

[18] The state adduced evidence to the effect that first respondent kicked the deceased once and thereafter started resuscitation. There was no further assault perpetrated on the deceased. There was no evidence that second respondent was in close proximity to the first respondent. The State failed to adduce evidence to support an inference that the second respondent could have prevented the assault or that he associated himself with the assault. He in fact reported the conduct of the first respondent to the charge office sergeant.

[19] If there was a common purpose, it was to arrest and detain the deceased. This is different from having formed common purpose to assault and/or to kill the deceased. The facts of the *State v George Botha & others*³ case which the applicant rely on, are distinguishable from the facts in this case. In that case the court found that the officers had a duty to care. The deceased in that case was beaten continuously by civilians during the night and the next morning by a police reservist before being taken to the police station where the police officers failed to have the deceased medically examined soon after his arrival at the police station. *In casu* the

³ Case no CC6/2002 HC, delivered of 15 October 2002.

court concluded that second respondent saw the kick by the first respondent and made a verbal report almost immediately to the charge office sergeant thus adequately discharging his duty to report the assault he had witnessed.

[20] I am not persuaded that the applicant has reasonable prospects to succeed as the facts simply not support the legal doctrine of common purpose, nor a conclusion that they participated in the assault or that they associated themselves with the fatal assault.

The legal position in respect of the concept of negligence

[21] Counsel for the applicant in his submission before judgment conceded that the state did not prove murder. This concession was correctly made. It must be born in mind that the causal connection between the conduct of the accused and the resultant death of the victim is but one aspect of the offence of murder/culpable homicide. The definitional elements of culpable homicide is the negligent causing of someone's death. There would be no merit in the submission that the court erred in law in discharging the first respondent on the charge of murder/culpable homicide despite having found his kick caused the death of the deceased.

[22] The conclusion by the court that the medical reports were contradictory is based on the evidence adduced. Dr Kabanje, the medical practitioner who conducted the post mortem report found in his examination inter alia that the lungs were congested with haemorrhagic infiltration and a 10 mm laceration on the liver and concluded that the cause of death was blunt force trauma to the abdomen. Dr Kidaaga, is the anatomical pathologist who microscopically examined the tissues sent to him by Dr Kabanje. His diagnoses of the cause of death was pulmonary haemorrhage or bleeding in the lungs. The court however was, despite this discrepancy, satisfied that the State had proven that the kick by the first respondent was the cause of death.

[23] The applicant submitted that the court erred in law by finding that it could not be said that the first respondent ought to have foreseen the death of deceased, despite having found that the first respondent ought to have foreseen serious injuries resulting from his kick. The court accepted *dolus eventualis* as the form of intent for assault with the intent to do grievous bodily harm. The court applied the following test: would a reasonable person in the accused's position have foreseen that the death of the deceased would ensue. The court concluded that it cannot be said that he ought to have foreseen the death of the deceased.

[24] It is indeed so that the first respondent, with a shod foot kicked the deceased once on the chest with some measure of force. The question for culpable homicide is not whether a reasonable person would have foreseen the possibility of a person suffering serious bodily injury, but his death.

Sentence

[25] The applicant submitted in the first ground that the court erred by imposing a sentence that is shockingly lenient in that it is not comparable to similar sentences for similar offences. The State referred this court to *S v Barnes 1990 (2) SACR 485*; *S v Phallo & others 1999 (2) SACR 558*; and *S v Madikane & others 1990 (1) SACR 377 (N)* where those courts imposed custodial sentences ranging from 8 to 2 year's imprisonment. In the *Barnes* case the deceased had been arrested for allegedly stealing a firearm, and police officers had taken him along in order to search for it. When it became apparent that the deceased was leading them on a wild goose chase, the first appellant began assaulting the deceased, punching and kicking him. After three such episodes, which according to the evidence did not contribute to the deceased's death, he was again assaulted (he was kicked in the vicinity of the stomach). This last assault caused the death of the deceased later that night. The deceased was assaulted on diverse occasions and the assault was sustained over a period. The accused who was responsible for the final assault was convicted of

culpable homicide and was sentenced to 8 years' imprisonment. Booyesen J, the appellate judge stated as follow:

'It is unfortunate for the accused but it is important that the public and policemen should know that our Courts will not tolerate assaults by policemen on those in police custody and will punish severely those who do commit such assaults, and particularly if they result in death which could have been foreseen, even if the death was not in fact either desired or intended.' My emphasis

It is not difficult to see that the facts of that case is distinguishable from the facts in this case.

[26] The case of *George Botha, supra* ⁴ Hoff J, as he then was, sentenced the civilians who assaulted the deceased continuously during the night and the police reservist who assaulted him the next morning before taking him to the police officer to three years' imprisonment and the police officers who failed to take him for medical examination to a fine of N\$4 000 or 18 months' imprisonment each.

[27] In *S v Nicklaus Hoaseb & 9 others CC 29/2008, delivered on 22 April 2010*, Mainga J, as he then was, convicted a number of police officers for *inter alia* culpable homicide. Members of the Serious Crime Unit interrogated a suspect until he collapsed. He died as a result of the 'overzealous investigation'. The officers in that case were given a non- custodial sentence of N\$8000 or two years imprisonment and a further two years which was wholly suspended for five years on the normal conditions.

[28] I am of the considered view that there are no reasonable prospects that the applicant would succeed on this ground given the wide range of sentences which this court has in the past imposed in related cases.

[29] The next ground raised was that the court erred by failing to consider and or attached little weight to a number of aggravating factors. The court in paragraph 4 of

⁴ (sentence delivered on 18 October 2002)

the reasons made the following remark: ‘... the deceased whose resistance consisted of a refusal to keep quiet and to sit down on the ground.’ This is an indication that the court was mindful of the non-violent stance adopted by the deceased.

[30] The court held that the assault by the other respondents was not established by the evidence adduced by the state and discharged them. The State did not prove that any of the respondents were responsible for wetting the deceased. The first respondent implicated his co-accused during his evidence in mitigation. The value and truth of this statement must be viewed against his failure to testify hereto during the trial when all the other respondents were present. The first respondent was arrested the morning after the assault. Common sense dictates that he could no longer “report” the incident but he could have implicated his co-accused if he so wished. He however exercised his right to remain silent. This court justifiably could not attach much weight to this evidence. Furthermore the fact that this issue was not mentioned does not mean the court did not give it consideration.

[31] The court however attached considerable weight to the fact that this was a case of police brutality. (See paragraph 4, 7 and 8 of the reasons)

[32] The fact that the first respondent and his co-respondents were working extended hours for overall protection and peace keeping of the town formed part of the description by state witnesses of the circumstances which prevailed that evening. The commission of the offence took place not in isolation but within a set of circumstances. This fact was not grabbed out of thin air but was evidence adduced by the state to sketch the circumstances which prevailed that evening. The conclusion that the alleged escape of the deceased contributed to the escalation of the tensions between the police and the detainees was properly premised on the various testimonies of both the charge office personnel and the inmates.

[33] I am of the view that there are no reasonable prospects that the applicant would succeed in showing any misdirection in respect of the exercise of the court's sentencing discretion.

[34] In the result the following order is made:

1. The application for leave to appeal the discharge of all four accused on the charge of murder and the resultant wholly suspended sentence of three years' imposed on the first respondent for assault with the intent to do grievous bodily harm, a competent verdict on a charge of murder, is refused.

MA TOMMASI J

Judge

APPEARANCES

THE STATE : **MR MATOTA.**
OFFICE OF THE PROSECUTOR-GENERAL

ACCUSED 1: **MR J VAN VUUREN**
KRUGER VAN VUUREN & CO.

ACCUSED 2 **MS INONGE MAINGA**
INONGE MAINGA ATTORNEYS

ACCUSED 3 **MR J NCUBE**
INSTRUCTED BY: GOVERNMENT
ATTORNEYS

ACCUSED 4 **MS F KISHI**
DR WEDER, KAUTA & HOVEKA INC.