

CASE NO.: CA 45/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

APPLICANT

AND

HAMUTENYA LAMEKA

RESPONDENT

CORAM:

SHIVUTE, J

Heard on:

28 January 2011

DELIVERED ON:

28 JANUARY 2011

**RULLING: APPLICATION FOR CONDONATION FOR THE LATE FILING OF
LEAVE TO APPEAL.**

SHIVUTE, J: [1] THIS IS AN APPLICATION FOR CONDONATION FOR THE LATE FILING OF LEAVE TO APPEAL BY THE STATE IN TERMS OF SECTION 310 (1) READ WITH SECTION 310 (2) OF THE CRIMINAL PROCEDURE ACT, 1977, ACT 51 OF 1977 WHICH WAS HEARD IN CHAMBERS.

[2] The Respondent was charged with attempted murder read with the provisions of the Combating of Domestic Violence Act, 2003, Act 4 of 2003 and convicted as charged in the Magistrate's Court Otjiwarongo on 13 January 2009. He was sentenced to 5 years imprisonment of which 2 years are suspended for 5 years on condition that the accused is not convicted of assault with intent to do grievous bodily harm or attempted murder committed during the period of suspension.

[3] The matter was sent for review. The reviewing Judge confirmed that the conviction was in order. However, he declined to confirm that the sentence was in accordance with justice as he was of the opinion that the sentence was too lenient and that the matter should have been referred to the Regional Court for sentencing.

[4] The State lodged its notice of application for leave to appeal against sentence together with an application for condonation for the late filing of the notice of application for leave to appeal on 4 February 2010.

[5] In its application for leave to appeal the State has set out several grounds of appeal. It is not necessary to restate them, but the main grounds in their totality are basically to the following effect:

"The learned magistrate misdirected herself,... by not stopping the proceedings and in terms of section 114 (1) (a) of Act 51 of 1977 committing the accused for sentence by a Regional Court having jurisdiction as the offence is of such a nature that it merits punishment in excess of the jurisdiction of the magistrate's court; by not properly considering the magnitude of the Respondent's attack on the complainant and that the Respondent inflicted twelve stab wounds on the complainant; by imposing a sentence which is so lenient that it induces a sense of shock and which is grossly inadequate in the circumstances as it does not serve a deterrent purpose at all but put a stamp of triviality on the crime committed and by not properly considering that domestic violence should be regarded as an aggravating factor when it comes to imposing punishment in this case." (sic)

[6] The Prosecutor-General in her supporting affidavit stated the reasons for delay *inter alia* as follows:

"Although the prosecution was represented at the trial by a public prosecutor such prosecutor did not bring the sentence to my attention. This matter only came to my attention during August 2009 when the honourable reviewing Judge refused to confirm that the sentence is in accordance with justice...

Although I initially, at first glance, held the view that the sentence is an appropriate sentence I am now of the opinion after properly studying the record of the proceedings that the sentence is too lenient and that the learned Magistrate erred by not stopping the proceedings and referring the matter to a Regional Court for sentencing...

I am of the opinion that the State has reasonable prospects of success on appeal against the sentence imposed."

[7] SECTION 310 (2) (A) READS AS FOLLOWS:

"A written notice of an application referred to in subsection (1) shall be lodged with the registrar of the High Court by the Prosecutor-General or other prosecutor, within 30 days of the decision, sentence, or order of the lower court, as the case may be, or within such extended period as may on application on good cause be allowed."

[8] It is apparent from the record that the application was served on the Respondent and the Respondent wrote a letter that he applied for legal aid to be represented during the hearing. He did not submit written submissions in terms of section 310 (4) of the Criminal Procedure Act. He also came to court in person. I told him to go back as proceedings of this nature are heard in Chambers and that there was no need for a full-scale hearing. It is not necessary for any appearance by either a representative of the state or the accused.

[9] When an Applicant is applying for condonation for the late filing of the notice of application for leave to appeal he/she should show good cause why there was non-compliance with the law within which the notice of appeal has to be filed.

[10] In the application before me, the applicant as previously noted, stated in her supporting affidavit that one of the reasons for her not to file the application on time was because, although the prosecution was represented at the trial by a public prosecutor, such prosecutor did not bring the sentence to her attention. This matter only came to her attention during August 2009 when the reviewing Judge refused to confirm that the sentence was in accordance with justice. She went on to say that although at first glance she held the view that the sentence was an appropriate one, having properly studied the record of proceedings, she was now of the opinion that the sentence imposed was too lenient and that the learned magistrate should have referred the matter to the Regional Court for purpose of sentencing.

[11] It is common cause that Applicant should have appealed against the sentence within the period of 30 days. She failed to do so, and this has rendered the application to be out of time.

[12] Despite the fact that the matter came to the attention of the Prosecutor-General during August 2009, she only lodged her application for leave to appeal on 4 February 2010, about 6 months after it came to her attention. She did not explain what happened between August 2009 and 4 February 2010 which might have caused the delay.

[13] It is therefore my conclusion that the State has failed to show good cause why it failed to lodge its application for leave to appeal on time. Because of the conclusion I have arrived at, I found it unnecessary to consider the merits.

[14] IN THE RESULT THE FOLLOWING ORDER IS MADE:

Application for condonation for the late filing of the notice of application for leave to appeal is refused.

SHIVUTE, J

