



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 134/2017

In the matter between:

**HARTMUT BEYER**

**APPELLANT**

And

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Beyer v S* (CA 134/2017) [2017] NAHCMD 267 (15 September 2017)

**Coram:** NDAUENDAPO, J *and* UNENGU, AJ

**Heard on:** 14 July 2017

**Delivered on:** 15 September 2017

**Flynote:** Criminal Procedure – Appeal – Appellant appealing against his conviction of a charge of attempted murder and the sentence – Appellant alleging that the State failed to prove that he intended to kill the complainant – Appellant fired one shot into the ground 15-20 metres behind a bakkie of which the complainant was the driver – Appeal against the conviction and the sentence upheld.

**Summary:** The appellant in the matter has appealed against his conviction of attempted murder and the sentence on various grounds including a ground that the learned magistrate erred in the law and or on the facts to find that the State has proved beyond reasonable doubt that he was guilty of the crime of attempted murder. Except for the evidence that a shot was fired in the ground 15-20 metres from the bakkie driven by the appellant, no other evidence was tendered by the State to prove the charge against the appellant. That being so, the court came to the conclusion that the State failed to prove beyond reasonable doubt that the appellant was guilty of the crime of attempted murder – and upheld the appeal as a result.

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### **ORDER**

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- (a) The appeal is upheld.
  - (b) The conviction and sentence passed on the appellant are set aside.
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### **APPEAL JUDGMENT**

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**UNENGU, AJ (NDAUENDAPO, J concurring):**

[1] This is an appeal from a judgment of the court below against the conviction and sentence handed down on the appellant on 27 September 2013 on the grounds set out in the amended notice of appeal<sup>1</sup>.

[2] The appellant was arraigned before the Magistrate's court sitting at Omaruru in the district of Omaruru on one main charge of attempted murder and two alternative counts of:

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<sup>1</sup> Appeal record pp. 301-304.

- a) Contravening s 38 (1)(o) read with s 1, 38 (2) and 39 of the Arms and ammunition act, Act 7 of 1996 as amended; and
- b) Malicious damage to property.

[3] The appellant was represented by Mr. Mueller during the trial in the court *quo* and by Mr. Chris Brandt in this court during the hearing of the appeal. Ms. Esterhuizen represented the State, the Respondent in this appeal.

[4] In the court below, the appellant pleaded not guilty to all the charges against him and the State therefore called six (6) witnesses to testify against him. After the close of the State's case, an application for a discharge of the appellant in terms of s174 of the Criminal Procedure Act, 51 of 1977, herein referred to as the CPA, was made, but was unsuccessful. This, despite a concession made by the Public Prosecutor that no *prima facie* case was established against the appellant on the main count.

[5] As a result of the refusal of the discharge by the magistrate, the appellant testified on his own behalf and also called Mr. Abraham Titus as his witness. Needless to say, after the closing of the appellant's case and the hearing of arguments before the verdict, the appellant was convicted of attempted murder and sentenced to 3 years imprisonment of which 18 months were suspended for a period of 5 years on the condition that he is not again convicted of the offence of attempted murder or any offence involving a fire-arm committed during the period of suspension. His fire-arm was declared forfeited to the State following the provisions of s 38(5)(a) of the Arms and Ammunition Act<sup>2</sup>.

[6] A few days later, on October 2013, the appellant filed a notice to appeal against the conviction and the sentence together with a special power of attorney. On the same day, the appellant applied to be released out on bail pending the outcome of the appeal. The application for bail was refused on the ground that the appellant did not enjoy reasonable prospects of success on appeal.

[7] However, the appellant appealed against the refusal to grant him bail pending the outcome of his appeal against the conviction and sentence, which appeal was heard by Geier, J on 2 December 2013. In his judgment Geier, J upheld the appeal

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<sup>2</sup> Arms and Ammunition Act 7 of 1996.

and found that the appellant had reasonable prospects of success on appeal and made the following order:

‘1. The appellant’s appeal against refusal of magistrate Kwizi, to admit the appellant to bail, pending his appeal, as made on 27 September 2013, is upheld.

2. Bail is granted to appellant with immediate effect on the following further conditions:

2.1. The appellant is to hand in all his travel documents to the investigating officer as soon as possible.

2.2. The appellant is to report to the office of the Namibian Police in Omaruru, alternatively to the investigating Officer, once a week between the hours 08h00 to 18h00.

2.3. If the appellant wishes to leave Omaruru for any reason he should inform the investigating Officer in this regard prior to leaving.

2.4. The appellant is directed to present himself at court personally at the time that his appeal is heard and /or at the time the judgment in the appeal is delivered.’

[8] Geier, J delivered a comprehensive judgment in the appeal against the refusal of bail by the learned magistrate.<sup>3</sup> He summarized the facts of the matter in detail. In para. 5 of his judgment, which I agree with as the correct summary of what transpired in the magistrate court he said the following:

‘5. . . . During the evening of 3 April 2010, the complainant, Brain Lehman and his friends drove in Erongo Street, Omaruru, where a “Potjie”, which they transported fell in their vehicle, a Toyota bakkie. He, as the driver stopped, in order to put the pot in good order as he put it, in the vehicle before he drove again. There is some divergence on the evidence whether the complainant and his friends were unruly and posed a threat and whether they had been drinking alcohol or not. The appellant was obviously disturbed by the commotion outside his house in the street and went out to investigate. Apparently and according to him, he had heard some shots on an earlier occasion and again just before he went out to investigate. The appellant allegedly felt threatened and testified that he thought he was being fired at from the people in the complainant’s bakkie. He found cover in his garden behind the palm tree and fired one warning shot into the ground. The bakkie according to him then fled at high speed. The complainant and his friends stopped at the Shell Service Station where they noticed an indent apparently made by a bullet at the back of the vehicle. The photo plan handed in as an exhibit shows this damage on the lower tail gate of the

<sup>3</sup> *Beyer v The State* (CA 136/2013) [2013] NAHCMD 384 (02 December 2013).

Toyota bakkie. A complaint was immediately made to the Police by the appellant's wife, that same evening, while the complainant laid his complaint, only on the following day. The photo plan, as mentioned before, was compiled and some four days later a projectile was also found. The appellant's fire-arm, a pistol, and a cartridge were taken in for forensic testing as well as the projectile that was found. The forensic examination could however not link the projectile to the appellant's fire-arm.'

[9] I must also mention that Geier, J came to the conclusion, that from a reading of the record it immediately became apparent to him, that the appellant did not assault Brian Lehman. Further, that the appellant did not shoot at the vehicle with the intent to injure any specific individual on the vehicle, let alone Mr. Lehman the complainant.

[10] It has not been disputed that on the fateful evening of the incident, the appellant, discharged a fire-arm in the direction of the vehicle driven by the complainant in Erongo Street, Omaruru. In dispute though, is the question whether it has been established by the State beyond a reasonable doubt that the appellant had the intention to kill or attempted to kill the complainant, Brian Lehman when he, the appellant fired the shot on the ground behind the vehicle driven by the complainant. Alternatively, whether the appellant foresaw the possibility of fatally injuring the complainant.

[11] The respondent contended that even though the onus is on the State to prove its case beyond reasonable doubt that does mean proof beyond a shadow of doubt. Counsel referred the court to *R v Mlambo*<sup>4</sup> where the following was said:

'In my opinion there is no obligation upon the crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such degree of probability is raised that the ordinary reasonable man after mature consideration comes to the conclusion that there exists no reasonable doubt that an accused committed the crime charged. He must be in other words morally certain of the guilt of the accused.'

[12] With that, I agree. The State does not need to close every avenue of escape which may be said to be open to an accused. However, the State has an obligation to produce evidence of such a high degree of probability that the ordinary reasonable

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<sup>4</sup> *R v Mlambo* 1957 (4) SA 727 at 738.

man after mature consideration comes to the conclusion, that there exists no reasonable doubt that an accused committed the crime charged.

[13] Except for the fact, that the appellant fired a shot into the ground behind the Toyota bakkie which was being driven by the complainant, which the appellant admitted, no further evidence was produced by the State raising such high degree of probability, leading an ordinary reasonable man to come to the conclusion that there exists no reasonable doubt, that the appellant attempted to kill the complainant and therefore was guilty of attempted murder. There is no such evidence on the record of proceedings in the court below.

[14] Even the dent or hole at the back of the Toyota bakkie observed by the complainant at Shell Service Station could not be linked to the shot fired by the appellant with the expert evidence of Mr. Nambahu. It is therefore wrong and pure speculation, to say that the bullet fired by the appellant caused the damage to the bakkie.

[15] Despite stating in his judgment that Mr. Nambahu, the expert witness could not examine or analyse the spent projectile, as such was deformed and that it had no grooves on it, the learned magistrate still went ahead and found that the spent projectile was the one that hit the back side of the vehicle apparently on circumstantial evidence, ostensibly because, the spent projectile was found in the surrounding area or vicinity of the incident.

[16] To assume that the spent projectile found in the surrounding area or vicinity caused the damage to the vehicle without evidence proving that the bakkie did not have a dent or damage before, in my view, is mere speculation.

[17] In the matter of *S v William*<sup>5</sup>, the accused, a corporal in the Namibia Defence Force stationed at the Omauni Base in the former Owambo-rural area close to the Angola border on 25 September 1990, armed with an AKM rifle, went out of the base to the place he previously saw suspicious movements in the area. About a kilometre from the base he saw a group of four people beneath a tree who were apparently digging a hole. He thought that they were either involved in stealing or possibly planting a land mine. When they saw him, they started running. He shouted at them

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<sup>5</sup> *S v William* 1992 (NR) 268.

to stop several times and then fired four shots with the fire-arm. One of the bullets struck the deceased in the back killing him and another struck a young boy who was running with the deceased. The young boy survived. The corporal was charged with murder of the deceased and attempted murder of the young boy. Hannah, J acquitted the accused on the charge of murder and convicted him of culpable homicide. However, on the charge of attempted murder he was acquitted. His defence tendered in the plea explanation statement in terms of s 115 of the Criminal Procedure Act,<sup>6</sup> which he repeated in his evidence in chief is that he fired warning shots in the general direction of the fleeing thieves. The State conceded that intention to kill in either the direct or legal sense was not established.

[18] The facts in *S v William*<sup>7</sup> and those in this appeal are almost similar. The corporal who was the accused in that matter was found guilty of culpable homicide on the murder charge which is a competent verdict of murder, for which intention in either form is not an element.

[19] The appellant has appealed his conviction on various grounds. In para. 1 of the amended notice of the appeal, the appellant is of the view that the learned magistrate erred in the law and/or on the facts to find that the State has proved beyond reasonable doubt that he was guilty of the offence of attempted murder. He is correct. The learned magistrate was wrong, in my view, to find on the evidence as a whole presented before him that the appellant fired the shot to kill or attempted to kill the complainant. If it was the appellant's intention to kill the complainant or any other occupant of the bakkie, what foiled him in his attempt to do so?

[20] The evidence on record shows that the appellant owns fire-arms for 45 years and is a registered fire-arm collector in Namibia and in Germany, a trainer of people how to use fire-arms and doing shooting for sport and hunting, making him a possible good shooter. Confronted with this evidence on record and the finding by Hanna, J in the matter of *S v William* above, can one, without doubt state that the State produced evidence raising a degree of probability that the ordinary reasonable man after mature consideration would come to the conclusion that there exists no reasonable doubt, that the appellant committed the crime of attempted murder? I do

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<sup>6</sup> Criminal Procedure Act, 51 of 1977.

<sup>7</sup> *S v William* 1992 (NR) 268.

not think so. Therefore, having regard to the decision of Hanna, J in the matter of the *State v William*<sup>8</sup> above and the facts of the appeal, I come to the conclusion that, the State failed to prove beyond reasonable doubt that the appellant was guilty of the crime of attempted murder. That being so, the appeal against the conviction should succeed on ground one of the appeal alone.

[21] In the result, I make the following order:

- (a) The appeal is upheld.
- (b) The conviction and sentence passed on the appellant are set aside.

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P E UNENGU  
Acting Judge

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NDAUENDAPO  
Judge

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<sup>8</sup> *S v William* 1992 (NR) 268.



## APPEARANCES

FOR THE APPELLANT:

Mr. C. Brandt

Of Chris Brandt Attorneys, Windhoek

FOR THE RESPONDENT:

Ms. K. Esterhuizen

Of the Office Of the Prosecutor General,  
Windhoek