REPUBLIC OF NAMIBIA

CASE NO. CC 18/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MUUAMUHONA KARIRAO **APPLICANT**

and

THE STATE

RESPONDENT

CORAM: **SHIVUTE, J**

Heard on: 2011 May 16

Delivered on: 2011 June 06

RULLING ON APPLICATION FOR LEAVE TO APPEAL

SHIVUTE, J: [1] The Applicant was convicted in this Court on three charges namely:

1st Count : Murder with direct intent.

2nd Count : Robbery with aggravating circumstances.

3rd Count : Attempting or obstructing to defeat the course of justice.

He was sentenced as follows:

1st Count : Thirty (30) years' imprisonment.

2nd Count : Twenty (20) years' imprisonment six (6) years of which are suspended for five (5) years on condition that the accused is not convicted of robbery with aggravating circumstances or any offence of which violence is an element committed during the period of suspension.

3rd Count : One (1) year imprisonment. The sentence on count 3 is to run concurrently with the sentence on count 1.

He subsequently applied for leave to appeal against both conviction and sentence.

[2] The Applicant is represented by Mr Muluti and the Respondent is represented by Mr Eixab.

[3] The application for leave to appeal is based on the following grounds which I find it necessary to set them in full:

"1. The Honourable Judge misdirected herself; alternatively erred in law and/or fact in respect of count 1:

1.1 *In finding that the State had proven that Applicant on the 21st June 2006 at or near Gobabis in the District of Gobabis, Applicant did unlawfully and intentionally kill Jan Hendrik Joubert an adult male person, alternatively;*

1.2 *That Applicant while acting with the concurrence of minds with Steve Kaseraera (Steve) killed Jan Hendrik Joubert;*

1.3 *In having regard to the instructions put to witnesses by defence counsel and regarding same as evidence in the absence of Applicant's evidence under oath;*

1.4 *By making a finding that the State proved the elements of common purpose beyond reasonable doubt and find its application thereof;*

1.5 *In finding that Applicant relied on the defence of compulsion without evidence led by Applicant establishing basis of such defence;*

1.6 *In finding that the Court will attach very little weight if any to the statements made by Applicant, in contradiction thereof, the Honourable Judge in essence relied on same in convicting the Applicant;*

1.7 *In finding that the failure of Applicant to testify was fatal, whilst there was not direct evidence compelling Applicant to testify in rebuttal thereof;*

1.8 *In not having regard to the fact that Steve Kaseraera (alleged accomplice) pleaded guilty to murder, and that in his plea he unequivocally stated and admitted that at all material times hereto he acted alone, hence non applicability of common purpose;*

1.9 *By making a presumption of fact and/or law in respect of direct intension to kill without any evidence adduced by the State showing the role Applicant and/or Steve played in causing the death of Jan Hendrik Joubert;*

2. *The Honourable Judge misdirected and/or erred in law and/or fact in respect of count 2:*

2.1 *In finding that the State had proven that on the 21st June 2006 at Gobabis in the District of Gobabis Applicant together with Steve Kaseraera did unlawfully, with the intention to force him into submission assault Jan Hendrik Joubert by shooting him in the chest with a firearm and with intent to steal from him the goods listed in Annexure* **"A"** *to the indictment, the property of or in the lawful possession of the said Jan Hendrik Joubert, and that aggravating*

circumstances as defined in Section 1 of Act 51 of 1977 are present.

2.2 *In having regard to the instructions put to witnesses by defence counsel and regarding same as evidence in the absence of Applicant's evidence under oath;*

2.3 *By making a finding that the State proved the elements of common purpose beyond reasonable doubt and find its application thereof;*

2.4 *In finding that Applicant relied on the defence of compulsion without evidence led by Applicant establishing basis of such defence;*

2.5 *In finding that the Court will attach very little weight if any to the statements made by Applicant, in contradiction thereof, the Honourable Judge in essence relied on same in convicting the Applicant;*

2.6 *In finding that the failure of Applicant to testify was fatal, whilst there was not direct evidence compelling Applicant to testify in rebuttal thereof;*

2.7 *In not having regard to the fact that Steve Kaseraera (alleged accomplice) pleaded guilty to Robbery, and that in his plea he unequivocally stated and admitted that at all material times hereto he acted alone, hence non applicability of common purpose;*

AD SENTENCE

3. *An effective term of imprison of one (1) year on count 3 is shocking and inappropriate in that:*

3.1 it is out of proportion with aggregate of the accepted facts in mitigation;

3.2 the honourable Judge overemphasised deterrence and retribution elements of punishment and in doing so ignored the mitigating factors of the Applicant's case."

[4] Counsel for the Applicant submitted that there existed a reasonable possibility that another Court might come to a different conclusion as to whether the State had proved the conviction in respect of counts 1 and 2. He made several other submissions that are essentially a rehash of the grounds of appeal and which may be summarized as follows:

(a) That the State failed to prove beyond reasonable doubt that the Applicant murdered the deceased while acting with a common purpose with one Steve Kaseraera who originally was jointly charged with the Applicant;

(b) That there was no direct evidence proving the elements of the crimes in the counts of murder and robbery with aggravating circumstances;

(c) That although the Court ruled the so called confessions made by Applicant inadmissible, these were relied upon in convicting the Applicant;

(d) That it is, in effect, a misdirection for a Court to rely on admissions made when cross-examining State witnesses unless there is evidence under oath from the accused confirming such admissions. Counsel relied on *S v Katoo* 2005 (1) SACR 522 (SCA) for this proposition;

(e) That despite the absence of direct evidence and what counsel referred to as “sufficient circumstantial evidence” to support the application of the common purpose, the Court found the Applicant guilty on counts 1 and 2 on the basis of the doctrine. This, so counsel argued,

amounts to a "misapplication" of the principles concerning the doctrine of common purpose as set out in *S v Safatsa and Others* 1988 (1) SA 868, *S v Mgedezi and Others* 1989 (1) SA 687 (A) to the facts of the present case;

(f) That although the Court stated that the Applicant had a constitutional right to remain silent it misdirected itself by stating that in the absence of the Applicant's explanation, the Court could not determine the veracity of the defence of compulsion and the extent to which the Applicant may have been affected by the alleged threats for him to do what he said he did, and

(g) That the Court should have taken into account statements made by Steve Kaseraera who pleaded guilty to the charges and stated that he was alone when he committed the crimes thereby eroding the fairness of the trial.

[5] With regard to sentence counsel for the Applicant argued that if during the hearing of this application this Court accepts that a reasonable possibility exists that another court may arrive at a different conclusion on conviction on counts 1–2, it should follow that the Supreme Court on appeal will also interfere with the sentence imposed on counts 1–3. He therefore argued only in relation to count 3 contending *inter alia* that the sentence of one (1) year imprisonment on that count was "shocking and inappropriate" as well as out of proportion with accepted facts in mitigation.

[6] On the other hand, counsel for the Respondent correctly argued that it has been stated in a long line of cases that in an application of this kind, the Applicant must satisfy the Court that he or she has a reasonable prospect of success on appeal. He referred to several authorities in this respect which I need not recite.

[7] Counsel for the respondent supported the decision of the Court and argued that the Court did not misdirect itself by convicting the Applicant on a doctrine of common purpose as an agreement does not need to be express but could be implied from conduct or words. *S v Thomas and Others* 2007 (1) NR 365 (HC) at 373.

[8] As regards sentence counsel for the Respondent correctly submitted that sentencing is a matter for the discretion of the trial Court and relied on the dictum of Levy J in *S v Tjiho* 1991 NR 361 at 364G-H where it was said:

> "This discretion is a judicial discretion and must be exercised in accordance with judicial principles. Should the trial court fail to do so, the appeal Court is entitled to, not obliged to, interfere with the sentence. Where justice requires it, appeal Courts will interfere, but short of this, Courts of appeal are careful not to erode the discretion accorded to the trial court as such erosion could undermine the administration of justice. Conscious of the duty to respect the trial court's discretion, appeal Courts have over the years laid down guide-lines which will justify such interference."

Counsel for the respondent thus supported the sentence passed on the applicant.

[9] I will deal now briefly with the arguments made by counsel for the Applicant firstly regarding conviction. I say "briefly" because many of the issues raised in the submissions and the contentions made were dealt with fully in the judgment on conviction and it is not necessary to repeat them here. This applies certainly to arguments summarized in paragraph 4 (a) and (b). Regarding argument in paragraph 4 (c), the Court never relied on the so called "confessions" as these were clearly found to be unreliable.

[10] About argument summarized in paragraph 4 (d) of this ruling, as previously mentioned counsel for the Applicant relies on the case of *S v Katoo*, *supra*. Counsel does not state on which *dictum* in that case he relies. The case concerned the following question of law reserved:

Whether the Court was correct in law in refusing the State an opportunity to present the evidence of the complainant on the charges preferred?

In paragraph [16] of that judgment, it is stated as follows:

> The other issue relates to the weight attached by the trial Judge to the defence version which was put to State witnesses under cross-examination. It was treated as if it were evidence when the trial Court considered its verdict on the merits. As the respondent failed to place any version before the Court by means of evidence, the Court's verdict should have been based on the evidence led by the prosecution only.

The authors of Du Toit's Commentary on Criminal Procedure Act at 22-26 Service 37, 2007 state in respect of the admissibility of admissions made when cross-examining as follows:

> "Unless an accused either terminates the services of his legal representative or an admission put to a witness is properly withdrawn, the Court is entitled to rely on what is put to the witness. In assessing the evidential value, the totality of what has been put to the witness must be taken into account... In *S v Mathlare* 2000 (2) SACR 151 (SCA) an unequivocal informal admission by implication arose from the tenor of cross-examination. See also generally *S v Maleka* 2005 (2) SACR 284 (SCA) at par [16]."

[11] I respectfully agree with what was stated in the above quotation. What counsel for the Applicant refers to as "instructions" put to State witnesses during the trial are essentially statements placing the version of the Applicant on the record so as to give the witnesses an opportunity to comment on in, if they are in a position to do so. In the process of putting such version to the witnesses, certain admissions were made. These are, for example, that after Steve had killed the deceased, the Applicant helped Steve to dispose of the deceased's body; helped to take away the deceased's belongings and drove the deceased's motor vehicle and that the Applicant went with Steve to Mr Kaseraera's house to offload the deceased's goods. The Court had considered the qualification put to witnesses that the Applicant was instructed by Steve to do the above things and that he complied in fear of Steve whom he had allegedly

witnessed killing the deceased. In claiming that he was threatened by Steve to do the things he says he did, the Court concluded that in law the Applicant was in fact raising a defence of compulsion. The Court gave fuller reasons for the rejection of this defence in paragraphs [62]-[64] of the judgment on conviction and it is unnecessary to repeat what was said there in this ruling. I must note in passing that by mistake, the judgment on conviction has two paragraphs that are numbered [62].

[12] With regard to the contention that the doctrine of common purpose was misapplied, the legal position was dealt with in correctly in the judgment. It was found that there was ample circumstantial evidence to convict the Applicant on the basis of common purpose. My view is also that the law relating to the right to remain silent was properly applied to the facts of the case in paragraphs [63]-[64] of the judgment on conviction.

[13] I will now consider the argument that the Court should have taken into account statement made by Steve Kaseraera in evaluating the evidence implicating the Applicant. This argument is also misplaced. Although Steve Kaseraera pleaded guilty to the charges preferred against him what he admitted can only be used against him and not against the co-accused. There had been a separation of trial. Steve was not called to testify and the record of proceedings in respect of Steve was not produced before this Court. It would therefore be wrong for the Court to consider what was said by Steve in the proceedings relating to the Applicant.

[14] I am satisfied that the State has proved its case beyond reasonable doubt in respect of the three counts against the Applicant. I am of the view that there is no prospect of success on appeal against conviction.

[15] I deal finally with the argument about the sentence. As far as the sentence is concerned, I have considered the arguments advanced by both counsel. I am of the opinion that the sentence imposed on the accused does not induce a sense of shock and I consider it to be appropriate in the circumstance. I do not wish to restate the reasons for the sentence imposed as I have already indicated them in the judgment on sentence. I reaffirm those reasons.

[16] For the fore going reasons I am of the view that the Applicant has no prospect of success on appeal both on conviction and on sentence.

[17] In the result, the application for leave to appeal is refused.

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SHIVUTE, J

Appearance for the parties:

For the Applicant	**Mr Muluti**
Instructed by:	**Muluti & Partners**

For the Respondent: **Mr Eixab**

Instructed by **The Prosecutor-General**