REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case no: CA 53/2013

In the matter between:

ADRIAN J LANG **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Lang v S* (CA 53/2013) [2013] NAHCMD 248 (23 AUGUST 2013)

Coram: CHEDA AJ
Heard: 31 July 2013
Delivered: 22 AUGUST 2013

REASONS

CHEDA AJ [1] This is an appeal against the leaned Regional Court Magistrate's refusal to grant bail pending appeal on the 17 April 2013 under Case NO SWK-CRM 3506/2011. On the 31 July 2013 this matter was argued before me, I made an order admitting Appellant to bail pending appeal and undertook to give my reasons later, these are they:

The brief historical background of this matter is as it appears hereinunder.

Appellant, a farmer, was self-employed as a land-surveyor, a part-time farmer and also a Lodge owner residing on the farm Okapeha, in the Omaruru district. He was arraigned at the Regional Court in the region of Swakopmund (wherein) he was charged with the following offences:

Count 1
Murder (in respect of one Joseph Hamukwaya)

Count 2
Attempted murder (assault) (in respect of one Gabriel Matsuib)

Alternative to count 2
A contravention of section 38 (1) (i) of the Arms and Ammunition Act, Act 7 of 1996 as amended (in respect of one Gabriel Matsuib)

Count 3
Attempted murder (Gerson Sabatha)

Alternative to count 3
A contravention of section 38 (1) (i) of the Arms and Ammunition Act, Act 7 of 1996 as amended (in respect of one Gerson Sabatha)

Count 4
A contravention of section 29 (1) (a) of the Arms and Ammunition Act, Act 7 of 1996 as amended.

Alternative to count 4
A contravention of section 2 of the Arms and Ammunition Act, Act 7 of 1996 as amended

[2] The facts of this matter are largely common cause and there is no need for me to go into details. Suffice to say that in count one, appellant was acquitted of the

charge of murder, but convicted of culpable homicide on the 12th of April 2012, which in itself is a competent verdict of the main charge of murder. He was convicted on the alternative charges on the rest of the main counts.

With respect to the conviction of culpable homicide, he was sentenced to 5 years imprisonment of which 2 years imprisonment was suspended on condition that he is not convicted of culpable homicide or any such offence of which violence on the person of another is an element.

[3] On the 25 April 2013, Appellant lodged an application for bail pending appeal to the High Court against sentence only in respect of Count 1. The learned presiding Regional Magistrate heard the application and dismissed it. It is that dismissal which has resulted in this application.

In her reasons for dismissal, she concluded on page 42 (record of proceedings) "…….. it is the opinion of this court taking into the (sic) account the fact of this case that there is no reasonable prospects that a court of appeal will come and (sic) to a different sentence that is then imposed the imprisonment and the application of Bail Pending Appeal from applicant is therefore refused and the appellant will remain in custody pending appeal".

Appellant was dissatisfied with the leaned Regional Magistrate's dismissal of his application. He has, through his counsel Adv Botes, argued that the court *a quo* misdirected itself by holding that he has no reasonable prospects of success on appeal.

[4] It is common cause that Appellant is a self-employed Land Surveyor who is also carrying out a livelihood as a farmer and in addition thereto, he runs a lodge in the Omaruru district. Prior to this incident there had been rampant poaching activities in the surrounding areas and his farm was not spared either. This resulted in his loss of game and other thefts to unknown people.

On this fateful day, the deceased and his friend happened to invade his farm and he spotted them, he fired warning shots in an attempt to stop them from fleeing which would have led to their apprehension and subsequent arrest. This, however, was not

to be as he negligently fired at them. This resulted in one Joseph Hamukwaya losing his life in the process. It is not an issue that the deceased met his death as a result of appellant's negligence, that was the finding of the court *a quo* and it cannot be disturbed by this court.

[5] The thrust of Adv Botes's argument if I understand it correctly is that the court *a quo* seriously misdirected itself by holding that appellant's prospects of success on appeal against sentence are absent, put, in another way, that his prospects for success are bleak.

On the other hand Ms Meyer for respondent argued that there was no misdirection on the part *of the court a quo* as all the relevant facts were duly considered by the trial court. Further that, the law pertaining to the application for bail pending appeal was properly applied, therefore, no allegation of misdirection attributed to the trial court can stick in the circumstances.

It is trite that the general approach with regard to the determination of bail pending appeal is totally different from the approach pertaining to a bail pending trial application. While in the former there exists a presumption of innocence until proven guilty by a competent court, in the later, that presumption does not arise as the trial court would have made a finding of fact. What remains is for appellant to convince the court on a balance of probabilities that his prospects of success on appeal are bright and that if granted bail he will not jeopardize the proper administration of justice by failing to await the outcome of his appeal.

[6] However, in making a determination, the court seized with such application is guided by two cardinal principles, namely, whether if appellant is admitted to bail is likely to await the outcome of his appeal or that he may abscond. The second being that whether there exists reasonable prospects of success on appeal.

In *casu* the leaned trial Regional Magistrate conceded that appellant is not a flight risk in view of his socio-economic circumstances. Therefore, this is no longer an issue. That finding in my opinion is legally sound.

The question that falls for determination, therefore, is whether or not there exists reasonable prospects of success on appeal to justify this court to suspend the decision of the court *a quo*. There has been a broad debate by academics and the judiciary as to what angle the question of "reasonability of success" entails. The court is grateful to Adv Botes for his reference to a number of authorities some of which seem to argue that a nore liberal approach seems to have ushered in a paradigm shift towards leniency, see s v Anderson 1991 (1) SACT 525 (c) at 527 E-G per Marais J, although it is more persuasive than binding as it is a South African authority. The same approach was adopted in s v Naidoo 1996 (2) SACR 250 (W) at 252, per Joffe J.

[7] I am of the opinion that this new approach is anchored on the universal need to give a meaning to fundamental rights enshrined in various democratic constitutions in general and Namibia in particular as stated in article 7 of the Namibian constitution which states: "no person shall be deprived of personal liberty except according to procedures established by law". This approach was ably laid down in S v Branco 2002 (1) SACR 531 WLD.

The most common deprivation of one's liberty is imprisonment. It therefore stands to reason that imprisonment should not be easily resorted to, as it is a human right and as such is sacrosanct. The English proverb, "he who loses liberty loses all" finds a comfortable home in this approach. In S v Mccoulaugh 2000 (1) SACR 542 (W) at 549-51, the court went further and stated that even where reasonable prospects of success are absent, the court should grant bail where the prison term would have expired when the appeal is heard. This, therefore, means that as long as the appeal is not doomed to failure as it were, it is therefore arguable the courts should in those circumstances grant bail to avoid prejudice to appellant, see S v Husdon 1996 (1) SACR 431 (W) at 434 b and S v Devilliers en In Ander 1999 SACR 297 (O) at 310 CR. I am fortified by the reasoning and approach adopted by the learned Judges in the above cases and fully associate myself with it.

Imprisonment as a punishment is the most rigorous punishment which should not be the first line of punishment by judicial officers. It should be the last resort and must be reserved for very serious and clearly deserving cases. If after a serious

consideration of the circumstances surrounding the commission of an offence the court entertains some doubt as to the suitability of imprisonment, in particular having had sight of the case authorities, it must consider admission to bail as this will no doubt serve the interests of justice.

In *casu* the fact that appellant has already been convicted of a lesser offence which is a correct and fitting judicial step-down from a more serious charge of murder. This with respect should usher in a measure of mercy. I say this, without in any way seeking to either actively or passively attempt to sway the mind of the appeal court destined to hear the case. My emphasis is on the point that bearing in mind the circumstances surrounding the commission of this offence in particular lack of *mens rea,* a different court may impose a different sentence. The fact that appellant was convicted of culpable homicide should have occurred to the court *a quo* that the sentence should be dealt with mercifully and that there is a possibility that another court might come up with a different sentence which if it is non-custodial the incarceration of the appellant would certainly result in actual prejudice. This therefore will not be in line with the proper administration of justice.

[8] It is on that basis then that in the event that the appeal court finds in the appellant's favour, the said appeal will turn out to be an academic exercise as he would have served his sentence. Such a scenario is undesirable. It is in this light then that this appeal can be said not to be doomed to failure, but, is arguable, as held in S v Hudson (supra). I do not agree with respondent that there are no reasonable prospects of success in this matter.

For that reason and that reason alone, it is my considered view that a different court is likely to come up with a different sentence which possibly may be non-custodial. In the event that this is so, appellant if not released on bail would have unnecessarily suffered actual prejudice due to his unjustified incarceration.

While sentencing is the most difficult, but, desirable and unavoidable end process of a trial, a judicial officer should, where a case is a borderline rather err on the side of leniency than to be harsh in the circumstances. In *casu* I find that the interest of justice demand that Appellant be granted bail pending his appeal.

These are my reasons for the order made on the 31 July 2013.

M Cheda

Acting Judge

APPEARANCES

APPELLANT:	Mr Botes Instructed by Stern & Barnard Windhoek
STATE:	Ms Meyer Of the Office of the Prosecutor General Windhoek