

Christiaan AJ:

Introduction

[1] The applicant in this matter, together with his co accused was convicted on a charge of murder and robbery with aggravating circumstances and was subsequently sentenced to 22 years imprisonment on the count of murder and 10 years' imprisonment on the count of robbery with aggravating circumstances. Half of the sentence imposed on the charge of robbery with aggravating circumstances was ordered to be served concurrently with the sentence on the charge of murder. The effective sentence is therefore 27 years imprisonment.

[2] The applicant is now appealing against the convictions and the sentences imposed.

Grounds of appeal

[3] The grounds of appeal against the conviction can be summarised as follows: (a) That the court misdirected itself when it failed to find that the state proved all the elements of the offence beyond reasonable doubt; (b) that the he court did not correctly consider the mutually destructive versions given by the state witnesses and that of the appellant.

[4] The ground of appeal against the sentence is that the court erred in law and/ or facts in failing to consider the appellants personal circumstances as they were not adequately taken into account when the court sentenced him.

Point in limine- condonation for late filing of the appeal

[5] At the hearing of the application for leave to appeal, the respondent raised a *point in limine* as the applicant's application for leave to appeal was filed out of time. To be specific, the applicant lodged the application for leave to appeal about 13 years later, after he was sentenced on 6 July 2010.

[6] It is trite that in order for the court to grant an application for condonation, the applicant has to satisfy two pertinent requirements, firstly that he has to provide a reasonable and acceptable explanation for the late filing of the leave to appeal application and secondly, the applicant has to show that he has prospects of success on appeal.

[7] In addition to that, the courts have now elucidated certain principles regarding condonation applications, namely, that:

(a) Where the explanation proffered is not reasonable but an applicant enjoys prospects of success on appeal, a court may condone the non-compliance¹.

(b) Where the applicant's non-compliance is found to be a flagrant disregard of the court rules, 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 refused².

[8] The applicant states in the application for condonation that he was not in a proper composed state of mind after his conviction, and that he could not adequately comprehend and take further steps. Further, it took him time to recover from the shock of his conviction and sentence.

[9] The applicant further contends that it was difficult and challenging for him to frame and formulate the appeal in the best English. He further states that, it came to his realization now that he could appeal against his conviction and sentence imposed.

[10] The applicant was legally represented by a legal practitioner throughout the trial proceedings. Therefore his reasons for being unable to frame and formulate his application in English cannot be accepted. The applicant also had the option to apply to the Directorate of Legal Aid, for a legal aid lawyer to be appointed to assist him with his application. It is not clear if accused explored that option. As such, accused person's

¹ *S v Nakale* 2011 2 NR 599 at 603.

² *S v Gowaseb* 2019 1 NR 110 (HC) 112.

reasons for the late filing cannot possibly and reasonably be true. Further, the court explained the accused person's right to appeal after sentencing.

[11] The applicant's reasons for the late filing of the notice of leave to appeal are not reasonable when regard is had to the extent of the time, it took the applicant thirteen years, to file his application for condonation and leave to appeal.

[12] It is evident that the application for leave was filed late, in fact, very late. The applicant has failed to show that he has a *bona fide* reason for his failure

[13] The applicant has still to cross the second hurdle in order to show that he has prospects of success on appeal.

Prospects of success on appeal

Ad Conviction

[14] With regard to the court a quo's reasoning for conviction, the court considered the fact that the deceased was last in the company of the applicant and his co-accused. The applicant and his co-accused were both on the premises of the deceased by their own informal admission. The court also found that, the only reasonable inference on all the proved facts is that the applicant and his co-accused were the persons who tied and gagged the deceased.

[15] With respect to the allegation that the conviction was against the evidence and the weight attached thereby and, that the State did not prove the applicant's guilt beyond reasonable doubt, there was overwhelming evidence against the applicant and his co-accused. Charges were put to the applicant in terms of s 119 of the Criminal Procedure Act, of which the applicant did not disclose any defence.

'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 person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient to prove the guilt

of the accused. Whether such a conclusion is justified will depend on the weight of the evidence'.³

[16] With regard to the allegation that the court *a quo* did not consider the mutually destructive versions from the state witnesses, the applicant fails to explain what the mutually destructive versions were. From the aforementioned it is clear that the appellant does not have reasonable prospects of success on appeal against the conviction.

Ad Sentence

[17] The applicant's grounds of appeal on sentence attacks the sentence imposed by the court *a quo*, that the sentence imposed is out of proportion with the totality of the accepted fact in mitigation, he further also attacks the fact that the court *a quo* disregarded all the steps allegedly taken by the applicant to assist and the circumstances of the applicant. The applicant does not mention the steps he has taken, which were disregarded by the court *a quo*.

[18] With regards to the court *a quo* not considering the circumstances of the accused, the court *a quo* did in fact consider the circumstances of the accused. The following are the factors that influenced the court *a quo* when it imposed the sentences:

- (a) That the applicant is a first time offender;
- (b) The applicant was young at the time the offence was committed;
- (c) The applicant having been in custody 5 ½ years awaiting trial;
- (d) No clear evidence of pre-planning;
- (e) Applicant co-operated with the police by immediately taking them to the stolen goods.

[19] The sentence imposed is not shocking, considering the manner in which the accused person was murdered. No person deserves to die like that. In fact the circumstances in which the deceased was robbed and murdered is shocking. The accused person took advantage of the fact that, the deceased was drunk and robbed and killed him in his own home. The applicant demonstrated a total disregard for human life.

³ *S v Boesak* 2001 (1) SA 912 para 39.

[20] Society yearns for peace and for perpetrators of violent crimes to be dealt with sternly by our courts. Courts are entrusted with the important function of administering justice and applying the law in the country, sentence that are too lenient may put the administration of justice into disrepute and may result in disrespect for the rule of law and lawlessness.⁴

[21] Henceforth, the application does not enjoy any reasonable prospect of success on appeal.

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

1. The applicant's condonation application for the late filing of the leave to appeal is refused.
2. The matter is struck from the roll and regarded as finalised.

Judge's signature	Note to the parties:
	Not applicable
Counsel :	
Applicant	Respondent
M Williams In person Windhoek Correctional Facility	MH Muhongo Of the Office of the Prosecutor General Windhoek

⁴ *S v Barnard* (CC 5/2013) [2018] NAHCMD 225 (25 July 2018).