CASE NO.: CA 61B/2010

IN THE HIGH COURT OF NAMIBIA:
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

In the matter between:

MOSES BENJAMIN **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: LIEBENBERG, J *et* TOMMASI, J.

Heard on: 28 May 2012
Delivered on: 04 June 2012

APPEAL JUDGMENT

LIEBENBERG, J.: [1] The appellant was charged in the Magistrate's Court Ondangwa with the offence of theft of a firearm (from a motor vehicle) and

after evidence was led, convicted and sentenced to eighteen (18) months imprisonment. He now appeals against his conviction.

[2] Before us the appellant argued his appeal in person while Mr *Matota* appeared for the respondent.

[3] The respondent *in limine* raised the point that the first two grounds of the appellant's notice of appeal do not satisfy the requirements set out in the rules[1] in that these 'grounds' are neither clear nor specific.

[4] In the first ground of appeal, as set out in the notice of appeal, it is stated that the appellant was not afforded a fair trial as guaranteed by the Namibian Constitution due to the bias of the presiding magistrate. Appellant elaborated on this point in argument contending that, because the magistrate found in favour of his co-accused (and acquitted second accused), she was bias. As regards the second ground appellant alleges that the magistrate misdirected herself by *"failing to subpoena all the witnesses including the investigating officer who had adequate knowledge of the case"*. During argument the Court enquired from the appellant why he did not call the witnesses mentioned to give evidence for the defence, he replied that he intended calling these persons but that the court refused him the opportunity to do so.

[5] Whereas the presiding magistrate did not give reasons when delivering her verdict, explaining why she acquitted the second accused and on which evidence the court relied in reaching its verdict; also omitting to furnish a

[1] Rule 67 (1) of the Magistrates' Court Rules

statement in terms of the rules, as the magistrate was required to do[2], this Court is unable to determine on which facts the trial court relied, or the weight given thereto, when convicting the appellant while acquitting the appellant's co-accused. Unless it is shown that the trial court misdirected itself on the facts, the presumption is that the conclusion reached by such court is correct and it is only when the appeal Court is convinced that it is wrong, that it will interfere.[3] Thus, this Court must be satisfied that the trial court misdirected itself either on the facts or the application of the law, before it would be entitled to interfere with the conviction.

[6] In the present instance, the bold statement of the appellant that the presiding magistrate was bias for accepting his co-accused's evidence (an assumption the appellant makes) whilst at the same time rejecting his evidence, falls short of the requirement set by the rules that the appellant must *clearly* and *specifically* set out in the notice of appeal the grounds he/she relies on for purposes of the appeal. The first ground thus, must be struck.

[7] I regress to remark on the magistrate's failure to furnish reasons pertaining to the facts found proved and the reasons for the factual findings specified in the appellant's notice; either when delivering the verdict or in terms of the rules. The magistrate's statement in reply to the grounds enumerated in the appellant's notice of appeal comprises two sentences i.e. that the appellant's 'legal rights' were explained and whereas the case was confirmed on review, the magistrate *"stand(s) with the decision of the*

---

[2] Rule 67 (3)
[3] *Rex v Dhlumayo and Another,* 1948 (2) SA 677 (AD) at 705 – 706.

honourable Justice" (sic). It seems apposite to reiterate what I occasioned to say in *Mbinge Tjipeta v The State*[4] at p8 of the judgment:

> "[14] The evaluation of the evidence adduced at the trial as set out in the judgment is most unsatisfactory and falls short of what can be described as a well-reasoned judgment. This Court in *David Shilyapeni Protasius v The State*[5] stated that on appeal, the Court of appeal is not only required to consider the outcome of the proceedings held in the lower court, but also the reasons furnished for the conviction or acquittal (as the case may be) and therefore, such reasons should be properly formulated and dealt with in the trial court's judgment, explaining the credibility findings made by that court. The Court of appeal is then required to decide whether due consideration was given to the evidence and whether the trial court has come to the right conclusion in its assessment of all the evidence; and in order to do that, a well-reasoned judgment would be most helpful.[6]" [Emphasis provided]

In terms of the rules, the magistrate in the present instance was under a *duty* to deal with the court's findings on the identification of the appellant which he specified in his notice and the court's alleged failure to call witnesses. Despite the conviction and sentence having been confirmed on review, it did not exonerate the magistrate of dealing with the grounds stated in the notice of appeal as she was obliged to do under the rules. The need for magistrate's to comply with the Magistrates' Court Rules is evident from the unfortunate approach adopted by the magistrate in this case.

---

[4] Unreported Case No CA 103/2010 delivered on 02.04.2012
[5] Unreported Case No CA 96/2010 delivered on 04.11.2011 at para[13]
[6] *S v Nkosi*, 1993 (1) SACR 709 (A) at 711e-g

[8] Regarding the court *a quo's* alleged failure to subpoena witnesses constituting an irregularity, the law is clear that the court has a discretion to subpoena witnesses *except* where the evidence of a witness appears to the court essential to the just decision of the case.[7] Appellant argued before us that during the investigation he had told the investigating officer 'everything' and this person would have been able to inform the trial court what really transpired i.e. what the appellant earlier conveyed to him. According to the appellant he was not afforded the opportunity to call his witnesses. This is certainly not borne out by the record of the proceedings – the correctness of which did not form the basis of the appellant's appeal. The record reflects that the matter was postponed to the 27th of January 2010 in order to secure the presence of the investigating officer who was not present at court at the time; however, when the matter was called for the continuation of trial on the said date, the State decided to close its case without calling the investigating officer to testify. No reason was given to the court why the said officer was not called. The rights of the accused persons were thereafter duly explained to them at the close of the State case and the appellant informed the court that he would give evidence and had no witness to call (Annexure 'D'). After appellant had finished giving evidence the court enquired from him whether he would be calling any witnesses and only then did the appellant mention the name of a certain Mr Kagwela, and asked the prosecutor to assist in that regard. The case was postponed for one month and when proceedings resumed, the prosecutor informed the court that the person appellant intended calling had passed away and as proof handed in a Death Certificate. The

[7] Section 186 of Act 51 of 1977

court again enquired from the appellant whether he intended calling (other) witnesses to which he responded: *"I close my case no witnesses to call".*

[9] Although the appellant in argument seems to suggest that the record of the trial proceedings is not complete or does not correctly reflect what transpired in the court *a quo*, it has not been raised as a ground of appeal in his notice; neither was it in any other way prior to the appeal hearing brought to the attention of either the registrar or the respondent. Further, there is nothing in the record itself from which this Court can deduce firstly, that the appellant intended calling other witnesses besides the deceased Mr Kagwela; secondly, that he was deprived of the opportunity to call those witnesses. At no stage during the trial did the appellant inform the court that the investigating officer was crucial to his defence and neither did he call the officer as a witness as he was entitled to do. In these circumstances there was nothing that prompted the magistrate to invoke the provisions of s 186 of the Criminal Procedure Act, Act 51 of 1977 to subpoena witnesses she considered essential for the just decision of the case. Accordingly, this ground is without merit and stands to be dismissed.

[10] Mr *Matota* contended, in our view correctly, that those grounds set out in para 1.3, 1.4 and 1.5 of the notice of appeal can all be summed up as one ground namely, that there is no link between the appellant and the offence committed because the eye witness' evidence is unreliable as he did not properly identify the perpetrator; hence, the appellant is not guilty of the offence with which he was charged.

[11] In summary, the evidence amounts to the following:

The complainant and owner of the stolen firearm, Johannes Shiningombwa, testified that he parked his vehicle outside the Mini Market in Ondangwa on 25 July 2008. He entered the shop whilst his 'son' (cousin) Reinhold Namuya, aged 36 years, remained seated in the vehicle, a pick-up. Upon his return he saw Namuya running after a red Toyota Corolla whereafter it was reported to him (by Namuya) that the pistol with its bag was stolen from his vehicle whilst he was scuffling with another person who had taken the container of oil from their vehicle's loading box. Their subsequent attempts to find the red Corolla were unsuccessful and thereafter charges were laid with the police. On the way to Onethindi the complainant was contacted by the police and informed that the Corolla was traced, whereupon they returned to the police station. The witness' pistol was subsequently recovered by the police and he positively identified it and the bag in which it was kept (shown to him in court) as being his property that was stolen earlier. Appellant did not challenge this evidence.

[12] Mr Namuya testified that whilst waiting for the complainant to return from the Mini Market an unknown man came and removed a 5 litre container with oil from their vehicle's loading box. He got out and whilst scuffling for possession of the container, the appellant opened the door of complainant's pick-up and took the black bag containing the pistol. He thereafter returned to the driver's seat of the red Corolla. He said the appellant was the driver of the

said vehicle and whilst the witness was holding on to the steering wheel, the appellant got the vehicle in motion and accelerated, causing the witness to lose his balance and fall to the ground. He confirmed that later in the day he and the complainant were called back to the Ondangwa police station where he identified the appellant as the driver of the red Corolla, being the same person who stole the firearm from the complainant's vehicle. When it was put to the witness under cross-examination that his attention was with the person with whom he was scuffling and not the person who had entered the pick-up, the witness replied that he *saw* the appellant when he went into the vehicle. When asked how he identified the vehicle as the one involved, he said he could see oil spills on the vehicle which were caused during his struggle for possession of the oil container, taken by the unidentified person. Appellant insisted that the witness was not certain about the vehicle and the identity of the person he had seen; however, the witness was adamant that it was the same vehicle and that he recognised the appellant instantly at the police station as the person he had seen driving the vehicle.

[13] The owner of the Corolla is a certain Anna Immanue, who testified that appellant was in her employ as taxi driver at the time and that he failed to return the vehicle after he had finished doing business for the day. The next day she discovered that the appellant was in custody and found the vehicle parked at the police station. Besides confirming that the appellant was the driver of the said vehicle, the evidence of this witness does not add anything to the case. The appellant's protestations in this Court that this witness gave her evidence under a different name, do not form part of his grounds of

appeal; neither has it been shown that it would make any difference to the outcome of the trial. It therefore requires no further attention.

[14] It is the appellant's evidence that on the said day he was the driver of the red Carolla, operating as a taxi, when he took three customers to the Mini Market in Ondangwa. One of these persons entered the market while the other two alighted from his vehicle and went to the pick-up parked next to him. He then saw the person in the pick-up getting out and started fighting for possession of the container. When the one who had entered the store returned, he went into the pick-up, took something and hid it under his jacket. Appellant testified that he then started his vehicle in order to drive off, but that his customers got into the vehicle, hit him with the pistol and told him to drive away otherwise he will be shot. During all this Mr Namuya clung to the steering wheel saying that they must return his pistol until such time that he lost his grip and fell down. He said he was forced by these persons to go to Oluno where the bag (containing the firearm) was handed to a person by the name of Kagwala. He thereafter dropped them off at Omwandi and was warned not to report the matter to the police lest he will be shot. He was still on his way back to Oshakati when he was apprehended by the police. He disputed Mr Namuya's evidence that there were oil spills on the roof of his vehicle.

[15] From the aforegoing it is clear that the appellant admits having been the driver of the red Corolla parked outside the Mini Market in Ondangwa on the day in question; that he saw Mr Namuya (albeit unknown to him at the time)

scuffling with another person for possession of a container; that he tried to drive away from the scene with a person as his passenger who had taken a bag from the complainant's vehicle whilst Mr Namuya clung to the steering wheel saying that the bag must be returned; that the appellant accelerated and Mr Namuya fell down. Also that he again met with Mr Namuya at the Ondangwa police station later that same day.

[16] The evidence given by the witness Namuya is single and should be approached with caution, where uncorroborated. There can be no doubt that the witness' evidence on the identification of the appellant at the scene was sufficiently corroborated by the appellant's own evidence; and the only point in dispute seems to be a determination of the involvement of the appellant in the commission of the crime.

[17] The established rule of practice where the court is presented with two versions that are mutually destructive is that the court must have a good reason for rejecting the one and accepting the other, by applying its mind to the intrinsic merits of the case; not only to the merits and demerits of the State and defence witnesses, but also to the probabilities of the case. See: *S v Engelbrecht*[8]*; S v Petrus*[9]*;* and *S v Singh*[10]*,* the latter followed in this Court in numerous cases. It is trite that a court does not base its conclusion whether to convict or not, on only part of the evidence. The conclusion arrived at, must account for all the evidence. The test is that an accused is bound to be convicted if there is sufficient evidence proving his guilt beyond reasonable

[8] 2001 NR 224 (HC)
[9] 1995 NR 105 (HC)
[10] 1975 (1) SA 227 (N)

doubt; logically if not, then he must be acquitted if it is reasonably possible that his version might be true and he being innocent.

[18] From Mr Namuya's evidence it is clear that it was the driver of the Corolla who alighted from his vehicle and entered the cabin of the complainant's pick-up whilst he (Namuya), was scuffling with another person at the back of the vehicle for possession of the container. He had also seen that person remove the bag and return with it to his vehicle. That explains why Mr Namuya switched his attention to the driver and clung to the steering wheel while demanding that the bag be handed back. The incident happened at daytime and Mr Namuya was right next to the appellant's vehicle, holding on to the steering wheel. He therefore must have had a clear view of the person and in the circumstances it seems highly improbable that he would have mistaken the identity of someone else with that of the appellant. The driver of the vehicle was none other that the appellant – a fact not disputed. The reason for taking of the container with oil from the loading box of the vehicle appears to have been merely to distract Mr Namuya's attention and to lure him out of the cabin so that the perpetrator could have easy access to the bag. Appellant said he saw Mr Namuya struggle for possession of the container which was taken by appellant's customers; yet, he does nothing to prevent it. He equally saw the third person remove something from the same vehicle which prompted him to start his vehicle, wanting to drive away. His evidence about what happened thereafter is conflicting regarding the stage at which his customers got back into his vehicle and what transpired next. Suffice it to say that if the events had taken place as described by the

appellant in the court *a quo*, then Mr Namuya must have observed the attack on the appellant whilst he was running next to the vehicle on the driver's side, clutching onto the steering wheel. No questions were put to him in that regard and the appellant's explanation as to why he failed to stop the vehicle only came during his testimony. The witness was not cross-examined on this crucial aspect of the appellant's defence i.e. the alleged assault on him – an incident the appellant knew the witness must have observed. Appellant's main concern during cross-examination of the witness Namuya was the identification of the appellant and the vehicle – evidence which eventually turned out *not* to be in dispute. Furthermore, appellant's explanation why he was unable to report the commission of the offence to the police, is unconvincing.

[19] In my view, this is a case where the State evidence is so convincing that it excludes the possibility that the appellant's version is reasonably possible; hence, it is rejected as false beyond a reasonable doubt where in conflict with the State evidence. There can be no doubt that the appellant's guilt was proved beyond reasonable doubt.

[20] Consequently, the appeal is dismissed.

_____

LIEBENBERG, J

I concur.

_____

TOMMASI, J

APPELLANT	**In person**
ON BEHALF OF THE RESPONDENT	**Mr Matota**
Instructed by:	**Office of the Prosecutor-General**