REPORTABLE

CASE NO. 15/2009

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SEVEREN IITA ARUBERTUS **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: Shivute, CJ, Mainga JA *et* Strydom AJA

Heard on: 21/10/2010

Delivered on: 01/12/2010

APPEAL JUDGMENT

SHIVUTE CJ:

[1] The appellant appeared in the Regional Court sitting at Otjiwarongo on a charge of murder, the allegation being that he had murdered an elderly female, formerly a resident of a plot near Otavi, and one count of housebreaking with intent to steal and theft for having allegedly broken into the deceased's farmstead. After trial on 4 November 2004, he was convicted on the count of murder, but on the second count he was convicted of theft only after it became clear that there was no evidence of a displacement of any obstruction at the premises alleged to have been broken into

for it to amount to a breaking. He was sentenced to twenty (20) years imprisonment on the count of murder and to one (1) year imprisonment in respect of the theft count. On the same day, the appellant addressed a letter to the regional court magistrate wherein he pleaded for the reduction of sentence on account of his youth and other personal circumstances. He concluded his letter with the request that he be allowed to return to the Regional Court to formally apply for the reduction of the sentence. There was no complaint directed against conviction. The magistrate replied by letter dated 9 December 2004 informing the appellant that he needed to file a formal Notice of Appeal setting forth the grounds of appeal. He was also notified that since the appeal would obviously be lodged out of time, the notice of appeal should be accompanied by an application for condonation setting out sufficient grounds why the notice was lodged outside the prescribed period.

[2] The appellant, who was legally represented at the trial in the Regional Court, then filed a notice of intention to appeal against his conviction and sentence in the High Court dated 7 February 2005 together with the application for condonation for the late lodging of the appeal. The legal practitioner who represented the appellant in the Regional Court was appointed *amicus curiae* counsel to argue the appellant's application for condonation for the late filing of the notice of appeal as well as his appeal against conviction and sentence. On the date of the hearing of the application and the appeal, however, the appeal against sentence was abandoned on the appellant's express instructions. Consequently, the High Court remained seized with the appeal against conviction only.

[3] As the notice of appeal should have been filed within 14 days from the date of sentence, pursuant to Rule 67(1) of the Rules of the Magistrates Court, the appellant was thus approximately two months out of time.

[4] The matter came before Van Niekerk J who after having heard argument from counsel on both sides, dismissed the application for what she perceived to be the absence of an explanation for the failure to lodge the appeal timeously and struck the matter off roll.

[5] The appellant then filed what purported to be a petition to the Chief Justice ostensibly for leave to appeal to the Supreme Court. Upon perusal of the petition, I declined to consider it, but remarked that since the purported petition was in fact an appeal against the dismissal of the application for condonation, the appellant was entitled to appeal to the Supreme Court as of right and no leave to appeal was required from the Supreme Court. Although the legal proposition on the basis of which the remarks were made is trite, the remarks appear not to have been understood in certain circles. It has therefore become necessary to restate the legal position herein for the avoidance of any possible doubt. The proposition is based on the clear authority of *S v Absalom* 1989 (3) SA 154, a decision of the South African Supreme Court of Appeal concerning a case that originated from this jurisdiction. In the headnote of that judgment which is written in Afrikaans, it was stated *inter alia* as follows:

> "An application for condonation of the late noting of a criminal appeal from the magistrate's court is not a 'civil proceeding' as intended in s 20(4) of the Supreme Court Act 59 of 1959. Such an application is so closely bound up with the accused's conviction, sentence and appeal that it is a criminal proceeding. The Court further found that the amendment of the Supreme Court Act by the Appeals Amendment Act 105 of 1982 (whereby the requirement of leave to appeal was extended—see s 20(4) of Act 59 of 1959 as amended by s 7 of Act 105 of 1982) did not cover an appeal against the refusal of condonation for the late noting of a criminal appeal. Such an accused can appeal to the Appellate Division and he did not have to have leave to appeal therefor."

[6] The above legal position was endorsed by this Court in *Phillipus Longer v The State,* unreported judgment of the Supreme Court delivered on 8/12/2000*.* Although there were three separate judgments in that case, both the majority and minority judgments endorsed the legal principle set out in *S v Absalom* (*supra*). (See the minority judgment of O'Linn AJA at page 2 and the judgment of Levy AJA (in which Teek AJA concurred) at page 6. See also other decisions of the South African Supreme Court of Appeal on the point in *S v Gopal* 1993 (2) SACR 584 (A); S v Tsedi 1984 (1) SA 565 (A).)

[7] The *lacuna* in our law referred to in *S v Absalom* (*supra*) has regrettably not been filled and has led to an undesirable state of affairs where appeals against the dismissal of applications for condonation have to be considered by this Court without the benefit of the filter system provided for by the petition procedure intended to weed out unmeritorious appeals. It should, however be emphasized that an appellant is entitled to appeal as of right against the order refusing condonation and not against

the conviction and sentence even though the merits of an appeal against the conviction and sentence are always part of the consideration of the application for condonation. If the Supreme Court upholds the appeal against the refusal to grant condonation, the matter has to be remitted to the High Court for the appeal against conviction and sentence to be heard in that Court. On the other hand, if the Supreme Court dismisses the appeal against the refusal of condonation, that is the end of the matter. (See also *Phillipus Longer v The State* (*supra*) on page 2 of the cyclostyled judgment of O'Linn AJA).

[8] Returning now to the appeal, the issue for decision in this Court therefore is whether the High Court erred or misdirected itself in dismissing the appellant's application for condonation. It is trite that an extension of time within which to file the notice of appeal is an indulgence which will be granted upon good cause shown for the non-compliance and upon the existence of good prospects of success on appeal. It is also axiomatic that an applicant must give a reasonable explanation for the delay to file a notice of appeal and it is to the appellant's explanation that I wish to turn next.

[9] In his explanation for the delay to timeously file the notice of appeal, the appellant referred to the fact that he had written a letter to the Regional Court magistrate pleading for the reduction in the sentence. He stated furthermore:

> "As a layman I did not know how to write a formal notice of appeal and I was helped by a fellow inmate. That is the reason why my appeal is filed late but the letter I wrote to the Magistrate of Otjiwarongo was written within fourteen days after sentencing."

[10] The Court *a quo* correctly found that the appellant had not accepted the conviction from the start and cited a passage in the record of the trial in the Regional Court which bears this finding out. There it was recorded as follows:

> "Defence:
> Accused refuses to put before Court any mitigating circumstances. I have explained to him the consequences of his decision. As a result I leave it in the court's hands. His reasons are that he did not commit the offences and as a result he sees no reason why he should ask mercy for something he did not do.
> Accused:
> I confirm. I cannot mitigate for something I did not do".

[11] The Court below did not accept the explanation put up by the appellant for the delay and remarked that there was no explanation whatsoever for the failure to lodge the appeal against conviction. It accordingly dismissed the application for condonation for want of good cause for filing the notice of appeal against conviction out of time. Although the learned Judge declined to consider whether there were reasonable prospects of success on appeal in any detail, she expressed the view that the appeal against conviction was entirely without merits.

[12] Mr Grobler who argued the appeal on the instructions of the Director of Legal Aid contended that the explanation offered by the appellant was sufficient enough to warrant the granting of condonation and that a delay of two months was not extraordinarily long. Therefore, so counsel contended, provided that the appellant

could show that he had some prospects of success on the merits, he should have been granted condonation so that he could present his case to the Court *a quo*.

[13] Mr Sibeya who argued the appeal on behalf of the respondent, on the other hand, argued that the explanation offered related to the appeal against sentence that had been abandoned and that there was no explanation as regards the appeal against conviction. I agree with Mr Grobler that the explanation for the delay in filing the notice of appeal is reasonably sufficient. I agree furthermore that the delay is not inordinate. The notice of appeal was filed after the appellant had been advised by the regional court magistrate of the correct steps to follow to prosecute his appeal. The fact that the appellant had written a letter to the regional court magistrate imploring him to reduce the sentence and to be given a chance to apply for the reduction of sentence in the Regional Court in my view utterly bears out the appellant's contention that he was ignorant of how to go about writing a formal notice of appeal. As previously noted, it is clear that he had not accepted his conviction. Although he had initially chosen to complain about sentence only, there is no reason why the explanation given in respect of the appeal against sentence cannot be extended to an appeal against conviction. I would agree therefore that provided that the other requirement for the grant of the application for condonation has been met, the applicant should have been granted condonation. It is to the consideration of this leg that I now turn.

[14] I must point out at the outset that the finding that the explanation is sufficient would be water under the bridge, because Mr Grobler has conceded that there are no reasonable prospects of success on the merits, a concession that the appellant says he was constrained to accept. Mr Sibeya in effect argued that the concession was properly made. It remains to consider whether the concession was indeed correctly made. It was common cause between the parties that the deceased and her husband lived on a plot of a farm near Otavi. There they had a plants nursery and were running a grocery at the farmstead. On 1 April 2003 at 13h15 the deceased's husband telephoned the house and spoke to the deceased. At 14h00 he received a message that the shop was broken into and that the deceased could not be found. He thereupon drove home. On arrival he noticed that the rooms were in a state of disorder as the drawers throughout the house were wide open and boxes that were in the cupboard were on the floor and cut open. A portable radio tape was missing; also missing were a bag and a shirt. He frantically searched for the deceased until he found her lying on the shop floor behind a counter. Upon feeling her pulse, he realised that she had unfortunately died. He telephoned the police and a doctor who in no time arrived and took over the scene. The appellant was well known to the deceased as he had assisted the family in their nursery only to offload plants and was a regular customer at their shop. It was also common cause that he was also known to the deceased's workers, one of whom was State witness Katriena Neibes. The appellant denied involvement in the crimes and insisted under oath that he had never set foot on the deceased's farm. He was, however, linked to the murder and the theft by the evidence which may be summarized as follows:

[15] The appellant was seen fleeing the murder scene. Katriena Neibes testified that on 1 April 2003 during her lunchtime she was sleeping on the veranda of the deceased's house. She was awoken by barking dogs. She then saw a person carrying a radio tape running away from the house. He was wearing a blue shorts and a sleeveless T-shirt. She was approximately 8 metres away from him. She recognized him as the appellant whom she knew because they had stayed in the same residential area. She reported the incident to a colleague who contacted the deceased's husband. The witness also testified that the appellant was running barefoot. She identified him at an identification parade at the police station. Although Ms Neibes was a single witness who in some respects contradicted herself, the learned magistrate warned himself properly against the dangers of convicting on the evidence of a single witness and her evidence to a greater extent was in any event corroborated.

[16] The footprints of only one person were found at the scene. Petrus Hunibeb testified that he met the appellant, who was bare foot at approximately 12h40 on the Otavi/Kombat road. He later heard about the attack on the deceased and passed on the information that he had met the appellant who was bare foot. While working in his employer's vineyard, he came across a blue T-shirt which he said looked similar to a T-shirt he saw in the deceased's shop. He and the other workers followed the foot prints until at a point where they found N$15.00 and a bag. It is not in dispute that the bag in question and the T-shirt were recognized by the deceased's husband as their property. Mr Hunibeb identified the appellant at an identification parade as the person

he had met on the road. The investigating officer, Warrant 0fficer Kupembona, told Court that barefoot prints of only one person had been found at the scene. The footprints found at the scene were of a person who appeared to have been running. The appellant had blisters on the sole of his feet when he was arrested.

[17] The appellant freely and voluntarily pointed out items stolen during the murder and theft. Warrant 0fficer Kupembona testified that the appellant pointed out a radio tape and wallet that he had allegedly thrown away and which were then recovered. The deceased's husband also identified these items as having been stolen from the farmstead.

[18] The appellant pointed out a knife - described as a traditional knife - which was consistent with incised stab wounds inflicted on the deceased's upper body. Warrant 0fficer Kupembona stated that the appellant pointed out the knife to him; it was found hidden under his bed. A report of a medical legal post mortem examination was handed in from which it became clear that the deceased received several incised wounds to the torso.

[19] The appellant's fingerprints were found on the murder scene. Detective Sergeant Johan Green testified that he lifted fingerprints from a card box in the wardrobe in the deceased's bedroom. The prints were linked to the fingerprints of the appellant.

[20] The appellant freely and voluntarily made statements to a district magistrate and police officers in which he admitted having been at the deceased's house during

the time the deceased was murdered. In the statement to the magistrate, he had claimed that he had accompanied a certain Frans Nakale to the deceased's house. The appellant later clarified to the police that this Nakale was a fictitious person that he had invented to keep the Police off track with their investigations. On the evidence, there can be no doubt that the appellant was correctly found guilty of murder and of theft. All the evidence points to the appellant as the person who committed the crimes and it cannot be said that the learned regional court magistrate erred or misdirected himself in finding that the only reasonable conclusion one could come to on the available evidence was that appellant was the deceased's murderer and that the crimes of murder and theft had been proved against him beyond reasonable doubt. The learned Judge *a quo* was also correct in remarking that the appeal against conviction was entirely without merit. It follows that the concession that there are no reasonable prospects of success on appeal was properly made. Consequently, the appeal falls to be dismissed. In the result, the following order is made:

> The appeal against the decision of the High Court dismissing the application for condonation is dismissed.

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SHIVUTE, CJ

I concur.

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MAINGA, JA

I also concur.

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STRYDOM, AJA

Counsel for the appellant:	Mr Grobler
Instructed by:	Director of Legal Aid
Counsel for the Respondent:	Mr Sibeya
Instructed by:	The Prosecutor General