



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CA 53/2013

In the matter between:

THE STATE

APPLICANT

and

JOHANNES IMMANUEL

RESPONDENT

Neutral citation: *The State v Immanuel* (CA 53/2013) [2014] NAHCNLD 1
(14 January 2014)

Coram: LIEBENBERG J

Delivered: 14 January 2014

Flynote: **Criminal procedure** – Appeal – Application for leave to appeal in terms of s 310 (1) of Criminal Procedure Act, 51 of 1977 – Test applied – Applicant must satisfy court that he has reasonable prospects of success on appeal – Court satisfied – Leave is granted to appeal.

Summary: Applicant (the State) seeks leave to appeal against the acquittal of the respondent on a charge of theft. The magistrate after evidence was

heard was not satisfied that the guilt of the accused was proved beyond reasonable doubt. Trial court clearly misdirected itself on the law which may cause another court to come to a different conclusion as regards the guilt of the accused. Court found that there are reasonable prospects of success on appeal and granted leave to appeal.

ORDER

The application succeeds and leave is granted to appeal against the judgment of the court *a quo*.

JUDGMENT

(Application for Leave to Appeal)

LIEBENBERG, J.: [1] This is an application for leave to appeal in terms of s 310 (1) of the Criminal Procedure Act, 51 of 1977 (the Act) in which applicant (the State) seeks leave of this court to appeal against the judgment delivered in the magistrate's court for Oshakati on 28 August 2013. At the end of the trial and after evidence was heard the respondent was found not guilty on a charge of theft of a gearbox (of a motor vehicle) and discharged. The State feels aggrieved by the respondent's acquittal and intends pursuing an appeal if leave were to be granted.

[2] Compliance was given to the provisions of subsection (3) of s 310 in that the applicant caused to be served on the respondent in person a copy of the notice together with a statement in which he is informed of his rights as set out in subsection (4). As per the return of service dated 04 October 2013, the respondent was duly served with a copy of the said notice by Constable Hepundjua at the police station, Ongwediva. Through the notice the respondent is informed that the State seeks leave to appeal against the trial

court's decision to acquit the respondent and in para 4 of the notice his attention is specifically drawn to the fact that he may, within a period of 10 days of service of the documents, lodge a written submission to the Registrar of the High Court of this Division for the attention of the judge who is to hear the application. To date no submission has been filed by the respondent.

[3] In view of the above I am satisfied that the respondent was duly served with notice of application for leave to appeal and in the absence of evidence to the contrary, I am inclined to find that the respondent has no submission to make. Accordingly, the application is considered on unopposed basis.

[4] In support of its application the applicant enumerated eight grounds relied upon in the proposed appeal and is further of the view that there are reasonable prospects of success on appeal. It is trite that the test to be applied in applications of this nature is that the applicant must satisfy the court that, if leave to appeal were to be granted, he or she has a reasonable prospect of success on appeal (*S v Ngubane and Others* 1945 AD 185 at 186-7).¹

[5] Turning to the grounds relied upon for purposes of this application, I do not deem it necessary to deal with each in any detail and it would suffice to say that, in essence, applicant contends that the learned magistrate misdirected himself when evaluating the evidence presented by attaching no or insufficient weight to the unchallenged evidence given by State witnesses; that a misdirection was committed by provisionally admitting evidence of State witness, Mr Paulus; that ownership of a gearbox, being the subject matter of the charge was common cause and not in dispute; and whereas the respondent elected to remain silent at the end of the State case, the magistrate followed the wrong approach and misdirected himself in his assessment and evaluation of the evidence adduced.

¹ Also see *S v Nowaseb* 2007 (2) NR 640 (HC).

[6] At the close of the State case the following facts, in my view, had been proved: During September 2012 the respondent became the custodian of complainant's Toyota Corolla sedan when she entrusted it to him for purposes of operating a taxi service on her behalf. When the respondent (at complainant's insistence) later returned the vehicle to her she realised that the gearbox was malfunctioning. A search initiated by Mr Kuutondokwa, complainant's husband, led him to the garage of a certain Mr Namongona where a gearbox was found which had to be fitted to a vehicle belonging to the wife of Mr Paulus Phillipus. Respondent had offered Mr Phillipus this gearbox for sale and delivered same to the garage of Mr Namongona. This is the gearbox being the subject matter of the charge of theft preferred against the respondent. Respondent admitted that he had given (sold) the gearbox to Phillipus.

[7] Respondent pleaded not guilty to the charge and in his plea explanation said his co-accused is the person who took the car to a friend who then removed the gearbox. I pause here to say that it does not appear from the record of proceedings that anyone else was charged together with the respondent. The car and gearbox herein referred to, as per the charge, is the property of or under the control of 'Kuutondokwa Albanus', the husband to the complainant who testified under the name 'Amathila'. Respondent clearly never challenged ownership of the gearbox in question.

[8] At the close of the State case the respondent elected to remain silent and called no witnesses to testify on his behalf.

[9] The court *a quo* reasoned that the evidence of Mr Phillipus was '*provisionally* admitted since the court had an assurance that the accused will testify'. It is not clear from the record who gave the court the assurance that the respondent would testify and it would appear that, in view of the respondent's later decision to remain silent, Mr Phillipus' evidence was ruled inadmissible and disregarded as far as it concerns an admission made by the respondent that he had given the gearbox to Mr Phillipus.

[10] The admissibility of an admission alleged to have been made by the respondent to Mr Phillipus who testified at the trial, was not dependent on whether or not he (respondent) gave evidence in his defence; neither did it constitute hearsay evidence as the magistrate seems to suggest in the judgement.

[11] Although the magistrate in his judgment took issue with the admissions allegedly made by the respondent in that 'It had not been placed on record that the accused was warned of his legal rights at the point he allegedly made the aforesaid admissions', the magistrate, when this evidence was adduced, failed to explain to the unrepresented respondent his right to object to evidence unconstitutionally obtained and the magistrate should *mero motu* have enquired into and decided the admissibility of such evidence. In my view, a case could be made out that by admitting the evidence without raising the issue of its admissibility and to reject same only in the judgment, the State was prejudiced – particularly in view of the respondent not claiming or suggesting that he was unfairly treated. Had the court sooner indicated to the State that it must prove the admissibility of the alleged admission made by the respondent, then the nature and extent of the evidence sought to be relied upon, could be determined and any shortcoming in the State case addressed and cured if necessary.

[12] It is trite that not every irregularity results in an accused not given a fair trial and where the nature and extent of an alleged irregularity, as in this case, had not been determined, another court might reasonably find that, even if an irregularity had been committed in the gathering of evidence against the respondent, it was not fatal to the outcome of the trial.

[13] From the above it seems inescapable to conclude that at the close of the State case a *prima facie* had been made out by the State.

[14] Respondent exercised his right to silence which left the *prima facie* case uncontested. The State's case is based on direct evidence implicating the respondent and his silence ought to have strengthened the State's case. In

his plea explanation the respondent said it was his 'co-accused' who removed the gearbox. He is the only one knowing the true facts and could, if innocent, easily have refuted the State's case but instead elected to remain silent. In the circumstances of the case the trier of fact would be entitled to draw an inference of guilt on the side of the respondent.

[15] In view of the above I am satisfied that applicant has shown that there is a reasonable prospect of success on appeal.

[16] Consequently, the application succeeds and leave is granted to appeal against the judgment of the court *a quo*.

JC LIEBENBERG
JUDGE