



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPLICATION FOR LEAVE TO APPEAL
RULING

Case No: CC 27/2012

In the matter between:

MELANIE THERON

APPLICANT

and

RESPONDENT

THE STATE

Neutral citation: *Theron v S* (CC 27/2012) [2020] NAHCMD 246 (10 June 2020)

Coram: NDAUENDAPO, J

Heard: 26 May 2020

Delivered: 10 June 2020

Flynote: Application for leave to appeal against conviction and sentence-Applicant convicted of contravening provisions of Anti-Corruption Act-Leave to appeal to be granted where there are reasonable prospects of success on appeal-No reasonable prospects of success on appeal exist-Application dismissed

Summary: The applicant was convicted of nineteen counts of contravening, *inter alia*, the Anti –Corruption Act and defeating and or obstructing the course of justice. She was sentenced to four years’ imprisonment of which two years were suspended. The applicant, a former magistrate, received payments (gratification) from traffic offenders and withdrew traffic tickets without the offenders appearing in court. As a result, she was charged with contravening the anti-corruption act.

The court found that she did receive payments (gratification) from these offenders and in return withdrew the charges against these offenders without any legal basis

ORDER

The application for leave to appeal against conviction and sentence is dismissed.

APPLICATION FOR LEAVE TO APPEAL

NDAUENDAPO, J

Introduction

[1] This is an application for leave to appeal against conviction and sentence. The applicant, a former magistrate, was convicted of nineteen (19) counts of, *inter alia*, contravening s 43(1) of the Anti-Corruption Act 8 of 2003 (corruptly using office or position for gratification, defeating or obstructing the course of justice, contravening s 47(a) of Act 8 of 2003. She was sentenced to four years’ imprisonment of which two years’ were suspended on the usual condition.

The applicable legal principles

[2] The applicable legal principles were succinctly set out in *S v Nowaseb* (2007(2) NR 640(HC) where the court said:

'The judge must ask himself or herself whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal, in other words, whether there is a reasonable prospect that the court of appeal may take a different view...But, it must be remembered, the mere possibility that another court might come to a different conclusion is not sufficient to justify the grant of leave to appeal.' (*S v Ceasr* 1977(2)SA 348(A) at 350E)

The court further stated:

'Application for leave to appeal have been dealt with extensively by this court. Time and again this court has emphasized that an application for leave to appeal under s316 (1) of the Criminal Procedure Act 51 of 1977 should be allowed if the court is satisfied that the accused has a reasonable prospect on appeal. These applications are not granted on compassionate ground, to console the accused or simply afford them a further opportunity to ventilate their arguments and, to obtain another judgment in a court of appeal.'

The grounds of leave to appeal are stated as follows:

Ad conviction

I will deal with the grounds *seriatim*

GROUND 1

Count 1

[3] 'The learned judge erred in concluding that the applicant withdrew the ticket without the prosecutor being present and yet the ticket was defective. The applicant testified that there was no year indicated and also no citation of the law and as such the ticket was defective and she withdrew it after an application was made by the prosecutor. Apart from the mere say so by witness Tertius Sabas that he did not appear in court when the ticket was withdrawn, there is no proof to that effect. The applicant testified that the prosecutor in her court on 26th May 2011, who also brought the application for the ticket to be withdrawn, was Ms. Shilunga, who was

never called as a state witness. In addition, the ticket of Mr. Daniel Nuuyoma as presented to court, did not have an annexure attached to it.'

Discussion

[4] Mr. Nuuyoma testified that he was issued with a traffic ticket on 24 February 2011. The fine was N\$1000 and the trial date was 26 May 2011. He gave the ticket and N\$2000 to Mr. Sabas to go and pay. He did not appear in court on 26 May 2011 and the accused withdrew the charge on her own without an application by the prosecutor. The applicant testified that the ticket was defective because there was no act cited. Even if no act cited, s84 (3) of the CPA, 51 of 1977 provides that the description of any statutory offence in words of the law creating the offence, or similar words, shall be sufficient. Mr. Sabas testified that he paid the N\$1000 to the applicant in her chambers and did not receive a receipt and that was the reason why she withdrew the ticket. Although the prosecutor, Ms. Shilunga, did not testify, Messrs. Nuuyoma and Sabas testified that they were not at court when the charge was withdrawn. The applicant testified that somebody did appear and that it was not her duty nor the practice, to confirm the identity of the appearer. That is clearly not true as everybody who appeared before her was the person whose name appeared on the traffic ticket. Why somebody else would appear on behalf of the offender and paid a fine or faced a jail term for an offence he or she did not commit? That is absurd. There is no merit in this ground.

Count 3

[5] 'With respect to exhibit "FFF", the ticket of Michael Sheehama, the learned judge erred by concluding that entries made in respect of Sheehama were false and that the proceedings did not take place because witness Michael Sheehama himself was not called to court to confirm this fact. The learned judge erred by believing the testimony of interpreter Mbware, which was not corroborated and contrary to what was reflected in the court book. (See record, page 849-850). In addition, the prosecutor indicated on the court documents is Shilunga, and she was never called to confirm that the said proceedings did not take place. Mr. Mbware confirmed that there were trainee interpreters during that period and their names would not be

recorded on the court records and Mr. Mbwale agreed that if, a trainee interpreter was present, the Magistrate cannot write their name on the court record but would write the name of an interpreter. (See record, Page 859 – 861).'

Discussion

[6] Although Mr. Sheehama in whose name the ticket was issued did not appear, Mr. Mbwale who was the interpreter assigned to the court of the accused, testified that he was the casual interpreter and worked with the applicant in court. He testified that the extract from the court book Exh "HHH" dated 27 June 2011¹¹ showed that the accused was Mr. Sheehama, presiding officer Ms. Theron and interpreter Mr. Maule and prosecutor Ms. Shilunga. The following entries were recorded:

'SP: Warrant of arrest inquiry

Crt: Accused, why were you absent from court?

Acc: I lost the ticket during the flood.

Crt: Satisfied. Warrant of arrest cancelled.

SP: Puts charge to accused.

Crt: Accused and you understand the charge and how do you plead/

Acc: Understand and plead guilty

Crt: accused you are found guilty

SP: No previous convictions

Crt: Accused's rights to mitigation explained

Acc: I have nothing to say

SP: Leave in the hands of court

Crt: Sentence-warned and cautioned'.

[7] Mr. Mbwale testified that those entries were made by the applicant and he was not present when those entries were made. Those entries were false and in contravention of s47 (b) of the Anti-Corruption Act 8 of 2003.

There is no merit in this ground.

Count 5

[8] 'The learned judge erred by concluding that Mr. Kakelo paid N\$500 to the applicant and yet there was no proof to that effect. There was also no proof that Mr. Kakelo did not appear in court on 12th August 2011 when the ticket was withdrawn and Kakelo himself was not sure about the date he appeared in court and indicated that it was the 15th August 2011. There was no proof presented that showed that the applicant did not withdraw the ticket based on the application that the prosecutor made. The prosecutor indicated on the court documents was Ms. Shilunga and she was never called to confirm that the proceedings did not take place.'

Discussion

[9] Mr. Kakelo testified that he was issued with a traffic ticket in May 2011. After that he was called and proceeded to room 8 at osha Kati magistrate's court and paid N\$500 to the applicant, but did not receive a receipt. The applicant denied that .On 12 August 2011 Mr. Kakelo did not appear in court, yet the charge/ticket was withdrawn by the applicant. There was no legal basis to withdraw the charge and by so doing the applicant contravened s 43(1) of Act 8 of 2003. There is no merit in this ground.

Count 6

[10] 'The learned judge erred by concluding that the entries of 12th July 2011 were false and that there was no application made by prosecutor Shilunga and yet Shilunga was not called to confirm this. In this regard there was no proof that Ms. Hekandjo did not appear in court on 12th July 2011 and that the entries in exhibit "JJJ2" are false'.

Discussion

[11] Ms. Hekandjo testified that in 2011 she owned a taxi, driven by Mr. Shikalepo. A traffic ticket was issued against Mr. Shikalepo, he failed to appear in court and on 30 June 2011 a warrant of arrest was issued. Ms Hekandjo testified that on 12 July 2011 she did not appear in court before the applicant. Exh "JJJJ", court book record showed that the employer, Mr Hekandjo, appeared in court. The presiding officer was the applicant .The entries as reflected in Exh "JJJJ" are false and was meant to defraud or conceal an offence in terms of s47(a) of act 8 of 2003.This ground is without substance.

Count 7

[12] 'The learned judge erred in concluding that because the applicant cancelled the warrant of arrest that was not signed, she made herself guilty of obstructing the course of justice in respect of Mr. Shikalepo. Mr. Franco Cosmos confirmed that a warrant of arrest has to be signed by a Magistrate to authorize it and that according to the training Magistrates, the Warrant of Arrest needs to be signed by a Magistrate, even if it is held over for 14 days. (See record, page 247-248)'

Discussion

[13] Mr. Cosmos testified that he was the magistrate assigned to the traffic court on 30 June 2011 at Oshakati magistrate's court and he noticed in the court book that the case of Mr. Shikalepo was withdrawn before he had dealt with it. After noticing this irregularity and bringing to the magistrate in charge, and as Mr. Shikalepo was in default, he ordered that a warrant of arrest be issued. The applicant testified that because the ticket was defective as there was no act citation, she had to do an inquiry and cancelled the warrant of arrest in respect of Mr. Shikalepo. She further testified that the warrant was also not signed and therefor invalid. The applicant assertion that she could cancel the warrant of arrest because it was not signed is misplaced, bearing in mind that Mr. Shikalepo was still in default on 12 July 2011 and did not attend court on

that day and by cancelling the warrant of arrest, the applicant made herself guilty of defeating or obstructing the course of justice. There is no merit in this ground.

Count 8

[14] 'The learned judge erred by concluding that the applicant was paid N\$1,000.00 by Mr. Hiluwa and yet there was no proof to that effect and there was no corroboration of the payment. There was also no proof that Mr. Hiluwa did not go to court on 28th July 2011, and the prosecutor who was indicated on the court record, Mr. Ipinge, said he could not recall those proceedings but he could not dispute them but he did confirm that he was the prosecutor in court on that date. (See record, page 760-762) Mr. Ipinge further stated that he could not recall which particular accused persons were in court on 28th July 2011 because there were about 69 traffic matters on the court roll. Mr. Ipinge further stated that he cannot say what he could have specifically applied for on the date in question in court and thus could not dispute that he made such an application. Witness Ipinge further confirmed that he worked with the applicant in 201 and that in practice there are some warrants of arrests that are cancelled in chambers by the Magistrates. (See record, page 761)'

[15] 'The witness further stated that he cannot dispute the record of 28th July 2011, which indicated that he was the prosecutor in the court of the applicant, and the matter was indeed in court. The record pertained to the case of Israel Haulenga. The witness stated that he was not the only prosecutor who worked with the applicant but most importantly, he said that discretion in terms of the sentence to impose lies with the Magistrate. (See record, page 775) Concerning entries in the court book, this witness informed the court that the entries are done by the court interpreters, except for the verdict and sentence that is entered by the Magistrate, but remarks are done by the clerks. (See record, page 783) This witness further admitted that there is nothing in the Criminal procedure Act 51 of 1977 as amended, that directs a presiding officer to issue a warrant of arrest, even when a ticket is defective. (See record, page 795)'

Discussion

[16] Mr. Haulenga testified that he was issued with a traffic ticket during 2011. He sent Mr. Hiluwa to go and pay the ticket for him. On Sunday he gave N\$1000 to Mr. Hiluwa and his ATM card to go and withdraw an additional N\$1000. On Monday, Mr. Hiluwa called him and told him that he had paid N\$1000 to Ms. Theron, but did not get a receipt. He further testified that he did not appear in court on 28 July 2011 before the applicant in respect of the traffic ticket where in the court book it was indicated that Mr. Haulenga pleaded guilty and made submissions in mitigation. Mr. Hiluwa also testified that he did not appear in court on 28 July 2011.

[17] The applicant testified that those proceedings took place and Messrs. Haulenga and Hiluwa did appear in court before her. Mr. Ipinge, the prosecutor testified that he could not remember those proceedings, but he noted the shockingly lenient sentence: "warned and cautioned" The applicant evidence that somebody must have appeared before her to make those entries is difficult to fathom, as it is highly unlikely that anybody else, except the person in whose name the a ticket had been issued, would appear before a magistrate, plead guilty and mitigate on behalf of the real owner of the ticket and pay affine or in default face a jail term. Mr. Haulenga's evidence that he was not in court is credible, otherwise why would he lie about it? The state proved beyond a reasonable doubt that the applicant contravened s47 of the Anti-Corruption Act, 3 of 2003. There is no merit in this ground.

Count 9

[18] 'The learned judge erred by concluding that the proceedings of 28th July 2011 with respect to Mr. Haulenga did not take place just merely based on Mr. Mbwale's testimony and yet there was a court record and Mr. Mbwale testified that there were casual interpreters that were present at the station. The prosecutor indicate on the record, Ms. Shilunga was again not called to confirm this version. Mr. Mbwale also testified that it is indeed the interpreters' responsibility to ensure that entries are made in the court book. (See record, page 837) The witness further testified that during the time

in question, there were many trainee interpreters working at Oshakati court, but in practice trainee interpreter's names are not entered into the court record but only permanent interpreters names are put there, even if they were not in court. (See record, page 859)'

Discussion

[19] According to Exh FF1, FF2 and contrary to counsel submission, the Prosecutor was not Ms. Shilunga but Mr. lipinge. Both Mr. Hiluwa and Mr. Haulenga, to whom the ticket was issued, denied being at court on that day. Prosecutor lipinge conceded on judicial sentencing discretion, but the record bears out his incredulity at the shocking sentences recorded for Mr. Hauling by the applicant. This ground is meritless.

Count 10

[20] 'The learned judge erred by concluding that Mr. Kakelo paid N\$500.00 to the applicant and yet his testimony was that he paid N\$500.00 to a "Baster lady" and also that there was no proof of this payment and no corroboration. The prosecutor in court at that time Ms. Shilunga, was again not called to dispute that she took the warrant of arrest to the applicant in her chambers in her capacity as Magistrate on that date.' **The applicant was acquitted on this count.**

Count 11

[21] 'The learned judge erred by concluding that Mr. Haulenga paid N\$1,000.00 to the applicant and yet there was no proof of this and no corroboration of this payment. There was also no proof that the entries made were false and that Mr. Haulenga and Mr. Hiluwa did not appear in court as reflected in the court record because the prosecutor was never called to confirm the respondent's version'.

Discussion

[22] Mr. Haulenga testified that he was issued with a traffic ticket during 2011. He sent Mr. Hiluwa to go and pay the ticket for him. On Sunday he gave N\$1000 to Mr. Hiluwa and his ATM card to go and withdraw an additional N\$1000. On Monday, Mr. Hiluwa called him and told him that he had paid n1000 to Ms. Theron, but did not get a receipt. He further testified that he did not appear in court on 28 July 2011 before the applicant in respect of the traffic ticket where in the court book it was indicated that Mr. Haulenga pleaded guilty and made submissions in mitigation. Mr. Hiluwa also testified that he did not appear in court on 28 July 2011. The applicant testified that those proceedings took place and Messrs.

[23] Haulenga and Hiluwa did appear in court before her. Mr. Ipinge, the prosecutor testified that he could not remember those proceedings, but he noted the shockingly lenient sentence: "warned and cautioned" The applicant evidence that somebody must have appeared before her, to make those entries is difficult to fathom, as it is highly unlikely that anybody else, except the person in whose name the a ticket had been issued, would appear before a magistrate, plead guilty and mitigate on behalf of the real owner of the ticket and pay affine or in default face a jail term. Mr. Haulenga's evidence that he was not in court is credible, otherwise why would he lie about it? The state proved beyond a reasonable doubt that the applicant contravened s47 of the Anti – Corruption Act 3 of 2003.

[24] The applicant made various false entries in Exhibits FF1, FF2, FF3 and those false entries are corroborative of such payment to her, otherwise why should she sought, by so doing, to benefit Mr. Haulenga? Applicant's version was a bare denial. Messrs. Haulenga and Hiluwa did not appear in court on 28 July 2011 when the applicant made the false entries in EXH FF!, FF2, FF3. The only reasonable inference to be drawn is that the applicant made those false entries because she received money

from Mr. Hiluwa, otherwise why would she do something like that? This ground is without substance.

Count 12

[25] 'The learned judge erred by concluding that Mr. Japhet Shipenda gave N\$1,000.00 to the applicant, and yet there was no proof to that effect and no corroboration of this payment and there was also no proof that he did not appear in court on 8th August 2011'.

Discussion

[26] Mr. Shipenda, a taxi driver, was issued with a ticket because he did not have a public permit. He failed to appear in court on the trial date. He proceeded to Oshakati magistrate's court where he met the applicant coming out of court going to her office. He followed her in the office and gave her the ticket and told her that he managed to raise N\$1000. He gave her the money and she counted it. He did not receive a receipt. He further denied that he was in court when the matter was withdrawn. Mr. Shipenda's version was corroborated by Mr. Mbwale, the interpreter, who testified that Mr. Shipenda's ticket was not dealt with in court which led to him noticing the anomaly of him having been entered by the applicant as the attending interpreter on Exh "U2". The only reasonable inference to be drawn from withdrawing the ticket of Mr. Shipenda is that the applicant received payment of N\$1000 from Mr. Shipenda, otherwise why withdraw the ticket in the absence of Mr. Shipenda? There is no merit in this ground.

Count 13

[27] 'The learned judge erred in concluding that Mr. Kalusha Itembu gave N\$500.00 to the applicant and yet there was no proof to that effect and no corroboration of that payment and there was also no proof that the ticket of Mr. Itembu was withdrawn without him being present in court.'

Discussion

[28] Mr. Itembu testified that he was issued with a traffic ticket on 21 April 2011. The fine was N\$1000 to be paid by 15 June 2011 in default the trial date was 30 June 2011. Before the trial date, he went to Oshakati magistrate's court with the intention to ask for more time to raise the monies. He met the applicant at the veranda and told her his problem and that he could only afford N\$500. He gave her the N\$500, but she did not give him a receipt. The applicant denied that. The version of Mr. Itembu was indirectly corroborated by the subsequent conduct of the applicant by withdrawing the ticket of Mr. Itembu without him being present at court. If the applicant did not receive gratification, why did she withdraw the ticket? This ground is meritless.

Count 14

[29] 'The learned judge erred by concluding that applicant withdrew the ticket of Kalusha Itembu without application by prosecutor Shilunga and yet Ms. Shilunga was never called to dispute this version.'

Discussion.

[30] Mr. Itembu testified that he never appeared in court before the applicant when the ticket was withdrawn. Mr. Mbware, the interpreter also testified that the withdrawal of Mr. Itembu did not take place in an open court. This ground is meritless.

Count 15

[31] 'The learned judge erred by concluding that there was no application made by Ms. Kefas, the prosecutor on that day in respect of the ticket of Ms. Peya Ndungula. Ms. Kefas indicated that the court book entry of 11th August 2011, in respect of Peya Ndungula that she cannot dispute that she was the one in court and she further indicated that she cannot dispute the entry. (See record, page 922-924) Ms. Kefas further agreed that the ticket of Peya Ndungula was defective because no Act was cited. The annexure to the ticket was not present and as such there could be no confirmation of the person who applied for the withdrawal of the ticket'.

[32] 'Witness Johanna Kefas also confirmed that although the court record entry of 30th June 2011 indicates that she is the one who was in court, she denied that she was in court and she further said that at times interpreters make wrong entries. She also further stated that although the court record of 11th August 2011 states that she was in court, she cannot say if indeed she is the one who was in court on that date. (See record, page 903 – 904).'

Discussion

[33] Ms. Kefas testified that she was the prosecutor in the applicant's court on 11 August 2011 and she never applied for the withdrawal of the ticket on the basis of defectiveness. Ms. Peya Ndungula also testified that she never appeared in court before the applicant on 11 August 2011. The applicant testified that she withdrew the ticket on application by the prosecutor because the ticket was defective as there was no Act cited. The applicant's explanation that there was such an application cannot be reasonably possibly true in the face of the prosecutor evidence that she did not apply for the withdrawal of the ticket. There is no merit in this ground.

Count 16

[34] 'The learned judge erred by concluding that the applicant withdrew the ticket of Mr. Shiyana and yet there was no application made by the prosecutor, and yet there was no proof to that effect. There was no annexure attached to confirm that the prosecutor, Ms. Kefas, did not bring an application for the withdrawal of the ticket. Ms. Kefas did not dispute that she was the prosecutor in court on the said date.'

Discussion

[35] Mr. Ashiyana testified that he did not attend court on 11 August 2011. On the reverse side of Exh "HH" the following entries were made: "Withdrawn-ticket defective", the applicant did not deny that she made those entries. The fact that there was no Act

cited was no basis for the withdrawal of the ticket. If indeed the ticket was defective why not ordered the amendment of the ticket? This ground is baseless.

Count 18

[36] 'The learned judge erred by concluding that the applicant made false entries in respect of Daniel Nuuyoma and Thadeus Sabbas because she received N\$1,000.00 from Sabbas and yet there was no proof to that effect and no corroboration in this regard. There was no way the learned judge could conclude that the applicant made false entries and as such contravened the said section of the Anti-Corruption Act'.

Discussion

[37] Mr. Sabas testified that in 2011 he received a ticket and N\$1000 from Mr. Nuuyoma to go and pay on his behalf at Oshakati magistrate's court. He proceeded to the court and paid N\$1000 to the applicant. He was told to come and get the receipt the next day, but when he came back, the applicant was not there. The applicant made false entries in the court book that indicated that the matter was withdrawn, yet neither Mr. Nuuyoma nor Sabas appeared before her in court and that conduct is indicative of the entries having been made with a mind to benefit either herself or Mr. Nuuyoma. The making of those false entries was a way of returning the favour for having received the N\$1000, otherwise why did the applicant make those false entries. There is no merit in this ground of appeal.

Counts 19 and 20

[38] 'The learned judge erred by concluding that the applicant called Namweya in the phone to come and make payment of N\$1,000.00 and yet firstly there was no proof of this phone call and secondly Sergeant Mwinga went into the applicant's office and just dropped the traffic ticket and money on the table without confirming what it was for. (See record page 1016-1018) Mwinga confirmed that he did not know what happened to the money and the ticket after he left

the applicant's office. Mwinga further confirmed that he spoke in Oshiwambo to the accused person. The investigation officer who was said to have entered the office of the applicant shortly after Mwinga, was never called to testify and thus he did not corroborate any version. The learned judge thus erred in concluding that the applicant solicited a gratification from Namweya in contravention of section 35 (1) and 43 91) of the Anti-Corruption Act. Mwinga never confirmed that he did have a discussion with the applicant and that he further never confirmed that the applicant knew what the money and the ticket placed on her table were for.'

Discussion

[39] Insp Namweya testified that he made sure that the fake traffic ticket with his cellphone number on was forwarded to the applicant's court, c court. Subsequent to that he received a call on his mobile from a lady who called around 15h00 saying: "This is magistrate Theron calling from Oshakati magistrate's court, you are having traffic ticket and that you need to be at court and the fine is N\$2000 and if you pay the same day before 16h00 you will get a discount of N\$1000 and if you come the next day you will pay N\$1500 and if you do not turn up, I will issue a warrant of arrest then you will be arrested and detained in the police cells". She introduced herself as magistrate Theron. The applicant denied having called Insp Namweya, but he was adamant that she was called by a magistrate who introduced herself as Theron. The applicant's court dealt with traffic tickets .Sergeant Mwinga testified that he was told by Insp Naweya that he was called by magistrate Theron and that they must proceed to Oshakati magistrate's court to make a payment. He went inside the office with a ticket and N\$ 1000 and handed it to the applicant. That ground is meritless.

GROUND 2

[40] 'The learned judge erred in law and/or in fact by not considering that the complainant had a leading role to play in the investigations and that he devised a strategy to trap the applicant. Witness Mikka Namwenya said he was informed by Magistrate Franco Cosmos that certain cases were withdrawn but the tickets were still with him. He further said he advised Cosmos to make his own endorsements. He further testified that although he was the

supervisor of the applicant, he did not approach her to get her version. He further testified that he also late noticed that he same cases appeared on the 12th July 2011 where the applicant was the Magistrate, lipinge the prosecutor and Mbwale the interpreter (See record, page 10, 18 23)'

[41] 'The witness further testified that he personally requested for two police officers to be sent from Windhoek and that he decided to lay a trap for the applicant. (See record, page 28) The witness confirmed that he did not do his own investigations and did not investigate why certain tickets were defective, however when he was presented with certain tickets, he admitted that since there was something wrong with the provision of the law under which a person was charged, it made the ticket defective. (See record page 59) The witness further said he personally requested for police officers from Windhoek because he did not want the investigations to be prejudiced as applicant is related to Chief Inspector Theron and yet he admitted that one of the two officers sent was his own biological brother. (See record, page 78-79) The witness further stated that apart from suggesting a trap for the applicant, he also suggested how exactly to do it and that he would do everything to get evidence and make all endeavors to do so. (See record, page 80) What further came out is that he said he also suspected a certain court interpreter but no trap was set against that interpreter. (See record, page 81)'

Discussion

[42] This is not a ground of appeal. The fact that the complainant played a role in setting up the trap is irrelevant. He was the head of the Oshakati magistrate's court and he acted on the irregularities that were detected. It was also not put to Mr. Namweya that his conduct was motivated by ulterior motives. Mr. Namweya also did not specifically request for two police officer as counsel submitted and he merely wrote to the special branch to seek their assistance. And as counsel for the respondent correctly argued:

'That he suggested the general outline of the trap is not evidence of malice, but was to be expected, taking into account that the officers were obviously not conversant with the

intricacies of how courts operate and with specific reference to traffic tickets “There is no merit in this’ ground’.

GROUND 3

[43] ‘The learned judge erred in law and/or fact by not considering the fact that the procedure that was followed in trapping the appellant was not fair, credible and not in conformity with her constitutional rights in the following respects:

It was not established that inspector Namweya was called by the applicant in respect of paying the N\$1,000.00.

It was not established that the applicant knew what the N\$1,000.00 that was thrown on the table was for.

It was not established that the applicant’s rights as per the constitution were acknowledged and respected and that she acted with this acknowledgment.

It was not established that Applicant was informed of her rights before she was coerced to sign the document by Inspector Kakwambi. Inspector Kakwambi did not come to testify as to what happened on the day in question and as such the version of Inspector Namweya is uncorroborated. Witness Absalom Namweya testified that he is the biological brother of the complainant Mikka Namwenya and that he was told on how to go and trap the applicant by the complainant. (See record, pages 638,642-643) He further testified that he cannot confirm that it is indeed the applicant that he talked to telephonically and that the MTC printout does not show that it was indeed the applicant that the talked to. (See record, page 669)’

[44] ‘Witness conceded that he did not see exactly what happened in the office of the applicant because he was behind Inspector Kakwambi and as such that is why he conceded that he lied that the signature on the copies of the money belonged to Inspector Kakwambi. (See record, page 673-674) Witness Seebetter Mwinga also testified and he said that he is the one that went to the applicant’s office and gave her the money. He further testified that he spoke in Oshiwambo to the applicant and dropped money as we as the ticket on the table of the applicant and that initially he said

applicant responded to him but later changed that she accepted by collecting the ticket and the money. (See record, pages 1016-1018) The witness further confirmed that he does not know what happened to the money after he put it on the table and he further said that applicant and himself, never had a conversation regarding why the money was put on the table and that applicant never acknowledged to him that she knew he brought the money and the ticket. Inspector Kakwambi was never called to explain his involvement in the case and to corroborate what the other witnesses testified.'

Discussion

[45] This so-called ground is vague, unclear and not concise. It is not stated why the trap was unfair, incredible and not in conformity with her constitutional rights. The evidence was overwhelming. Mr. Namweya spoke to a person called Theron from the traffic court and there is no doubt that it was indeed the applicant who is Theron and that she was dealing with traffic tickets. The trapping was a fair investigating tool, more so since the applicant was not an innocent victim who was induced to commit crimes.

GROUND 4

[46] 'The learned judge erred in law and/or fact by not considering the version of the applicant and the explanations that she gave with regards to each of the counts 1, 3, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 18, 19 and 20 even when the applicant is under no obligation in law to give any explanation.'

[47] 'Count 1: Applicant explained that she withdrew the ticket because there was no year citation and no Act citation. The withdrawal was done after an application by the prosecutor and there was always someone who appeared in court as the accused person. (See record, page 1172-1177)

[48] Count 3: Applicant explained that she is not the one responsible for asking for the identity document of the person standing in court as the accused person and as such she cannot state with certainty that the person who appeared in court is not the right person. She further confirmed that the court record was true. (See record, page 1185 – 1189)

[49] Count 5: Applicant explained that she never received any money from Mr. Paulinus Kakelo and that he appeared before her in court. She further explained that Paulinus Kakelo's ticket was withdrawn because there was no citation of the Act which made it defective. (See record, page 1195- 1198)

[50] Count 7: Applicant explained that the reason she cancelled the warrant of arrest for Chrispus Shikalepo was because the ticket was defective in that there was no citation of the Act and there were only regulations and as such there needs to be the Act cited to indicate which law has been transgressed. (See record, page 1230 – 1240)

[51] Count 8: It was explained that the proceedings with regard to Israel Haulenga took place in court and that a long hand court record is present as proof. (See record 1241 – 1248)

[52] Count 9: Applicant explained that the entry made with respect of Israel Haulenga was correct as per the court record. She further explained that somebody did appear in court as Israel Haulenga. (See record, page 1249-1251)

[53] Count 10: applicant explained that with regards to the ticket that was issued to Paulinus Kakelo, there was no year and no Act cited and as such she withdrew it because it was defective. (See record page 1252 – 1259)

[54] Count 11: Applicant stated that she never received any money from Mr. Hiluwa. (See record, page 1260 – 1263)

[55] Count 12: The applicant stated that she never received N\$1,000.00 from a Mr. Japhet Shipenda. She further explained that all the witnesses who testified were summoned to report themselves to the police station by Inspector Kakwambi. (See record, page 124- 1269)

[56] Count 13: Applicant testified that she did not receive any money from Kalusha Itembu and that she has never met him before. (See record, page 1270 – 1273)

[57] Count 14: Applicant testified that there was an alteration on the traffic ticket of Kalusha Itembu and as soon as there is an alteration it makes the ticket defective unless the traffic officer initials the alteration. (See record, page 1274 – 1283)

[58] Count 15: Applicant testified that the ticket of Ms. Ndungula was defective in the sense that there was no Act cited on the ticket and the application for cancellation of the ticket was brought by Ms. Kefas and the ticket was cancelled in court. (See record, page 1284 – 1287)

[59] Count 16: Applicant explained that she withdrew the ticket because there was no Act cited and the ticket was scratched out without being initialed. The application was brought in court by the prosecutor. (See record, page 1288-1292)

[60] Count 17: Applicant explained that she has never met a Japhet litenge who alleges that she called him on his cell phone to come to her office and that at court they use their surnames and not their first names. (See record, page 1293 – 1297)

[61] Count 19 and 20: Applicant explained that she did not receive any money from Namweya because he just left the money and a ticket on her table and she could not understand him and she sent him to look for an interpreter and then Inspector Kakwambi came in and he banged her desk and said that she should give him the money which she showed him was on the table with the ticket. (See record, page 1309 – 1218)

[62] Applicant testified in her defense and she stuck to her testimony even in cross-examination. The applicant clearly explained the process of filing in a ticket and whose responsibility it is. She further explained what makes a ticket defective and that before she withdrew a case, there was an application made by the prosecutor. She further explained that when a ticket is defective, the accused person need not come to court as long as prosecutor and interpreter are present then the case can be dealt with. She further testified that she can neither accept nor deny that certain accused persons were not at court, but as far as she is concerned, there was always someone that appeared before her. She further testified that she did not commit any act of concealment because she made entries into the court book which is open to every Magistrate, every interpreter and any interested person. The applicant remained unshaken even in cross examination.’ (See record, pages 1170-1332)

Discussion

[63] This ‘ground’ is vague, unclear and not concise. In any event, the explanations of the applicant were clearly considered and the court found that they were not reasonably possible true and the court correctly rejected them. This ‘ground’ is meritless.

Ad sentence

GROUND 5

[64] 'The sentence of four years, of which two years were suspended, imposed on the applicant is extremely harsh and induces a sense of shock especially that there was no option of a fine or wholly suspending the sentence.'

Discussion

[65] In my respectful view the sentence imposed was not harsh and did not induce a sense of shock. In *S v Rabie* 1975(4) SA855 at 857 the court said:

'In every appeal against sentence, whether imposed by a magistrate or judge, the court hearing the appeal-

- (a) Should be guided by the principle that punishment is a matter pre-eminently for the discretion of the trial court, and
- (b) Should be careful not to erode such discretion; hence the further principle that the sentence should only be altered if the discretion has not been judicially exercised.'

[66] In *Deon Angula v The State* CA 60/2001 the court said:

'Ms. Harmse, who appeared for the respondent, has referred us in her heads of argument to a number of cases where this Court has stressed the need to punish those who commit crimes of dishonesty at a time such crimes are so prevalent and showing no signs of abating severely. We entirely agree that this must be the policy of courts and that the imposition of a prison sentence is generally called for in cases of theft and fraud and the like even in the case of a first offender'.

The applicant, although a first offender, was convicted of nineteen counts of contravening the Ant-Corruption Act, 8 of 2003 and a custodial sentence was inevitable.

Having regard to the above authorities, there are no prospect of success on appeal and the application for leave to appeal is dismissed.

Order

The application for leave to appeal is dismissed.

NDAUENDAPO, J

JUDGE

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