

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2023/00014

In the matter between:

COLLIN KORUPANDA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Korupanda v S* (HC-MD-CRI-APP-CAL-2023/00014) [2023]
NAHCMD 788 (04 December 2023)

Coram: JANUARY J et CHRISTIAAN AJ

Heard: 10 November 2023

Delivered: 4 December 2023

Flynote: Criminal Appeal – Procedure – Notice of Appeal filed late – Condonation application – No reasonable and acceptable explanation for delay – No prospects of success on appeal – Appeal struck from the roll.

Summary: The appellant was convicted of rape in the Regional Court sitting at Windhoek. He pleaded not guilty, offered no explanation and was convicted after the evidence was led. He was sentenced to 14 years' imprisonment. Dissatisfied with the conviction, appellant filed a notice to appeal. Requirements for a successful application for condonation revisited. Held that an applicant applying for condonation must not only make allegations about prospects of success but must also state on oath with reference to the record and other relevant documents, reasons why it is claimed the applicant for condonation has reasonable prospects of success. Held, the appellant did not, save for making mere allegations, establish that he had reasonable prospects of success. Application for condonation refused.

ORDER

The application for condonation is refused and the matter is struck from the roll and regarded as finalised.

JUDGEMENT

CHRISTIAAN AJ (JANUARY J concurring):

Introduction

[1] On 21 June 2022 the appellant was convicted of rape (with coercive circumstances in contravention of s 2(1)(a) of the Combating of Rape Act 8 of 2000 in the Regional Court sitting at Windhoek and he was sentenced to 14 years imprisonment. During the trial, he was represented by Mr Beukes who was appointed by the Directorate of Legal Aid. In this appeal, appellant is represented by Mr Kanyemba while the respondent is represented by Ms Shilongo.

[2] The allegations by the State were that on or about the 12th day of September 2019 at or near Windhoek the appellant did wrongfully, unlawfully and intentionally

commit or continue to commit a sexual act with Uaningana Uuziau hereinafter called the complainant by inserting his penis into the vagina of the complainant by or while applying physical force to the complainant by grabbing her arm throwing her on the bed and holding her by the neck, and is therefore guilty of the offence of rape.

[3] The appellant pleaded not guilty to the offence and opted not to disclose the basis of his defense in terms of section 115 of the Criminal Procedure Act (“CPA”). The appellant testified in his defense, after the close of the State’s case and did not call any witness.

[4] Appellant filed a notice of appeal together with an application for condonation on 21 February 2023, a period of about 9 months from the date he was sentenced. Reading from his notice of appeal, appellant is asking for the conviction of rape to be set aside, grounded on the courts failure to reject the version of the appellant, accepting that of the complainant and finding that the state proved its case beyond reasonable doubt.

[5] In his affidavit for the application for condonation, the appellant alleged that he was not able to file the appeal on time, due to the fact that he was not in a sound state of mind to adequately take further steps; that he was not in a financial position to instruct a private legal practitioner and had to apply for legal aid, which was only approved on 19 June 2023. He further stated that his legal practitioner, after consultation, advised him to file an amended notice of appeal which was also out of time. The appellant further argued that he experienced logistical and communication challenges in having court documents forwarded to him and having same send back to his legal practitioner. Moreover, without making any reference to any specific issues appellant argued that he has prospects of success on appeal by regurgitating his grounds of appeal and prayed that condonation be granted.

Points *in limine*

[6] At the hearing, counsel for the respondent raised points *in limine* stating that the appellant’s notice of appeal did not comply with rule 67 of the Magistrates court

rules in that; the appellant failed to provide an adequate explanation for the delay in noting the application for leave to appeal. Secondly, it is contended that the appellant failed to deal with the prospects of success on appeal. It was further argued that the appellant attempts to address the prospects of success by regurgitating the grounds of appeal as stated in the amended notice of appeal, without discussing the reasons why the appellant has prospects of success on appeal.

[7] Ms Shilongo submitted that the notice of appeal was filed late by 9 months and that it was only in the appellant's heads of argument where appellant alleged that his rights to appeal were not explained to him, despite the fact that he was represented by counsel at the trial. **(On the point *in limine* and while referring the court to the matter of *Gaeseb v S*¹, she argued that if an appellant states that he was in a state of shock and therefore could not file an appeal in time, he must explain the nature, severity and duration of the alleged shock so as to enable the court to assess how the alleged shock disabled him from not being able to prosecute the appeal on time and also what steps he took to try and note the appeal timeously during the duration of the entire period).** It was argued that the appellant failed to meet this standard.

[8] Counsel for the respondent concluded that the appellant failed to show that he has a reasonable and acceptable explanation for the delay and that he enjoyed reasonable prospects of success on appeal. She submitted that on those grounds, the appeal should be struck.

[9] In response to the points *in limine* and in addition to what was contained in the appellant's affidavit of the application for condonation, counsel for the appellant indicated that the appellant was appealing against the conviction. He went further to state that the appellant is a lay person and just put down what he thought was proper and therefore he advised that an amended notice of appeal be filed, which was also out of time. With regards to his notice of appeal having been filed out of time, he submitted that the appellant was in a state of shock and did not have the assistance of a legal practitioner, up until the time that he was appointed to represent the appellant. Counsel further explained that they had logistical and communication

¹ HC-MD-CRI-APP-CAL-2023/00033 [2023] NAHCMD 544 (4 September 2023)

challenges, as the appellant was incarcerated at Hardap Correctional facility, making it impossible for them to consult.

[10] In considering the appellant's application for condonation and the points *in limine* raised by the respondent, I remind myself that an application for condonation should satisfy two requirements before it can succeed. These entail firstly, establishing a reasonable and acceptable explanation for the delay, and secondly, satisfying the court that there are reasonable prospects of success on appeal.²

[11] Applications for condonation are common in our jurisdiction. The requirements are thus trite. Therefore, it appears that for an application for condonation to succeed, it is important for the applicant to address the twin elements of a reasonable explanation for the delay or non-compliance together with the issue of prospects of success.³ In *Balzer v Vries*⁴ the Supreme Court pronounced itself on this matter. The court said:

'[20] It is well settled that an application for condonation is required to meet the two requisites of good cause before he or she can succeed in such an application. These entail firstly establishing a reasonable and acceptable explanation for the delay and secondly satisfying the court that there are reasonable prospects of success on appeal.'

[12] The granting of condonation is not just for the asking. The Rules of Court and court orders are to be observed to facilitate strict compliance with them to ensure efficient administration of justice.⁵ We shall accordingly adopt and apply them in the instant case.

[13] Two questions therefore arise for determination and they are: has the appellant provided an acceptable explanation for the failure to file the application timeously? Tied to this is a sub question, whether the application for condonation

² See *Balzer v Vries* 2015 (2) NR 547 (SC), *Leonard v Oshana Security Services CC* (HC-NLD-LAB-APP-AAA-2021/00006) [2023] NAHCNLD 1 (17 April 2023).

³ *Quenet Capital (Pty) Ltd v Transnamib Holdings Limited* (I 2679/2015) [2016] NAHCMD 104 (8 April 2016).

⁴ 2015 (2) NR 547 (SC) at 661 J – 552 F.

⁵ *S v Kakolo* 2004 N 7 at 10 E- C.

was timeously launched without undue delay? The second major question is whether the appellant has sufficiently dealt with prospects of success on appeal.

The explanation for the delay

[14] Regarding the first question, the explanation is that the appellant was in a state of shock, he was not financially able to appoint a legal practitioner to assist him with the drafting of the notice of appeal and therefore applied for legal aid. A legal practitioner was appointed and he advised the filing of an amended notice of appeal, which was also out of time. It was further submitted that there were logistical and communication challenges between him and his legal practitioner during the preparation of the appeal. It would appear that the conviction and sentence was meted on 21 June 2022. In this connection, the application for appeal should have been lodged within 14 days. The application for appeal was lodged on 21 February 2023.

[16] It would appear therefore that the application was made some 8 months after the date by which the application ought to have been filed. On a mature consideration of all the facts, we are of the view that the delay in this matter based on the state of shock of the appellant, financial, logistical and communication challenges without an explanation as to the nature, severity and duration for the alleged shock so as to enable the court to assess how the alleged shock disabled him from not being able to prosecute the appeal on time and also what steps he took to try and note the appeal timeously during the duration of the entire period, amounted to a bare allegation.

[17] As pointed out above, condonation should not be a rescue plan, but, rather only be resorted to when there has been a genuine error on the part of a litigant and/or legal practitioner. Financial, logistical and communication challenges cannot be classified as such. In our view, the time has now arrived that the tide of disorganisation on the part of legal practitioners and appellants should be met measure for measure. We would like to hazard to add that, the time has come for legal practitioners and appellants to diligently comply with the rules of court and not to relax in the hope that they will always apply for condonation and such applications

will be automatically granted. We accordingly find the explanation given by the appellant for the delay to be flawed.

[18] We will now proceed to deal with the second leg of the test, which deals with prospects of success.

Prospects of success

[19] The second leg of the enquiry is whether the applicant has shown that he has reasonable prospects of success on appeal. To answer this aspect of the enquiry, one has to advert to the affidavit of the appellant. This affidavit is as brief as can be. The appellant, in one short paragraph stated the following regarding the issue of prospects of success at para 17:

‘In as far as it may be necessary to deal with the merits and prospects of success on appeal, I pray that the grounds which are raised in my Amended Notice of Appeal be read as if expressly set out herein. The grounds of appeal as set out below will be extensively argued in the appeal suffice it to say that they enjoy prospects of success:’

Do the following averments meet muster in so far as they establish that the applicant has prospects of success?

[20] A reading of the above paragraph, particularly the first, we must say reflects some reluctance at worst, or at best a half-hearted attempt on the part of the deponent to deal with the pertinent issue of prospects of success. I say so for the reason that the applicant uses the words ‘In as far as it may be necessary to deal with prospects of success...’ From the authorities, it is clear that this is an issue that must be squarely and fully addressed as it weighs a lot in the decision whether or not to grant condonation. It is not one that an applicant for condonation must pay lip service to or one which it may deal with laconically or with some element of reluctance. It is an important cog in the entire enquiry.

[21] We are of the considered view that the issue of establishing prospects of success on appeal is not a question of a mere formality. An applicant must, on the

papers fully canvas the issue by making relevant allegations on the issue, stating in clear and unambiguous terms why it is claimed that the applicant has reasonable prospects of success. It does not suffice in my view, to merely make reference to the notice of appeal and pray that same be incorporated as having been part of the affidavit filed in support of the application for condonation. There should, as I have said, be depositions on oath as to why it is contended that the applicant has prospects of success and this is part of the burden that the applicant for condonation must discharge before condonation can be granted.

[22] The grounds of appeal have their place and it is not ordinarily in the application for leave, but primarily during the hearing of the appeal proper. A party which takes a short-cut in this regard and does not fully address the reasons why it claims it has prospects of success, does so only to its peril. Reasons should be advanced in the papers on the prospects of success which may include addressing some of the grounds of appeal together with reasons why it is claimed that the prospects of success are extant.

[23] It is not acceptable, correct nor fair for an applicant for condonation to merely make loosely assembled allegations and expect the court to do research for that party and in the process plough through the entire record to find for itself what may have been in the applicant's contemplation when it merely alleged it had reasonable grounds of success. Parties are expected to assiduously make their respective cases and to assist the court in making what will hopefully be the correct decision in their favour. Parties cannot and should not be allowed to abdicate their duties and responsibilities in this regard and let the courts do what is essentially and traditionally their duty. If that is allowed, then judicial officers and the parties may well trade places.

[24] The sentiments expressed by the learned Deputy Chief Justice in *Katjaimo v Katjaimo And Others*⁶ are in my view pertinent and therefore bear repeating in this matter. At para [31], the learned Judge said the following in relation to applications for condonation:

⁶ (SA 36 – 2013) [2014] NASC 12 (12 December 2014).

'Legal practitioners should not take it for granted that the court will grant applications for postponement and condonation as a matter of course. The fate of such applications is in the discretion of the court . . . To take a relaxed approach to these matters is to do one's client a great disservice'.

[25] Having regard to the papers filed of record, we are of the view that the applicant assumed a relaxed approach to condonation and thus failed to show that it has prospects of success on appeal. We cannot, in the circumstances find that this is a proper case in which to grant condonation, for lack of effort and necessary information and pertinent allegations. We are of the considered view that one of the necessary requirements has not been sufficiently dealt with or satisfied by the applicant herein.

[26] In the premises, the application for condonation is refused and the matter is struck from the roll and regarded as finalised.

P. CHRISTIAAN
JUDGE

I concur.

HC JANUARY
JUDGE

APPEARANCES

APPELLANT

Mr S. Kanyemba
Salomon Kanyemba Incorporated, Windhoek

RESPONDENT

Ms Shilongo
Of the Office of the Prosecutor-General, Windhoek