

“ANNEXURE 11”

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION

Case Title: <i>The State v Tobias Erwens Hansa Haiduwa</i>	Case no: CC 02/2017
	Division of Court: Northern Local Division
Heard before: Honourable Justice Tommasi J	Delivered on: 28 February 2020 Reasons delivered on: 06 March 2020
Neutral citation: <i>S v Haiduwa</i> (CC 02/2017) [2020] NAHCNLD 37 (06 March 2020)	
The order: <ol style="list-style-type: none">1. The applicant is granted leave to appeal against the court’s decision on 05 November 2018 i.e. that the warning statement made by the accused is ruled inadmissible as evidence in the main trial;2. Leave to appeal against the court’s decision on 01 March 2019 to acquit the accused on a charge of murder, is refused;3. Leave to appeal against the court’s decision on 01 March 2019 to acquit the accused on a charge of robbery, is refused; and4. The applicant is granted leave to appeal against the forfeiture order made in respect of the amount of U\$2025 on 30 August 2019.	
Reasons for order:	

TOMMASI J,

- [1] The applicant applied for leave to appeal the decision of the court's refusal to admit into evidence the warning statement made by the accused, the acquittal of the accused on a count of murder and robbery, and against a forfeiture order made in terms of section 35(4) of the Criminal Procedure Act, 51 of 1977. The application was opposed by the Respondent/accused.
- [2] The test to be applied has been clearly stated in *S v Ningisa and Others 2013 (2) NR 504 (SC)* as follows:

'In determining whether or not to grant a convicted person leave to appeal, the dominant criterion is whether or not the applicant will have a reasonable prospect of success on appeal ... As regards the latter, difficult though it may be for a trial judge to disabuse his/her mind of the fact that he/she has himself/herself found the state case to be proved beyond reasonable doubt, he/she must, both in relation to questions of fact and of law, direct himself/herself specifically to the enquiry of 'whether there is a reasonable prospect that the Judges of Appeal will take a different view.'
- [3] I have considered the grounds raised in respect of the court's ruling not to admit the warning statement of the accused into evidence in the main action and I am of the view that there are reasonable prospects that the applicant may succeed on those grounds.
- [4] The grounds raised in respect of the verdict on murder deals primarily with the fact that the court erred in finding that it is reasonably possibly true that the accused was stabbed by the accused and or acted in self defence. The court extensively dealt with facts and properly considered the onus which rest on the applicant to prove the guilt of the respondent beyond reasonable doubt. This, the applicant dismally failed to do.
- [5] Whilst the court did not deal with each one of the elements of robbery, common sense dictates that once the court concluded that the respondent was not the aggressor, the

robbery could not have taken place in the manner described by the applicant in the indictment.

[6] This court properly weighed and considered the evidence and there are no reasonable prospects that the applicant would succeed on the grounds raised in its application for leave to appeal.

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

1. The applicant is granted leave to appeal against the court's decision on 5 November 2018 that, the warning statement made by the accused is ruled inadmissible evidence in the main trial;
2. Leave to appeal against the court's decision on 1 March 2019 to acquit the accused on a charge of murder is refused;
3. Leave to appeal against the court's decision on 1 March 2019 to acquit the accused on a charge of robbery is refused; and
4. The applicant is granted leave to appeal against the forfeiture order made in terms of section 35(4) of the Criminal Procedure Act, 51 of 1977 (CPA) on 30 August 2019.

Judge's signature	Note to the parties:
	These reasons should be lodged together with the appeal to the Supreme Court.
Counsel:	
Applicant	Respondent
<i>Mr. J Mudamburi</i> <i>of</i> <i>The Office of the Prosecutor General</i> <i>Oshakati</i>	<i>Mr. P Grusshaber</i> <i>of</i> <i>Legal Aid</i> <i>Windhoek/Oshakati</i>