



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

Case no: CA 129/2016

THOMAS HAUNGEYA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Haungeya v S* (CA 129/2016) [2017] NAHCMD 172 (23 June 2017)

Coram: NDAUENDAPO J and SHIVUTE J

Heard: 20 February 2017

Delivered: 23 June 2017

Fly Note: **Criminal Procedure** – Appellant appealing against conviction and sentence – appellant contending that two of the state witnesses part of the group which attacked him --The two witnesses testified but such allegation not put to them – Unfair to let the witness' testimony go unchallenged and later urge the court not to believe it. Appellant criticising the court a quo for relying on a statement that exculpated the Appellant – Although statement not meeting the requirements of a confession -- Statement made freely and voluntarily – Statement containing some admissions – Fact that statement not amounting to an unequivocal plea of guilt not meaning it has no probative value – Defence failing to challenge the admission of statement – Issue only raised on appeal which is impermissible.

Criminal Procedure – Sentence – Appellant appealing against sentence on grounds that the court failed to take into account personal circumstances of Appellant – Appellate court to be slow to interfere with the sentence unless it is in the interests of justice; where the sentence is vitiated by irregularity or misdirection or when it induces a sense of shock – Sentence imposed not falling under those circumstances – No reason for the appellate court to interfere.

ORDER

- a) The appeal against both conviction and sentence are dismissed.
- b) The Appellant's bail is cancelled.
- c) Appellant to surrender himself to Mondesa police station with 48 hours from the time of the service of this order upon him in order for the effect to be given to the sentence imposed by the Regional Court sitting at Swakopmund.

APPEAL JUDGMENT

SHIVUTE J, (NDAUENDAPO J CONCURRING)

[1] The Appellant was convicted of murder with direct intent in the Regional Court sitting at Swakopmund and he was sentenced to 17 years' imprisonment. The Appellant is not happy with his conviction and sentence, hence this appeal.

[2] Grounds of appeal may be summarised as follows:

- (a) The Court a quo erred by accepting the evidence of the State witnesses when their testimonies did not corroborate each other. Furthermore, the State witnesses were friends and the Court was not supposed to rely on their testimonies.

- (b) The learned magistrate erred by rejecting the Appellant's version and erred in interpreting private defence by taking an arm chair approach in deciding the issue.
- (c) The Court erred by failing to take note of the defence witness's testimony as regards the pepper spray.
- (d) The learned magistrate erred by accepting what is purported to be a confession that exculpated the Appellant.
- (e) Concerning the sentence, the Appellant alleges that the Court a quo did not give proper weight to the time spent in custody by the Appellant awaiting the finalisation of his trial, the health of the Appellant and that the Appellant showed remorse.

[3] The brief facts of the case are that the Appellant had an argument with another person whereby the deceased intervened and told them not to fight. According to Prince Olavi, the person who was quarrelling with the Appellant was pulled away by two female persons. The Appellant turned to the deceased and threatened to hurt him. He pointed a finger at the deceased whilst his right hand was in the pocket. The witness pulled the deceased away, the Appellant pulled him back and by then the Appellant had a knife in his hand. The deceased grabbed the Appellant by the arm and they started to wrestle. They both fell down and the Appellant stabbed the deceased on the back and on the neck. It was at that time a bottle was thrown from the crowd and hit the Appellant. Pepper spray was also deployed, although it was not sprayed to a specific person. The Appellant stabbed the deceased whilst the deceased was on top of him because when they fell down the Appellant was under and the deceased landed on him. The witness disputed that the Appellant was attacked by a group of people.

[4] Willem Nautoro corroborated Olavi's testimony that the Appellant threatened to hurt the deceased and that during the quarrel, the Appellant had his hands in the pocket. He further corroborated Olavi's version that when the deceased and the Appellant fell down the deceased was on top of the Appellant. He observed a knife in the Appellant's hand and stabbed the deceased on the back. Olavi was lifting the deceased up and he observed the Appellant stabbing the deceased on the neck. The witness did not see any other person attacking the Appellant. According to Olavi, the

deceased was stabbed after he and the deceased fell down. However, the version of Nautoro contradicted that of Olavi when Nautoro testified that the pepper spray was deployed before the Appellant and deceased fell down but he corroborated Olavi that the pepper spray was not directed to the Appellant. Furthermore, his testimony corroborated the testimony of Olavi that a bottle that was thrown from the crowd and hit the Appellant was thrown after the deceased was already stabbed. According to Nautoro he did not see the deceased assaulting the Appellant whilst the deceased was on top of the Appellant, however what he observed is that after the Appellant threatened to hurt the deceased, the deceased hit the Appellant on the chest. This was before they fell down.

[5] Fikameni Haimbodi corroborated Olavi and Nautoro that the Appellant threatened to hurt the deceased. Haimbodi further testified that the Appellant assaulted the deceased. After that, pepper spray was deployed but it was not directed to the Appellant. The witness corroborated Nautoro that the accused and the deceased fell down before the pepper spray was deployed contrary to Olavi's testimony who said it was deployed after they fell down. The three witnesses corroborated each other that when the Appellant and the deceased fell down the deceased landed on top of the Appellant. The Appellant stabbed the deceased on the back and on the neck. He again corroborated Olavi and Nautoro's versions that the Appellant was hit by a bottle after the deceased was already stabbed. All the above mentioned witnesses corroborated each other that the deceased did not have a weapon and that no other persons had attacked the Appellant.

[6] Immanuel Shikongo's evidence is that the Appellant first had an argument with one Charlos when the deceased intervened and advised them not to fight over a beer. He also heard the deceased referring to the Appellant that the Appellant is a coward and he would do nothing to the deceased. When the deceased uttered those words, the Appellant stood close to the deceased and the deceased pushed him away. The Appellant put his hand in the pocket and when it came out, the witness saw a knife. The Appellant swung the knife towards the deceased. The knife struck the deceased between the shoulder and the neck. The deceased and the Appellant wrestled and they both fell down. Deceased fell on top of the Appellant. There was a crowd that made a circle. Whilst the Appellant was underneath, he stabbed the deceased. He

saw the arm that was underneath stabbing the deceased. The security guard deployed pepper spray and the witness took a bottle and hit the Appellant. Shikongo's testimony that the pepper spray was deployed after the Appellant and the deceased fell down corroborated the version of Olavi. This witness did not see anybody attacking the Appellant and that the deceased had no weapon.

[7] Charles Michael Thourob's version is that he was arguing with the Appellant when the deceased came and inquired what was going on. The Appellant pushed the deceased. The Appellant and deceased wrestled and they both fell down. When they fell down the witness left and met the deceased later on the other side of the road. By then, the deceased was already stabbed.

[8] Helena Andreas also confirmed that the Appellant was quarrelling with another person initially. She later on saw the deceased and the Appellant who appeared to be quarrelling. They both fell down. The deceased was on top of the accused. The Appellant took a knife from the pocket and stabbed the deceased on the neck. Immanuel took a bottle and hit the Appellant after the deceased was already stabbed. The security guard by the name Kandilo deployed pepper spray but not specifically to the accused. The witness did not see any other person fighting with the Appellant. However, the witness corroborated Shikongo's version that he heard the deceased saying to the Appellant that he was a loser.

[9] Police officer Beauty Neibas testified that the Appellant never informed her that he was robbed. However, he informed her that pepper spray was deployed on him and that he was struck with a bottle after the deceased was stabbed. She observed a wound where the Appellant was struck with a bottle.

[10] The Appellant Thomas Haungeya's version is that after his beer bottle was broken he went outside with the guy who broke it. The deceased appeared and grabbed the Appellant by the collar and asked him what he wanted from his brother. The guy who broke the bottle was taken away by the girls. The deceased said that the Appellant was gay and a loser. The deceased grabbed the Appellant by the chest. The deceased was joined by three people who surrounded the Appellant. The Appellant placed his hand in the pocket and one of the men who was in the company of the

deceased put his hand in the Appellant's pocket. The Appellant was pepper sprayed. His arms were held backwards whilst the deceased was holding him by the collar. The Appellant was further assaulted and kicked. The Appellant wrestled with the deceased and they both fell down. The deceased was on top holding him by the throat and punching him with fists whilst the deceased's friends were busy kicking him. The Appellant was also hit with a bottle. After he was hit with a bottle that is when he took a knife, opened it and swung it around without aiming at a specific person. The knife fell down. Appellant's defence is that he was acting in self-defence. The deceased was taken away by his friend. The Appellant thereafter realised that the money that was in his pocket was no longer there.

[11] The appellant's witness Andreas Shadwama known as Kandilo testified that he did not deploy a pepper spray and the other security guard who worked with him did not have a canister of spray. The witness further testified that he knew the Appellant because a certain lady from the witness's village resides with the Appellant. The witness's further version is that there was no pepper spray that was deployed.

[12] Another witness called by the Appellant is Gases who testified that she did not know how the fight between the deceased and the Appellant started, she only saw the deceased bleeding and realised that he was stabbed. She further testified that earlier on she saw guys that looked like they wanted to fight and the Appellant was part of those guys.

[13] Mr Dube counsel for the Appellant argued that most of the State witnesses were friends to the deceased and that the Court *a quo* misdirected itself by holding that the Appellant's version is false and highly improbable although from the facts of the case the version of the Appellant that he was robbed by a group of men becomes probable. Furthermore, the learned magistrate misdirected herself by weighing evidence of the Appellant against that of the State. It was again counsel's argument that the Court *a quo* erred by counting the number of corroborations in the State witness testimonies against that of the Appellant, forgetting that the Appellant was the only person who was involved in the argument from the beginning to the end, hence he was able to testify to his mind set and perception at the time. The State witnesses gave different versions of utterances made by the Appellant during the altercation but despite the

shortcomings the learned magistrate found the evidence adduced by the State to be overwhelming, certain and corroborative. The magistrate ought to have treated the evidence from State witnesses with caution as it was given by the deceased's friends and in all probabilities given with bias against the Appellant, so counsel argued.

[14] It was again counsel for the Appellant's point of criticism that the witnesses for the State contradicted each other as to which stage Appellant took the knife from his pocket and at what time the pepper spray was deployed, and when the deceased was struck by the knife around the neck area. Counsel continued to argue that the Appellant produced a knife out of necessity when the deceased was sitting on top of him assaulting him. State witnesses deliberately lied to the Court and withheld certain information to the Court with a view to cast the deceased in good light and to paint him as a pacifier instead of the aggressor that he was. Counsel further argued that the Court, by ignoring the serious contradictions, amounts to a misdirection on its part. Another point of criticism against the Court *a quo* by counsel for the Appellant is that the Court took an arm chair approach by expecting the Appellant to be calm after he, the Appellant, was upset by the loss of his beer and the insults he received from the deceased. The Court also erred by misinterpreting the defence of private defence.

[15] It was again counsel for the Appellant's argument that the Court *a quo* erred by not accepting the Appellant's version that when he swung his knife he could not see and that the Court *a quo* had no reason to reject defence witness Shadwama's testimony that he and his colleague did not deploy pepper spray. If that is the case, the only reasonable inference to be drawn is that the pepper spray was deployed by the Appellant's assailants.

[16] Concerning the defence of private defence counsel argued that when the deceased uttered the words to the Appellant '*what will you do to me, you are a coward and a loser*' the deceased was inviting the Appellant to fight making the deceased to be the aggressor.

[17] Furthermore, counsel argued that the Court misdirected itself by relying on the so called confession a statement that exculpated the Appellant. The Appellant in the statement explained that he was assaulted and robbed and that he acted in self-

defence. The Court misdirected itself by holding such statement to be a confession as it did not meet the requirements.

[18] With regard to the sentence, counsel argued that the Court a quo failed to take into consideration that the Appellant sent his mother and relatives to the deceased's family to go and apologise and the fact that the Appellant contributed towards the cost of the deceased's funeral. Counsel again contended that the Court failed to take into account that since the Appellant was provoked, this had reduced his state of moral blameworthiness and ought to have suspended part of the sentence.

[19] On the other hand, counsel for the Respondent argued that whilst there were differences between the versions of various State witnesses, such contradictions were not material to the extent that they would taint the conviction. State witnesses testified that the Appellant was the aggressor; the Appellant threatened to hurt the deceased, the deceased was a peacemaker who was not armed. Although teargas or pepper spray was deployed, it was not directed to a specific person. The deceased was stabbed twice and at the time he was stabbed, there was no other person between the deceased and the Appellant therefore the Appellant could not have been defending himself from attackers.

[20] Counsel further argued that to assume that because witnesses were friends to the deceased, they would thus lie in favour of the deceased is without foundation. To merely allege bias without any basis but on grounds of infinity or some relationship is without merit.

[21] With regard to the criticism that the Court a quo erred by rejecting the Appellant's private defence, misinterpreting it and taking an arm chair approach, counsel for the Respondent argued that the learned magistrate analysed the whole evidence and found the version of the Appellant not to be reasonably possibly true and rejected it. He also argued that since the deceased was not armed the Appellant exceeded the bounds of private defence.

[22] Concerning the argument advanced by counsel for the Appellant that the Court a quo failed to take note of the defence witness Shadwama's testimony as regards the

pepper spray, counsel for the Respondent argued that the mere fact that Shadwama who is known as Kandilo denied to have sprayed pepper spray did not advance the Appellant's case further. The witness could have been mistaken about Kandilo or in the alternative Kandilo was afraid to own up and accept responsibility.

[23] Counsel for the Respondent argued that in respect of the so called confession that did not meet all the requirements of the confession, but the Appellant introduced the statement he made to the magistrate by referring to it. He confirmed that he made the statement freely and voluntarily. The defence did not challenge the statement and its admission or use by the State prosecutor.

[24] With regard to sentence counsel argued that the learned magistrate considered the time spent in pre-trial incarceration, the Appellant's health and that the Appellant showed remorse and made a finding that those factors were outweighed by other factors.

[25] In dealing with this appeal I will be guided by the principles set down in *R v Dhlumayo and Another* 1948 (2) SA 677(AD) at 705-706 namely:

- '3. The trial judge has advantages - which the appellate Court cannot have - in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. Not only has he had the opportunity of observing their demeanour, but also their appearance and whole personality. This should never be overlooked.
4. Consequently the appellate Court is very reluctant to upset the findings of the trial judge.
5. The mere fact that the trial Judge has not commented on the demeanour of the witnesses can hardly ever place the appeal Court in as good a position as he was.
6. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct; the appellate Court will only reverse it where it is convinced that it is wrong.

- 7.. In such a case, if the appellate Court is merely left in doubt as to the correctness of the conclusion than it will uphold it.
8. An appellate Court should not seek anxiously to discover reasons adverse to the conclusion of the trial Judge. No Judgement can ever be perfect and all – embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.’

[26] Having dealt with the principles of law involved, when dealing with the appeal purely on facts, I will now deal with the issues raised by the appellant. The Appellant contended that the learned magistrate relied on the State witnesses’ testimonies whilst there are material differences. Although we agree with counsel for the Appellant that there were discrepancies with regard to the State witnesses’ versions, these contradictions are mainly with regard to utterances made by the Appellant during the altercation and the sequence of events *inter alia*, whether the deceased was stabbed for the first time whilst he was standing before he and the Appellant fell and at what stage the pepper spray or gas was deployed. Counsel’s submission by saying that the versions of the State witnesses should be rejected, I find it to be untenable because it is *trite* that contradictions per se do not lead to the rejection of a witness’ evidence as a whole, what the trier of facts has to take into consideration are the nature of the contradictions, their number and importance and their bearing on other parts of the witness evidence. These differences could either be immaterial to the charges the accused is facing or bona fide mistake made by a witness. It must be borne in mind that the trier of fact, when assessing the evidence of a witness, is entitled while rejecting one portion of the sworn testimony of a witness, to accept another portion (*R v Kumalo* 1916 AD 480 at 484).

[27] Having considered the evidence as a whole, the contradictions referred to by counsel for the Appellant do not per se make those witnesses dishonest or unreliable witnesses.

[28] Concerning counsel for the Appellant’s contention that the court was supposed to treat the evidence tendered by most of the State witnesses with caution because

the witnesses were the deceased's friends, and in all probabilities given with bias. I have not come across a rule that a piece of evidence should be rejected because it was given by complainant's friends or the accused's friends. There is no basis for this argument and I find it to be unmeritorious.

[29] Although the Appellant claims that he was attacked by the deceased and his friends and robbed, these allegations are not borne out by evidence. All the witnesses testified that there were no other people involved in the fight with the Appellant except the deceased. Concerning the issue that the Appellant was robbed, it is highly unlikely as the Appellant was not surrounded by the deceased's friends as he claimed. Again if the Appellant was robbed of such amount of money, he could have informed the police officer straight away in the way he informed her that he was assaulted with the bottle. At the time the deceased was stabbed there were no other people close to the Appellant and the deceased.

[30] Despite the discrepancies concerning the sequence of events in the State's case, what is evident from the record is that the deceased intervened whilst the Appellant was arguing with another person and inquired what was going on. The deceased told the Appellant and the other person not to fight. The Appellant threatened to hurt the deceased. Although the deceased could have uttered insulting words to the Appellant, this was after the Appellant already made his intentions known to the deceased that he would hurt him. The Appellant was insulted at the time the deceased and the Appellant were parting ways that is when the Appellant moved towards the deceased and they held each other before they both fell down. The deceased was unarmed. However, he was stabbed twice namely around the neck area and on the back. The Appellant was not attacked by a group of people therefore there was no need for him to defend himself against the group. Although when the deceased and the Appellant fell, the deceased on top of the Appellant, there was no need for the Appellant to stab the deceased twice as the deceased was unarmed.

[31] Furthermore, the Appellant alleged that Haimbodi and Nautoro were among the group of people who allegedly attacked him however this was not put to them through cross-examination when they testified. It would be very unfair to let the version of the witness go unchallenged and later on claim that it should not be believed. The only

inference that could be drawn from the Appellant's failure to cross-examine the witnesses is that what he is alleging is an afterthought.

[32] The Appellant also contended that the learned magistrate erred by rejecting the Appellant's version concerning private defence, that the Court misinterpreted the concept and took an arm chair approach. Furthermore, that the Court erred by rejecting the version of Shadwama that none of the security guard deployed the pepper spray / gas. All the witnesses including the Appellant testified that pepper spray was deployed except Shadwama who through cross-examination said that there was no pepper spray deployed. Therefore, the magistrate was correct to reject his version that no pepper spray was deployed. The evidence established that pepper spray was indeed deployed but not with the intention of perpetrating a robbery or with a view to attack the Appellant. As noted earlier, it was not directed to a particular individual. Having had regard to the learned magistrate's judgment, the magistrate clearly analysed and evaluated the whole evidence properly, dealt with the law regarding private defence and applied it correctly and I do not see any misdirection on the part of the learned magistrate in that regard. By stabbing an unarmed victim twice, the appellant exceeded the bounds of self-defence.

[33] With regard to the issue of criticism levelled against the learned magistrate by accepting a so called confession which exculpated the Appellant, I am in agreement with counsel for the Respondent that while the statement does not meet all the requirements of a confession, it does contain some admissions that could be relied upon. The statement was made freely and voluntarily. The Appellant is the one who introduced or referred to it. The defence did not challenge its admission. The admission only became an issue on Appeal, which is impermissible. The fact that the statement is not an unequivocal plea of not guilty does not mean that it has no probative value and that it cannot be used during the trial especially if the Appellant is the one who started referring to it.

[34] I am satisfied with the reasons given by the magistrate in her judgment in arriving at her verdict which need not be recounted. The magistrate made findings of fact which this Court cannot interfere without offending the principles as stated in *Dhlumayo* above. Applying these guidelines to the facts of the present case, there are

no valid reasons to allow us to interfere with the magistrate's findings. Therefore, the Appeal against conviction is dismissed.

[35] Having dealt with the grounds of Appeal in respect of conviction, I will now proceed to consider the Appeal against sentence. The Appellant's contention is basically that the Court *a quo* failed to attach proper weight to the time spent in custody awaiting the finalisation of the trial; the health of the Appellant and that the Appellant showed remorse.

[36] This Court should be slow to interfere with the sentence unless there are exceptional circumstances *inter alia* where the interests of justice require it. It is a settled rule of practice that punishment falls within the ambit of the discretion of the trial Court; the discretion may be said not to have been judicially or properly exercised if the sentence is vitiated by an irregularity or misdirection. Whether the sentence is manifestly excessive and that it induces a sense of shock. *S V Tjiho* 1991 NR 36 at 366; *S v Ndikwetepo and Others* 1993 NR 322 – 323C.

[37] We are of the view that the learned magistrate took into consideration the personal circumstances of the Appellant including the period he spent in incarceration awaiting trial and all the relevant facts such as the gravity of the offence. She found that the personal circumstances of the Appellant have been outweighed by other factors. Considering the legal principles set out as to when the Appellate Court can interfere with the sentence, the magistrate did not impose a sentence that is vitiated by irregularity, or misdirection, the sentence does not induce a sense of shock. We consider the sentence to be appropriate because it does justice to the Appellant as well as the interests of society. Therefore, there is no reason for us to interfere.

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

- a) The appeal against both conviction and sentence are dismissed.
- b) The appellant's bail is cancelled.
- c) Appellant to surrender himself to Mondesa police station with 48 hours from the time of the service of this order upon him in order for the effect to be given to the sentence imposed by the Regional Court sitting at Swakopmund.

NN SHIVUTE

Judge

G N NDAUENDAPO

Judge