

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
DIVISION, OSHAKATI
LEAVE TO APPEAL RULING



NORTHERN LOCAL

PRACTICE DIRECTION 61

Case Title: <i>Hamukushi Joseph Max Samuel v The State</i>	Case No: CC 03/2020
	Division of Court: Northern Local Division
Heard before: Mr Justice Munsu	Heard on: 21 November 2024
	Delivered on: 05 December 2024
Neutral citation: <i>Samuel v S</i> (CC 03/2020) [2024] NAHCNLD 147 (05 December 2024)	
IT IS ORDERED THAT: <ol style="list-style-type: none">1. The application for condonation for the late filing of the appeal is granted.2. The application for leave to appeal to the Supreme Court is granted in respect of the sentence imposed on count 2.3. The matter is finalised and removed from the roll.	
Reasons for decision:	
MUNSU J	

[1] The applicant was indicted in this court on two counts, namely:

Count 1: House breaking with intent to murder and murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003.

Count 2: Attempted murder.

[2] At the end of his trial, he was found guilty on both counts, and sentenced to life imprisonment in respect of count 1 and 15 years on count 2.

[3] He approached the court for leave to appeal to the Supreme Court against the sentence imposed on count 2.

Condonation

[4] The applicant was sentenced on 23 July 2021. He filed his notice of appeal out of time, only in November 2021. In terms of s 316(1) of the Criminal Procedure Act, 51 of 1977, he ought to have done so within 14 days. Hence, he simultaneously applied for condonation.

[5] He attributes the late filing of the appeal to his lack of knowledge of the law, lack of education and inability to read and write. The applicant further explains that he only managed to be assisted by someone unidentified during the period 01 to 08 November 2021.

[6] The above reasons are not convincing, more so when the applicant failed to deal with the prospects of success. In the exercise of the discretion whether to condone the late filing of the application for leave to appeal, the court ought to take into account the tenets of fairness and justice to the parties.¹ For the view I take having considered the matter, and having heard arguments, I reluctantly grant condonation, notwithstanding that the applicant assumed a relaxed approach in his application.

Grounds of appeal

¹ See *Jacob v State* (CA 198/2007) [2012] NAHCMD 55 (7 November 2012).

[7] The grounds of appeal can be summarised as follows:

- a) The court failed to consider that the applicant was a first offender.
- b) The court failed to consider that the applicant handed himself to the police and reported the incident.
- c) The sentence imposed was harsh and without due consideration of the mitigatory factors of the applicant.
- d) The court failed to consider that the applicant pleaded guilty from the beginning and did not waste the court's time.

[8] I am indebted to counsel for their helpful submissions. I do not wish to regurgitate what they stated, except where necessary.

[9] As the judgments on conviction and sentence would show, it is not correct that the applicant pleaded guilty, nor was he a first offender. Similarly, the ground that he handed himself to the police is of no relevance. The reason is that it was not part of his case, nor did he raise it in mitigation. The evidence presented was that the police were tracking him, and upon realising this, he ran to the police station. The record further reflects that the police were aware of the matter not because of the applicant but because it was reported by the family.

[10] As pointed earlier, the applicant seeks leave to appeal only against the sentence imposed in respect of count 2. He initially took issue with the fact that the court did not order the sentence imposed in respect of count 2 to run concurrently with the sentence imposed on count 1. However, when s 99 of the Correctional Service Act, 9 of 2012 was pointed out to him, he conceded. The said provision states that:

'(2) Where a person sentenced to life imprisonment or who has been declared a habitual criminal is sentenced to any further term of imprisonment, such further term of imprisonment is served concurrently with the earlier sentence of life imprisonment or declaration as a habitual criminal, as the case may be.'

[11] As a result, the applicant acknowledged that his position regarding the sentence he would have to serve would remain unchanged even if the Supreme Court were to interfere with the sentence imposed on count 2.

[12] The only remaining issue relates to the duration of the sentence. To this end, it was submitted on behalf of the applicant that the sentence imposed in respect of count 2 is shockingly inappropriate, and that an appeal court will be justified to interfere with such a sentence. It was further submitted that the court over-emphasised the seriousness and prevalence of the offence and the interest of society over the personal circumstances of the applicant. Counsel emphasised the need for uniformity in sentencing.

[13] On the other hand, it was submitted on behalf of the respondent that the seriousness of the offence and the interest of society far outweighed the interests of the applicant.² Counsel reiterated the factors and circumstances which were taken into account by the court in sentencing. These considerations are well captured in the court's judgment on sentence.

[14] In considering the application for leave to appeal, the court must decide whether there exist reasonable prospects of success on appeal. Reasonable prospects of success on appeal means that the court seized with an application for leave to appeal must be satisfied that, on the facts or conclusions of the law involved, the court of appeal may take a different view and come to a different conclusion.³ The mere fact that a case is arguable on appeal is insufficient, as there must be substance in the argument advanced on behalf of the applicant.⁴

[15] Although this court believes that it exercised its discretion properly, I am of the view that there are reasonable prospects that another court may arrive at a different conclusion.

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

1. The application for condonation for the late filing of the appeal is granted.
2. The application for leave to appeal to the Supreme Court is granted in respect of the sentence imposed on count 2.
3. The matter is finalised and removed from the roll.

Judge's signature:

Note to the parties:

² Reference was made to *S v Van Wyk* 1993 NR 426.

³ *S v Ningisa and Others* 2013 (2) NR 504 (SC), *S v Tcoeib* 1992 NR 198 (HC).

⁴ See *S v Hauulu* (CC 06/2018) [2023] NAHCNLD 33 (21 April 2023).

D Munsu Judge	None
Counsel:	
Applicant	Respondent
J Greyling Jnr of Greyling & Associates Oshakati	S Petrus Of The Office of the Prosecutor-General Oshakati