



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC 10/2011

In the matter between:

**IGNATIUS PETU MURUTI**

**APPLICANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Muruti v The State* (CC 10/2011) [2014] NAHCNLD 2 (15 January 2014)

**Coram:** LIEBENBERG J

**Heard:** 13 January 2014

**Delivered:** 15 January 2014

**Flynote:** **Criminal procedure** – Appeal – Application for leave to appeal in terms of s 316(1)(b) – Court found no reasonable prospects of success on appeal.

Condonation - Notice of appeal filed outside prescribed time limit – In view of no reasonable prospects of success on appeal – Application refused.

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**ORDER**

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The application for condonation of late filing of the notice of appeal is refused.

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**JUDGMENT**

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***Application for Leave to Appeal***

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**LIEBENBERG, J.** [1] At the end of a criminal trial applicant was convicted on a charge of murder (having acted with direct intent) and a charge of assault with intent to do grievous bodily harm. Applicant was sentenced on the 31<sup>st</sup> of January 2012 on the first count to 18 years' imprisonment of which 5 years was suspended on condition of good conduct whilst on the second count he was sentenced to 1 year' imprisonment.

[2] Applicant lodged his application for leave to appeal on the 3<sup>rd</sup> of April 2012, clearly outside the prescribed time limit of 14 days. Applicant simultaneously applied for condonation and in a supporting affidavit several reasons are advanced explaining the delay. These *inter alia* are that the applicant is a lay person and whereas the court failed to explain to him the procedure of appeal against his conviction and sentence, he was late in filing the application. Neither did he have anyone to assist him in preparing his application.

[3] Having been represented at the trial by Ms *Mainga*, applicant is silent as to whether or not he conveyed his dissatisfaction about his conviction and sentence to his then legal representative and what advice or assistance he was given, if any, regarding the lodging of an appeal. Neither does he say

how and when it came to his knowledge that he could appeal his conviction and sentence.

[4] In terms of s 309(2) of the Criminal Procedure Act, 51 of 1977 this court is competent to condone the applicant's failure to file a notice of appeal within the prescribed time limit and will usually condone such failure if the applicant provides an acceptable explanation and his prospects of success on appeal are reasonable.<sup>1</sup>

[5] Except to say that he is a lay person who experienced some problems in lodging an appeal, applicant failed to explain exactly what he did to overcome the obstacles he was facing at the time. I shall find in his favour that he did apply for legal aid and that his application was refused. From a reading of the notice of appeal and supporting affidavit it is evident that the applicant, being a lay person, barely managed to draw up his papers. Although the explanation for the delay in filing his notice of appeal falls short from being satisfactory in material respects, the granting of condonation or otherwise, in my view, will depend on the prospects of success on appeal, to which I now turn.

[6] Prior to oral submissions being heard I enquired from the applicant whether he also seeks leave to appeal against his conviction because, from the grounds stated in para 1 of the notice, he says that he did not intend committing the crimes in question and that the court ignored his statement (evidence). Applicant however informed the court that he only sought leave to appeal against both sentences imposed, and not his conviction in respect thereof.

[7] From the notice itself there appear to be no clear and specific grounds of appeal except perhaps in para 2.5 where it is contended that the court over-emphasised deterrence as a sentencing objective, whilst at the same time ignoring the mitigating factors. During oral submissions the applicant confirmed that this would be the only ground relied upon for purposes of this application.

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<sup>1</sup>*Penncock and Another v Attorney-General, Natal* 1958(3) SA 875 (NPD) at 880C-D.

[8] Mr *Lisulo*, appearing on behalf of the respondent, opposes the application and submits that the application is without merit and that there are no reasonable prospects of success on appeal.

[9] The court in its reasons on sentence referred to the triad of factors which must be considered when sentencing and in addition, the court is enjoined to consider the element of mercy (para 2). As for the objectives of punishment it was pointed out that punishment has to be determined in the circumstances of the case and whereas equal weight need not be given to the often competing factors, that one or more factors may be emphasised at the expense of the others. The discretion the court has in this regard must obviously be exercised judiciously and what the court is required to do is to impose a balanced sentence without over- or under-emphasising any of these factors (para 3). In my view the court in the present instance followed this approach.

[10] The personal circumstances of the applicant are set out in para 4 of the judgment and were given due consideration when deciding what sentence would best serve the interests of, not only the applicant, but also that of society. The applicant's youthfulness was found to be a mitigating factor counting in his favour. The court was guided by existing case law on sentence in respect of juveniles and concluded that, in the present case, it could not be excluded that applicant's immaturity contributed to the commission of the offence, thus constituting a mitigating factor (para 9 – 11).

[11] Despite applicant's youthfulness the court was of the view that it would not be in the interest of justice to impose a wholly suspended sentence and that the wrong impression might be gained that juveniles, making themselves guilty of serious crimes, would go unpunished. Deterrence was thus a sentencing objective while the court also acknowledged that there were good prospects of rehabilitation. This prompted the court to impose a partly suspended sentence. Proper consideration was given to counsel's submission about a wholly suspended sentence being imposed, but the circumstances of this case do not justify such course (para 13). Regard was further had to the

period of almost two years the applicant had been in custody pending finalisation of his case.

[12] Having considered the application objectively, I am not satisfied that the applicant has shown that there is a reasonable prospect of success on appeal and that the Supreme Court may take a different view about the sentences imposed by this court on both counts.

[13] In the result:

The application for condonation of late filing of the notice of appeal is refused.

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**JC LIEBENBERG**  
JUDGE

APPEARANCES

APPLICANT

In person

RESPONDENT

D Lisulo  
Of the Office of the Prosecutor-General,  
Oshakati