



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 19/2011

In the matter between:

CHARLES NAMISEB

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Namiseb v S* (CC 19/2011) [2020] NAHCMD 439 (25 September 2020)

Coram: MILLER AJ

Heard: 7 September 2020

Delivered: 25 September 2020

Flynote: Criminal Procedure – Application for leave to appeal – Test – Applicant must clearly indicate reasonable prospect of success – Application for leave to appeal against conviction dismissed – Application for leave to appeal against sentence is granted.

Summary: On 29 February 2016, the applicant was convicted on three counts of rape in contravention of section 2(1)(a) read with sections 1, 2, (2), 3, 5 and 6 of the Combating of Rape Act 8 of 2000; a count of robbery with aggravating circumstances and two counts of assault with intent to do grievous bodily harm – Consequently, on 20 May 2019, the applicant was sentenced to a cumulative term of 57 years' imprisonment – In the current proceedings, the applicant sought leave to appeal to the Supreme Court against the conviction on those counts and the sentence imposed thereof – The court found that the applicant did not show that he has reasonable prospect of success on appeal against the conviction, but he has reasonable prospect of success against the sentence imposed by the trial court.

ORDER

1. The application for condonation for the late filing of the notice of appeal is granted.
2. The application for leave to appeal against conviction on three counts of rape, a count of robbery with aggravating circumstances and two counts of assault with intent to do grievous bodily harm is dismissed.
3. The applicant is granted leave to appeal against the sentence imposed on the three counts of rape, a count of robbery with aggravating circumstances and two counts of assault with intent to do grievous bodily harm.

JUDGMENT
Application for Leave to Appeal

MILLER AJ:

Application for condonation

[1] The applicant in this matter has brought an application for condonation for failure to file his notice of appeal on time. The applicant was convicted on 29 February 2016 and sentenced on 20 May 2019. The notice of the application for leave to appeal before me was filed on 10 July 2019, which is long after the prescribed period of 14 days from the date of sentencing.

[2] In the case of *Arubertus v S*¹, Shivute CJ said as follows:

‘It is trite that an extension of time within which to file the notice of appeal is an indulgence which will be granted upon good cause shown for the non-compliance and upon the existence of good prospects of success on appeal. It is also axiomatic that an applicant must give a reasonable explanation for the delay to file a notice of appeal.’

[3] The applicant filed an affidavit in support of his application for condonation in which he explained that he is a lay person who had a desire to appeal against his sentence but he could not do so through his privately appointed lawyer because he did not have funds. He explained that he waited until when he could secure funds through his family, which he did on or about 8 June 2019 and enlisted the services of his lawyer, Mr Mbanga Siyomunji. The applicant also filed on 11 May 2020 what he titles as ‘complaint letter/leave to appeal not put on court roll’ in which he stated that he filed a notice of application for leave to appeal against his conviction on 22 May 2019 but after he followed up he was informed by the registrar that the matter has not been put on the

¹ *Arubertus v S* 2010 NR 17.

roll because his case documents could not be found. The notice of application for leave to appeal that the applicant is referring to has been attached to his letter and has a stamp of the Office of the Judiciary dated 22 May 2019. I take note of the fact that the notice of leave to appeal was filed out of time, but I am satisfied that the applicant has given a reasonable explanation for his failure to file his notice of appeal on time, and has shown that there exists good prospects of success on appeal against his sentence as I will explain later herein, therefore his application for condonation is granted.

Application for leave to appeal

[4] The applicant in this matter has applied for leave to appeal to the Supreme Court in respect of both conviction and sentence imposed by this court. On 29th February 2016, the applicant was convicted on three counts of rape in contravention of section 2(1)(a) read with sections 1, 2, (2), 3, 5 and 6 of the Combating of Rape Act 8 of 2000; a count of robbery with aggravating circumstances and two counts of assault with intent to do grievous bodily harm, and subsequently on 20th May 2019 he was sentenced as follows:

‘Count 1: Rape: Fifteen (15) years’ imprisonment;

Count 2: Rape: Fifteen (15) years’ imprisonment;

Count 6: Rape: Fifteen (15) years’ imprisonment;

Count 7: Robbery with aggravating circumstances as defined in Section 1 of Act 51 of 1977: Twelve (12) years’ imprisonment;

Count 8 and 9: Assault with intent to do grievous bodily harm: These two counts are taken together for purposes of sentence: Six (6) years imprisonment. It is ordered that the sentence imposed on the accused in counts 8 and 9 should run concurrently with the sentence imposed in count 7.’

[5] The applicant was sentenced to an effective term of 57 years’ imprisonment.

Submissions by counsel for the applicant and the respondent

[6] Ms Nyoni, on behalf of the respondent argued that there are two legs of an application for condonation; one is that there should be an acceptable explanation for the delay and the second one is that there should be reasonable prospect of success on appeal. She argued that the applicant's application for condonation lacks the second leg because the applicant did not demonstrate a reasonable prospect of success against his conviction and sentence on appeal.

[7] Counsel for the respondent also submitted that the remarks of the trial court should also be taken into consideration in deciding this matter. She submitted that the trial court remarked that the applicant attacked two elderly people in their house, and that he was the mastermind in committing the offences, and that he was the one giving the orders in the commission of the offences. She also submitted that the trial court remarked that the applicant committed the crimes out of greed but not out of need because he had a thriving business at the time. She further added that the trial court remarked that the applicant did not testify in mitigation of his sentence, but a submission was made on his behalf by his counsel who placed his personal circumstances before court.

[8] Ms Nyoni submitted that the Supreme Court judgment in the matter of *Zedikias Gaingob and 3 Others v S*² was passed in the context of a murder charge, but not in the context of rape charges that the applicant was convicted of in the present matter. She added that the sentencing of the applicant on three counts of rape was done in terms of a statute, which is the Combating of Rape Act 8 of 2000, and because a spade was used, the prescribed minimum sentence had to be imposed by the trial court, in the absence of compelling circumstances, in terms of section 3(1)(a) of the Combating of Rape Act 8 of 2000. She added that the Combating of Rape Act is law and has not been declared unconstitutional, and therefore the sentences imposed by the trial court had to be in the realm of that Act. She concluded that the trial court's hands were tied because of the minimum sentences that have been prescribed by the Act.

² *Zedikias Gaingob and 3 Others v S* (SA 7/2008, SA 8/2008) [2018] NASC 4 (06 February 2018).

[9] Mr Siyomunji on behalf of the applicant responded to Ms Nyoni that they have expanded on the second leg of their application for condonation in their heads of argument, which is the requirement that there must be a reasonable prospect of success on appeal. He argued that the State did not prove its case beyond a reasonable doubt because there was no identification parade done and it is known that the accused was at the scene. He submitted that one forensic scientist testified that there was nothing of value to proceed with in the samples received at the National Forensic Science Institute, and that it was also testified by Ms Swart from the National Forensic Science Institute that the samples that were submitted for analysis were contaminated, therefore he argued that due to that contamination the applicant can be acquitted. He further added that there is doubt, and even if the applicant did not testify, the State should have proved its case beyond a reasonable doubt.

[10] In relation to the sentence imposed upon the applicant, Mr Siyomunji contended in his heads of argument that the sentence of 57 years' imprisonment imposed on the applicant is extremely harsh and induces a sense of shock.³ He orally submitted that the Supreme Court judgment of *Zedikias Gaingob and 3 Others v S*⁴ is still standing and is binding over the Combating of Rape Act 8 of 2008. He stated in the heads of argument that based on that judgment of the Supreme Court, it means that any sentence imposed that is above 37 years and half years should rather be converted to a life sentence to which a person is eligible for parole after 25 years. Based on those submissions, he asked that leave be granted to appeal against conviction and sentence.

[11] In reply, Ms Nyoni stated that Frank AJA provided the context within which the judgment of *Zedikias Gaingob and 3 Others v S*⁵ should be read, when he stated in para 78 that: 'I agree with the judgment of Smuts JA with two provisos. First, it must be seen in the context of the sentences of life imprisonment only. Second, it must be read to deal only with sentences that seek to circumvent the statutory mechanism entitling persons sentenced to life imprisonment to apply for release on parole after serving the statutorily prescribed period. In my view, the decision of this court in *Tcoeib* must also

³ Page 10 of the Applicant's Heads of Argument in Leave to Appeal.

⁴ *Zedikias Gaingob and 3 Others v S* (SA 7/2008, SA 8/2008) [2018] NASC 4 (06 February 2018).

⁵ *Ibid.*

be seen in the above context. As pointed out by Smuts JA in his introductory paragraph what lies at the heart of this appeal is 'inordinately long fixed terms of imprisonment'. She further stated in reply that the sentences imposed by the trial court upon the applicant are prescribed by a statute, the Combating of Rape Act 8 of 2000, and added that that Act does not impose life imprisonment.

Application for leave to appeal against conviction

[12] In seeking leave to appeal against conviction, the applicant relied upon the following grounds:

'Ground 1: The learned Judge erred in law and/or fact by concluding that the applicant is the person who was at the residence of the complainants on 3 October 2010, despite the fact that complainants could not identify the applicant and no identification parade was conducted.

Ground 2: The learned Judge erred in law and/or fact by concluding that the applicant is the person who raped Maria Catherina Jacoba Balt and yet the J88 does not reveal any signs of rape or sexual assault.

Ground 3: The learned Judge erred in law and/or fact by concluding that the applicant committed an act of robbery when there was no evidence confirming that.

Ground 4: The learned Judge erred in law and/or fact by concluding that the applicant attempted to murder the complainants and yet no conclusive evidence places him at the scene.

Ground 5: The learned Judge erred in fact and/or law by concluding that the State had proven its case beyond a reasonable doubt.'

[13] I will address the grounds of appeal advanced together.

[14] The trial judge provided a brief summary of the evidence showing the sequence of events from the time that the applicant and his co-accused were seen along the street where the scene of the crime is situated in Uis on 3 October 2010, which is the day that the crimes were committed, until the day they were arrested in connection with

those crimes. The trial judge found that the chain of events credibly establishes beyond reasonable doubt an uninterrupted link pointing only at the accused as the persons who attacked, raped and robbed the elderly couple.

[15] Mr Jan Coenraad Balt testified that Maria Catherina Jacoba Balt is his wife and they lived in Uis, and added that they were home on 3 October 2010 when two men came to their house asking for money which he refused to give, then one of the two men hit him with a spade which made him unconscious, and then later he realized that he was pulled to the bedroom when he regained conscious, then he saw that one of the two assailants is busy raping his wife on the bed. His hands were tied behind his back and his legs were tied together. He testified that the two men beat his wife twice with a spade and one hit him with a spade on the ear which rendered it dysfunctional. He testified that the robbers took a Toyota Corolla motor vehicle, fire-arms, cash, rings, jewelry, bullets and an electric shaver.

[16] The evidence of Ms Maria Catherina Jacoba Balt is that, on 3 October 2010 they were home with her husband when she saw two unknown men standing close to her husband who was sitting under a tree. She was told to go back inside the house by one of the two men, but she insisted on sitting down to listen to what they were discussing, and later she went back in the house.⁶ She heard a frightening yell of her husband while she was in the house, and when she opened the kitchen door one of the men hit her with a spade in the face, and she sustained a wound that was bleeding. The other man then pulled her husband into the house and she could see blood on his head and face.⁷ The two men then entered the house through the kitchen door, asking for money. One of the men was wearing a green t-shirt with white stripes, while the other one was wearing a light pink t-shirt with light grey stripes.⁸ Then the man with grey t-shirt tied her hands behind her back and told her to go to the bedroom. In the room, the man with green t-shirt pulled off her trouser and panty, leaving her naked. The man with green-shirt with white stripes then pushed her onto the bed and she fell on the right side of it.⁹ She begged him not to rape her, but he continued to insert his right hand finger

⁶ Paragraph 5 of the judgment.

⁷ Paragraph 5.1 of the judgment.

⁸ Paragraph 5.1 and 5.2 of the judgment.

⁹ Paragraph 5.2 of the judgment.

into her vagina, and he later took a knife which he held to her chest in a threatening way. He then put down the knife and pulled down his trouser and inserted his penis into her vagina without her consent, after which she closed her eyes and the man was busy with her for a certain period.¹⁰ He then finished, and his friend took over by also inserting his penis into her vagina without her consent.¹¹ She also testified that the robbers took money, guns, watches and rings, while her hands were still tied, and again she got a blow with spade on her face and heard the same sound where her husband was laying, and later she heard the house door being slammed. She then stood up, loosened her hands, and called their neighbor, whom she told to call the police and other people mentioned.¹² She testified that an ambulance took them to the hospital and described the nature and extent of the injuries she sustained and the type of medical attention she received.¹³ She informed the court that the reason why there were no tears, bleeding or bruising found during the medical examination could be because the men were not busy with her for hours, but were instead very fast and not doing it violently.¹⁴

[17] The evidence presented before the trial judge is that two men were seen in the proximity of the crime scene on the day of the incident by a neighbor of the complainants, and that one of them was seen wearing a green shirt with white stripes.¹⁵ The two people were seen in the morning carrying big bags coming from the side of the complainants' house and later in the afternoon facing the complainants' house.¹⁶ The evidence of Ms Balt, one of the complainants, is also that one of the robbers was wearing a green shirt with white stripes. Further, the evidence is that a Toyota Corolla car was stolen from the house of the complainants, which was later found by police officers abandoned along the Khorixas road after the occupants failed to stop at a roadblock set up by the police, and blood-stained green shirt with white stripes was found in the proximity of the abandoned car when the police officers were tracking the two persons who abandoned the vehicle. They found a pistol magazine with live rounds

¹⁰ Paragraph 5.3 of the judgment.

¹¹ Paragraph 5.4 of the judgment.

¹² Paragraph 5.4 and 5.5 of the judgment.

¹³ Paragraph 5.6 of the judgment.

¹⁴ Paragraph 5.9 of the judgment.

¹⁵ Paragraph 8 of the judgment (*S v Namiseb* (CC 19/2011)[2016] NAHCMD 45 (29 February 2016)).

¹⁶ *Ibid.*

in the cabin of that car. A police officer testified that from the tracks they followed, it appears that the driver of the vehicle disembarked barefooted. Another witness also recognized the applicant as the anxiously looking male person who came to his house on a Sunday at around 20h00 in the evening barehanded, with no shoes and no shirt on and asked him for clothes, and that the applicant came back with the police to his house five days later. Evidence placed before court is that the driver of the abandoned stolen vehicle left his brown sandals on the floor below the pedals, and left the vehicle barefooted. During investigations, the mother of the applicant gave a photo of the applicant to the police, in which the applicant is wearing a green shirt with white stripes. Evidence before court shows that the applicant occupied the abandoned stolen vehicle with the second accused, and that the second accused who was tracked down and arrested was the passenger who occupied the front seat in the said abandoned vehicle and left blood on his seat, and that he disembarked the car wearing tekkies shoes as observed from his tracks by the police, and those shoes were found on him. The evidence is also that two shots fired by Inspector Nuujoma into the back of the non-stopping stolen vehicle at the road block hit the second accused in the buttocks.¹⁷ The trial court also considered forensic evidence and the evidence presented by other witnesses on the events that led to the arrest of the applicant in relation to the crimes committed.

[18] I find that the trial judge satisfied himself that the sequence of events as testified by various prosecution witnesses has complied with the requirements of inferential reasoning as set out in *R v Blom*¹⁸ where it was stated that in reasoning by inference there are two cardinal rules of logic which cannot be ignored, the first rule is that the inference sought to be drawn must be consistent with all the proven facts; if it is not, the inference cannot be drawn, and the second rule is that the proven facts should be such they exclude every reasonable inference from them save the one sought to be drawn: if these proved facts do not exclude all other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

¹⁷ Paragraph 33 of the judgment (*S v Namiseb* (CC 19/2011)[2016] NAHCMD 45 (29 February 2016)).

¹⁸ *R v Blom* 1939 AD 188 at 202-203.

[19] I therefore find that there is enough circumstantial evidence upon which the trial judge could safely reach the conclusion that the applicant is guilty of rape, robbery with aggravating circumstances and assault with intent to do grievous bodily harm. It is not necessary to address the ground advanced that the learned judge erred in law and/or fact by concluding that the applicant attempted to murder the complainants in the absence of conclusive evidence placing the applicant at the scene, because I do not see it anywhere in the judgment where the trial judge reached such a conclusion, and it is worth noting that the applicant was not convicted of attempted murder.

[20] Siboleka J noted in his judgment that the applicant in this matter chose to remain silent and neither did he call witnesses to place his case before court.¹⁹ In *Auala v S*²⁰ the Supreme Court held that the decision of an accused not to testify is not without consequences by stating as follows:

[15] So too, may the appellant's decision not to testify have consequences. What Langa DP said in *S v Boesak, supra*, at 923E-F equally applies *mutatis mutandis*, I think, to the situation in this case:

“The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused's person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence, is sufficient in the absence of an explanation, to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.”

Langa DP in this connection approved the remark of Madala J in *Osman and Another v Attorney-General-Transvaal*, 1998(4) SA 1224 (CC) (1998(2) SACR 493; 1998(11) BCLR 1362) para [22]:

“Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who

¹⁹ Paragraph 24 of the judgment (*S v Namiseb* (CC 19/2011) [2019] NAHCMD 154 (20 May 2019)).

²⁰ In *Auala v S* (SA 42/2008) [2010] NASC 3 (27 April 2010).

fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecutor's case may be sufficient to prove the elements of the offence. The fact that an accused had to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."

In *S v Kato*, 2005(1) SACR 522 (SCA) Jafta AJA criticised the weight attached by the trial judge "to the defence version which was put to State witnesses under cross-examination" and remarked further:

"It was treated as if it were evidence when the trial court considered verdict on the merits. As respondent failed to place any version before the Court by means of evidence, the Court's verdict should have been based on the evidence led by the prosecution only."

[21] In *Mbwale v The State*²¹ the applicant was convicted on multiple charges of rape (c/s 2(1)(a) of Act 8 of 2000) and sentenced to 40 years' imprisonment. On some counts sentences were ordered to run concurrently to the effect that accused must serve 25 years' imprisonment. The accused aged 66 years worked as a traditional healer and the complainants were former patients of his. The applicant sought leave to appeal against his conviction on all seven counts, and the court had the following to say:

'[4] The crimes the applicant stands convicted of in counts 1 – 3; 5 – 6; 8 and 11 are similar in nature and arose from incidents during which treatment was administered by the applicant, a traditional healer, to each of the complainants as patients of his. With the conclusion of proceedings he was convicted on seven (of 13) counts of rape and sentenced to ten years' imprisonment on the first count and to five years' imprisonment on each of the remaining six counts. In order to ameliorate the cumulative effect of 40 years' imprisonment, it was ordered that some of the sentences must be served concurrently, bringing the sum total to be served to 25 years.

²¹ *Mbwale v The State* (CC 19/2010) [2014] NAHCNLD 3 (23 January 2014).

[5] It is trite that the test to be applied in applications of this nature is that the applicant must satisfy the Court that there is a reasonable prospect of success on appeal (*R v Ngubane and Others*²²; *R v Baloi*²³). In *S v Nowaseb*²⁴ the court cited with approval the case of *S v Ceasar*²⁵ where Miller, JA emphasised that ‘the mere possibility that another Court might come to a different conclusion is not sufficient to justify the grant of leave to appeal’. In *Nowaseb (supra)* the court said that what the trial judge is required to do is to disabuse his or her mind of the fact that there is no reasonable doubt as to the guilt of the accused person (applicant) and to ask himself or herself whether, on the grounds of appeal raised in the application, there is a reasonable prospect of success on appeal (640H-I).’

[22] After having perused the evidence that the trial court took into consideration and consequently convicted the applicant on the counts listed earlier, I am persuaded that there is no reasonable doubt as to the guilt of the applicant and I am persuaded that there is no reasonable prospect of success on appeal on the grounds advanced in respect of the conviction. Therefore the application for leave to appeal against conviction on the counts the applicant has been convicted upon is dismissed.

Application for leave to appeal against sentence

[23] Both counsel for the applicant and the respondent have advanced arguments in relation to the Supreme Court judgment in the matter of *Zedikias Gaingob and 3 Others v S*,²⁶ in which the appellants were sentenced to long fixed terms of imprisonment of 67 and 64 years for two counts of murder, one count of housebreaking with intent to rob and robbery with aggravating circumstances, and two counts of housebreaking with intent to steal and theft. What was at issue in that appeal is the question whether inordinately long fixed terms of imprisonment which could extend beyond the life expectancy of an offender, constitute cruel, inhumane or degrading treatment or punishment in conflict with Article 8 of the Namibian Constitution which entrenches the right to human dignity. In that judgment Frank AJA stated as follows:

²² 1945 AD 185 at 186-7.

²³ 1949 (1) SA 523 (AD) at 524-5.

²⁴ 2007 (2) NR 640 (HC).

²⁵ 1977 (2) SA 348 (AD) at 350E.

²⁶ *Zedikias Gaingob and 3 Others v S* (SA 7/2008, SA 8/2008) [2018] NASC 4 (06 February 2018).

[81] The legislature has determined that in respect of life imprisonment a prisoner will only be entitled to apply for parole after having served 25 years. In other words, this is the period deemed to satisfy the requirements of retribution and deterrence provided the prisoner has been rehabilitated. The periods stipulated in the Correctional Services Act relevant to applications for parole or early release have not been attacked on any basis. The Act must therefore be applied. As pointed out by Smuts JA in respect of serious crimes where fixed terms of imprisonment have been imposed prisoners can only apply for parole after having served two thirds of their sentences. This means that where a person is sentenced to imprisonment for a period longer than 37 and half years it would mean such sentence would in effect be a sentence that is harsher than a sentence of life imprisonment. 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 years and a half years is materially misdirected and can be rightly described as inordinately long and is thus liable to be set aside. Such sentence is imposed contrary to the principle enunciated in *Tcoelib* and the statutory scheme relating to parole enconced in the Correctional Service Act.'

[24] It is correct as submitted by counsel for the State that section 3(1)(a) of the Combating of Rape Act 8 of 2000 prescribes minimum sentences that should be imposed in the circumstances defined therein. However, I am of the view that there is a reasonable prospect that a different court may take the view that some of the sentences imposed upon the applicant should run concurrently, since the various counts the applicant has been convicted on all stem from a single course of conduct.

[25] In light of what the Supreme Court said in the judgment of *Zedikias Gaingob and 3 Others v S*²⁷ and taking into consideration the fact that the applicant has been sentenced to a cumulative imprisonment term of 57 years, I am persuaded that on the grounds of appeal raised in the application in respect of that sentence, there is reasonable prospect of success on appeal. Therefore, the application for leave to appeal against the cumulative sentence of 57 years is hereby granted.

²⁷ *Zedikias Gaingob and 3 Others v S* (SA 7/2008, SA 8/2008) [2018] NASC 4 (06 February 2018).

K Miller
Acting Judge

APPEARANCES:

APPLICANT: M Siyomunji
Of Siyomunji Law Chambers, Windhoek

RESPONDENT: I Nyoni
Of Office of the Prosecutor-General, Windhoek