REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA,

MAIN DIVISION, HELD AT WINDHOEK

Case No: CA 73/2011

In the matter between:

THOMAS TITUS **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **NDAUENDAPO, J et SIBOLEKA, J**

HEARD ON: **24 February 2012**

DELIVERED ON: **14 March 2012**

NDAUENDAPO J

[1] On 07th October 2007 the appellant was convicted of murder in the Regional Court sitting at Windhoek. He was sentenced to 15 years imprisonment of which 5 years were suspended on the usual condition.

[2] He now appeals against conviction. The appellant is represented by Mr Jones (*amicus curiae)*. The Court wishes to thank him for his assistance. Ms Wantenaar appeared for the state.

Point in *limine*

[3] At the outset of the proceedings, Ms Wantenaar raised a point in *limine.* She submitted that the notice of appeal was filed out of time. She submitted that the appellant was convicted and sentenced on 7 October 2009. His notice of appeal was filed on 20 September 2010. In terms of rule 67 [1] of the Magistrate's court Act, the notice of appeal should have been filed within 14 days from date of conviction and sentence. Although the appellant was unpresented in the court a *quo* the presiding magistrate informed him that he should filed his notice of appeal within 14 days. His appeal was accordingly filed way out of the time after a period of 24 months had passed. In his affidavit

in support of the application for condonation for the late filling of the appeal, he states that his family promised to appoint a lawyer for him to conduct the appeal and that after his father died on 23 August 2010, the money they raised was used for his funeral. He further states that: "I am a layman and do not have a high standard of education having only completed basic schooling. I have not undergone any tertiary education. This coupled with my poor command of the English language, made it very difficult for me to comply with the provisions of rule 67 of the rules of the magistrate's court relating to the stipulated 14 day period in which a notice to appeal must be filled". In terms of our law this Court has a discretion to condone non compliance with the period within which the appeal must be noted. To succeed in convincing the Court to grant condonation, the appellant must:

[1] Show a reasonable and acceptable explanation as to why he had not filed his notice of appeal within 14 days and

[2] He must show that there are reasonable prospects of success on appeal. See **Penock & another v Attorney General Natal 1958 SA 875 of 880.**

The explanation by the appellant is clearly not reasonable and acceptable. The appellant was clearly aware that he had to file his appeal within 14 day from 07 October 2007. There is nothing in his application indicating what steps he took to remind his family to get a

lawyer as promised, so that the appeal could be filed timeously. A period of almost 24 months had passed without him taking any steps to ensure that his family kept to their promise of finding a lawyer for him. The explanation that he is a layman is also not acceptable. He was given the option of getting a lawyer from Legal Aid or to represent himself. He chose the latter and by so doing he took the risk and he cannot now be heard to complain that he is a layman and does not know the procedures. In the result there is no reasonable and acceptable explanation before this Court to condone the late filing of the appeal. In any event, there are no prospects of success on appeal which many 'tip the scale' in his favour to grant the condonation.

[4] Mr Jones submitted that the appellant's right to a fair trial was infringed. In essence he submitted that the appellant was denied the opportunity to engage or obtain a lawyer from legal aid. He argued that "it must follow that the right of an accused to be represented by Legal Practitioner must include not only being informed of his right to apply for legal aid but also to be afforded a proper opportunity to make such application for the necessary instance [sic] to obtain the services of a Lawyer". He referred this Court to the **S v Kasunga 2006 [1] NR 348** at **367 F .I and S v Kau & other 1995 NRI at 9 E**. In this regard he referred to what the Regional Court Magistrate informed the appellant:

On 24 October 2008 the presiding Magistrate informed the appellant that: 'you are entitled to your own attorney or your own lawyer if you have mean (sic) to do so, you may also apply for Legal Aid or conduct own defense'. The Magistrate further stated "Accused was informed that

<u>at the moment</u> Legal Aid has run out of money what do you intent to do?"[My underlining] 'Accused: informs court that he shall conduct own defence. Have [sic] made up his mind

On 8 April 2009, the appellant informed the court that he will still conduct his own defence and on 22 September 2009, he informed the court that he will conduct his own defence. That is what transpired in the Regional Court. But the Court cannot turn a blind eye to what had transpired in the Magistrate's Court where the appellant appeared for the first time. When the appellant appeared in the Magistrate's Court on 2 October 2007, the presiding officer explained the appellant's right to Legal representation as per annexure 'A' [proforma]. Annexure [A] clearly states that if the accused [appellant] cannot afford a Lawyer at his own cost, he may apply for Legal Aid Lawyer and that he can obtain the form from the Clerk of the Court who can assist him to complete the form. The appellant indicated that he will conduct his own defense. Again on 2 July 2008 the presiding officer asked him the following:

"*Court: accused you indicated on your first court appearance that you will conduct your own defense in this matter is that still the case, or do you wish to apply the services of an attorney, whether it is one paid by yourself or by applying for Legal Aid. Accused: own defense*"

It is clear from the above exchanges that the appellant's right to Legal representation [including Legal Aid] was explained to him and that he chose to represent himself.

[5] When the appellant appeared in the Regional Court, he was aware of his right to legal representation at his own cost or through legal aid. Although the Magistrate informed the appellant on that first appearance in the regional court that legal aid did not have money 'at that moment', that in my view only referred to the time when appellant appeared in the Regional Court for the first time and not to the future. He chose to represent himself. The case was then postponed on [3] three occasions and if the appellant was desirious to exercise that option he would have done so. But it was clear from the very beginning that he wanted to represent himself despite the availability of legal aid lawyer. During the trial the presiding officer duly informed the appellant of his right to cross examination and other rights and duly assisted the appellant. In our respectful view the appellant's right to a fair trial was not infringed. Accordingly that submission is without merit.

STATE'S CASE

[6] On the merits, the state called two witnesses: Dian Botswana and Suzette Rooinasie. Botswana testified that on the evening of 30 September she went to Kabila Shebeen at Brackwater. At the shebeen she found the appellant, the deceased and Suzette. She testified that Suzette was standing with the deceased and talking. After a short while Suzette left the deceased. She testified that she saw the appellant walking to the deceased and stabbing him on the chest and then left. She testified that she was approximately 4-5 meters away from the deceased when she saw the stabbing. She further testified that she did not see any fight or quarrel between the appellant and the deceased. She also testified that the deceased did not have a knife in his hand and that after the appellant stabbed the deceased he walked away. She testified that the appellant stabbed the deceased in the chest. She saw what had happened because there was a bit of light.

[7] **Suzzet Rooinasie** testified that the appellant was her ex-boyfriend. On 30 September 2007 she went to Mix Camp in Brackwater. She went to a shebeen and met the deceased. She did not know him but used to see him in Mix Camp. The deceased gave her N$50.00 to go and buy beer and to bring his change. She bought the beer and gave the change back. She testified that she was busy dancing when the appellant came there. He came and pulled her and told her to go and sleep. She refused and the deceased at that stage was in another shebeen nearby. She went to the shebeen were the deceased was. The deceased

called her and they stood outside and the deceased gave her N$1.00 to go and buy bubble gum. She left and the deceased was still standing where she left him. When she returned, Botswana told her that the deceased was stabbed by the appellant.

APPELLANT'S CASE

[8] The appellant testified during his trial. In his plea explanation he told the Court that he acted in self-defence. He testified that on the 30 September 2007 he went to the shebeen of Muhe. He found the deceased there. He leaned against the pool table and the deceased asked him why he was looking at him in a rude manner? He replied by saying "why are you asking that question". 'I do not even know you this is my first time to see you'. After that conversation he went outside. From there he went to another shebeen. He stood outside the entrance of that shebeen and peeped inside. When he turned around he saw someone coming from behind. He moved backward and saw this person storming at him with a knife in his hand. He grabbed him on his arm and pushed him away. On the question by the Court whether he stabbed the deceased, he testified "so when he grabbed me your worship, I did not know that I stabbed him, I just grabbed him and pushed him I did not know that I stabbed him". He further testified that at the "place where he found me your worship there was no way for me to ran away. So I had to push him so I can get a chance when I

grabbed him on his chest your worship. I just pushed him with force your worship, that is when it was started [sic] your worship". That was the case of the appellant.

[9] The evidence by **Botswana** was clear that she saw the appellant walking to the deceased and stabbing the deceased in the chest. He was the aggressor. That evidence was not challenged or disputed in cross examination. She also testified that there was no quarrel or fighting between the appellant and the deceased. There was no attack on the appellant to have acted in self-defence, as he claimed. **Botswana** knew the appellant and not the deceased. According to **Botswana** he was the one who walked over to the deceased and stabbed the deceased in the chest. Her evidence that she saw the deceased being stabbed in the chest is corroborated by the medical report where the doctor's finding on the cause of death was an 'incision wound on the right side of the chest'. She saw what happened as there was a bit of light.

Mr Jones submitted that no causal link was established between the accused's actions and the ensuing result. The evidence of **Botswana** was clear on that causal link. She saw the appellant walking to the deceased, stabbing him in the chest, blood coming from his chest, collapsing and died and he [appellant] walking away. In addition the medico legal report confirms the cause of death as an 'incision wound to the chest'. There was no evidence to suggest that the causal chain

was interrupted. The submission by **Mr Jones** is therefore without merits.

Mr. Jones also took issue with the medico-legal report which was admitted into evidence. He submitted that [even if the applicant [sic] had consented to the handing in of the medico legal report it is insufficient for the court to receive this report and ultimately rely on its contents without having first resorted to the procedure under section 220 of the Criminal Procedure Act. That submission is meritless.

Section 212 (4) does not require the procedure under section 220 to admit an affidavit. The mere production (without an objection) of such an affidavit under section 212 (4) becomes *prima facie* proof of the content of such an affidavit. The words *prima facie* 'mean that the judicial officer will accept the evidence as prima facie proof and in the absence of other credible evidence, that prima facie proof will become conclusive proof' [S v Mkhize & others 1998 (2) SACR 478 W at 479H-J). In *casu* there was no other credible evidence and therefore the medico legal report became conclusive proof of the identity of the victim and the cause of death.

In the result, the appeal is dismissed.

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NDAUENDAPO, J

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SIBOLEKA, J

COUNSEL ON BEHALF OF THE APPELLANT: **Mr. Jones**

INSTRUCTED BY: **NEVES LEGAL PRACTITIONERS**

COUNSEL ON BEHALF OF THE RESPONDENT: **Ms. Wantenaar**

INSTRUCTED BY: **OFFICE OF THE PROSECUTOR -GENERAL**