



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CALL-2018/00032

In the matter between:

JOSEPHAT BOOIS

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Boois v S* (HC-MD-CRI-APP-CALL-2018/00032) [2019] NAHCMD 122 (26 April 2019)

Coram: NDAUENDAPO J et SHIVUTE J

Heard: 15 March 2019

Delivered: 26 April 2019

Flynote: Criminal Procedure – Appeal - Sentence – Appellant convicted of murder and robbery – Sentenced to effective twenty years – Appellant spent five years three months as trial awaiting prisoner – Appellant says that constitute compelling and substantial circumstances – Misdirection by court to fail to take that into account – Appeal filed late by six years and seven months– No proper application for condonation – Explanation for late noting of

appeal not reasonable and acceptable – No prospects of success on appeal –
No misdirection on the part of magistrate in imposing the sentence –
Application for condonation is refused – Appeal dismissed.

Summary: The appellant was convicted in the Regional court sitting at Windhoek of murder and robbery with aggravating circumstances. He was sentenced to sixteen years on the count of murder and four years on the count of robbery. The sentences were ordered to run consecutively. He noted an appeal against sentence. The appeal was filed late. He was sentenced on 19 March 2010 and the notice of appeal was filed on 10 October 2016. No proper application for condonation was filed. An 'affidavit' which was not signed before a commissioner of oath was attached to the notice of appeal. Another signed affidavit was filed on 15 February 2019. The appellant complained that he spent five years and three months as a trial awaiting detainee and that constituted compelling and substantial circumstances that the court should have taken into account. He further complained that his personal circumstances were not taken into account.

Held that, there is no proper application for condonation for the late noting of appeal.

Held further, that, the affidavit filed on 15 February 2019 in which the appellant states that he filed his notice of appeal timeously is not reasonable and acceptable as there is no proof of having filed the notice timeously.

Held, further that, there are no prospects of success as the magistrate only sentenced appellant to sixteen years on murder instead of the maximum of twenty years as per the Regional court jurisdiction.

Held, further, that the application for condonation is refused – Appeal dismissed.

ORDER

1. The application for condonation is refused.
2. The appeal is dismissed.

JUDGMENT

NDAUENDAPO J (SHIVUTE J concurring):

Introduction

[1] On 19 March 2010, the Regional court sitting at Windhoek convicted the appellant and two others on one count of murder and one count of robbery. On the count of murder he was sentenced to 16 years imprisonment and on robbery count to 4 years imprisonment. The sentences were ordered to run consecutively. He was sentenced to 20 years effective imprisonment. He now appeals against sentence.

The grounds of appeal are:

- (1) The trial court misdirected itself alternatively paid lip service when it failed to consider the 5 years and 3 months spent in custody pending finalization of the trial.
- (2) The trial court further erred in law by not considering a lesser sentence taking into consideration the personal mitigatory factors as well as the remorse shown by appellant.

Point in limine

[2] The appellant was sentenced on 19 March 2010 and the appeal was noted on 10 October 2016, six years and seven months after he was sentenced. The appeal is hopelessly out of time. There is no proper application for condonation. There is an 'affidavit' filed with the notice of appeal, but it was not signed under oath. Another affidavit was filed on 15 February 2019. In the affidavit of 15 February 2019 the appellant sets out the reasons why the appeal was filed out of time.

[3] Counsel for the appellant argued that the appellant spent five years and three months as a trial awaiting detainee and that should have been considered as compelling and substantial circumstances which warranted the court to have deviated from the prescribed minimum sentence.

[4] Counsel for the respondent argued that there is no proper application for condonation for the late noting of the appeal. The first so called affidavit is not under oath. There is also no acceptable explanation for the delay in noting the appeal on time.

[5] On the merits, counsel argued that there are no prospects of success on appeal. The offences were serious and the murder was committed in a brutal manner. He submitted that the sentence does not induce a sense of shock and in actual fact the sentence is quite lenient.

[6] It is a well-established principle of our law that the proper procedure for obtaining condonation for the late noting of an appeal is by way of an application supported by an affidavit. Furthermore, in considering an application for condonation, the questions to be decided are twofold: firstly whether the applicant gave a reasonable and acceptable explanation for the late filing of the notice of appeal and secondly; whether there are any prospects of success on appeal. If the appellant fails the first requirement, s/he is out of court and the appeal should be dismissed. What amounts to a reasonable and acceptable explanation for failure to file a notice of appeal within the prescribed time limit, is normally a value judgment based on the particular circumstances of the case.¹

[7] The appellant's notice of appeal is dated 15 March 2010 and the official date stamp of the clerk of the criminal court is dated 10 October 2016. There is no evidence before us that the appellant forwarded his notice of appeal on 24 March 2010 as he claims in the affidavit. The explanation that it was filed on 26 March 2010 is therefore unacceptable. This court is bound to accept

¹ S v Nakapela and another 1997 NR 184 (HC) at 185 and S v Van Niekerk 1967 (4) SA 269 (SWA) at 272.

that the notice of appeal was only filed on 10 October 2016 as per the official stamp of the clerk of the court. That is hopelessly out of time.

[8] There are also no prospects of success on appeal. The appellant was convicted of murder and robbery with aggravating circumstances. On the murder charge he was sentenced to sixteen years' imprisonment and on the robbery charge to four years' imprisonment. The sentences were ordered to run consecutively. The learned magistrate, erroneously, reasoned that because of the limited jurisdiction of the Regional Court, she could only impose an effective sentence of twenty years' imprisonment. That was wrong. The appellant was convicted of two separate counts and the maximum sentence as per the Regional court jurisdiction is twenty years on each count.

[9] As alluded to, there is no proper application for condonation. The reasons given in the affidavit are not reasonable nor acceptable and there are no prospects of success on appeal. The appellant argued that he spent five years and three months trial awaiting and the magistrate erred by not taking that into account as compelling and substantial circumstances and thus reducing the sentences imposed. I disagree. She did take that into account when she stated: 'we must also not lose sight of the fact that you had been incarcerated for quite a considerable period of time after you were arrested...' In my respectful view the maximum sentence on a count of murder a regional court can impose is twenty years, yet the appellant was only sentenced to sixteen years. That shows that the learned magistrate took into account the time spent in prison before conviction and sentence. The learned magistrate did not err by sentencing the appellant to 16 years imprisonment.

[10] The ground that the magistrate erred by not having considered the personal circumstances of the appellant and that he had shown remorse, is without substance. The murder was committed in most callous and brutal manner. The deceased was a taxi driver who was attacked by the appellant and killed in a most vicious manner. After he was killed, they dumped his body in the bushes and robbed his motor vehicle and drove around with the murder

weapon inside the vehicle. They went to buy chicken at hungry lion as if nothing had happened. There is clearly no merit in this ground of appeal.

[11] In the result, the court is not satisfied with the explanation given for the late noting of the appeal and there are no prospects of success on appeal.

[12] Order

1. The application for condonation is refused.
2. The appeal is dismissed.

N. G. NDAUENDAPO
JUDGE

N. N. SHIVUTE
JUDGE

APPEARANCES:

APPELLANT

Mr. Brockerhoff
Of Brockerhoff & Mbunje, Windhoek

RESPONDENT

Mr Olivier
Of the Office of the Prosecutor-General
Windhoek.