

REPUBLIC OF NAMIBIA

HIGH COURT OF  
WINDHOEK  
LEAVE TO APPEAL



NAMIBIA MAIN DIVISION,  
JUDGMENT

<b>Case Title:</b>  The Applicant  and  Brendon Dreyer Respondent	State    Dreyer	<b>Case No:</b> HC-MD-CRI-APP-SLA-2022/00067
		<b>Division of Court:</b> Main Division
		<b>Heard on:</b> 30 January 2024
<b>Heard before:</b> Justice N N Shivute	<b>Delivered on:</b> 12 February 2024	
<b>Neutral citation:</b> <i>S v Dreyer</i> (HC-MD-CRI-APP-SLA-2022/00067) [2024] NAHCMD 43 (12 February 2024)		
<b>The order:</b> The application for leave to appeal by the State against the acquittal of the respondent is granted.		
<b>Reasons for order:</b>		
SHIVUTE J:  [1] This is an application for leave to appeal in terms of section 310(1) read with section 310 (2) (a) of the Criminal Procedure Act, 51 of 1977 (CPA or the Act).		

[2] The respondent was charged with robbery with aggravating circumstances as defined in section 1 of the CPA. After the trial, he was found not guilty and acquitted. Dissatisfied with the verdict of not guilty, the State moved an application for leave to appeal against the respondent's acquittal by the court a quo.

[3] The facts of the case may be summarised as follows: The respondent was one of a group of five assailants who approached the complainant whilst he was on his way home. The assailants demanded money from the complainant and everything that he had. The complainant refused.

[4] After he refused they started to assault him. All of them were armed with knives. One of them assaulted the complainant with a beer bottle on the eye. They took N\$700 and a Huawei cell phone, valued at N\$1499, from him.

[5] Although the incident took place around 22h00, at the place where it happened there was a big light post. The complainant recognised the respondent as one of his assailants. According to the complainant, the respondent was standing in front of him and he saw him picking up something which he believed to be the cell phone.

[6] The complainant was able to recognise the respondent because there was enough light at the scene of crime and he knew the respondent since the respondent's childhood, as he grew up in front of the complainant. Therefore, the complainant could not have been mistaken about the respondent's identity.

[7] The respondent exercised his right to remain silent as he was entitled to do. There is no obligation on the accused, where the State bears the onus, for the accused to prove his innocence.

[8] The learned magistrate concluded that the complainant was a credible witness and that it was common cause that he was robbed. The trial court observed that there were shortcomings in the evidence of the State, including the question whether the respondent indeed exercised any form of force apart from the fact that he was part of the group of the assailants. The court proceeded to say that the complainant confirmed that the respondent was one of the persons who assaulted him, which evidence in essence satisfied the element of violence in relation to robbery. However, when it comes to the actual appropriation of property, the witness could not confirm whether the respondent took his money and cell phone.

[9] The court further stated that, although the respondent was part of the assailants, the complainant did not testify that he saw the respondent with the cell phone in his hand. The court wondered whether due to the chaotic nature of the events that transpired, the respondent could perhaps not have picked up something other than a cell phone. The trial court reasoned that it may well be that anyone else in the respondent's company might as well have taken the complainant's property. For the above reasons, the court a quo gave a benefit of the doubt to the respondent and acquitted him.

[10] The State seeks leave to appeal among other things on the grounds that the court a quo failed to give due consideration to the fact that the respondent was part of the assailants who approached the complainant and took away his property after they assaulted him.

[11] The court a quo failed to consider that it was not necessary for a finding of common purpose for the State to prove that the respondent was the one physically removing the complainant's cell phone and N\$700 cash, as the applicant had proved that the respondent made common cause and associated himself with the group of assailants by leading the assault.

[12] The respondent opposed the application on the grounds that he is innocent as he did not commit the offence. The complainant was unable to identify the real culprits and he failed to adduce sufficient evidence to prove the case.

[13] The primary consideration for the court to decide whether to grant leave to appeal or not is whether the applicant has prospects of success on appeal and whether another court may arrive at a different conclusion.

[14] Looking at the facts of the case, it appears the respondent acted in common purpose with others.

[15] In *S v Dias & another* (SA 53 [2021] NASC 16 (13 April 2021) at paras [121] to [122], it was held that: 'Common purpose is present when two or more persons having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them is imputed to the others. Proof of a common purpose is not dependent upon a prior agreement or conspiracy but may be inferred from the circumstances of the case where the evidence shows active association with the common purpose.'

[16] Having carefully considered the evidence produced before the court a quo as well as the principles of the doctrine of common purpose, this court is of the opinion that another court may arrive at a conclusion different from that of the court a quo. The trial court appears to have misapplied the principles of common purpose to the facts of the case. The applicant has shown that there are prospects of success on appeal.

[17] In the result, the following order is made:

The application for leave to appeal by the State against the acquittal of the respondent is

granted.	
<p style="text-align: center;"><b>N N SHIVUTE</b> <b>Judge</b></p>	
<b>Counsel:</b>	
<b>Applicant</b>	<b>Respondent</b>
<p style="text-align: center;">E Ndlovu Applicant Office of the Prosecutor General Windhoek</p>	<p style="text-align: center;">B Dreyer – In Person Respondent Erf 640 Nama Location Tseblaagte Keetmanshoop</p>