REPORTABLE

CASE NO.: SA 33/2012

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CLAASEN EISEB **Appellant**

and

THE STATE **Respondent**

Coram: SHIVUTE CJ, MAINGA JA and DAMASEB AJA

Heard: **15 April 2014**

Delivered: **21 July 2014**

APPEAL JUDGMENT

MAINGA JA (SHIVUTE CJ and DAMASEB AJA concurring):

[1] This is an appeal with the leave of this Court. The appellant was charged with one count of murder and one count of assault with intent to do grievous bodily harm (GBH) in the regional court. The appellant pleaded not guilty to both counts but admitted having stabbed the deceased on the neck and scratched the complainant on the arm in the assault GBH charge. He raised self-defence in both instances. At the conclusion of the trial, appellant was convicted on both counts. He was sentenced on both counts, taken together for purposes of sentence, to 14 years imprisonment.

[2] Appellant noted an appeal against his conviction and sentence to the High Court. His appeal was dismissed, so was his subsequent application for leave to appeal to this Court. He thereafter applied to the Chief Justice for leave to appeal against conviction and sentence on the count of murder. The leave to appeal was granted on 28 September 2011.

[3] I pause here to mention that appellant was represented in the regional court, but appeared in person in the High Court. He, in person, petitioned the Chief Justice for leave to appeal and also appeared in person in this Court on 11 November 2013, but his case was postponed to 15 April 2014. The Legal Aid Directorate of the Ministry of Justice was approached to assist the appellant in prosecuting his appeal. It obliged and counsel was appointed to argue appellant's appeal. Appellant, in person, had filed the following contentions with respect to conviction and sentence:

'1. Their Lordships erred in the law and/or on the facts in failing to find out that appellant didn't have any intention to kill the deceased.

2. Their Lordships erred in failing to find out that appellant was convicted wrongly.

3. Their Lordships erred in failing to find out that appellant was suppose to be convicted of culpable homicide not murder.

4. Their Lordships erred in failing to reject the post-mortem report as hearsay evidence and inadmissible.

5. Furthermore, the failure of the State to call the medical practitioner who has done the post-mortem.

6. In failing to find out that the deceased is the cause of his own death.

AD THE SENTENCE

7. The court *a quo* erred in failing to impose a lesser sentence.

8. The court *a quo* failed to take into account that appellant was a first offender.'

[4] When the matter was called on 15 April 2014, counsel for the appellant singled out contentions 4 and 5 above and abandoned the other six. Those grounds amount to arguing that the State did not prove the cause of death and that therefore appellant could not have been convicted of causing the death of the deceased. The argument is premised on the fact that the medical practitioner, one Dr G O Amaechi, who performed the post mortem examination on the deceased and who was in the service of the State, left Namibia and returned to his country of origin. He was not available to testify at the trial. Worse still, the medical practitioner's report in terms of s 212(4) of Act 51 of 1977 was not made under oath. Thus, it was argued on behalf of the appellant, the report or affidavit does not comply with the provisions of s 212(4)(*a*); it is not an affidavit in law, and the State did not prove the causation element to the crime of murder. Counsel for appellant further relied on *S v Zingolo* 2005 NR 349 (HC) where the High Court held that when a court is dealing with the provisions of s 212(4)(*a*) and (8)(*a*), it is necessary to comply strictly with the provisions of the Act in order for the certificate to be admitted as *prima facie* evidence.

[5] The State's reply to the respondent's argument is twofold: first, it was argued that the unsworn declaration of the medical practitioner was received in evidence in terms of subsec 7(A)(*a*) of s 212, brought about by the Criminal Procedure Amendment Act 24 of 2003 which amendment relaxed the strict evidential provision in s 212(4)(*a*) and that the uncommissioned medical report was such a document. Secondly, it was contended that the cause of death and the injuries suffered by the deceased, were not placed in dispute during the trial, the only issues in dispute at the trial on the charge of murder being unlawfulness and intention.

[6] The relevant provision of s 212(4) reads as follows:

> '(a) Whenever any fact established by any examination or process requiring any skill in biology, chemistry, physics, astronomy, geography, anatomy, any branch of pathology or in toxicology or in the identification of finger-prints or palm-prints, is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he is in the service of the State or of a provincial administration or is in the service of or is attached to the South African Institute for Medical Research or any university in the Republic or any other body designated by the State President for the purposes of this subsection by proclamation in the *Gazette*, and that he has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be *prima facie* proof of such fact: Provided that the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall *mutatis mutandis* apply with reference to such certificate.' (My emphasis.)

[7] Subsection 7(A)(a) reads as follows:

> 'Any document purporting to be a medical record prepared by a medical practitioner who treated or observed a person who is a victim of an offence with which the accused in criminal proceedings is charged, is admissible at that proceeding and *prima facie* proof that the victim concerned suffered the injuries recorded in that document.'
> (My underlining.)

[8] The High Court has developed a legion of authority on the same issue raised by appellant. In *Joel Kambala v The State,* Case No CA 74/2010, unreported judgment, delivered on 18 January 2011, paras 6 and 10, per Liebenberg J, Tommasi J concurring, one of appellant's contentions was that the regional court erred when it relied on the medical report not confirmed by the medical practitioner who examined the complainant. The court held that the requirements of s 212(4) of Act 51 of 1977 were met and the trial court had correctly admitted the report. The court further held that, in any event, in terms of s 212(7A)(*a*) the medical report was admissible and *prima facie* proof of any injuries the complainant might have suffered which are recorded in the report. See also *The State v Hangula Simson Mwanyangapo*, Case No CC 21/2010, unreported judgment, delivered on 17 October 2012, para 50, per Shivute J; *Shilunga Thomas v The State*, Case No CA 67/2010, unreported judgment, delivered on 26 November 2012, para 27, per Liebenberg J, Tommasi J, concurring; *The State v Herbert Cimu Nkasi*, Case No CC 02/2010, unreported judgment, delivered on 24 March 2010, para 65, per Liebenberg J. The case directly on point is

Teofelus Taanyaanda, Case No CA 43/2009, unreported judgment, delivered on 30 July 2010, para 22, per Liebenberg J, Tommasi J concurring. Although the affidavit/declaration was not commissioned, the learned judges held the affidavit to be admissible in evidence in terms of s 212(7A)(*a*).

[9] It is clear from subsec 7A(*a*) that the Legislature omitted the word 'affidavit' from the subsection, in the process relaxing the strict evidential rule that only a 'document purporting to be an affidavit shall, upon its mere production at . . . proceedings be *prima facie* proof of such fact . . . '. Any document purporting to be a medical record, is since the 2003 amendment, also admissible in evidence. Without a doubt, as counsel for the respondent correctly argued, the unsworn declaration by Dr G O Ameachi, stating his qualification in Medicine; that he was in the service of the State as a district surgeon/pathologist; and that the body of the deceased was identified by Detective Sergeant Nuuyoma at the Grootfontein State Hospital Mortuary; and that he examined the body of the deceased, and that he determined the chief post-mortem findings as well as the cause of death, is such a medical document as provided for by subsec 7A(*a*).

[10] The above relaxations are not unusual. The Legislature has relaxed various strict provisions in our criminal, procedural and evidential systems, for example: s 227A of the Criminal Procedure Act 51 of 1977 inserted by the Combating of Rape Act 8 of 2000 which prohibits evidence of sexual conduct or experience of complainant of rape or offence of an indecent nature to be adduced and no questions

regarding such sexual conduct or experience shall be put to the complainant or any witness in criminal proceedings in which an accused is charged with rape or an offence of an indecent nature. Furthermore, the Criminal Procedure Amendment Act of 2003 provides for the making of special arrangements for vulnerable witnesses; for the manner of cross-examination of witnesses under a certain age; for the admission as evidence of certain medical records as evidence; and for the admission as evidence of certain statements made out of court.

[11] I have good reason to believe that subsec 7(A)(*a*) has its origin in the previous abuse of s 212(4)(*a*), particularly by some defence lawyers. Many a time, before the enactment of subsec 7A(*a*), the defence would invariably object to the admission of a medical report even when there was nothing questionable in the report, thus resulting either in the exclusion of the report or in a conviction of a lesser offence, when it was apparent from evidence *aliunde* that the accused committed the offence. This occurred mostly when the medical practitioner (the author of the report) was a foreign national who had in the meantime returned to his/her country of origin. Our trial process clung to the practice of excluding the medical report in the absence of the author, upholding the strict evidential rule at the expense of justice. The Legislature has closed that avenue with the enactment of subsec 7A(*a*).

[12] The authors Schwikkard *et al* in the first edition of their book*: Principles of Evidence, in the context of South Africa*, which also holds for Namibia, at p 133 state that, 'statutory reform has to a large extent been aimed at relaxing the strict evidential

rules which owe their existence to trial by jury'. In terms of the strict evidential rule and in terms of s 212(4)(*a*), the unsworn declaration of Dr Ameachi would not have qualified as admissible evidential material, and the appellant would have been convicted of a lesser offence, notwithstanding evidence *aliunde* showing that the stab wound was the cause of death.

[13] No doubt, with the enactment of subsec 7A(*a*), the difficulties that bedevilled compliance with s 212(4)(*a*) have been brought to rest, but I must be quick to say it should not be the turn of the prosecuting authority to abuse subsec 7A(*a*). A document purporting to be a medical record cannot be any piece of paper scribbled without sufficient information required as *prima facie* proof. To have omitted the commissioning of the declaration of Dr Amaechi is a dereliction of duty and such practices must be examined and prevented by the responsible authorities.

[14] Turning to the issue whether the appellant can raise or dispute the cause of death in this Court or the court *a quo* when he admitted the same during the trial, the answer should be in the negative. The appellant should have received the statements of the witnesses the State was going to call at the time the magistrate's court transferred his case for trial to the regional court or long before the trial commenced in the regional court. He must have seen the unsworn declaration of the medical practitioner. When the trial started his defence was that of self-defence, that is, he caused the death of the deceased in self-defence. Appellant was represented by a Ms

Nuyoma and the respondent by a Ms van Zyl. After appellant's plea explanation the following transpired:

> 'MS VAN ZYL: As it pleases the Court. Your Worship, at this stage before calling its first witness, the State would like to hand in the post-mortem report. Your Worship, if you give me one moment, I think there is a problem with this. Thank you, Your Worship for your indulgence. Your Worship, at this stage the State would like to hand in the post-mortem report completed by Doctor G O Amaheki attacked (*sic*) to an Affidavit in terms of Section 212(4) of the Criminal Procedure Act to form part of the record. Your Worship, the State would like to hand in this Affidavit attached to the post-mortem report in respect of Section 212 the amendment of Section 212 of the Criminal Procedure Act, Your Worship, due to the fact that the medical doctor who completed the post-mortem report, in the meantime was employed in the Government Service, in the meantime left the country for his country of origin. And based on the afore-mentioned the State is unable to call this Doctor to come and testify …. if the Defence have no objection thereto?
> MS NUJOMA: No objection from the Defence, Your Worship.
> COURT: The post-mortem report will be marked as Exhibit A.
> **EXHIBIT A: POST-MORTEM REPORT**'

[15] The failure of appellant's legal representative to object to the medical report was a clear indication to the State and the court that she was not objecting to the admissibility of the medical report as evidence. In *Wolfgang Hans Hufnagel v The State*, Case No CA 28/2001, unreported judgment, delivered on 15 October 2001 per Levy AJ, Manyarara AJ concurring, it was alleged by the appellant that the affidavit of the forensic analyst relied on by the State where she analysed one blood sample of the appellant was invalid for the reason that it was commissioned by the head of the National Forensic Science Institute.

[16] Levy J stated in relation to the lawyer who represented the accused in that case: 'Mr Brandt's statement that he had no objection was a clear indication to the State and the Court that he was not objecting to the admissibility of the affidavit in evidence. If the affidavit was invalid, his failure to object does not make it valid. However, by reason of his specific statement and conduct, appellant is estopped from raising this point on appeal. A litigant is bound by the decision of his legal adviser when the latter handles his trial'. See also *SOS Kinderdorf International v Effie Lentin Architects* 1993(2) SA 481 Nm HC at 490C-D.

[17] In *S v Maleka* 2005(2) SACR 284 (SCA), the appellant's murder conviction by the regional court was set aside by the High Court and substituted for one of culpable homicide. On a further appeal to the Supreme Court of Appeal, the appellant's contention was that the State failed to prove that the appellant had caused the injuries sustained by the deceased. At the trial appellant did not make the admission that the deceased's body had suffered no further injuries between his death and the performance upon it of the post-mortem. But during the trial at no stage was it suggested that the deceased's body had in fact suffered further injuries.

[18] At p 287 paras 11, 12, 13 and 16, Cameron JA said the following:

> '[11] The point the appellant now takes arises from the fact that at the outset of a prosecution involving an unlawful killing the admissions made usually include the identity of the deceased, the accuracy of the post-mortem report, and, in addition, *that*

the deceased's body suffered no further injuries between his death and the performance upon it of the post-mortem. These admissions are almost invariably made together. Otherwise the doctor who performed the post-mortem (if not already scheduled to testify) can be called to clarify matters or to resolve any dispute.

[12] In this case, the admission concerning absence of further injuries was not made. This appears to have been an oversight, due to inexperience or inadvertence on the part equally of magistrate, defending attorney and prosecuting counsel. At no stage during the trial was it suggested that the deceased's body had in fact later suffered further injuries.

[13] The point is clearly an after-thought, arising from the gap opened by the omission of the usual admission; and is in this sense opportunistic

. . . .

[16] Had the point now taken been raised at the trial, the magistrate may well have been duty-bound in the interests of justice to call the doctor who performed the post-mortem and those responsible for ensuring the integrity of the corpse between the scene of the incident and the mortuary (*R v Hepworth* 1928 AD 265 at 277). The taking of such a point after the trial may in appropriate circumstances raise the question whether an admission such as that at issue now – concerning the integrity of the body between death and post-mortem – may not be taken to have been made impliedly.'

[19] In *S v Mathlare* 2000(2) SACR 515 (SCA) the appellant was charged in the regional court with rape. He was acquitted on the charge but was convicted of contravening s 14(1)(*a*) of Act 23 of 1957 in that he had intercourse with a girl under the age of 16. He was sentenced to four years imprisonment. On appeal to the Witwatersrand Local Division, the conviction was confirmed but the sentence was reduced from four years to 18 months imprisonment. Appellant was granted leave to

appeal to the Supreme Court of Appeal against conviction. The question to be decided was whether the State had proved beyond a reasonable doubt that the blood samples analysed by an expert witness called by the State were those taken from the appellant, the complainant and the child.

[20] At 518h-519a-c Zulman JA states:

> '[8] The appellant's counsel drew attention to the fact that no formal evidence was presented as to the actual drawing of a sample of blood from the appellant and also that the State did not lead any direct evidence to show that the blood samples in the "crime kits" which the witness Philips received and analysed were those taken from the appellant, the complainant and her child. These facts were relied on by the appellant's counsel in contending that an essential element of the State's case had not been proved. I do not agree.
>
> [9] It seems to me that the whole tenor of the cross-examination of Philips … especially viewed in the context of the events that occurred earlier in the trial, and not, I stress, before the trial commenced indicates that it was accepted that the samples of blood were those of the three relevant parties. In my view there was a clear implied informal admission of this fact by the appellant's legal representative. I have detailed these events earlier in this judgment. In summary they are:
>
> (a) The magistrate's order that the appellant's blood be taken, despite his objection thereto.
>
> (b) The subsequent postponement of the trial in order for this to be done.

(c) The evidence given some four months later in chief by the expert witness Philips resulting in the request for a postponement so that her evidence could be considered.

(d) The presumption of the trial approximately a month later and the cross-examination of the analyst in a manner consistent only with acceptance of the premise upon which her evidence was based, namely, that the samples she analysed were indeed those of the appellant, the complainant and the child born to her.'

[21] The learned judge continued at 520b-d to say:

'[11] Applying these remarks to the matters which I have set out above and even although there was no "explicit assertion" during the cross-examination of Philips, it was implicit in the questions put that it was the blood of the appellant, the complainant and her child which had been analysed. I am therefore satisfied that there was an unequivocal informal admission by implication during the course of the trial, requiring no formal proof, that the blood samples analysed by Philips were those taken from the three relevant persons. (See also *S v W* 1963 (3) SA 516 (A) at 523C-F, *R v Modesa* 1948 (1) SA 1157 (T) at 1159.)

[12] I am also satisfied, upon the basis of the expert testimony of Philips, which was not seriously challenged on appeal, that the appellant's genotype was found to correspond with that of the child born to the complainant, it being Philips' evidence that there was a mere 0.06% possibility that the appellant was not the biological father of the child.'

[22] Given the failure of appellant's legal representative to object to the allegedly defective 'affidavit', appellant must be taken to have admitted the report and the information contained therein. Appellant is not challenging the contents of the report, he himself in his grounds of appeal notwithstanding the alleged defectiveness of the

medical report, states that the court *a quo* should have found that he was guilty of culpable homicide. The sole question in dispute at the appellant's trial was whether he intended to kill the deceased. Directing the attack at such a vulnerable part of the body, appellant had the intention to kill the deceased. I am satisfied that he was correctly convicted.

[23] Counsel did not attempt to say anything on sentence and I find nothing to say.

[24] The appeal against both conviction and sentence is dismissed.

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MAINGA JA

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SHIVUTE CJ

_____
DAMASEB AJA

APPEARANCES:

Appellant:	M S Rukoro
	Instructed by Director of Legal Aid
Respondent:	A T Verhoef
	For the State