REPUBLIC OF NAMIBIA

CASE NO. CA 96/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THOMAS FILLEMON **Appellant**

and

THE STATE **Respondent**

CORAM: **VAN NIEKERK, J *et* SIBOLEKA, J**

Heard: 25 June 2010

Delivered: 16 March 2011

APPEAL JUDGMENT VAN NIEKERK, J: [1] The appellant stood trial in the Regional Court with two co-accused on charges of murder and robbery with aggravating circumstances. The appellant was convicted of murder and the third accused of robbery with aggravating circumstances. The second accused was acquitted on both counts. On 1 June 2006 the appellant was sentenced to 15 years imprisonment of which 4 years were suspended for 5 years in condition of good behaviour.

[2] The appellant appeals against the conviction on 13 grounds set out in his notice of appeal. Mr *Kuutondokwa,* who appears for the respondent, *in limine* took issue with the notice of appeal, which he submitted is not *bona fide* as it contains certain clear inaccuracies about the conduct of the trial. In fact, State counsel went so far as to state that the appellant lied in the notice of appeal and that the appeal should be dismissed forthwith on this basis alone, without considering whether there are prospects of success on appeal. Counsel did not provide any authority for this proposition. I do not see the purpose of approaching the matter in this way. The grounds of appeal cannot

be considered in any other manner but on their merits. If some of them are factually blatantly inaccurate, this necessarily means that they have no merit. This does not mean that the Court of Appeal can ignore the other grounds of appeal without also considering them on their merits. It would seem that counsel is confusing the matter with an application for condonation. In such a case the explanation offered, which is usually done under oath, must be *bona fide* and show good cause, while the prospects of success on the merits are often a factor to consider. The point *in limine* is dismissed.

[3] State counsel raised a further matter. He referred to the case of S v *Valende* 1990 NR 81 (HC) and made the startling submission that it would be irregular to continue the appeal without the appellant's co-accused as they also had an interest in the appeal proceedings. It was pointed out to him that the second accused was acquitted and could not possibly have an interest, but counsel persisted.

[4] As far as the third accused is concerned, he addressed two letters to the Registrar in which he made it plain that he does not wish to appeal against the conviction and sentence on robbery, but only made certain prior queries to the Registrar because he wanted clarification on the date of commencement of a certain sentence imposed, which apparently was wrongly interpreted as an indication that he wanted to appeal against the sentence. There is in fact no notice of appeal by accused no. 3. These facts were also pointed out to counsel. What is more, the appellant complained that he appealed alone and did not want his appeal hearing to be delayed - as he put it, "I did not appeal so that others should be here".

[5] Nevertheless, as I understood counsel, he submitted that in all cases where there are more than one accused, any appeal by one of them means that all the others also have an interest and they should be brought to court to participate in the appeal. How this was to be effected he did not explain.

[6] In the *Valede* case only one accused among seven convicted in the court *a quo* appealed against his conviction and sentence. Counsel appearing for the appellant in that case submitted that if his client succeeded on appeal it would not be fair and just that the accused who did not appeal should remain with convictions. He offered to argue the appeal on their behalf as well. The Court *(per* LEVY J and MULLER AJ, as he then was) allowed the appeal to proceed as if all the accused had noted appeals and permitted counsel to argue the appeal on their behalf as well on the basis that there were gross procedural irregularities in respect of all the accused in the matter and inasmuch as certain defects in the complainant's evidence were applicable to all the accused. Eventually the Court upheld the appeals in respect of all the accused. It is clear that *Valede* dealt with an unusual situation and that it is no authority for State counsel's general submission, especially as he did not point to any gross procedural irregularities, but supported the conviction in respect of the appellant. The facts in *Valede* are distinguishable from the facts of the present appeal, as there the Court was clearly of the view that there were gross procedural irregularities which affected all the accused. The High Court under its general review powers may take notice of gross irregularities in the proceedings of lower courts and take action to remedy same. It was obviously considered convenient and just to deal with the matter, as the Court did in *Valede,* in the course of an appeal ripe for hearing.

[7] Counsel also referred to a passage in S *v Davids; S v Dladla* 1989 (4) SA 172 (N) at 193D-E as support for his submission. However, with great to respect to counsel, I simply fail to see its relevance and he was unable to

explain it.

[8] The result is that I am satisfied that there is no basis upon which the appeal should be postponed to drag the appellant's co-accused to court to participate in an appeal in which accused no. 1 has no interest and which accused no. 3 does not wish to pursue. I am also satisfied, on a magnanimous view of State counsel's submissions, that there is no reason to note an appeal on behalf of accused no. 3 on the authority of the *Valede* case.

Summary of proceedings in the court *a quo*

[9] In the court *a quo* the appellant, represented throughout by Ms Shakwa, pleaded not guilty to both charges and disclosed no defence. The charges allege that the murder and robbery took place on 22 July 2002 at Windhoek and that the deceased was robbed of a bicycle.

[10] The State called no eye witness to the crimes, but presented admissible evidence that the appellant and the second accused pointed out certain points at the scene of the crime where the deceased's body was found. Deputy Commissioner Visser dealt with the pointing out by the appellant, which took place on 24 July 2002. The appellant explained to him that he obtained knowledge about that which he would point out because he knew "the place as we were there during the day." The appellant directed Visser to a place in the vicinity of the Eros Airport near a railway line where he pointed out a spot along a foot path parallel with Mandume Ndemufayo Avenue as the

place where he had allegedly stabbed the deceased. Visser observed blood stains on the ground at this spot. The appellant then indicated a further spot about 80 metres in a westerly direction as the direction from where the victim came. Notes and photographs were taken by the police, which were handed in during the trial. No cross examination was directed at this evidence.

[11] Mr Boytjie Ananub told the court *a quo* that he knew appellant from the location. On the evening of 22 July 2002 the appellant came to his house and asked whether he had seen the two co-accused. Ananub did not know where they were. The appellant asked him for N$2 and gave him a black folding knife which opens when pressure is applied. The knife had blood stains on it. The appellant told him to keep the knife and said that when he brings back the N$2, Ananub should return the knife. The next day he heard the appellant and accused no. 2 talking to each other. Accused no. 2 said that the appellant "had stabbed the man very badly", whereupon the appellant replied that he "stabbed the man, but not badly". The two of them, accompanied by accused no. 3 and a fourth person also brought a bicycle to his place. They were fixing it and left with it. He had the impression that they went to sell it. From the conversation between the appellant and accused no. 2 he understood the bicycle to belong to the appellant. The next day he saw the bicycle in the custody of the police, who also seized the knife. His evidence was not contested under cross examination.

[12] The prosecution also presented the evidence of Mr Abisai Hasihana who stated that he knew accused 2 and 3 from the 23 July 2002 when they came to his house to sell a bicycle to him. Accused no. 3 told him they got the bicycle from their boss in Klein Windhoek. Hasihana bought the bicycle for

N$250. The next day he was arrested and the bicycle was seized by the police after he told them who he had bought it from.

[13] Hasihana's evidence was confirmed by his girl friend Lydia Nujoma, except she testified that the sellers of the bicycle were accused no. 3 and another person, who was not at court.

[14] The State also called Mr du Plessis, the deceased's employer of 18 years. On 22 July 2002 at about 18h00 to 19h00 he was telephoned by the police, who had found the deceased's body in the veld near the witness' home with a stab wound in his neck. The police traced du Plessis after they found a pay slip in the deceased's pocket. He identified the deceased's body at the scene of the crime. He knew that the deceased spent a lot of money on the bicycle by buying mirrors, mudguards, reflectors, etc. He made a name plate for the deceased which was stuck to the bicycle. On 24 July he identified the bicycle in the custody of the police to be that of the deceased, specifically as the name plate was still attached.

[15] The *post mortem* report was handed in by agreement and indicates that the deceased died from haemorrhagic shock from a stab wound in the neck which injured the jugular vein.

[16] After the State case was closed, the appellant closed his case without testifying. So did his co-accused. During argument, Ms Shakwa submitted that the appellant could only be convicted of culpable homicide. The trial magistrate disagreed. Relying on the location and size of the wound, the

instrument used and the absence of any explanation by the appellant as to his state of mind, he concluded that the only reasonable inference that he could make was that the appellant acted with intention in the form of *dolus eventualis* when he inflicted the deadly wound and that he is guilty of murder. The magistrate was of the view that there was not sufficient evidence that the appellant participated in the robbery or in the sale of the bicycle. He was therefore acquitted on the robbery charge.

The grounds of appeal

[17] The first ground of appeal is to the effect that the State failed to prove that it was the appellant who committed the murder. Clearly there is no merit in this ground. During the trial it was not disputed that the appellant admitted to Visser that he stabbed the deceased. On the deceased's body there was only one stab wound, which was the cause of death. As such it must have been inflicted by the appellant. During submissions in the court *a quo* it was not disputed by his legal representative that he was the one who inflicted the wound.

[18] The second ground of appeal states that the conviction is "against the evidence and the weight of the evidence" without providing any further particulars. This ground is too vague to be considered. In this regard it was stated as follows in *S v Horne* 1971 (1) SA 630 (CPD) at 631G-632A:

> "A notice of appeal which states that appeal is noted against the conviction on the ground that it is against the weight of evidence and

> bad in law, tells the Court nothing, or rather it tells it no more than that the grounds are based both on fact and law. That is not enough. The Rule provides in simple unambiguous language that the appellant must lodge his notice in writing in which he must set out "clearly and specifically" the grounds on which the appeal is based. He must do this for good reason. The magistrate must know what the issues are which are to be challenged so that he can deal with them in his reasons for judgment. Counsel for the State must know what the issues are so that he can prepare and present argument which will assist the Court in its deliberations, and finally, the Court itself will wish to be appraised of the grounds so that it can know what portions of the record to concentrate on and what preparation, if any, it should make in order to guide and stimulate a good argument in Court. These advantages may well be frustrated where the appellant uses the blanket phrase - "against the weight of evidence and bad in law"."

The same approach has been followed in S *v Wellington* 1990 NR 20 (HC) at 22F-23A and S *v Gey van Pittius* 1990 NR 35 (HC) at 36F-I.

[19] In the third ground of appeal the appellant states that the magistrate failed to take into account that he was a layman before the trial court and unrepresented although he once expressed the desire for a lawyer. This is clearly incorrect as he was represented throughout by Ms Shakwa.

[20] The fourth ground of appeal is that the magistrate failed to take into account that the only three State witnesses failed to present *prima facie* evidence or evidence implicating the appellant. This ground has no merit. In the first place there were not only three State witnesses, but seven. Secondly, the ground is vague. Thirdly, some of the State witnesses did implicate the appellant, notably Visser and Ananub.

[21] The fifth ground of appeal is that the magistrate based the appellant's

conviction on the pointing out by accused no. 3, which he mentions by name. However, there is no evidence that accused no. 3 pointed out anything. Rather it was accused no. 2. However, should the appellant mistakenly have referred to accused no. 3, I shall proceed to consider the merits of this ground. The magistrate in his judgment expressly stated in connection to the admissions made by accused no. 2 during the pointing out: "What was said here can only of course be used against Accused no. 2 and not against any of the other Accused persons." (Record p 93, lines 11-13). However, in spite of warning himself, he did shortly afterwards in the judgment, when determining what went on in the mind of the appellant, take into consideration that, according to accused no. 2, the deceased was on his bicycle when he was pushed off; that the deceased tried to defend himself; that the knife was taken from him and that he was stabbed without any reason. All this information came from the second accused's extra-curial statement not repeated under oath. The trial magistrate misdirected himself by not heeding his own warning not to take into consideration what was stated by accused no. 2 when laying a basis for convicting the appellant. However, this was in my view not a fatal misdirection which should upset the conviction, as there is still sufficient other evidence on which to conclude that the appellant stabbed the deceased with intention to kill. In this regard I agree with State counsel that the learned trial magistrate cannot be faulted on his reasoning in concluding that the appellant, in the absence of an explanation by himself, had *dolus eventualis* when he inflicted the knife wound to the neck.

[22] The sixth ground of appeal is that the magistrate failed to take into account that Visser testified that the appellant did not know the place of crime. This is simply not correct. The evidence is clear that the appellant stated to Visser that he knew the place he wanted to point out because they

(i.e. he and his co-accused) were there during the day. He then directed Visser to the exact spot where he had stabbed the deceased.

[23] The seventh ground of appeal is that the trial magistrate erred by failing to "exonerate" the appellant under section 174 of the Criminal Procedure Act, 51 of 1977. There was no application by the defence in terms of section 174 to discharge the appellant after the close of the State case. There is, of course, a duty on the trial court to *mero motu* consider whether the accused should not be discharged at the close of the State case. However, in this case it was not necessary as there was clearly sufficient evidence to convict at that stage.

[24] The eighth ground of appeal is that the magistrate did not have regard to the rules of natural justice, more particularly *audi alterem partem* and the fair trial provisions in the Namibian Constitution. No further particulars of the alleged misdirections are given. This ground is too vague to be addressed. In any event, the accused was represented by his lawyer, who closed his case without calling him to testify on the merits.

[25] In the ninth ground the appellant states that the trial court erred by "not staying within the 'four corners' of the proven facts, thereby starting to speculate". Again, no specific particulars are given to identify the speculative aspects of the magistrates' judgment. The ground is dismissed for vagueness.

[26] In the tenth ground of appeal the appellant takes issue with the alleged failure of the State to call other vital witnesses who might have helped the court. No specific witnesses are mentioned. In argument the appellant referred to the fact that the doctor who performed the *post mortem* was not

called as a witness to prove the cause of death. However, the fact of the matter is that the doctor's oral testimony was not necessary as the *post mortem* report was handed in with the consent of the appellant's lawyer.

[27] In the eleventh ground of appeal issue is taken because the State failed to hand in the murder weapon as an exhibit during the trial. There is no merit in this ground of appeal. It was common cause that the appellant stabbed the deceased in the neck. Photos were handed in of the wound and there is a full description with measurements of the wound in the *post mortem* report. It was not disputed that on the evening of the murder appellant gave a folding knife with blood stains on it to Ananub to keep and that this knife was later seized by the police. While it may have been informative to let the court see the knife, there is no reason to think that this would have altered the outcome of the trial in any way.

[28] The twelfth ground of appeal is completely without any merit. It is to the effect that the magistrate erred by failing to hold that the State had totally failed to break down the evidence by the appellant. The short answer is that he closed his case without presenting an iota of evidence.

[29] The thirteenth ground is a combination of some of the other grounds which have already been held to be vague or which have been dismissed. It is to the effect that the trial court erred by convicting although there was no *prima facie* evidence of the appellant's involvement in the murder and that the magistrate was not fair towards the appellant during the proceedings.

[30] To sum up, none of the appeal grounds advanced has any merit. The appeal is accordingly dismissed.

VAN NIEKERK, J

I agree.

SIBOLEKA, J

Appearance for the parties

For the appellant:	In person
For the State:	Mr J Kuutondokwa
	Office of the Prosecutor-General