



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: CA 45/2015

In the matter between:

SIMON HAIBEB

APPELLANT

And

THE STATE

RESPONDENT

Neutral citation: Haibeb v The State (CA 45/2015) [2016] NAHCMD 112 (18 April 2016)

Coram: USIKU J

Heard: 5 February 2016

Delivered: 18 April 2016

Summary: The Prosecutor General may in terms of Section 310 (1) of the Criminal Procedure Act 51 of 1977, as amended, appeal inter alia against an order made in a lower court. In terms of Section 310 (2) (a) such an application must be lodged within 30 days of such order or within such extended period as may on application on good cause be allowed – Application for leave to appeal lodged 33 days out of time. The applicant has sufficiently dealt with the issue of condonation though the respondent

did not oppose the application for condonation, as the reasons set out by the applicant clearly explain the reasons for the late filing of the appeal.

ORDER

The application for leave to appeal against the respondents' acquittal is granted.

APPEAL JUDGMENT

USIKU J

[1] The respondent was charged on five counts in the Otjiwarongo Regional Court. He pleaded not guilty to all counts. After a trial the court *aquo* convicted the respondent on counts 1 and 4 which are rape and assault with intent to do grievous bodily harm. The respondent was acquitted on counts 2, 3 and 5 respectively.

[2] The application for leave to appeal lies against the respondent's acquittal on counts 2, 3 and 5.

[3] In terms of the provisions of section 310 (1) the Prosecutor General or other prosecutor may appeal against any decision given in favour of an accused in a criminal case in a lower court including an order made or sentence imposed by such court.

[4] Section 310 (2) a provides as follows: A written notice of an application referred to in subsection (1) shall be lodged with the registrar of the High court by the Prosecutor General or other prosecutor, within a period of 30 days of the decision, sentence or order of the lower court, as the case may be, or within such extended period as may on application on good cause be allowed".

[5] The grounds advanced in support of the application for leave to appeal are set out in the heads of arguments filed by the applicant.

[6] In the heads of arguments filled by the respondent it is indicated that they do not oppose the application for condonation, as the reasons set out by the applicant clearly explain the reasons for the late filling of the appeal.

[7] It is common cause that the respondent was acquitted in the Regional Court on counts 2, 3 and 5 on the 1 April 2015.

[8] Ms Esterhuizen and Mr Visser who appeared on behalf of the applicant and the respondent during the application argued the application. The applicant in the notice have raised several issues where the court in her view erred and misdirected itself regarding the acquittal of the respondent on counts 2,3 and 5. Those misdirection are summarised in the applicant's main heads of arguments. On the evidence the court *aquo* could have been convinced beyond reasonable doubt that the respondent had committed the crimes as charged.

[9] With an application for leave to appeal, the test is that the applicant must convince the court that where leave is to be granted, there are reasonable prospect of success on appeal, see *R v Ngumbane and Others* 1945 AD 185-7 also see *S v Nowaseb* 2007 2 NR 640 (HC). In essence, the question is whether there are reasonable prospects that a court of appeal will have a different view and that the appeal may succeed. In his or her assessment, the trial judge has to consider questions of facts as well as the law.

[10] In my assessment of the question raised by the applicant as set out in their grounds of appeal, and the court's application of the law to the facts. I am convinced that there is reasonable prospects of success that another court will come to a different conclusion regarding the acquittal of the respondent on counts 2, 3 and 5 as well as on the sentences imposed on count 1 and 4 respectively.

[11] In the result:

The application for leave to appeal against the respondents' acquittal is granted.

DN USIKU

Judge

APPEARANCES

APPELLANT: Mr Visser

Instructed by Legal Aid, Windhoek

RESPONDENT: Ms Esterhuizen

Of the Office of the Prosecutor-General, Windhoek