REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA, MAIN DIVISION

LEAVE TO APPEAL JUDGMENT

CASE NO: CC 5/2019

In the matter between:

RYNARDT WYLIE ROELF
APPELLANT

and

THE STATE **RESPONDENT**

Neutral Citation: *Roelf v S* (CC 5/2019) [2024] NAHCMD 605 (16 October 2024)

Coram: RAKOW J
Heard on: **5 September 2024**
Delivered: **16 October 2024**

Flynote: Criminal Procedure – Leave to appeal to the Supreme Court – Sentences – Condonation for the late filing of his leave to appeal application –

Onus on the applicant – Non-compliance with rule 115(2) of High Court Rules – Prospects of success are very low – Leave to appeal application is dismissed.

Summary: This is an application for leave to appeal against the sentence of this court. The appellant was convicted of one count of murder read with the provisions of the Domestic Violence Act 4 of 2003 on 12 June 2020, in that during the period of 22 to 23 January 2018 in Karasburg, the accused unlawfully and intentionally killed Kathrina Aloysia Alexander by repeatedly beating her, throwing her on the ground and strangling her.

Held that: there is no escaping the fact that the appellant did not comply with the peremptory requirements of rule 115(2) of the rules of the High Court as regards the filing of his notice of appeal. Whether or not the appellant is legally represented at the lodging of the appeal does not matter. He must unfortunately comply with the rules of court.

Held that: the appellant indicated that he was suffering from psychological issues caused by his conviction and sentence. He, however, filed no documents or statements to support this averment, neither did he tell the court who diagnosed him or what time period this affliction was for. It is trite that an application for condonation must be filed without delay and must provide a full and detailed explanation for the entire period of the delay including the timing of the application of condonation.

Held further that: it is further the opinion of the court that the prospects of success are also very low in this matter and for these reasons the application for condonation is denied and the leave to appeal application is dismissed.

ORDER

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1. The application for condonation is refused.
2. Leave to appeal application is dismissed.

JUDGMENT

RAKOW J:

[1] The accused was convicted of one count of murder read with the provisions of the Combating of Domestic Violence Act 4 of 2003 on 12 June 2020, in that during the period of 22 to 23 January 2018 in Karasburg, the accused unlawfully and intentionally killed Kathrina Aloysia Alexander by repeatedly beating her, throwing her on the ground and strangling her. The accused filed an appeal against sentencing together with a condonation application.

Sentencing procedures

[2] He testified on his own behalf during the sentencing procedure and also called one witness, the mother of his deceased girlfriend (not the current deceased one) with whom his daughter is staying, Berthile Matroos. He testified that he was born on 29/10/1983 in Walvis Bay but never knew his father. He attended school up to standard two (grade four). When his grandfather passed away he moved to the farm to stay with his grandmother to help her. He learned about farming and stayed with his grandmother until her death. He then left the farm and moved to Karasburg and then to Windhoek. In Windhoek he worked as a driver for a builder and became a self-taught brick-layer. He eventually returned to Karasburg. He became romantically involved with the deceased in 2017. They loved each other and was good for one another initially. He feels bad for what happened to the deceased as he did not expect that she would die, but take responsibility for her death. They did not have any children together but he has a

9 year old daughter. The mother of his daughter passed away three years ago. He was an active father before he was incarcerated and stood in as a mother for his child. He further testified that she is in grade 3 and stays with her maternal grandmother but he is maintaining her. She is asking about him and where he currently is. She has no disabilities or diseases.

[3] He spoke to the family of the deceased, specifically her mother and father and asked their forgiveness. Whilst in custody in Karasburg he sent a message to them to come to him and they met in an office at the police station where he told them that the purpose of the meeting was for him to ask their forgiveness. He was arrested in January 2017 on the day that the deceased died and was released in April 2017.

[4] Berthile Matroos testified that she knows the accused from the time he was in a relationship with her daughter. They have a child together who is 9 years old. Her daughter passed away. The accused has been taking care of his child since her birth. Whenever he did some work, he would call and ask what the child needed and then buy some things. The child resides with her and her husband. She and the accused have a good relationship. She continued to testify that the child is asking what happened to her father and when he is to return and she does not know how to answer the child. Her father's absence will have a huge impact on her. The accused did not stay with them but would come around and even eat with them. The child is staying with her although the accused asked for her to come and stay with him, she did not want to allow it. She is selling some things to generate money and her other children also contribute to the expenses of the household.

[5] The accused has no previous convictions. During his submission on behalf of the accused, Mr Haoseb, the legal representative of the accused during the trial, pointed out that the court must strike a balance between the crime, the offender and the interest of society, and guard against over or under

emphasizing these elements. This is the first time that the accused offended and he was gainfully employed when he still enjoyed his freedom. Although he had no formal vocational training, he taught himself the art of welding and brick laying. He is not a lazy vagabond who is an unnecessary drain on the taxpayer. The accused grew up without a father figure and the court is urged to consider the effect thereof on him.

[6] He has a minor dependant whose interest should not be overlooked. Court is the upper guardian of all children and should take their interest into account when deciding on an appropriate sentence. The accused is not an absent father but an interested father and investing in the life of his daughter. It is further unclear as to whether the elderly caregivers are up to the task of looking after the child in the approaching future.

[7] The court is also asked to take into account that the accused showed genuine remorse evident from the fact that he asked to speak to the parents of the deceased not long after the incident and asked their forgiveness. He further did not shy away from taking the court into his confidence and to testify in his own mitigation before this court.

[8] On behalf of the State it was argued by Mr Itula that murder is one of the most serious offences and the accused and the deceased were in a domestic relationship, which with reference to *S v Bohitile*[1] is seen as an aggravating circumstance. As to whether the fact that the type of intent the accused had when killing the deceased (*dolus eventualis*) should be seen as a mitigating circumstance, the State argued that it is not necessarily the case. It should depend on the attack on the deceased.[2] It should be taken into account that the accused kicked the deceased, strangled her and threw her on the floor.

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[1] *S v Bohitile* 2007 (1) NR 137 (HC).
[2] See *State v Joseph Gerson Gariseb* Case SA6/2014 delivered 12 May 2016 ; *S v De Bruin* 1968 (4) SA 505.

[9] This matter arose some amount of indignation, the accused declares his undying love for the deceased and then kills her. In *S v Katjjivi*[3] the court said that in serious cases the personal circumstances of an accused move to the background when considering an appropriate sentence but it does not mean that no weight is attached to it. In these instances a lengthy custodial sentence is unavoidable, things like that he is employed and takes care of his daughter takes the back seat to the interest of society and the seriousness of the offence. The interest of the deceased should also be considered although there is nothing this court can do that will bring back the life of the deceased, it is necessary to show that her life mattered.

Guiding the sentencing process.

[10] In our law there are a number of principles crystalized through various decisions of our courts which play a role or influence in the sentencing process. One of the cases that today is still as applicable as it was in 1975 is the case of *S v Rabie*[4] where Jomes JA stated seven general guidelines for consideration during sentencing:

‘(a) "*Let the punishment fit the crime - the punishment fit the crime*", sang the Mikado in 1885, echoing the British judicial sentiment of those days. (W.S. Gilbert was a barrister, who retained his interest, though not his practice, in the Courts). The couplet is still quoted in Britain, at any rate in relation to the retributive aspect of punishment; see Criminal Law of Scotland, by G.H. Gordon (1967), p. 50, line 3.

(b) That used to be the approach in this country, too; see, e.g., *R. v Motsepe*, 1923 T.P.D. 380 in fin.: *"The punishment must be made to fit the crime."* However, in 1959 this Court pointed out that the punishment should fit *"the criminal as well as the crime";* see *R. v Zonele and Others*, 1959 (3) SA 319 (AD) at p. 330E.

(c) The interests of society in punishment were noted in *R. v Karg,* 1961 (1) SA 231 (AD)

[3] *S v Katjjivi* 01/2016 delivered 9/9/2016 by Liebenberg J.
[4] *S v Rabie* 1975 4 SA 855.

at p. 236A - B, and *S. v Zinn,* 1969 (2) SA 537 (AD) at p. 540G.

(d) Then there is the approach of mercy or compassion or plain humanity. It has nothing in common with maudlin sympathy for the accused. While recognising that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society; see *S. v Narker and Another*, 1975 (1) SA 583 (AD) at p. 586D. That decision also pointed out that it would be wrong first to arrive at an appropriate sentence by reference to the relevant factors, and then to seek to reduce it for mercy's sake. This was also recognised in *S. v Roux,* 1975 (3) SA 190 (AD).

(e) This quality of mercy or compassion is not something that has judicially cropped up recently. It was first mentioned in this Court some 40 years ago, by BEYERS, J.A., in *Ex parte Minister of Justice: In re R. v Berger and Another,* 1936 AD 334 at p. 341:

"*Tereg word gesê dat na skuldigbevinding die Regter in 'n ander sfeer verkeer waar die oplê van die straf gepaard moet gaan met oordeelkundige genade en menslikheid ooreenkomstig die feite en omstandighede van die geval."*

(In passing, BEYERS, J.A., pioneered the use of Afrikaans in the judgments of this Court; see *Souter v Norris*, 1933 AD 41 at p. 48 (dated 27 October 1932); followed by WESSELS, C.J., in *R. v Gertenbach*, 1933 AD 119 (8 March 1933). For an early judgment in Afrikaans by VAN DEN HEEVER, J. (subsequently a pillar of this Court), see *Ex parte Pieterse*, N.O., 1933 S.W.A. 4 (6 March 1933)).

Since then, the approach of mercy has been recognised in several decisions in this Court, with a number of Judges, in all, concurring; see *S. v Harrison*, 1970 (3) SA 684 (AD) at p. 686A:

"Justice must be done, but mercy, not a sledgehammer is its concomitant";

S. v Sparks and Another, 1972 (3) SA 396 (AD) at p. 410G; S. v V., 1972 (3) SA 611 (AD) at p. 614H*; S. v Kumalo*, 1973 (3) SA 697 (AD) at p. 698A; *S. v De Maura*, 1974 (4) SA 204 (AD) at p. 208H; *S. v Narker and Another*, 1975 (1) SA 583 (AD) at p. 586. And does not Portia refer to the unstrained quality of mercy "*which season's justice*", in a

memorable passage worthy of judicial study? (The Merchant of Venice, Act IV, Scene 1 - a court of justice).

(f) The main purposes of punishment are deterrent, preventive, reformative and retributive; see *R v Swanepoel*, 1945 AD 444 at p. 455. As pointed out in Gordon, Criminal Law of Scotland, (1967) at p. 50:

"*The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation... The other theories, reformative, preventive and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment."*

It is therefore not surprising that in *R. v Karg*, 1961 (1) SA 231 (AD) at p. 236A, SCHREINER, J.A., observed that, while the deterrent effect of punishment has remained as important as ever,

"the retributive aspect has tended to yield ground to the aspects of prevention and correction".

(g) it remains only to add that, while fair punishment may sometimes have to be robust, an insensitively censorious attitude is to be avoided in sentencing a fellow mortal, lest the weighing in the scales be tilted by incompleteness. Judge Jeffreys ended his days in the tower of London.

(h) To sum up, with particular reference to the concept of mercy -

(i) It is a balanced and humane state of thought.

(ii) It tempers one's approach to the factors to be considered in arriving at an appropriate sentence.

(iii) It has nothing in common with maudlin sympathy for the accused.

(iv) It recognises that fair punishment may sometimes have to be robuse.

(v) It eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger.

(vi) The measure of the scope of mercy depends upon the circumstances of each case."'

[11] In *S v Sparks and Another*,[5] the principles of punishment was summarized that punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances. These factors should be considered together with the main purposes of punishment in mind as reiterated in *S v Tcoeib*[6], being deterrent, preventative, reformative and retributive. These four themes of sentencing is the cornerstones of a solid criminal justice sentencing system and should therefore be given weight in any sentencing procedure before arriving at a suitable sentence.

[12] It is further true that in sentencing, courts are called upon to strike a balance between the competing factors of sentencing in order to deliver sentences commensurate to the offences on which the accused is convicted. In so doing, it may sometimes be unavoidable to emphasize one factor at the expense of the others.[7]

Condonation application

[13] In terms of the rules of the High Court the applicant must request leave to appeal against the judgment if such leave is not asked at the time of the judgment within 15 days after the date of the order appealed against. In this instance the appellant took three years seven months and four days to file his notice for leave to appeal. He therefore seeks condonation for the late filing of his leave to appeal application.

[14] In *S v Albertus*[8] the court held that it is trite that an extension of the time within which to file a notice of appeal is an indulgence which will be granted on good cause shown for non-compliance and upon the existence of good prospects of success on appeal. The court further stated that it is axiomatic that an

[5] *S v Sparks and Another* 1972 (3) SA 396 (A) B at 410H.
[6] *S v Tcoeib* 1991 NR 263.
[7] *S v Van Wyk* 1993 NR 426 (SC).
[8] *S v Albertus* 2011 (1) NR (SC) at page 160.

applicant must give a reasonable explanation for the delay to file a notice of appeal.

[15] The court will normally condone non-compliance with its rules where the applicant, firstly provides a reasonable and acceptable reason for failing to comply with the rules, and secondly where he or she shows that they have reasonable prospects of success on appeal.[9]

[16] In *S v Kohler*[10] the court made the following ruling:

'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 mail application (for leave to appeal); secondly, applicant has to show that he has propsects 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 an appeal, a court may condone the non-compliance. [11]
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.[12]'

[17] In *Langerman v The State*[13] the court said the following:

'When considering the point *in limine*, the court is alive to the fact that the appellant at the time of drafting the notice of appeal acted in person as a lay

[9] *Swanepoel v Marais and others* 1992 NR 1 and *S v Nakapela* 1997 NR 184 (HC).
[10] *S v Kohler* (CC21/2017) [2020] NAHCMD 96 (16 March 2020).
[11] *S v Nakale* 2011 (2) NR 599 (SC) at page 603.
[12] *S v Gowaseb* 2019 (1) NR 110 (HC) at page 112.
[13] *Langerman v The State* (HC-MD-CRI-APP-CAL-2020/00025) [2021] NAHCMD 254 (26 May 2021).

person, and that the court in such circumstances should approach the matter with some leniency.[14] There are however limitations to this approach as stated in *Boois v The State*[15] at para.4 where it was said that this proposition cannot be taken too far 'as to cover … situations where peremptory statutory provisions has not been complied with'. The relevant statutory provision in this instance is Rule 67(1) of the Magistrates Court Rules which requires of a convicted person desiring to appeal, to lodge with the clerk of the court 'a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based'. The rule is a peremptory requirement as regards the grounds on which the appeal is based namely, that it must be *clear* and *specific*.

Discussion

[18] The court is of the view that the appellant does not proffer a reasonable or acceptable explanation for his late filing of the leave to appeal application. His non-compliance is a fragrant disregard of the rules and therefore there exists no prospects of success in his appeal.

[19] There is no escaping the fact that the appellant did not comply with the peremptory requirements of rule 115(2) of the rules of the High Court as regards the filing of his notice of appeal. Whether or not the appellant is legally represented at the lodging of the appeal does not matter. He must unfortunately comply with the rules of court.

[20] The appellant indicated that he was suffering from psychological issues caused by his conviction and sentence. He however file no documents or statements to support this averment, neither did he tell the court who diagnosed him or what time period this affliction was for. It is trite that an application for condonation must be filed without delay and must provide a fill and detailed explanation for the entire period of the delay including the timing of the

[14] *S v Ashimbange* 2014 (1) NR 242 (HC).
[15] *Boois v The State* CA 76/2014 [2015] NAHCMD 131 (8 June 2015).

application of condonation.[16]

[21] It is further the opinion of the court that the prospects of success are also very low in this matter and for these reasons the application for condonation is denied and the leave to appeal application is dismissed.

[22] In the result, it is ordered that:

1. The application for condonation is refused.
2. Leave to appeal application is dismissed.

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E RAKOW

Judge

APPEARANCES:

[16] See *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) at para 5.

Applicant: R W Roelf
In Person

Respondent: T Iitula
Of Office of the Prosecutor-General, Windhoek