

IN THE HIGH COURT OF NAMIBIA



MAIN DIVISION, WINDHOEK

RULING

<b>Case Title:</b> Khamastar Ndukireepo v The State	<b>Case No:</b> HC-MD-CRI-APP-CAL-2021/00080
<b>Ruling on Application for leave to Appeal</b>	<b>Division of Court:</b> Main Division
<b>Heard before:</b> Judge January et Judge Claasen	<b>Delivered on:</b> 07 November 2022
<b>Neutral citation:</b> <i>Ndukireepo v S</i> (HC-MD-CRI-APP-CAL-2021/00080) [2020] NAHCMD 607 (07 November 2022)	
<b>The order:</b> a) The application for condonation is refused. b) The matter is struck from the roll.	
<b>Reasons for decision:</b>	
JANUARY J (CLAASEN J concurring):  [1] The applicant in this matter was convicted on a count of murder. He was sentenced to 20 years' imprisonment on 10 December 2020. He appealed against his conviction but it was dismissed on 08 April 2022. This is an application for leave to appeal against the dismissal of his appeal.  [2] The applicant was represented during the appeal by Mr Siyomunji and is	

represented in this application by Mr McNally. The application for leave to appeal was filed out of time on the 11th of May 2022. An application for condonation with a supporting affidavit is thus filed.

[3] It is trite that an applicant has to satisfy two pertinent requirements, firstly, that he has to provide a reasonable and acceptable explanation for the late filing of the main application (for leave to appeal); secondly, the applicant has to show that he has prospects of success on appeal. In addition, the courts have elucidated certain principles as regards condonation applications which, *inter alia*, are the following:

- a) Where the explanation proffered is not reasonable but an applicant enjoys prospects of success on appeal, a court *may* condone the non-compliance.<sup>1</sup>
- b) Where the applicant's non-compliance is found to be a flagrant disregard of the rules of court, a court need *not* consider the prospects of success on appeal.
- c) If prospects of success on appeal are non-existent, it matters not whether there is a reasonable explanation or not, the application will be *refused*.<sup>2</sup>

[4] The applicant stated in the application for condonation that he is incarcerated and because of delays in arrangements at the relevant correctional facility, he was late on the day that the appeal was dismissed. He could thus not note the judgment and was only afterwards informed by the judge's research assistant about the outcome without any further explanation. He could not reach his legal representative to advise him on the way forward. He, with assistance of family members, afterwards obtained the services of Mr McNally on 25<sup>th</sup> April 2022 and placed him in funds on 5<sup>th</sup> of May 2022. He stated that Mr McNally drafted the application for leave to appeal on 6 May 2002 and instructed a legal practitioner in Windhoek, Mrs Leonalda Gentz, to file the same. Apparently, Mrs Gentz was on leave in the meantime and as a result the application could only be filed on 11<sup>th</sup> May 2022. In the meantime, problems were experienced to file the application on e-justice because the previous legal representative failed to withdraw their representation on the e-justice system. The withdrawal was only effected on 11<sup>th</sup> May 2011 enabling the

<sup>1</sup> *S v Nakale* 2011 (2) NR 599 (SC) at page 603.

<sup>2</sup> *S v Gowaseb* 2019 (1) NR 110 (HC) at page 112.

necessary application to be filed.

[5] In addition, the applicant stated that he experienced logistical challenges because of his incarceration. He was faced with this problem to personally depose to the supporting affidavit with Mrs Delpont who was instructed by Mr McNally who is based in Keetmanshoop. He further stated that on his information, the judgment of the appeal was only filed on e-justice on the 22<sup>nd</sup> of April 2022 and that the 14 days within which he could have filed this application would only have expired on 16<sup>th</sup> May 2022. Even if we accept the explanation for the late filing, the applicant still has to cross the second hurdle to show that he has prospects of success.

[6] The applicant further stated that he has prospects of success elaborating that another court may find that he acted in self-defence, alternatively in putative private defence. In addition, the applicant stated that he fired the fatal shot to scare off the deceased and his companions without having the direct intention to kill. Thus, he stated that he lacked *mens rea* and could not have been convicted for murder.

[7] The respondent raised a point in *limine* in that the applicant did not comply with s 316 of the Criminal Procedure Act 51 of 1977 to file his application within the prescribed time of 14 days. The respondent submitted that the reasons advanced for the delay are unreasonable and that there are no prospects of success on appeal.

[8] The applicant stood charged with murder. He pleaded not guilty and exercised his right not to disclose the basis of his defence. His defence of self-defence became apparent during the trial. Eye witnesses of the state and the appellant testified that the deceased and another person took planks/timber belonging to the appellant. The applicant pursued and confronted them, tried to grab the one plank from the deceased, eventually assaulted and shot him with a firearm. The court *a quo* rejected the applicant's defence of self-defence. The eye witnesses from the State emphatically testified that the deceased was not retaliating but tried to run away.

[9] The applicant did not file heads of argument in this application and in effect based

his application for leave to appeal on the grounds that were raised in the appeal. The court of appeal dealt with those grounds in the appeal. Be that as it may, this court needs to disabuse its mind in this application and consider if on the grounds raised herein, there is a possibility that another court will, not may, come to a different conclusion. We have given considerable thought objectively to the application, disabusing our minds, as far as is humanly possible, and came to the conclusion that there was no reasonable doubt concerning the guilt of the applicant. We are not at all convinced that there is a reasonable prospect that the Supreme Court may take a different view about the guilt of the applicant on the offence as charged. It follows that in our view, the applicant has failed to show that he has a reasonable prospect of success on a further appeal.

[10] In the result:

- a) The application for condonation is refused.
- b) The matter is struck from the roll.

**NOTE TO THE PARTIES**

The reason(s) hereby provided should be lodged together with any Petition made to the Chief Justice of the Supreme Court

<b>H C JANUARY JUDGE</b>	<b>C CLAASEN JUDGE</b>
<b>APPELLANT: Lentin, Botha &amp; Van Den Heever Mr. McNally</b>	<b>RESPONDENT: Office of Prosecutor General Mr. Malumani</b>