



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 198/2007

In the matter between:

JAPHTA JACOB**APPELLANT**

and

THE STATE**RESPONDENT**

Neutral citation: *Jacob v State* (CA 198/2007) [2012] NAHCMD 55 (7 November 2012)

Coram: NDAUENDAPO J and PARKER AJ

Heard: 17 September 2012

Delivered: 7 November 2012

Flynote: Criminal procedure – Appeal – Lay litigant – Application for leave to appeal – No application to condone late filing of application for leave to appeal – No rule of law that in such a matter lay litigant ought to be treated differently from the Prosecutor – Guiding factor in exercise of court's discretion in consideration of late filing of such application is fairness and justice to both the litigant and the Prosecutor.

Summary: Criminal procedure – Appeal – Application for leave to appeal – Lay litigant applicant filing application for leave to appeal some three years and four months out of time – Applicant not filing any application to condone late filing of

application for leave to appeal – There is no rule of law which entitles the court to treat lay litigant differently from Prosecutor – Guiding factor in court’s exercise of discretion as to whether to condone such delay is fairness and justice to both the Prosecutor and litigant – Where there has been undue delay and no reasonable and acceptance explanation is given for the delay and no clear indication as to the applicant’s reasonable prospects of success is shown there is no proper application for leave to appeal properly before the court.

ORDER

The applicant’s so-called application for leave to appeal is dismissed.

JUDGMENT

PARKER AJ (NDAUENDAPO J concurring):

[1] On 17 September 2012, having heard Mr Jacob (the applicant) in person, and Mr Eixab, counsel for the respondent, this court dismissed the applicant’s leave to appeal. We said then that reasons for the decision would follow in due course. These are the reasons.

[2] This is an application for leave to appeal, and it has a chequered history. The applicant was convicted in the Regional Court, Windhoek, on one count of rape in terms of the Combating of Rape Act 8 of 2000 and sentenced to 15 years’ imprisonment. The applicant (appellant then) appealed against his conviction. The appeal was dismissed by this court on 5 June 2008. Not satisfied with the decision of the court, the applicant petitioned the Honourable Chief Justice; a route that is wrong in terms of the Criminal Procedure Act 51 of 1977.

[3] Be that as it may, the matter was removed from the roll when it found its way back to the roll of the court. Thus, on 18 May 2009 the matter was removed from the roll as the applicant informed the court that he was awaiting legal representation from the Director: Legal Aid. The matter was put back on the roll – this time, quite inexplicably – under another case number: Case No. CA 198/2007. The application for leave to appeal was struck on account of the fact that there was no proper application for leave to appeal. The application was reinstated and was struck from the roll once again on 5 March 2012. The applicant is once again before this court. In all this, as Mr Eixab, counsel for the respondent, points out, the applicant was represented by counsel in both the trial magistrate's court and in this court when the matter came up for appeal.

[4] We note that the applicant in the present proceeding is a lay litigant, and in that behalf the court may not insist on meticulous compliance with the rules of the court. But in the exercise of our discretion whether to condone the late filing of the application for leave to appeal, the court ought to take into account such factors as the tenets of fairness and justice not only to the litigant but also to the Prosecutor and also be guided by the interest of fairness and the proper administration of justice. (See *Jose Ngongo v The State* Case No. CA 128/2003 (unreported).)

[5] There is no rule of law that I know of, and none was referred to the court, that in matters such as the present a lay litigant should be treated differently from the Prosecutor; that is to say, the court should be strict in the case of the Prosecutor but give limitless and undue allowance to the lay litigant to act in any way he or she likes. The court ought to be guided in the exercise of its discretion to accept or reject an application that has been filed out of time by what is in the interest of fairness and justice to both the lay litigant and the Prosecutor. In our view, therefore, where there has been an undue delay in the filing of an application for leave to appeal and no reasonable and acceptable explanation for the delay has been forthcoming, it would not be in the interest of fairness and justice to the Prosecutor and the litigant to condone the late filing of the application – whether the applicant is a lay litigant or legally represented. In the instant case, we find that the delay in bringing such application is a delay of three years and four months, and the delay is unexplained.

On any pan of scale the delay is indubitably undue. In any case, there is no application before the court for the court to consider whether to condone the late filing of the application for leave to appeal in which the applicant would have given a reasonable and acceptable explanation for the failure to comply with the rules of court and in which the applicant would have shown that he has reasonable prospects of success on appeal. (See *S v Nakapela and Another* 1997 NR 184.)

[6] We are not persuaded by the applicant's reference to his being a lay litigant and that solely for that reason this court should – without more – just accept that there is a condonation application for the late filing of the application for leave to appeal when there is clearly no such application filed with the court.

[7] For these reasons, we hold that there is no proper application for leave to appeal and so there is no application properly before the court. In the result, the applicant's so-called application for leave to appeal is dismissed.

C Parker
Acting Judge

N Ndauendapo
Judge

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APPEARANCES

APPELLANT: In person.

RESPONDENT: J E Eixab
Of Office of the Prosecutor-General, Windhoek.