

REPUBLIC OF NAMIBIA

HIGH COURT OF
WINDHOEK
JUDGMENT



NAMIBIA MAIN DIVISION,

Case Title: <i>Tukondjeni Tulimekondjo Amatwi</i> Appellant v <i>The State</i> Respondent	Case No: HC-MD-CRI-APP-CAL-2020/00046
	Division of Court: Main Division
Heard before: Mrs Justice Shivute <i>et</i> Mrs Justice Claasen	Delivered on: 21 October 2022
Neutral citation: <i>Amatwi v The State</i> (HC-MD-CRI-APP-CAL-2020/00046) [2022] NAHCMD 577 (21 October 2022)	
The order: (a) The application for condonation is refused. (b) The matter is struck from the roll and considered finalised.	
Reasons for order:	
SHIVUTE J (CLAASEN J concurring): [1] The appellant was convicted of a single count of murder, one count of attempted murder and one count of assault with intent to do grievous bodily harm in the Regional Court sitting at Swakopmund. He was sentenced to 20 years' imprisonment on the murder count, one year imprisonment on attempted murder and six months' imprisonment on assault with intent to do grievous bodily harm. The sentences were ordered to run consecutively.	

[2] The appellant initially filed his notice of appeal on time. However, the matter was struck from the roll because the notice of appeal did not conform to the legal requirements as grounds of appeal were not clear and specific.

[3] The appellant filed a new notice of appeal accompanied by an application for condonation for the late filing of the notice of appeal. He explained that his notice of appeal was late due to the fact that his initial notice of appeal was defective and it was struck from the roll.

[4] We are satisfied with the explanation tendered by the appellant for the cause of the delay. However, the appellant having satisfied the first leg in an application of this nature, he still has to satisfy the court on the second leg that he has reasonable prospects of success on the merits. The appellant never stated in his affidavit that he has reasonable prospects of success when prosecuting his appeal apart from making a bold statement that the court should condone his application.

[5] We reserved our ruling on the application for condonation and allowed the parties to address us on the merits in relation to prospects of success.

Grounds of appeal

[6] Although the appellant filed a notice of appeal against both his conviction and sentence, he had abandoned his appeal against conviction. His grounds of appeal against sentence are as follows:

- (i) The learned magistrate misdirected herself by failing to consider the circumstances under which the crimes were committed and the personal circumstances of the appellant.
- (ii) The court imposed a startlingly inappropriate and excessive sentence.

[7] The appellant argued that 20 years' imprisonment imposed on the murder count is too severe and he would like this court to reduce the sentence. The court a quo was supposed to take into consideration the sentence imposed on the other counts and order the sentence on counts 2 and counts 3 to run concurrently with the sentence on count 1.

[8] On the other hand, counsel for the respondent argued that the appellant has no prospects of success because the grounds to attack the sentence imposed has not been substantiated. The appellant wants a lesser sentence unfortunately that is not the test. The test is whether the court a quo exercised its discretion judiciously and whether the sentence induces a sense of shock. The court a quo did not misdirect itself. The court a quo before sentencing had considered the appellant's personal circumstances in detail as well as the circumstances of the case. Therefore, the sentence imposed is appropriate in the circumstances.

[9] With regard to the prospects of success on appeal, at the pain of being repetitive, the appellant never dealt with the issue in his supporting affidavit. The appellant was required to address the issue of prospects of success in his affidavit supporting an application for condonation as well as in his heads of arguments. It is the appellant's duty to substantiate his grounds of appeal that he has prospects of success on appeal.

[10] Although the appellant argued in respect of both conviction and sentence, his appeal is only against the sentence. Sentencing is pre-eminently for the trial court and that a court of appeal would only be entitled to interfere with a sentence where the trial court exercised its discretion improperly. *S v Van Wyk* 1993 NR 426 SC at 447 G.

[11] The learned Magistrate was alive to the personal circumstances of the appellant. Although the appellant is a first offender, he went on a stabbing spree and stabbed the deceased on his neck with a knife. He also attempted to kill the second complainant by stabbing him and assaulted the third complainant with intent to do grievous bodily harm. The deceased was only 19 years old. The court had also considered the injuries suffered

by the second complainant and that the appellant's victims were family members and they were not armed. The court a quo further considered the circumstances under which the crimes were committed and the seriousness of the crimes and their prevalence.

[12] We are therefore of the view, that the court a quo exercised its discretion judiciously and the appellant failed to establish that he has reasonable prospects of success on the merits of the appeal against sentence.

[13] In the result, the following order is made:

(a) The application for condonation is refused.

(b) The matter is struck from the roll and considered finalised.

N N SHIVUTE Judge	C CLAASEN Judge