REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2017/00017

In the matter between:

KASSIAN MUKUVE MBATHERA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mbathera v S* (HC-MD-CRI-APP-CAL-2017/00017) [2022] NAHCMD 284 (10 June 2022)

Coram: SHIVUTE J et CLAASEN J
Heard: **13 May 2022**
Delivered: **10 June 2022**

Flynote: Appeal – Conviction and Sentence – Application for condonation – late filing of notice of appeal – Requirements to be met – Reasonable explanation and prospects of success – Court finding explanation not reasonable and no prospects of success on appeal – Court *a quo* not misdirecting itself in convicting appellant and in imposing the sentence – Application for condonation declined – Matter struck from the roll.

Summary: The appellant was convicted and sentenced in the Rundu Regional Court on charges of murder and arson. He was sentenced on a murder charge to a period of 16 years' imprisonment and to 3 years' imprisonment in respect of the count of arson. The two sentences were ordered to run consecutively. The appellant filed his notice of appeal out of time and offered an explanation that was unreasonable and not acceptable. He also did not establish that he had prospect of success when prosecuting his appeal on the merits. It is well established that an application for condonation is required to satisy two requirements namely; reasonable, acceptable explanation for the non-compliance with the rules of court and to show that there are reasonable prospects of success on appeal. The application for condonation is refused and the matter is struck from the roll.

ORDER

(a) The application for condonation is refused.

(b) The matter is struck from the roll.

APPEAL JUDGMENT

SHIVUTE J (CLAASEN J concurring):

[1] The appellant was convicted in the Regional Court sitting at Rundu on charges of murder and arson. It was alleged that the appellant on 12 August 2010 and at or near Shinunga village in the district of Rundu, unlawfully and intentionally murdered Mbathera Achilles by shooting him with a shotgun. In respect of the second count, it is alleged that on the same date and same place as state above in the district of Rundu the appellant wrongfully, unlawfully and maliciously set on fire a hut, the property of Frida Katiku Muruti and did then and there and thereby burn and destroy or damage the said hit with intent to injure the said Frida Katiku Muruti in her property.

[2] He was sentenced to 16 years' imprisonment in respect of the count of murder and to 3 years' imprisonment in respect of the count of arson. The sentences were ordered to run consecutively.

[3] The appellant was represented during his trial. However, his original notice of appeal was filed without the assistance of a legal representative. He is dissatisfied with both the conviction and sentence, hence this appeal.

[4] The appellant was sentenced on 6 August 2015, however his notice of appeal was only filed on 28 July 2016 with the clerk of court at Rundu according to the date stamp.

[5] Counsel for the State raised points in *limine* that the notice of appeal was filed out of time and that the appellant had no prospects of success on appeal. He also raised an issue that the appellant's grounds of appeal are defective in that they fail to meet the mandatory requirements of being set out clearly and specifically as required by Rule 67(1) of the Magistrate's Court Rules.

[6] On 25 October 2021, the appellant through his legal representative filed an amended notice of appeal amending his grounds of appeal against conviction and sentence.

[7] In terms of Rule 67(1) of the Magistrate's Court Rules, the appellant was supposed to file his notice of appeal within 14 days from the date of sentence. However, in the present matter the notice of appeal was filed more than 11 months later.

[8] The appellant explained the first notice of appeal was file on 6 August 2015, the date on which he was sentenced which is within the prescribed time. He gave it to the Correctional Facility Officers to forward it to the clerk of Court. The fact that it was not forwarded on time was not due to his fault.

[9] The appellant did not address the issue of prospects of success in his application for condonation.

[10] We allowed the parties to argue the application for condonation as well as the merits in the context of the overall consideration of the prospects of success on appeal.

Grounds of appeal

[11] The grounds of appeal on the conviction may be summarised as follows:

1. The learned magistrate drew a negative inference because the appellant exercised his right to remain silent notwithstanding the fact that the State's evidence failed to prove the case against the appellant beyond a reasonable doubt on both charges.

2. The Court *a quo* failed to take into consideration that the burden of proof lies with the prosecution to prove the appellant's guilt beyond reasonable doubt.

3. The Court *a quo* gave little or no attention to the appellant's defence of *alibi* and failed to consider that the appellant's version was reasonably possibly true.

4. The learned magistrate gave no consideration to the ballistic report from the National Forensic Science Institute, which proved that there was no causal link between the shotgun found in the applicant's possession and the death of the deceased which exonerated the appellant from the commission of the offence of murder.

5. Although the Court *a quo* exercised caution when evaluating the evidence of eye witnesses, it ignored the following factors that:

    (i) the witnesses' evidence was not clear and satisfactory on every point;
    (ii) witnesses had an interest or bias adverse to the accused;
    (iii) witnesses had made previous inconsistent statements;
    (iv) the witnesses contradicted themselves and that they did not have proper opportunity for observation.

6. The Court *a quo* was confronted by two mutually destructive versions of evidence by the State and the appellant, but failed to exercise its discretion in favour of the appellant.

As to the appeal against sentence, three grounds were advanced and they are as follows:

1. The learned magistrate failed to properly take into account the traditional triad of sentencing.

2. The Court *a quo* in its reasons for sentence misdirected itself by concentrating exclusively on the crime thereby overemphasing this factor to the exclusion of other relevant considerations.

3. The learned magistrate failed to properly consider and/or ignored the period of five (5) years that the appellant spent in custody awaiting the finalisation of his trial.

[12] Counsel for the respondent argued that the respondent filed his notice of appeal late. He was sentenced on 6 August 2015 but the notice of appeal was filed only on 28 July 2016. The appellant in his supporting affidavit stated that the reason for his late submission was due to the failure by officials at the Correctional Facility where he is incarcerated to deliver his notice of appeal on time. However, there is no proof that such notice was ever handed over to the above mentioned officials within 14 days.

[13] Counsel further argued that the notice of appeal should contain grounds upon which such appeal is based. Such grounds should be set out clearly and specifically as required by Rule 67(1) of the Magistrate's Court Rules.

[14] On the other hand, counsel for the appellant argued that, concerning the late filing of the notice of appeal, the appellant was in the predicament in the process of lodging his notice of appeal, because he was incarcerated. It was argued that after

the appellant was convicted and sentenced, he was transferred to Grootfontein Correctional Facility. There, he drafted his notice of appeal during 2015 and gave it to the officers to deliver to the clerk of court in Rundu. However, the notice was only filed in 2016. His liberty is curtailed and is therefore, at the mercy of the prison officers to assist him to deliver the said notice of appeal. Upon handing it to them, the appellant was under the impression that it was filed.

[15] After the appellant realised that there was no response from the Rundu Magistrate's Court concerning his notice of appeal, he engaged the Office of the Ombudsman to seek assistance. The Office of the Ombudsman informed him that the appellant's notice of appeal was received by the Rundu Magistrate's court under appeal no: 7/2015 and that the delay was due to the record being transcribed.

[16] Counsel argued that the appellant filed his notice of appeal during 2015 and not during 2016 and this is the reason why the correspondence from the Ombudsman to the appellant dated 4 March 2016 made reference to the Appeal Register in the Magistrate Court, Rundu, that the matter was registered as appeal no.: 7 of 2015.

[17] With regard to the amended notice of appeal, the matter was set down on 22 May 2018. However, the original record was not available and the matter was struck from the roll. It was enrolled again on 19 February 2019. This time around, the appellant was not brought to court and the matter was struck off the roll. It was argued that the delay was not due to the appellant's fault.

[18] An appellant seeking condonation for his non-compliance with the rules of court must give reasons for his failure to comply with the rules. This explanation must not be only reasonable and acceptable, but it must also be *bona fide*. He must also show that he has good prospects of success on the merits of the appeal. If the applicant fails to satisfy the requirements, then the applicant for condonation must fail. *S v Nakapela* & Another 1997 NR (HC) at 185 G – H.

[19] Regarding the explanation provided for the late filing of the notice of appeal, such explanation is not acceptable because assuming that it was filed during 2015, it is not stated on which exact date which it was filed. There is no proof that it was filed

within the prescribed time of 14 days. Therefore, the appellant has failed to satisfy the first leg of the requirements.

[20] With regard to the prospects of success on appeal, as earlier stated the appellant never dealt with the issue in his supporting affidavit. However, the issue was addressed in his heads of argument. It was contended that the prospects of success were good. The appellant was required to address the issue of prospects of success in his affidavit accompanying an application for condonation as well in his heads of argument.

[21] The first ground of appeal turns on the issue that the learned magistrate drew a negative inference because the appellant exercised his right to remain silent notwithstanding that the State has failed to prove its case against the appellant beyond a reasonable doubt.

[22] The two key witnesses who testified in this case were the accused's mother and his sister. His mother's evidence was that the appellant came home in the middle of the night and set the hut on fire in which she and the deceased were sleeping. The deceased went out of the hut and inquired from the appellant what he was doing. The appellant's mother followed the deceased. The appellant entered the burning hut and took out a firearm and shotgun ammunition. The appellant was disarmed by his sister. The appellant's sister corroborated her mother in this regard.

[23] However, the appellant did not stop there. He went back into the burning hut and came out with a shotgun and another 'big gun'. The deceased, the appellant's mother and sister seeing that the appellant was armed again they ran away. The appellant also went out of the homestead using a separate exit point. The appellant met his fleeing family outside the homestead and shot his father (the deceased) at a close range.

[24] The appellant's sister testified that when she went out of her room she observed the parents' hut on fire. She also saw the appellant standing with their parents. At that stage the appellant was armed with a firearm. She approached the appellant and took away the firearm from him. When the witness found the appellant standing with his parents, their father was asking the appellant saying:'Kassian why

are you doing such a thing? The appellant responded: 'you will die today, you are going to die.'

[25] After the witness disarmed the appellant he went back to the burning hut and came out with a firearm that he used to shoot the deceased. Before the deceased was shot, the witness was on the way to call her other brother who was residing at a nearby homestead. Whilst she was about 10 meters away from the scene, she heard two gun shots. She also saw the appellant running away from the place where he fired the two shots. The appellant ran away with the firearm. It was further this witness' testimony that when she disarmed the appellant of the first firearm that he took from the burning hut she also grabbed the appellant's jacket from him. Furthermore, there is evidence that the deceased died due to injuries sustained from the gun shots.

[26] There was direct evidence incriminating the appellant. The appellant did not testify to contradict this evidence. The court a quo was alive to the State's direct evidence and correctly in my view accepted it. The State's evidence was not contradicted because the appellant exercised his right by deciding to remain silent.

[27] In S v Mkombeni & Another 1963 (4) SA 877 (A) at 893 (G) Holmes J had this to say:

> 'But the situation is different where there is direct evidence of the commission of the offence. In such a case, the failure to testify or the giving of false alibi, whatever the reason therefor – *ipso facto* tends to strengthen the direct evidence, since there is no testimony to gainsay it and therefore, less occasion or material for doubting it.'

[28] The evidence adduced by the appellant's mother and sister begged for an answer. However, the appellant did not offer an answer nor did he contradict their testimonies. Although the appellant was not obliged to testify, he took a risk by deciding to remain silent. His failure to testify had left the State's case unshaken. Therefore, the Court *a quo* was justified not to ignore the direct evidence incriminating the accused.

[29] With regard to an alibi defence, the appellant did not testify and his alibi could not be tested through cross-examination. In fact, there was no evidence adduced

before the Court *a quo* as far as an alibi defence was concerned. The appellant was known by the State witnesses. His name was mentioned by his father (deceased) when he inquired from him why he was doing what he did. The appellant's sister was in close proximity to the appellant, especially when she took the firearm and the jacket from him. The evidence concerning the jacket was not challenged. The appellant was heard uttering words that he was going to kill the deceased. The appellant could clearly be identified by the witnesses because the place was illuminated by the blaze from the burning hut.

[30] In connection with the ballistic evidence that was tendered by the defence in the form of a report, that the spent shell exhibit B was not fired from shotgun s/no:A538/19, it could be possible that the firearm found in possession of the accused did not fire the fatal shot. There is evidence from the appellant's mother that when the appellant went in the burning hut for the second time he came out with a shotgun and another 'big gun'. He left 'the big gun' and went with a shotgun. The appellant was known by his mother and his sister. Therefore, the issue of mistaken identity does not arise. Although the investigation was sloppy at its best, especially with regard to the shortcomings pointed by the court *a quo* the State had managed to adduce overwhelming evidence against the appellant.

[31] With regard to the credibility of witnesses, the court *a quo* had the opportunity to listen and observe the witnesses when they were testifying. After a careful evaluation of the evidence, it found the witnesses to be credible and reliable. Although there were a few inconsistencies and contradictions, these were not material to warrant a rejection of the witness' entire evidence.

> 'Contradictions perse do not lead to the rejection of a witness' evidence, as it may simply be indicative of an error.' *S v Auala* (1) 2008 (1) NR 223 (HC) at 233 E.

[32] This court is not satisfied that the court *a quo* misdirected itself in its assessment of the evidence. Therefore, the prospects of success on conviction on the above grounds are very slim.

Sentence

[33] Criticisms were levelled against the court *a quo* that it overemphasised the crime at the expense of the personal circumstances of the appellant and that it failed to take into account the 5 years the appellant spent in custody awaiting his trial. However, the court *a quo* had taken into account the period the appellant spent in custody. It was alive to the fact that the appellant was a first offender. The appellant committed a serious offence that was committed within a domestic setting. The appellant took the life of a person who brought him to life. Violence against family members is a cancer of this society. The sentences of 16 years' imprisonment in respect of murder and 3 years' imprisonment in respect of arson do not induce a sense of shock and are not inappropriate. We do not find any misdirection any misdirection on the part of the court *a quo*. The sentence is appropriate and befitting the crime, the criminal and the interest of society. We are, therefore, not persuaded that there are good prospects of success on the appeal against both conviction and sentence.

[34] In the premise, the following order is made:

(a) The application for condonation is refused.

(b) The matter is struck from the roll.

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N N Shivute

Judge

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C Claasen

Judge

APPEARANCES:

APPELLANT:	Mr Profysen Muluti Muluti & Partners
RESPONDENT:	Mr Hesekiel Kuye-Awike Iipinge On behalf of Respondent Government - Office of the Prosecutor-General