

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPLICATION FOR LEAVE TO APPEAL RULING

Case No: CC 5/2021

In the matter between:

**PAULINU MATEUS KATALE**

**APPLICANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** Katala v S (CC 5/2021) [2024] NAHCNLD 09 (26 January 2024)

**Coram:** SMALL, AJ

**Heard:** 23 October 2023, and 22-23 January 2024

**Delivered:** 26 January 2024

**Flynote:** Criminal Procedure-Application for leave to appeal in terms of section 316(1) of the Criminal Procedure Act 51 of 1977- Reasonable prospect of success means the Judge dealing with an application for leave to appeal must be satisfied that, on the facts or conclusions of law involved, the Court of Appeal may take a different view and come to a different conclusion.

Criminal Procedure-Application for leave to appeal in terms of section 316(1) of the Criminal Procedure Act 51 of 1977-The trial judge, hearing the application must disabuse his mind of the fact that he himself has no reasonable doubt as to the guilt of the accused:

he must ask himself whether there is a reasonable prospect that the judges of appeal will take a different view.

**Summary:** The Applicant were arraigned on charges of Arson and Murder read with the Combating of Domestic Violence Act, 4 of 2003. During the trial, the Applicant pleaded not guilty to both counts, raised an alibi, and denied involvement in committing the two crimes. The Court found that two witnesses recognised and correctly identified the Applicant, and that corroborating evidence strengthened the evidence of these witnesses' identification. The Court concluded that the Applicant's denial of being the arsonist and the deceased's assailant was false beyond reasonable doubt and convicted him.

In the application for leave to appeal, Applicant's counsel argued that there are reasonable prospects that another Court might apply the cautionary rule on identification differently and find no credible evidence identifying the Applicant or that there was inadequate corroboration to accept the evidence of the identifying witnesses.

The Court granted the Applicant leave to appeal against both convictions.

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### ORDER

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- (1) The Respondent's Point *in Limine* is dismissed.
- (2) The Applicant's Application for the late filing of his leave to appeal is condoned, and
- (3) In terms of Section 316(1) of the Criminal Procedure Act, 51 of 1977 the Applicant is granted leave to appeal to the Supreme Court against his convictions of Arson and of Murder with direct intent to kill read with the provisions of the Combating of Domestic Violence Act, 4 of 2003.

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### JUDGEMENT

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SMALL AJ:

Introduction

[1] On 25 August 2022, the Court convicted the Applicant on charges of Arson and Murder read with the Combating of Domestic Violence Act, 4 of 2003. During the trial, the Applicant pleaded not guilty to both counts, raised an alibi, and denied involvement in committing the two crimes. The Court found that two witnesses recognised and correctly identified the Applicant and that corroborating evidence strengthened evidence of these witnesses' identification. The Court concluded that the Applicant's denial of being the arsonist and the deceased's assailant was false beyond reasonable doubt and convicted him.<sup>1</sup> He was subsequently sentenced on 2 September 2022.<sup>2</sup>

[2] He is now represented by Ms Nghifewa from the Directorate of Legal Aid Outapi, while Ms Shigwedha from the Office of the Prosecutor-General, Oshakati, represents the State. Both Counsels also appeared during the trial.

[3] The Applicant now applies for leave to appeal on an amended application for leave to appeal filed on 12 January 2024 against the convictions mentioned above. This application is accompanied by a founding affidavit of the Applicant and a confirmatory affidavit by his counsel seeking for condonation for the late filing of his notice of appeal.

[4] The Applicant had to file application for leave to appeal and notice of appeal within 14 days of the passing sentence following such conviction. The application for leave and notice of appeal to appeal should clearly and precisely set out the grounds upon which the accused desires to appeal.<sup>3</sup>

[5] It is settled law that an Applicant must meet two requirements to succeed in an application for condonation. Firstly, the Applicant must reasonably explain why he did not file the notice of appeal on time. Secondly, the Applicant must show that he has reasonable prospects of success on appeal. The Applicant is not absolved from the second requirement, regardless of whether he furnished a reasonable explanation. The prospect of success on appeal is imperative. If the prospect of

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<sup>1</sup> *S v Katala* (CC 5/2021) [2022] NAHCNLD 79 (25 August 2022)

<sup>2</sup> *S v Katala* (CC 5/2021) [2022] NAHCNLD 80 (2 September 2022)

<sup>3</sup> See section 316(1) and 316(2) of the Criminal Procedure Act 51 of 1977

success at appeal is non-existent, it matters not whether the Applicant satisfied the first requirement; the appeal must fail.<sup>4</sup>

[6] In considering the application for leave to appeal the Court must decide whether there exist reasonable prospects of success on appeal. It was described as follows in *Rex v Kuzwayo*<sup>5</sup>

‘That test must, to the best of the ability of the trial judge, be applied objectively. By that is meant that he must disabuse his mind of the fact that he himself has no reasonable doubt as to the guilt of the accused: he must ask himself whether there is a reasonable prospect that the judges of appeal will take a different view. This applies to questions both of fact and of law: there is, in this respect, no distinction between a question of fact and a question of law.’

[7] The mere fact that a case is arguable on appeal is insufficient. There must be substance in the argument advanced on behalf of the applicant.<sup>6</sup> The mere possibility that another court might come to a different conclusion is not enough to justify the granting of leave to appeal.<sup>7</sup> Reasonable prospect of success means the Judge dealing with an application for leave to appeal must be satisfied that, on the facts or conclusions of law involved, the Court of Appeal may take a different view and come to a different conclusion.<sup>8</sup>

[8] A judge considering if his judgment might be regarded as wrong by a higher court is in an invidious position as he essentially is required to reconsider his own decision. That, however, is a duty imposed by the legislature upon judges in criminal matters. But as difficult as it might be, I must free my mind of the fact that I found that the evidence presented proved the Applicant's guilt on the two charges beyond reasonable doubt. My original decision should not cloud the enquiry whether there is

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<sup>4</sup> *S v Gowaseb* 2019 (1) NR 110 (HC) paragraphs 3-4, *S v Murangi* [2013] NAHCMD 50 (CA 88/2013; 14 February 2014) paras 7 – 9, *S v Ngombe* 1990 NR 165 (HC) at 165 H-J and *S v Nakale* 2011 (2) NR 599 (SC) paragraph 7

<sup>5</sup> *Rex v Kuzwayo* 1949 (3) SA 761 (AD) at 765; See also *Rex v Baloi* 1949 (1) SA 523 (A) at 524-525

<sup>6</sup> *R v Muller* 1957 (4) SA 642 (A) at 645D-E

<sup>7</sup> *S v Ceaser* 1977 (2) SA 348 (A) at 350E and *S v Nowaseb* 2007 (2) NR 640 (HC) paragraph 2

<sup>8</sup> *S v Ningisa and Others* 2013 (2) NR 504 (SC) in paragraph 6 the Supreme Court approved and applied the test as laid down in *R v Boya* 1952 (3) SA 574 (C) at 577B – C and *S v Ackerman en 'n Ander* 1973 (1) SA 765 (A) at 766H. See also stating in *S v Tcoeib* 1992 NR 198 (HC) at 199H and *R v Ngubane and Others* 1945 AD 185 at 187, See also *Ndovai v S* (CC 10/2019) [2021] NAHCNLD 85 (11 October 2021) paragraph 6.

a reasonable prospect that the Judges of Appeal will take a different view of the facts and the law.<sup>9</sup>

### History of the Application for Leave to Appeal

[9] Although the Notice on Appeal on which this application for leave to appeal was only filed on 12 January 2024 in respect of a matter finalized on 2 September 2022, the background to such late filing and the fact that this is an amended notice of appeal is essential as it assists in the proper evaluation of the explanations given by the Applicant.

[10] The Registrar of the High Court Northern Local Division enrolled the application for leave to appeal on 22 November 2022 for a status hearing on 15 February 2023. The Oluno Correctional Facility received this Notice of Set Down on 28 November 2022. A Notice of Appeal filed with the Registrar of the Northern Local Division must have prompted her to enrol this matter for a status hearing.<sup>10</sup> Such Notice of Appeal is unfortunately not in the court file.

[11] The Court file, however, contains a Notice of Appeal (PMK-2) of 17 pages signed on 15 September 2022. A letter was addressed to the judge in the status hearing indicating that the Applicant intended to substitute his appeal grounds dated 14 September 2022 with the attached PMK-2 dated 15 September 2022. All these documents are attached to a letter from the Oluno Correctional Facility dated 16 January 2023. The High Court of Namibia Northern Local Division received it on 18 January 2023.

[12] The Applicant further applied for legal aid on 16 January 2023 before he appeared before the High Court on 15 February 2023. On the latter date, the Court instructed that he re-apply as the outcome of the first application was not forthcoming. No reply was received from the Directorate of Legal Aid before appearances of 11 April 2023, 18 April 2023, 25 April 2023, 9 May 2023, 13 June

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<sup>9</sup> *R v Muller* 1957 (4) SA 642 (A) at 645E-F and 645G. and *S v Ningisa and Others* 2013 (2) NR 504 (SC) paragraph 5

<sup>10</sup> Practice Directive 38(1) promulgated under Government notice No. 67 High Court Practice Directions: Rules of High Court of Namibia, 2014 and published in Government Gazette 5461 dated 9 May 2014

2023 and 31 July 2023. On 5 September 2023, Ms Nghifewa came on record on behalf of the Applicant after the Director of Legal Aid reappointed her.

[13] Amended notices of appeal were filed on 2 October 2023, 16 October 2023 and finally on 12 January 2024. The latter contains only two grounds of appeal, repealing all previous notices containing possible grounds of appeal by the Applicant and his legal representative.

[14] The Court considered the history of the application for leave to appeal above to show that the Applicant clearly intended to launch an appeal against his conviction from 15 September 2022 and possibly from 14 September 2022. If these notices were filed on the same date they were completed, they would have complied with the 14-day requirement prescribed by section 316(1) of the Criminal Procedure Act 51 of 1977, as amended.

[15] The aforesaid gives credence to his explanation of why he did not file his application for leave to appeal and appeal grounds within the prescribed time. It is abundantly clear that he intended to appeal from the onset. He states that he was overwhelmed by the prison situation and procedures and had to adjust to his new conditions, coupled with the fact that he, as a layperson, needed assistance in drafting a Notice of Appeal. He received assistance eventually, but this caused the late filing of his Notice of Appeal. Although the Respondent raised a point in limine, disputing that the explanation is reasonable and acceptable, the Applicant's explanation stands uncontradicted. The Court finds that the Applicant has provided a reasonable explanation for the late filing of his Notice of Appeal.

*Reasonable prospects of success on appeal*

[16] The reasonable prospects of success on appeal are vital to both the application for condonation and leave to appeal, so the Court will now consider such prospects against the two grounds raised.

[17] The two grounds of appeal were formulated as follows:

- (a) The learned judge erred and misdirected himself by finding that there was sufficient evidence which positively identifies the accused as having being the

person who committed the offences.

- (b) The learned judge erred and misdirected himself by finding that there existed sufficient evidence before him to identify the accused as having made a phone call to Ms Aili and making admissions through that phone call.

[18] The two grounds of appeal essentially aver that the Court erred or misdirected itself when it found sufficient evidence identifying the Applicant as the person who committed the offences and to determine that it was the Applicant who made admissions to Ms Aili during that phone call.

[19] In arguing, Ms Nghifewa submitted that it is trite that a Court should exercise caution when evaluating evidence on identification. Therefore, she proposed that there are reasonable prospects that another Court might find no credible evidence identifying the Applicant or that there was inadequate corroboration to accept the evidence of the identifying witnesses.

[20] She further submitted that the Court did not adequately evaluate that the identifying witnesses did not mention the Applicant by name in their original statements and only did so in additional statements after the Applicant was arrested and appeared in Court. She also pointed out that the police initially did not obtain cell phone printouts verifying calls between numbers from MTC. According to her, this is aggravated by the fact that the station commander had the witnesses' phone in his possession until the next day. When the police eventually requested the records, they were no longer available. Such documents could have provided either additional corroboration of the evidence of the witnesses or contradicted whether the calls were made at the time and whether this was done to and from the accused's phone.

[21] Ms Shigwedha, on the other hand, submitted that the Court did not misdirect itself and that there exist no reasonable prospects of success on appeal. She requested the Court to make such a finding, refuse to condone the late filing of the notice of appeal and strike the matter from the roll.

[22] As I have mentioned in the judgement on the merits, it is apparent that the investigation left much to be desired. Not obtaining the MTC printouts of the witness' phone and that of the accused is one of them. This can be added to the fact that the

police officers who were following the tracks of the assailant were called off once the Applicant was arrested. Furthermore, the DNA examination was not done on the Applicant's T-shirt to establish whether the dark spots were blood and, if blood, whether it was that of the Applicant, deceased or both.

[23] The Court is convinced that the convictions of the Applicant were correct. However, divorcing myself for that finding given the principles mentioned above, I'm satisfied that the Applicant has shown that there exist reasonable prospects of success on appeal insofar that another Court might find the Applicant's identification inadequate or at least require more corroborating evidence before accepting the evidence of the witnesses identifying the Applicant on the scene and as the one using the cell phone beyond a reasonable doubt.

[24] In the result:

- (1) The Respondent's Point *in Limine* is dismissed.
- (2) The Applicant's Application for the late filing of his leave to appeal is condoned, and
- (3) In terms of Section 316(1) of the Criminal Procedure Act, 51 of 1977 the Applicant is granted leave to appeal to the Supreme Court against his convictions of Arson and of Murder with direct intent to kill read with the provisions of the Combating of Domestic Violence Act, 4 of 2003.

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D F Small  
Acting Judge



## APPEARANCES:

## APPLICANT:

N. Nghifewa

Of Directorate of Legal Aid, Outapi

## RESPONDENT:

V. Shigwedha

Of Office of the Prosecutor-General, Oshakati