

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
APPEAL JUDGMENT

Case no: CA 50/2013

In the matter between:

SHIVUTE RUBEN NDISHISHI

APPELLANT

and

RESPONDENT

THE STATE

Neutral citation: *Ndishishi v The State* (CA50/2013) [2017] NAHCNLD 40
(25 April 2017)

Coram: TOMMASI J and JANUARY J

Heard: 20 February 2017

Delivered: 25 April 2017

Flynote: Evidence – Circumstantial evidence – Court must be satisfied that the inference sought to be drawn is be consistent with all the proved facts; and that the proved facts is such that they exclude every reasonable inference from them save the one sought to be drawn - State failed to adduce

crucial evidence proving the nexus between the body found at the scene and the body examined by the Pathologist.

Summary: The appellant was unrepresented in the court *a quo*. He now appeals against the conviction of murder. He was also charged *inter alia* with two counts of *crimen injuria*. He pleaded not guilty to murder and chose not to disclose the basis of his plea. He did not ask a single question in cross-examination of all the witnesses and at the end of the State's case he opted to remain silent. The court *a quo* literally only had the State's case to determine the guilt of the accused. One witness saw a vehicle with two occupants fighting for the steering wheel before the vehicle crashed into a wire fence. This witness and a security guard saw a person at the scene swearing and using obscene language. The appellant admitted that he was swearing because "someone was about to die", effectively placing himself at the scene. The vehicle caught fire and gunshot like sounds emanated from the vehicle. The appellant left the scene and a dead body was found with blood coming out from behind the ear. Drag marks were observed from the car to where the body was. No one identified the body at the scene. No fire-arm was recovered and the post mortem recorded that the deceased died of a gunshot wound to his right temple. There was however no evidence adduced by the person who removed the body from the scene and who identified the body nor was the person who received the body at the mortuary, called to give viva voce testimony.

The court held that the learned magistrate erred when he concluded that the State had proven the guilt of the appellant beyond reasonable doubt.

The court further held that murder is a material or define a "result crime" (See page 74 C R Snyman, Criminal Law, 5th Ed. 79-80) which prohibits the conduct which causes a specific condition. The State thus had to prove the nexus between the conduct of the accused and that it caused the death of the deceased. The State failed to prove beyond reasonable doubt that that the body which the appellant dragged out of the vehicle was the same body which was examined by the pathologist.

The appeal is upheld and the conviction and sentence are set aside.

ORDER

1. Condonation is granted for non-compliance with the Magistrate's court rules;
 2. The appeal against the conviction of murder is upheld and the conviction and sentence are set aside.
-

JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] The appellant was convicted of murder and *crimen injuria* in the regional court sitting at Oshakati. He was sentenced to 19 years imprisonment for murder and fined N\$200 or thirty days' imprisonment for *crimen injuria*

[2] The appellant was sentenced on 22 May 2009 and he noted his appeal and filed it together with an application for condonation 6 years thereafter on 5 May 2015. The respondent opposed the application for condonation on the grounds that the appellant's explanation is not *bona fide* and submitted that he has no reasonable prospects of success.

[3] The appellant filed his first notice of appeal against conviction and sentence on 28 May 2011. Attached thereto is an affidavit by the appellant. The explanation proffered by the appellant in that affidavit is that he was emotionally traumatised by the death of the victim to such an extent that he

was diagnosed during 2011 as being mentally disturbed after a psychiatric examination. For some reason this matter was not set down

[4] Ms Horn was appointed *amicus curiae* and she came on record on 30 April 2015. On the same date she filed a notice of withdrawal of the original notice of appeal and a new notice of appeal against both the conviction and sentence. On 6 May 2015 she filed an application for condonation. The appellant stated therein that although his right to appeal was explained after sentence was passed, he did not understand it as he is a lay person. His highest qualification is grade 10. His fellow inmates showed him how to draft the appeal papers and they are also lay persons.

[5] Ms Horn informed the court that the appellant appears to suffer from a mental illness and the appellant was referred for mental observation to ascertain if he was able to follow the court procedure. Although the appellant was examined no report was forthcoming and the court set the matter down for hearing. The court ruled as such as the appeal is decided within the four corners of the record. The appellant did not claim to be mentally ill during the trial. The court is satisfied that the appellant, assisted by a legal practitioner, was entitled to exercise his right to appeal.

[6] The affidavit of the appellant does not entirely explain the delay of 6 years. It must however be stated that a delay occurred in the enrolment of this matter. This court was of the view that the appellant had reasonable prospects of success.

[7] This court, considering all these factors, decided to grant the appellant the indulgence he seeks and considered the appeal on the merits.

Ad conviction - Murder

[8] The following is a summary of the grounds against conviction in respect of count 1:

- (a) the court *a quo* erroneously found that the appellant had the requisite intention to kill.
- (b) the court erred in the evaluation of the evidence in light of the fact that the State relied on circumstantial evidence to convict the appellant of

murder and the court a quo ought to have inferred from the circumstances that that that the appellant was guilty of culpable homicide.

- (c) The court did not assist the appellant who was unrepresented at the trial;
- (d) The court failed to take into consideration other possibilities which may have led to the discharge of the fire-arm
- (e) The court a quo erroneously convicted the appellant of murder as the crime of murder was not proven beyond reasonable doubt.

[9] The learned magistrate was satisfied that the guilt of the appellant was proved beyond reasonable doubt.

[10] The appellant was charged with four counts i.e:

Murder - having shot and killed Shivute Immanuel Ishitile (count 1);
Malicious damage to property - having maliciously damaging (burning) the vehicle of Shivute Immanuel Ishitile (count 2); and

Two counts of (*crimen injuria*) for having insulted the dignity of Matheus Katene (count 3) and Dominikus Kornelius (count 4) by using obscene words.

It was alleged that this all happened at the same time.

[11] The accused chose to represent himself and pleaded not guilty to count 1, count 2 and 4. When he was asked to plead to count 3 the appellant gave the following answer: "I indeed insult, but I was insulting in Oshivambo calling for help that there is a person who is about to die, can one render assistance to the person.(sic)"

[12] I deem it necessary to, at the outset, mention that the appellant apart from the afore-said plea explanation gave no indication to the court what had happened that evening and neither did the State adduce evidence of an extra curial statement made by the appellant. The appellant asked no questions to all the witnesses during cross-examination and opted to remain silent after the close of the State's case. The State's case, in the absence of any explanation by the appellant who was the only eye witness, was purely circumstantial. In

view of his total silence, the court *a quo* literally had only the State's version to consider.

[13] The key State witness, Mateus Katene, informed the court *a quo* that he was a security officer at Agra and that he was on duty on 5 October 2007. At around 20H30, he heard a sound coming from the direction of the road. Shortly thereafter he heard a bump in the yard of Agra. He saw an old Peugeot, which had entered just a small distance into the yard. A slender built man got out of the vehicle and called him. The man invited him to come closer. He told him to speak from where he was standing and not to come closer.

[14] According to this witness there was another vehicle which passed by. He saw the person ran toward this other vehicle but the vehicle did not stop. The man swore at him, got into the vehicle and reversed it. The vehicle became stuck smoke came from the bonnet and, after a while, it caught fire.

[15] He testified that after the vehicle caught fire, he heard two gunshots coming from the direction of the car. He distanced himself from the vehicle. He saw the person dragging a body from the car. His fellow security guards arrived at the scene and he warned them that the person was dangerous. He saw the person approaching the security officers and they retreated. The police arrived. The person walked towards the road in a staggering manner, as if drunk, and disappeared. A fellow security guard confirmed that they received a report from this witness that a vehicle crashed into the fence. He testified that upon their arrival, this witness cautioned and informed them that he heard gunshots. He testified that they retreated when the person approached them and the person left the scene. Both witnesses were not able to identify the appellant.

[16] Mateus Katene testified that, in the presence of the police, he moved closer and observed the signs that something was dragged from the vehicle to the water canal. He saw the body of a "dead person". He also observed blood on the head behind the ear, the back of the neck and on the ground. The vehicle was burnt beyond recognition. This witness, when questioned by the court *a quo*, became unsure whether the sound he heard were gun-shots or sounds emanating from the burning vehicle. He did not identify the body.

[17] The State called one of the persons who were in the vehicle which according to Mateus Katene “passed by”. He testified that, as they were coming from Oshakati, a Peugeot overtook them. He saw two persons in the vehicle. He could not identify the person driving the vehicle but he recalled that the driver was wearing a white T-Shirt. He saw two person were struggling for the steering wheel. The vehicle was driving from side to side in a zig zag manner and was not stable on the road. The vehicle left the road and it came to halt when it drove into a wire fence.

[18] Contrary to the testimony of Katene, he testified that they stopped their vehicle and saw a slender built man disembarking from the Peugeot. The man was staggering as if drunk. He started swearing but the witness was not able to state whether he was swearing at them or just in general. According to this witness it was not the person with the white T-shirt. The man returned to the Peugeot and they left the scene. He was also unable to identify the man who was swearing at them.

[19] Two ladies employed at a bottle store and market in Oshakati, testified that they saw the appellant at the store at around 22h00. One heard him saying the words “kill you” and “fuck is fuck. If I am with a person and the person is dead what else can I do? I will rather run away”. Both witnesses described his behaviour as strange and one testified that he acted like a person who was mentally ill. The appellant broke a chair outside the bottle store. He also wanted to throw a juice bottle against the other bottles because he was annoyed and “wanted to wash out his annoyance” or “cool down”. The appellant also tried to grab one of the ladies phone. One of the ladies testified that the appellant was wearing a red T-shirt, a trouser and no shoes.

[20] A security officer working at Okatana Service Station, testified that he saw the appellant around 01h30 in the morning i.e. 6 October 2007. He testified that the appellant robbed a lady of her cell-phone and ran off but he managed to catch him. The appellant told him that it is better if he kill him as he was already with a companion who died. He brought the appellant back to where the lady was and the appellant was assaulted by the people who had witnessed the robbing of the phone. The appellant left the service station. The appellant was known to him.

[21] The second investigating officer who attended the scene the next morning testified that they were unable to locate the pistol. They found a burnt sedan vehicle and a white sandal at the scene. He asked the appellant if the sandal belonged to him and the appellant did not deny that it was his. He did not find the body on the scene.

[22] None of the State witnesses mentioned the name of the deceased and neither did the accused.

[23] Dr Vasin, the pathologist who compiled the post-mortem report, testified that he, on 8 October 2007 examined the body of Shivute Imanuel Ishitile. He confirmed that the body he examined was identified by Sergeant Namwandi. He was informed that the death occurred on 5 October 2007, "around" Oshakati. He found a single contact gunshot entrance wound on the right temporal area of the head which he concluded was also the cause of death. The deceased had on a blood stained white T-shirt. A bullet was lodged under the skin on the left side of the head. He removed the bullet but it was not handed into evidence as the court *a quo* questioned the chain of custody of the bullet. The post mortem report was handed into evidence and marked exhibit "A".

[24] Attached to this exhibit were a "certificate of post-mortem examination" by Dr Vasin dated 6 October 2007; an affidavit by one Josef Namwandi in terms of section 212 (7) of Act 51 of 1977; an affidavit in terms of section 212(4) of Act 51 of 1977 by Dr Vasin; and an affidavit titled "Identification of the body sworn to by one Anna Kalina David. The affidavit of Joseph Namwandi does not stipulate the date in October 2007 when he received the dead body of Shivute Immanuel Ishitile. In the affidavit of Anna she identifies the body to Sgnt Namwandi at the Government mortuary who found it in a police vehicle, Sgnt Namwandi in turn identified the body to Dr Vasin.

[25] It is not clear from the record how these documents became part of the record. It was not specifically recorded that these affidavits were handed into evidence and I must assume that they were handed in as part and parcel of the Post-Mortem Report.

[26] The appellant was convicted in terms of section 112(1)(a) in respect of count 3 (crimen injuria) and he was discharged in terms of section 174 in respect of count 2 (malicious damage to property) and count 4 (crimen injuria). The appellant was placed on his defence and he chose to remain silent. During his address the appellant informed the court that he remembered that he uttered some words at the scene because he was “offended by the incident”. He denied killing the deceased and he admitted that he did not dispute the testimony that he was struggling for the steering wheel. He agreed that he ought to have done so because he did not struggle for the steering wheel.

[27] The court *a quo* in the judgment reasoned that the silence of the accused under the circumstances may be taken into account against him when considered against the totality of the evidence. The court *a quo* found the following facts to have been proven: that two people were struggling for the steering wheel of the car; that the appellant was driving the vehicle; that gunshots-like sounds were heard emanating from the motor vehicle in question; that the deceased was found a few meters from the motor vehicle having been dragged from the left side of the motor vehicle in question; that the cause of death was a single gunshot wound to the head. The court *a quo* concluded that the only reasonable inference to be drawn from the proven facts is that he deceased met his death through the agency of the appellant.

[28] Both counsel were *ad idem* that the court *a quo* made its finding on circumstantial evidence. It is trite that “Where the court is required to draw inferences from circumstantial evidence, it may only do so if the ‘two cardinal rules of logic’ as set out in *R v Blom* 1939 AD 188, have been satisfied. These rules were formulated in the following terms: (1) the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.¹”

[29] Ms Horn, counsel acting *amicus curiae*, submitted that the State failed to prove its case beyond reasonable doubt in that the evidence does not

¹ The headnote of *S v HN* 2010 (2) NR 429 (HC)

support a conclusion that the only reasonable inference was that the appellant had the necessary intent to murder the deceased, but rather that the appellant ought to have been found guilty of culpable homicide given the fact that there was evidence that the appellant had consumed a lot of alcohol. She further submitted that the discharge of the fire-arm may have been as a result of an act of self-defence or that the deceased threatened to commit suicide. She invited the court to consider the fact that the appellant had removed the body of the deceased from the burning car and also that no evidence was adduced that there was gunshot-residue on the appellant's hands and clothing.

[30] Mr Pienaar acting for the respondent, submitted that the court *a quo* was correct with its inference of mens rea. He submitted that the State proved that the appellant was seen fighting for the steering wheel; and the shooting was at very close range as per the evidence of Dr Vasin who described the wound as a "*contact wound*" He submitted, correctly so in my view, that appellant failed to place evidence before the court that the fire-arm was accidentally discharged and did not raise the defence of self-defence during his trial. He submitted that the court *a quo*, in the absence of his explanation, was entitled to infer that he acted with direct intent.

[31] The silence of the appellant was, correctly so, taken into account by the court *a quo* when it convicted the appellant of murder. The court *a quo* however had to be satisfied that the prosecution had proven its case beyond reasonable doubt. In *S v Auala* 2010 (1) NR 175 (SC), Mtambanengwe AJA referred to the following remarks of Madala J in *Osman and Another v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC) (1998 (2) SACR 493; 1998 (11) BCLR 1362) in para 22:

'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecutor's case may be sufficient to prove the elements of the offence. The fact that an accused had to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.'

[32] This court requested counsel to make further submissions on whether the State proved the nexus between the body which was dragged out of the burning vehicle and the body which was examined by the Dr Vasin.

[33] Both Ms Horn and Mr Pienaar referred this court to the documents which were attached to the Post-Mortem Medical Report. I shall for argument sake accept that the affidavits in terms of section 212(4) and 212(7) were, upon mere production thereof, *prima facie* proof of the matter so alleged. The affidavit of Anna Dawid however does not fall into this category of documents.

[34] Anna David did not testify and the content of this affidavit was thus not subjected to cross-examination. The appellant was not informed of its production and there is no record that he consented thereto. Witnesses in a criminal trial must give evidence *viva voce* and the mere production of this affidavit was irregular. There was thus no proper identification of the body.

[35] Murder is defined as the unlawful and intentional causing of the death of another human being and the appellant could still be convicted of murder despite the fact that the identity of the deceased is not known. The key question however is whether or not the State proved that the body which was examined by Dr Vasin is the same body which was removed from the scene of crime.

[36] Mrs Horn submitted that the state failed to prove a proper chain of evidence from the scene of the crime to identification of the corpse which was examined in the mortuary. She referred this court to *S v Andima* 2000 (2) NR 639 (HC).

[37] Mr Pienaar conceded that there was no *viva voce* evidence in respect of the identity of the person who was in the vehicle and whose body was dragged out of the vehicle the evening of 5 October 2007. He submitted that the appellant did not dispute the identity of the deceased. It must be borne in mind that none of the State witnesses mentioned the name of the deceased. The appellant therefore was not called upon to dispute this fact. The State is required to prove the offence and what is contained in the charge sheet. It cannot be said that an accused who chooses to remain silent failed to place issues which are not attested to, in dispute.

[38] He further submitted that: Mateus Katene saw the “dead body”; there was evidence that a police officer removed the body from the scene; that the witness Katene heard a sound which he said could be that of a fire-arm coming from the vehicle; that Katene saw blood behind the ear of the body. He submitted that this evidence sufficiently proves that the appellant was the one who inflicted the gunshot wound which was found by Dr Vasin. I surmise that Mr Piennar is encouraging this court to, by means of inferential reasoning, arrive at the conclusion that the body which was on the scene is indeed the body which was examined.

[39] In *S v Andima, supra*, the defence argued that the chain, from the involvement of the appellant until the post-mortem on the body of the deceased, was not proved. In that case no witness in the court *a quo* identified the body of the person to the doctor and the name of the person who identified the body to the doctor was not filled in. There was also no evidence that clearly established the name of the deceased as being the person who was stabbed by the appellant. The conviction and sentence in that case were set aside.

[40] In this matter there is no evidence that the body which was examined by Dr Vasin is indeed the body which was at the scene of crime. There is no admission by the appellant that the person who was “about to die” is the same person who was examined and no evidence was adduced by the officer who transported the body from the scene to Police Mortuary. The affidavit of Sgnt Namwandi does not indicate the day during October 2007 when he received the body, although Dr Vasin’s affidavit states that he was informed that the death occurred on 5 October 2007. No time is indicated in the space provided in the post-mortem report. It is evident however that Sgnt Namwandi received it at 19h00. The witness Katene indicated that the incident occurred at around 20h30. This case may be distinguished from *S v Andima, supra* in that the identity of the deceased was proved.

[41] The appellant chose not to disclose the basis of his plea of not guilty, thus the State was called upon to prove all the elements of the offence beyond reasonable doubt. Furthermore, the failure to testify does not relieve the prosecution of its duty to prove the guilt of the appellant beyond

reasonable doubt. The important fact to remember is that the appellant was unrepresented. It is indeed so that he did not cross-examine the witnesses but no witness came to testify that the “dead body” which was at the scene was the “dead body” which was received by Sngt Namwandi. In this case, it was crucial evidence which was not placed before the court *a quo*.

[42] There was a crash, the body was removed from a burning vehicle, and blood was seen behind his ear, on his neck and on the ground. The presence of blood may reasonably be ascribed to injuries sustained during the crash. Katene was a single witness in respect of the “gunshots”. He could not be sure whether it was the burning car or gunshots. He heard 2 shots and the body which was examined had 1 bullet wound. No other bullet or bullet casings were found at the scene. It cannot be said, in the absence of the evidence by the police officer who removed the body from the scene, that the proven facts are consistent with the inference that the deceased died of a gunshot wound to his right temporal side of his head.

[43] I am of the considered view that the court *a quo* erred when it found that the inference sought to be drawn was consistent with all the proved facts firstly and secondly that the proved facts exclude every reasonable inference from them save the one to be drawn. The State had not proven its case beyond reasonable doubt.

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

1. Condonation is granted for non-compliance with the Magistrate’s court rules;
2. The appeal against the conviction is upheld and the conviction and sentence are set aside.

M A Tommasi
Judge

HC January
Judge

APPEARANCES

For the Appellant:

Ms Horn
Of Horn Attorney

For the Appellant:

Mr Pienaar
Prosecutor General Office