



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGEMENT

Case no: CA 03/2016

In the matter between:

FANUEL HAIPINGE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Haipinge v The State* (CA 03/2016) [2017] NAHCNLD 94 (28 September 2017)

Coram: TOMMASI J and JANUARY J

Heard: 5 July 2017

Delivered: 28 September 2017

Flynote: Appeal — Criminal Procedure — Legal representation — Cumulative circumstances resulted in deprivation of right to legal representation — Misdirection by magistrate further by failing to determine failure by the state to call a witness warranted an adverse inference — Failure by magistrate to advise appellant that he may call witnesses not used by the State — Appellant prejudiced and his right to a fair trial infringed — The nature of the irregularity is such that it vitiates the conviction and sentence.

Summary: The appellant in this matter was convicted of robbery and was sentenced to 3 years' imprisonment. On appeal against conviction he raised the ground that the court *a quo* erred in allowing the trial to proceed without legal representation. The appellant applied for legal aid and a legal representative was appointed who failed to turn up at court and withdrew from the matter shortly before it was enrolled for trial. He thereafter applied for a postponement to obtain another legal practitioner. The State prosecutor erroneously informed the court that another legal practitioner was appointed. This practitioner was appointed to represent the appellant in another matter. The court *a quo* incorrectly put it to the appellant that he had opted to represent himself whereas he did not waive his right to legal representation. The court proceed with trial without inquiring whether the appellant was able to obtain the services of another legal practitioner. The court held that the appellant's right to be represented by a legal practitioner was infringed. The court further held that the appellant was prejudiced and that the irregularity vitiated the entire proceedings. The conviction and sentence are set aside.

ORDER

1. The application for condonation is granted;
2. The appeal is upheld; and
3. The conviction and sentence are set aside.
4. The Registrar's Officer is directed to bring this judgment to the attention of the Director of the Law Society

JUDGEMENT

TOMMASI J (January J concurring)

[1] This is an appeal against conviction and sentence. The appellant has been convicted of robbery and sentenced to 3 years' imprisonment in the Magistrate's Court sitting in Omungwelumbe. The appellant filed his notice of appeal outside the time period provided for in Rule 67 of the Magistrate's Court and applied for condonation. The respondent did not per se oppose the application for condonation but submitted that there are no reasonable prospects of success.

[2] The appellant's first ground of appeal is that the learned magistrate allowed the trial to proceed without legal representation when he could clearly see that the appellant wanted legal representation and the frustrations with regards to legal representation were not of his own making.

[3] Mr Greyling, acting *amicus curiae* for the appellant submitted that the right to legal representation is firmly entrenched in our law; when an accused waives his right to legal representation, such waiver must be with full knowledge before it can be said that such waiver is valid; and that the consequences of such waiver must be fully explained to the accused. He furthermore submitted that it is not sufficient for the learned magistrate to explain the appellant's right to legal representation, the court must allow the appellant sufficient opportunity to exercise these rights. He referred this court to, inter alia *S v Kambatuku 2014 (4) NR 1142 (HC)*.

[4] Mr Matota submitted that the question of granting a postponement or not was in the discretion of the court, the appellant opted to conduct his own defense and there was thus no irregularity. He submitted that no prejudice was caused, the conduct of the trial was conducted fairly and the appellant was assisted by the learned magistrate. He

argued that the court of appeal has no power to reverse or alter the conviction of sentence by reason of any irregularity or defect in the record of proceedings, unless it appears to the court that a failure of justice has in fact resulted from such an irregularity or defect. He cited *Petrus Haodm v The State, CA 18/200, unreported judgment delivered on 28/08/2001*.

[5] The facts forming the background to this issue are summarized as follows: The appellant was arrested on 10 October 2010 and appeared before the Magistrate's Court on 12 October 2010. His right to legal representation was explained as follows:

'Ct: Accused, it is your right to engage a legal representative of your choice. A legal representative may be a lawyer, who will advise you on points of both law and facts during the trial before court. This person (lawyer), will be at your own costs. However, you may apply for a legal aid lawyer, who will be provided for you by the government. There are forms with the clerk of court to be filled in. The clerk of court will assist you in doing that.'

The appellant confirmed that he understood and he opted to conduct his own defense. He pleaded not guilty and stated that he knows nothing about the robbery. He was granted bail on condition that he pays N\$500. The matter was postponed to 22 November 2010.

[6] On 22 November 2010 the court *a quo* was informed that the investigation is incomplete and the appellant requested a reduction of the bail to N\$50. The court *a quo* reduced the bail amount to N\$200 and once again postponed the matter to 8 February 2011. On 8 February 2011 the appellant requested the court *a quo* to release him on warning. Despite opposition by the State Prosecutor, the court *a quo* warned the appellant to be at court on 3 March 2011.

[7] On 3 March 2011 the appellant indicated that he wanted to apply for legal aid. Although the typed record does not indicate the date, it appears that the proceedings were mechanically recorded. The learned magistrate put it to the appellant that he indicated previously that he would conduct his own defense and asked him if he maintained the same position. The appellant then indicated that he misunderstood or wrongly understood. It was evident that the appellant knew where he had to apply for

legal aid and had failed to do in the period between postponements. The court warned the appellant that the matter would proceed with or without a legal representative. The matter was postponed to 5 May 2011 to afford him the opportunity to apply for legal aid.

[8] On 5 May 2011 the appellant informed the court *a quo* that he was made to sit outside the office of the clerk of court till all the officials knocked off. The court *a quo* cautioned the clerk of court to assist the appellant and remarked that it was not the first time the court received complaints from the office of the clerk of the court. The matter was postponed to 4 July 2011.

[9] On 4 July 2011 the prosecutor informed the court *a quo* that the appellant was in custody for another matter and he was not brought to court. The prosecutor further informed the court *a quo* that the appointed lawyer who was not there but that he had written a letter. This letter was received by the court and it forms part of the record. In terms of this letter Shakumu & Associates confirmed their appointment. The writer thereof explained that Mr Shakumu was seeing an eye specialist in Windhoek and he would not be able to travel to the court due to the distance involved. The matter was postponed to 7 September 2011.

[10] On 7 September 2011 the appellant indicated that: he applied for legal aid, the lawyer did not consult with him; and he still wanted a lawyer as he could not go ahead on his own. He requested a further postponement. The prosecutor objected to the postponement. The learned magistrate granted a further postponement and advised the appellant that it was a final postponement. He further advised the appellant to approach the directorate of legal aid to instruct another legal practitioner if the legal practitioner who was appointed fails to appear. The matter was postponed to 9 September 2011 for the fixing a trial date.

[11] On 9 September 2011 the appellant informed the court *a quo* that the “so called lawyer” is not available and that he never shows up in court. He informed the court *a quo* that he is no longer interested and that he will conduct his own defense. The matter was postponed to 12 January 2012 for trial. The State on this date applied for a

postponement as the State was not in a 'better position to proceed with the matter'. The application was granted and the matter was postponed to 6 June 2012 for trial.

[12] On 6 June 2012 the appellant and all the witnesses were present. Attached to these proceedings was a letter from Mr Shakumu stating that he would not be available on 6 June 2012 as he had to be at the High Court. Mr Shakumu in this missive requested a date in July 2012 for trial. The assistant magistrate postponed the matter to 6 November 2012 and recorded no reason for the postponement to this date.

[13] On 6 November 2012 Mr Muharukua appeared on behalf of Mr Shakumu. He informed the court *a quo* that Mr Shakumu did not receive disclosure. The court *a quo* pointed out disclosure was not raised in any of the previous correspondence as an issue and recorded that the record will be referred as a report to the Law Society. The matter was however still postponed for plea and trial to 3 April 2013.

[14] On 3 April 2013 the prosecutor handed the court *a quo* a letter wherein Mr Shakumu gave notice of his withdrawal as legal practitioner for professional reasons. The letter was dated 19 March 2013 but it was received by the prosecutor on 25 March 2013. The appellant informed the court *a quo* that he did not receive any notice of withdrawal and requested another chance to obtain the services of another lawyer. The postponement was granted. The matter was thereafter postponed three times waiting for a response from the Directorate of Legal Aid. On 3 July 2017 the court instructed the clerk of court to make enquiry at the offices of Legal Aid.

[15] On 16 August 2013 the State Prosecutor informed the court that Ms Amupolo was appointed. A document originating from the Directorate of Legal Aid was handed to the court *a quo* the date stamp of the clerk of the civil court indicates it was received by the clerk of the civil court on 17 July 2013. The matter was postponed to 5 September 2013. A letter was sent by the office of the Prosecutor-General to Ms Amupolo advising her that she was appointed as legal aid counsel and informing her that the matter was postponed to 5 September 2013 for legal representation.

[16] On 5 September 2013 the prosecutor informed the court *a quo* that Ms Amupolo was appointed but the case number referred to was not the same. Upon closer scrutiny

of the document which the clerk of court received from the Directorate of Legal Aid it appears *ex facie* the document that Ms Amupolo received instructions to represent the appellant in another case i.e. case no 327/12 on a charge of 'grievous bodily harm(sic)'. It is evident *ex facie* the document, that Ms Amupolo was not instructed to represent the appellant in the matter before the court *a quo*. The State Prosecutor nevertheless indicated that the presence of Ms Amupolo was required. The appellant was not present during these proceedings. It may be inferred that he was thus unaware that Ms Amupolo's instructions was for another matter. The matter was postponed to 8 November 2013 for Legal Aid Lawyer.

[17] On 8 November 2013 the appellant informed the court *a quo* that he met with Ms Amupolo and she agreed to meet him at court on 5 September 2013 but he was not brought to court. The prosecutor informed the court *a quo* as follow: 'The state has found that it is proven futile that Ms Amupolo would not come to the court. Accused may write to legal aid to inform them that the lawyer is not forthcoming.' The matter was hereafter postponed to 15 April 2014 for trial. On this date the appellant, who was in custody in respect of another matter, was not brought to court. The matter was postponed once again to 10 February 2015 for trial. It is noted that the appellant was in custody at the time and he was advised to write to the Directorate of Legal Aid.

[18] On 10 February 2015 the following was recorded

'Court: 'Accused you earlier on requested for the appointment of legal aid on a number of occasions. Some lawyers were appointed, some withdrew and I remember one never came forth and that is Ms Amupolo of Legal Aid, she never came forth in this regard. As a result you indicated that you were to conduct your own defense. Do you maintain the same?

Accused: Yes your Worship.'

There was no enquiry done to determine whether he informed the Directorate of Ms Amupolo's failure to come to court and whether or not he received a response from the Directorate of Legal Aid. The appellant was not informed of the fact that the document

reflects that Ms Amupolo was instructed to represent him in another case and not in the matter before the court *a quo*.

[19] The magistrate in the additional statement indicated that the appellant gave up and decided to “go solo” on his case; and that ‘On the date of trial, accused confirmed, presumably also out of frustration, that he will conduct (his) own defence.’ During submission Mr Matota argued that the court must apportion blame where it must be.

[20] I have set out the background facts in detail to demonstrate the travesty of justice which occurred in the conduct of the criminal trial against this appellant. The matter was delayed for over 4 years. The appellant was held in custody for the better part of this matter and thus reliant on the court’s administration to assist him with his application for legal aid. The following highlights the shortcomings in the procedure:

- (a) There were numerous postponements without proper reasons recorded for such postponements;
- (b) Once it became known that the accused is held in another matter, those who detain the accused simply failed to keep a proper record of the different dates for different matters thus contributing to the inordinate delay which occurred;
- (c) Communication challenges between the district court and the Directorate of Legal Aid resulted in endless delays with no solution in sight; Court personnel are burdened with the duty to assist accused to apply for legal aid in the absence of legal aid staff deployed to perform this function at the courts. It may be necessary to summon responsible persons from the Directorate of Legal Aid to attend court proceedings in order to determine whether or not application ought to be granted.
- (d) The State prosecutor(s) in this case failed to place material facts before the court regarding the appointment of Ms Amupolo alternatively misled the judicial officer. It would have been a futile exercise to get Ms Amupolo to come to court in a matter which she received no instructions to act as

legal aid counsel. The State prosecutor was aware of this fact yet insisted that she should come to court. Failure to properly advise the court resulted in an unnecessary delay.

- (e) Mr Shakumu, a legal practitioner accepted instructions from the Directorate of Legal Aid and failed to act in professional manner. He was appointed on 4 July 2011 and withdrew on 3 April 2013 causing a delay of almost two years. The conduct of the legal practitioner in this matter amount to contempt of court. Where the court is of the view that a legal practitioner's conduct may make him guilty of this offence, the court may deal with such practitioner in terms of the relevant statutory provisions.
- (f) Given the above delay the magistrate's patience was sorely tested. In this matter the learned magistrate indeed granted the appellant ample time to obtain legal aid and conceded that the appellant, out of sheer frustration decided to conduct his own defense. The magistrate herein however, when explaining the history of the accused's request for legal representation, incorrectly explained the status quo to the appellant. The appellant, although he decided to defend himself at some stage, he later indicated that he could not do it on his own. The magistrate herein was fully entitled to proceed with the trial after a proper enquiry as to whether the directorate of Legal Aid instructed another counsel after the unceremonious withdrawal of Mr Shakumu.

[21] The cumulative effect of all of the above resulted in the appellant being deprived of legal representation. The remaining question is whether this deprivation was such that it vitiated the entire proceedings.

[22] The complainant, a constable, testified that she was robbed late at night by the appellant. He pulled off two of her chains which she was wearing around her neck. She knew the appellant when he was held as an inmate at the police cells and she recognized him. She screamed that the appellant was trying to kill her and held on to him for a while. A security officer came to her aid. She was later requested to speak to

the appellant as he wanted her to withdraw the case. She requested one officer, constable Shikeso, to accompany her to the cells and in his presence the appellant requested her to withdraw the case. The appellant during cross-examination put it to her that 24h00 was his sleeping time thus placing his identity in dispute.

[23] The State called Constable Shikeso who confirmed that he overheard the conversation as described by the complainant i.e. that the appellant wanted her to withdraw the matter. The appellant informed the court *a quo* that the statement of this witness was not disclosed to him prior to the giving his testimony before court. The prosecutor confirmed this when asked by the court *a quo*.

[24] The appellant denied he had committed this offence. He indicated that the complainant may have been under the influence of alcohol in view of the place where she was robbed. He bemoaned the fact that the security guard was not called whereas he was informed that this witness will be called later.

[25] The learned magistrate in his judgment makes reference to the failure by the State to call the security guard as witness and makes the following observation: 'The prosecution did not identify or has not informed the court as to why this witness was not called. It would have been most appropriate to inform the court as to why a certain witness could not have been called more so that the appellant was insisting that all the time he expected this witness to be called. However that not having been done the court is mindful of the fact that the prosecution is *dominus litis* and even if the witness is listed as a state witness the accused could still call that witness if he thinks he had evidence that could have supported his evidence.'

[26] In *S v Mwanyekele 2014 (3) NR 632 (HC)* Hoff J, as he then was, at page 635, para 17 – 18, stated the following:

'I may state at this stage that it is trite law that the state has the burden of proving the commission of an offence beyond reasonable doubt and in this regard it is appropriate, in my view, to remind prosecutors once again of the consequences of the failure to call witnesses where they have been identified and are available. In *S v Teixeira 1980 (3) SA 755 (A)* at 764A the court held that in the circumstances the failure by the state to call the other witness to testify justified the inference that in state counsel's opinion his

evidence might possibly have given rise to contradictions which could have reflected adversely on the credibility and reliability of the single witness.'

The learned magistrate was required to consider whether or not the said failure to call the witness justified an adverse inference.

[27] Moreover the learned magistrate did not inform the appellant that he was entitled to call this witness. The court *a quo* mentioned this for the first time in his judgment. After the state closed its case the court *a quo* gave the following explanation: 'Whether you remain silent or you testify under oath, you have the right to call witnesses. These witnesses will have to testify under oath. They also could be subjected to cross-examination.' The appellant informed the court *a quo* that there was a certain witness who was supposed to be called but instead a witness was called whose statement was not disclosed to him. The appellant had raised a defense of an alibi and there is a distinct possibility that the witness may have contradicted the complainant in respect of her identification of the appellant. The appellant would have conducted his defense differently if he had known this or if he had legal representation.

[28] There can be no doubt that the appellant had been prejudiced and that infringement of his right to legal representation rendered his trial unfair. The nature of the irregularity is such that it vitiates the conviction and sentence.

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

1. The application for condonation is granted;
2. The appeal is upheld; and
3. The conviction and sentence are set aside.
4. The Registrar's Officer is directed to bring this judgment to the attention of the Director of the Law Society

M A Tommasi

Judge

I agree

H C January

Judge

APPEARANCE:

FOR THE APPELLANT:

Mr Greyling JNR

Of Greyling & Associates

FOR THE RESPONDENT:

Mr Matota

Of Office of the Prosecutor General

Oshakati