REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT (LEAVE TO APPEAL)

Case no: CA 34/2013

In the matter between:

THE STATE **APPLICANT**

and

GERSON ANANIAS **RESPONDENT**

Neutral citation: *State v Ananias* (CA 34/2013) [2013] NAHCMD 238 (6 August 2013) [In Chambers]

Coram: PARKER AJ
Delivered: **6 August 2013**

Flynote: Criminal procedure – Appeal – Application for leave to appeal by the State – Applicant should state that reasonable possibility exists that an appeal court would reach a different conclusion from that reached by the trial court and must also clearly indicate reasonable prospects of success – In the instant case, the court found that there were serious misdirections on the part of the learned magistrate on the law and the facts on material issues – On that score, the court satisfied that the applicant has discharged the onus cast on it for the court to grant the application.

Summary: Criminal procedure – Appeal – Application for leave to appeal by the State – To succeed applicant should state that reasonable possibility exists that an appeal court would reach a different conclusion from that reached by the trial court and must also clearly indicate reasonable prospects of success on appeal – In

instant case court found serious misdirections on the law and the facts on the part of the trial learned magistrate on material issues being the learned magistrate's wrong application of the *novus actus interveniens* principle and his failure to apply the principle in *S v Shivute* 1991 NR 123 (HC) that exculpatory statements in s 115 (Act 51 of 1977) statements must (as a general rule) be repeated by the accused under oath in the witness-stand for them to have any value in favour of the accused – Consequently, the court found that an appeal court may come to a different conclusion from that of the trial court and there are prospects of success on appeal – Accordingly, the court granted the State's application for leave to appeal.

ORDER

The application for leave to appeal is granted.

JUDGMENT

PARKER AJ:

[1] The respondent was arraigned before the Regional Magistrates' Court, Karasburg, on a charge of culpable homicide. After the State closed its case, the learned Regional Magistrates' Court magistrate ('the magistrate') heard arguments from the respondent's counsel and the applicant's counsel in respect of an application brought by the respondent in terms of s 174 of the Criminal Procedure Act 51 of 1977. The magistrate concluded, 'In view of the above observations your application for discharge at the close of the State's case is allowed. I find you not guilty'. The decision on the s 174 application was given on 2 April 2009.

[2] On 14 May 2009 the Prosecutor General (for the applicant) lodged a notice of application for leave to appeal in terms of subsection (1), read with subsection (2), of

s 310 of the Criminal Procedure Act 51 of 1977 ('the CPA') ('the leave to appeal application'). It follows irrefragably that the notice was lodged with the registrar some 13 days in excess of the thirty days' time limit.

[3] It is worth noting that the notice was accompanied by an application to condone the late lodging of the notice and a founding affidavit deposed to on 13 May 2009 by a public prosecutor attached to the office of the Prosecutor General ('the condonation application'). It is not a case where such condonation application is filed some months or years after the applicant became aware of his or her non-compliance with applicable rules or the applicable Act.

[4] In the instant case, the time for lodging the notice was exceeded by 13 days. At the same time and on the same day as the notice was lodged the applicant acted with commendable expeditiousness and filed a condonation application. Under these circumstances it cannot be said that the delay is unreasonable or due to gross negligence (see *Transnamib v Essjay Ventures Limited* 1996 NR 188 (HC)); neither can it be said that there has been flagrant breach of the Act (see *Dimensions Properties and Contractors CC v Municipal Council of Windhoek* 2007 (1) NR 288 (HC)). Indeed, I find that on the facts there has not been an unreasonable delay in the lodging of the notice. I also find that there has not been any delay at all in launching the condonation application. In sum, the badge of wilful and unreasonable delay cannot attach to either the lodging of the notice or the launching of the condonation application.

[5] Furthermore, I have pored over the explanation for the delay of 13 days in lodging the notice and I am satisfied that the reasons for the delay are sufficient and reasonable. In this regard, with respect, I fail to see any merit in Mr McNally's submission that the 'applicant was inactive for a period in excess of four years'. It is not the fault of the applicant that the condonation application was not heard by the court so soon after 14 May 2009 when, as I have found, both the notice and the condonation application were lodged with the registrar as the CPA provides.

[6] In all this Mr McNally overlooks the fact that the respondent, too, should have, within a period of 10 days of serving of the notice on him, lodged a submission with the registrar. The respondent did not do that; neither did the respondent make an application to the court to condone the respondent's non-compliance with s 310(4) of the CPA. I allowed Mr McNally to file such submission on or before 22 July 2013, that is, some four years after the respondent's non-compliance with s 310(4) of the CPA. What is good for the goose must be good for the gander, I should say. I have granted an indulgence to both the applicant on good cause shown and also on the respondent, although he did not show any good cause. I did so in order to have the benefit of the respondent's response to the applicant's grounds of appeal. In any case, I did not hear Ms Moyo to object vigorously against the extension of time granted.

[7] Having taken these factors into careful consideration together with the fact that in my view, as appears later in this judgment, there are prospects of success on appeal from the magistrate's decision, I think I should exercise my discretion in favour of granting the indulgence sought. The result is that I condone the late lodging of the notice of the application for leave to appeal from the decision of the magistrate.

[8] I now proceed to consider the merits of the case. From the record it is clear that the magistrate accepted the evidence that the respondent hit the deceased with a glass on the deceased's cheek, and as a direct result of such attack on the person of the deceased the deceased sustained serious injuries and that those injuries were not inflicted by someone else. The magistrate concludes that '[T]here is a possible cause of death that immediately comes to mind when looking at the testimony of the state witnesses. That is the continuous refusal by the deceased to be taken to hospital in Karasburg after he was injured'. But there is no evidence, particularly medical evidence, placed before the regional magistrates' court to have established that death occurred because of the deceased's initial refusal to be taken to hospital. On the contrary, the evidence points to one irrefragable direction, namely, that the injuries that the respondent inflicted upon the deceased were lethal. The injuries were inflicted – according to the Report on A Medico-Legal Post-Mortem

Examination (Exh ‘E’) – on the left side of the deceased’s face. Thus, the glass used by the respondent to attack the deceased cut the ‘facial artery left mandible’ which sent the deceased into ‘hypovolemic shock’ which in turn led to an acute loss of blood, resulting in death. The certificate of post-mortem examination (Exh ‘C’) does not state that the ‘hypovolemic shock’ and the acute loss of blood was as a result of the deceased’s initial refusal to be taken to the hospital in Karasburg.

[9] Thus, there is no evidence establishing that the deceased’s initial refusal to be taken to hospital constituted an event that qualifies as *novus actus interveniens* so that the infliction of the serious injuries on the deceased that were lethal can no longer be regarded as the cause of death of the deceased. Besides, the evidence is clear that the deceased was intoxicated and had earlier on given a great deal of trouble to the respondent in his shebeen, including harassing patrons of the shebeen. On that score I do not think the deceased was in his sober mind to act reasonably, that is, to make any rational decision that he be taken to hospital, as Ms Moyo submitted. Thus, this is not a case where the evidence establishes that if the deceased had initially consented to being taken to hospital that would undoubtedly have saved his life. The deceased’s conduct was not capable of breaking the causal chain between the inflicting of the lethal wounds on the deceased and the death of the deceased at the hands of the respondent. For these reasons I find that the magistrate’s observation and conclusion to the effect that the deceased’s initial refusal to be taken to hospital ‘is a possible cause of death’ is a serious misdirection on the law and the facts.

[10] Ms Moyo submitted in this way. In his s 115 plea explanation at the commencement of the trial the respondent had raised a defence of self-defence and/or private defence. In his s 174 ruling the magistrate stated that the respondent had been entitled to defend his property as the deceased’s aforementioned conduct had the effect of driving away the respondent’s customers. In that event, so argued Ms Moyo, when a private defence is proferred during a trial, an accused person cannot be acquitted at the close of the State case as there is the need for the accused to repeat his s 115 plea explanation under oath and for its credibility to be tested under cross-examination. Counsel relies on *S v Shivute* 1991 NR 123 (HC)

and *S v Tjiho* (2) 1990 NR 266 (HC) to support her argument. Mr McNally argued contrariwise that *Shivute* and *Tjiho* do not place a general duty on an accused to repeat his (or her) plea explanation under oath; and so, according to Mr McNally the applicant's reliance on those cases 'is misplaced'.

[11] I accept Mr McNally's argument that neither *Shivute* nor *Tjiho* places a general duty on an accused to repeat his (or her) plea explanation. And I do not read Ms Moyo's submission to say that they do. What Ms Moyo says is part of the *ratio decidendi* of both *Shivute* and *Tjiho*. In *Tjiho* the court held that in the light of the evidence adduced by the State, the evidential value of the unsworn and uncontested statement of the accused was such that *not much weight* could be given to it. (Emphasis added) And in *Shivute* the court held that exculpatory statements in s 115 plea explanation 'must, as a general rule, be repeated by the accused under oath in the witness-stand for them to have *any value* in favour of the accused'. (Emphasis added) One possible exception to the general rule is that when a defence is raised in the exculpatory part of an explanation of plea, it may be necessary for the State to negative that defence to a prima facie extent.

[12] I do not accept Mr McNally's submission that Ms Moyo's reliance on *Shivute* and *Tjiho* is misplaced. Ms Moyo repeats the *ratio decidendi* of the two cases, namely, that an exculpatory statement in plea explanation must be repeated by an accused under oath in the witness stand in order for it to have *any value* in favour of the accused. *Shivute* or *Tjiho* does not state that the accused has a duty to repeat the statement on oath in the witness box. And that is also the submission by Ms Moyo. In sum, the *ratio* of *Shivute* and *Tjiho* is that if the accused does not repeat the exculpatory statement on oath, in the witness box, the court is not entitled to place *any value* on the statement in favour of the accused person. *In casu*, at the close of the State case the learned magistrate should not have found the exculpatory statement in the respondent's s 115 plea explanation to have *any value* in favour of the respondent. But he did. (See *S v Shivute* at 127A-B.) And I find that at the close of the State case, in the light of the evidence adduced by the State, the State on the evidence had made out a prima facie case on the main charge which the respondent

had to answer. This finding satisfies the ‘one possible exception to the general rule’ mentioned by O’Linn J in *S v Shivute* at 127C, and referred to previously.

[13] For all these reasons, I find that the magistrate erred in putting great value on the exculpatory statement of the respondent in his s 115 in the respondent’s statements favour which resulted in the magistrate’s decision not to put the respondent on his defence on the main charge. Accordingly, I conclude that on the grounds raised by the applicant and for the aforegoing reasoning and conclusions thereanent, I am satisfied that the applicant has indicated reasonable prospects of success and also that reasonable possibility exists that an appeal court would reach a different conclusion from that reached by the learned magistrate in upholding the respondent’s s 174 application and discharging the respondent on the main charge. (See *S v Nowaseb* 2007 (2) NR 640 (HC).)

[14] In the result, the application for leave to appeal is granted.

C Parker

Acting Judge

APPEARANCES:

APPLICANT :	C Moyo Of Office of the Prosecutor-General, Windhoek
RESPONDENT:	P McNally Of Lentin, Botma & Van Den Heever, Keetmanshoop c/o Delport Attorneys, Windhoek.