CASE NO.: CA 42/2005

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ANGULA IMMANUEL KASHAMANE **APPELLANT**

and

THE STATE

RESPONDENT

CORAM: **PARKER, A J**

Heard on: 2006 July 26

Delivered on: 2006 August 14

JUDGMENT:

PARKER, A J.:

[1] This is an appeal from a decision of the Oshakati magistrate's court, which convicted the appellant of the offence of assault with intend to cause

grievous bodily harm. After evidence was led, the learned magistrate convicted the appellant, and sentenced him to three years imprisonment of which one year was suspended for three years on condition that the appellant was not convicted of a charge of assault with intent to cause grievous bodily harm committed during the period of the suspension.

[2] In his notice of appeal filed with the Oshakati magistrate's court on 9 November 2004, the appellant sought to appeal against sentence only. In response thereto, the learned magistrate filed the following day his reasons for the sentence. Almost one year later, i.e. on 19 September 2005, the appellant, through his instructed counsel, filed amended notice of appeal in which he directed the appeal against both conviction and sentence. The learned magistrate did not file any reasons for the conviction. In a letter dated 4 October 2005, he informed the Registrar that he did not "have any additional reasons to adduce in this matter." I think it was wrong for the learned magistrate to have assumed that the reasons for the conviction could also stand for the reasons for the sentence because conviction and sentence are two different aspects of our criminal justice system. Be that as it may, as I will show shortly, there was sufficient evidence on the record to support the conviction.

[3] Counsel for the State, Mr. Sibeya, had filed the respondent's main heads of argument, which were directed to the first notice of appeal. He subsequently

filed supplementary heads of argument in response to the amended notice of appeal. The appellant's counsel, Ms. Kishi, also filed heads of argument.

[4] At the commencement of the hearing Mr. Sibeya sought to argue a point *in limine* to the effect that the appeal was not ripe for a hearing because the learned magistrate had not, in terms of the rules of the Magistrates' Courts, given reasons for his decision concerning conviction in line with the amended notice of motion. Mr. Sibeya, however, abandoned the preliminary legal objection when I informed him that the learned Magistrate had in October 2005 informed the Registrar in writing that he did not have any more reasons to give, as mentioned above. His preliminary objection concerning the appellant's counsel's failure to file heads of argument timeously had been overtaken by events since the appeal was not heard in September 2005, as scheduled. Therefore, counsel did not pursue this objection, too.

[5] I turn now to deal with the merits of the appeal; first, in respect of conviction. The appellant has raised three grounds of appeal in this regard, namely, that the learned magistrate (1) erred in law by refusing appellant the opportunity to call a witness, (2) erred in law by admitting into evidence inadmissible evidence, and (3) erred in law and/or on the facts by rejecting the appellant's version and accepting that of the complainant.

[6] The gravamen of Ms Kishi's argument in respect of the first ground is that the presiding magistrate had a duty to assist the appellant, who was not represented by counsel, to enjoy a fair trial. In this connection, she submitted, the learned magistrate's failure to call a witness for the appellant constituted a fatal irregularity, which should lead to quashing of the proceedings. Mr. Sibeya argued contrariwise: he submitted that not every irregularity committed by a presiding officer was fatal, leading to setting aside of the proceedings. What mattered, he argued, was the nature of the irregularity and its effect on the proceedings as a whole.

[7] In terms of s. 179 (3) of the Criminal Procedure Act 1977[1] (CPA), the State must assist an accused, who is unable for financial reasons to secure the attendance of any witness, in securing the attendance of such witness, so long as the evidence of such witness is necessary and material to the accused's defence. In *Gert Kisting v The State*,[2] I observed that the CPA provision has found powerful expression in the fair trial provisions under art. 12 (1) (d) and (e) of the Namibian Constitution. I am of the opinion that the touchstone of the applicability of s. 179 (3) of the CPA is the intertwined requirements of necessity and materiality. Thus, in practical terms, the judicial officer ought to investigate the situation and surrounding circumstances to determine whether the evidence of such witness is necessary and material for the accused's

[1] Act No. 51 of 1977.
[2] Case No. CA 39/2004 at p 5. (Unreported)

defence.[3] On this point, I cannot do better than to repeat what I said in *Gert Kisting v The State*, *supra*, where I referred to propositions of the law by this Court and South African Courts:

> From the foregoing, it is my view that a court will be stifling the accused's right that the Constitution guarantees to him or her under art. 12 (1) (d) and (e), if the court purported to decide for the accused what witnesses he or she must call. I am fortified in my view by the apt statement by Hannah, J in *Johannes Shitaleni v The State*, namely, that "[I]t is not for a judicial officer to decide whether an accused should or should not call a witness." [Case No.: CA 63/2002 at p6] If a judicial officer has the power to decide for the accused, then the provisions of art. 12 (1) (d) and (e) would be rendered futile and otiose. Of course, there may be circumstances in which an accused may forfeit his or her right to call witnesses. [See S v Beahan 1970 (3) SA 18 at 24E] Therefore, in order not to forfeit his or her right to call witnesses, the accused, for example, "must make some plausible showing of how their (i.e. the witnesses') testimony would have been both material and favourable to his defence." [*Beahan*, *supra*, *loc. cit*.]
>
> In this connection, *S v Selemana* [1975 (4) SA 908] is pertinent and apposite to this appeal and the issue being examined. Franklin, J stated succinctly:
>
> > A magistrate must be exceptionally careful when refusing to allow an accused to call a witness. In particular, when the accused is unrepresented, the magistrate, before refusing such a request, should make certain that such a witness cannot possibly give relevant evidence. If the court is not careful to observe this obligation, a miscarriage of justice may result: *S v Tembani*, 1970 (4) S.A. 395 (E). [*Selemana*, *supra*, at 909A][4]

That is the manner in which I approach the present issue.

[3] See, *ibid*., pp 5-6.
[4] *Kisting*, *supra*, at pp 6-7.

[8] From the record, it is clear to me that the learned magistrate did not just refuse to permit the appellant to call his witness without first investigating the circumstances to determine whether the evidence of the witness was necessary and material for the appellant's defence. The following critical and apropos dialogue between the learned magistrate and the appellant appear on the record:

COURT: Accused person is there anything in reply from what the Prosecutor has cross-examined? Is there anything to clarify? --- Yes.

Yes, Tell us. --- I want the owner of the car to come so that he can explain to the Court who has his car.

Who is the owner? --- He is in Ongwediva.

When I postponed this case yesterday I informed you to bring your Witness, why is he not here? --- He said that he will come because he said that he was in a meeting.

For how long must I wait for him? --- Even ten minutes your Worship.

Anything else? --- That's all Your Worship.

Come back this side. You said you want to call the owner of the car. On what point will he come and testify? --- Yes Your Worship.

On what point? --- I want him to come and explain to the Court whether he is the one who give the car to the Complainant or he took the keys of the vehicle from the table.

The case before the Court (Intervention) --- The case before the Court is not the theft of the motor vehicle, it is assault with intent to do grievous bodily harm. I don't think, I don't see any materiality for that Witness to come before this Court, therefore I will proceed in this case. Mr. Prosecutor let's proceed with submissions.

[9] Having applied the principles underlying the authorities referred to

above, I am satisfied that the learned magistrate carried out the correct investigation, as he was expected to do in the circumstances, and made certain that the appellant's witness could possibly not give any relevant evidence pertinent to the matter. As Mr Sibeya submitted, the witness was not present when the appellant stabbed the complainant, and whether or not the witness gave the vehicle to the appellant to keep would not on any ground possibly assist the appellant in his defence. That being the case, I conclude that the appellant forfeited his right to call the witness because he failed to make any plausible showing as to how the testimony of the witness would have been both material and favourable to his defence. I, therefore, find that the learned magistrate did not err in law or on the facts when he denied the appellant's request to call the witness.

[10] The appellant's second ground of appeal is that the learned magistrate erred in law by admitting inadmissible evidence. This relates to the way the medical report was admitted into evidence. Ms Kishi submitted that an irregularity was committed when the medical report (on Form J88) was handed in and accepted as an exhibit in a manner that was not in conformity with s. 212 (4) and (12) of the CPA.

[11] I respectfully accept Ms Kishi's submission as well founded, but only to the extent that for the certificate (on Form J88) to have been

admitted as part of the prosecution's evidence in terms of s. 212 (4) and (12), in the circumstances, it was not only desirable but also proper for the maker of the certificate to have been either subpoenaed to give oral evidence or to have been requested to reply to written interrogatories respecting the contents of Form J88. Nevertheless, her submission to the effect that the contents of a certificate and those of an affidavit under s. 212 (4) should be substantially the same, is, with respect groundless.

[12] A certificate is issued in lieu of an affidavit, and the provisions of para. (a) of s. 212 (4) regarding the contents of such affidavit only apply *mutatis mutandis* with reference to such certificate. For this reason, in my view, the contents of Form J88 and an affidavit need not be the same; they should only be substantially and reasonably the same. I, therefore, find that the contents of Form J88 *in casu* satisfy the requirements of s. 212 (4) of the CPA, apart from my finding above that the admission of From J88 constituted an irregularity. However, as I shall demonstrate shortly, I do not think a failure of justice resulted from such irregularity within the meaning of s. 309 (3) of the CPA so as to lead to the quashing of the conviction.[5]

[13] In this connection, I respectfully accept Mr. Sibeya's argument that even in the absence of the medical report (Form J88) there was ample and credible

[5] See *S v Davids, S v Dladla* 1989 (4) SA 172 (N) at 193E-F; *S v Skikunga and another* 1979 NR 156 at 170F.

evidence *aliunde* the Form J88 upon which the learned magistrate could find the following. The appellant stabbed the complainant at the right side of his back with a kitchen knife without any provocation from the complainant. The stabbing took place in the yard of the house of the owner of a motor vehicle that is away from the bottle store, where earlier on the complainant and the appellant had had some altercation as to which of the two the owner of the said vehicle had left the vehicle with.

> [14] The complainant testified, and these are his own words: "After I locked the vehicle and came out, the Accused person told me that here he is, I am now in their yards, I cannot talk nonsense as I was doing it at the bar. And I will 'fuck' you today. I did not respond to him. I was just walking, going to the gate." He proceeded: "As soon I realized that he stabbed me, I did not respond, I just run and he still chased me until, until I came out from the house yard." The complainant repeated what he had said in examination-in-chief in cross-examination.

[15] I hold it proved that the appellant armed with a kitchen knife waited for the complainant to arrive in the house because he bore him a grudge (in connection with the motor vehicle), intending to stab him with the knife, and he did stab him with the knife after he had parked the vehicle in the house. The appellant directed his will towards achieving his goal of unlawfully stabbing the

complainant. This, in my view, is a classical example of *dolus directus* in our criminal law.[6]

[16] Having so held, I do not see how *S v Philipi Matias*,[7] which Ms Kishi referred me to, can be of any assistance on the examination of the point under consideration. In the present case, the appellant did not intend to carry out a common assault; he clearly set out to perform an act of assault with a knife, intending to cause grievous bodily harm. I have taken into account the following factors to hold that the appellant had such intention: the appellant stabbed the complainant with a knife at his back when the complainant was not looking, and the complainant sustained injuries, needing medical attention. As Snyman has rightly observed, "The crime may be committed even though the physical injuries are slight.[8]

[17] The appellant's version that the complainant had thrown a bottle at him, thus provoking him into stabbing him could not reasonably possibly be true. Besides, the appellant did stab the complainant in the house away from the bottle store and some time later; he did not stab the complainant in the heat of the moment. A reasonable period ('the cooling off' period) had elapsed between the altercation at the bottle store and the attack in

[6] Snyman, *Criminal Law*, 3rd Ed: pp 168-9.
[7] Case No.: CR 101/ 1995. (Unreported)
[8] Snyman, *supra*, p 418.

the house. The result is that in my opinion, there was no provocation, which in law could exclude the appellant's intention to assault the complainant and cause him grievous bodily harm.

[18] The totality of evidence goes to show – without the shadow of a double – that the appellant's account is not only improbable but also false beyond a reasonable doubt.[9] This conclusion also disposes of the appellant's third ground of appeal, for in my opinion, the learned magistrate was correct in rejecting the appellant's account of what led to his stabbing the complainant.

[19] For all these reasons, I have no good reason to interfere with the learned magistrate's findings on credibility and factual findings, which according to the authorities,[10] fall primarily within his domain as the trial magistrate, and may only be interfered with if irregularities or misdirections are proved or apparent on the record. I have already found above that the only irregularity committed concerning the admission of Form J88 did not result in a failure of justice. Indeed, it is not every irregularity that should justify interference by an appeal court.[11] Consequently, applying the proviso of s. 309 of the CPA, I refuse to reverse the conviction. For all these reasons, the appeal against conviction must

[9] *S v Shaanika* 1999 NR 247 252G-H.
[10] *Rex v Dhlumayo and another* 1948 (2) SA 677 at 696; *S v Gey van Pittius and another* 1990 NR 35 at 40B-C; *S v Slinger* 1994 NR 9 at 10E; *Willy Harold Hendricks and Thadeus A Mutota Sheweda* Case No.: 172/2003 at p 10. (Unreported)
[11] *S v Shikunga and another* 1997 NR 156 (Nm SC) at 170F-G; *Eben Riruako v The State* Case No. 166/2003 at p 9. (Unreported)

fail.

[20] I proceed to deal with the grounds of appeal against sentence. Ms Kishi has set out five main grounds of appeal, which she developed during her oral submission. I will dispose of the fifth ground immediately without much ado: I have already held above that the appellant acted without provocation. I, therefore, respectfully agree with Mr. Sibeya that the appellant's last ground of appeal against sentence is without merit.

[21] I now turn to deal with the appellant's grounds that the learned magistrate misdirected himself because he failed to take into account the appellant's mitigating factors, including the fact that he was permanently employed. On the contrary, the learned magistrate actually mentions at the commencement of his judgment that he took into account some important and relevant factors, namely, that the appellant was taking care of children in the home, that he was employed as a driver in the Ministry of Health, and that he did not have any previous conviction. Of significance also is the learned magistrate's statement in his "REASONS FOR SENTENCING" that he weighed the mitigating factors against the aggravating factors in the case and imposed an appropriate sentence. For all these, I am satisfied that the learned magistrate took into account relevant mitigating factors before imposing the sentence.

[22] Another ground of appeal canvassed by Ms Kishi on behalf of the appellant was that the learned magistrate erred in law or on the facts by overemphasizing the seriousness and prevalence of the offence. I think it was within the discretion of the learned magistrate to take into account the seriousness of the offence and the fact that the crime with which the appellant was charged is prevalent in the district of the court below. I am fortified in my view by the following: In *R v Motlagomang and others*,[12] Innes, CJ approved the principle enunciated in *R v Mapumulo and others*[13] that the infliction of punishment was pre-eminently a matter for the discretion of the trial court, and it is that court which can better appreciate the atmosphere of the case and can better estimate the circumstances of the locality and the need for a heavy or light sentence than an appellate tribunal.

[23] As I see it, both counsel do not dispute that it is settled rule of practice that punishment falls within the ambit of the discretion of the trial court and interference by an appellate court is not readily available unless there is good cause. And there is good cause where in the opinion of the appellant court, the discretion of the court below was not judicially and properly exercised because the sentence is vitiated by irregularity or misdirection or is disturbingly

[12] 1958 (1) SA 626 at 628G.
[13] 1920 AD 56 at 57.

inappropriate as to induce a sense of shock.[14]

[24] Be that as it may, Ms Kishi submitted that the learned magistrate overemphasized the seriousness of the applicant's action. To her mind, the wound that the complainant sustained was not severe, and going by the instrument used, that is the kitchen knife, the appellant did not really intend to cause grievous bodily harm. She submitted further that the appellant was a first offender. He was gainfully employed. Therefore, the custodial punishment would not rehabilitate him; it would rather destroy him. That being the case, the sentence is not in the interests of justice. Ms Kishi relied on *S v Anderson*[15] in support of her contention. Consequently, she submitted, this Court should find that the custodial punishment without the option of a fine was manifestly excessive as to induce a sense of shock in the mind of the Court.

[25] Mr. Sibeya argued in the opposite way. Relying on the authorities,[16] counsel submitted that the sentence that the learned magistrate imposed was appropriate, and, therefore, this Court should not interfere with it. In this connection, he submitted that in considering whether to disturb the sentence, this Court should take into account the following, namely, that the offence involved is a serious one, given the injury sustained, the nature of the weapon

[14] *S v Ndikwetepo and others* 1933 NR 319 at 322G; *S v Giannoulis*, 1975 (4) SA 867 at 868G-H; *S v Tjiho* 1991 NR 361 at 366A-B; *S v Rabie* 1975 (4) SA 855 at 857D-E; *S v Pillay* 1977 (4) SA 531 (A) 535D-G.
[15] 1964 (3) SA 494 (A).
[16] E.g. *S v Tjiho*, *supra*; *S v Rabie*, *supra*; *S v Pillay*, *supra*, at 535D-G.

used (the kitchen knife), and the complainant was wounded at a vulnerable part of his body.

[26] It has been stated, "Clearly, the doctrine of the deference to be paid to the findings of the trial Judge (which is discussed above) on fact must not be pushed too far."[17] I do not see any good reason why this statement cannot apply with equal force to the doctrine of the obeisance paid to the sentence imposed by a trial court. For my part, I think the notion, too, should not be pushed too far as to whittle away an appellate Court's power to disturb a sentence imposed by a trial court on good cause, as explained previously.

> [27] Although I have held it to be established on the evidence that the appellant intended to stab the complainant and cause him grievous bodily harm, there is no evidence to prove the seriousness and severity of the wound the complainant sustained. The complainant testified that he sustained a serious injury; nevertheless, to a question from the Prosecutor as to what type of treatment he received, he answered (and these are his own words), "The first day I received just first aid, the doctor he applied some medicine on the wound and he, then he regard (probably requested) me to come back the next day. I spent about two weeks visiting the doctor." Thus, the complainant received only first aid for his injury; he

[17] *Rex v Dhlumayo and another*, *supra*, at 698.

did not receive any stitches; and he was only an outpatient. Since the maker of Form J88 was not called to give evidence or asked to reply to interrogatories, neither the trial court nor this Court could say from the record precisely what was the nature or severity of the injury inflicted on the complainant. It seems to me clear that this information is essential to a proper consideration of the question of sentence. That being the case, I think the benefit of a doubt favours Ms Kishi's submission that the wound suffered by the complainant was not serious.

[28] While I accept Mr. Sibeya's counter argument that there is no rule of law that a first offender should not be given a custodial sentence, I am of the view that whether or not a first offender should be sentenced to imprisonment will depend largely upon many factors, e.g. the seriousness of the offence, the need to protect society from the accused, the age of the accused, and the accused's personal circumstances.

[29] In *S v Van Rooyen and another*,[18] this Court approved the following statement in *S v Holder*:[19]

> No court can prescribe to another court by holding that imprisonment can only be imposed on, eg, a certain class of offenders. That would be a simplification of a complex problem which itself would be a

[18] 1992 NR 165 at 188E-F.
[19] 1979 (2) SA 70 (A) at 72 (Head note).

misdirection. Granted that imprisonment, if at all possible, ought not to be imposed, a middle course must be followed wherein extremes must be avoided. Too lenient is just as wrong as too severe. The community itself could resist it.

In the application of the principle that imprisonment ought to be avoided, the penal element must, in serious offences, of whatever nature, come to the fore and be properly considered, if punishment still has any meaning in the criminal law. The community expects that a serious offence will be punished, but also expects at the same time that mitigating circumstances must be taken into account and the accused's particular position deserves thorough consideration. That is sentencing according to the demands of our time.

[30] In the same case,[20] this Court also cited with approval the principle enunciated in *S v Scheepers*[21] that -

Imprisonment is not the only punishment which is appropriate for retributive and deterrent purposes. If the same purposes in regard to the nature of the offence and the interest of the public can be attained by means of an alternative punishment to imprisonment, preference should, in the interests of the convicted offender, be give to alternative punishments in the imposition of sentence. Imprisonment is only justified if it is necessary that the offender be removed from society for the protection of the public and if the objects striven for by the sentencing authority cannot be attained with any alternative punishment.

And in *S v Khumalo*,[22] Holmes, JA made this pithy statement on the relationship between criminal justice and punishment: "Punishment," he said, "must fit the criminal as well as the crime, be fair to society, and be blended with a measure

[20] *Van Rooyen and another*, *supra*, *loc cit*, H-I.
[21] 1977 (2) SA 154 (A) at 155A-B.
[22] 1973 (3) SA 697 (AD).

of mercy according to the circumstances. … The last of these four elements of justice is sometimes overlooked."[23]

[31] In *Persadh v R*,[24] the learned magistrate had stated in the reasons for his decision that a fine or suspended sentence would not have punitive, reformative or deterrent effect. The Court rejected the learned magistrate's approach thus:

> In the ordinary way it (suspended sentence) has two beneficial effects. It prevents the offender from going to gaol …. The second effect of a suspended sentence, to my mind, is a matter of very great importance. The man has the sentence hanging over him. If he behaves himself he will not have to serve it. On the other hand, if he does not behave himself, he will have to serve it. That there is a very deterrent effect cannot be doubted.[25]

In *S v Goroseb*, [26] this Court accepted the approach in *Persadh*, which the Court observed, has been adopted in a number of cases.

[32] Having applied the above principles to the present case, I come to the conclusion that the facts and the circumstances do not justify removing the appellant from society for the protection of the public. He must be given the opportunity to behave himself. I also do not think that imposing an alternative punishment cannot attain the objects of punishment. I am of the opinion that the

[23] At 698A.
[24] 1944 NPD 357.
[25] At 358.
[26] 1990 NR 308 at 309H-I.

appellant must be shown a measure of mercy, and that *a fortiori*, the objects of punishment striven for by the learned magistrate can still be attained if the accused's sentence is suspended *in toto*.

[28] In the result, I make the following order:

(1) The conviction of the appellant is confirmed.

(2) The sentence is set aside and the following sentence substituted therefor:

The accused is sentenced to three years' imprisonment suspended in whole for five years on condition that the appellant is not found guilty of the offence of assault with intent to cause grievous bodily harm committed during the period of suspension.

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PARKER, AJ

ON BEHALF OF THE APPELLANT:	Ms F Kishi
Instructed by:	Hitula and Associates
ON BEHALF OF THE STATE:	Adv O S Sibeya
Instructed by:	The Office of the Prosecutor-General