

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2017/00004

In the matter between:

IMMANUEL BENJAMIN

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Benjamin v S* (HC-NLD-CRI-APP-CAL-2017/00004) [2018]
NAHCNLD 37 (19 April 2018)

Coram: TOMMASI J and JANUARY J

Heard on: 15 March 2018

Delivered: 19 April 2018

Flynote: Appeal – Criminal Procedure – Plea – Plea of guilty – Must be an unequivocal admission of the elements of the offence – Magistrate could not have been satisfied of guilt of bribery in contravention of s 38 of the Anti-Corruption Act, 2003 (Act 8 of 2003) – Admission of the ‘public act’ not unequivocal.

Summary: The appellant pleaded guilty to bribery in contravention of s 38 of the Anti-Corruption Act and admitted he gave a police officer N\$800 to withdraw the charges. He informed the court that the police officer opened a case against him and he paid the police officer to withdraw the case. It was not clear from the answers given whether the appellant wanted the officer to withdraw the case in his official capacity or in his personal capacity as the complainant. The court held that this was not an unequivocal admission that he wanted the public official to perform a 'public act'. The conviction and sentence were set aside and the matter was remitted with directions that the magistrate act in terms of s 113 of the Criminal Procedure Act.

ORDER

1. The appellant is granted condonation for non-compliance with rule 67.
2. The conviction and sentence are set aside.
3. The matter is remitted in terms of s 312 of Act 51 of 1977 to Outapi District Court with the directive to act in terms of s 113 of Act 51 of 1977.
4. In the event of a conviction, the court in sentencing must take into account the sentence already served by the appellant.
5. The matter be enrolled at the Outapi magistrate's court on or before 26 April 2018.

JUDGMENT

TOMMASI J (JANUARY.J concurring):

[1] The appellant was charged with bribery and corruption in contravention of s 38(b) of the Anti-Corruption Act, 2003 (Act 8 of 2003). He pleaded guilty and was sentenced

to 36 months imprisonment of which 12 months were suspended for a period of five (5) years on condition accused is not convicted of contravening section 38 of Act 8 of 2003. The appellant appeals against the conviction and the sentence.

[2] The appeal was noted out of time and the appellant applied for condonation. The appellant was sentenced on 24 April 2017 and he appealed against his sentence on 23 May 2017, ie approximately 5 days out of time. The appellant's explanation for the delay is the fact that he waited for his family to secure the services of a private legal practitioner as he, a layperson, did not know how to note an appeal. The application was opposed on the basis that there were no reasonable prospects that the appeal would succeed. The court was of the view that there are reasonable prospects of success. Considering the fact that there are reasonable prospects of success, the matter was heard on the merits.

[3] The appellant's first ground of appeal is that the learned magistrate erred in finding that the appellant admitted all the allegations/elements in the charge in light of two exculpatory/contradictory answers he gave.

[4] The charge against the appellant was framed as follows:

'That the accused is guilty of the crime of bribery contrary to section 38(b) read with sections 51,49 of act 8 of 2003 in that upon or about 12 day of April 2017 and at or near Outapi town in the district of Outapi the said accused did wrongfully and corruptly offered, gave or agreed to give to Amakali Leonard, a member of the Namibian Police Force and as such a Public Official, payment of N\$800 in cash as a fee, gift or reward with the intent to induce or to attempt to induce the said Leonard Amakali not to perform official act to wit: not to testify against the accused & to destroy a police docket and the accused did contravene the said section.

[5] During the questioning in terms of s 112(1)(b) the following is an extract of the material questions and answers:

'Q - Were you on 12/04/2017 at Outapi town in the district of Outapi?

A – Yes

Q – What did you do to be guilty to the charge?

A – I met a police officer Amakali, he is the one who opened a case against me and I told him to **withdraw the charge** against me.

Q – Is the officer a member of the Member of the Namibian Police force?

A – Yes

Q – The state alleges that you made a payment of N\$800-00 Do you dispute?

A – No

Q – Why did you make the payment?

A – It was a thanksgiving that he was to **withdraw the charge**

Q – Do you agree that this was done so that the officer does not perform his official act?

A – Yes

Q – What makes you say that?

A – Because the case would not be there against me as the case would be **withdraw**.
(sic)

Q – The state alleges that it has indicated that he is not to testify against you and destroy the docket, do you admit?

A – Yes

Q – Did you know it was wrong?

A – Yes

Q – Did you know it was unlawful?

A – Yes

Q – Why did you do it?

A – Because my case took time to be finalized and it is costing me a lot to travel for the case to be finalized.'

[6] Mr Aingura, counsel for the appellant reasoned that the appellant admitted he wanted the police officer to withdraw the case but did not admit that the case which the police officer 'opened' against him was in his capacity as a police officer. He submitted that the police officer may 'open' a case as a private citizen. In the latter case the appellant would not necessarily act unlawfully by asking the complainant, to withdraw the case against him. He argued that the learned magistrate could not have been satisfied that the appellant admitted the offence of bribery.

[7] Mr Tjiveze, counsel for the respondent, submitted that the appellant admitted that he gave a police officer money (reward) as inducement not to testify against him i.e. to perform his official duties. According to Mr Tjiveze it is immaterial whether the case was opened in the official capacity as a police officer or in his personal capacity. He argued in his heads of argument that it is also not evident from his plea of guilty whether the case was opened in his personal capacity or official capacity.

[8] The magistrate when questioning an accused on the facts of the case in terms of section 112 (1)(b) must do so to ascertain whether the accused admits the allegations in the charge to which he or she has pleaded guilty, and may convict, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty.

[9] It is imperative to consider the provisions of section 38(1)(b) of the Anti-Corruption Act to determine whether the appellant indeed admitted all the elements of the offence of bribery. Section 38(1)(b) reads as follow:

'A person who offers or gives or agrees to give to a public officer, or who, being a public officer, solicits or accepts or agrees to accept, any gratification as an inducement or a reward for, or otherwise on account of

- (a) ...;
- (b) performing or abstaining from performing, or aiding in procuring, expediting, delaying, hindering or preventing the performance of, any official act;
- (c) ...; or
- (d) ...,

commits an offence, whether or not the public officer had the power, right or opportunity so to do.' [my emphasis]

[10] The bribery alleged in the charge sheet is that the appellant gave a public official gratification as an inducement not to perform official act to wit: not to testify against the accused & to destroy a police docket'. The 'official act' which the appellant in his own words wanted the public official to do, was to withdraw the charge. This was not the official act which the State alleged. The learned magistrate then asked a leading question to which the appellant simply answered yes. The appellant was unrepresented at the time and one cannot attach too much weight to his affirmative answer to a leading question by the presiding magistrate i.e. admitting that he wanted the police officer not to testify and to destroy the docket.

[11] Once a charge is laid it may be withdrawn by the Prosecutor-General. If a person pays a police officer to withdraw the charge it would not be a defense that the police officer does not have the power or authority to withdraw a charge. A charge may however also be withdrawn by a complainant. The latter may not necessarily be unlawful. It would thus make a difference if the police officer was approached to withdraw the case in his official capacity or in his personal capacity. I am not persuaded that the appellant made an unequivocal admission that he gave gratification for the police officer to perform an 'official act'.

[12] The learned magistrate in this case considered the charge sheet as drafted by the State Prosecutor and the answers by the appellant and could not reconcile the two. This is evident by the leading question asked by the magistrate. What was required was evidence or further questions to determine whether the appellant admitted all the elements. The learned magistrate could not, on the answers given by the appellant, have been satisfied of the guilt of the appellant.

[13] In light of this conclusion, the conviction cannot be allowed to stand. In terms of s 312 the matter must be remitted to the magistrate to act in terms of section 113.

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

1. The appellant is granted condonation for non-compliance with rule 67 of the magistrate court rules.
2. The conviction and sentence are set aside.
3. The matter is remitted in terms of s 312 of Act 51 of 1977 to Outapi District Court with the directive to act in terms of s 113 of Act 51 of 1977.
4. In the event of a conviction, the court in sentencing, must take into account the sentence already served by the appellant.
5. The matter be enrolled at the Outapi magistrate's court on or before 26 April 2018.

MA Tommasi

Judge

I agree

H C January

Judge

Appearances:

For The Appellant:

S Aingura

Of Aingura Attorneys, Oshakati

Instructed by Legal Aid

For The Respondent:

L Tjiveze

Prosecutor General's Office, Oshakati