



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

HC-MD-CRI-APP-CAL-2018/00016

In the matter between:

NIKLAAS GAROSAB

APPELLANT

v

THE
RESPONDENT

STATE

Neutral citation: *Garosab v S* (HC-MD-CRI-APP-CAL-2018/00016) [2018] NAHCMD
394 (3 December 2018)

Coram: LIEBENBERG J and D USIKU J

Heard: 8 October 2018

Delivered: 3 December 2018

Flynote: Appeal against conviction and sentence – Appellant convicted of murder with direct intent – Notice of appeal filed out of time – No proper grounds for condonation and no prospects of success shown – Condonation refused – matter struck from the roll.

Summary: Criminal Procedure. Appellant convicted in the Regional Court sitting at Otiwarongo with the crime of murder with direct intent where after he was sentenced to 16 years' direct imprisonment. Appellant filed notice of appeal against sentence only on 6 November 2015, which notice was filed out of time and applied for condonation.

- (1) Application for condonation required to be made immediately after realization that the rules have not been complied with.
- (2) Application for condonation refused as it did not clearly explain the reason for delay.

ORDER

1. Application for condonation is refused.
2. The appeal is struck from the roll.

APPEAL JUDGMENT

USIKU J

[1] The appellant appeared before the Otjiwarongo Regional Court charged with the crime of murder. He was consequently found guilty as charged and sentenced to 16 years' imprisonment.

[2] The appellant subsequently filed a notice of appeal styled 'Notice for leave to appeal' on 11 September 2017 in which he sought leave to appeal against sentence only.

[3] An amended notice of appeal was filed on 6 August 2018 which included an appeal against both conviction and sentence.

[4] An application for condonation for the late filing of the notice of appeal was also filed on 17 September 2018 with the supporting affidavit by the appellant in support of the application.

[5] At the hearing, Mr Brockerhoff appeared for the appellant and Mr lipinge for the respondent (the State).

Condonation

[6] Condonation is not for the mere asking and non-compliance with the rules will only be condoned once an applicant provides an acceptable and reasonable explanation and that the prospects of success on appeal are good. The appellant in *casu* explained under oath the delay in filing the notice of appeal by saying that after he was sentenced on 6 November 2015 in the Regional Court Otjiwarongo, his rights were not explained to him by the presiding magistrate and that his erstwhile legal representative did not fulfil her promise to file the notice of appeal within the required period of 14 days.

[7] The appellant does not explain why it took him two years to draft the notice of appeal. In the supporting affidavit for condonation for the late filing, the appellant states that his notice of appeal does not comply with the rules of the Court due to the fact that it was filed out of time.

[8] He further states that the trial court on the date of the sentence did not explain to him his right to appeal and had tasked his legal practitioner of record to do so. His further averment is that the legal practitioner also did not explain to him his rights, neither the process that should be followed and the time limits that are applicable thereto.

[9] The appellant further states that upon learning of the process, he then instituted the appeal against the sentence.

[10] The appellant confirmed that after he had been advised by his current legal representative about the defectiveness of his initial notice of appeal, he was advised further that he had reasonable prospects of success on appeal against the conviction as well as the sentence. Thus an amended notice of appeal was then filed.

[11] The appellant states that he did not wilfully and/or deliberately disregard the rules of the Court. The late filing of his notice of appeal was purely as a consequence of not being timeously and duly informed by the trial Court and/or his initial legal representative at the time as to the correct procedures to be followed when lodging an appeal of this magnitude and the time limits applicable thereto.

[12] In the present case the notice of appeal was filed two years later, and the longer period puts more pressure on the applicant to come up with a convincing explanation to satisfy the court. It is settled law that an application for condonation is required to be made as soon as the party concerned realises that the rules have not been complied with.

[13] The rules of court apply to both lay litigants and those represented by counsel and both must observe the rules. The law clearly states that an application for condonation must clearly set out adequate reasons for the late filing and that there are prospects of success on appeal. See *Semba Fyanbo v The State*,¹ an unreported judgment of the High Court of Namibia, delivered on 2 May 2013 at page 4.

[14] The Court reserved its ruling on the condonation application and counsel proceeded to argue the matter.

[15] Evidence before court shows that the appellant and the deceased were at Tyre bar during the evening of 27 of September 2013. According to the appellant he visited the bar in order to buy a candle and a cigarette. The deceased then asked him for a cigarette which, he gave him to smoke. The deceased finished the cigarette whereafter he told him “to ask from Otjiwarongo as he does not see a way” or words to that effect, which the appellant did not understand.

[16] The deceased then took out a knife in an attempt to stab him but he was under the influence of alcohol. In the process the knife fell to the ground and both struggled to get hold of it. The appellant managed to pick up the knife first as the deceased stood and started to stab the latter. The appellant was angry due to the reason that the deceased insulted his mother’s private part and had finished his cigarette.

[17] Contrary to the appellant’s version that the cigarette was his, Mr Katjivingua testified that the appellant was only asked to light the cigarette whereafter he gave it to the deceased. After the deceased was given the cigarette he went to sit on the tyre. The witness denied that the deceased insulted the appellant. The cigarette belong to him and not to the appellant. His further testimony is that it was the appellant who started to beat the deceased. He could see clearly because the light outside was brighter than moonlight. Furthermore, according to the witness, the appellant was the

¹ *Semba Fyanbo v The State* No. CA 25/2012.

one who went towards the deceased and started to beat him behind the back of the head.

[18] The deceased remained seated as he was being beaten whereafter he fell whereby his hat fell off. Whilst being beaten by the appellant, he did nothing in return. Another person intervened and advised the appellant to stop beating the deceased who appeared drunk at the time.

[19] Mr Katjivingwa's testimony is further that the deceased was stabbed on the back of his neck after he had bent over and did not do anything. In the meantime the appellant left but returned and started to beat the deceased for the second time. There was no time when the deceased produced a knife, over which he and the appellant struggled. The deceased did not take out or pull out anything.

[20] Mr Johannes Efo, the owner of the bar confirmed that he was informed about the person having been stabbed outside the bar at his premises. He went out and saw the deceased sitting outside. He observed a stab wound on the back of the deceased's neck. When he spoke to the deceased, the deceased informed him that the appellant was the one who stabbed him. The appellant was present on the scene and confirmed to have stabbed the deceased with a knife. He did not provide the knife he had used in the stabbing.

[21] On those facts, the court *a quo* correctly found that it was unnecessary for the appellant to have stabbed the deceased and convicted him on a charge of murder with direct intent.

[22] It is common cause that a knife was used in the stabbing of the deceased. The appellant too conceded to that fact. The neck is a vulnerable part of a human body. The post-mortem examination report indicates that the deceased had a stab wound in the posterior side of the neck which was about 5 by 2 centimetres. It penetrated the neck between the second and third vertebra of the carnal column and perforated the

skin, muscle, arteries and the spinal cord. This implies that a lot of force must have been applied.

[23] The obvious purpose of the stabbing according to the appellant's own version was because the deceased had finished his cigarette and that made him (appellant) angry.

[24] The appellant admitted to having stabbed the deceased once in the neck, allegedly in private defence.

[25] Considering the evidence adduced in the court *a quo*, the attack on the deceased was unlawful. The reasons being that at the time the appellant stabbed the deceased, there was no attack on him at all by the former, thus the appellant could not have been legally entitled to stab the deceased. Neither was the appellant in any imminent danger of being attacked by the deceased.

[26] It is trite that in order to constitute private defence:

- (a) The defensive act must be directed against the attacker;
- (b) The defensive act must be necessary; and that
- (c) There must be a reasonable relationship between the attack and the defensive act; and the attacked person must be aware of the fact that he/she is acting in private defence.

[27] None of the above elements were established in this case. Firstly there was no attack on the appellant by the deceased. Secondly the appellant was also not aware of the fact that he was acting in private defence. The appellant conceded to have acted in anger because the deceased had finished his cigarette.

[28] Coming to the sentence, it is a settled rule of practice that a court of appeal will only interfere with the sentence if it has been shown that the sentencing court did not

exercise its discretion judiciously and properly. Also, that the power of this court to ameliorate sentences on appeal are limited *S v Tjiho*² the appellant during the hearing implored this court to reduce the sentence due to the fact that at the time of the crime the appellant was a youthful offender. Indeed instances do occur where the Court of appeal will intervene when the sentence imposed is found to be so manifestly excessive that it induces a sense of shock in the mind of the Court (*Tjiho supra*). In the present case the appellant stabbed the deceased just because of a cigarette, he was unarmed. The deceased was stabbed on the neck and died a distance from the crime scene. Though the appellant was a youthful offender the crime of murder, is considered to be a serious one, as such imprisonment is the only form of punishment that could be imposed, in order to deter the appellant and would be offenders. In the case of *S v K*³ it was held:

'Young offenders cannot always hide behind their youthfulness when they are guilty of committing serious crimes. The message should also be clear to young people that they will not simply be excused by the courts on account of youthfulness and go scot-free, but where justice will not otherwise be done, they will be held accountable and be punished accordingly for the pain and misery caused to others as a result of serious crimes committed by them'.

[29] It is trite that youthfulness and the fact that the appellant is a first time offender are important factors, but not the only factors to be considered. It is important also to consider the public outcry to impose stiffer sentences in order to root out the evil of violent crimes which have reached higher proportions within our communities. The court was therefore justified to impose a sentence of 16 years direct imprisonment and it did not misdirect itself under those circumstances.

[30] In the result, the appellant's application for the late nothing of the appeal and the amendment thereto is refused.

The appeal is struck from the roll.

² *S v Tjiho* 1991 NR 361 HC at 366 A – B.

³ *S v K* 2011 1 NR.

D N USIKU
Judge

LIEBENBERG J,

[1] I have read the judgment of my sister and although I concur with the conclusion reached in the end, I do not agree with the approach followed when preparing the judgment. It is my considered opinion that the approach followed by a court of appeal is different from that of the trial court, in that it is not required to reassess the evidence adduced at the trial with the view of establishing whether it comes to the same conclusion as the court *a quo*. The primary duty of the court of appeal is to focus on those grounds raised on appeal and approach the evidence from that point in order to determine, from the presiding officer's reasoning, whether or not the court misdirected itself on the facts or the law, and whether there is any merit in the respective grounds raised on appeal.

[2] From a reading of the judgment above it is evident that the grounds on which the appeal is founded have not at all been stated. Neither was any mention made of the court *a quo*'s reasoning in respect of the alleged misdirections committed by that court.

[3] As regards the merits, the approach followed in this instance was to summarise and assess the evidence of the respective witnesses afresh, from which it was concluded in paras 21 and 25 of the judgment that the trial court correctly convicted on

the murder charge, as the attack on the deceased was unlawful ‘the reasons being that at the time the appellant stabbed the deceased, there was no attack on him at all ...’. This likely led to the judge’s reasoning being inconsistent with what the trial court had actually found as regards the defence raised by the appellant, but without dealing with it in any manner in the judgment. I will revert to this point later.

[4] In summary, the principal grounds of appeal against conviction is that (1) the trial court erred in law and/or fact by finding that the appellant exceeded the bounds of private defence; and (2) erred in law by finding that the appellant acted with direct intent to kill.

[5] The grounds as enumerated in the notice of appeal form the basis of an appeal and that is what is before the court of appeal for consideration. The appellant is required to narrow down in the notice of appeal, in clear and specific terms, the grounds raised and the parties are bound to limit argument to only those issues. Ultimately the court of appeal will decide the matter on the said grounds, but would be entitled to raise any further issues for consideration *mero motu*. It is thus not expected of the court of appeal to summarise and reassess the evidence again, unless that becomes necessary. That would normally be the case where an irregularity was committed (but which does not vitiate the conviction) and where the court of appeal is then required to assess the evidence afresh. The following was said in *S v Shikunga and Another*⁴ at 170F-1:

‘Circumstances are conceivable where such a confession is wrongly used to convict the accused and there is debatable other evidence to support the conviction, and the court on appeal is nevertheless asked to uphold the conviction on the grounds that it is justified without having any regard to the confession at all. In such cases the court might have to analyse carefully the evidence in order to determine whether it would be safe to uphold the conviction, and it might often be reluctant to come to that conclusion.’ (Emphasis provided)

This is clearly not an instance where an irregularity was committed by the trial court.

⁴ 1997 NR 156 (SC).

[6] The first complaint (as per the notice of appeal) is that the court erred when finding that the appellant *exceeded the bounds of private defence*. This is based on the court *a quo*'s finding⁵ that the deceased's action when he drew his knife but dropped it and thereafter reached for it in order to pick it up with the intention of stabbing the appellant, can undoubtedly be regarded as an attack within the bounds of the definition of private defence. The court reasoned that the attack was at least imminent. Also that the other requirements namely, the attack being unlawful and directed against an interest legally deserving of protection, have been satisfied. The court was thus satisfied that as far as it concerned the attack, the requirements of private defence were met. (See *S v Naftali*⁶ at 303).

[7] Contrary thereto, my sister in para 25 states that the attack on the deceased was unlawful because there was no attack on the appellant, neither was he in any imminent danger of being attacked by the deceased. This is not what the trial court had found as it accepted the appellant's evidence when it found that he had come under attack from the deceased and that the imminent danger existed that he could be stabbed. Despite coming to a different conclusion than the court *a quo* on this point, it was not dealt with in the judgment.

[8] The trial court in its reasoned judgment next turned to the second leg of the enquiry and continued to determine whether the appellant's defensive act exceeded the bounds of self-defence. The lawfulness or otherwise of the appellant's defensive act forms the basis of the first ground of appeal.

[9] The court was alive to the fact that the test applicable was subjective in determining whether the appellant genuinely believed that he was acting in self-defence

⁵ Record at 88 lines 1 – 19.

⁶ 1992 NR 299 (HC).

and that he was not exceeding the bounds of private defence. Also that the court must guard against being an armchair critic when considering the reasonableness of the appellant's actions when executing his defensive act. The question for consideration was why the appellant in circumstances where the deceased 'was clearly in a very uncoordinated state due to drunkenness', did not simply keep the knife and move away from the deceased? The requirement that the defence must be directed against the attacker was satisfied, but whether the act was necessary in the circumstances remained for consideration.

[10] The court reasoned that the deceased was still stooped forward and by then posed no threat to the appellant when he stabbed him in the back of the neck. Regard was further had to the appellant well-knowing that the deceased was unarmed, as he (appellant) was in possession of the weapon the deceased earlier produced. As regards the appellant's subjective mind when stabbing the deceased, specific attention was paid to the appellant's testimony when he repeatedly said – even during re-examination by his lawyer – that he stabbed the deceased 'because he was angry'. It is on strength of these facts that the trial court concluded that the appellant exceeded the grounds of private-defence.

[11] What is clear from the evidence is that the attack on the appellant was interrupted when the deceased dropped the knife and the appellant taking possession thereof. Also that the appellant fatally stabbed the deceased even before he could realign himself in order to launch a new attack, if he intended that. For counsel to argue as to what would have happened if the deceased succeeded in picking up the knife is nothing more than conjecture and mere speculation, and must be ignored.

[12] The conclusion reached by the trial court is based on the facts and I am unable to fault the court on its application of the law. I am therefore in agreement that,

objectively viewed, the appellant exceeded the bounds of self-defence and that there is no prospects of success on appeal as far as the first ground is concerned.

[13] As far as it concerns the second ground of appeal which is based on the court *a quo*'s finding that the appellant acted with direct intent, I associate myself with the trial court's reasoning that it may be inferred from the nature and extent of the injury inflicted (on a sensitive and vulnerable part of the body), that the appellant acted with direct intent to kill. As remarked in the judgment of my sister, it implies that much force must have been used.

[14] As regards sentence, the first ground raised concerns the court's finding that the appellant had acted with direct intent. That question has been resolved and requires no further consideration.

[15] The second ground turns on the appellant's young age in respect of which a lesser sentence should have been imposed. Though the age of the appellant at the time of the commission of the offence is stated as 16 years in the notice, he was two months short of turning 17 and almost 19 when sentenced. In sentencing and with specific reference to his moral blameworthiness, the trial court accepted that the appellant's actions were likely influenced by his youthfulness. Also that the deceased was the aggressor. However, when regard is had to the seriousness of the offence and the circumstances in which the deceased was killed, considered together with the interest of society, the court said the 'rampant lawlessness as was displayed in this specific offence' could not let the appellant go unpunished, as this might lead to anarchy in that society would take the law into its own hands. The option of a wholly suspended sentence was also considered but, in the end, the court found that a lengthy custodial sentence in the circumstances of the case was justified.

[16] It is settled law that when the court of appeal is called upon to decide whether or not the sentence imposed in the circumstances is appropriate and fair to the appellant as well as society, it is not about what is right or wrong and whether this court would have imposed the same sentence or not. The question is whether the sentencing court

exercised its discretion properly and judiciously. Whereas the present attack against sentence is primarily based on the appellant's youthfulness, it seems apposite to remind oneself of this court's view as stated in *S v K*⁷ and discussed in my sister's judgment. I endorse her view on sentence and agree that the court *a quo* did not commit any misdirection in sentencing. Though the sentence of 16 years' imprisonment could be seen as being on the harsh side, I do not believe that it crosses the threshold of being '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 the court of appeal'.⁸

[17] Whereas the young age of the appellant was indeed a factor the court *a quo* took into account when sentencing, and for the reasons set out above, there is no merit in the appellant's submission that mere lip-service was paid thereto. Accordingly, this ground of appeal against sentence is equally without merit.

[18] In the result, there are no prospects of success on appeal and I agree with the order made herein.

J C LIEBENBERG

JUDGE

⁷ 2011 (1) NR 1 (HC).

⁸ *S v Tjiho* 1991 NR 361 (HC).

APPEARANCES

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