

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

CASE NO.: CA 43/2017

In the matter between:

**GEORGE NDAMWOONGELA**

**APPELLANT**

And

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Ndamwoongela / S* (CA 43/2017) [2017] NAHCMD 282 (6 October 2017)

**CORAM:** NDAUENDAPO, J and LIEBENBERG, J

**Heard:** 24 July 2017

**Delivered:** 6 October 2017

**Flynote:** Criminal Procedure – Appeal – Conviction and sentence – s 49 of the Criminal Procedure Act – Not applicable to justify killing of innocent passenger – Appellant had no intention to kill – Negligent – Culpable homicide. Sentence – Negligently causing death of innocent passenger – Whilst carrying duties as Police Officer – Sentence to be blended with mercy – Sentenced to five years, wholly suspended on usual condition.

**Summary:** The appellant, a police officer, was convicted of murder acting with *dolus eventualis* and sentenced to 12 years' imprisonment. The appeal is against conviction and sentence. The appellant whilst pursuing a suspect who sped off in a Corolla, fired a warning shot and another shot aiming at the rear tyre of the Corolla, but the shot hit the deceased, who was a passenger, in the head. Appellant invoked s 49 of the Criminal Procedure Act 51 of 1977 and argued that his actions were justified as the suspect whom he was pursuing was fleeing from attempted arrest as he was suspected of having committed a robbery. Appellant had no intention to kill the deceased, but aimed at the tyre of the vehicle to bring it to a standstill, however, the shot hit the surface and ricocheted.

*Held*, that s 49 cannot be relied upon where the deceased was an innocent passenger who was not fleeing from being arrested in the vehicle of the suspect who was being pursued.

*Held*, further that, the court below misdirected itself in rejecting the version of the appellant that he had no intention to kill the deceased and that he aimed at the tyre of the vehicle.

*Held*, further that, the appellant must have realised that the shot which was fired with a lethal weapon at a fast moving vehicle with occupants inside might hit someone. But he took no steps to guard against that eventuality and therefore he is guilty of culpable homicide, rather than the offence of murder.

Regarding sentence, held, that the conviction on culpable homicide calls for a lesser sentence.

*Held*, further, that appellant, a police officer was carrying on his duties (as a police officer) when he shot the innocent passenger. He was pursuing a suspect when he fired the shot that killed the deceased. In those circumstances the court must show mercy to the appellant who was a first offender. The sentence of twelve years is set aside.

Accordingly, the appellant is sentenced to five years' imprisonment, wholly suspended for five years on condition that the appellant is not convicted of culpable homicide, committed during the period of suspension.

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## ORDER

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1. The appeal succeeds.
2. The conviction of the appellant on murder acting with *dolus eventualis* is set aside and substituted with the following:  

The appellant is convicted of culpable homicide
3. The sentence of 12 years imprisonment is set aside and substituted with:  

The appellant is sentenced to five years' imprisonment wholly suspended for a period of five years on condition that the appellant is not convicted of culpable homicide, committed within the period of suspension.
4. The sentence is antedated to 12 April 2017.

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## APPEAL JUDGMENT

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### **NDAUENDAPO, J (LIEBENBERG, J concurring)**

[1] The appellant was convicted of murder acting with *dolus eventualis* in the Regional Court sitting at Windhoek. He was sentenced to 12 years' imprisonment. Disenchanted with the conviction and sentence, he now appeals against both conviction and sentence.

#### The State's case

[2] On 11 February 2012 a robbery took place in Hockland Park. The robbers got away in a white Polo vehicle. On 12 February 2012 the appellant, who was a former

Constable in the Namibian Police Force, together with Constables Shikomba, Nantinda and Namvula were assigned to investigate that robbery. The victim managed to note down the registration of the Polo vehicle and the owner was traced through Natis. The victim and the previous owner of the Polo vehicle reported the matter at the police station. The previous owner informed the police that he sold the Polo in 2013 and would be able to identify the person to whom he sold the vehicle and point out where the Polo is being parked.

[3] They, accompanied by the appellant, Sergeants Nanvula, Nantinda and Amukwa drove to the place where the Polo used to be parked. They were all wearing civilian clothes. At the single quarters, they got information about the new owner of the Polo and armed with that information traced the Polo at a place called Kwasa Kwasa. The victim identified some of her stolen goods found in the Polo. The owner of the Polo by the name 'Jesus' told them that the Polo vehicle was driven on the day of the robbery by his friend. Jesus called his friend who then arrived. Upon his arrival he admitted that he was only the driver when the victim was robbed. He was prepared to point out the other suspects who were with him when the robbery occurred. He, together with the police officers got into the Polo and proceeded to where the other suspects were. The suspect drove the Polo. On their way the suspect called the other suspects and arranged for them to meet at a four way intersection in Goreagab residential area. At the four way Constable Shikomba and the suspect got off the Polo and the appellant remained in the Polo. Within two minutes the second suspect, by the name of Shaanika, arrived in a silver Corolla and was dropped off where they were. As he got off the Corolla, he was handcuffed by Constable Shikomba. The driver of the Corolla testified that when he saw Shaanika being handcuffed, he disembarked from the Corolla to go and enquire why Shaanika was being handcuffed, but as he came closer to the Polo, he was told to go back to the Corolla by Shikomba and the appellant. Shikomba and the appellant disputed that and testified that the driver of the Corolla never disembarked and just sped off when he saw Shaanika being handcuffed. Shikomba testified that, as they were walking back to the Polo, the appellant disembarked from the Polo and gave chase behind the Corolla screaming for the driver to stop, whereupon the appellant informed

him that Sergeant Kokule had informed him that the Corolla with the white cello tape at the back window had a case registered against it of robbery, where some Angolan nationals were robbed at Hochland Park. The appellant then fired a warning shot and again a second shot went off and according to Shikomba when he looked at the appellant, he was aiming at the right rear tyre. After firing the second shot, the Corolla came to a standstill and they went closer to the Corolla and saw that the bullet had smashed the rear window of the Corolla and the deceased was struck in the head. He further testified that before the shooting incident, there was no gathering of people and no other vehicle except the Corolla in that area.

[4] Titus Shuuvani Shikomba testified that on 12 February 2012 he was driving a silver Corolla with the deceased, Martha, whom he gave a lift and who was seated in the back seat. On his way he met Shaanika who asked for a lift up to the four way intersection in Goreangab residential area. As they reached the four way, Shaanika asked him to stop the vehicle close to the Polo which was parked alongside the road. He stopped the vehicle and Shaanika disembarked and walked over to the Polo. As Shaanika approached the Polo, he was handcuffed by a person wearing plain clothes. When he saw that, he disembarked from the Corolla and walked towards the Polo to enquire why Shaanika was being handcuffed but, as he came closer, a person who was with Shaanika ordered him to go back to the Corolla. He returned to the Corolla and started the engine and as there were many cars he waited to get onto the main road to proceed further. He got onto the road and drove a distance of fifty metres when he heard a gunshot and when he looked back he saw blood coming from the deceased's head. He stopped the vehicle and he was apprehended by a police officer who placed him in a police van. He further testified that he heard only one shot and no warning shot. He denied that he sped off when Shaanika was handcuffed.

[5] Dr. Guriras conducted the post-mortem examination and her observations were: *'There was a 2cm entrance wound in the left temporal bone. Bone fragments were projected inwards with brain evisceration. There was a linear skull fracture extending from the above mentioned wound frontwards. There was an exit wound in the right*

*frontal area with bone fragments under skin in that area. There was a projectile retrieved from this area.'* According to her the cause of death was '*gunshot wound to the head.*' During cross examination, it was put to her that: 'the bullet ricocheted from a hard surface and accordingly hit the deceased in the head'...and she replied 'I cannot dispute that but also the fact that the bullet hit the first bone it could have ricocheted [off] that also changing its directionality including the tilt that she could have been in or any other factors could have played a role.'

[6] Investigating Officer Sibolile attended to the scene of crime. He found Constable Shikomba who narrated to him what had occurred. According to him the driver of the Corolla got off to enquire why Shaanika was being handcuffed and he was then instructed to go back to the car by the appellant and Shikomba. The moment he got to the Corolla the appellant followed him with the aim of stopping the car. The driver sped off and he fired a warning shot, but the Corolla drove off and he fired another shot aiming at the tyre. When he interviewed the appellant, he told him that the Serious Crime Unit were looking for the Corolla, but when he verified with the said unit, they denied that. The appellant's explanation was that he aimed at the tyre but the bullet hit a hard surface and ricocheted and hit the deceased. Sibolile testified that they checked the tarred road but could not see any mark made by the bullet. The area is congested, there are busses and vendors along the road and people are moving up and down. He further testified that the appellant and Shikomba informed him that the appellant was aiming at the tyre of the Corolla, but does not know how it happened that the deceased was hit. During cross-examination contradictions were pointed out in his *viva voce* evidence and his statement. In his statement he mentioned that the driver of the Corolla did not get off the vehicle, he sped off and drove away, whereas in his evidence he mentioned that he was informed by Shikomba that the driver of the Corolla did disembark from the Corolla.

#### Appellant's case

[7] The appellant testified that they were investigating a case of robbery and they were on their way to arrest the suspects. He was with Constable Shikomba and the

suspect who was the driver of the Polo. At the four way intersection in Goreagab residential area, they stopped the Polo alongside the road. Suspect 1 and Shikomba got off the Polo and stood at the road side waiting for another suspect, Shaanika, to arrive. After few minutes a silver Corolla stopped nearby the Polo. Shaanika disembarked from the silver Corolla and went to where Shikomba and suspect 1 were. He was immediately handcuffed by Shikomba. The driver of the Corolla did not disembark as he claimed. Appellant got off the Polo and shouted at the driver of the Corolla to stop as he was informed by Serious Crime Unit that the Corolla was involved in a robbery. The Corolla sped off and he ran after the Corolla shouting to the driver to stop, but to no avail. He then fired a warning shot, but the Corolla kept on moving fast. He then fired a second shot aiming at the left rear tyre of the Corolla. The Corolla then stopped. When he came closer, he realised that the deceased was shot. He testified that his aim was to shoot at the tyre, but the bullet hit the tarred road, ricocheted and hit the rear window and the deceased in the process. He further testified that the windows of the Corolla were tinted so it was difficult to see that somebody was seated in the back seat of the vehicle. He had no intention to shoot at the deceased nor the driver, that is why he aimed at the tyre. He further testified that he believed that it was possible that the driver of the Corolla was one of the suspects they were looking for since four people were mentioned as the robbers, explaining why he shot at the Corolla with the aim of bringing the Corolla to a standstill and to arrest the driver.

### Grounds of appeal

#### [8] Grounds against conviction

'1. *The court erred in law and or fact by finding that the provisions of s49 of the Criminal Procedure Act 51 of 1977 as amended are not of application to the case at hand.*

2. *The court erred in fact that the accused's version is improbable and false, when weighed against the medical evidence produced by Doctor Guriras which corroborates the appellant's version of events.*

3. *The court erred in rejecting the version of the accused even where such is corroborated by evidence adduced by witness Siegfried Shikomba.*

4. *The court erred in accepting the evidence of Mr Claasen Sibolile on the sequence of events whilst it was clearly shown that he is not a clear and credible witness on material aspects.*

5. *The court erred in finding that Mr Titus Shuuvani did not know he was being pursued whilst evidence was produced to the effect that he saw an arrest and sped off is present. (sic)*

6. *The court further erred in finding that there was no attempt to escape or evade arrest on the part of Mr. Titus Shuuvani, whilst his conduct portrays an attempt to evade apprehension.*

7. *The court erred in fact by failing to appreciate the totality of evidence produced and the surrounding circumstances to the shooting incident.'*

[9] Grounds against sentence

*'The court erred in law and or fact by disregarding alternatively (a) paying lip service to the accused personal circumstances, (b) over emphasizing the seriousness of the offences at the expense of other surrounding circumstances, (c) by not suspending a significant portion of the sentence imposed.'*

I now turn to discuss the grounds of appeal against conviction

Grounds 1, 5 and 6

These grounds deal with the requirements of s 49 of the Criminal Procedure Act<sup>1</sup> and will be discussed together hereunder.

[10] In his written heads, the appellant argued that the learned magistrate erred in fact and law where she found that s49 of the Criminal Procedure Act does not apply to this case. The appellant in his written submission avers that his conduct complies fully with the provisions of the above section on the following basis: That he was a police

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<sup>1</sup> Criminal Procedure Act 51 of 1977.



officer who was fully authorized to effect an arrest of any person suspected of having committed an offence and that there is no dispute that the appellant chased after the motor vehicle and made a clear attempt to stop it without the use of force. It is further not in dispute that he chased after this speeding vehicle for a distance of 90m before he fired in the direction of the vehicle. It is further not disputed that he first fired a warning shot in an attempt to halt the vehicle before he fired in the direction of the vehicle. Counsel furthermore submitted that in compliance with the requirements of s 49 the appellant was in the middle of an active investigation and the driver of the Corolla was suspected to be involved in the current robbery case, and the vehicle or its driver/owner was needed for questioning for the robbery case involving Angolan nationals. Thus, there existed reasonable suspicion which justified the conduct of the appellant in this matter.

In the premise, counsel argued, that the court erred in law when it found that the appellant could not rely on the protection afforded to law enforcement as his conduct did not comply with the requirements set out to invoke s 49. In this regard counsel relied on the authority of *Absalom Johannes v State*<sup>2</sup>. Counsel for the respondent argued that the police officers were wearing civilian clothes whilst driving an unmarked Polo and a reasonable person could not have known that these men were police officers. Therefore, when the driver of the Corolla drove away, he was not aware that an attempt was being made to arrest him, nor was he fleeing from the police.

[11] *Section 49* of the Criminal Procedure Act provides:

*'49. Use of force in effecting arrest.-*

*(1) If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person –*

*(a) Resists the attempt and cannot be arrested without the use of force; or*

*(b) Flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees, the person so authorized may, in order to effect the arrest, use such force as may in the circumstances be*

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<sup>2</sup> *Absalom Johannes v The State* (CA 20/2009).

*reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.*

*(2) Where the person concerned is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him the killing shall be deemed to be justifiable homicide. (My underlining)*

In *Macu v Du Toit and another*<sup>3</sup>, the court held that 'the person concerned' refers only to a person who:

- (a) resists the attempt and cannot be arrested without the use of force, or
- (b) flees when it is clear that an attempt is being made to arrest him or resist such attempt and flees...

The section does not refer to an innocent bystander<sup>4</sup> or passenger, like in this case.

In *Government of the Republic of South Africa v Basdeo and another*<sup>5</sup> the Supreme court held that: 'Section 49(2) should not, and indeed cannot, be regarded as a licence for the wanton killing of innocent people, nor can any attempt to extend its operation to cases not falling within its ambit be countenanced.'

[12] The deceased was an innocent passenger who got a lift in the vehicle driven by Mr Titus Shuuvani Shikomba. She was a woman and from the description given only men were involved in the robbery. She was not resisting any attempt to arrest her, nor was she fleeing from any attempted arrest. Reliance by counsel on the authority of *S v Johannes supra*, is misplaced as the facts are distinguishable from the facts in this case. In the *Johannes* matter a police officer shot and killed the deceased who had broken into someone's house and he was convicted of murder. On appeal the court

<sup>3</sup> *Macu v Du Toit and another* 1983 (4) SA 629 (A) at 641E-F.

<sup>4</sup> *George v Minister of Law and Order* 1987(4) SA 222(SE) 228G-I, 229B -C.

<sup>5</sup> *Government of the Republic of South Africa v Basdeo and another* 1996 (1) SA 355 (AD) at 368D - E.

found that the court below was correct to find that the appellant had not discharged the onus on a balance of probabilities that he had conformed with the requirements of s 49. The court found that the deceased had been in close proximity and the appellant had not fired a warning shot, nor had he aimed at the deceased's legs, he had aimed at his head. In this matter the appellant shot at an innocent passenger who was not suspected of having been involved in the robbery. In my respectful view s 49 provides no justification for the killing or injury of an innocent passenger and 's 49 may not be utilized as justification for the infliction of harm to persons other than the person whose arrest is sought to be effected or whose flight is sought to be prevented<sup>6</sup>. These grounds are accordingly meritless.

#### Grounds 2, 3, 4 and 7

##### Submissions by appellant

Counsel submitted that 'the court *a quo* did not apply its mind to the totality of the evidence produced inclusive of the medical evidence, the witness testimonies and placed too much emphasis on the fact that at the time of the shooting the appellant was a trained police officer and accordingly his conduct in the setting was reckless. The court further opined that due to the supposed presence of people in the area at the time of the shooting, which conclusion was drawn based on the evidence of witness Sibolile who in fact was not present at the time of the shooting, showed that the appellant should have foreseen that he may kill a person in the adjacent bars or one of the occupants of the vehicle. It is argued at this juncture that in finding that the appellant was reckless in his conduct, which implies a degree of negligence, the court should have returned a conviction on culpable homicide and not murder as is the case here.'

##### Submissions by respondent

Counsel for respondent argued that 'the court *a quo* found that the appellant's version that he ran after the vehicle and aimed at the tyres, improbable. This finding was made, by the court *a quo*, having a holistic view of the evidence before it, as opposed to

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<sup>6</sup> See: Du Toit et al (April 2000) at commentary on the Criminal Procedure Act 5 - 28A - 5 - 29.

evaluating it in isolation. Furthermore, the court *a quo* evaluated the photo plan which depicted that the back screen of the Silver Corolla was hit and the medical report which indicated where the deceased was struck by the bullet. The court *a quo* came to the conclusion that the only inference that the court can draw, is that the appellant did not aim at the tyres of the vehicle but rather at the vehicle itself. Counsel further argued that this finding is in accordance with the cardinal rule of logic applicable in respect of circumstantial evidence as summarized by the then appeal court in South Africa in the case of *R v Blom* 1939 AD 188 at 202 – 203.'

[13] These grounds amount to the fact that the court erred in rejecting the version of the appellant as improbable, despite corroboration by Constable Shikomba and Dr. Gurirab and that the court failed to appreciate the totality of the evidence produced. Shikomba testified that he was present when the accused ran after the Corolla shouting for the driver to stop. He also testified that he saw the appellant aiming at the left rear tyre when the appellant fired the second shot. The court *a quo* rejected his version and reasoned that the appellant's was in front of him with his back turned on him, therefore his view was obscured and could not see in which direction he fired. The fact that he was standing behind the appellant does not mean that he could not see the appellant aiming at the tyre. The appellant was running straight behind the Corolla in the street and Mr Shikomba was at the Polo which was parked opposite the road and it is possible that from the angle where he stood or his vantage point, as submitted by counsel for appellant, he could clearly see where the appellant was aiming, namely the left rear tyre. The learned magistrate further reasoned that if the appellant fired the shot into the (tarmac) road, there would have been a marking on the road if the bullet ricocheted. The evidence of Shilamo that he looked for a mark but could not find it, is not conclusive. In cross-examination he testified that he could not dispute the possibility that the bullet ricocheted. There is also no evidence from a ballistic expert to dispute the version of the appellant that he aimed at the rear tyre and that the bullet ricocheted. His version was also corroborated by Constable Shikomba who testified that he saw the appellant aiming at the tyre. Dr Guriras who conducted the post-mortem also testified that she could not dispute the version of the appellant that the bullet ricocheted. In my respectful

view the court misdirected itself in concluding that the only reasonable inference to be drawn is that the appellant did not aim at the tyre of the vehicle, but at the vehicle itself. In my opinion the evidence shows that he indeed aimed at the tyre of the Corolla when he fired the second shot. If that is the case, did the accused have the intention to kill the deceased? The version of the appellant is that he had no intention to kill the driver or the deceased, but aimed at the tyre of the vehicle because he suspected that the driver was involved in the robbery. This version was also conveyed by both Constable Shikomba and the appellant to the investigating officer when they were interviewed the next day. The version of the appellant is therefore reasonably possibly true.

[14] If that is the case, can the accused be convicted of a competent verdict of culpable homicide? The facts are that the accused had a lethal weapon and was running after a fast moving vehicle in which persons were when he fired the shot at the tyre. It was therefore not possible to shoot with any degree of accuracy and he must have realised that the shot might hit someone and he failed to take the necessary steps to guard against that eventuality. He is therefore guilty of culpable homicide<sup>7</sup>.

### Sentence

[15] The appellant was sentenced to twelve years direct imprisonment on the count of murder with *dolus eventualis*. Now that his conviction on murder has been overturned and replaced with culpable homicide, it follows that this court must interfere with the sentence. In *S v Rabie*<sup>8</sup> the court held that '*punishment must fit the criminal, the crime as well as the interests of society, and must be blended with mercy or compassion.*' The applicant is a first offender. He was a police officer and the shooting incident that claimed the life of the deceased occurred whilst he was performing his duties as a police officer. According to his testimony he thought that the driver of the Corolla was one of the suspects who was involved in the robbery the previous day and that is why he chased after the Corolla. He asked forgiveness from the family of the deceased and that is an acknowledgement of wrongdoing and remorsefulness. In my respectful view

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<sup>7</sup> *S v William* 1992 NR 268 at 271C - D.

<sup>8</sup> *S v Rabie* 1975 (4) SA 855 (A) at 861A - 862F.

those are weighty considerations that the court must attach weight to. The crime of culpable homicide is a serious crime. An innocent human being lost her life. What diminishes his moral blameworthiness is the fact that the appellant had no intention to kill the deceased, but he should have realised, that his action may cause the death of the deceased, and he failed to take steps to guard against that. In my respectful view, although society expects anyone who commits a crime of culpable homicide should be punished severely, society also expect that each case should be treated on its own merits when punishment is meted out. In this case the appellant was a police officer who was on a mission to investigate a robbery that occurred the previous day. He suspected that the driver of the Corolla was involved in the commission of that robbery and that is why he chased after it and shot at it. Given the circumstances of the appellant, the punishment to be imposed should be blended with mercy. This court is at large to consider what an appropriate sentence is. In *S v Johannes*<sup>9</sup> this court sentenced an appellant who was a police officer and who was convicted of murder acting with *dolus eventualis* to five years' imprisonment, wholly suspended for five years on the usual condition. The court reasoned that a police officer who kills a fleeing suspect under these circumstances should not be treated as an ordinary criminal who has committed an offence of murder. It is further clear from that judgment and sentence that the magistrate never considered suspending the sentence at all, or part of it. The court reasoned that this constituted a misdirection. In this matter the appellant, also a police officer, was pursuing what he believed to be a suspect when he shot the deceased in the course of his duties. He had no intention to kill the deceased but was negligent in causing the death of the deceased. In the result a custodial sentence, wholly suspended would be appropriate in the circumstances.

#### Order

1. The appeal succeeds.
2. The conviction of the appellant on murder acting with *dolus eventualis* is set aside and substituted with the following:

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<sup>9</sup> *S v Johannes* 2009 NR 579 HC at 595.

The appellant is convicted of culpable homicide.

3. The sentence of 12 years imprisonment is set aside and substituted with:

The appellant is sentenced to five years' imprisonment wholly suspended for a period of five years on condition that the appellant is not convicted of culpable homicide, committed within the period of suspension.

4. The sentence is antedated to 12 April 2017.

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G.N. NDAUENDAPO

Judge

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J. C. LIEBENBERG

Judge

FOR THE APPELLANT:

Mr Brockerhof

Of Legal Aid, Windhoek

FOR THE RESPONDENT:

Ms Jacobs

Of the Office Of The Prosecutor General