



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT

CASE NO.: CA 64/2016

In the matter between:

STEPHANUS RODNEY SWARTZ

1ST APPELLANT

WARREN EVRIL ANDRIES

2ND APPELLANT

And

THE STATE

RESPONDENT

Neutral citation: *Swartz v S* (CA 64/2016) [2017] NAHCMD 150 (24 May 2017)

CORAM: NDAUENDAPO, J and SHIVUTE, J

Heard: 21 October 2016

Delivered: 24 May 2017

Flynote: Criminal Procedure – Appeal – Convictions – Murder – First Appellant raised Private defence - Second appellant denied having seen deceased on fateful night - Private defence rejected as deceased was unarmed and posed no danger to appellants - Second appellant handed over the murder weapon to first appellant - No misdirection – Appeal dismissed.

Summary: The appellants were convicted of murder. They appealed against conviction. First appellant admitted that he stabbed the deceased, but acted in private defence when he did so. The court *a quo* rejected that and found that they punched and kicked the deceased to the ground and continued kicking him as he was lying on the ground and then he stabbed the deceased. The deceased was unarmed and posed no danger to his life and therefore his defence of private defence was rejected. The court also found that the second appellant also took part in the assault on the deceased. The second appellant's version was that he did not see the deceased on that fateful night. The court found that he was the one who handed over the knife to the first appellant which he used to stab the deceased. On the basis of the doctrine of common purpose, the court found him guilty of murder.

On appeal, counsel for the appellants argued that the presiding officer repeatedly descended into the arena when witnesses for the State were cross-examined and therefore the appellants did not receive a fair trial. Counsel also argued that the learned magistrate switched off the recording machine during the trial and some parts of the record were missing. Furthermore, counsel argued that the learned magistrate erred in rejecting the first appellant's defence and also in rejecting the second appellant's version that he did not see the deceased on that fateful night.

Held, that if counsel's complaint was that the record was incomplete because of the switching off of the recording machine by the learned magistrate, counsel should have applied to have the record reconstructed, but that counsel did not do.

Held, further that the learned magistrate was justified to 'descend into the arena to ensure that justice was done and to protect the dignity of witnesses who were subjected to protracted, repetitive and sometime irrelevant cross-examination by counsel for defence.

Held, further that the court did not err when it found that the first appellant did not act in private defence as his life was not in danger when he stabbed the deceased.

Held, further that the court did not err in finding that the second appellant partook in the assault on the deceased and handed over the murder weapon to the first appellant in order to stab the deceased and on the basis of the doctrine of common purpose he was found guilty.

Held, that in the result, the appeal is accordingly dismissed.

ORDER

In the result, the appeal is dismissed.

APPEAL JUDGMENT

NDAUENDAPO, J (SHIVUTE, J concurring):

Introduction

[1] The appellants were convicted in the Regional court sitting at Luderitz on a charge of murder. They were sentenced as follows: The first appellant was sentenced to sixteen years of which four years were suspended on the usual conditions. The second appellant was sentenced to thirteen years of which five years were suspended on the usual conditions. Dissatisfied with the convictions, they noted an appeal.

Grounds of appeal

[2] The appellants' grounds of appeal are stated as follows:

'1. That the learned Magistrate erred by in after he switched off the recording machine, the State Prosecutor in future to enquire from the defence council (sic) whether he admit

that an accused is admitting that he caused the death of the deceased with the aim of assisting the state to prove its case (sic).

2. That the learned Magistrate erred in threatening the defence council (sic) to report him for unethical conduct when the witness Danson Isaaks was cross examined regarding the person who had read to him the contents of his witness statement prior to him testifying under oath after the state prosecutor made certain disclosures to the defence council (sic) resulting in appellant's not having a fair trial.

3. That the learned Magistrate erred in descending into the arena by repeatedly interrupting the cross-examination of witness Desmond Morkel, more specifically whether 1st appellant could have been killed if he did not defend himself he was attacked by the deceased, thereby assisting the state to prove its case.

4. That the learned Magistrate erred in mainly referring to the evidence in chief of the various state witnesses and refusing to apply his mind to their testimony under cross-examination.

5. That the learned Magistrate erred in finding that the 1st and 2nd state witnesses corroborated each other as to what transpired prior to the stabbing incident – there being no basis for such finding.

6. That the learned Magistrate erred in finding that there are more similarities in the accounts of the 1st witness and 2nd witness differences – there being no basis for such finding.

7. That the learned Magistrate erred in finding that witness Desmond Morkel had no reason to fabricate his evidence (sic) there being no basis for such a finding.

8. That the learned Magistrate erred in accepting the version of witness Danson Isaacks and witness Desmond Morkel in their testimony in chief despite the numerous contradictions in their testimony in chief, their answers during cross-examination and the contents of their police statements and their inability to satisfactorily explain it.

9. That the learned Magistrate erred in finding that 2nd appellant's version that he did not see the deceased on the night in question is patently false – there being no basis for such finding.

10. That the learned Magistrate erred in finding that version of witness Desmond Morkel that the deceased by the post-mortem examination report (sic) there being no basis for such a finding.

11. That the learned Magistrate erred in finding that the doctor who performed the post-mortem examination observed two stab wounds on the left chest of the deceased which wounds

were in close proximity to each other – there being no basis for such a finding and indicates that the learned Magistrate went out of his way to find excuses for the acceptance of the evidence of the witness Desmond Morkel.

12. That the learned Magistrate erred in describing 1st appellant's version as regards that when the deceased attacked him the first time he chose to punch 1st appellant with a fist whilst holding a broken bottle in his other hand as "it defies logic – is non-sensical" – there being no basis for such a finding.

13. That the learned Magistrate erred in reasoning how is it possible that the deceased only achieved two tears in the jacket of 1st appellant after slashing out at him repeatedly – such approach clearly indicated that (sic) unwillingness of the learned Magistrate to even consider the version of 1st appellant that he earlier observed scratch marks on his chest, as collaborated (sic) by the testimony of the state witness Sergeant Slinger.

14. That the learned magistrate erred in finding that 1st appellant obtained a knife from 2nd appellant and "it is clear that accused 1 went looking for deceased so that he could exact revenge on the earlier incident" – there being no basis for such a finding.

15. That the learned Magistrate erred in finding with reference to 1st appellant's evidence about the stabbing incidents: "but more importantly, accused 1st movie style, superhuman heroic depicting of how he managed to evade all of the deceased's best efforts to stab him both near Nono's house and at the rubbish dump and how he acted with clinical precision not only to evade accused's blows but inflict two deadly blows on deceased's body before grabbing deceased by the shoulder and bringing him down judo style is the stuff fiction is made by. It is merely a figment of his fertile imagination, no I reject is as not only highly improbable but false beyond reasonable doubt – there being no basis for such finding."

16. That the learned magistrate erred in finding "not their blatant dishonest denial of an incident which had occurred moments earlier is deeply indicative of their guilt state of mind" – there being no basis for such a finding.

17. That the learned Magistrate erred in rejecting 1st appellant's defence of private defence – there being no basis for such finding.

18. That the learned Magistrate erred in rejecting 2nd appellant's defence that he handed over his knife to 1st appellant when first appellant requested him to hand over his knife to defend himself. 2nd appellant was unaware against whom 1st appellant wanted to defend himself. 2nd

appellant was not present at the stabbing incident and he did not see the deceased on the night in question.’

Brief factual background

[3] The two appellants were convicted of murder. The deceased was stabbed twice in the chest by the first appellant with a knife he received or obtained from the second appellant. The first Appellant admitted that he stabbed the deceased, but explained that he acted in private defence when he did so. The second Appellant denied any involvement in the murder of the deceased, but admitted that he handed over the murder weapon to the first appellant. The court *a quo* found that the first appellant did not act in private defence as there was no actual or imminent danger to his life. The deceased was lying on the ground having been kicked and overpowered by the appellants when the first appellant stabbed him with the knife in the chest. In respect of the second appellant, the court *a quo* found him guilty based on the doctrine of common purpose. The court reasoned that the second appellant was not only present when the deceased was assaulted, but participated in the kicking of the deceased when he was on the ground. The court further reasoned that the second appellant had the intention to make common purpose by kicking the deceased and subsequently handing his knife to the first appellant, which knife the first appellant used to stab the deceased. This conduct by the second appellant evinced the second appellant’s intention to associate himself with the subsequent stabbing of the deceased. The court also reasoned that ‘had second appellant not handed over the knife to first appellant at that critical moment, the deceased would probably have been alive. Second appellant therefore must have and therefore did realize and foresee that the deceased was to be stabbed.’ On that basis the court was satisfied that the State proved its case beyond a reasonable doubt.

I now turn to the grounds of appeal and will discuss them seriatim.

Discussion of the grounds of appeal

Ground 1

[4] The appellants alleged that the magistrate during proceedings switched off the recording machine and thereby assisted the State to prove its case. Counsel argued that

when the magistrate switched off the recording device that part of the record is 'lost forever'. That is clearly not a ground of appeal and if appellant is complaining that the record is incomplete or there are missing sections because of the switching off the mechanical recording device, then the appellant could have applied for the record to be reconstructed. In *State v Aribeb*¹, the court set out the procedures to be followed to reconstruct the record where an accused was convicted and sentenced and stated that: '(i.e. after conviction or sentence) the clerk of the court would be directed to reconstruct the record with the assistance of State witnesses, the magistrate, the prosecutor, the interpreter or the stenographer. This reconstructed record is then submitted to the accused (or his or her legal representative) to obtain his or her agreement with it. (See also *S v Gumbi* 1997 (1) SACR 273 (W) and *S v Joubert* 1991 (1) SA 119 (A)).' This is clearly not the route the appellants elected to take.

[5] Should the applicants however feel that there are substantial sections missing from the record of the proceedings, section 76 (3) (c) of the Criminal Procedure Act 51 of 1977 provides: 76 (3) (c): 'Where the correctness of any such record is challenged, the court in which the record is challenged may, in order to satisfy itself whether any matter was correctly recorded or not, either orally or on affidavit hear such evidence as it may deem necessary.'

[6] The appellant failed to apply to have the record reconstructed or to invoke the provisions of section 76 (3) (c) of the Criminal Procedure Act 51 of 1971 and as a result cannot now on appeal complain about the magistrate switching off the recording machine during trial. There is no merit in this ground.

Ground 2

[7] I cannot not see how the fact that the magistrate threatened to report defence counsel for unethical behavior could have resulted in an unfair trial. It could only have been the case if counsel was prevented from cross-examining witnesses. This ground is not a ground of appeal.

Ground 3

¹ *State v Aribeb* (CR 60/2013) 2013 NAHCMD 273 (4 October 2013) para 10.

[8] The appellant alleges that 'the magistrate erred in descending into the arena by repeatedly interrupting the cross-examination of witness Desmond Morkel more specifically on the aspect of whether first appellant could have been killed if he did not defend himself he was attacked by the deceased, (sic) thereby assisting the State prove its case.' Counsel for the appellant argued that 'the learned magistrate's overall conduct of the trial resulted in the appellants not having had a fair trial. He persistently interrupted cross-examination of the State witnesses Densel albert Isaacks and Desmond Morkel. This he could not and should not have done. It is respectfully submitted that it must be clear upon a reading of the record that justice has not been done in this particular trial. Counsel further argued that the learned magistrate's continuous and persistent descending into the arena during cross-examination of the State witnesses negated appellant's right to a fair trial as guaranteed by Article 12 of the Constitution of Namibia. Counsel further argued that the manner, and the number of times the learned magistrate descended into the arena, led to his vision, being clouded by the dust of the conflict and deprived him from detachedly and objectively assessing the evidence adduced before him.'

[9] In this case the witnesses were subjected to lengthy, protracted, repetitive and sometimes irrelevant cross-examination bordering on badgering and or wearing down of witnesses. To illustrate the point, the cross-examination of the first State witness extends over 80 typed and transcribed pages whereas the cross-examination of the second State witness spans over about 100 typed pages (page 11 to 200) of the case record. I agree with the submission by counsel for the respondent that the cross-examination of those witnesses were so excessively protracted and prolonged that it borders on the ludicrous. In fact, the magistrate showed remarkable constraint when attempting to curb and redirect the never ending barrage of pointless, irrelevant and redundant questions by the appellant's lawyer, Mr. Le Roux. In such circumstances, it is the duty of the presiding officer to ensure that the witnesses were treated with dignity and not subjected to badgering. In his response to the grounds of appeal, the magistrate referred to s 166 of the Criminal Procedure Act 51 of 1977 which provides that:

'If it appears to the court that any cross-examination contemplated in this section is being protracted unreasonably and thereby causing the proceedings to be delayed unreasonably, the

court may request the cross-examiner to disclose the relevance of any line of examination and may impose reasonable limits on that cross-examination regarding the length thereof or regarding any particular line of examination.’

[10] In *Eino v The State*² the court held that: ‘. . . it is advisable that the court’s endeavor is at all times to protect witnesses by timeous intervention to avoid badgering by legal practitioners and also to ensure that the witnesses be treated with dignity.’

[11] The conduct of the learned magistrate was clearly justified in terms of that provision and the learned magistrate was perfectly correct in the manner he conducted himself. In *S v Van der Berg*³ O’Linn, J considered the role of Namibian Courts in relation to ss 167 and 186 of the Criminal Procedure Act 51 of 1977 and remarked as follows at:

‘The role of the court in Namibia has often been described as that of administrator of justice. The role of administrator of justice entails that the court will attempt to ensure with all the means at its disposal including the powers and duties under ss 167 and 186, that substantial justice is done. Substantial justice in turn is ensured when an innocent person is not punished and a guilty person does not escape punishment. The role of administrator of justice furthermore envisage a balancing of interest of the prosecution with that of the defence.’

[12] The judge went on to discuss the perception regarding the court descending into the arena in *S v Van der Berg* as follows:

‘Of course, the court should never descend into the arena so to speak. But when the court is placed in the position where it has to inform itself it must of necessity exercise its powers and fulfil its duties in terms of aforesaid provisions of the Criminal Procedure Act and to do so cannot be regarded as descending into the arena. Alternatively, even if it can be described as ‘descending into the arena’ such descending into the arena is prescribed by statute and is mandatory in some cases and desirable in others. The basic role as administrator of justice again needs emphasis because it seems that many legal practitioners and even some judicial officers are either not aware of these provisions and precedents or fail for some unknown reason to give effect to it.’⁴

² *Eino v The State* (CA 107/2010) [2016] NAHCNLD 5 (25 January 2016) para 15.

³ *S v Van der Berg* 1995 NR 23 (HC) at p 68J-69B.

⁴ *S v Van der Berg* 1995 NR 23 (HC) at p 71D-F.

[13] The so called 'descending in the arena' by the learned magistrate was in my view to ensure that witnesses were not subjected to bullying by counsel who subjected the witnesses to lengthy , protracted and repetitive sometimes irrelevant cross-examination bordering on badgering. The conduct of the learned magistrate was clearly justified in terms of the law and he was perfectly correct in the manner he conducted himself. There is no merit in this ground.

Ground 4

[14] The learned magistrate in his judgment referred to the totality of the evidence, the evidence of witnesses in chief as well as evidence during cross-examination before reaching his verdict. There is no basis for this ground.

Grounds 5 and 6

[15] These grounds are intertwined. Counsel for the appellants argued that 'witness Desmond Morkel was a single witness and that his evidence was far from satisfactory in every material respect. He did not mention the second appellant in his statement to the police at all. The learned magistrate did not even obliquely refer to this aspect at all, but refers to his evidence in laudatory terms. This witness was initially also a suspect in this case. He had all the reason to lie, since he was an accomplice. This witness was not only reluctant to give a statement but testified in court that he was forced to do so. The learned magistrate does not even vaguely mention this aspect of the evidence.' Mr. Isaacks and Morkel both testified that they were present at club Vibe on the night the incident occurred. They saw how the appellants punched and kicked the deceased until he fell to the ground and whilst on the ground they both saw how the appellants were kicking the deceased. Mr. Isaacks did not see the stabbing, because as the fighting continued people came out of the bar and were blocking his view. Morkel on the other hand saw how first appellant stabbed the deceased while he was lying on the ground. There was therefore more similarities in their evidence as to what they saw before the stabbing. The witnesses corroborated each other and Mr. Morkel is therefore not a single witness as to what transpired before the stabbing. There are no merits in these grounds.

Ground 7

[16] The learned magistrate found that Morkel had no reason to fabricate his evidence because he was a friend of the appellants, they were together for the greater part of that evening. They were drinking and dancing together, their relationship was 'so cordial, warm' that after the stabbing, Morkel went to sleep at the first appellant's house. The learned magistrate could therefore not be faulted for finding that Morkel had no reason to fabricate his evidence. There is no merit in that ground.

Ground 8

[17] Counsel for the appellant argued that the learned magistrate erred in finding that there were more similarities than differences in the accounts of the first and second state witnesses. Although the magistrate found that there were contradictions in the evidence of Isaacks and Morkel and the contents of their police statements, such contradictions were not material and it was human. The court held that 'it must always be borne in mind that the differences between witnesses on matters of detail do not always lead to the conclusion that one or more of them are lying. Witnesses vary in the keenness of their observations, their powers of recollection. Further a fact that impresses one witness may not necessarily impress another.' In *S v Albertus Hanekon*⁵ Strydom CJ held: 'Before evaluation of the evidence of the various witnesses, mention must also be made of the fact that not every contradiction or discrepancy in the evidence of the witness reflects negatively on such witness. Whether such discrepancy or contradiction is serious depends mostly on the nature of the contradictions, their number and importance and their bearing on other parts of witnesses' evidence.' Isaacks and Morkel's evidence immediately prior to the stabbing of the deceased by first appellant was similar. Both saw how the appellants punched and kicked the deceased until they knocked him to the ground and that whilst on the ground they continued kicking him. There is no merit in this ground.

Ground 9

[18] Counsel for the second appellant argued that there was no basis for the learned magistrate's rejection of second appellant's version that he did not see the deceased on

⁵ *S v Albertus Hanekon* (SA4/00) [2001] NASC 2 (11 May 2001).

that fateful night. Mr. Isaacks testified that he knew both appellants for more than five years and that on that fateful night he was at club Vibe when the incident occurred. He testified that visibility was good and he saw how the deceased was moving backwards out of the bar being followed by the first and second appellants. He testified that he overheard the second appellant telling first appellant to beat up the deceased, whereupon the deceased charged at him, (second appellant) and asked him why he was 'chipping in' the argument between himself and the first appellant. He further testified that he saw how both appellants were beating up the deceased until he fell to the ground. He was 3 to 5 metres away from them. Mr. Isaacks' evidence was corroborated by witness Morkel who testified that he was also present at club Vibe when both appellants punched and kicked the deceased until he fell to the ground. The learned magistrate was therefore correct to reject as false second appellant's version that he did not see the deceased on that fateful night. He took part in the assault on the deceased. This ground is without substance.

Ground 10

[19] This ground is not concise and clear. It does not make sense.

Ground 11

[20] Counsel for the appellants argued that 'the learned magistrate erred in finding that the deceased had two stab wounds to the chest and that this finding demonstrates the extent to which he was prepared to go to find excuses for convicting appellants.' The post mortem report described the injuries as follows: Stab wound, gaping, 55cm in length and 60mm in width, great, open and fatal injury, the other one is described as linear, oblique 65mm shallow incision on the left side of the neck, non-fatal injury. The bottom line is that there were two injuries one fatal and the other one non-fatal caused by the knife used by first appellant on the body of the deceased. This ground is baseless.

Ground 12

[21] If the deceased charged at the first appellant having a broken bottle in his hand, which he deliberately broke with the intention to go and attack the first appellant, logic dictates that he would have used that broken bottle instead of his fist to inflict injury.

Otherwise, what was the point of breaking the bottle if the intention was not to use it to attack the first appellant? The magistrate was therefore correct to arrive at that conclusion.

Ground 13

[22] This is clearly not a ground of appeal. The learned magistrate considered the totality of evidence adduced, including the first appellant's version and found that he did not act in private defence when he stabbed the deceased.

Ground 14

[23] The evidence was that the first appellant obtained the knife from the second appellant and that was corroborated by the second appellant who testified that when the first appellant came to get the knife from him, the first appellant told him that he needed the knife in order to go and defend himself. By then, the attack on him (the first appellant) by the deceased had ceased and therefore the question is, against what was he going to defend himself, as there was no attack on him? The only reasonable conclusion was that he was going to take revenge for the attack that the deceased had earlier perpetrated on him. The learned magistrate can therefore not be faulted in finding that the first appellant was going to take revenge. This ground is baseless.

Grounds 15 and 17

[24] These grounds are intertwined and amount to the fact that the learned magistrate allegedly erred in fact in rejecting first appellant's version that he acted in private defence when he stabbed the deceased. Counsel for the appellant argued that the 'learned magistrate erred in choosing to rely on unsatisfactory evidence of the state witnesses more specifically Desmond Morkel to convict first appellant and in rejecting first appellant's defence of private defence'. Counsel further submitted that the first appellant's version is corroborated by the tears in his jacket. This is not a ground of appeal as it is not clear and specific. The evidence was clear that the deceased was punched and kicked

to the ground by both appellants and whilst on the ground they continued kicking and punching him and the first appellant then stabbed the deceased twice with a knife. The deceased was unarmed. The court found that the deceased whilst on the ground did not pose any danger to the first appellant and by stabbing him twice whilst on the ground, the first respondent did not act in private defence and accordingly the magistrate was correct to reject the first appellant's version that he acted in private defence when he stabbed the deceased. The tears in the first appellant's jacket were sustained earlier that night and not during the fight when the deceased was stabbed. That ground is also without merit.

Ground 16

[24] This is clearly not a ground of appeal as it does not indicate how the magistrate erred in law or in fact. Counsel for the appellants argued that young persons like the appellants can be expected to resort to denying an incident since young people are notoriously immature and prone to impetuous decision making. He further argued that the finding/reasoning by the magistrate that their blatant denial of an incident which occurred moments earlier is indicative of their 'guilt state of mind' and is unreasonable and untenable. The first appellant admitted that when he stabbed the deceased, he acted in private defence. However, a day after the stabbing incident, he denied that he stabbed the deceased. Although the appellants were young at the time, if the first appellant acted in private defence he would not have denied it because he was justified to do so. The learned magistrate reasoned that the behavior after an incident may shed light on the state of mind at the time of the incident. In *S v Asser Shinganda*⁶ the Supreme Court held that:

'Evidence of behavior after an event can, of course, serve as an indication as to the state of mind at the time of the true event'. There was nothing unreasonable or untenable in the magistrate's finding or reasoning.

Ground 18

⁶ *S v Asser Singanda* (SA 6/95) [1997] NASC 3 (20 August 1997) at 14.

[24] Morkel testified that after the appellants punched and kicked the deceased to the ground, the second appellant had a knife which he handed to the first appellant. He then saw the first appellant stab the deceased with the knife twice. The second appellant was clearly aware that the first appellant took the knife from him in order to stab the deceased. His version that he did not see the deceased on the night in question has been dealt with in the discussion of ground 9 above. This ground is meritless.

[25] In the result, the appeal is dismissed.

G N NDAUENDAPO

Judge

N N SHIVUTE

Judge

APPEARANCES:

FOR THE APPELLANT:

P McNALLY

Of Delport Nederlof Attorneys,
Windhoek

FOR THE RESPONDENT:

A MEYER

Of the Office of the Prosecutor General