

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

RULING

APPLICATION FOR LEAVE TO APPEAL

Case no: CC 03/2019

In the matter between:

STEPHANUS PAULUS

APPLICANT

v

THE STATE

RESPONDENT

Neutral citation: *Paulus v S* (CC 03/2019) [2022] NAHCNLD 104 (30 September 2022)

Coram: SALIONGA J

Heard: 08 September 2022

Delivered: 30 September 2022

Flynote: Criminal Procedure – Application for leave to appeal– Clear and specific grounds- New grounds not allowed to be introduced during hearing- Application challenges both conviction and sentence- Application drafted in layman language- Duty of lawyer to file proper application- Nullity- Points in *limine* upheld and application struck from the roll- Accused has the right to appeal.

Summary: The applicant was convicted for murder and rape and sentenced to 25 years imprisonment for murder and 15 years for rape. He is represented by Counsel who opted to rely on the application for leave to appeal that was drafted by the applicant. The averments in the application attacks both the Judge's findings on the convictions and sentences although he specifically applied for leave to appeal against sentence. Counsel for the respondent raised the points *in limine* to which counsel for the applicant failed to address. Respondents in his point *in limine* attacked the new grounds introduced and requested the court to consider grounds on the application for leave to appeal and prospects of success only on sentence. Surprisingly counsel for the applicant abandoned all challenges/arguments in the heads of arguments pertaining to the convictions and asked the court to proceed with the application for leave to appeal against sentence only.

Held: that an application for leave to appeal is the foundation of the applicant's notice of leave to appeal. It should constitute what the applicant seeks leave to appeal against from this Court in the form of either findings on points of law or findings of facts or findings against both points of law and of facts.

Held also: that Applicant is entitled to bring his case before the Court and to have it amply adjudicated on the merits only with a proper notice and application for condonation.

ORDER

1. The points *in limine* are upheld.
2. The application for leave to appeal is hereby struck from the roll.
3. This application should only be re-enrolled on a fresh and proper application accompanied by an application for condonation.
4. Copies of this judgment to be served on the Director: Legal Aid Directorate and the Director of the Law Society.

RULING
(Application for Leave to Appeal)

SALIONGA, J:

[1] In this application, the applicant through her legal representative, Ms. Boois, is seeking leave to appeal to the Supreme Court against the decision (s) of this court made at trial. Mr. Shileka is representing the respondent (State). It is not really clear from the papers filed by both the applicant and his counsel whether the appeal is against the conviction or sentence or both as will become evident during this judgement. I must however express my dismay that the documents filed are regrettably in a pitiful state and in my view Counsel for the applicant could have done a much better job.

[2] The brief background of this matter is that the applicant was charged with two counts namely; count 1 Murder and Count 2 Rape read with the provisions of the Combating of Rape Act, 8 of 2003. On 22 November 2019 he was convicted for count 1- murder with direct intent on his own plea of guilty and subsequently following a trial he was also convicted for Rape read with the provisions of the Combating of Rape Act, 8 of 2003 on 17 August 2020.¹ The applicant was on 16 September 2020 sentenced to 25 years imprisonment on count 1 and 15 years imprisonment on count 2.² The applicant's application for leave to appeal is dated 16 November 2020, stamped by the Correctional Facility on 24 November 2020 and filed with the Office of the Registrar of the High Court on 22 January 2021.

[3] It must be pointed out that the applicant's application for leave to appeal was filed out of the prescribed period and both the application for leave to appeal and application for condonation were filed by the applicant himself. The following is an extract of the purported application for leave to appeal that the applicant and his counsel are relying upon and I quote it verbatim:

¹ *S v Paulus* (CC 3/2019) [2020] NAHCNLD 108 (17 August 2020)

² *S v Paulus* (CC 3/2019) [2020] NAHCNLD 130 (16 September 2020)

‘NOTICE OF APPEAL

Application for appeal on the sentence I received in the high court of Oshakati on case no: CC 3/2019

‘I was convicted on the 16 September 2020 at Oshakati high court on murder and rape case. I am appealing the sentence based on the following grounds:

The appellant is humbly requesting the court of law to reduce the sentence and allow him the option of fine due to that , the killing of the deceased was unintentional neither planned , It was a sudden incident and therefore unfortunate. The appellant is a disable, old, mentally disturbed and traumatised; the sentence is too harsh under his condition.

The family of the appellant have deeply regretted the killing and remorously offered the deceased family a sum of money equivalent to 15 (fifteen) cattle on traditional court value. In the case of rape the appellant was not aware that the victim was under age and it was not the first time they were engaged in sexual intercourse with the victim, meaning an agreement was reached.’

Dated at Evaristus Shikongo correctional facility on this 16 November 2020.’(SIC)

[4] An application for leave to appeal is the foundation of the applicant’s notice of leave to appeal. It should constitute what the applicant seeks leave to appeal against from this Court in the form of either findings on points of law or findings of facts or findings against both points of law and of facts. Applications for leave to appeal are governed by section 316³ of the Criminal Procedure Act, 51 of 1977, Rule 115⁴ and Practice Directive 38.⁵ Specifically, section 316 (2) of the Criminal Procedure Act provides that:

‘Every application for leave to appeal shall set forth clearly and specifically the grounds upon which the accused desires to appeal: Provided that if the accused applies

³ **316.** (1) An accused convicted of an offence before the High Court of Namibia may, within a period of fourteen days of the passing of any sentence as a result of such conviction or within such extended period as may on application (in this section referred to as an application for condonation) on good cause be allowed, apply to the judge who presided at the trial or, if that judge is not available, to any other judge of that court for leave to appeal against his or her conviction or against any sentence or order following thereon (in this section referred to as an application for leave to appeal), and an accused convicted of any offence before any such court on a plea of guilty may, within the same period, apply for leave to appeal against any sentence or any order following thereon.

⁴ Rules of the High Court of Namibia: High Court Act, 1990 (2014)

⁵ High Court Practice Directions: Rules of High Court of Namibia, 2014,

verbally for such leave immediately after the passing of the sentence, he shall state such grounds and they shall be taken down in writing and form part of the record.'

[5] At hearing counsel for the respondent in the main as well as the supplementary heads of argument took issue with what they termed 'introduction of new grounds of appeal on conviction by the applicant'. I do agree with Mr. Shileka's submission in that new grounds of appeal are not allowed to be introduced outside the initial notice of appeal or application for leave to appeal. In referring this court to *Nghipunya v S*⁶, Mr. Shileka argued that this court should only consider grounds which are covered in the notice of application for leave to appeal.

[6] On her part and in response to the points *in limine* raised, Ms. Boois, shockingly informed the court that she did not have instructions do deal with points *in limine*. It is not clear what counsel for the defence meant by saying she did not have instructions to deal with the points *in limine*. It is also not clear at what stage during the hearing Counsel for the applicant got instructions to abandon the challenge against convictions. A closer look at the applicant's application for leave to appeal indicates that he attacks both the convictions and sentences. On the murder count for example he specifically states that 'the killing of the deceased was unintentional neither planned, It was a sudden incident and therefore unfortunate.' and on the rape count applicant states that 'the appellant was not aware that the victim was under age and it was not the first time they were engaged in sexual intercourse with the victim, meaning an agreement was reached'. Therefore for counsel to state that she did not have authority to argue on the point *in limine* is misplaced. A *point in limine* is a technical legal point, raised prior to getting into the merits of the case and Counsel cannot selectively choose to or not to address it because it forms and remains part of the issues that the court has to decide on.

[7] It is common cause that the notice of appeal was drafted by a layman who had no legal knowledge. It is also common cause that counsel was appointed to assist applicant way before the matter was set for hearing. In fact Mr. Edegware had already come on record on 05 April 2022 and the matter was only heard on 08 September 2022. Counsel had sufficient time to consult, go through the application that was drafted by the applicant, withdraw it and file a fresh and proper application.

⁶ *Nghipunya v S* (HC-MD-CRI-APP-CAL-2020/00077) [2020] NAHCMD 491 (28 October 2020)

Regrettably, counsel did not do what she was required by law to do resulting in uncertainties' with regards to what the applicant seeks leave to appeal against. This to me is a dereliction of duty which should not be overlooked and one wonders whether the instructing office, in this case the Directorate of Legal Aid is aware of such conduct.

[8] Apart from counsel's dereliction of her duties, I further noticed that the grounds of this application are falling way below the standard as set out in section 316 (2) of the Act above.⁷

[9] The law governing a notice of appeal (and also notice of application for leave to appeal) is trite. The grounds of appeal in a notice of application for leave to appeal must be clearly and succinctly set out in unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. As Strydom AJP in *S v Gey van Pittius*,⁸ explained at 36H:

'The purpose of grounds of appeal as required by the Rules is to apprise all interested parties as fully as possible of what is in issue and to bind the parties to those issues. (See further in this respect the judgment of my Brother *Frank* AJ in the matter of *S v Wellington* (1990 NR 20) and the cases referred to therein.)' (Emphasis Added) Similarly the court in *S v Kakololo*⁹ at 8F-9A, explains the above principles as follows:

'The noting of an appeal constitutes the very foundation on which the case of the appellant must stand or fall (*S v Khoza* 1979 (4) SA 757 (N) at 758B). It serves to inform the trial magistrate in clear and specific terms which part of his or her judgment is being appealed against, what the grounds are on which the appeal is being brought and whether they relate to issues of law or fact, or both...

The notice also serves to inform the respondent of the case it is required to meet and, regard being had to the record and the magistrate's reasons, whether it should concede or oppose the appeal. Finally, it crystallizes the disputes and determines the parameters within which the Court of Appeal will have to decide the case (Compare: *S v Maliwa and Others* 1986 (3) SA 721 (W) at 727; *S v Nel* 1962 (1) SA 134 (T) at 135A; and *R v Lepile* 1953 (1) SA 225 (T) at 230H.)

⁷ *ibid*

⁸ *S v Gey Van Pittius and another* 1990 NR 35 (HC); *S v Wellington*, 1990 NR 20 (HC) at 22 H-I.

⁹ *S v Kakololo* 2004 NR 7.

Consequently, it also serves to focus the minds of the Judges of Appeal when reading the (sometimes lengthy) record of appeal, researching the law in point, considering argument and adjudicating the merits of the appeal.’

(Emphasis added)

[10] Respondent in his oral submissions stated that the applicant’s first ground in the notice of appeal/application for leave to appeal could be construed as a proper ground and requested that the court should consider it for purposes of this application. I disagree with the above submission because the applicant in the notice of application states that ‘the appellant is a disable, old, mentally disturbed and traumatised and the sentence is too harsh under his condition.’ Adjudicating this application only on harshness of the sentence thereof is likely to deprive applicant of his right to appeal against both conviction and sentence as stated in the notice. It is trite law that applicant is bound by his or her notice of appeal/application for leave to appeal and that he or she is constrained to argue his or her appeal within the four corners of that notice or application.

[11] In *Nghipunya v S*¹⁰ at para 23 the following was stated:

‘Therefore, with deference to counsel for the appellant, it is a trite principle of law and practice of this court that an appellant cannot introduce additional grounds of appeal in his/her heads of argument or at the hearing, which has not been encapsulated in the notice of appeal. This court has held in *Avital Ben Birovsky and The State*¹¹ at p.4 para 12:

“Any such submission that is not based on one or more of the appellant’s grounds of appeal cannot be entertained because the grounds of appeal have not been amended and have not been submitted to the magistrate for his consideration.” Therefore the stance taken up by Counsel is not permissible in law and had failed/prejudiced the applicant in this matter.

[12] The applicant in his application, apart from repeating his mitigation and making some general observations surrounding his conviction and sentence, has not clearly and specifically pointed out how this court misdirected itself on point law or fact or both law and fact save for mentioning that due to his condition the sentence is too harsh.

¹⁰ *Nghipunya v S* (HC-MD-CRI-APP-CAL-2020/00077) [2020] NAHCMD 491 (28 October 2020)

¹¹ *Avital Ben Birovsky and The State* CA 08/2010 NAHC delivered 19 October 2010.

Certainly it is not for this court to try and interpret what applicant meant by that, especially where he is represented by Counsel. It is a different case altogether if applicant is a self-actor. Again, if counsel had no instructions as she wants this court to believe, why was it necessary to deal with arguments on conviction in the heads of arguments?

[13] That being the case and despite the fact that on the first count accused pleaded guilty and thus cannot appeal against such a conviction,¹² it is difficult for this court to ignore the allegations surrounding the conviction on the second count if the issue was mentioned in the initial notice of application for leave to appeal. With proper legal advice given the application should have been withdrawn and a fresh and proper application together with its application for condonation should have been filed instead of proceeding on the notice or application which is defective and bad in law. A failure to rectify the defective application for leave to appeal denotes that such notice/application is a nullity which cannot be corrected.

[14] In that regard, what is before court is a defective application for leave to appeal which this court cannot adjudicate on and any attempt to consider this application on merits is likely to prejudice the applicant for the reasons stated above. On that basis the points in *limine* raised has to be upheld.

[15] It must however be made clear that despite a finding on the application for leave to appeal, that fact alone (the defect) cannot and should not bar the re-enrollment of this application in future. Applicant is entitled to bring his case before the Court and to have it amply adjudicated on the merits only with a proper notice and application for condonation.

[16] In the result, I make the following order:

1. The points *in limine* are upheld.
2. The application for leave to appeal is hereby struck from the roll.
3. This application should only be re-enrolled on a fresh and proper application for leave to appeal accompanied by an application for condonation.

¹² See section 316 above

4. Copies of this judgment to be served on the Director: Legal Aid Directorate and the Director of the Law Society.

J. T. SALIONGA

Judge

APPEARANCES:

APPLICANT: Ms. B. Boois
BB Boois Attorneys, Ondangwa
(Instructed by Legal Aid)

RESPONDENT: Mr. R. Shileka
Office of the Prosecutor-General, Oshakati