

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

APPEAL JUDGEMENT

Case Title: Loide Phillipus v The State	Case no.:HC-NLD-CRI-APP-CAL-2022/00037
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga J et Honourable Mr Justice Kessler J	Heard: 16 June 2023 Delivered: 11 August 2023
Neutral citation <i>Phillipus v S</i> (HC-NLD-CRI-APP-CAL-2022/00037) [2023] NAHCNLD 80 (11 August 2023)	
The order: <ol style="list-style-type: none">1. The appeal is upheld and the conviction and sentence are set aside.2. In terms of section 309(3) read with section 304(2) of the Criminal Procedure Act 51 of 1977 as amended, the matter is remitted to the Ondangwa Magistrates' Court for proceedings to start <i>de novo</i> before another magistrate.3. If the appellant is convicted again, the time served for this matter should be considered during sentencing.4. The appellant is granted bail in the amount of N\$ 1 000 on the condition that she is not	

allowed any direct or indirect contact with the complainant. If bail is paid, the appellant is warned to appear at the Ondangwa Magistrates' Court (A Court) on the 12 September 2023 and furthermore warned that if she fails to appear in court, a warrant for her arrest may be issued against her, her bail money will be provisionally cancelled and the bail money will be provisionally forfeited to the State pending an enquiry into her absence.

Reasons for the order:

KESSLAU J (SALIONGA J concurring)

Introduction

[1] The appellant was convicted in the Magistrates' Court of Ondangwa on a charge of attempted murder. She was sentenced to five years imprisonment.

Points in limine

[2] Mr Matota for the State raised two points *in limine* the first being that, even though the notice of appeal indicated an appeal against both the conviction and sentence, the grounds of appeal are only concerned with the conviction. The point was conceded by Mr Shapumba for the appellant and this court will thus proceed accordingly.

[3] The second point *in limine* raised by Mr Matota was that the grounds of appeal fail to comply with the rules of court in that they are not clear and specific. Mr Shapumba argued that the grounds were clear enough for the magistrate to provide reasons for the conviction and thus the point should be dismissed.

[4] The appellants' notice of appeal against the conviction consist of a six page document including headings and subheadings with about 26 points which appear to include a combination of opinions most of which are intertwined or duplications. The magistrate

managed to provide reasons on most of the points, however she appears to be as confused as the State by the document. The State similarly struggled to address the several grounds and in an attempt to reply, combined them into their own structure. To avoid this confusion, counsel's attention is drawn to Rule 67 of the Magistrates' Court Rules and the decided cases.¹

[5] The only clear ground that this court got from the notice of appeal is an error or failure by the magistrate to explain the right to disclosure of the docket to the unrepresented accused at the start of the trial. The Magistrate recognised this ground of appeal and provided her reason for the failure whilst the respondent similarly addressed the ground in both their written and oral arguments. The point *in limine* is thus partially upheld in that there is only one ground of appeal before this court being that the magistrate failed or erred in not explaining the right to disclosure of the docket to an unrepresented accused.

The ground of appeal: failure to explain the right to disclosure

[6] It is clear from the court record that the appellant was unrepresented and that the right to disclosure was not explained to her at any point during the proceedings. The magistrate conceded that due to an oversight on her part it was not done however that it was not a fatal irregularity as she advised the appellant 'to listen carefully so as to be able to cross examine the state witnesses'.

[7] The question to be determined is thus whether the failure to explain disclosure to the appellant amounted to a gross irregularity that vitiates the entire proceedings to such an extent that it cannot be said that a fair trial was conducted.

[8] The position of disclosure regarding criminal matters before the High Court was discussed in *S v Nassar*² wherein it was held that to ensure a fair trial and to uphold the provisions of Article 12 of the Constitution, an accused should be provided with disclosure.

¹ *Liswaniso v S* (HC-NLD-CRI-APP-CAL-2022 00042) [2023] NAHCNLD 54; *S v Kakololo* 2004 NR 7; *Nghipunya v S* (HC-MD-CRI-APP-CAL-2020/00077) [2020] NAHCMD 491 (28 October 2020); *S v Gey van Pittius and another* 1990 NR 35; *Boois v State* (CA 76-2014) [2015] NAHCMD 131 (8 June 2015).

² 1994 NR 233.

Only then will an accused be in a position to properly and fully prepare for trial.³ It was however added that the position would not be necessarily the same in lower courts where *inter alia* the nature and complexity of the offense would determine the need for disclosure or not.

[9] The right to disclosure in the lower court was further developed in the matter of *S v Angula and others; S v Lucas* wherein guidelines were provided in matters where the State has the duty of disclosure in offences involving complexities in law or fact or in matters where there is a reasonable prospect of imprisonment. It was added that 'there is not a different brand of fairness in the lower courts in comparison to that applicable in any of the superior courts'.⁴ The right to disclosure was however qualified to not include minor cases; where disclosure might impede the ends of justice or; be against public interest. The circumstances of each cases thus plays a role in this determination.

[10] Turning to the matter at hand, the appellant was charged with attempted murder. The expected sentence upon conviction has become direct imprisonment which was the sentence imposed in this matter. The appellant was unaware of her right to get disclosure of the content of the docket which included a medical report and witness statements. In my view the irregularity was fundamental and potentially prejudiced the appellant to such an extent that it cannot be said that she received a fair trial.⁵

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

1. The appeal is upheld and the conviction and sentence are set aside.
2. In terms of s 309(3) read with s 304(2) of the Criminal Procedure Act 51 of 1977 as amended, the matter is remitted to the Ondangwa Magistrates' Court for proceedings to start *de novo* before another magistrate.
3. If the appellant is convicted again, the time served for this matter should be considered during sentencing.
4. The appellant is granted bail in the amount of N\$ 1 000 on the condition that

³ See also *S v Kahevita* (CR 11/2011) [2011] NAHCMD 25 (14 February 2011).

⁴ *S v Angula and others; S v Lucas* 1996 NR 323 at 326 E-F.

⁵ *S v Shikunga and another* 1997 NR 156 (SC).

she is not allowed any direct or indirect contact with the complainant. If bail is paid, the appellant is warned to appear at the Ondangwa Magistrates' Court (A Court) on the 12 September 2023 and furthermore warned that if she fails to appear in court, a warrant for her arrest may be issued against her, her bail money will be provisionally cancelled and the bail money will be provisionally forfeited to the State pending an enquiry into her absence.

Judge(s) signature	Comments:
Kessler J:	None
Salionga J:	None
Counsel:	
Appellant	Respondent
A Shapumba Of Shapumba & Associates Inc., Ondangwa	L Matota assisted by V Shigwedha Of Office of the Prosecutor General, Oshakati