SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 53/2013

In the matter between:

ADRIAN JOHN LANG **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Lang v The State* (CA 53/2013) [2013] NAHCMD 342 (18 November 2013)

Coram: **SMUTS, J *et* MILLER AJ**

Heard: 28 October 2013

Delivered: 18 November 2013

Flynote: Appeal against sentence of 5 years imprisonment with two years suspended for culpable homicide. The appellant had fired warning shots in order to arrest the deceased who was poaching on the appellant's farm. The regional magistrate said that the appellant's offences must have shocked a small community like O […] and referred to the appellant taking the law into his own hands. But there were no facts before her as to how the community in O […] was affected. Nor did the

facts establish that the appellant took the law into his own hands. The purpose of firing warning shots was to affect an arrest. The court found that the regional magistrate misdirected herself by over emphasizing what she considered to be the interests of society in balancing process which is inherent to sentencing as set out by the Supreme Court in *S v van Wyk* 1993 NR 425 at 448. The regional magistrate also misdirected herself by failing to consider an alternative to a sentence of imprisonment and also misdirected herself in wrongly referring to the evidence of a clinical psychologist as hearsay evidence and not properly evaluating that evidence. The sentence was disturbingly inappropriate, taking into account the uncontested facts of the crime. Sentence set aside and substituted by a fine of N$15 000 or 2 years imprisonment plus 3 years suspended.

ORDER

In the result the appeal succeeds. The sentence imposed on count 1 is set aside and is substituted by the following sentence: ' The accused is sentenced to a fine of N$15, 000.00 or 2 years imprisonment. The accused is in addition sentenced to three years imprisonment which is entirely suspended for a period of five years on condition that the accused is not convicted of culpable homicide or any other offence involving injury to the person of another committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine.’

JUDGMENT

<u>MILLER AJ (SMUTS, J concurring):</u> [1] The appellant appeared before the learned regional magistrate sitting at Swakopmund. He was arraigned on the following main and alternative charges:

1) Murder
2) Attempted Murder

   Alternatively to count 2 a contravention of Section 38 (1) (1) of Act 7 of 1996 as amended (Negligent discharge of a fire-arm).
3) Attempted Murder

Alternatively a further contravention of Section 38 (1) (1) of Act 7 of 1996 as amended.

4) A contravention of Section 29 (1) (a) of Act 7 of 1996 as amended (Possession of a machine gun), alternatively a contravention of Section 2 of Act 7 of 1996 as amended (Possession of an unlicensed fire-arm).

[2] A fifth charge in the indictment was withdrawn by the prosecutor prior to the appellant pleading thereto.

[3] As a consequence the appellant pleaded to and the trial proceeded on the four charges I referred to.

[4] The appellant, who was legally represented at the trial, pleaded not guilty to all the charges. The learned regional magistrate, after hearing and considering a substantial body of evidence concluded in a comprehensive and reasoned judgment that the state had established beyond reasonable doubt that the appellant was guilty of the following crimes:

1) Culpable Homicide which relate to count 1.

2,3,4 The alternative charges in respect of Count 2, 3 and 4.

[5] There is no appeal, and in my view correctly so, against any of the convictions.

[6] I need only add that the learned regional magistrate concluded in her judgment insofar as the matrix of facts is concerned, that there was a reasonable possibility that the facts deposed to by the appellant and the witnesses called on his behalf were reasonably possibly true. It follows that those facts underpinned the convictions. The relevant facts were conveniently and correctly summarized by Mr. Botes, who appeared for the appellant before us in the Heads of Argument filed prior to the hearing of the appeal. They are the following:

‘

21.1 Appellant and his family (his wife and elderly mother); at the time of the incident during 2010 were residing on farm O […]. He also owned the property adjacent to it i.e. O […]. This is in the O […] district close to the town of O […] and between 6 & 10 km from the township of O […].

21.2 Appellant was self-employed as a land surveyor and a part-time farmer and also a lodge owner (Wilderness Safari Lodge); situated on the property referred to supra.

21.3 Appellant farmed with his father on the property for approximately 23 years.

21.4 The farm consists of an area of approximately 8,500 hectares.

21.5 Appellant and his father initially started farming with cattle. They later had to give up cattle farming because of continuous stock losses due to theft.

21.6 The farm was losing approximately 30 head of cattle per year.

21.7 After abandoning cattle farming appellant built a lodge on the farm in order to establish himself in the tourism business.

21.8 Appellant started with a horse stud; having very expensive horses which differed in value; but in the range of N$50, 000.00 – N$150, 000.00 per horse.

21.9 Due to poaching the wildlife numbers dwindled and there is not much left of a previously prosperous and abundance of wildlife. The game numbers on the farm have decreased to a point where it was nearly impossible to actually shoot game on the farm for self-consumption.

21.10 Appellant, at the time of the incident, had a number of cases pending that he reported to the Namibian Police in O […] in respect of poaching.

21.11 Approximately 20 Oryx would be caught in snares on a monthly basis on the farm referred to supra, which is in fact situated in a sanctuary area or also referred to as a conservancy area.

21.12 The tourists that were visiting the lodge did so basically with the view of seeing wild animals. This was not possible anymore.

21.13 Appellant employed a poaching unit which was headed by Mr. L M Venter (one of the state witnesses called).

21.14 Not only is appellant's farm secured by a security fence but his homestead is also surrounded by an additional security fence. There was an incident during the year of 2009 where he found an intruder

inside his property and in fact found the person running from his house inside the security fence area; fleeing the scene.

21.15 Prior to this incident the appellant's parents, who lived on the property were robbed from jewellery, a firearm and other valuables. The firearm so robbed was later found to be the firearm that was used to kill their very good and close friends, the Kruger family.

21.16 On the date of the incident in 2010 the appellant once again, as numerous times in the past found one of his horses with a snare around its neck.

21.17 Appellant then contacted the Anti-Poaching Unit in order to assist him as he had every reason to believe that there were poachers on the farm busy stealing his game and possibly attempting to steal his horses.

21.18 According to state witness L M Venter, the head of the Anti-Poaching unit, stock theft and poaching is an acute and huge problem in the district of O […]. He testified that he is aware of the fact that the appellant was in fact forced to abandon his Bonsmara Cattle Stud due to stock theft. The witness testified that game used to be in abundance on the farm of the appellant, but the numbers have decreased dramatically. This witness also relates and was in fact involved in the investigation of the Kruger murders, referred to supra.

21.19 Witness L M Venter testified that he knew the deceased person, J.H., as he arrested him in the past for poaching on the farm of the appellant. He in fact served a period of imprisonment of six months.

The incident where J.H. was injured and died

22. Appellant found one of his stud horses with a snare around the neck on the date of the incident.

23. He phoned Mr. L Venter of the security company / Anti-Poaching Unit to come and assist. Mr Venter indicated that he does not have transport and requested the appellant to assist the Anti-Poaching Unit's members who were on the farm at that point in time.

24. When appellant approached the poachers and over a distance of approximately 60m he shouted to them to sit down and not jump up or run away. When the first of the poachers jumped up and started running he fired a warning shot. He thereafter fired a number of further shots which shots he aimed at the hill lock. Appellant did this as he

was hoping that the fleeing poachers would become afraid and stop in order to surrender / allow themselves to be arrested.

25. Behind the hill lock was a very densely populated area with bushes and trees. If a person would reach this area it will be unlikely to apprehend such fleeing person.

26. According to the observations of Mr L M Venter, state witness, he stated that he was of the opinion that the appellant was not aiming directly at the fleeing suspects as he found the white marks on the granite hill-lock where the bullets struck the rocks.'

[7] I need only add that during this incident, the deceased J.H. was fatally wounded. His companion was also wounded, but survived.

[8] Prior to imposing sentence the learned magistrate heard the evidence of a psychologist, Gerhard Meier, who was called by the appellant and a social worker who was called by the State. The thrust of Mr. Meier's evidence is that the situation that prevailed on the farm of the appellant and the situation in which he found himself induced in the appellant a state of depression for which he had been receiving treatment to which he responded favourably.

[9] Mr. Meier was of the opinion that the prognosis to keep the depression under control will be better if the appellant was not sentenced to a term of imprisonment.

[10] The evidence of the social worker was to the effect that the appellant will receive treatment for his condition if he was imprisoned.

[11] The learned regional magistrate in her judgment on sentence concluded that a custodial sentence was the appropriate sentence to impose on count 1, the conviction of culpable homicide. In respect of that conviction the following sentence was imposed:

' Five years imprisonment of which two years are suspended for a period of five years on condition that the accused is not convicted of culpable homicide or any offence of which violence towards the body of another person is an element committed during the period of suspension.'

[12] The present appeal lies against that sentence. On the remaining counts fines with the alternative of imprisonment were imposed.

[13] The Notice of Appeal lists some 21 grounds on which the sentence imposed is attacked.

[14] I do not deem it necessary to quote those in full. In essence it is stated that the learned regional magistrate misdirected herself in several respects and that in any event the sentence imposed is startlingly inappropriate.

[15] In *S v Tjiho 1991 NR (HC)* Levy J said the following at 365 A – B:

> 'The appeal court is entitled to interfere with the sentence if:
>
> (i) The trial court misdirected itself on the facts or on the law;
>
> (ii) An irregularity which was material occurred during the sentencing proceedings;
>
> (iii) The trial court failed to take into account material facts and/or over emphasized the importance of other facts;
>
> (iv) The sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by a court of appeal.'

[16] These principles, if I may call them that correctly summarize our law on this score and is a convenient distillation of a fair number of judgments both in this Court and South African Courts.

[17] The task of the trial court is to consider the nature of the crime which will include the circumstances under which it was committed, the personal circumstances of the accused so convicted and the interests of society and then to impose in the words of Holmes JA a sentence that…

> 'should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.'

S v Rabie, 1975 (4) SA 855 (A) at 862 G-H.

Ackermann AJA in his judgment in *S v Van Wyk* 1993 NR 426 (SC) was in my respectful view correct when he said the following at 448 D-F:

'As in many cases of sentencing, the difficulty arises, not so much from the general principles applicable, but from the complicated task of trying to harmonize these principles and to apply them to the facts. The duty to harmonize and balance does not imply that equal weight or value must be given to the different factors. Situations can arise where it is necessary (indeed it is often unavoidable) to emphasize one at the expense of the other.'

[18] The learned regional magistrate when dealing with the interest of society expressed herself in the following way:

'Now if one looks at the interest of society, society expect the Court to uphold the law and order, not to take the law into own hands. These offences before the Court must have shocked a small community like O [….] and it must not be lost sight of the fact, that as already, one incident happened in 2009 the other 2010.'

[19] That the community of O [….] must have been shocked by these incidents is an assumption not based on any evidence. Given the fact that stock farming in the O [….] district is not an occupation for the feint-hearted. I do not know how that community reacted. Conceivably there may have been some empathy for the appellant given the circumstances. I believe it to be more correct that right-thinking members of society will recognize that persons must not take the law into their own hands and to expect that those who do so to be convicted and sentenced. I am not persuaded that they will expect that in all cases a custodial sentence must be imposed.

[20] Moreover the facts of this case do not establish that the appellant took the law into his own hands. The purpose of him firing the shots was not to exact some summary and arbitrary punishment. To the contrary it was an attempt to arrest the fleeing suspects in order to have them arrested and brought to Court.

[21] In my view the conclusion of the learned regional magistrate proceeds not only from the wrong factual premise, but the interest of society is overemphasized in the balancing process referred to by Ackermann AJA in van Wyk (supra).

[22] In my view the learned regional magistrate erred on the facts by finding that the evidence of Mr. Meier is mainly hearsay. Clearly it is not. The result in my view is that the evidence of Mr. Meier was not properly evaluated and accorded the weight it otherwise deserved.

[23] In finding that because a life was lost through the negligence of the appellant and that consequently a heavier sentence than would otherwise have been imposed, the learned regional magistrate seeks to rely on a passage from the judgment of Parker J and Manyarara AJ in *S v Simon* 2007 (2) NR 500 (HC). I think the passage the learned regional magistrate had in mind is the one appearing at 517 C-D which reads as follows:

> 'It has been held that if the consequences of the accused person's negligence has resulted in serious injury to others or a loss of life such consequences will almost inevitably constitute an aggravating factor warranting a more severe sentence than might otherwise have been imposed (*S v Nxumalo* 1982 (3) SA 856 (A) at 861 H).'

[24] This passage must not be read in isolation as the learned magistrate seems to have done. At 518 D-F the Court states the following:

> 'It appears to us that in the present case in determining an appropriate sentence the Court must have regard to the degree of culpability or blameworthiness exhibited by the appellant in committing the "negligent act" for which he was convicted. And, in doing so, the Court ought to take into account the appellant's unreasonable conduct in the circumstances, foreseeability of the consequences of his negligence, and the consequences of his negligent act (*S v Nxumalo* (supra at 861 G-H). Indeed the community expects that a serious offence will be punished, but also expects at the same time that mitigating circumstances must be taken into account and the accused person's particular position deserves thorough recognition: that is sentencing according to the demands of our time.'

[25] It is also helpful to always bear in mind what was stated in *S v Scheepers* 1977 (2) SA 154 (A) at 155 A-B:

> 'Imprisonment is not the only punishment which is appropriate for retributive and deterrent purposes. If the same purposes in regard to the nature of the offence and the interest of the public can be attained by means of an alternative punishment to

imprisonment, preference should, in the interest of the convicted offender, be given to alternative punishments in the imposition of sentence. Imprisonment is only justified if it is necessary that the offender be removed from society for the protection of the public and if the objects striven for by the sentencing authority can not be attained with any alternative punishment.'

[26] In casu the learned regional magistrate found that the only appropriate sentence was one of imprisonment. What is absent from the reasoning are the reasons why alternative sentences were considered to be not fitting.

[27] In my view ultimately the learned regional magistrate misdirected herself in the respects I dealt with. There may well be others but the ones I mentioned are of sufficient weight to entitle us to interfere with the sentence.

[28] Sitting as the Court of first instance I would have imposed a sentence that did not have the inevitable effect that the appellant should be incarcerated. Attaching to the relevant considerations the weight they deserve and balancing them against one another leads me to the conclusion that upon a proper consideration of the crime, the circumstances of the appellant and the interest of society, a sentence which is not custodial will meet the needs of this case.

[29] I raised with Ms. Meyer who represented the State whether this conclusion does not have as its effect that the sentence imposed by the learned regional magistrate is startlingly inappropriate. Ms. Meyer in response referred to the following passage from a judgment written by Maritz J (as he then was) in *Harry de Klerk v The State* SA 18/2003 which reads as follows:

'Moreover, a sentence is not inappropriate simply because a Court of appeal considers that a different type of punishment might also have been appropriate in the circumstances of the case.'

[30] I agree with the learned judge.

[31] The fact remains, though that the sentence imposed by the learned regional magistrate is entirely inappropriate. The effect of it is that the appellant must at his age spend time in prison.

[32] That aspect renders the sentence disturbingly inappropriate.

[33] In the result the appeal succeeds.

[34] The sentence imposed on count 1 is set aside and is substituted by the following sentence:

‘The accused is sentenced to a fine of N$15, 000.00 or 2 years imprisonment. The accused is in addition sentenced to three years imprisonment which is entirely suspended for a period of five years on condition that the accused is not convicted of culpable homicide or any other offence involving injury to the person of another is committed during the period of suspension for which he is sentenced to imprisonment without the option of a fine.’

P J Miller

Judge

I agree

D F SMUTS

Judge

APPEARANCES

APPELLANT:	L BOTES Instructed by Stern & Barnard
RESPONDENT:	A MEYER Of Office of the Prosecutor-General