

Reportable

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

CASE NO.: CA 86/2015

In the matter between:

ZAMBWE JOSEPH ZAMBWE

APPELLANT

And

THE STATE

RESPONDENT

Neutral citation: *Zambwe v The State* (CA 86-2015) [2016] NAHCMD 262 (12 September 2016)

CORAM: NDAUENDAPO, J (SHIVUTE, J Concurring)

Heard: 16 May 2016

Delivered: 12 September 2016

Flynote: Criminal Procedure – Notice of appeal lodged out of time– Application for condonation for the late filing of the appeal –No reasonable explanation for the delay – No prospects of success – Appeal dismissed.

Summary: This is an appeal against the conviction on a charge of murder in the Regional Magistrates Court sitting at Katima Mulilo. No confirmatory affidavits to confirm that notices of appeal were lodged by the appellant, but lost at the clerk's office. The appellant had intended to kill a person and had told his sister of his intentions. He then later that day, struck the deceased with a knife. He had the direct intention to kill a person and unfortunate for the deceased, he was that unlucky soul. There was no reasonable explanation for the delay nor were there prospects of success on appeal. The application for condonation and the appeal are hereby dismissed. .

ORDER

In the result, it is ordered that: the application for condonation and the appeal are hereby dismissed.

APPEAL JUDGMENT

NDAUENDAPO, J (SHIVUTE, J concurring)

BACKGROUND

[1] This is an appeal against the conviction by the Regional Magistrate Court sitting at Katima Mulilo. The appellant was convicted on a charge of murder on 14 November 2008 and subsequently sentenced to 15 years imprisonment. The appellant is represented by Mr. Kamwi and the Respondent is represented by Mr. Khumalo.

[2] This appeal was filed out of time, but it was submitted on behalf of the appellant that he had on previous occasions lodged appeals with the clerk of the respective Magistrate Court, however these were lost. In an affidavit in which he explained the reasons for his delay, the appellant stated that, the first notice of appeal was lodged on 20 November 2009 at the office of the clerk of the Katima Mulilo Magistrates court. According to the appellant, this notice got lost. He thus subsequently lodged a second one on 10 July 2009 with the clerk again, this too got lost at the office of the clerks. Due to the fact that these notices of appeal were 'lost', there is no proof to this effect, but the appellant's say so. He then lodged a third one on 21 June 2010, this is attached to the record at pages 239-243. He then lodged the fourth notice on 31 October 2014, this is seen on pages 244-250 of the record. He further stated that, the clerks at the court informed him that, the delay in his appeal was due to a change in the clerks and that the previous clerk retired in 2010. He said he was further informed that, the original case record was missing. There are however, no confirmatory affidavits to confirm these communications.

[3] This is an appeal in terms of an amended notice of appeal together with an application for condonation which was filed with the assistance of the appellant's new legal representative. This appeal is against the conviction of the court a quo on the following grounds: That the learned Magistrate erred in law and/ fact;

a) When he refused to grant the appellant a remand to obtain the services of another legal representative when he stated that Mr. Mbaeva had not shown interest in the appellant's case and then so ordering that the appellant's case was an appropriate case where the sins of the legal representative ought to be visited upon his client for failing to take remedial action on time, alternatively when he refused to grant the appellant a postponement to secure another legal representative through the Directorate of Legal aid;

- b) When he failed to order the State to supply the accused with a copy of the contents of the docket in order for the accused to prepare his defence;
- c) When he concluded that if accused was attacked in the yard then other people in the same yard could have witnessed the fight, while the appellant's sister testified that she was awake and went to the sitting room to watch television and everyone at the house had gone to bed;
- d) When he stated by his own finding that the appellant targeted the chest of the deceased which is a delicate part of the body and that convinced him that the appellant intended to kill, when there is no evidence before court that the accused person reconciled himself and targeted the chest of the deceased;
- e) When he drew an inference in that probabilities favour that the appellant went out of his yard and stabbed the deceased to death in the chest whereas that is not the only reasonable conclusion as the other can be that the deceased ran and fell in the street after he was stabbed;
- f) When he failed to consider that even if the appellant's defence of self defence failed, there was still no proof beyond reasonable doubt that appellant had intended to murder the deceased; and
- g) When he failed to consider that even if the appellant was a very poor witness who could not satisfactorily explain his actions, whose testimony was untruthful and whose version cannot be reasonably possibly true, it was still incumbent upon the State to prove his guilt on a charge of murder beyond a reasonable doubt and further that being untruthful does not automatically declare an intention to kill.

[4] The court has to determine firstly, whether it should grant condonation, secondly, whether the refusal by the presiding officer to allow a further postponement for the

appellant to apply for legal representation was not in the interest of justice, and the thirdly, whether the accused intended to cause the death of the deceased.

AD CONDONATION

[5] Rule 67 (1) of the Magistrate court Rules

'A convicted person desiring to appeal under section 103 (1) of the Act, shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based: Provided that if such appeal is noted by a legal practitioner on behalf of a convicted person he shall simultaneously with the lodging of the notice of appeal lodge a power of attorney authorizing him to note an appeal and to act on behalf of the convicted person. A convicted person who, after a judge of the court of appeal has refused to certify that there are reasonable grounds for appeal, still desires to prosecute an appeal which he has noted shall, within 14 days after being notified of such refusal, in writing indicate or cause to be indicated to the clerk of the court whether he intends prosecuting the appeal other than in person and unless he so indicates and takes the necessary steps to prosecute the appeal within the said period, the noted appeal shall be deemed to have lapsed.'

[6] In terms of Section 309 (1) and (2) of the Criminal Procedure Act, 51 of 1977

(a) Any person convicted of any offence by any lower court (including a person discharged after conviction), may appeal against such conviction and against any resultant sentence or order to the provincial division having jurisdiction.

(b) Where, in the case of a regional court, a conviction takes place within the area of jurisdiction of one provincial division and any resultant sentence or order is passed or, as the case may be, is made within the area of jurisdiction of another provincial division, any appeal against such conviction or such sentence or order shall be heard by the last mentioned provincial division.

(2) An appeal under this section shall be noted and be prosecuted within the period and in the manner prescribed by the rules of court: Provided that the provincial division having jurisdiction may in any case extend such period.'

[7] In *Federated Insurance Co of South Africa Ltd v Malawana* 1984 (3) SA 489 (E) at 495H Zietsman, J stated that,¹

'It is clear from rule 27(3) and from 30(3) that a breach of the rules is not necessarily visited with a nullity and can be condoned. The court has a discretion which must be exercised judicially after considering the relevant circumstances and deciding what will be fair to both sides.'

[8] In *Ignatius Petu Muruti v The State* (CC 10/2010) [2014] NAHCNLD 2 (15 January 2014), Liebenberg, J stated that

'in terms of section 309 (2) of the Criminal Procedure Act, 51 of 1977, this court is competent to condone the appellant's failure to file a notice of appeal within the prescribed time limit and will usually condone such failure if the appellant provides an acceptable explanation and his prospects of success on appeal are reasonable.'

[9] The failure to obtain confirmatory affidavits with respect to the first notices of appeal allegedly filed with the clerks of the Magistrate Court makes it difficult for this court to accept that they were in fact lodged. Such failure could either be because there were no such notices of appeal or the legal representative who assisted the appellant with the notice of appeal which gave rise to these proceedings had failed to advise his client accordingly. Thus the court is not convinced by the reasons advanced for the delay. All is however not lost, the court will proceed to consider the prospects of success on appeal and if there will be prospects of success on appeal, the court will be inclined to condone the noncompliance. In order to determine the prospects of success, it is necessary to turn to the grounds of appeal on the merits.

¹ Cited with approval by Mainga, J in *Daniel Fereciano v The State* (SA 31-2014) [2016] NASC (22 August 2016).

AD MERITS

THE RIGHT TO LEGAL REPRESENTATION

[9] 'All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice [emphasis].¹²

[10] In *The State v Kambatuka* 2014 (4) NR 1142 (HC) Shivute, J et Siboleka, J stated that,

'...The right to be legally represented is a fundamental right. Whether the failure of the accused to be afforded the opportunity to be represented results in a failure of justice is a question of fact which depends on the circumstances of each case.'¹³

And

'...the failure of the learned magistrate to afford the appellant the second opportunity to get a legal representative from Legal Aid as he had already applied and received acknowledgement of receipt of his application and was again willing to reapply resulted in fatal irregularities which amounts to an unfair trial.'¹⁴

² Article 12 (1)(e) of the Namibian Constitution.

³*The State v Kambatuka* 2014 (4) NR 1142 (HC) at 1145D-F.

⁴*The State v Kambatuka* 2014 (4) NR 1142 (HC) at 1146E-G.

[11] ‘...It is a fundamental principle of our law and indeed of any civilized society that an accused person is entitled to a fair trial...Put simply, the argument is that implicit in a fair hearing under the adversarial process is the ability of the accused to present his/her case in a legally effective manner. Where the accused lacks that ability, legal representation is essential, otherwise the trial will not be fair... Fairness is an issue to be decided by the trial court having regard to the circumstances of each case. The test for determining fairness is objective with prejudice as the yardstick. A trial cannot be completely fair when the accused is in any way prejudiced, but on the other hand, the trial can hardly be unfair where there is no prejudice... The court in each case would have to exercise a proper discretion, balancing the accused’s need for a fair trial against the legitimate interests of the State in enhancing and protecting the ends of justice. At the heart of a fair criminal trial and what infuses its purpose is, for justice to be done and to be seen to be done.’⁵

[12] Some of the principles applicable to postponements were set out by Masuku, AJ in *S v Conradie*,⁶ and these are:

- (i) ‘the trial judge has a discretion as to whether an application for a postponement should be granted or refused;
- (ii) the discretion must be exercised judicially and I may add judiciously. It should not be exercised capriciously or upon wrong principle, but for substantial reasons;
- (iii) a court should be slow to refuse a postponement where the true reason for a postponement for a party’s non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case;
- (iv) an application for postponement must be made timeously, as soon as the circumstances giving rise to application become known to the appellant for a postponement. Where however, fundamental fairness and justice justify a postponement, the court may in appropriate cases allow the application even if not timeously made;

⁵ Bekker, P. “The Right to Legal Representation, including effective assistance, for an accused in the criminal justice system of South Africa. In *The Comparative and International Law Journal Southern Africa*. Vol. 37 #2at pp. 177,178

⁶*S v Conradie* (CC 20-2013) [2015] NAHCMD 101 (27 April 2015).

- (v) an application for a postponement must always be *bona fide* and not used to gain a tactical advantage or be a manoeuvre for the purpose of obtaining an advantage to which the appellant is legitimately not entitled;
- (vi) the court should weigh the prejudice which will be occasioned to the respondent if the application is granted against the prejudice which will be occasioned to the appellant if it is not.⁷

[13] In *S v Conradie* supra, the court further stated that, a postponement of a matter set down for trial on a particular day cannot be claimed as of right and will not be granted merely for the asking.⁷ For a court to grant an application for postponement it has to be satisfied that it would be in the interest of justice.⁸

[14] The learned magistrate stated on page 174 of the record that,

‘...the court has no duty to call his (the accused’s) legal representative. It is him and his legal representative to attend to that. The legal representative must appear in court whenever required. My duty is to ensure the matter is tried as soon as possible and finalised within a reasonable time.’

[15] On the same page of the record, the public prosecutor informed the learned magistrate that, the secretary of the legal representative of the accused had contacted him and had requested a postponement. The public prosecutor lamented about the fact that the matter had already been postponed on six occasions for plea and trial and that the accused’s legal representative had only been present once. The public prosecutor informed the court that the State would oppose a further postponement and that this opposition was conveyed to the secretary of the accused’s legal representative.

[16] On page 175 of the record, the accused informed the court that he was not prepared for plea and trial. The accused requested the assistance of the court to get a

⁷*S v Conradie*, at para. 10.

⁸*Ibid.*

different legal representative as he felt that the charges levelled against him were serious and that he could not represent himself.

[17] On page 176 of the record, the learned magistrate after a brief journey through the history of the case, article 12 (1)(a), 12 (1)(b) and 12(1)(e), stated that the fact that the matter had been on the roll for five years and subsequently refused a further postponement as such “would not be in the interest of justice”. Thereafter the accused was asked to plead to which he pleaded guilty and after the section 112(1) (b) enquiry, the plea was altered to not guilty.

[18] It was submitted on behalf of the accused that the fact that the trial court punished the appellant for the sins of his legal representative was fatal to the proceedings. It was further submitted that the fact that the Directorate of Legal Aid granted the appellant the services of a legal practitioner indicates that the accused was facing serious charges and finally that the failure by the learned Magistrate to grant a further postponement for the appellant to obtain services of another legal representative with the aid of the Directorate of Legal Aid led to the appellant having an unfair trial.

[19] It was submitted on behalf of the respondent that the matter had on seven previous occasions been postponed and that a further postponement would have delayed the course of justice. Furthermore, that the right to legal representation is not an absolute right and that the trial court had a discretion to postpone or to refuse a further postponement depending on the facts unveiled at court. Some of the factors that a court should take into account when exercising this discretion are, inconvenience to State witnesses, the delay in the judicial process and the fault of the accused in causing these. Counsel drew the attention of the court to the fact that the appellant was on bail and this was extended every time the matter was postponed. As such the appellant had the opportunity to consult and contact his lawyer.

[20] The appellant was denied his right to legal representation. He was legally represented and it cannot be said that he suffered any prejudice due to the postponements that took place as he was on bail. He thus had at his disposal the opportunity to contact and consult with his attorney readily. When he realized on the second, third, fourth and fifth court days he should have made attempts to get another lawyer, but he opted to wait till the eleventh hour to request a postponement to obtain another legal representative. State witnesses who were subpoenaed to testify were inconvenienced as the plea and trial could just not take off. The failure to allow a further remand in light of these facts, was not a denial of justice. The trial court exercised its discretion judiciously and this court will not interfere.

INTENTION

[20] It was submitted on behalf of the appellant that, neither one of the two State witnesses were eye witnesses and that the trial court was wrong to conclude that the fact that the deceased was struck by the knife on the chest which is a delicate part of the human body is indicative of the appellant's intention to kill the accused. It was further submitted that, it cannot be suggested from the testimonies by the two State witnesses that, when the appellant threw the knife he did so after having "reconciled himself to any part" of the deceased's body. It was further submitted that, regarding the appellant's defence of private defence, there were two versions placed before the court that is that, it was not clear whether the deceased had entered the yard of the appellant with his friends or whether the deceased was merely trying to get into the appellant's yard. Furthermore, that the fact that the weapon used, being a knife and thus a dangerous weapon in itself does not indicate an intention to kill per se.

[21] It was submitted on behalf of the respondent that, prior to the incident the appellant had told his sister who was one of the State witnesses that, 'today I'm going to kill someone', this is seen on page 191 of the record. It was further submitted that, after

having stated his intention to kill someone that day, the appellant went armed with a knife and that these two factors indicate an 'intention to commit the offence as stated'. After the incident the appellant had gone back to his sister and told her that he had killed a person. On this evidence, it was submitted the trial court was correct to find that the appellant had the intention of 'killing this person' and thus correctly convicted the appellant for murder.

[21] The sister of the appellant also testified that, the appellant was intoxicated when he informed her that he had killed a person. When asked the degree of his intoxication, her response was that he was not too intoxicated.

APPLICABLE LAW

[22] The accused must have directed his will towards the commission of an act or the causing of a result, in the knowledge of the existence of the circumstances mentioned in the definitional elements of the relevant offence and in the knowledge of the unlawfulness of the act.⁹

[23] 'When homicide has been committed, but it is uncertain whether it happened with intent to kill, the imperial laws advise that, if the killing was done with an instrument commonly used for killing such as a gun or knife, than it is accepted that there was intention to kill'.¹⁰

[24] In determining whether the appellant intended to kill the deceased, this court has to look at the totality of the facts of this case and determine whether a reasonable inference can be drawn therefrom that the appellant indeed had the requisite intention to kill the deceased.¹¹ In drawing these reasonable inferences, the part of the body injured is a relevant consideration.¹²

⁹ Snyman, CR. 2008. *Criminal Law* 5th Ed. Durban: LexisNexis, p. 281.

¹⁰ *R v Ndlovu* 1945 AD 369.

¹¹ *S v Sigwahla* 1967 (4) SA 566 at 569.

¹² *Ibid.*

[25] In the present case the salient facts are that, the accused had told his sister that he was going to kill a person on that day. He then armed himself with a knife and went out to drink. Upon his return, he informed his sister that he killed someone. In the trial court, he did not deny that he threw the knife in the direction of the deceased and that, that knife struck the deceased in the upper part of his chest and subsequently caused his death. The appellant had previously developed an intention to kill a person that day and later that day, satisfied his intended object.

[26] Is it possible that his intoxication could have reduced his moral culpability? 'In considering the relevance of the intoxicating liquor to extenuating circumstances, the approach of a trial court should be one of perceptive understanding of the accused's human frailties, balancing them against the evil of his deed'.

[27] In this case, the accused did not develop the intent to kill a person after he had become intoxicated. He developed this intent before he got intoxicated. It may reasonably be inferred that he got intoxicated to gain Dutch courage. He merely directed his will to effect his intended result, which was to kill and this he executed well.

[28] In the result, there is no reasonable explanation for the delay and no prospects of success on appeal. The appeal and the application for condonation are hereby dismissed as the conviction by the trial court was justified.

G.N. NDAUENDAPO

Judge

N. N. SHIVUTE

Judge

FOR THE APPELLANT:

Mr K. Kamwi

Of Sibeya & Partners

FOR THE RESPONDENT:

Mr. P. Khumalo

Of the Office Of The Prosecutor General