

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

LEAVE TO APPEAL JUDGMENT

Case No: CA 28/2016

In the matter between:

**THE STATE**

**APPLICANT**

And

**MICHAEL KUSCH**

**RESPONDENT**

**Neutral citation:** *State v Kusch* (CA 28/2016) [2017] NAHCMD 38 (13 FEBRAURY 2017)

**Coram:** NDAUENDAPO, J

**Heard:** 3 February 2017

**Delivered:** 17 February 2017

**Flynote:** Application for leave to appeal against conviction and sentence – Leave to appeal against conviction and sentence must only be granted where there are reasonable prospects of success on appeal – Application for leave to appeal granted.

**Summary:** The respondent was charged with housebreaking with intent to steal and theft. He had acted as watchman for a co-accused who broke into premises with scissors supplied by the respondent for the purposes of breaking and entering the premises. Knowing what the intention of the co-accused was, the respondent supplied the co-accused with scissors to break in, enter and steal the printer. The co-accused then gave the respondent the stolen printer. The respondent took this printer home with the intention to sell the same. The trial court convicted the respondent of the competent verdict of theft instead of housebreaking with intent to steal and theft. The applicant, now wishes to appeal against this conviction on the grounds that the respondent acted in association with the co-accused and that the principles relating to the doctrine of common purpose should have been applied. The applicant thus avers that the respondent should have been convicted of housebreaking with intent to steal and theft and not on the competent verdict of theft.

Held; that there are reasonable prospects that the court of appeal will come to a different decision.

Held; that the application for leave to appeal is granted.

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### **ORDER**

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

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### **APPLICATION FOR LEAVE TO APPEAL**

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NDAUENDAPO, J

#### Introduction

[1] This is an application for leave to appeal against the judgment of the Walvis Bay District Magistrate Court. In that court, the respondent was arraigned on a charge of housebreaking with intend to steal and theft. The court found the respondent guilty on

the competent verdict of theft. He was subsequently sentenced to three months imprisonment or to pay a fine of N\$ 800.00. The applicant dissatisfied with this judgment now applies to appeal against the same.

[2] The application was argued before this court by Mr. Kuutondokwa for the applicant and Mr. Ipumbu for the respondent.

### The Application for leave to appeal

[3] In terms of s 310 (1) and s 310(2) of the Criminal Procedure Act<sup>1</sup>:

'The Prosecutor-General or, if a body or a person other than the Prosecutor-General or his or her representative, was the prosecutor in the proceedings, then such other prosecutor, may appeal against any decision given in favour of an accused in a criminal case in a lower court, including-

- (a) any resultant sentence imposed or order made by such court;
- (b) any order made under section 85(2) by such court,

to the High Court, provided that an application for leave to appeal has been granted by a single judge of that court in chambers.

(a) A written notice of an application referred to in subsection (1) shall be lodged with the registrar of the High Court by the Prosecutor-General or other prosecutor, within a period of 30 days of the decision, sentence or order of the lower court, as the case may be, or within such extended period as may on application on good cause be allowed.

(b) The notice shall state briefly the grounds for the application.'

[4] This application is thus properly and timeously before this court.

### Brief factual background

[5] On 20<sup>th</sup> May 2015, the respondent was visited by one Prince Eiseb, the co-accused in the court *quo*. Upon arrival at the respondent's house, the co-accused informed him that there was a printer 'at Welwitschia' that he wanted and all he needed from the respondent were tools. The respondent gave the co-accused scissors. The co-accused requested the respondent to go with him and only after the third time, the

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

respondent agreed to go with the co-accused. At the premises where this printer was, the co-accused told the respondent to stand outside and keep a look out for him, while he broke into the premises to get the printer. The respondent obeyed these instructions and played watchman for the co-accused who broke into the premises and stole the printer. Thereafter, the co-accused gave the printer to the respondent, who took it home with the intention of selling it.

[6] In its notice of application, the applicant set out its grounds of appeal against both the conviction and sentence. The applicant's main submission in respect of the conviction is that the trial court 'misconstrued the legal principles applicable and relevant to the determination of the application of the doctrine of common purpose which resulted in the application of the wrong test and thereby wrongly convicted the respondent of theft'. Counsel for the applicant further submitted that, the fact that the trial court accepted that the respondent was under the influence of intoxicating substances because his eyes were tiny at the time of the commission of the offence was a misdirection. Furthermore, that the sentence imposed was so inappropriate and shocking and should be substituted with a custodial sentence.

[6] The respondent filed his heads of argument and therein stipulated his grounds of opposition against the application. Counsel for the respondent submitted that, the respondent did not have the intention to break in and was correctly convicted of theft only and not housebreaking with intent to steal and theft. Furthermore that the respondent merely played watchman and did not break into the premises. It was further submitted on behalf of the respondent that, the sentence imposed by the trial court was appropriate. According to the counsel for the respondent, mitigating factors which justified this sentence were that the respondent was a first offender, that the stolen item (the printer) was recovered, that the respondent was a youthful offender as he was 18 years old at the time of his conviction and sentence, that the respondent was remorseful, that the respondent was under the influence of intoxicating substances before he committed the offence and lastly, that the printer's value was N\$ 750.00.

### The Test in respect of an application for leave to appeal

[8] In determining whether to grant or refuse an application for leave to appeal, this court will have to be guided by the test as applied in *Nowaseb v S*<sup>2</sup>. The court has to be convinced that there are reasonable prospects of success on appeal before it grants an application for leave to appeal. That is, this court should be convinced that ‘there is reasonable prospect that the court of appeal may take a different view’ the possibility of a mere difference of opinion it seems will not do.

### The Doctrine of Common Purpose

[9] In cases such as this, where two or more persons are in each other’s presence and the one commits an offence, the question is, can the conduct of the one be imputed on the other? It is in cases like these that courts apply the doctrine of common purpose. ‘The essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together to achieve that purpose, then the conduct of each of them in the execution of that purpose is imputed to the others. . . The essential requirement is that the persons must all have had the intention to murder [or in this case, to break into premises and steal the printer (my addition)] and to assist one another in committing the murder [or in this case, assist one another in breaking into the premises and stealing the printer (my addition)].<sup>3</sup> Snyman, although the discussion in his book is limited to the offence of murder states that, ‘the doctrine is couched in general terms and therefore not confined to one type of crime only’.<sup>4</sup> He states further that, for the conduct of one accused to be imputed on the other, it is not necessary that the intention of the latter be *dolus directus* (direct intention). ‘It is sufficient if his intention takes the form of *dolus eventualis*’, that is, that ‘he foresees the possibility that the acts of the participants with whom he associates himself may result in Y’s death [breaking and entering the premises of another and stealing property on those premises and belonging to another (my addition)] and reconciles himself to this possibility’.<sup>5</sup>

[10] In *S v Safatsa and Others*, in the headnote Botha, JA had the following to say; ‘The principle applicable in cases of murder where there is shown to have been

<sup>2</sup> *Nowaseb v S* Case No.: 51/2005, delivered on 23 October 2007.

<sup>3</sup> CR Snyman, 2008 *Criminal Law* 5<sup>th</sup> Ed. Durban:Lexus Nexis (2008) p 265.

<sup>4</sup> CR Snyman, 2008 *Criminal Law* 5<sup>th</sup> Ed. Durban:Lexus Nexis (2008) p 265.

<sup>5</sup> CR Snyman, 2008 *Criminal Law* 5<sup>th</sup> Ed. Durban:Lexus Nexis (2008) p 268.

*common purpose is that the act of one participant . . . is imputed, as a matter of law, to the other participants (provided, of course, that the necessary mens rea is present). A causal connection between the acts of every party to the common purpose and the [result of those acts (my addition)] need not be proved to sustain a conviction . . . in respect of each of the participants.*<sup>6</sup> Therefore, causation need not be proven in respect of the respondent. What needs to be proven is that, the respondent knew that the co-accused had the intention to break into a certain premises to steal a printer and that the respondent reconciled himself with this intention. 'It has long been accepted that the operation of the common purpose doctrine does not require each participant to know or foresee in detail the exact manner in which the unlawful consequence occurs. Were it otherwise, it would not be possible to secure a conviction simply on the basis that some event had happened during the execution of the common purpose that all the participants in the common purpose had not more or less planned for. All that is required for the state to secure a conviction on the basis of common purpose is that an accused must foresee the possibility that the acts of the participants may have a particular consequence . . . , and reconciles himself to that possibility.'<sup>7</sup>

[11] Having regard to the facts of this case as well as the written and oral submissions of both parties in light of the principles relating to the doctrine of common purpose, this Court is satisfied that there are reasonable prospects that the court of appeal will come to a different finding from that of the trial court.

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

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NDAUENDAPO, J

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<sup>6</sup> *S v Safatsa and Others* 1988(1) SA 868 (A).

<sup>7</sup> *S v Molimi and Another* 2006 (2) SACR 8 SCA para.33.

**APPEARANCES**

APPLICANT

Mr Kuudondokwa

For the Office of the Prosecutor General

RESPONDENT

Mr Ipumbu

Ipumbu Legal Practitioner