

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

LEAVE TO APPEAL

PRACTICE DIRECTIVE 61

Case Title: <i>Fabian Lazarus v The State</i>	Case No: CC 06/2022
Ruling on Application for leave to Appeal	Division of Court: Main Division
Heard before: Mr Justice Liebenberg	Delivered on: 9 March 2023
Neutral citation: <i>Lazarus v S</i> (CC 06/2020) [2023] NAHCMD 99 (9 March 2023)	
The order: <ol style="list-style-type: none">1. The application for condonation is refused.2. The matter is struck from the roll.	
Reasons for decision:	
LIEBENBERG J [1] This is an application for leave to appeal to the Supreme Court against this court's judgment delivered on 12 October 2022. The applicant was convicted on charges of murder; assault; theft; conspiracy to commit housebreaking with intent to rob (r/w s 18(2)(a) of the Riotous Assemblies Act 17 of 1956); and	

- [2] defeating or obstructing the course of justice. Applicant and his co-accused (accused 1) were sentenced on 14 November 2022.
- [3] Section 316 of the Criminal Procedure Act (the CPA) 51 of 1977 provides that an accused person, wishing to apply for leave to appeal, is required to lodge the application within a period of 14 days after sentence, which the applicant failed to comply with.
- [4] Disgruntled with the judgment, applicant lodged an application for leave to appeal dated 05 December 2022. Whereas the application is out of time by 7 days, applicant, with the help of his legal representative, Mr Engelbrecht, simultaneously filed a condonation application together with the notice of application for leave to appeal. The respondent opposes the application. Whilst conceding that the duration of the period of non-compliance is negligible, respondent is of the view that it remains a flagrant disregard of the requisites set out in s 316 of the CPA. Therefore, counsel submitted, the court need not consider the prospects of success on appeal. Moreover, where the applicant failed to address the prospects of success on appeal in the condonation application.
- [5] During oral submissions the court intimated to counsel that the court's ruling on the condonation application is reserved and invited counsel to proceed on the merits of the main application.
- [6] The respondent opposed both the condonation application and the application for leave to appeal. It is thus imperative for this court to first deal with the preliminary issue of condonation.
- [7] In his condonation application applicant states that he (from the outset) had the desire to lodge an appeal but unable to do so, for various reasons. He explains that due to financial constraints his family members were unable to assist him. Further, that he requested the assistance from the responsible person at the correctional facility, the senior correctional officer of Unit B, to apply for legal assistance from the Directorate of Legal Aid, but was simply told to wait. Applicant claims that his delay in noting the

application for leave to appeal was not deliberate but, being a lay person, he relied on the help and assistance of 'members of the prison' who failed him. He is further of the view that, based on the grounds of appeal set out in the notice, he has good prospects of success on appeal.

[8] In the absence of any accompanying confirmatory affidavit, applicant's assertions regarding the cause of the delay in filing the applications are unsubstantiated. Be that as it may, in applications of this nature our courts have become accustomed to sworn statements made by serving prisoners in which the difficulties encountered by inmates to establish contact with the Directorate of Legal Aid are set out. Experience has shown that not all allegations in this regard are without merit. In light of the relative short delay in filing the application for leave to appeal within the requisite time frame and, in view of the importance of the application, the court in this instance, would be inclined to allow a more lenient approach when deciding whether or not the explanation advanced by the applicant is reasonable and acceptable.

[9] When deciding the question of prospects of success on appeal, the court needs to consider those grounds enumerated in the applicant's notice of application for leave to appeal. The application is founded on a total of 11 grounds. Some of these grounds are mere repetitious, unclear or simply amount to conclusions reached by the drafter and therefore lacks particularity. This much has been conceded by Mr Engelbrecht, counsel for the applicant, as regards grounds 5, 7 and 11. Hence, the submissions made on behalf of the applicant, in respect of these grounds, require no further consideration.

[10] In the first, second and third grounds it is alleged that the court failed to make a clear finding of the applicant's shoeprints at the crime scene; that the prints found at the applicant's house differed; and that the investigation as regards shoeprints was of such poor quality that it adversely impacted on the applicant's case.

[11] With regards to the finding of shoeprints found leaving the crime scene, the court at para 77 of the judgment comprehensively discussed the evidence and what weight it should be accorded. Although the evidence established that a diamond shaped pattern imprint observed at the crime scene matched the diamond shaped pattern on the soles of a pair of tackies found soaked in water at the applicant's

house, it could not be said to have been identical, only similar. The court therefore could not find that one set of

prints found at the scene was indeed that of the applicant; only that there were similar features, a fact which the court was entitled to take into consideration when assessing all the evidence adduced. Neither was the applicant convicted merely on shoeprint evidence.

[12] Where the state's case is based on circumstantial evidence – as in this instance – the court is guided by established principles and rules of law in its assessment of the evidence. The approach followed in this instance is set out at para 53 and 54 of the judgment and need not be repeated. The breaking down of the evidence into individual components by the applicant in an attempt to show that the court erred in deciding those components, is not how circumstantial evidence is evaluated. This could only be done with full regard being had to the whole body of evidence presented and not in piecemeal. Moreover, where it is alleged in the charges preferred against the applicant and his co-accused that they, together with a former co-accused (Daniel) who escaped before going on trial, committed the crimes whilst acting with common purpose. The principles applicable to common purpose are set out at para 56 of the judgment.

[13] The fourth ground turns on an Adidas sandal of the deceased found with Daniel at the time of his arrest. Applicant's contention is that the court misdirected itself when relying on circumstantial evidence pertaining to the sandal when there is no direct evidence that applicant was present at the crime scene. Any assertion that the applicant could not be linked to the crime scene is a blatant disregard of proven and undisputed facts established by means of forensic evidence. Forensic evidence, as summarised in par 40, directly links the applicant to a sandal which was removed from the crime scene during the commission of the offences charged. As stated at para 77 and 78 of the judgment, the effect of DNA evidence of the applicant being found on the sandal of the deceased, in itself, constitutes real evidence that links the accused and Daniel to the crime scene. When considered together with the rest of the evidence, proving the applicant's involvement already during the planning stages of the robbery, there can be no doubt that the accused was indeed on the scene at the time of committing the offences. What the evidence further established is that the perpetrators acted in concert and with common purpose.

[14] In grounds 6 and 10 of the notice it is contended that the court faulted for not calling an alibi witness mentioned by the applicant. What is absent from applicant's assertion, is any explanation from his side

why he failed to call the said person, being his girlfriend at the time; alternatively, why an application was not made to the court to consider calling the person as a witness where the applicant was unable to do so. Applicable principles to the assessment of an alibi defence are set out at para 57 and applied to the present facts as discussed in detail at para 81 – 87 of the judgment and need not be rehashed.

[15] The eight ground implies that the court erred in finding that the state proved the case against the applicant beyond reasonable doubt in circumstances where the prosecution submitted that there was insufficient evidence before the court to convict the applicant on counts 1, 2 and 3. It will suffice to say that the trier of fact is certainly not bound by submissions made by counsel on either side. It amounts to nothing more than what the meaning of the word 'submissions' is. Though intended to assist the presiding officer in deciding the matter, it has no binding force on the adjudicator and is, at most, merely persuasive.

[16] The ninth ground relates to the acceptance of the single evidence of state witness Daphne !Nawases in the face of contradictions and the evidence of Christian Hall. What these contradictions comprise and how it impacts on the court's judgment in the end, had neither been stated in any particularity, nor addressed in submissions advanced on behalf of the applicant. In light thereof, the evidence of this witness is summarised at para 14 and evaluated at para 67 up to 74 of the judgment. For the reasons stated, Daphne !Nawases was found to be a credible witness, despite giving single evidence. The warning extended to her employers about applicant's intention to unlawfully gain access to the victims' house does not have any corroborative value, but shows consistency in her version, especially where the key to the safe was found afterwards at the crime scene – the very same key applicant said was in his possession when he sought her assistance to gain access into the home of the elderly couple.

[17] In conclusion, the grounds on which the applicant's notice for leave to appeal are founded are unmeritorious for reasons stated above and, in particular, where referenced in this court's earlier judgment. I am not persuaded that applicant has succeeded in showing on a balance of probabilities that there are prospects of success on appeal.¹ Hence, applicant's application for condonation is

¹ *S v Nowaseb* 2007 (2) NR 640.

without merit.

[18] In the result, it is ordered:

1. The application for condonation is refused.
2. 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

J C LIEBENBERG
JUDGE