CASE NO.: CA 71/2009

IN THE HIGH COURT OF NAMIBIA:
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

In the matter between:

THADEUS KAMBAU THOMAS **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: LIEBENBERG, J *et* TOMMASI, J.

Heard on: 12 March 2012
Delivered on: 16 March 2012

APPEAL JUDGMENT

LIEBENBERG, J.: [1] The appellant, an adult person, and his biological mother (accused no 2) appeared in the Regional Court, sitting at Oshakati, on

charges of murder and obstructing the course of justice; second accused charged only with the latter. Appellant pleaded guilty to both charges but during the court's extensive questioning pursuant to the provisions of s 112 (1) (b) of the Criminal Procedure Act, 1977 (Act 51 of 1977), he raised private defence as a defence whereafter pleas of not guilty were entered in respect of both charges. Accused no 2 pleaded not guilty from the onset. The court, after hearing evidence, convicted the appellant on both charges, but discharged second accused (his mother). Appellant was sentenced to seventeen (17) years' imprisonment on count 1 and three (3) years' imprisonment on count 2; the latter ordered to be served concurrently with the sentence imposed on the first count.

[2] Appellant, in person, filed a notice of appeal against sentence within the prescribed period of time but which was subsequently withdrawn ('cancelled')[1]. A new notice styled 'Amended Notice of Appeal' dated 15 September 2011 and supported by an application for condonation, was filed, in which twelve distinguishable grounds of appeal against conviction and sentence were noted. It is clear from the notice that the appeal now lies against both the conviction and sentence only in respect of count 1, the charge of murder.

[3] When the matter came before us it was pointed out to Mr *Wamambo,* appearing for the respondent, that he failed to deal with any of the grounds raised against conviction. Although he initially was of the view that the grounds raised in the amended notice were a mere repetition of those

[1] See para 1 of appellant's Supporting Affidavit dated 07 March 2011

enumerated in the first notice, he conceded that on closer inspection, there were indeed grounds on which the appeal could be heard and committed himself to making oral submissions in that respect. Regarding the application for condonation of the late noting of the appeal, the respondent opposed it only as far as it concerns the prospects of success on appeal. We considered the appellant's explanation of his late noting of the appeal to be reasonable in the circumstances; and the appeal was heard on the merits, but limited to only those grounds satisfying the requirements of being clear and specific, as set out by the Rules of Court.

[4] Not all the grounds of appeal stated in the notice satisfy the requirements of Rule 67 (1) of the Magistrates' Court Rules in that it is either not clear and specific; or constitutes no valid ground as such and therefore stand to be struck. Those grounds are the following:

Para 1.1.1 – The court's refusal to allow the appellant to communicate in English (denying him his right to freedom of expression).

At the beginning of the trial the magistrate realised that the appellant did not have proper command of the official (English) language and requested him to use his vernacular, which is the Oshiwambo language. From a reading of the record and having heard the appellant during oral submission, it is clear that this was only to the appellant's benefit and his so-called 'right of expression' finds no application; hence, it is not a valid ground of appeal.

Para 1.1.3 – Failure by the State to call witnesses who could testify about the misdemeanours of the deceased, being the cause of the discord between them.

The State is under no duty to call witnesses whose testimony would adversely reflect on the character of the deceased; therefore it does not constitute a ground of appeal. Although evidence to that extent was given by the appellant and his mother when testifying in their defence, it is irrelevant to the appellant's conviction and would only be relevant for purposes of mitigation.

Para 1.1.4 – Failure by the State to call a certain police officer by the name of Willem Ashili, who, when requested, refused to assist the appellant with the deceased.

What has been said in the preceding paragraph equally applies to this ground of appeal.

Para 1.1.10 – What is recorded in this paragraph is nonsensical and does not constitute any ground.

Para 1.1.11 – That the record of the proceedings held in the court *a quo* is incomplete.

In oral submission appellant contended that the transcript of the proceedings was incomplete and when the Court enquired from him the reasons why he said so, it emerged that this is based on the fact that cassettes were changed during the trial, without stopping proceedings. After explaining to the appellant that there was nothing irregular about that as it was a double deck

recording machine used by the courts which permits the operator to change cassettes without it being necessary to stop proceedings, he abandoned this point.

Consequently, the aforementioned ‘grounds’ are given no further consideration.

[5] As regards conviction, the following four grounds were raised:

- The trial court erred by finding that the appellant had acted with intent (para 1.1.5);
- The court failed to appreciate the fact that the appellant was attacked by the deceased and that he acted in self-defence (para 1.1.6);
- The court failed to appreciate that the appellant could not flee (para 1.1.7); and
- The court failed to appreciate that the attack on the appellant came unexpectedly (para 1.1.8).

Regarding sentence, there are three grounds:

- The court in sentencing erred by taking into account irrelevant facts i.e. that the appellant had trussed up the deceased the previous evening (para 1.1.2);

- The court failed to take into consideration that the appellant of his own volition disclosed the commission of the offences (para 1.1.9); and
- The sentence is too severe and should be reduced (para 1.1.12).

[6] The evidence adduced at the trial, in summary, amounts to the following:

It is common cause that the appellant, his younger brother aged sixteen years (the deceased), and an even younger sister called Emmerita, stayed together at their mother's house at Iipumbu Shomugongo village, in the district of Oshakati. It is furthermore not in dispute that the deceased had been causing trouble and brought unnecessary hardship to his family by stealing from them and others; and in the latter instance the family would be held accountable. He would also play truant and disappear from home for periods of time. It is clear from the record that the deceased's conduct was not only mischievous, but also of grave concern to his family who found it difficult to control him. It is also evident that whereas their father had passed away, the appellant took the responsibilities which would have been with his father upon himself; and as he said, he would talk to his younger brother in order to persuade him to renounce his bad habits. In the past and prior to the incident leading to the death of the deceased, the appellant trussed up the deceased in order to prevent him from leaving home. It would appear that neither the appellant nor his mother considered this to be a serious violation of the deceased's rights and that it was rather a matter of the end justifies the means i.e. to keep the

deceased out of trouble. It does not seem that the deceased was tied up for long periods and that this, in the appellant's view, was necessitated by the deceased running away from home every time he was rebuked by the appellant.

[7] Whereas there are no eye-witnesses for the State who could possibly implicate the appellant, the conviction of the appellant on the murder charge is based solely on the admissions made by the appellant during the court's questioning following his plea of guilty, and the appellant's *viva voce* evidence.

[8] Appellant, from the outset, admitted that he has caused the death of the deceased, but denied having acted with intent to do so when he threw two sticks at the deceased which struck him on the back of his head. He claims to have acted in self-defence, necessitated by an attack on him by the deceased during which he was struck on the back of his head with the very same stick. The attack, as correctly conceded by the respondent, was still continuing when he defended himself by throwing two sticks at the deceased. Much was made by the trial court of the sticks having struck the deceased on the back of his head, thus, posing no threat to the appellant, but this the appellant explained by saying that the deceased bent down to pick up other sticks when the appellant threw the stick (which he had taken away from the deceased) at him, and which hit him on the back of his head, killing him instantly.

[9] I regress to mention that from the appellant's narrative the deceased returned home the previous night after he had stolen a cellular phone from the

appellant, his grandmother's blankets and a bicycle and then disappeared from home for some days. Appellant in the interim went looking for him as they received message from family members that the deceased had lied to them about his whereabouts. Upon his return in the evening the appellant found the deceased in their mother's room, from where he pulled him outside in order to force him to fetch their grandmother's blankets; which were subsequently returned to her. On the way the deceased again tried to run away, but back home the appellant tied up the deceased's hands with shoe laces and his feet with a chain and padlock. He remained as such throughout the night until the following morning when only his hands were untied. He accompanied his mother to the field to work, with his legs still chained, but which still allowed him to walk. They returned home whereafter the deceased had to assist Emmerita with the pounding of maize. Some time during the afternoon their mother left home to visit their grandmother.

[10] Appellant explained that he thereafter unlocked the chain from the deceased's legs so that he could assist the appellant to put back the thatch (lid) on the omahangu storage container. After this, Emmerita went to fetch water, leaving only the appellant in the company of the deceased. Appellant instructed the deceased to fetch fire wood and warned him not to take anything from their mother's room, which was not locked at the time. The deceased left while the appellant went up to the side of a hole he had earlier dug for a pit toilet; and whilst sitting there, the deceased returned. He, unexpectedly and without warning, hit the appellant once on the back of his head with a stick (a piece of fire wood) and when he turned around, he was hit

for a second time on his forehead. Appellant managed to grab the stick away from him and as he threw it at the deceased, the latter stooped to pick up another piece of wood when struck on the back of his head. It did not appear that the deceased was injured and as he was busy picking up another stick, appellant threw a second stick at him which also hit him on the back of his head, causing him to fall down. This time he was bleeding and appellant fetched water to rinse off the blood. He noticed that the deceased stopped breathing and had died. He started to panic and decided to bury the deceased's body in the half dugout toilet pit, without informing anyone about it. Appellant deceived his mother by telling her that after he had removed the chains from the deceased's legs – as she had earlier told him to do – the deceased left the house without returning.

[11] Some four months later and under false pretences, the appellant summoned the police to the spot where he had buried the deceased earlier under the pretext that someone had buried something in their field. The body was exhumed and identified to be that of the deceased. Dr Vasin, the pathologist who performed the autopsy on the deceased's body, found two distinctive skull fractures on the back of the head but due to the advanced state of decomposition of the body, he was unable to determine the exact cause of death.

[12] It is evident from the testimony adduced at the trial that the investigating officer in the case, by deceitful conduct on her part, tricked the second accused into admitting to the commission of the crime as set out in count 2;

which she was clearly not guilty of and for which she eventually remained in custody for more than one year. As a consequence of his mother's suffering the appellant, who was also in custody on both charges, confessed his guilt to his mother, and in court.

[13] As stated hereinbefore, the trial court acquitted second accused, but was satisfied that the appellant on count 1, was guilty of murder, having acted with intent (*dolus eventualis*); and guilty on count 2 for obstructing the course of justice.

[14] In his judgment the magistrate, having rejected the appellant's defence of private defence, concluded that although the appellant lacked direct intent to kill the deceased, he foresaw the possibility of death ensuing when *"he beat him twice on the head with such a big, rough sticks"* (sic); and accordingly convicted appellant of murder, having acted with the required intent in the form of *dolus eventualis.*

[15] It is not entirely clear to me from the judgment on what evidence the court rejected the appellant's defence of having acted in self defence. The magistrate correctly found that there was no one else present besides the appellant who could have contributed to the death of the deceased and that the State case was entirely based on circumstantial evidence. When assessing the appellant's evidence the magistrate was not convinced that he could not have fled the scene because of the one metre deep toilet pit immediately behind the appellant; that the deceased's back was turned

towards the appellant when he was struck on the back of his head by the sticks thrown at him by the appellant, therefore the deceased posed no threat; and that the appellant, because of his age, could easily have overpowered the deceased without acting in the manner as he did. In reaching the latter conclusion the magistrate relied on the appellant's evidence pertaining to the previous evening when he trussed up the deceased.

[16] Unfortunately I am in respectful disagreement with the magistrate's reasoning and it is my view that, had there been a proper application of the law, then the court *a quo* undoubtedly would have come to a different conclusion. I say this for the following reasons: Although the magistrate, in my view correctly, disbelieved the appellant when he said that it was impossible for him to flee, that was not sufficient reason to reject the appellant's entire evidence as being false. The only evidence about the incident during which the deceased got killed was adduced by the appellant, and there is no other evidence rebutting his version; neither can it be said that his version is so improbable that it cannot be true. On the contrary, the court relied on the appellant's evidence – from which certain (unjustified) inferences were drawn – to convict him.

[17] The undisputed evidence is that the appellant came under attack when the deceased approached him from behind and unexpectedly struck him on the back of his head and again on the forehead, with a stick. This stick was described as 'a root of a tree' and although it was not produced in evidence, the magistrate requested the appellant to bring sticks of similar size to court,

in order to get some indication as to what it looked like. Appellant obliged and these were referred to in the judgment as follows: *"The sticks produced by Accused number 1 are not only heavy and strong, but they are in fact plants with protruding rough surfaces in their sides (sic).* *<u>They pose a great source of danger if one is struck with a stick of that nature, particularly on the head</u>."* (emphasis mine) The learned magistrate continued saying: *"Accused number 1 should have realised this as well and it is because of the nature of the sticks used by Accused number 1 and probably the force with which he inflicted the assault, the deceased had two injuries on the head. If one strikes a young boy of deceased's age with such a rough stick twice on the head, obviously depending on the force used, one should expect the child of sixteen years to sustain serious injury or injuries, …."*

[18] Having had the benefit of viewing the sticks produced and as described on record, I have no reason to disagree with the magistrate's opinion that these sticks could be considered as dangerous weapons when directed at the head of a person with some force. However, there is no reason why such injury should be limited to persons of the deceased's age (sixteen years); as I would think that such object would equally be capable of causing fatal injury to *any* other person, depending of course, as stated, on the amount of force put behind the blow. Although the magistrate appreciated such consequence as far as it concerns the deceased, he failed to do so in respect of the appellant, who was struck first by the deceased on the head twice, with the very same stick. In the circumstances there can be no doubt that the appellant's life was under threat as both blows were directed at and hit him on the head, causing

open wounds. He was thus entitled to defend himself against the deceased, who unexpectedly, launched an unlawful attack on him.

[19] The magistrate was of the view that once the deceased had turned his back on the appellant, the danger was over and there was no need to throw the stick at him. This finding, however, disregards the evidence that the deceased was busy picking up other sticks when struck by the appellant. There can be no doubt that the attack was still ongoing and had not come to an end until the deceased was down. To find otherwise, as the court did, is not supported by the evidence and constitutes a misdirection. Appellant's evidence that he did not aim at the deceased's head when he threw the sticks, was not disproved and I am not persuaded that there is evidence on record on which a different conclusion could be reached.

[20] When rejecting the appellant's defence, the court was of the view that the appellant could easily have overpowered the deceased; which finding is based on the events of the previous night when the deceased was trussed up by the appellant. It was said that because the appellant managed on his one to truss up the deceased and to chain together his legs, that *"(t)hese are all indications additional to the age of deceased that deceased could not mount resistance against Accused. Accused number 1 did not need any force to suppress or overpower the deceased, a little boy of sixteen years of age."* The magistrate further reasoned, saying: *"It is therefore questionable that this time around deceased initiated the attack on Accused number 1 and was even more powerful than Accused number 1, such that Accused number 1*

had to defend himself." These findings are certainly not borne out by the evidence and are neither considered reasonable in the circumstances.

[21] The age difference between the deceased and the appellant was exaggerated to suit the argument that the deceased was a *harmless boy*, for he was certainly not. He had attacked the appellant with a dangerous weapon and inflicted open wounds to the head. In cross-examination when asked whether he was stronger than the deceased, appellant replied that when he and the deceased were together, it would not appear to be the case; and that the deceased was actually stronger than him. It would also be wrong, without evidence to support such inference, to find that, because the appellant was the older person, therefore, he could easily have overpowered the deceased. Neither would the events of the previous evening be anything to go by when coming to such conclusion; because the appellant testified that once he managed to pull the deceased out their mother's hut, he did not put up any resistance when trussed up. Thus, the fact that appellant had managed to do so without help, is not supportive of the inferences drawn by the trial court, who clearly misdirected itself on the facts and the law in this regard.

[22] The requirements of the defensive act are fourfold: (i) It must be directed at the attacker; (ii) the defensive act must be necessary; (iii) there must be a reasonable relationship between the attack and the defensive act; and (iv) the defender must be aware that he/she is acting in private defence.[2]

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[2] C R *Snyman: Criminal Law (5th Ed) at 107*

[23] When applying these requirements to the present facts, there can be no doubt that the appellant, when he so acted, appreciated the wrongfulness of the deceased's actions and realised that he had the right to defend himself against the attack. He explained that the reason why he threw the sticks at the deceased was to discourage (stop) him from further picking up sticks which he intended using during the attack and that he did not aim (as the court found) at the head, but at the deceased's back and hands. The reason why he was struck on the back of his head was because the deceased went in a stooping position to pick up the sticks. Although there might be some doubt as to the truthfulness of this explanation, I am convinced that it cannot be ruled out as being impossible and therefore false. It must be remembered that the court need not believe an accused person's version in all its detail; and even where it has been shown that the accused was untruthful in certain respects or where the court does not believe his story[3], the court may only reject his version if satisfied that it is not only improbable, but false beyond reasonable doubt.[4] The trial court made much of the appellant's contention that he could not flee the scene and in my view, gave too much weight thereto when evaluating his evidence. Neither am I persuaded that he was under a duty to flee. Appellant was clear that he did not intend to kill the deceased and merely wanted to discourage him to continue with the attack. Regarding the requirement that there should be a reasonable relationship between the attack and the defensive act, I am not convinced that the appellant exceeded the bounds of private defence in any form or manner. Respondent's submission that the appellant acted negligently, in my view, is unmeritorious

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[3] *S v Jaffer,* 1988 (2) SA 84 (C) at 89D
[4] *S v Haileka*, 2007 (1) NR 55 (HC); *S v Naftali*, 1992 NR 299 (HC)

for it has not been shown that the appellant, in the circumstances of this case, exceeded the boundaries of private defence. In the end, that much was conceded by the respondent.

[24] Whereas private defence is one of the grounds of justification, it must be evident from the aforementioned reasoning that the killing of the deceased by the appellant was not an unlawful act; and that the trial court, in respect of the first count, wrongly convicted him. The conviction and sentence imposed on count 1, accordingly, stand to be set aside. The conviction and sentence imposed on count 2, however, remain unaffected.

[25] In view of the conclusion reached above, it has become unnecessary to consider the remaining grounds of appeal set out in the notice of appeal; hence, I decline to so.

[26] In the result, the following order is made:

1. Appellant's non-compliance with the Rules of Court is condoned.
2. The appeal in respect of count 1 is upheld and the conviction and sentence are set aside.
3. The conviction and sentence imposed on count 2 were not appealed against and remain as it is.

LIEBENBERG, J

I concur.

TOMMASI, J

APPELLANT **In person**

ON BEHALF OF THE RESPONDENT	**Mr N M Wamambo**
Instructed by:	**Office of the Prosecutor-General**