



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: CA 48/2016.

In the matter between:

ANTONIO JOSE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Jose v S* (CA 48/2016) [2017] NAHCNLD 46 (6 June 2017)

Coram: TOMMASI J and JANUARY J

Head: 16 May 2017

Delivered: 6 June 2017

Flynote: Criminal Procedure – Brought to the notice of the court that the proceedings are not in accordance with justice – Appeal not considered but matter reviewed in terms of s 304(4) – Questioning in terms of s 112 (1)(b) – Murder – The appellant raised private defense as a possible defense – Court ought to have noted a plea of not guilty in

terms of s 113(1) – Conviction and sentence set aside – Matter remitted to regional court with direction to proceed in terms of section 113(1).

ORDER

1. The conviction and sentence are set aside.
2. The case is remitted to the trial court in terms of s 312 of Act 51 of 1977 with a direction to act in terms of s 113(1) and to bring proceedings to its natural conclusion.

JUDGEMENT

TOMMASI J (JANUARY J concurring)

[1] The appellant appealed against conviction and sentence.

[2] The appellant not only filed his appeal out of time but also failed to set out clearly and specifically the grounds on which the grounds on which his appeal was based. These “grounds” however brought to the notice of this court that the proceedings were not in accordance with justice. In view of this fact the court dealt with the matter in terms of section 304(4) of the Criminal Procedure Act.

[3] Mr Nyambe acted amicus and Ms Nghiyoonanye acted for the respondent. Counsel were requested to address the court on the question of whether the appellant admitted all the elements of the offence of murder and the learned magistrate was offered the opportunity to give a statement on the same question.

[4] The appellant pleaded guilty in the regional court to the charge of murder. He was questioned by the regional court magistrate in terms of section 112(1)(b). The appellant admitted to having stabbed the deceased with a knife in the abdomen. He admitted that he intended to kill the deceased. When asked why he killed the deceased he gave the following answer: 'We were fighting and I then stab (sic) the deceased. The deceased did not have weapon on him. The friends of the deceased grabbed my friend and threw him on the ground. They assaulted my friend. I wanted to help my friend. I then took a knife and stabbed the deceased.' The following questions and answers were thereafter recorded:

'Was your life in danger? No

Were you assaulted by the deceased or his friends? No, they fought with my friend

Did you have the intention to kill the deceased? Yes as I was angry for what they did to my friend.'

The appellant was unrepresented at the time.

[5] The court enquired from the learned magistrate whether he was satisfied that the appellant admitted the element of unlawfulness. The learned magistrate responded as follows: 'The element of unlawfulness was dealt with in the question whether the appellant had the intention to kill the deceased.'

[6] Both counsel were *ad idem* the appellant raised a possible defense i.e. private defense which is defined as follows: 'A person acts in private defence, and her act is therefore lawful, if she uses force to repel an unlawful attack which has commenced or is imminently threatening, upon her or somebody else's life, bodily integrity, property or other interest which deserves to be protected, provided the defensive act is necessary to protect the interest threatened, is directed against the attacker, and is reasonably proportionate to [the] attack .'¹ They further agreed that the learned magistrate erred in law by not distinguishing between the element of unlawfulness and intention.

[7] In *S v Pieters* 2014 (3) NR 825 (HC) at page 828, para 12, Hoff J, as he then was, cited with approval the following from *S v Naidoo* 1989 (2) SA 114 (A) at 121F – G

¹ CR Snyman *Criminal Law* 5 ed at 103.

'In conformity with the object of the Legislature our courts have correctly applied the section with care and circumspection, and on the basis that where an accused's responses to the questioning suggest a possible defence or leave room for a reasonable explanation other than the accused's guilt, a plea of not guilty should be entered and the matter clarified by evidence'.

[my emphasis]

The learned magistrate, having failed to recognize the possible defence raised by the appellant, failed to record a plea of not guilty in terms of section 113 of the Criminal Procedure Act, 51 of 1977.

[8] The conviction, in light of the error, cannot stand and the matter ought to be remitted to the magistrate in terms of the provisions of s 312.

[9] In the result, it is ordered:

1. The conviction and sentence are set aside
2. The case is remitted to the trial court in terms of s 312 of Act 51 of 1977 with a direction to act in terms of s 113(1) and to bring proceedings to its natural conclusion.

MA Tommasi

Judge

I agree

H C January
Judge

APPEARANCE

FOR THE APPELLANT:

MR NYAMBE

**OF SHIKONGO LAW CHAMBERS
(amicus curiae)**

FOR THE RESPONDENT:

MS NGHIYONANYE

**OF PROSECUTOR-GENERAL'S
OFFICE OSHAKATI**