CASE NO.: 5/2012

IN THE HIGH COURT OF NAMIBIA

In the matter between

ANDREAS VAN TAAK

APPELLANT

versus

THE STATE **RESPONDENT**

CORAM: VAN NIEKERK, J *et* UEITELE, J.

Heard on: 02 JULY 2012
Delivered on: 25 JULY 2012

APPEAL JUDGMENT

UEITELE, J.: [1] The appellant was charged in the Magistrate's Court for the district of Karasburg with two separate counts, the first count being the offence of malicious damage to property. The appellant also faced an alternative charge to the first main count, namely that he contravened

section 38 (1)(l) read with Sections 38 and 39 of the Arms and Ammunitions Act, 1996, (Act No. 7 of 1996). The second count which the appellant faced was that he contravened section 38 (1)(i) read with Sections 38(1), 38(2) and 39 of the Arms and Ammunitions Act, 1996, (Act No. 7 of 1996).

[2] On the 10th of November 2010 the appellant was convicted in respect of the first main count (namely malicious damage to property) and on the second count. (The record indicates guilty of contravening section 38(1)(l) of Act 7 of 1996).

[3] On the same day (i.e. on 10th of November 2010) the appellant was sentenced as follows:

(a) In respect of count 1, to pay a fine of N$ 1 500-00 or serve fifteen months imprisonment in default of payment.

(b) In respect of count 2, to 6 (six) months imprisonment suspended in whole for five years on condition that the accused is not convicted of contravening section 38(1) (l) of Act 7 of 1996 committed during the period of suspension.

Dissatisfied with his conviction and sentence the appellant appealed against both conviction and sentence.

[4] Before us the appellant argued his appeal in person while Ms Husselman appeared for the respondent. The respondent raised two points *in limine.* The first point raised is that the appellant's notice of appeal does not satisfy the requirements set out in the rules[1] in that the 'letter' on which the appeal is based does not constitute a valid notice of appeal in that no grounds are advanced upon which either the conviction or sentence are attacked. The second point *in limine* relates to the time of noting the appeal. At the hearing of the appeal the respondent abandoned the second point *in limine* when the appellant produced a hand written notice of appeal indicating that the appeal was indeed noted within the time prescribed in the rules.

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

[5] The notice filed by the appellant is addressed to the High Court of Namibia and is in the form of a letter with the subject heading "PA VAN TAAK: APPEAL AGAINST VERDICT IN THE MAGISTRATE COURT KARASBURG DATE 10 - 11-2010". In the letter appellant amongst others states that:

> "(a) …I herewith wish and beg to appeal to the Honourable High Court of Namibia against the conviction and sentence imposed by the said presiding Magistrate.
>
> (b) My reason for the appeal against conviction and sentence are as follows:
>
> The prosecution failed to prove and lead evidence to proof that the offences was *(sic)* committed and that most essential part of the crime was proofed *(sic)* and or the accused acted intentionally or unlawful…"

[6] I agree with Ms Husselman's submission that the courts have on many occasions emphasised the requirements for clear and specific grounds of appeal and the importance of a proper notice of appeal[2]. I, however, also take note of the fact that in each case the Appeal Court must interpret the notice of appeal to assess its compliance or otherwise with the requirements set by the law.

[7] In this case, the letter which launches the appeal was written by a lay person without assistance of a lawyer. I therefore find the comments of Van Niekerk J[3], fitting this matter when she said:

> "I do not think that an overly fastidious and technical approach should be followed in the circumstances of this case in considering whether it is a notice of appeal. I think justice will be served if the Court rather seeks, if possible, to interpret the letter in a manner upholding its validity as a notice of appeal so that the merits of the matter may be dealt with and the appeal may be disposed of. While the letter is not couched in the form and language that a properly

2 (see e.g. ***S v Horne*** **1971 (1) SA 630** (CPD) 631H-632A; ***S v Khoza*** **1979 (4) SA 757 (N) 758B;** ***S v Wellington*** **1990 NR 20** HC 22G-23A; ***Tuhafeni Kakololo v The State*** (Case No. CA 42/2001, unreported, delivered 15/11/2002);

3 In ***S v Zemburuka*** 2008 (2) NR 737 (HC) at page 738

drawn notice of appeal should be, the substance of the letter is clear – the accused appeals against sentence because he feels aggrieved by the fact that a sentence of direct imprisonment was imposed...."

[8] In the present matter the appellant actually sets out the basis of his appeal . He is stating that the magistrate misdirected himself as there was not sufficient evidence to sustain a conviction, he further argues that he acted in self-defence when he shot the dog. I am able to make out what the substance of the complaint is, and in my view the letter in this case should be considered to be a valid notice of appeal and the point *in limine* accordingly fails.

[9] I now turn to the merits of the appeal. The learned magistrate did not provide further reasons when the notice of appeal was served on him, but remarked that the reasons for judgment and sentence are included in the judgment. The learned magistrate's *ex tempore* judgment with respect to conviction is very brief. It reads as follows:

"The available evidence reflects that accused was the aggressor from the time he arrived at the farm stead of the complainant. His aggressive conduct continued until the time of arrival of the complainant. Such aggression caused the assault and attack by the dog. After that the accused had a choice to leave the farm and to report to the Police and seek medical attention. Instead he returned to the scene with a clear intention to shoot the dog. He fulfilled his intention. The court finds the main count charge against him in count 1 proven. In respect of count two the court finds it proven that the accused handled a firearm in a manner that put the lives of other people at risk. The evidence available therefore proves a contravention of section 38 1(l)."

[10] The issue which we are called upon to decide is whether the appellant was correctly convicted both on the main charge on the first count and on the second count. I will deal with the second count first.

[11] The second count alleges that the appellant is guilty of a contravention of section 38 (1)(i) read with Sections 38(1), 38(2) and 39 of the Arms and

Ammunitions Act, 1996, (Act No. 7 of 1996). Section 39 of the Arms and Ammunition Act creates certain presumptions which are not relevant to this matter. The provisions of section 38 which are relevant to the charges which the appellant faced in material terms provide as follows:

> **"38 Offences and penalties**
>
> (1) Any person who-
>
> (a) …
>
> (i) willfully points any arm or air rifle which is not an arm at any person;
>
> (l) discharges an arm and thereby negligently kills, injures, endangers the life or limb of another person or damages property of any other person, or who handles an arm in a negligent manner, whether that arm discharges or not; …
>
> shall be guilty of an offence.
>
> (2) Subject to the provisions of this section, any person convicted of an offence under this Act shall be liable-
>
> (a) …;
>
> (d) in the case of a contravention of any other provision of this Act, to a fine not exceeding N$4 000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment."

[12] In coming to the conclusion that the appellant was guilty of the second count the magistrate reasoned as follows: '*in respect of count two the court finds it proven that the accused handled a firearm in a manner that put the lives of other people at risk. The evidence available proves a contravention of section 38 1(l)'*.

[13] The misdirection in the learned Magistrate's reasoning is obvious. The second count with which the appellant was charged is a contravention of section 38(1)(i) of the Arms and Ammunition Act, 1996 and not contravention of section 38(1)(l). The charge of contravening section 38(1)(l) of the Arms and Ammunition Act, 1996 was an alternative to the main first count and since the appellant was convicted on the main count he could not also be

convicted on the alternative count[4].

[14] I have taken into consideration that the reference to section 38(1)(l) in the Magistrate's judgment might be a writing error or 'slip of the tongue' and ought to have been 38(1)(i). However, the Magistrate's finding that the accused handled the firearm in a manner that put the lives of other people at risk is to my mind an indication that he was in fact intending to convict the appellant of a contravention of section 38(1)(l) and not section38 (1)(i). In any event, the State in the court *a quo* conceded that there was not sufficient evidence to find the appellant guilty of contravening section 38(1)(i) of the Arms and Ammunition Act, 1996. In my view it would be unfair towards the appellant to now, on appeal and without prior notice, resurrect that charge after the State in the court *a quo* has conceded defeat. I also do not understand Ms Husselmann to submit that this should be done.

[15] However, the matter does not end there. The prosecutor in the lower court submitted that the appellant should be found guilty on the offence of common assault as being a competent verdict. On appeal the respondent did not address us on the submissions made by the State in the court *a quo*. Even if it could be argued that common assault is a competent verdict on a charge of pointing a firearm[5], I have in the present matter an unresolved problem, and that is, it does not appear anywhere on the record that the appellant was given any notice that he was in danger of being convicted of an offence which is a competent verdict of the offence with which he was originally charged. In the case of ***S v Mkize***[6], it was held that although it is not necessary to charge an offence which constitutes a competent verdict as an alternative, the dictates of common fairness require that an accused person who faces the danger of being convicted of such an offence must be given some sort of notice of the danger.[7]

[16] I am furthermore of the view that Article 12(1)(a) of the Namibian

4 See ***R v Schech*** 1927 TPD 839 at page 841
5 See ***Hiemstra's Criminal Procedure***: LexisNexis at page 26-25
6 1961 (4) SA 77 (N) at 78A
7 See also ***S v Velela*** 1979 (4) SA 581 (C).

Constitution which confers upon every accused person a right to a fair trial, includes, amongst others, the right to be informed of the charge with sufficient detail to answer it.[8] I am thus of the view that conviction on a competent verdict where there is a failure to inform an accused person that he is in danger of being so convicted amounts to an unfair trial.

[17] In the circumstances the conviction and consequent sentencing in respect of count 2 must accordingly be set aside.

[18] respect to the first main count the appellant's attack upon the conviction appears to be twofold. First it is based on the allegationthat the *'prosecution failed to proof* (sic) *and lead evidence to proof that the offences were committed'*. In this regard the appellant relies thereon that his plea of self-defence was incorrectly rejected.

[19] The state called three witness and all the three witnesses gave vivid and credible accounts of how the appellant was bitten by the dog and how he left the farm, returned and shot the dog. I am in agreement with the Magistrate's observation that on the *'available evidence that the appellant was the aggressor and that appellant's aggressive conduct caused the assault and attack by the dog. After that the accused had a choice to leave the farm and to report to the Police and seek medical attention. Instead he returned to the scene with a clear intention to shoot the dog.'* can therefore not fault the Magistrate when he rejected the appellant's allegation that he acted in private defense.

[20] The attack on the conviction is secondly based on certain alleged irregularities namelythe curtailing of the appellant's cross-examination by the

8 Compare ***S v Kester*** 1996 (1) SACR 461

prosecutor. (Appellant appears to also allege that the court stopped him when he was cross-examining one witness).

[21] The appellant did not refer us to a specific incident where he was stopped from cross-examining a witness. I agree with Ms. Husselman where she argued that: "*It seems that the appellant is referring to an objection against the appellant's attempt at eliciting what the prosecutor termed "hearsay evidence" from a State witness during cross examination and the court sustained the objection."* appellant was not stopped from cross-examining the witness, but only in relation to the specific aspect, to which the appellant indicated that he would call the particular witness who could testify about the matter. He also did so. In my view the appellant was not prejudiced by the objection being upheld.

[22] In my view there is no merit in the submissions by the appellant that he was wrongly convicted on the first main count and the appeal against the conviction on the first main count must therefore be dismissed.

[23] The appellant, in his 'letter of appeal' indicated that the appeal is noted against both conviction and sentence, but in his letter and oral arguments in court the appellant did not mention anything against the sentence. In light hereof this aspect is not considered further.

[24] In the result I make the following order:

1 The appeal fails in respect of the conviction and sentence on the first main count.

The conviction and sentence in respect of the second charge are set aside.

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UEITELE J

I agree.

_____
VAN NIEKERK, J

COUNSEL ON BEHALF OF THE APPELLANT: In Person

COUNSEL ON BEHALF OF THE RESPONDENT: Ms. Husselmann INSTRUCTED BY: OFFICE OF THE PROSECUTOR -GENERAL