



CASE NO.: CA 182/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MAVEHEHEKO MUHENJE

APPLICANT

and

THE STATE

RESPONDENT

CORAM: DAMASEB, JP *et* PARKER, J

Heard on: 2012 February 6

Released on: 2012 February 10

APPLICATION FOR LEAVE TO APPEAL

REASONS

DAMASEB, JP: [1] This is an application for leave to appeal against an order of this Court dismissing an appeal against a sentence of 20 years for the theft of six head of cattle valued at N\$12,000. The applicant pleaded guilty in the district court, Opuwo, which then committed him to the regional court for sentencing. That court having found that

there were no substantial and compelling circumstances he was sentenced to the minimum prescribed sentence of 20 years. It was that sentence he had appealed against to this Court. He failed and now wants to approach the Supreme Court on sentencing only.

[2] The applicant's first hurdle is that his application for leave is about 12 months out of time. He has filed of record a document that purports to be an application for condonation but which shows a very clear lack of understanding on his part of the nature of the process associated with an application for condonation. That clear lack of understanding is bound up with the question whether there are reasonable prospects that another Court will come to a different conclusion to which this Court came.

APPLICATION FOR LEAVE TO APPEAL

[3] From the documentation submitted by the applicant in support of the application for leave to appeal, it is clear that he suffers from a very poor command of English. The concepts 'condonation' and 'reasonable and acceptable explanation' for his failure to appeal, are patently beyond his reach. But he has made some attempt at an explanation and in so doing only demonstrates his ignorance.

[4] Given the length of the sentence imposed by the regional court, there is no real prejudice for the State in the sense of the need to have the matter finalised as quickly as possible to get certainty and finality.

[5] I am satisfied that in the case of the present applicant, justice demands that he be granted condonation to pursue his application for leave to appeal outside the time limits provided; predominantly because his prospects of success, as I will soon show, are very good.

PROSPECTS OF SUCCESS ON APPEAL

[6] The applicant was, on his own plea, found guilty of theft of six head of cattle valued at N\$12,000. He hails from the Himba tribe in the north-western part of Namibia. The magistrate who sentenced him *a quo* told him before doing so to give reasons why he ought to get a lesser sentence than the statutorily prescribed minimum of 20 years. In reply he told the magistrate that he stole the cattle because he needed to pay school fees as his parents could not assist him; and that people of the tribe he hails from do not understand the value of education. (It is a notorious fact that the Himba tribe of Namibia are a marginalised community at the bottom of the economic ladder;

and that the Government has in place special programmes to uplift them because of that reality. This Court cannot ignore that fact). A young boy from that community who demonstrates a hunger for education and asks for mercy for his crime of stealing in order to go to a school is, in my view, a circumstance that the Supreme Court most probably will find to constitute a substantial and compelling circumstance. The weight of that factor as a substantial and compelling circumstance is strengthened by the fact that all the stolen cattle had been recovered and returned to the owner. The conviction had, on the other hand, made it so improbable that he can pursue his hunger for education and, with that, the promise of a better life. Another court most probably will consider that as a substantial and compelling circumstance.

[7] Additionally, the applicant for leave was a young man of only 20 years at the time of the offence. He pleaded guilty and played open cards and gave, from the outset, the true reason for the criminal act. His age at the time and the fact that he pleaded guilty and even - while he felt the value of the cattle as given by the owner was exaggerated and ought only to have been 12,000 (the value later accepted by the sentencing Court) - was prepared to plead guilty to the exaggerated value. That honesty - even to his own

prejudice - most probably will be considered by the Supreme Court as counting in his favour as a compelling reason justifying deviation from the minimum prescribed sentence.

[8] For all those reasons and disabusing my mind, as far as humanly possible, of the fact that the Court had decided during the appeal that no substantial and compelling circumstances existed to justify imposing sentence lesser than the statutorily prescribed sentence, I am satisfied that there are very good prospects that the Supreme Court will come to a different conclusion to the one this Court did. I accordingly therefore grant the applicant leave to appeal to the Supreme Court against the sentence of 20 years' imprisonment imposed by the regional court.

[9] Accordingly it is ordered as follows:

- a) The applicant's late filing of leave to appeal is condoned.
- b) The application for leave to appeal against the decision of this Court dismissing the appeal against sentence, is granted.

c) A special request is made to the Hon. Chief Justice of the Supreme Court to consider early adjudication of this matter in that Court in view of the strong prospects of success on appeal.

DAMASEB, JP

I agree.

PARKER, J

ON BEHALF OF THE APPLICANT:

IN PERSON

ON BEHALF OF THE RESPONDENT:

MRS MOYO

INSTRUCTED BY:

OFFICE OF THE PROSECUTOR-GENERAL