REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPLICATION FOR LEAVE TO APPEAL

CASE NO: CC 38/2009

In the matter between:

JULIUS DAUSAB **APPLICANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Dausab v S* (CC 38/2009) [2018] NAHCMD 327 (19 October 2018)

Coram*:* SIBOLEKA J

Heard on: 24 September 2018

Delivered: on: 19 October 2018

Flynote: Criminal law: Application for leave to appeal against conviction – the test is to satisfy/convince the court, that there are reasonable prospects of success on appeal – such is not the case on this matter. – Application is dismissed. Appeal against sentence is in order.

Summary: The applicant, armed with a .308/7.62 mm hunting rifle shot and killed his girlfriend and her mother at Kavendja's residence in Ovitoto. Regarding the severity of his sentence on this matter, there is merit, and the appeal should succeed.

Held: The prosecution evidence is very solid and so credible such that the applicant has no prospects of success on conviction.

Held: The application for leave to appeal against conviction cannot succeed. However, the same cannot be said as regards sentence.

ORDER

In the result I make the following order:

a) The application for leave to appeal against conviction is dismissed.

b) The appeal against sentence succeeds.

APPLICATION FOR LEAVE TO APPEAL JUDGMENT

SIBOLEKA J:

[1] On 31 January 2017 the applicant was convicted: and sentenced on 03 April 2018 as follows:

Count 1: Murder dolus directus – read with Act 4 of 2003: 38 years' imprisonment

Count 2: Murder dolus indirectus: 25 years' imprisonment

Count 3: Possession of a firearm without a licence: 2 years' imprisonment

Count 4: Possession of ammunition on diverse occasions without a licence: 2 years' imprisonment: It was ordered that the sentences imposed in counts 3 and 4 were to run concurrently with the sentence imposed on him in count 1.

[2] He now applies for leave to appeal against the above conviction.

[3] On this matter the applicant was convicted on 31 January 2017. On 18 October 2017 the applicant filed an application for leave to appeal against his conviction. This application was removed from the roll for failure to comply with the rules of court. The application was not accompanied by an application for condonation for the late filing of the notice of appeal given the fact that it was lodged out of time.

[4] The same applicant came before this court again today on the same application for leave to appeal. The court will state the material shortcomings on this application. I will first start with the sworn affidavit by the applicant himself.

[5] In paragraph one he appropriately identifies himself as an adult male person, the 'applicant'.

[6] In the second paragraph he states that:

'I am consequently duly able and authorized by the applicant to dispose to this affidavit …'

This Court is not able to state whether that is only an 'error' or an oversight on the part of the counsel drafting the documents on the applicant's behalf. But the error is material in the sense that it destroys the very purpose for which the application stands for before this court. I say the above because it is the 'applicant' himself who is legally obligated to explain to this court the reason why he filed his notice out of the prescribed period of fourteen days. When the applicant so explains he is not allowed to do so on behalf of somebody else. I will accept the above mistake as a typing error.

[7] The second material defect on the applicant's purported sworn affidavit is that it has not been commissioned at all. There is only a purported signature but the same is not accompanied by the prescribed particulars of the Commissioner of Oats – such as his full names; capacity, and the relevant address of his duty station. This important portion of the applicant's affidavit has not been completed at all. Section 4(2) of the

regulations made in terms of the Justices and Commissioners of Oaths Act 16 of 1963 (Section 10): Regulations Governing the Administering of an Oath or Affirmation Government Notice 1258 of 1972 (RSA GG 3619) that came into effect on 21 July 1972 states the following:

'4(2) The Commissioner of Oaths shall sign the declaration and state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio'.

In Court the applicant's counsel did not find it appropriate to explain this material failure.

[8] It is a requirement that an application for condonation must be on a sworn affidavit. It follows therefore that there is no proper application for condonation for the late filing of this notice of appeal. This, as I have stated already is the applicant's second application and appearance before Court represented by Counsel. The first application was struck from the roll for failure to comply with the rules and this is the second application also riddled with material defects. I feel legally hesitant to throw out this application because it is on a private instruction, meaning the applicant has paid, like he did the last time. This, coupled with the fact that, the applicant is looking for closure on this application, which is coming a long way back. I have thus directed the parties to nonetheless address me on the merits, which they did.

[9] In short what comes out in the grounds of the application for leave to appeal are the following; the rest are only the counsel's own conclusions which are not in accord with the body of the evidence on this matter.

[10] The first ground is that the R1 rifle ammunition that fires in the .308/7.62 mm the applicant had borrowed from Kheimseb and was in possession of at the scene of crime is only used by the military and the police. It is not available to civilians. This ground has no merit. The applicant himself testified that he borrowed the said hunting rifle without ammunition. The evidence of Kheimseb from whom he borrowed the rifle is that the

applicant told him he will get ammunition elsewhere. The ballistic expert's evidence on this point is that it was possible to get the ammunition of the .308/7.62 mm hunting rifle elsewhere. This evidence is credible given the fact that the applicant was going to shoot a stray donkey. Logical thinking credibly shows that the applicant could not have proceeded to borrow the rifle without ammunition if he knew that he would not be able to secure the same from somewhere else. The reason being that he would then not be able to execute the shooting of the stray donkey. It follows therefore that the legal owner of the rifle was correctly told by the applicant that he will get the rounds from elsewhere which is what he did, hence the two rounds of the empty cases retrieved at the scene were ballistically connected to the said rifle.

[11] The second ground is that the rifle did not have a silencer, Kavendja would have easily heard the first gun shot. This is not a ground, it is the counsel's own conclusion and it has been credibly displaced by Kavendja's evidence regarding his inability to hear the first gunshot.

[12] According to the applicant the following had happened. Before the incident he borrowed a .308/7.62 mm rifle from Kheimseb to shoot a stray donkey. He handed the rifle back to the owner informing him that the animal was not yet found and placed in the kraal where it could be shot and slaughtered. Once the above was confirmed to him he will again re-borrow the said rifle. On the day of the incident he re-borrowed the rifle informing Kheimseb that the animal has been found and placed inside the kraal. Both the first and the second borrowing of the rifle was without ammunition. It was from here that the applicant proceeded driving to the scene of crime to visit his girlfriend while in possession of the said rifle. He parked his Ford Cortina bakkie at the residence of Simon Kavendja, the scene of crime, and it remained there until the incident came to the end. The applicant and his girlfriend had put up bedding at the back of the bakkie. Kavendja confirmed the applicant's evidence on that score. He went to the bush to relieve himself and while there he saw a white sedan vehicle driven by an unknown person which also came and parked at the scene twice. None of its occupants came out, and it later drove off. He was still in the bush when the same sedan vehicle came

back and again parked at the scene. This time he saw a stout short man disembarking from it and started to exchange words related to a soured love relationship with the applicant's girlfriend who was inside the back of the bakkie. During this exchange the unknown man shot her to death. The same man started exchanging words of the same nature and on the same tone with the mother of the applicant's girlfriend who was sleeping inside the shack/house with Simon Kavendja and five children. This man shot through the shack/house door and struck the applicant's mother-in-law. She died inside there. The sedan vehicle drove away.

[13] According to Kavendja, the prosecution witness, during the afternoon on the day of the applicant's visit to his residence, he was tired when he went to bed, because he had been drawing water on a donkey cart. This is the reason why he was unable to hear the first gun shot that killed his stepdaughter, the applicant's girlfriend. After his wife, the second deceased had woken him up, she started walking heading for the shack door to go out, but she was struck by a gunshot and she fell down dead before she could even open the door.

[14] Immediately after Kavendja's wife had fallen down dead, the accused called and asked him to come out and help him push his bakkie to start. When Kavendja opened the door of his shack he saw the applicant standing in front of the door holding a rifle in his hands. That is how Kavendja came to know that it was the applicant who shot through the shack door of his house killing his wife.

[15] The applicant said to Kavendja 'I have got no problems with you … there are no problems with you … I will not do anything to you.'

The applicant reassured Kavendja that he will not harm him because he did nothing wrong to him. In general the above words could safely be taken to mean that the applicant had some problems with the two women he had just gunned down. At gunpoint the applicant told Kavendja to assist him to push the vehicle to a start which he did. When the applicant's vehicle started, Kavendja jumped the fence and ran away. It is

that borrowed .308/7.62 mm hunting rifle Kavendja saw in the applicant's hands when he opened the door of his shack which the results of the ballistic expert tests found to have fired the two bullets who's empty cases were retrieved at his shack (the scene of crime). The two deceased females were each shot once.

[16] The prosecution evidence further shows that the police arrived at the scene of crime that same day in the early hours of the morning. They only saw the tracks of the applicant's vehicle. There were no tracks of the alleged second vehicle. Kavendja, the owner of the residence where the incident took place testified that there was only the applicant's vehicle at his house.

[17] It was in view of the above solid, credible evidence that this court was satisfied beyond reasonable doubt that there was no second vehicle driven by an unknown person that came and parked at the scene of crime twice at the time of the incident. It was only the applicant who came at the scene of crime armed with a hunting rifle which he used to shoot the two ladies to death. It follows therefore that it is highly unlikely that another Court may arrive at a different conclusion on this matter. The applicant has therefore no prospects of success on appeal. From this evidence, it follows therefore that the application for leave to appeal against conviction has no merit.

[18] From the beginning, the applicant's counsel did not mention anything in regard to an appeal on sentence. He has however related to that as an additional ground at the end of his grounds of application for leave to appeal. In this disregard the court will make the following observations: In view of the Supreme Court's ruling in the matter of *Zedikias Gaingob & Three others* Case Nos. SA 7/2008 and SA 8/2008 delivered on 06 February 2018 wherein custodial sentences in access of twenty five; thirty seven and half years imprisonment were found to be unconstitutional, the applicant's appeal in this regard has merit, and should be allowed.

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

a) The application for leave to appeal against conviction is dismissed.

b) The appeal against sentence succeeds.

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A M SIBOLEKA

Judge

APPEARANCES:

FOR THE APPLICANT: Mr. M. Siyomunji
Directorate of Legal Aid, Windhoek

FOR THE RESPONDENT: Mr. E. Moyo
Office of the Prosecutor-General, Windhoek