

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**LAZARUS NAKANDJEMBO**

**Appellant**

and

**THE STATE**

**Respondent**

**CORAM:** SHIVUTE CJ, MARITZ JA and DAMASEB AJA

**Heard:** 10 April 2008

**Delivered:** 29 November 2016

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**APPEAL JUDGMENT**

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DAMASEB AJA (SHIVUTE CJ concurring):

[1] This appeal was heard on 10 April 2008 by Shivute CJ, Maritz JA (since retired) and myself. Maritz JA was assigned the responsibility to prepare the court's judgment. Regrettably, in circumstances similar to those described by Mainga JA in *Minister of Finance v Merlus Seafood Processors (Pty) Ltd* SA 91/ 2011 delivered on 30 September 2016, paras 1-2, Maritz JA has not presented a draft judgment for consideration. Maritz JA has since advised the Chief Justice that, for medical reasons,

he is unable to perform further judicial work. The Chief Justice has therefore asked me to prepare a draft judgment which, if he agrees, will be the judgment of the court.

### Brief background

[2] The appellant was jointly charged and tried with another person in the Walvis Bay Regional Court and subsequently found guilty on 6 counts of fraud in terms of the Customs and Excise Act 20 of 1998. He was sentenced on 11 March 2002 to a fine of N\$ 5000 or 1 year imprisonment wholly suspended for 5 years on the usual conditions. On 11 August 2006 he appealed against his conviction to the High Court. On appeal, the conviction was varied: The High Court instead finding him guilty as an accessory after the fact to the crime of fraud.

[3] The appellant was employed as Chief Customs and Excise Officer in the Ministry of Finance, Walvis Bay. His co-accused, Mr Ashar Dinath (accused 1 in the Regional Court) is a South African businessman who shipped from South Africa a consignment of goods through the Port of Walvis Bay, intended for export to Angola. According to accused 1, he could not trace the importer in Angola. He then decided to dispose of the goods by securing a market back in South Africa. The Regional Court found that accused 1 falsely completed a declaration form to the effect that the goods were to be sold in Angola – a country that falls outside the Southern African Customs Union (SACU) Area. As a result, the goods were released to him. He further failed to submit the ‘acquittal’ forms as proof that the goods so released were exported outside SACU. It is on those grounds that accused 1 was convicted of fraud. The appellant’s involvement

relates to the approval of the paperwork of accused 1 and sanctioning the release of the goods without the latter paying the duties payable to the Namibian State on account of the goods being sold within SACU.

[4] The Regional Court convicted the appellant on the basis, as it found, that he made a false representation to other Customs and Excise officials that the acquittals were received, when in fact no acquittals were completed. It is on that basis that the Regional Court was satisfied that the appellant was guilty of fraud. The appellant did not testify in his defence in the Regional Court, although he was legally represented up to the end of the State's case when an application for discharge was dismissed. The appellant appealed against his conviction on fraud to the High Court. He was out of time and required condonation to prosecute his appeal to that court.

#### Proceedings in the High Court

[5] After granting condonation for the late prosecution of the appeal, the court *a quo* evaluated the merits of the appeal and concluded that there was not an 'iota of evidence on record' to prove that the appellant was present when accused 1 made the false representation about the goods to Customs and Excise officials. Therefore, the High Court found, the Regional Court erroneously convicted the appellant of the crime of fraud. The High Court pointed out that the conduct of the appellant, ie making a false representation that he had received the acquittals while being 'unmistakably aware' that such acquittals were non-existent, leads to the inference that he unlawfully and intentionally associated himself with the commission of the crime of fraud by helping

accused 1 evade justice. The court *a quo* therefore found the appellant guilty as an accessory after the fact. The court *a quo* relied on s 257 of the Criminal Procedure Act, 51 of 1977 (CPA), which reads:

'If the evidence in criminal proceedings does not prove the commission of the offence charged but proves that the accused is guilty as an accessory after that offence or any other offence of which he may be convicted on the offence charged, the accused may be found guilty as an accessory after that offence or, as the case may be, such other offence, and shall, in the absence of any punishment expressly provided by law, be liable to punishment at the discretion of the court: provided that such punishment shall not exceed the punishment which may be imposed in respect of the offence with reference to which the accused is convicted as an accessory: provided further that the punishment to which such accessory shall be liable shall not include the sentence of death.'

[6] The appellant filed an application for leave to appeal against the order of the High Court varying the original conviction of fraud to that of accessory after the fact. That application was refused by the High Court and he petitioned the Chief Justice who granted him leave to appeal. The notice of appeal contains the following grounds of appeal:

'The honourable Judge erred and/or misdirected himself on the facts and/or the law to vary the judgment of the court *a quo* on appeal to accessory after the fact and should have found the Appellant not guilty of fraud and acquitted him.

1. The Honourable Judge erred and/or misdirected himself on the facts and/or the law to find that the appellant unlawfully and intentionally associated himself with the commission of the crime of fraud by accused No 1 and therefore made himself guilty of accessory after the fact of the crime of fraud.

2. The Honourable Judge erred and/or misdirected himself on the facts and/or the law to find that the appellant made false representations to two customs and excise officials that he had received or seen the acquittal forms of accused no 1 when he must have been unmistakably aware that such acquittals were non-existent.
3. The honourable Judge erred and/or misdirected himself on the facts and/or the law by not considering at all or not considering properly that the appellant would be severally prejudiced if his conviction is varied on appeal to accessory after the fact in the following circumstances:
  - 3.1 The court a quo did not prove the charge brought against the appellant;
  - 3.2 The appellant did not testify on behalf of himself as it was not necessary;
  - 3.3 The appellant was not charged with the crime of accessory after the fact and it is not a competent judgment on the crime of fraud.'

#### Issues to be decided on appeal

[7] The issues that fall for decision are whether the High Court was competent to vary the conviction from fraud to accessory after the fact; whether the appellant was prejudiced by the High Court varying the conviction and whether there was evidence that he made false representations to assist accused 1 evade justice.

#### *Submissions by the appellant*

[8] Mr Grobler for the appellant submitted that there was no evidence that the appellant was guilty of the crime of accessory after the fact to the fraud committed by accused 1. The involvement of the appellant was limited to the allegation that he saw the acquittals and gave them to colleagues, A Titus and S Elia, when in truth and fact, there were no acquittals at all. Counsel submitted that such evidence was not sufficient

to establish that the appellant unlawfully and intentionally associated himself with accused 1 nor is it sufficient to lead to the inference that the appellant knew, at the time that he made the remarks to Selma and Titus, that accused 1 exported the goods to South Africa instead of Angola.

[9] Counsel further pointed out that since the appellant was not charged with the crime of accessory after the fact in the Regional Court, the court *a quo* could not convict the appellant of being an accessory after the fact since the elements of the two crimes are different. He added that the court *a quo* should have foreseen that the appellant would be prejudiced by the variation of the conviction. The prejudice, it is suggested, lay in the fact that since the appellant was not asked to plead to the charge of accessory after the fact, it was not inevitable that he would have opted not to testify on his own behalf. It is said that the failure to put the charge of accessory after the fact to the appellant already at trial contravened his constitutional right to fair trial, in that the appellant was not given an opportunity to defend himself on the charge of accessory after the fact.

[10] Finally, it was put on appellant's behalf that since the court *a quo* found that there was no evidence to support the conviction on fraud, no evidence was presented to sustain a conviction of accessory after the fact, especially in light of the fact that the appellant was found not guilty on count 4 in terms of s 90, read with s 1 of the Customs and Excise Act – which states that it is an offence for a person to remove, or to assist in or permit the removal of, any goods in contravention of any provision of the Act.

[11] The appellant prays that the judgment and order of the court *a quo* be set aside and that he be acquitted.

*Submissions by the respondent*

[12] The respondent was represented by Mrs Lategan. Counsel drew the court's attention to the evidence she suggested proves that the appellant is guilty as accessory after the fact. According to her, a colleague of the appellant, R C Strong, proved that all five acquittals were allowed by the appellant, in his capacity as Chief Customs Officer. Appellant's signature appears on the acquittals. Elia who followed up on the outstanding acquittals was told by the appellant that he had received them already with a cheque to the value of N\$20 000 and gave them to Titus. Elia proved that accused 1 lied about the acquittals being handed in. After he was given an extension of a week to obtain the acquittals from Johannesburg, he never produced them. Titus proved that the appellant continuously lied that he saw the acquittals with accused 1. Titus also testified that accused 1 admitted that the goods were never sent to Angola but to South Africa and informed the witness that the acquittals were in Johannesburg but could not provide proof of the fact. M Dumeni's evidence corroborated that of Titus that the goods were indeed sold in South Africa and not Angola.

[13] Counsel for the State added that the evidence that the accused saw the acquittals with accused 1 when they did not exist, render him liable as an accomplice to the fraud committed by accused 1. As Chief Customs and Excise Officer, it was

incumbent on the appellant to investigate the absence of acquittals of the consignments and to demand same from accused 1. Counsel submitted that the appellant had a legal duty in terms of the Customs and Excise Act to detect irregularities and the failure to do so constituted not only the crime of fraud but also that of being an accessory after the fact.

[14] Ms Lategan submitted that s 257 of the CPA makes accessory after the fact a competent verdict because the section refers to 'any offence'; and that the court can convict, without it being necessary to amend the charges, on a competent verdict which did not form part of the charges put to an accused (*Ex Parte Aarons (Law Society, Transvaal, Intervening)* 1985 (3) SA 290 at 291-292). She added that if the court should find that the appellant ought to have been warned of the possibility of being convicted on a competent verdict, he did not suffer prejudice as his defence would not have been conducted differently.

[15] Counsel for the respondent supported the variation of the conviction and asked that the court *a quo's* judgment not be disturbed.

## The Law

### *Jurisdiction of Appeal Court*

[16] The High Court's jurisdiction in appeals arises, in the first place, from s 19(1)(b) of the High Court Act 16 of 1990:

'(1) The High Court shall have power -



- (a) . . . . . ;
- (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.'

[17] Secondly, s 322(1) of the Criminal Procedure Act 51 of 1977 (CPA) reads:

'Powers of court of appeal.

(1) In the case of an appeal or of any question of law reserved, the court of appeal may-

- (a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or
- (b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or
- (c) make such other order as justice may require:

Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.'

[18] Where the court of appeal is convinced that the trial court, because of a wrong finding of fact or of a mistake of law, convicted the appellant of a less serious offence than that which, in terms of the indictment, he should have been convicted, the court of appeal has the power, under s 322 of the CPA, to set aside the sentence concerned

and either refer the case to the trial court for that court to impose an appropriate sentence, or itself to impose a sentence (*S v E* 1979 (3) SA 973 (A)).

[19] In *S v Gurirab & others* 2008 (1) NR 316 (SC) at 325D-F, Strydom AJA stated as follows:

[41] Before dealing with the merits of the appeal there is the question whether this court is empowered to substitute a conviction of murder, which is a more serious crime, for the conviction of attempted murder. Also in this regard counsel for the State and counsel for first appellant agreed that this court is competent to do so.

[42] I have no doubt that that is so. Section 322 of the Criminal Procedure Act 51 of 1977, as amended by Act 26 of 1993 (the Criminal Procedure Amendment Act) circumscribes the powers of the court of appeal and ss (1)(b) provides that this court (can) 'give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or. . . '.

[43] On the basis of this provision the South African Appeal Court found that the court has the power to alter the conviction, on appeal, to a conviction of a more serious crime. (See *R v Mkwanazi and Others* 1948 (4) SA 686 (A), *S v E* 1979 (3) SA 973 (A) and the commentary on the said section in Kriegler Hiemstra Suid-Afrikaanse Strafproses 5 ed at 861.)

[44] I therefore find that this court is competent to substitute a conviction of a more serious crime, namely murder, for a conviction of a less serious crime, namely attempted murder.

[20] In my view, s 322 confers a general power while s 257 confers a specific power also to the court of appeal to alter a conviction from the main charge to a competent

verdict if the evidence, assessed as a whole, proves that an accused should have been convicted by the trial court of being an accessory after the fact.

[21] In my view, that disposes of the appellant's complaint that the court *a quo* had no jurisdiction to vary the conviction in the way it did.

### *Competent Verdicts*

[22] A conviction on a competent verdict is subject to the principle that the accused should not have been prejudiced in the presentation of his case (*S v Mwali* 1992 (2) SACR 281 (A) at 284b-285a). Determining whether there is prejudice or not is a question of fact. Prejudice may exist if there is a possibility that the accused might have conducted his defence differently if he was alerted to the possibility of being found guilty on a competent verdict.

[23] It is settled that if the competent verdict is not formally charged, the presiding judicial officer should at least ensure that the accused is given an opportunity of appreciating the nature of the offence of which he/she may be convicted in the alternative, including the nature of any answer he may raise in defence thereto (*S v Dayi & Others* 1961 (3) SA 8 (N) at 9D-H). It was held in *S v Velela* 1979 (4) SA 581 (C) at 586G that:

'In law it is not necessary that a competent verdict should formally be mentioned in the indictment. It is desirable that an accused should be informed either in writing or orally of the competent verdicts which can be brought in against him, especially where those verdicts rest upon sections which place an onus on the accused. In this regard it is

desirable that the magistrate should explain to the accused the nature of the alternative competent offence as well as the onus which rests on the accused and the manner in which it can be shifted. Where an accused is not so informed he can be prejudiced. Whether there has been prejudice in a particular case is a question of fact and, depending upon what took place in the particular trial, the convictions can be set aside on appeal with or without a remittal to the trial court for the case to be properly dealt with. The practical effect of these principles is that in all cases where the State charges theft it would be desirable and advantageous for the State to inform the accused in writing or at least orally of the competent verdicts and the onus which rests on him.'

[24] But that assumes, of course, that a conviction on a competent verdict is within the contemplation of the trial court. In the present case, the possibility of a competent verdict was not in the contemplation of the Regional Court or the State.

[25] In *S v Mwali* above it was held that a conviction on a competent verdict without the accused being warned beforehand is not necessarily fatal. It is not necessary, in my view, that a competent verdict formally be mentioned in the indictment or charge sheet for an appeal court to invoke the provisions of s 257. Prejudice will be the overriding consideration.

[26] The following propositions are trite:

- (a) An accessory neither causes the crime nor furthers it: *R v Mlooi* 1925 AD 131.
- (b) An accessory helps the perpetrator or an accomplice escape justice.

- (c) After completion of the crime, the accessory unlawfully and intentionally engages in conduct intended to enable the perpetrator, or the accomplice in the crime, to evade liability for his crime, or to facilitate such person's evasion of liability. The object he has in mind must be to assist the perpetrator evade liability for the offence (ie to defeat or obstruct the administration of justice): *S v Khoza* 1982 (3) SA 1019 (A) 1040C-D; *S v Morgan* 1993 (2) SACR 134 (A) at 174d-e, *S v Williams* 1998 (2) SACR 191 (SCA) at 193c-e.

[27] Thus, an accessory after the fact protects either the co-perpetrator or the accomplice. An omission may lead to accessory after the fact liability if there is a legal duty upon the accused to act positively (*S v Barues* 1990 (2) SACR 485 (N) at 493). Absence of knowledge of the main crime negatives intent and in that case the accused may escape accessory after the fact liability (*S v Madlala* 1992 (1) SACR 473 (N) 465-476). Mere passivity is not enough: *S v Phallo* 1999 (2) SACR 558 (SCA) at 567c-d.

*Did the evidence prove accessory liability?*

[28] The appellant did not testify during the trial and chose to remain silent when he faced charges of fraud. His conduct called for an explanation which was not forthcoming. I fail to see how his defence would have changed if he was informed of the competent verdict of accessory after the fact, which is no more serious than the main charge of fraud. A court of appeal should only interfere if there has been prejudice.

[29] The court *a quo* instead convicted the appellant as being an accessory after the fact due to the false representations made to his colleagues in connection with the acquittals while he was well aware of the fact that the acquittals were non-existent. It is obvious that he sought to shield accused 1's criminal conduct. He not only associated himself with accused 1's fraud, but he intended to help him evade justice.

[30] It is not disputed that the submission of acquittals was compulsory in respect of the goods that accused 1 ended up selling in South Africa. As Chief Customs Officer he knew that such obligation existed. His persistence in falsely representing to his own colleagues that the acquittals were submitted confirms such obligation. The evidence does not indicate that the appellant laboured under the wrong impression that the acquittals were handed in. He consciously told a falsehood. He represented that he personally received the acquittals and handed them over to another colleague, while in fact he knew that he never received anything. That, no doubt, is an indication beyond reasonable doubt that the appellant intended to assist accused 1 evade justice.

[31] The High Court therefore did not err in varying the conviction as the evidence does prove, beyond reasonable doubt, that the appellant made himself guilty as an accessory after the fact to the fraud perpetrated by accused 1.

[32] Being satisfied that there was no prejudice suffered by the appellant, the appellant's conviction as accessory after the fact by the High Court is justified in law.

Order

[33] In the result, the appeal is dismissed.

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**DAMASEB AJA**

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**SHIVUTE CJ**

APPEARANCE:

APPELLANT:

Z J Grobler

Instructed by Grobler & Co

RESPONDENT:

A Lategan

For the State