

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no.: HC-NLD-CRI-APP-CAL-2019/00035

In the matter between:

JOSEPH NDEMUTETAKO SHAANIKA

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Shaanika v S* (HC-NLD-CRI-APP-CAL-2019/00035) [2020] NAHCNLD 32 (21 February 2020)

Coram: JANUARY J *et* SALIONGA J

Heard: 05 September 2019

Delivered: 21 February 2020

Flynote: Criminal Procedure - Appeal - Conviction - Murder with direct intent - Heads of argument late - Reasons for delay reasonable - prospects of success - Magistrate evaluated evidence piecemeal and not with the totality of evidence - Appellant's version reasonably possibly true - Appeal succeeds - Convicted for culpable homicide

Summary: The appellant appeals against conviction. He was convicted for murder with direct intent. The appellant went to the house where the deceased resided on the day of the incident. He wanted to confront her about a traditional gate that he constructed at his field to prevent his animals not to get strayed from his field. The gate was constructed with sticks. The sticks were removed and not replaced. The problem started two days before the alleged crime.

The appellant followed footprints from the gate to the house where the deceased resided. When he approached the house the deceased and another girl ran away. The deceased went into a hut of her uncle. The appellant went to the door of the hut and called the deceased by name. She said she will come out but did not come out of the hut.

The appellant eventually tried to remove a curtain at the door of the hut with a shotgun that he went with to the hut. A shot went off through the curtain during the process of trying to remove it. The deceased was fatally injured.

The evidence is circumstantial. The appellant is the only one who could testify how the shot went off. He gave an explanation which is reasonably possibly true. The conviction of murder with direct intent is set aside. The appellant is convicted for culpable homicide.

ORDER

1. The application for condonation is upheld;
2. The conviction for murder is set aside;
3. The appellant is convicted for culpable homicide;
4. The matter is remitted to the magistrate to sentence the appellant afresh considering the period of imprisonment that the appellant already served.

APPEAL JUDGMENT

JANUARY J (SALIONGA J concurring):

Introduction

[1] The appellant was convicted for murder with direct intent. He was sentenced to 15 year's imprisonment of which five years were suspended for five years on condition that the appellant is not convicted for murder committed during the period of suspension. The court also ordered that the appellant is declared unfit to possess a fire arm for ten years.

[2] This appeal is against conviction. The grounds of appeal are:

1. That the learned magistrate erred in law and/or in fact or misdirected himself by finding that the State proved beyond reasonable doubt that the appellant acted with direct intent when he injured the deceased with his shotgun;

2. The learned magistrate erred in facts and law in finding that the State had proved beyond reasonable doubt that the appellant had formed the intention to kill the deceased;

3. The magistrate erred in law and in facts in finding that the state proved beyond reasonable doubt that the shot which wounded the deceased was targeted at her by the appellant;

4. The learned magistrate erred in facts and in law in finding that the state had proved beyond reasonable doubt that the appellant had prior to the incidence (sic) in question assaulted the deceased with a knob-kierie.

5. The learned magistrate erred in facts and in law in finding:

5.1 That the inference to be drawn from the circumstantial evidence of the case was that the appellant was angry that the deceased had vandalised his gate and then bought bullets in the pretence of killing his ailing cow;

5.2 That the state proved beyond reasonable doubt that the deceased was injured by one of the ammunitions which the appellant had bought on the day in question.

6. The learned magistrate – in the absence of ballistic evidence to disprove such version – erred in both facts and law in rejecting the appellant’s version that the gunshot went off by mistake;

7. The learned magistrate erred in both facts and law in failing to find that the appellant’s version was reasonable possibly true.

8. The learned magistrate erred in facts in finding that the state proved beyond reasonable doubt that the shooting incidence took place at about 15h00 on the day in question;

9. The learned magistrate erred in both facts and law in failing to find:

9.1 that the refusal by the deceased’s aunt (Martha Fillemon to allow the appellant to take the deceased to the nearest clinic (being the Omungwelume Primary Health Clinic, or nearest hospital constituted a *novus actus intervenus* (*sic*);

9.2 the subsequent failure by the police to take the deceased to the nearest health clinic also constituted a *novus actus intervenus* (*sic*);

10. The learned magistrate erred in both facts and law in disregarding, alternatively, not attaching due weight to the testimony of the appellant’s witnesses.

11. The learned magistrate erred in both facts and law in failing to properly and correctly assess the evidence in total.’

[3] The appellant is represented by Ms Mugaviri and the respondent by Ms Petrus.

Point in limine

[4] Ms Petrus, representing the respondent raised a point *in limine* that the appellant filed his notice of appeal late. The appellant was sentenced on 09 February 2017. His notice of appeal is dated the 15 February 2017 and received by the clerk of court,

Oshakati on 24 February 2017. In my view, the notice of appeal was timeously filed within 14 days as stipulated by the rules of court.

[5] Ms Mugaviri filed her heads of argument late and applied for condonation. She explained that she started representing the appellant in 2017 in the court below. When the matter appeared in this court for the first time on 09 July 2019, the appellant was held at Elizabeth Shikongo Correctional Facility. She thus could not consult with the appellant. She had to apply to this court for the appellant to be transferred to Oluno Correctional Facility to enable her to consult.

[6] It was brought to her attention only on 15 August 2019 that the appellant was transferred to Oluno on 24 July 2019. She was on sick leave due to the ill health of her son for about two weeks until 12 August 2019 and could only prepare heads of argument thereafter. I find the explanation reasonable. I further find that there are reasonable prospects of success as will become evident below.

The facts

[7] The appellant pleaded not guilty. He was represented in the Regional court and opted not to give a plea explanation. He was eventually convicted as charged. The State called 14 witnesses and the defence six witnesses.

[8] The evidence indicates that on the 16th June 2014, the appellant who was the neighbour of the deceased shot the deceased with a shotgun. The incident was preceded when the deceased and another child were sent to collect marula fruits from a neighbouring village of one Simeon. On their way they had to pass a gate of the appellant where he, the appellant, had placed a stick to prevent animals to stray through the gate.

[9] The deceased and the other child did not replace the stick on their way back home because they were carrying the baskets with marula fruits. The appellant appeared some time thereafter at the house where the deceased and other child were and greeted them. He had a knob-kierie with him. The appellant shouted that the deceased and other child should go and fix the gate. The children ran away being afraid

of the appellant with a knob-kierie. They encountered another person with a panga who was also residing with the appellant.

[10] In their attempt to flee the children tried to climb over the boundary wall of their house. The appellant threw the deceased with the knob-kierie and hit her. At some point the deceased sustained an injury on her foot and was no longer in a position to move and just sat down. The appellant again shouted that when he comes back the gate should be fixed. The appellant drove away with his motor vehicle. The children were reprimanded by the person residing with the appellant and their mother to fix the gate.

[11] The children went to repair the gate and thereafter returned home. At about 15h00 the deceased went to wash her school uniform and took a bath. The children were thereafter resting in the house when they heard the voice of the appellant. The deceased was in the room of a certain uncle Kamati while the other child was in the house but afterwards went out. She saw the appellant with a fire arm, a shotgun which was identified in court. The appellant was in front of the room of Kamati and the deceased was inside the room. The appellant shouted to the deceased to come out of the room. The deceased agreed to come out. The appellant lifted a curtain with the shotgun in the doorway of Kamati's room and thereafter saying: "come out" he released the curtain. Shortly thereafter a shot went off fired by the appellant.

[12] The appellant fired into the room causing injuries to the right knee and the left leg of the deceased. The wound was covered to stop bleeding. The police were called and they transported the deceased to the hospital.

[13] The post-mortem report reflects:

- A shotgun entry wound on the anterior aspect of the right lower limb about 3 cm above the knee. The wound measures 40 mm x35 mm.
- Complete destruction of the patella and tibial platform on the site of the wound; Femoral condyle was evenly damaged (fractured).

- An exit wound on the posterior aspect of the right knee on the popliteal region. The wound path went through skin, muscles, ligaments and tendons, transacted popliteal vessels and exited as described.
- Marked mucous membrane and pallor.
- Two abrasions were noted on the opposite lower limb almost at the same area.

The cause of death was a shotgun wound to the right knee.

Circumstantial evidence

[14] Nobody saw the actual shooting and the conviction is based on circumstantial evidence. The approach to circumstantial is trite:

'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.

The law does not require from a court to act only upon absolute certainty, but rather upon just and reasonable convictions. When dealing with circumstantial evidence, as in the present case, the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused's guilt has been proved beyond reasonable doubt. In other words, doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation, but those doubts may be set at rest when it is evaluated again together with all the other available evidence.¹

[15] Further on circumstantial evidence I agree with Liebenberg J where he stated in *S v Nicodemus* (CC 15/2017) [2019] NAHCMD 271 (06 August 2019).

Evaluation of evidence

¹ See: *S v HN* 2010 (2) NR 429 (HC) headnote at 429 C-F

When faced with circumstantial evidence, it is trite that the approach of the court should be what is stated in *S v Reddy*² namely, that evidence must not be assessed in piece-meal but in its totality. The court should carefully weigh together the cumulative effect of all the circumstantial evidence adduced, from which certain inferences may be drawn.³ On circumstantial evidence the court in *R v Mtembu*⁴ said the following at 679:

“But in any event it is not clear to me that the Crown's obligation to prove the appellant's guilt beyond reasonable doubt required it to negative beyond reasonable doubt all pieces of evidence favorable to the appellant. I am not satisfied that a trier of fact is obliged to isolate each piece of evidence in a criminal case and test it by the test of reasonable doubt. But that does not necessarily mean that every factor bearing on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied.”

And further at 680:

“Circumstantial evidence, of course, rests ultimately on direct evidence and there must be a foundation of proved or probable fact from which to work.”

[16] The appellant testified in his defence and called two witnesses. He testified that about two days before the incident, he found someone driving his donkeys outside a field. Upon further investigation he found a gate as he put it being destroyed. The gate consists of wooden sticks to restrain animals to go astray through the gate. The appellant repaired the gate. He also noticed footprints leading to the house of a certain Ms Martha where eventually the incident happened. The following day, a Sunday he again found his donkeys outside a field. He instructed a boy staying with him to collect the donkeys and was informed that the small gate was destroyed. The boys replaced the stick.

[17] On 08h00 the Monday, the day of the incident, the appellant called the boy and they went together to repair the small gate with tools such as pliers, wires a shovel and an axe. Thereafter the appellant had to attend church. He also had an ailing cattle. He informed the boy that he will have to kill the ailing cow when he comes from church. He

² 1996 (2) SACR 1 (A) at 8c-g.

³ *R v Blom* 1939 AD 188 at 202-3.

⁴ 1950 (1) SA 670 (A).

drove to church with his motor vehicle and noticed on the way that the gate was again removed.

[18] The appellant and the boy again observed footprints and followed it to a certain house of one Ndaluluma. As they were approaching the house the deceased ran away and climbed over the boundary wall of the homestead. The appellant called her back to enquire about the gate. The deceased did not respond. The appellant instructed the children to repair the gate and that he should find it fixed when he returns from church. The deceased insulted him. The appellant attended church. From there he went to buy bullets at a shop to shoot the ailing cow. He bought 4 bullets and returned home.

[19] He instructed the boy to collect the ailing cow to kill it. In the meantime the appellant went into his room to collect the rifle (shotgun). He enquired from another boy if the gate was repaired. The boy went to inspect and reported that it was not fixed. The appellant went to the house where the children were staying to enquire about the gate. When reaching their house the deceased ran away into a bedroom. The appellant called the deceased who eventually responded that she is coming but she eventually did not come. The appellant approached a linen at the entrance of the door to the room with his firearm in the left hand. He allegedly thought the deceased will hit him with something. He took the firearm to move the linen to one side. As he was moving the linen, the firearm hit against the wall and a shot went off through the linen.

[20] The appellant testified that he was in shock and offered to take the deceased to hospital. He was apparently stopped and chased from the house. He went home and called the police at Ekolola. The police there told him that they were without transport and offered to phone the police at Omungwelumbe. Eventually the police arrived. According to the appellant the police took a while to arrive. He went with the police to the house where the incident happened but was refused entrance by a relative of the deceased. He was taken to Omungwelumbe police station. He stated that the police took about 15 to 20 minutes before they transported the deceased to Oshakati.

[21] The appellant testified in cross-examination that he is a retired pensioner as a Major in the Namibian Defence Force. He received extensive training in the operation of firearms. He knows that one may not endanger the life of another by pointing a firearm.

[22] The State submitted that the appellant is guilty to murder with direct intent and he was convicted as such. The defence vehemently submitted that the appellant should have been acquitted. In brief it was submitted that the State dismally failed to prove the intention to murder because the case was based on circumstantial evidence. As such the version of the appellant and his defence witnesses is reasonably possibly true and the court should have given him the benefit of the doubt. Both counsel and the court correctly agreed that the evidence was only circumstantial. The law pertaining to circumstantial evidence was already restated in paragraph 15 above.

[23] The defence argued that the State failed to prove the following:

- (a) It failed to state or specify in what manner the alleged unlawful and intentional act was carried out;
- (b) That none of the 14 State witnesses were direct eye-witnesses to the alleged incident of shooting;
- (c) That the shot discharged from the firearm in possession of the accused was directed at the deceased;
- (d) That the State's case is based on circumstantial evidence;
- (e) That there was *novus actus interveniens*.

[24] The learned magistrate dealt with each of the submissions. He concluded that the appellant knew what the averments were with reference to section 84 of the Criminal Procedure Act 51 of 1977 that deals with the essentials to the charge, section 85 that deals with objections to the charge, which was not exercised by the appellant and section 88 which provides for defects which are cured by evidence.

[25] With reference to paragraph (b) above he correctly found that there was only circumstantial evidence. In relation to paragraph (c) above he concluded that the closest

hereto was the evidence of the appellant that he took the rifle with him to do enquiries why the gate was not fixed. He removed a curtain with the rifle. The rifle hit a wall and a shot went off. In relation to paragraph (d) that the State's case of intention was only circumstantial. The magistrate concluded that a state witness testified that it is evident that the appellant was angered by the behaviour of the children including the deceased and that he intended to cause harm to them. Furthermore the appellant went straight to the room where the deceased was. He even called her name and he went there with a shotgun.

[26] The magistrate found that the pretext of having went there with the shotgun to shoot an ailing cattle later and that appellant was under the impression that the deceased might have hit him with something is unfounded. The magistrate thus rejected the appellant's version.

[27] The record further reflects the following:

'Although circumstantial as the evidence presents, this Honourable court feels obliged to accept the argument of the state that the accused had formed an intention to injure these children. As a trained military personnel (sic) with many years of experience he was not suppose (sic) to carry gun when he is angry, let alone pointing it in the room where is someone (sic), unless he already formed an intention to injure or kill someone. Thus the drawn inferences of this circumstances is well founded and is accepted.'

[28] In relation to causation and *novus actus interveniens* the learned magistrate found that although there were differences between state and defence witnesses in relation to the time when the incident occurred when the deceased was shot and when she eventually received medical assistance, he found that there was no new intervention between the appellants act and the death of the deceased. I find that the timespan between the shot being fired and the eventual death of the deceased is not material in this appeal.

[29] In *S v Ananias*⁵ a deceased refused medical treatment after being assaulted with a glass. It was argued that her refusal constituted a *novus actus interveniens*. The court

⁵ 2014(3) NR 665 (HC)

refused to accept the refusal to go for medical treatment as a new intermediate fact. The undisputed fact that remains on the evidence is that the injuries that the appellant inflicted on the deceased were lethal, as in this case.

Conclusion

[30] In my view, the magistrate considered and evaluated the evidence piecemeal and not as a whole. The evidence as a whole reflects that the appellant was continuously agitated by children who left open a gate that restraint the appellant animals to go astray. In my view appellant had all the right to confront the children. His testimony that he went to confront the children with a gun he intended to go and shoot an ailing cow with was corroborated by his witnesses. I find this version probable. In my view, the appellant's version is reasonably possibly true. It is tragic that the deceased was shot. He need not convince the court of the truth thereof. He was grossly negligent in causing the death of the deceased by confronting her with a loaded gun that was not safe.

[31] In the result:

1. The application for condonation is upheld;
2. The conviction for murder is set aside;
3. The appellant is convicted for culpable homicide;
4. The matter is remitted to the magistrate to sentence the appellant afresh considering the period of imprisonment that the appellant already served.

H C JANUARY
JUDGE

I agree

J T SALIONGA
JUDGE

APPEARANCES

FOR THE APPELLANT: Ms G Mugaviri
Of Mugaviri Attorneys, Oshakati

FOR THE RESPONDENT: Ms S Petrus
Of the Office of the Prosecutor General, Oshakati