

NOT REPORTABLE



REPUBLIC OF NAMIBIA

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO: CA 72/2013

In the matter between:

**POMPILI IMMANUEL SHAILEMO
FRANS HANGULA HANYOTI**

**FIRST APPELLANT
SECOND APPELLANT**

vs

THE STATE

RESPONDENT

Neutral citation: *Shailemo v State* (CA 72/2013) [2013] NAHCMD 323 (8 November 2013)

Coram: HOFF J and SIBOLEKA J

Heard on: 11 October 2013

Delivered on: 08 November 2013

Flynote: Criminal Procedure: In an appeal matter the appellant is required to clearly and specifically show this court the areas of fact or law on which he thinks the presiding officer has misdirected herself.

Summary: Two robbers, one of them armed with an unlicensed Makarov pistol whose serial number has been erased entered Erundu Bar at 02h00 at night and robbed the complainant at gunpoint. They fled the scene, stealing an amount of N\$ 1 830 and one bottle of Mokador. A security guard was hit on the head with the pistol during a fight that ensued as the robbers exited the bar. Police on night patrol were alerted and the robbers were immediately pursued up to a plastic built shack where they were found pretending to be asleep with clothes, shoes and socks still on. The pistol and a bloodstained T-shirt were found in the shack. Stolen items were never recovered.

Held: The evidence against the appellants is solid, credible and were therefore correctly convicted and sentenced.

Held: The appeal against conviction and sentence is dismissed.

ORDER

The appeal against conviction and sentence is dismissed.

JUDGMENT

SIBOLEKA J (HOFF J concurring):

[1] At the hearing of this matter the appellants appeared on their own and Ms Wantenaar for the respondent. The court is indebted to the counsel's valuable arguments in this regard.

[2] The appellants filed applications for condonation for the late filing of their notices of appeal. Reasons cited for the delay by both of them is that they are lay

litigants, ignorant of appeal procedures. These are not adequate reasons in terms of Rule 67 but it was nonetheless agreed by the parties that arguments be heard on the merits to finalize the matter.

[3] The appeal is against conviction and sentence. The grounds of appeal are as follows:

[4] Grounds of appeal in respect of the first appellant: Pompili Immanuel Shailemo

- “There was no finger prints taken from the firearm involved in order to have linked me to the mentioned charge;
- The firearm itself was never found in my position thus it fails me to understand how I was convicted on the second count;
- The Court *a quo* relied on assumptions and hearsay as there was no eyewitness in this case that should have proved the State’s case beyond reasonable doubt;
- There wasn’t any identification parade involved that should have put the question of mistaken identity at rest;
- Since the scene of crime couldn’t link me to it for example fingerprints or eyewitnesses the Court *a quo* relied on conjecture and as such overemphasized the facts and undermined the law that states that the benefit of the doubt should be granted to the accused when the state fails as in this case to prove its case.”

[4.1] At the hearing the first appellant supplemented his grounds of appeal as follows:

Some witnesses did not give proper evidence, they were not truthfully and they told a lot of lies. The Magistrate imposed a long sentence based on untruthful evidence. The guard of the premises allegedly robbed that he fought with was not called to testify.

[5] Grounds of appeal in respect of the second appellant:

- “The Magistrate imposed a lengthy sentence despite my reasonable contention that I was not at the scene of crime, and therefore did not take part in the robbery;
- No exhibits were produced to prove my involvement beyond reasonable doubt;
- Evidence for the prosecution were assumptions, fabrications, inconsistent and contradictory;
- The Prosecution’s reasons for my conviction is not truthful;
- There was no identification parade, a factor the Magistrate had failed to take into account because of biasness.”

[6] Rule 67(1) of the Magistrate’s Court Rules provides:

“A convicted person desiring to appeal under Section 309(1) of the Criminal Procedure Act 51 of 1977 shall, within 14 days after the date of conviction, sentence or order in question, lodge with the Clerk of the Court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law on which the appeal is based ...” my own underlining

[7] From the above it is clear that the purported grounds do not clearly and specifically relate to any misdirections the Magistrate has committed in convicting and sentencing them. Their unhappiness appears to be that they feel there was no evidence connecting them to the offences they were facing. It is for this reason that I have decided to examine the evidence on the matter, instead of dealing with each of the grounds separately.

[8] From the evidence of the prosecution the facts of the matter are that on 28 July 2007 at 02h00 in the early hours of the morning accused 1 and his friend found Sarah Kandawu alone inside the lighted Erundu Bar. It was the first time she saw the accused, who came closer to her and started asking a lot of questions on the prices of different items in the bar. They talked for quite some time and she had ample opportunity to look and observe his face. While they

were talking the accused's friend was looking at the juke box and suddenly accused 1 pulled out a pistol and pointed it at her. She started screaming and before accused 1 ordered her to stop, the security guard outside the bar woke up and came to the scene.

[8.1] Before the guard came accused 1, jumped over the counter to where Sara was standing, took a plastic bag containing N\$2 200 and ran out of the bar. As he was exiting he met the security guard at the door. He hit him with the pistol on the head and a fight between them ensued. The guard was eventually overpowered and accused 1 fled with the money and one bottle of Mokador. The complainant picked up N\$300 at the door where the fighting took place and the robber fled with N\$1 830. That same night Sgt. Juniors Abraham who was on patrol duty was informed on radio about the incident and he immediately drove to the scene, where he found the security guard and the complainant. In the presence of the complainant the security guard related to this officer what happened and showed him the two shoe tracks of the two appellants one having a Paulo Falcone sandal which he appeared to have taken off and continued fleeing with socks on, the other had All Star tekkies on. While still at the scene Sgt. Abraham conveyed this information to his officers doing night patrol, Matheus and Amukwa. The robbers fled in the direction of Ehenye Combined School.

[8.2] The officers were assisted by the lights of their vehicles and Amukwa had a torch with him. Sgt. Abraham joined them and they followed the tracks up to a plastic built shack where in one room they found accused 1 pretending to be asleep with clothes and tekkies on. In that same room underneath a bag of clothes they found an unlicensed Makarov pistol whose serial number was scratched off. The pistol had a magazine with four rounds. Accused 2 was also found in the other room pretending to be asleep with clothes and socks on. A blood stained T-shirt was found in the shack as well as a black cap in one of the suspect's pockets. From the shack the two accused were taken to the Police

Station where the officers found the complainant reporting the robbery case, and she pointed accused no. 1 as the person who pointed her with a pistol at the bar. The security guard did not testify because his whereabouts were unknown, and so was his contact address. He could therefore not be traced.

[9] The evidence of the first appellant in the Regional Court was that in 2007 he came from Onambango bar drunk and as a result he ended up sleeping alone in a friends room who was not there at the time. When he was about to fall asleep the police knocked and kick away the door. He woke up and they started shaking, kicking, hitting him with a fist on the chest. He was handcuffed and pushed outside. There he was told and questioned about a robbery at a place called Oneshila, knowledge of which he denied. He was taken to the Police Station where he met accused no. 2 whom he didn't know before, and was never taken to the scene. After several appearances they were granted bail but later his was withdrawn by the Regional Court for reasons unknown to him.

[9.1] The second appellant testified that his co-appellant is unknown to him. On the day of his arrest he was asleep with his wife in his room. Police came, knocked at the door saying the footprints they were following lead them to his house. They searched and asked him to switch on his cellular which he did, and they took it. He was taken to the Police Station where a lady identified the first appellant as the one who pointed her with a firearm. The security also said what he knew about the matter although he never testified in court. Contrary to his claim that he knew nothing about the robbery because he does not know the place where it allegedly took place, he asked the complainant pertinent questions which clearly shows he was there: I quote verbatim from page 24 line 30 of the record:

“Accused 2: Can you recall the other person who was with you at the counter while people were fighting outside?”

By this question, in my view accused no. 2 clearly placed himself on the scene.

[10] In his judgment the Magistrate was persuaded by the evidence related to the police following the suspects' tracks from the scene up to where they were found and arrested. He also hinted on accused no. 2 who during his cross-examination of the complainant put what he said was his own knowledge of events during the robbery, an admission he did not displace during his evidence in chief.

[11] The evidence clearly shows a swift tracking exercise by the police officers from the scene immediately in pursuit of the fleeing robbers up to the plastic built shack where they were found pretending to be asleep with clothes and tekkies on in respect of accused no. 1 and clothes and socks on in respect of accused no. 2. This evidence is credible, solid and unshakable. The appellants were therefore correctly convicted. The seriousness of this offence lies in the fact that the complainant was robbed at gunpoint, an amount of N\$1 830 and one bottle of Mokador stolen. Nothing was recovered. In the circumstances the sentences imposed on the appellants are reasonable and should be allowed to stay.

[12] In the result the appeal against conviction and sentence is dismissed.

A M SIBOLEKA
Judge

E P B HOFF
Judge

APPEARANCES

APPELLANTS:

In Person

RESPONDENT:

Ms B L Wantenaar
Office of the Prosecutor-General, Windhoek