REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION

APPEAL JUDGMENT

Case No: HC- MD-CRI-APP-CAL-2019/00033

In the matter between:

ANDRE MAJIEDT **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Majiedt v S (*HC-MD-HCMD-CRI-APP-CAL-2019/00030) [2022] NAHCMD 227 (6 May 2022)

Coram: USIKU, J, (JANUARY J concurring)
Heard: **4 April 2022**
Delivered: **6 May 2022**

Flynote: Appeal – Conviction – Sentencing – Robbery with aggravating circumstances – Application for condonation – Incomplete record of proceedings – Condonation application dismissed. Criminal procedure – Appeal against sentence – Totality of evidence – Noting of appeal within time limit – Appellant's version of events not challenged by the state – Appellant's version believable and probable – Court

concluded that upon the authorities, the court *a quo* misdirected itself in convicting the appellant.

Summary: The appellant entered a plea of not guilty in respect of the charge of robbery with aggravating circumstances. He gave an explanation in terms of Section 115 of the Criminal Procedure Act 51 of 1977.

He stated that he was being robbed and during this robbery he saw a car, persons that were familiar to him, that he knows and in the process demanded the car so that he could escape his assailants. His version of events was sufficiently corroborated by the majority of witnesses.

Held that the inferences sought to be drawn are consistent with all the proven facts.

Held that the version of the appellant as placed before court was never challenged by the state and thus remains as a reasonable version before court.

Held further that the evidence should be considered in its totality from which the court would then be able to draw certain inferences.

ORDER

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1. The appellant's point *in limine* is dismissed.
2. The appeal succeeds.
3. The matter is considered finalised and is removed from the roll.

JUDGMENT

USIKU J, (JANUARY J, concurring):

Introduction

[1] The appellant was charged before the Regional Magistrates' Court, Katutura on 05 February 2019. He pleaded not guilty to a charge of robbery with aggravating circumstances read with s1 of the Criminal Procedure Act 51 of 1977 as amended. The state led evidence and at the end of the trial, the court being satisfied with the evidence adduced found the accused guilty, whereafter he was sentenced to 15 years imprisonment of which 5 years imprisonment were suspended for a period of 5 years on condition that the accused person is not convicted of robbery or an offence of which violence is an element, committed during the period of suspension.

[2] The appellant is represented by Mr. Nhinda whilst Mrs. Esterhuizen appeared for the respondent.

Grounds of appeal

[3] The appeal lies against conviction and sentence and the grounds of appeal were listed as:

'AD CONVICTION

3.1 The learned Magistrate erred in law and/or fact in finding that the accused person had the requisite intention to permanently deprive the lawful owner/complainant of ownership over the motor vehicle and other items therein.

3.2 The learned Magistrate misdirected herself in law and/or fact by excluding the element of intention to permanently deprive ownership from the legal definition robbery, and as a result the court failed to adequately apply its judicial mind to all the essential elements of the offence of robbery.

3.3 The learned Magistrate erred in law and/or fact by rejecting the unchallenged version of events by the accused which demonstrates the accused person's lack of intention to permanently deprive the owner of the property in question.

3.4 The learned Magistrate erred in law and/or in fact by concluding that the state had proven its case beyond reasonable doubt.

AD SENTENCE

3.5 The learned Magistrate erred in law and/or in fact by imposing a harsh sentence that induces a sense of shock.'

Points *in limine*

[4] At the start of the proceedings it was argued that the appeal was filed out of time. As a result the parties addressed the court on that point, whereafter the respondent conceded that the appeal was lodged timeously. After perusal of the record it became evident that the notice of appeal was indeed filed on time.

[5] Mr. Nhinda raised a point *in limine* in his heads of argument in that the record of proceedings in the trial court is incomplete. That the state called five witnesses to testify however on record, the cross examination of the complainant is missing, further that the complete testimony of Kenny Leigh Loubster, the second state witness is missing as well as part of the appellant's testimony[1]. It was further submitted that most of the delay of this appeal was wasted on trying to reconstruct the record, which turned out futile.

[6] It was the appellant's contention that not much can be made out of what transpired with the missing testimonies and as such that this will prejudice him and it would amount to a failure of justice. The court was referred to a matter of *S v Madema*[2] wherein Liebenberg J referred to the case of *Katoteli and Another v The State*[3] at para 7 where it reads:

'The reconstruction of a record is an administrative process, requiring of the clerk of the court to obtain the best secondary evidence of the content of the court proceedings. It has been submitted … that there is no legal basis on which to subject an accused person to a second "trial" and that it may also be unconstitutional to do so. Where the record of proceedings in a court of law cannot be reconstructed, an appeal court may not refer the matter back to the court a quo to start proceedings de novo or for a "retrial".

[1] Page 183 to 184 of the record of appeal.
[2] *S v Madema* (CR 20/2020) [2020] NAHCMD 118 (27 March 2020).
[3] *Katoteli and Another v S* (CA 201/2004) [2009] NAHC 117 (06 March 2009).

[7] In reply thereto Mrs. Esterhuizen acknowledged that some pages of the record of proceedings are missing, such as the cross-examination of the first witness. However, after an application by the appellant's legal representative to re-call the first witness, because he failed to put the version of the accused to this witness, the court allowed the application and the witness was re-called.[4] The re-cross-examination of the first witness, Re-Kyle Snyder, forms part of the record.[5] The evidence of the second state witness is also missing from the proceedings. Certain pages of the appellants testimony is missing[6] however, the largest part of his testimony is intact.

[8] She submitted that the Appeal Court is in possession of the transcript of the evidence of four state witnesses and the mere fact that the record of the proceedings might be lost or incomplete would not, automatically entitle the court to the setting aside of a conviction or sentence. The largest part of the appellant's testimony and two witnesses called by the appellant also form part of the record. This court is in possession of the plea explanation, as well as the cross examination of the state witnesses by the appellant's legal representative and the submissions by his legal representative. Therefore this court is in a position to evaluate the appellant's case as well as the state's case as presented in the trial court.

[9] In *Katoteli and 1 other v The State*[7] it was stated that an appeal record need not be a perfect record, but it must be adequate. Further in *Soondaha v The State*[8] at para 29 it was stated that:

'The court must be placed in a position to evaluate the evidence in conjunction with the reasons of the learned magistrate in order to decide if the convictions were just and in accordance with justice or if the alleged misdirections have any merit. This court is not in a position to do that without a proper record or proper reconstructed record of those proceedings. The missing record in relation to cross-examination may be material to the appeal and in my view to decide the appeal in the absence thereof may be detrimental to both he appellants and the respondent.'

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[4] Page 163 handwritten court notes from court *a quo*, Page 87 typed record.
[5] Page 163-169 handwritten court notes from court *a quo*.
[6] Pages 67-71 of the typed court record.
[7] Supra.
[8] *Katoteli and 1 other v The State* (CA 28/2013) [2016] NAHCNLD 76 (22 August 2016)

[10] I associate myself with this view, however in the present instance the appellant substantially relies on the dicta enunciated in *Katoteli and 1 other v The State*[9] para 7 in support of a contention that a material irregularity occurred in that the record of proceedings is so poorly constructed that it creates prejudice that cannot be remedied. It would however appear to me that the facts of that case are significantly distinguishable from the facts before us.

[11] I therefore dismiss the point *in limine* as the court is capable of evaluating the evidence in conjunction with the reasons of the learned magistrate in order to decide whether the conviction was just and in accordance with justice and proceed on the merits of the appeal.

The merits

[12 As previously stated herein the appellant was charged with one count of robbery with aggravating circumstances. The appellant pleaded not guilty to the charge and in his plea explanation informed the Court that he was being robbed whereafter he saw a car with a person that was familiar to him. He demanded the use of the car so that he could escape from the robbery.

[13] On arrival, at the home of his fiancé, he asked his daughter to call the police and inform them that he had taken a vehicle in an attempt to escape from a robbery. Further that the vehicle belonged to a family friend. Several witnesses testified and the appellant testified also in his own defence and called two witnesses. The testimonies of the witnesses are as hereunder:

[14] Re-Kyle Snyders testified that she knows the appellant as he used to go to their bar and he is also a neighbourhood friend who is an acquaintance to her parents. On the day in question, her father asked her to go buy stock for the bar at Cash & Carry. She went with Kennelly Leigh and Tarquin Van Wyk. She was the driver of the car. They bought stock and went back to the bar, whilst she was reversing the vehicle in

[9] supra

front of the bar, the appellant approached her and gun pointed her, first on her head. He told her to keep quiet or he will shoot her. She then asked him, “Uncle Andre, what is going on”, he was talking to her but had no voice. His voice was gone and that she could not hear what he was saying. The appellant then pulled out the key and the complainant’s friend jumped out of the car and ran into a nearby China shop. Appellant opened the car door and her Cousin Taquin, state witness three jumped out and ran behind a lorry.

[15] The complainant could recall the appellant telling her why he was taking the vehicle. She further testified that the car with all its stock was recovered at the family house where the Isuzu bakkie was found parked. She equally cannot remember the appellant telling her that he had just been robbed and that she should call the police because that time she was in shock.

[16] In cross examination after the complainant was recalled, she in short testified that she knows nothing about any version that came prior to the incident of appellant pointing a firearm at her because she was not there. She could not hear what he was saying, his voice was husky. She could not dispute appellant’s version as she was in shock nor could she hear him at some points. She further confirmed that the vehicle and the goods were found at a house that was known to her. Neither did the accused harm her. It was put to her that accused did not have the intention to rob her and all he wanted to do was to escape from the incident that happened prior, to which she replied that she did not know.

[17] Tarquin Van Wyk testified that they were sent by the complainant’s father to buy alcohol for the bar. They drove to Cash & Carry bought stock and came back. Upon reversing to offload the stock, he saw appellant coming running around the car. A gun was pointed at the complainant as well as towards him. They all got out of the car. The appellant then took the car and drove off. He did not see any incident prior to the appellant approaching them. He also did not hear appellant saying he must be taken to the police. On the instruction that appellant had no intention to rob the complainant and that he was just looking to escape with the vehicle, he confirmed that appellant drove and stopped right in the street, however, he did not see what happened thereafter.

[18] Andrew Van Neel a state witness collaborated most of appellant's testimony. He testified that appellant came and pointed a firearm and instructed him to unlock the car. The appellant got in the back left side of the car but was not seated, he remained standing while the witness drove. His body emerged from the car as he kept the door open. He testified that appellant told him to take him to city police. He later wanted to be taken to Star hotel to see a doctor because he got injected. At Star hotel, the appellant demanded for the witness's keys but he refused.

[19] He further testified that appellant was not normal and something was not right, he was confused and looked like someone that was cornered and wanted to get away where he was. He does not know the appellant to act like that. He did not know where appellant was injected but knows that appellant was at his neighbours' house. After he came from buying his cool drink he found appellant talking to another lady, got her out of her car and drove a distance whereafter, a male embarked and he proceeded to drive till he came to stop at a house in Begonia Street. He further testified that he did not hear any gun shots as stated by his wife in his statement. He only heard a bang and his wife screaming. He also testified that appellant threatened him but he did not take it seriously.

[20] Warrant Joseph Ndokosho testified that he is the investigating officer in this matter. He received a call from Inspector Amakali to assist at Begonia Street, Khomasdal, where there was an alleged robbery and the appellant was arrested. He met the appellant, and also saw an Isuzu bakkie full of stock. He was informed that a lady was gun pointed. At the house, he was taken inside a bathroom and given a revolver/pistol. He observed one spent cartridge on the scene. The firearm belonged to the appellant who showed him the licence thereof. He later met the appellant at the police station who informed him that he was robbed. The appellant wore an underwear only and was not wearing anything on top. He appeared confused, and acted like someone at the psychiatric ward, jogging around, and wore wet socks.

[21] He knew the appellant prior to this incident. He was not normal on this occasion. He testified further that appellant told him that he was injected and that people were trying to rob him. As a result he fired a shot against the wall of the house where the incident happened. He confirmed the complainant's testimony that appellant's voice was rusty or with no voice. He mentioned that he was injured and asked to be taken to a doctor whereafter he referred him to the charge office sergeants. The appellant opened a case under CR350/11/2015 which was later closed by Chief Inspector Amakali. He did not check appellants back for any injuries.

[22] Andre Majiedt is the appellant. He testified that on 22 October 2015, he received a call from a man called Rudy who was a mechanic. This person asked him if he could go to his residence to test-drive his motor cycle which he left with him for reparation and maintenance. Whilst there, four men formally dressed, disembarked from a vehicle and entered the house where he was. One of the men went to the appellant and introduced himself as a member of the Namibian Police by showing him the card/photo of the Namibian Police. The appellant testified that he was then assaulted. He felt a blow behind his head p. 182. During the assault by the unknown men, he felt a sharp object penetrating his right upper buttock which made him to feel pain and became dizzy as if he was suffocating.

[23] The appellant further testified and stated:

'I could not control emotions. All the emotions were in turmoil and millions of thoughts were going through my mind and the only panicking thought was that I was going to die.'

He further testified that he saw the complainant, a daughter to his acquaintance and told her to take him to the police as he has been robbed but she did not seem to understand what he was saying. Mr. Nhinda contends that this version was uncontested by the state at all material times.

[24] The appellant does not deny that he might have pointed a fire arm at the complainant. But he testified that the state of mind in which he found himself was in panic mode to get away. He was not thinking clearly. He had no intention to permanently deprive the complainant of her property but did so out of fear, which was in

his mind at the time, in order to get away from the scene as he thought he was going to die.

[25] He thought his assailants were behind him. It is also his testimony that there was a lot of cash and valuables in the vehicle but he did not take anything, all he wanted was his safety. When he took the car from the complainant, he realized his vision was too blurry. He stopped and asked Lesley to take him to the nearest police station. Lesley was about three houses from where he took the car from the complainant. Lesley refused to drive but still encouraged him to drive until his fiancé's place. This version remained uncontested by the state. He was never taken to the hospital nor did anybody ever check to confirm his wounds. However he managed to open a case (CR.350/11/2015) of robbery as his ammunition, boots and phone that were gone.

[26] Jennet James testified that she has two children with the appellant. The appellant arrived at her house not in a normal state but very confused with a revolver in his hand. He told her that he was robbed and stabbed in the back. He asked her to call the police and his friend Dennis, the owner of the car with the stock. She observed marks on his neck as though he was strangled. His eye was slightly swollen and he had a sore back. She then asked their daughter to call Randy and the police. She concluded her testimony that she has never seen him in this state before.

[27] Lesley Van Wyk testimony that he found the appellant in the kitchen wearing socks. He had marks around the neck and he also saw the appellant holding a firearm. The appellant informed him that persons tried to rob him. As a result the witness went to him and made sure that the firearm was safe. When he went outside he saw that the appellant was with Dennis's car. The appellant asked him to drive but he refused and got in the passenger's seat whereafter the appellant drove the vehicle. They wanted to go to the police station but along the way they saw the ex- girlfriend's house and went there instead because it was closer. At the house the appellant asked that the police and Dennis, the owner of the car with stock to be called.

<u>The law</u>

[28] Having summarized the evidence presented and counsel's submissions, I will proceed to discuss the principles regarding non-pathological criminal incapacity as they reverberate with the defence raised by the appellant in order to determine whether the appellant had the necessary intention to commit the offence of robbery with aggravating circumstances. I will approach the present matter in the light of those principles. In *S v Eadie*[10] Navsa JA stated the following at para 2:

'It is well established that when an accused raises a defence of temporary non-pathological criminal incapacity, the State bears the onus to prove that he or she had criminal capacity at the relevant time. It has repeatedly been stated by this court that:

(i) in discharging the onus the State is assisted by natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability, does so consciously and voluntarily;
(ii) an accused person who raises such a defence is required to lay a foundation for it, sufficient to create a reasonable doubt on the point;
(iii) evidence in support of such a defence must be carefully scrutinized;
(iv) it is for the Court to decide the question of the accused's criminal incapacity, having regard to the expert evidence and all the facts of the case, including the nature of the accused's actions during the relevant period.'

[29] It is in the light of these legal principles that I will proceed to determine the crucial question of whether the appellant met all the elements of the offence of robbery with aggravating circumstances. There is sufficient corroborated evidence from both state witnesses and witness of the appellant in the court *a quo* to appreciate that the behaviour and conduct of the appellant was not normal on the day in question.

[30] The respondent is submitting that:

'6.3 The appellant's defence that people chased after him, robbed him and injected him is not genuine. This can be illustrated by highlighting a few points in the evidence. When one look at the manner in which he described the event up to each stage, the appellant had the ability to orientate himself with regard to their respective positions, the direction he drove, the manner how he took the vehicle from the complainant.'[11]

[10] *S v Eadie* (1) 2001(1) SACR 172(C) (27 March 2002).
[11] Respondent's heads of argument page 13.

The onus is on the state to satisfy that a version contrary to this above version exists. According to the testimony of Joseph Ndokosho the investigating officer, the appellant was exhibiting behaviour that is not normal, to him as he knew the appellant prior to the incident of that day, this observation was made by the complainant herself as she knew the appellant. Similar observations were made by his fiancé who asked her daughter to call for help immediately upon the instructions of the appellant.

[31] The elements of the crime of robbery are: (a) *theft* of property; (b) through the use of violence or threats; (c) a causal link between the violence and the taking of the property; (d) unlawfulness; and (e) intention.[12] In this instance, It is worth mentioning at this point that at all material times as apparent from the testimony of witnesses both state and the appellant himself, from his arrest, his plea explanation to his testimony in court, his version remained the same and unchallenged and is accepted by this court. He seemed to have no concern with the stock, cash and cell phones that were in the car. It was also testified that the owner of the vehicle simply collected the vehicle where the appellant had left it. The appellant instructed that the owner of the vehicle be called.

[32] In *S v Linde*[13] at page 3 and 4 Manyarara AJ, stated the elements of theft as follows:

'The principles enunciated by Snyman Criminal Law 4 ed at 481 et seq may be summarized as follows:

1. The form of culpability required for theft is intention. The crime can never be committed negligently.
2. Intention in respect of the property means that X must know that F what he is taking belongs to somebody else.
3. Intention in respect to unlawfulness means that X must know that Y has not or would not have consented to the removal of the property.
4. Intention to appropriate is required. This intention best describes the mental state which is characteristic of a thief, ie to permanently deprive the owner of his property, and intention to benefit there from is irrelevant.'

[12] Snyman, C., 2014. *Criminal Law.* 6th ed. Cape Town: Lexis Nexis, pp.106 – 113.
[13] *S v Linde* 2005 NR 344 (HC).

[33] Further *S v Mekula*[14] at 523 and 524 where Eksteen J held as follows with regard the crime of theft:

'For an act of appropriation to constitute theft it is accordingly necessary that both these elements be satisfied, namely that the rightful owner or possessor must be excluded from his property, and the offender must assume control over the stolen item.'

[34] Mrs Esterhuizen contends that the learned Magistrate refers to the given definition. The proposition of the law is very clear that once a person uses violence and remove the property of the other person without that person's consent and take control of the said property then such person's conduct fell in the ambit of robbery definition. In *S v Auala*[15] at para 35, Liebenberg J remarked as follows:

'The evaluation of evidence requires from the court to consider the evidence as a whole, instead of focusing too intently upon the separate and individual parts of the evidence. Doubt may indeed arise when one or more aspects of the evidence are viewed in isolation, but when evaluated with the rest of the evidence, such doubt may be set to rest. The approach followed in *S v Chabalala*[16], in my view, correctly sets out the manner in which evidence should be evaluated. Heher AJA at 139i - 140b says the following:

> "The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt to the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party was decisive but that can only be on an *ex post facto* determination and a trial court should avoid the temptation to latch on to one obvious aspect without assessing it in the context of the full picture in evidence."'

[34] What is required is to consider the evidence in its totality from which the Court would then be able to draw certain inferences. However, before the inferences are drawn two requirements should be met namely.

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[14] *S v Mukela* 2012(2) SACR 521.
[15] *S v Auala* (No 1) 2008 (1) NR 223 (HC), page no 235.
[16] *S v Chabalala* 2003 (1) SACR 134 (SCA).

‘(i) the inferences sought to be drawn are consistent with all the proven facts, and

(ii) the proved facts are such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.’ *R v Blom*[17] 188 at 202.3 found in *S v Reddy*[18].’

Conclusion

[35] Therefore, after having carefully considered all the evidence adduced, I find that there was a misdirection by the Magistrate, in convicting the appellant under the circumstances of this particular case. That being so, I come to the conclusion that the appeal succeeds.

[35] In the result the following order is made:

1. The appellant’s point *in limine* is dismissed.
2. The appeal succeeds.
3. The matter is considered finalised and is removed from the roll.

D USIKU

Judge

H JANUARY

Judge

[17] R v Blom 1939 AD 228.
[18] 1996 (2) SACR 1 (A).

APPEARANCES

APPELLANT	MR. NHINDA DIRECTORATE OF LEGAL AID Windhoek Namibia
RESPONDENT	MRS. ESTERHUIZEN Of the Office of the Prosecutor-General, Windhoek Namibia