

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI  
LEAVE TO APPEAL

“ANNEXURE 11”

<b>Case Title:</b> <i>The State v Maurus Valombola</i>	<b>Case No:</b> CC 15/2013
<b>Ruling on Application for Leave to Appeal</b>	<b>Division of Court:</b> Northern Local Division
<b>Heard before:</b> Honourable Mr. Justice January	<b>Heard on:</b> 22 June 2020 <b>Delivered on:</b> 06 July 2020
<b>Neutral citation:</b> <i>S v Valombola</i> (CC 15/2013) [2020] NAHCNLD 83 (6 July 2020)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. Condonation for the late filing of the application for leave to appeal and heads of argument of the respondent is granted;</li><li>2. Leave to appeal against the conviction and sentence for culpable homicide is granted;</li><li>3. Leave to appeal against the acquittal of contravening section 38(1)(o) read with sections 1, 38(2) and 39 of the Arms and Ammunition Act, Act 7 of 1996- discharging a fire arm in or on any public place or public road is refused;</li><li>4. Leave to appeal against the conviction of culpable homicide is refused;</li><li>5. Leave to appeal against the order of non- forfeiture of the motor vehicle in question</li></ol>	

is refused.

**Reasons for Order:**

JANUARY J

*Introduction.*

- [1] The respondent in this matter was convicted on 26 March 2020 for Culpable Homicide, a competent verdict on a charge of murder for which he was indicted. He pleaded not guilty. He was acquitted on a charge of contravening section 38(1)(o) read with sections 1, 38(2) and 39 of the Arms and Ammunition Act, Act 7 of 1996, discharging a firearm in or on any public place or public road He was thereafter sentenced on 14 June 2020 to 9 years imprisonment of which 6 years were suspended for 5 years on condition that that accused is not convicted for culpable homicide committed during the period of suspension.
- [2] Mr Matota is representing the applicant and Mr Greyling is representing the respondent.
- [3] The applicant filed an application for leave to appeal against the acquittal on the charge of murder and a charge of contravening section 38(1)(o) read with sections 1, 38(2) and 39 of the Arms and Ammunition Act, Act 7 of 1996, discharging a firearm in or on any public place or public road. An application for leave to appeal is also filed against the sentence and an order that a motor vehicle which is the instrumentality of the crime should not be forfeited to the State.
- [4] The respondent filed a cross- application for leave to appeal against the conviction for culpable homicide and opposed the application for leave to appeal against the order of non-forfeiture.

*The applicant's grounds*

*Murder*

[5] The applicant submitted that the court erred in law by finding: that there is no direct evidence of the intention to kill; that the court had doubt that the accused intended to kill as he was in possession of a pistol, could have shot the deceased and could have driven over the deceased if he intended to kill; not finding that the accused subjectively considered that death is a possible consequence but recklessly acted; the court erred in law and/or on facts by not attaching more weight to the medical evidence of witnesses as relevant factors in determining that the accused had the requisite intention in the form of *dolus eventualis* to kill the deceased.

*Discharging a fire arm in a public place or on a public road*

[6] The court erred in law and on facts by finding; that the accused fired the shot in private defence; that the deceased was armed, was the aggressor and assaulted the deceased; that the accused did harvest the belief and foresaw that he was acting within the boundaries of self-defence; alternatively that the accused acted in self-defence without any requirements of self-defence outlined in the case of *S v Lukas 2014 (2) NR 374 (HC) at 374*.

*Ad sentence*

[7] It is submitted that the court erred by imposing a sentence that is shockingly lenient by; overemphasizing the time of pre-trial incarceration of the accused; failing to consider that respondent was convicted of a crime of violence and that the court should attach more weight to the deterrent aim of punishment; failing to attach more weight to the fact that respondent showed no remorse; failing to adequately consider that the respondent is a repeat offender for a crime of violence; failing to find that the aggravating factors outweighs the personal circumstances.

*Ad the order in terms of section 34(1)(b) of the CPA*

[8] Applicant submits that the court erred in law; in making an order that the motor vehicle must be returned to the lawful owner; failing to forfeit the said motor vehicle to the State.

*The respondent's grounds*

[9] Respondent filed their application for leave to appeal late. Mr Greyling filed an application for condonation with a supporting affidavit. Mr Matota did not oppose the application. Mr Greyling provided a reasonable explanation for the delay. The judgement on conviction is quite bulky and due to other commitments, he could not finalize the necessary documents in preparation of the appeal. I allowed both parties to prosecute their applications.

[10] Mr Greyling contented that the court erred and/or misdirected itself in fact and/or in law; in the evaluation of evidence of different witnesses by finding that minute discrepancies were immaterial to the adjudication of the case; by finding that evidence is reliable despite discrepancies in their evidence compared to their witness statements; by failing to have the cross-examination of a witness, Leonard Kamwandi stood over; by failing to consider the accumulative effect of discrepancies of witnesses; by finding that the motor vehicle in question and the deceased were present at the location of the crime scene; finding that the said motor vehicle bumped the deceased; that the deceased sustained fatal injuries as a result of being bumped by the motor vehicle; finding that the deceased died as a result of such injuries sustained; in finding that the State proved the cause of death; the court erred/misdirected itself in rejecting the appellant's evidence that he did not bump the deceased and/or caused the fatal injuries.

*Non-compliance with Rules of court*

Rule 131 (1) stipulates as follows:

**'131 Preparation of court documents**

(1) All typed pleadings, notices and other court documents must comply with the following typing style-

(a) line spacing, including line spacing of quotations must be 1.5;

- (b) **text must be typed in the Arial (regular) font 12 points;**
- (c) **quotations must be typed in the Arial (regular) font 11 points;**
- (d) **footnotes must be typed in the Arial (regular) font 10 points;**
- (e) short quotations forming part of a sentence must be typed the same as the text and must comply with paragraph (b);
- (f) the justification of the text of typed pleadings, notices and other court documents must be set to full justification;
- (g) all pleadings, notices and other court documents should bear page numbers, except that the covering page may not be numbered;
- (h) **page numbers must be at the right hand side at the top of the page; and**
- (i) **the second line of a paragraph should not be indented.' (my emphasis)**

[11] Both counsel's heads of argument are not typed in Arial font. In addition, Mr Grayling's notice of motion documents also do not comply with the rules. Non-compliance of the rules may lead to the matter to be struck from the roll. I have however decided to entertain both applications because this matter is dragging without finalization since 2013.

*The merits*

[12] I will first deal with the cross-application for leave to appeal against the conviction of culpable homicide. More specifically with the reasons for conviction. I have extensively dealt with the facts in my judgement on conviction and only highlight material facts in this judgment.

[13] The appellant admitted that on the night of the incident he was at MK Special feeling bar of which he is the owner. He confirmed evidence of various witnesses that at some stage he had an altercation with the deceased eventually leading him to fire a shot in self-defence. He testified that the deceased threw stones at him. Witnesses confirmed that stones landed on the roof of the bar.

[14] Appellant further in his plea explanation and testimony made the following admissions: that after the incident at the bar he encountered the deceased on a

road; he recognized the deceased as the person he had the altercation with at the bar earlier; he applied brakes, swerved out of the road and confronted the deceased about the earlier confrontation.

[15] Photos that were handed up in court depict tyre tracks of a vehicle with skid marks on a tar road with the skid marks continuing onto gravel next to the road followed by tyre tracks turning towards a gravel road, across it and towards an area where small bushes are depicted. The tracks lead to some of the bushes where the tracks overran some of them as was testified by the witness who took the photos. The tracks stopped in front of one of the bushes. A sandal or sandals later identified belonging to the deceased were found close to the bush where it seems the motor vehicle came to stop.

[16] From this scene footprints were followed to where the deceased were found with injuries and not able to stand or walk. The appellant admitted that he at some stage searched for the deceased. He further admitted that he at some stage had to drive over bushes and that pieces of bark found on the motor vehicle could be as a result thereof. This is consistent with tracks found at the scene. In my view, the only inference from these facts is that this scene is where the appellant found the deceased. On these facts, no other court may come to a different conclusion.

[17] The scene of crime officer testified that he observed sandal imprints indicative of a person running. He also observed visible tyre tracks in the direction of where the person was running up to the point where the sandal or sandals were found. The inference from these facts is that the motor vehicle chased or pursued the person running.

[18] One of the photos depicts a broken branch of a Mopani tree. The officer traced shoe prints from the broken branch to a place where a person must have been sitting or crawling. The appellant admitted in his plea explanation that when he encountered the deceased that they were in a physical struggle. This entails that the

appellant must have disembarked from the motor vehicle. In my view this is but one of the examples where the appellant downplayed his involvement with the deceased. There is therefore only one inference that the appellant caused the injuries to the deceased from which he eventually died.

[19] In the circumstances on the above highlighted facts I am not convinced that another court may arrive at a different conclusion that the appellant should be acquitted. The counter application by the respondent therefore stands to be refused.

[20] The appellant was convicted for culpable homicide on circumstantial evidence. There was no direct evidence. This court arrived to the conclusion by inferential reasoning. In my view another court may come to a different conclusion on the proven facts.

[21] On the charge of discharging a fire arm in a public place or on a public road, the accused testified that he acted in self-defence as the deceased was throwing stones and bottles at him. He was to an extent corroborated by State witnesses that stones indeed landed on the roof of the bar. I am not convinced that another court will find that the appellant did not act in self-defence.

[22] In conclusion I have to comment on the respondent's bulky heads of argument consisting of 114 pages. Almost every finding of this court is attacked despite material admissions from the appellant and facts that are common cause.

[23] Rule 17 (7) of the Supreme Court stipulates amongst other:

**(7) Heads of argument filed with the court in terms of these Rules must-**

(a) ...;

(b) **be clear and concise and must not contain unnecessary elaboration;**

(c) ...;

(d) ....

Rule 118 of the Rules of the High Court in relation to appeals likewise stipulates that

a concise statement, without elaboration must be filed. In my view the principle is likewise applicable to heads of argument for applications of leave to appeal. Non-compliance may lead the court not to entertain such applications.

[24] In the result:

1. Condonation for the late filing of the application for leave to appeal and heads of argument of the respondent is granted;
2. Leave to appeal against the conviction and sentence for culpable homicide is granted;
3. Leave to appeal against the acquittal of contravening section 38(1)(o) read with sections 1, 38(2) and 39 of the Arms and Ammunition Act, Act 7 of 1996- discharging a fire arm in or on any public place or public road is refused;
4. Leave to appeal against the conviction of culpable homicide is refused;
5. Leave to appeal against the order of non- forfeiture of the motor vehicle in question is refused.

<b>Judge(s) signature</b>	<b>Comments:</b>
January J	<b>NOTE TO THE PARTIES</b> <b>The reason(s) hereby provided should be lodged together with any Petition made to the Chief Justice of the Supreme Court.</b>
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondent</b>
Mr P Greyling Of Greyling & Associates Oshakati	Mr L Matota Of Office of the Prosecutor-General Oshakati