

IN THE HIGH COURT OF NAMIBIA

“ANNEXURE 11”

<b>Case Title:</b> <i>Madhimbilo Tjatendela v The State</i>	<b>Case No:</b> CC 17/2006
<b>Ruling on Application for leave to Appeal</b>	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Mr Justice Liebenberg	<b>Delivered on:</b> 24 August 2020
<b>Neutral citation:</b> <i>Tjatendela v S</i> (CC 17/2006) [2020] NAHCMD 372 (24 August 2020)	
<b>The order:</b> <ul style="list-style-type: none"><li>a) The condonation application is granted.</li><li>b) The application for leave to appeal is granted.</li></ul>	
<b>Reasons for decision:</b>	
<p>LIEBENBERG J</p> <p>[1] This is an application for leave to appeal against the court’s sentence imposed on 11 May 2006. The applicant was convicted on one count of murder and sentenced to an effective term of 38 years’ imprisonment.</p> <p>[2] After a few postponements on this court’s review roll in order to secure legal aid, Ms <i>Malambo</i> was instructed to represent the appellant. The application was set down on 23 June 2020. On that day the court raised a discrepancy on the age alleged in the applicant’s affidavit (65 years) and the age as reflected in the record of proceedings at the time of sentence (30 years). Counsel for the applicant sought a postponement which was granted in order to verify the applicant’s age as</p>	

well as the appellant's name, as same differed from his identity document.

- [3] On the next date of appearance the applicant availed a document to court, dated 24 June 2020 and issued by the Executive Director of the Ministry of Home Affairs, Immigration and Safety and Security, stipulating the applicant's registered name as *Antonjo Mwingeli* and his current age as 60. Moreover, The document indicated that the name *Madhimbilo Tjatendela* is not recorded in the Population Register. The state did not challenge the contents and reliability of the said document. This court deems it appropriate and in the interest of justice that this fact be taken into account for purposes of this application. It therefore follows that the appellant, now 60 years of age, could not have been 30 years of age at the time of sentence, but in actual fact, 46.
- [4] The applicant's ground of appeal is solely premised on the fact that his sentence of 38 years' imprisonment falls within the category of excessively long fixed terms of imprisonment as set out in the Supreme Court judgment of *S v Gaingob and Others*.<sup>1</sup>
- [5] This application was unpunctually filed by some 14 years. The reason advanced for this exorbitant delay as stated in his application for condonation, is that his only relief and opportunity to refile an appeal emerged after he became aware of the *Gaingob* matter (*supra*).
- [6] Although the state did not oppose his explanation advanced for the late filing of the application for leave to appeal, this court must criticise the condonation application filed for its haphazard structure. It was incumbent on counsel to set out clearly advanced reasons why condonation should be granted along the line of established requirements and in detail explain each aspect of the delay. This was only done to some degree in the heads of argument filed by counsel for the applicant. The state opposed the main application on the grounds that the appeal does not enjoy prospects of success on appeal.

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<sup>1</sup> 2018 (1) NR 211 (SC).

[7] Ms Ndlovu, for the respondent, contended *inter alia* in her heads of argument that the sentence meted out by the trial court cannot be said to be a *de facto* life sentence, as the sentence of the appellant falls under section 115 of the Correctional Service Act<sup>2</sup> and the applicant would become eligible for parole after serving two thirds of his sentence. This equates to 25 years and 3 months' imprisonment. Based on the appellant's age on the appeal record, he would be 55 years of age at that time which, in the respondent's view, cannot be said to remove the appellant's ability to fully engage in society again. The respondent further contends that the sentence complained about, defies the benchmark of 37 and a half years by only six months.

[8] The Supreme Court stated at 229A-B of the *Gaingob* judgment as follows:

- a. 'As life imprisonment is the most severe sentence that can be imposed any sentence that seeks to circumvent this approach by imposing fixed term sentences longer than 37 and a half years is materially misdirected and can be rightly described as inordinately long and is thus liable to be set aside.'

(Emphasis provided)

[9] Having perused the record and the factors which the trial court took into account and the reasons advanced for the sentence imposed, it can hardly be said that there is an apparent misdirection. The sentence was in line with established legal principles applicable at the time. The trial court considered the personal circumstances of the applicant, the interest of society as well as the crime. The court found particularly aggravating, the circumstances under which the murder was committed and that the appellant was a real threat to society as he attacked a woman who, at the time, had her 3 year old baby on her back when strangled her to death.

[10] Furthermore, it is doubtful whether the ground of appeal raised, in itself, inspires prospects of success on appeal. However, this ground taken together with the fact that the appellant was 46

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<sup>2</sup> Act 9 of 2012.

years old and not 30 at the time of sentence and will be 71 when he is eligible for parole, in my view, is a relevant factor at sentencing and may very well on appeal be found favourable for the applicant. Consequently, there are prospects of success on appeal.

[11] In the result, it is ordered:

- a) The condonation application is granted.
- b) The application for leave to appeal is granted.

<b>NOTE TO THE PARTIES</b> <b>The reason(s) hereby provided should be lodged together with any Petition made to the Chief Justice of the Supreme Court</b>	
	<b>J C LIEBENBERG</b> <b>JUDGE</b>