

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT

CASE NO: HC-MD-CRI-APP-CAL-2021/00068

In the matter between:

WILLIAM IMMANUEL

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Immanuel v S* (HC-MD-CRI-APP-CAL-2021/00068) [2023]
NAHCMD 230 (08 May 2023)

Coram: LIEBENBERG J et JANUARY J

Heard: 09 December 2022

Delivered: 08 May 2023

Flynote: Criminal procedure - Appeal – Sentencing – Appeal filed four years and eight months out of time – Condonation application for late filing – Requirements re-stated - Contradictory reasons for the delay – Explanation not bona fide – Prospects of success on appeal – No prospects - Condonation refused – Struck from the roll.

Summary: The appellant was convicted of murder and assault with intent to do grievous bodily harm. He was sentenced to 20 years' imprisonment for murder and to three years' imprisonment for assault with intent to do grievous bodily harm. The appellant filed a notice of appeal about 4 years and 8 months late in non-compliance with rule 67(1) of the Magistrates Court Rules. He, in addition, filed a supporting affidavit alleging that his rights to appeal were not explained and that, as a layman, he could not have been expected to know the rules of court. He was represented by an experienced legal representative during the trial, including sentencing.

On advice by his new legal practitioner, he submitted a supplementary affidavit wherein he alleged that the delay was due to lack of income and that he could not afford the funds to instruct a private legal practitioner. In addition, he initially did not apply for legal aid, being under a misconception that, because they refused his initial application due to his income at the time, that such an application would again be refused. Further that, when he eventually applied, the applications were lost or not received by the Directorate Legal Aid, causing him to have to re-apply on more than one occasion.

It turned out that the appellant was not truthful when he alleged that he did not know of his rights to appeal and that he had to comply with the rules of court. It is evident from his first notice of appeal that he was aware of his rights to appeal and that he needed to apply for condonation.

The Magistrate appropriately evaluated the evidence and committed no misdirection.

Held – The reasons for the delay is contradictory and not bona fide.

Held further – The appellant was not truthful that he was not aware of his rights to appeal and that he had to comply with the rules of court.

Held further – The reasons for the delay are not acceptable.

Held further – There are no prospects of success

ORDER

1. The application for condonation is refused.
 2. The matter is struck from the roll and considered finalised.
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APPEAL JUDGMENT

JANUARY J (LIEBENBERG J concurring):

Introduction

[1] The appellant appeared in the Regional Court, Katutura for the district of Windhoek on charges of murder and assault with intent to do grievous bodily harm. He pleaded not guilty on both counts. He was eventually convicted on both counts and sentenced on count one to 20 years' imprisonment and on count two to three years' imprisonment. The accused person was represented in the court a quo.

[2] The appeal is against the sentencing. The appellant is represented by Mr. Velikoshi and the respondent is represented by Mr. Kalipi.

[3] We have reserved our ruling on the application for condonation and entertained the appeal on the merits relating to the sentencing. In any event, the merits are relevant in the adjudication of the application for condonation.

The background

[4] On 22 February 2013, the deceased, the complainant in count two and another person were walking in a street in Grysblock, Katutura. The accused drove passed them with a motor vehicle, stopped and reversed. He disembarked with a pistol in his hand.

He confronted the complainant in count two as to why the latter hit his motor vehicle. Complainant responded that no one hit the car. The accused hit the complainant in the face with the pistol, turned around, cocked the pistol and shot the deceased in the chest. Thereafter, the accused walked back to his motor vehicle and drove off. He did not report the incident to the police.

Grounds of appeal

[3] The grounds of appeal are set out as follows:

'1. The sentences imposed by the learned Regional Magistrate are so excessively severe as to generate sensations of shock, and therefore there is a strong likelihood that the High Court will interfere with it in that:

- 1.1 The learned regional magistrate committed an error when she imposed the maximum 20 year sentence allowed under the Regional Court's jurisdiction.
- 1.2 The learned regional magistrate failed to use her discretion judiciously by failing to accurately examine the personal circumstances of the appellant.
- 1.3 The learned regional magistrate failed to take into account that the offence was not premeditated, which is an unusual circumstance justifying a lesser sentence than the one imposed.
- 1.4 That the 20-year imprisonment sentence that the regional magistrate had imposed on count 1 (murder), is shocking since it is inconsistent with sentences imposed in cases with comparable circumstances.
- 1.5 The learned regional magistrate committed an error when she omitted to consider a sentence with an option of a fine for count 2 – Assault with intent to cause grievous bodily harm.
- 1.6 The regional magistrate erred when she failed to take into account the period that the appellant had previously served as a trial awaiting prisoner.

1.7 The learned magistrate committed a legal or factual error when she directed that the sentences for counts 1 and 2 be served consecutively.’

Point in limine

[4] Mr. Kalipi raised a point in limine because there was a substantial delay in noting the appeal. The appellant was sentenced on 20 September 2016. The notice of appeal is dated the 31st May 2021 and filed on the 08th of September 2021, about four years and eight months out of time.

[5] It was submitted by the respondent that the explanations for the long delay are not reasonable and not genuine (if not false altogether), as the appellant was represented by a legal representative throughout the whole trial. Further, it was submitted that there is no explanation as to how he managed to file the notice of appeal only after a delay of four years and seven months. Secondly, it was submitted that there are no prospects of success on appeal.

[6] It appears that the notice of appeal was filed by way of a notice of motion with an application for condonation and a supporting affidavit in person by the appellant. The documents, however, clearly reflect that they were not drafted by a layperson and that the appellant must have been assisted by a person knowledgeable in law as reference is made to case law and established principles in support of submissions.

Condonation

[7] It is trite, considering the application for the condonation of the late filing, that the requirements, as correctly submitted by counsel are twofold, consisting of the reasonableness of the explanation and the prospects of success on appeal. In *Uixab v S*,¹ as referred to by Gibson J in *S v Nakapela and another*², the following was stated:

‘In my opinion, proper condonation will be granted if a reasonable and acceptable explanation for the failure to comply with the sub-rule is given; and where the appellant has shown that he has good prospects of success on the merits of the appeal. In my opinion, these

¹ *Uixab v S* 2021/00024 [2022] NAHCNLD 33 (01 April 2022) at 6.

² *S v Nakapela and another* 1997 NR 184 (HC).

requirements must be satisfied in turn. Thus if the appellant fails on the first requirement, the appellant is out of court’.

Furthermore, in *S v Kashire*,³ Lichtenberg AJ said the following at page 167 H:

‘The proper procedure for the obtaining of condonation of the late filling of a notice of appeal is by way of an application, supported by an affidavit made by the accused.’ In such application it is required of an appellant to give a reasonable and satisfactory explanation for his or her delay in filing the notice of appeal and such explanation must also be *bona fide*, meaning in good faith’.

Explanation for the delay

[8] The appellant stated in his first supporting affidavit that he is a layperson. Further, his rights were never explained to him during sentencing or thereafter as borne out by the record of proceedings. Consequently, he was not aware that he should have noted the appeal within fourteen days from the date of sentence. In addition, he stated that such failure was not due to any negligence or error on his side as he did not appreciate the legal procedures as prescribed by the High Court Rules. The appellant further referred to cases and articles dealing with the independence of the judiciary, the legal profession, their duty, freedom from bias and criticism of members of the Legal Aid Centre on reprehensible conduct when handling matters of clients. The appellant, however, did not anywhere state that he was subjected to any reprehensible conduct apart from stating that he was not informed about his rights to appeal.

[9] In a supplementary affidavit, the appellant stated that he was represented by a legal practitioner whom he instructed privately. After sentencing he started serving his sentence and as a result lost his source of income. Consequently, he could no longer afford the services of his privately instructed legal representative. The Legal Aid Directorate denied to grant him legal aid previously, due to his income. After he was sentenced, he mistakenly held the belief that the Directorate of Legal Aid would still not

³ *S v Kashire* 1978 (4) SA 166 (SWA).

assist him and thus, did not apply. Instead he relied on his family to raise funds to instruct a private lawyer to pursue an appeal. The relatives were unable to raise funds and as a result it delayed the noting of the appeal even further.

[10] Eventually, the appellant re-applied for legal aid during 2017. That application was apparently not received by the Directorate of Legal Aid causing him to again apply. It allegedly took time to review his new application. He further stated that since he was incarcerated serving his sentence, he could not follow up on the application. Months passed without any response which caused him to submit a third application for legal aid during 2018. Eventually his application was approved on condition that he had to contribute N\$350.

[11] He was unable to raise the money due to him relying on his family for financial aid. He could only raise the N\$350 at the beginning of 2021 where after he paid the contribution. It took a few months before the Directorate of Legal Aid appointed a lawyer. The process was also influenced by the COVID-19 pandemic. In the meantime, the appellant was assisted by a fellow inmate with legal background to draft the Notice of Appeal which he submitted on 28 May 2021.

[12] The appellant's amended notice of appeal with a supplementary affidavit reflect that he was apparently only advised by his new legal representative that he needs to apply for condonation, to provide an acceptable and credible explanation for the delay and demonstrate that he has good prospects of success on appeal. Thereby, he creates the impression that he did not have this knowledge before. It is however evident, that he was aware of these requirements even at the time that he initiated the appeal in person.

[13] It is trite that an appellant must be frank and *bona fide* when he gives an explanation for his failure to file a notice of appeal on time. I agree with Hoff J (as he then was) when he stated:

'Where an applicant in an application for condonation is not frank or *bona fide* the court may for that reason refuse condonation. The court would normally consider whether the

explanation given was a reasonable and acceptable explanation and if so, would then thereafter look at the prospects of success on appeal.’⁴

[14] Considering that the appellant in his initial supporting affidavit stated that the crux of the delay was that his rights of appeal were not explained, that it does not appear on the record of proceedings and that he was a layperson, compared to the supplementary affidavit wherein the reason for the delay was that he lacked funds and a delay by the Legal Aid Directorate on his applications for legal aid, the explanations are contradicting and unconvincing. It appears that he was aware of his rights to appeal and to apply for condonation even before he was advised by his current legal representative in September 2022. The reasons advanced in the supplementary affidavit therefore appear to be afterthoughts.

[15] In the circumstances, the appellant has failed on the first leg of his application to provide a reasonable and acceptable explanation. In an application for condonation the court will not sympathize with an untruthful applicant, and the applicant bears the onus of providing a reasonable and satisfactory explanation. We are of the view that, in this particular application for condonation, the appellant was not *bona fide* in his explanation for the delay. In view of what was stated in *S v Nakapela and another*,⁵ the condonation application is bound to fail.

[16] Notwithstanding, the Supreme Court stated amongst others the following in *S v Likoro*⁶:

‘Considering the prospects of success on the merits is part of an overarching exercise to determine whether the court will exercise its discretion in favour of the applicant or not, and, as

⁴ See: *Kambinda v State* (CA 68/2014) [2014] NAHCMD 337 (24 October 2014). See also: *Shekutumba v S* (HC-NLD-CRI-APP-CAL- 2018/00059) [2019] NAHCNLD 76 (14 May 2019); *Relito v State* (CA 127/2013) [2014] NAHCMD 64 (14 February 2014); *Fillemon v State* (CA 80/2013) [2014] NAHCMD 58 (14 February 2014).

⁵ *S v Nakapela and another* (*supra*).

⁶ *S v Likoro* 2022 (2) NR 443 (SC).

was stated in *Arubertus (supra)*, prospects of success on appeal always form part of the consideration whether to grant condonation or to refuse it.'

Consequently, I turn to consider the prospects of success on appeal.

Prospects of success

[17] The appellant submitted that he has good prospects of success on appeal because the sentences are harsh and inconsistent with sentences in comparable cases and in similar circumstances. In addition, he stated that the Magistrate did not consider imposing a fine in relation to the conviction of assault with intent to cause grievous bodily harm as was suggested by the defense and the prosecution.

[18] The judgment on sentencing reflects that the Magistrate properly considered the evidence tendered in mitigation, aggravation as well as submissions by both the legal representative of the appellant and the public prosecutor. Further, in a well-reasoned judgment, the principles and factors were properly considered and applied. We do not find any misdirection by the court a quo in its evaluation of the evidence and application of sentencing principles.

[19] The evidence reflects that the murder was committed in cold blood, that both crimes are senseless and without any provocation or reason. In addition, the appellant afterwards simply drove away from the scene and the police had to search for him. He did not report the matter. A family member testified that the accused laughed at court when they crossed paths. It points to what type of character the appellant displayed. He never showed any remorse. A fine on the second count would be trivializing the crime in relation to count two in these circumstances.

[20] Consequently, this court cannot exercise its discretion in favor of condoning the non-compliance with Rule 67(1) of the Magistrate's Court Act.

[21] In the result, the following orders are made:

1. The application for condonation is refused.

2. The appeal is struck from the roll and considered finalised.

JANUARY J

LIEBENBERG J

APPEARANCES

APPELLANT:

I VELIKOSHI

of Ileni Velekoshi Inc, Windhoek

RESPONDENT:

J M KALIPI

Office of the Prosecutor-General, Windhoek