CASE NO: CC 40/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ELIAS NHINDA -TJIRIANGE **APPLICANT**

And

THE STATE **RESPONDENT**

CORAM: UEITELE, AJ.

Heard on: 2010.10. 25

Delivered: 2011.04.20

JUDGMENT

UEITELE A J

[1] The Applicant was arranged before this court, on charges of:

"(1) Murder (*dolus directus*);

(2) Robbery with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act, 51 of 1977;

(3) Defeating or obstructing the course of justice;

(4) Possession of a fire-arm without a license in contravention of Section 2, read with Sections 1, 8 and unlawful possession of ammunition in contravention of Section 33 read with Sections 1, 8, 10, 38 and 39 of Act 7 of 1996 as amended."

[2] On 12 August 2008, the Applicant was, on his own pleas of guilty, convicted of:

1. Murder

2. Defeating or obstructing the course of justice;

3. Possession of fire-arm without a license in contravention of Section 2 read with Sections 1, 8, 10, 38 and 39 of Act 7 of 1996.

4. Possession of Ammunition in contravention of Section 33 read with Sections 1, 8, 10, 38 and 39 of Act 7 of 1996, and

5 after leading evidence, was convicted of "robbery with aggravating circumstances as defined in Section 1 of the Criminal Procedure Act, 51 1977".

[3] On 17 April 2009, the Applicant was sentenced as follows:

(a) Count 1-(Murder) Twenty Five years imprisonment;

(b) Count 2-(Robbery with aggravating circumstances) ten (10) years imprisonment fine five (5) years of which is ordered to run concurrently with the sentence on Count 1

(c) Count 3-(Defeating or obstructing the course of justice) five (5) years imprisonment;

(d) Court 4 & 5-(Possession of a fire-arm without a license and possession of ammunition) are both taken together for purposes of sentencing two (2) years imprisonment which sentence is ordered to run concurrently with the sentence on count 2.

[4] The Applicant is aggrieved by the conviction on count 2 and the sentence imposed and is now seeking leave to appeal against the convictions and sentences.

[5] The Applicant filed his notice to appeal out of time and is also seeking condonation for the late filing of the notice to appeal. The State took a point *in limine* to the effect that:

(a) there is no proper application for condonation for the late filling for leave to appeal against the convictions and the sentences before the Court;

(b) there is no reasonable and acceptable explanation to the inordinate delay of up to 146 days before filing the application for leave to appeal; and

(c) there are no prospects of success on appeal.

[6] At the trial, the applicant was represented by Mr. Basson on the instructions of the Legal Aid Directorate. For the application for leave to appeal the applicant appears in person. The Court heard arguments on the point *in limine* at the commencement of this hearing from the Appllicant after this issue was explained to him.

[7] The factual situation in respect of the Applicant's Notice of Appeal and application for condonation for the late filing thereof is as follows:

(a) As I have indicated above the Applicant' was sentenced on 17 April 2009;

(b) In terms of Section 316(1) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) an appeal must be filed within 14 days of the date of sentence or within such extended period as may on application on good cause be allowed.

(c) On 17 July 2009, the Appellant addressed a letter in handwriting to the Registrar of the Court with the heading: "*Application for Condonation and Notice of Appeal.*

(d) That document contains four pages of what are apparently reasons for the late filling of the notice to appeal.

(e) From the documents on the Court file, I gathered the following:

    (i) On 20 November 2009, the Applicant was informed that his application for leave to appeal was set down for hearing on Monday 25 January 2010;

    (ii) On Monday 25 January 2010; the application for leave to appeal was removed from the Roll.

(iii) The application for leave to appeal was again enrolled for 23 April 2010. On that day (i.e. 23 April 2010) the application for leave to appeal was again removed from the Roll. The Court Order reads as follows: "*That the Application for leave to Appeal is hereby struck from the roll, affidavit not filed as previously advised by court*."

(iv) On 17 June 2010, the Applicant addressed a letter of complaint to the Ombudsman with respect to his application for leave to appeal. The Ombudsman referred that letter to the Registrar of this Court for further handling. The Registrar then directed a letter to the Applicant in which she advised the Applicant that his *"...application does not comply with the Rules of the High Court of Namibia and cannot be enrolled for the aforesaid reason".*

(v) On 04 August 2010, the Registrar of this Court received a document titled *"Applicant's Amended Application for Condonation and Notice of Appeal*". This document contains 13 A4 size hand written pages, I however, confess that I could not make out on what grounds the applicant is seeking to appeal against the judgment of Mainga J and whether he is appealing only against part (both on conviction and sentence) of the judgment or the whole of the judgment (as he then was).

(vi) The *Applicant's Amended Application for Condonation and Notice of Appeal*" was accompanied by a document titled *"Applicants affidavit in respect of condonation application".* This latter document *inter alia* reads as follows: (unedited)

"(6) After sentencing, or in the 14 day period I entrusted my solicitor or defence team of B D Basson incorated at the time with my handwritten notice of appeal dated 27th April 2009 . With the instructions that the document should be typed and delivered or submitted to the Registrar of the Supreme Court and High Court within the timeframe or the prescribed periods wherein an applicant must file his notice of appeal.

(7) On the 13th of July 2009 I made a follow up enquiring with the solicitor which had been prompted by a letter from the directorate of legal aid requested detailed information regarding my appeal application the feedback from the solicitor was in the negative, in that the instructions attached to the handwritten notice of appeal were not met as he Mr. Bradley Basson had retracted from the matter pending the outcome of the legal aid application or further instruction the Directorate of Aid.

(8) It then became apparent that my notice of appeal had not been filed. Thus I filed a notice for application for condonation dated the 17th July 2009 of which I hand delivered in course to ensure that application reached the Registrar of the High Court on the 22nd of July 2009…"

[8] The law in respect of an application for condonation is as stated in the case of ***S v Kashire*** 1978 (4) SA 166 (SWA) where Lichtenberg AJ said the following at page 167 H:

> "The proper procedure for the late filing of a Notice of Appeal is by way of an application, supported by an affidavit made by the accused (the present applicant)..."

[9] In the present case the Applicant made an application and also a supporting affidavit, but is that enough to grant the condonation the Applicant is seeking? I do not think so. I say so for the following reasons. In the case of ***S v Itembu*** 2010 NR 160 Muller, J said "*Condonation cannot only be granted just*

for the asking thereof. An Applicant seeks the indulgence of the Court and has to be absolutely honest with it.

[10] In the case of the ***S v Abraham Ruhumba***, case no. CA 103/2003, an unreported judgment of Damaseb AJ, as he then was, delivered on 20 February 2004, the learned Judge said at page 5:

> "It is a notorious fact that applications for condonation of late filling of appeals and leave to appeal by prisoners are not in vogue; such that this court is inundated with applications of this kind. *A fortiori* an applicant that comes to this court seeking condonation must provide as ***sufficient information as possible*** to enable the court to decide whether or not the reasons for the delay are acceptable. Such applications must be *bona fide* …In terms of Section 309(2) of Act 51 of 1977, the court of appeal is competent to condone the applicant's failure to file a notice of appeal timeously, if the applicant provides an acceptable explanation and his prospects of success on appeal are reasonable ... prospects of success on appeal only become a consideration if the reason for the delay is acceptable. If the reason for the delay is unacceptable, it matters not that the prospects on appeal are reasonable except in the rare case where there has been a complete failure of justice, or the verdict of the lower court is so repugnant and perverse that the court on appeal cannot, in all conscience; allow it to stand. Such instances are bound to be rare" ". {My Emphasis}.

[11] In the case of ***Arubertus v S*** 2010 NR 17 Shivute CJ said:

> "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 "

[12] In the case of ***S v Nakapela and Others*** 1997 NR 184 Gibson J said:

> " In my opinion proper condonation if a reasonable explanation for the failure to comply with the subrule is given, and where the appellant has shown that he has good prospects of success on the merits in the appeal."

[13] I will now thus turn to the explanation to see whether the reason for the delay is acceptable. In his affidavit the Appellant states that he entrusted his solicitor or defence team of B D Basson at the time with his handwritten notice of appeal dated 27th April 2009 with the instructions that the handwritten notice of appeal should be typed and delivered or submitted to the Registrar of the Supreme Court and High Court within the timeframe or the prescribed periods wherein an applicant must file his notice of appeal.

[14] In the affidavit, the Applicant does not state who the solicitor from BD Basson is and furthermore, no one from BD Basson's office made any affidavit confirming that he or she received the handwritten notice of appeal from the appellant and explaining why the Notice of Appeal was out of time. Instead there is a confirmatory affidavit deposed to by Mr. Basson on 22 September 2010. In that affidavit Mr. Basson says:

> "I confirm that I represented Elias Nhinda Tjiriange in his criminal matter, case No. CC 40/2008. After the accused person (The present Applicant) was sentenced I consulted with him, whereby he indicated that he wished to appeal against the conviction of armed robbery more specifically.
>
> I accordingly also explained to the accused person the procedure relating to appeals as well as the prospects of success and also possible consequences which may arise should his appeal be unsuccessful.
>
> As such I informed the accused person that he should liaise directly with the Directorate of legal Aid as our office did not have instructions to do the appeal and that such instructions might take very long".

[15] The affidavit by Mr. Basson does not confirm what the appellant is alleging. I echo the sentiments expressed by Muller J in the ***Itembu (supra)*** matter that an Applicant for condonation of late filing of leave to appeal seeks the indulgence of the Court and has to be absolutely honest with it. I am not convinced that Applicant was absolutely honest with the Court. I thus do not accept the excuse proffered by the Applicant.

[16] Section 316 (2) of the Criminal Procedure Act provides as follows:

> "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 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."

[17] Section 316(2) is identical to Rule 67(1) of the Magistrates Court Rules. The purport of Rule 67(1) of the Magistrates Court Rules has been spelt out in a line of cases in this court and those views are by parity of reasoning applicable to section 316(2) of the Criminal Procedure Act. I will highlight some of the cases below:

(a) In the case of ***S v Gey Van Pittius and Another*** 1990 NR 35 (HC) Strydom AJP (as he then was) said the following with regard to the purpose of a notice of appeal.

> "***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***." {My Emphasis}

(b) In the case of ***S v Wellington*** 1990 NR 20 at page 22 paragraph F-H, Frank AJ held that Rule 67(1) of the Magistrate's Courts Rules;

"provides in simple unambiguous language that the appellant must lodge his notice in writing in which he must set out "clearly and specifically" the grounds on which the appeal is based. ***He must do this for good reason.*** {My Emphasis}

(c) In the case of ***S v Tjiho*** **1991 NR 361** (HC) Strydom JP said:

"A notice of appeal must set out clearly the grounds of appeal. It serves as a notice to the prosecutor and to the court what grounds will be argued. An appellant is confined to his grounds of appeal and generally will not be allowed to argue any matter not raised in his grounds of appeal"."

(d) In the South African case of ***S v Horne*** 1971 (1) SA 630 (C) which has been cited with approval by this Court, Diemont J said at page 631G-632A

*"A notice of appeal which states that appeal is noted against the conviction on the ground that it is against the weight of evidence and bad in law, tells the Court nothing, or rather it tells it no more than that the grounds are based both on fact and law. That is not enough. The Rule provides in simple unambiguous language that the appellant must lodge his notice in writing in which he must set out "****clearly and specifically****" the grounds on which the appeal is based. He must do this for good reason…. These advantages may well be frustrated where the appellant uses the blanket phrase - "against the weight of evidence and bad in law".{* My Emphasis}

(e) Also see the unreported cases of ***Jose Ngongo v The State*** Case No CA 128/2003 delivered on 22 July 2004; and ***Antonio Bee Andreas v The State*** Case No. CA 40/2009 delivered on 22 April 2010.

[18] If the application for leave to appeal does not "***clearly and specifically"*** set out the grounds upon which the accused desires to appeal,

how will the Judge know what the issues are which are to be challenged? The answer is that he will not know.

[19] The application for condonation is rejected on the ground of a lack of an acceptable explanation for the delay and also because the application for leave to appeal does set forth clearly and specifically the grounds upon which the accused desires to appeal.

[20] The question of prospects of success does not have to be considered any further. However, considering the submissions made in the heads of argument and the court's judgment's on conviction and sentence, there are in my opinion no prospects of success that another court may come to another conclusion.

[21] In the result, the application for condonation is refused and the appeal is struck from the roll.

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UEITELE, AJ

ON BEHALF OF THE APPLICANT: IN PERSON

ON BEHALF OF THE STATE: ADV. MARONDETSE

INSTRUCTED BY: THE OFFICE OF THE PROSECUTOR-GENERAL