

HIGH COURT OF  
WINDHOEK



NAMIBIA MAIN DIVISION,

Case No: HC-MD-CRI-APP-CAL-2018/00059

CLEOPHAS NAMENE

APPELLANT

v

THE  
RESPONDENT

STATE

**Neutral citation:** *Namene v S* (HC-MD-CRI-APP-CAL-2018/00059) [2019] NAHCMD 69 (29 March 2019)

**Coram:** NDAUENDAPO, J et SHIVUTE, J

**Heard:** 11 February 2019

**Delivered:** 29 March 2019

**Flynote:** Criminal Procedure – Condonation – Late filing of notice of appeal – Appellant out of time for about a year – Appellant failing to give acceptable and reasonable explanation as to cause of delay-

Prospects of success – Appellant failing to deal with prospects in his application for condonation – Appellant only making reference to prospects in grounds of appeal – Such averments to be made not only in grounds of appeal – Appellant required to give full reasons in application for condonation why he is saying he has reasonable prospects of success - Court allowing parties to argue point *in limine* concerning late

filing of notice of appeal as well as the merits – Court realising after argument that application for condonation not accompanied by affidavit – Mandatory requirement — Court made Appellant to have legitimate expectation that his matter was being heard and coming to finalisation – Court not taking into consideration that condonation was not supported by an affidavit.

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### ORDER

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- (i) The appellant has failed to satisfy both legs of the application for condonation of the late filing of the notice of appeal. Therefore, the application for condonation is refused.
- (ii) The matter is struck from the roll.

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### APPEAL JUDGMENT

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#### **SHIVUTE, J (NDAUENDAPO, J concurring)**

[1] The appellant was jointly arraigned in the Regional court sitting at Otjiwarongo with two other co-accused persons on a charge of robbery with aggravating circumstances. It is alleged that on 28 June 2018 they robbed Opawa Bar whilst they were armed with a firearm and took N\$4 000.

[2] The appellant's co-accused persons escaped from lawful custody before the trial could commence and there had been separation of trials. The appellant was convicted of robbery with aggravating circumstances as charged and sentenced to twelve years' imprisonment. He was aggrieved by both conviction and sentence hence this appeal.

Grounds of appeal

[3] The appellant's grounds of appeal may be summarised as follows:

- (a) The trial court misdirected itself by making a finding that the state had proved its case against the appellant although there was no evidence linking the appellant to the commission of the offence.
- (b) The learned magistrate misdirected herself by not accepting the appellant's version that he came to the bar as a customer and was found by the robbers who forced him to lie down.
- (c) With regard to the sentence, the learned magistrate erred by sentencing the appellant whose conviction was not proved beyond reasonable doubt. Therefore, the appeal court should set aside the conviction and sentence and find the appellant not guilty.

[4] Counsel for the respondent raised a point *in limine* that the appellant was convicted and sentenced on 31 March 2017, however he only filed his notice of appeal on 19 March 2018. The appellant was out of time for about a year.

[5] We allowed the parties to argue the application for condonation as well as the merits. The appellant who argued the appeal in person had written what purports to be an application for condonation in which he sought to explain his failure to meet the mandatory requirements of rule 67 of the Magistrate's Court Rules.

[6] The appellant explained that the cause for his delay to lodge his notice of appeal on time was due to the following:

- (i) Although he was aware that he had to lodge his appeal within 14 days, he could not do it because he was waiting for the record.

- (ii) The appellant further stated that he was admitted in hospital due to an eye infection on 24 June 2017.
- (iii) He again explained that he needed someone to complete the notice of appeal as he could not write it himself.

[7] With regard to the appellant's explanation that he was waiting for the record, counsel for the respondent correctly argued that there was no need for the appellant to wait for the record to file his notice of appeal. The appellant was involved in the trial proceedings and he was aware of what transpired.

[8] Concerning the admission of the appellant in hospital on 24 June 2017, this is not a reasonable explanation in the circumstances. The appellant had ample time to file his notice prior to that date as he was already out of time for three months.

[9] In connection with finding someone to help the appellant to assist him in filing his notice, counsel for the respondent correctly pointed out that no explanation was given as to why he could not find someone earlier or the effort he made in finding someone.

#### Applicable law

[10] The Supreme Court held in *Father Gert Dominic Petrus v Roman Catholic Archdiocese* 2011 (2) NR 637 (SC) that:

'It is trite that a litigant seeking condonation bears the onus to satisfy the court that there is a sufficient cause to warrant the grant of condonation.'

Furthermore, the proper procedure for obtaining condonation of the late filing is by way of an application supported by an affidavit.

[11] Apart from satisfying the court with an acceptable and reasonable explanation the appellant must also satisfy the court that there is reasonable prospects of success on appeal.

[12] The appellant in his so called application for condonation never touched on the issue of prospects of success of his appeal. However, he stated in the grounds of appeal that the state failed to prove the charge against him because he was not one of the three robbers but a victim as well. He was a customer who went to the bar where the incident took place to buy a recharge voucher. When the robbers entered, one of them pointed a firearm at him and ordered him to put his arms up.

[13] It is trite that establishing prospects of success on appeal is not a mere formality. An applicant must fully canvass the issue in his application for condonation stating the reasons why he is contending that he has reasonable prospects of success. The burden rests with an applicant and he must discharge it before condonation is granted.

[14] Witnesses for the state namely; Langermann, Sarah Kambindji and Karuaihe all corroborated each other that appellant was not one of the customers who remained in the bar when the bar was closed. They only saw the appellant in the bar at a later stage after the police had arrived. Karuaihe's version is that after he and three other customers who were inside the bar finished their drinks, he went to the door that was closed from inside to open it. Whilst he was busy opening, four men who were armed with a firearm kicked the door and stormed into the bar. One of them pointed a firearm at him and ordered them to put their hands up and lie down.

[15] Counsel for the respondent argued that since the appellant was not part of the people who were allowed to remain in the bar to finish their drinks after it had closed, there is strong evidence that the appellant was one of the people who stormed into the bar. Therefore, the appellant has no reasonable prospects of success. With regard to the sentence, there is no reason advanced by the appellant why the court should interfere with the sentence.

[16] The court having considered the applicant's explanation for the cause of the delay, it is not satisfied that the applicant had given an acceptable explanation for him to not comply with the mandatory requirements. Therefore, he is out on this leg.

[17] Again, with regards to reasonable prospect of success on appeal, the applicant did not canvass in his application for condonation fully by making relevant allegations why he is contending that he has reasonable prospects of success. These allegations should be stated in the application for condonation itself and not only in the appellant's grounds of appeal or heads of argument as in this case.

[18] Furthermore, although the court had allowed the parties to argue the application on condonation and on the merits, the application on condonation for the late noting of appeal was not accompanied by an affidavit as required by the law. There was an oversight on the part of the court because it only discovered the defect at a later stage after the parties had already argued the appeal. Had this come to the attention of the court earlier, the matter was going to be struck from the roll right away. Now that it had been argued, in order not to prejudice the appellant to go through the process again after he was made to have legitimate expectation that his case was being heard and finalised, the matter has to be dealt with accordingly. However, the court will not base its decision on the fact that the application was not accompanied by an affidavit because this was not brought to the attention of the appellant.

[19] Even if the court assumes that the application was accompanied by an affidavit, the appellant has failed to satisfy the court by furnishing reasonable and acceptable reasons for the cause of the delay. The appeal must be filed within fourteen days after sentence and one year is way out of time. The appellant has also failed to furnish full reasons why it is contended that he has reasonable prospects of success on appeal.

[20] In the result the following order is made:

- (iii) The appellant has failed to satisfy both legs of the application for condonation of the late filing of the notice of appeal. Therefore, the application for condonation is refused.
- (iv) The matter is struck from the roll.

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N N Shivute  
Judge

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G N Ndauendapo  
Judge

APPEARANCES:

APPELLANT: Mr Namene (In-person), Windhoek

RESPONDENT: Mr Olivier  
Office of the Prosecutor-General, Windhoek