NOT REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CA 51/2003

In the matter between:

REHABEAM ANGULA **FIRST APPELLANT**

KYSSELAM IPENGEH **SECOND APPELLANT**

CHRISTOMAS FRANSISCO **THIRD APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation:

Angula and others v State (CA 51-2003) [2013] NAHCMD 40 (18 February 2013)

Coram: VAN NIEKERK J

Heard: 18 September 2009

Delivered: 18 February 2013

ORDER

The three appellants' applications for leave to appeal are refused.

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JUDGMENT

VAN NIEKERK J:

Introduction

[1] This matter concerns applications for leave to appeal against a judgment I delivered sitting alone in an appeal from the regional court. In the appeal I confirmed the convictions and 13 year sentences of the three appellants on a charge of robbery with aggravating circumstances. In respect of the first appellant I set aside his conviction and sentence on a charge of possession of a firearm without a licence. I confirmed the convictions and six months sentences of the second and third appellants on a charge of possession of a firearm without a licence.

Points *in limine* : Failure to file applications in time and to show good cause for condonation

[2] The appeal judgment was delivered on 19 December 2006. Mrs *Nyoni,* on behalf of the respondent, takes the point that the appellants are late with the application for leave to appeal as they have not filed same within the required period of 14 days. It is trite that where an application for leave to appeal is filed late, an application for condonation should be made. In terms of section 316(1) of the Criminal Procedure Act, 1977 (Act 51 of 1977), the applicant must show good cause for the failure to file the application in time.

[3] The first appellant initially drew up two documents dated 22 January 2007, which were stamped by the prison authorities on 23 January 2007 and received by the Registrar of this Court on 30 January 2007. The one document is an application for leave to appeal against my decision on appeal and directed to the

Chief Justice. The other document is an application for condonation of the lateness of the application for leave to appeal.

[4] After the first appellant was allegedly informed that he had followed the wrong procedure by directly approaching the Chief Justice, he on 17 September 2008 filed an application for leave to appeal directed to the High Court. It is accompanied by a document in the nature of a letter in which the appellant states that he is late with the application because he followed the wrong procedure.

[5] On 23 April 2009 the first appellant filed an amendment to the previous set of documents as he had allegedly been advised by court officials that his previous application was in the wrong format; that it lacked specific grounds of appeal; and that it should have been addressed to the High Court and not to the Chief Justice. The first appellant attached an amended application for leave to appeal. He also attached an unsworn application for condonation for the late filing of the application for leave to appeal. In this application he states that the three appellants were given only one copy of the judgment delivered on 19 December 2006. As they were in different section of the prison, the first appellant only received this copy from the second appellant on 27 January 2007. However, in the meantime he had already started to draft the application for leave to appeal without insight into the judgment. He says the fact that he did not have sight of the judgment, caused a delay in the drafting, which he did with the assistance of an inmate. However, as he is a layman and not acquainted with the rules and procedures, he did not comply with the time limits and addressed the application to the wrong Court. It was only after he made telephonic enquiries to follow up the status of his application that he was informed that he had followed the wrong procedure. Thereafter the applicant had difficulties in obtaining and paying for

the services of another inmate to assist him in drafting the other documents I described.

[6] The first appellant's latest explanation, although not under oath, is reasonable and appears to be consistent with the documents filed and with his first explanation. It is clear that he was intent upon appealing from an early stage and from the contents of the various applications it is evident that he had put in considerable effort to set out the grounds for the application for leave to appeal as best he could. The delay between the date of the judgment and the filing of the first application is short. In all the circumstances I am inclined to find that his explanation is satisfactory and that he has shown good cause for the delay. I do not deem it necessary to consider the prospects of success at this stage, but prefer to consider his application for leave to appeal on its merits.

[7] There are several documents on the court file relating to the second appellant's application. The first is a letter dated 18 February 2008 and received by the Registrar on 29 February 2008. In this letter the second appellant makes enquires about a petition he had written on 18 January 2007 and in relation to which he had received no news. On 14 May 2008 a member of the Registrar's staff responded by stating that the second appellant's petition was premature; that he should apply for leave to appeal from the High Court and that he should apply for condonation as his application would be late._

[8] On 12 August 2008 the second appellant filed an application for leave to appeal accompanied by an application for condonation not supported by an affidavit. The explanation given is to the effect that it is late because he had directed his first application to the wrong court. The second appellant states that he is a layman and that he was not aware of the correct procedure. He does not

attach a copy of the petition and there is none on the Court's file. The respondent appears to accept that he did indeed file a petition, but criticizes the second appellant because he waited from May 2008 to August 2008 to file the two applications. The second appellant's explanation is that when the Registrar's letter arrived at Windhoek Central Prison, he had already been transferred to Oluno Prison on 12 March 2008. When he was transferred back to Windhoek on 22 July 2008 he discovered that in the meantime the letter had been forwarded to Oluno Prison. It was returned to the Windhoek Central Prison some time later, where he received it and prepared his applications in August 2008.

[9] The second appellant blamed his lack of compliance with the time limits and his failure to follow the correct procedure on ignorance.

[10] In respect of the third appellant there was no indication on the Court file that he had filed an application for leave to appeal. The first indication of such an application was received when he filed heads of argument on 10 September 2009. The respondent hurriedly filed heads of argument in response. State counsel gave notice of a point *in limine* that the third appellant had failed to apply for leave to appeal; and that he has not given any explanation for his failure.

[11] The third appellant at the hearing handed in a carbon copy of a document dated 22 January 2007, which is an application for condonation for the late filing of his application for leave to appeal. In this application, which is not supported by an affidavit, the third appellant states that he is a layman with no money to instruct a lawyer. The lawyer who represented him at the appeal was instructed by the Directorate of Legal Aid. He further states that he received a copy of the appeal judgment from the second appellant on 20 January 2007. He had earlier requested a copy of the judgment from the Registrar, but he was allegedly

informed that it would only be available after the festive season and that it would be sent to his lawyer, who would provide it to him. However, the lawyer never did so. As he did not have a copy of the judgment, he could not prepare the application for leave to appeal. It seems that, after he received a copy from the second appellant, he drew up the application.

[12] A certified copy of an extract from a prison register recording the delivery of documents to the Registrar was handed in with the leave of the Court. It indicates that on 19 January 2007 the third appellant filed a document described as an 'application for judgment and condonation'. Another certified extract from the same register reflects that on 30 January 2007 the third appellant delivered a High Court application for leave to appeal. The extract of the same date records that the second appellant also delivered an application for leave to appeal to the Supreme Court and that the first appellant filed his application for condonation for the late filing of a notice of appeal.

[13] Unfortunately it seems that the second and third appellants' documents filed on 30 January 2007 were not placed on the Court file or went missing. They were not able to hand in copies of these documents. In the circumstances I think that it was fair to allow them to present their submissions on the grounds of appeal and to regard their heads of argument as setting out the grounds on which they wish to apply for leave to appeal. There was no prejudice caused hereby as the respondent was able to draw heads of argument and to present full argument on these grounds.

[14] As in the case of the first appellant it is clear that the second and third appellants were intent upon lodging applications for leave to appeal from a very early stage. I am inclined to condone the lateness, such as it is. I accept that

they were not aware that the application for condonation should have been supported by a sworn statement. Their explanations are satisfactory and are supported by the prison register. The lateness of their applications is therefore condoned.

The approach to applications for leave to appeal

[15] In considering the applications for leave to appeal I bear in mind that in applications of this nature the appellants are required to satisfy the Court that they have reasonable prospects of success on appeal. This means that the Court will refuse to grant the application of there is no chance of success on appeal or if this court is satisfied beyond a reasonable doubt that the appeal will fail (*R v Ngubane and others* 1945 AD 185 186-7).

The merits of the first appellant's application for leave to appeal

[16] The first appellant sets out several grounds for his application for leave to appeal The first is a general complaint that this Court erred by holding that he had been correctly convicted; that the State had proved its case beyond a reasonable doubt; and so on. This ground is too vague and does not constitute a proper ground of appeal. Attempting to give more particularity to this vague complaint, the appellant added that this Court failed to take account of all the evidence in upholding the conviction. He does not specify what evidence was overlooked or wrongly disregarded.

[17] The first appellant attacked the conviction on the basis that the evidence by Mr Kolle regarding his identification was a dock identification which was questionable. In this regard it must be remembered that evidence of identification of an accused while he is in he accused dock is not *per se* inadmissible. It

depends on the circumstances of each case how much weight should be attached to such identification. See *S v Haihambo* 2009 (1) SA NR 176 (HC) at 182C where the Court continued to states (at 182G-H):

> '[24] It is well established that it is necessary to approach the evidence of dock identification with considerable caution. (*S v Mthetwa* 1972 (3) SA 766 (A) at 768A; *S v Rico Hoxobeb and Three Others* CR 68/2001 unreported Namibian High Court judgment delivered on 7 May 2001.)
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> [25] The confidence and sincerity of a witness identifying a suspect are not sufficient, neither is the honestly of the witness identifying a suspect by itself any guarantee of the reliability of such identification. (See *S v Mehlape* 1963 (2) SA 29 (A) at 32F; *S v Ndika and Others* 2002 (1) SACR 250 (SCA) at 256f - g; *S v Charzen and Another* 2006 (2) SACR 143 (SCA) ([2006] 2 All SA 371) at 147i - j.)'

[18] As is evidence from the appeal judgment, the Court did give careful consideration to Kolle's evidence and did not only rely on the fact that he identified the first appellant in the dock as one of the robbers. The Court also considered the evidence by Mr Schaeffer, Mr Willibard and the first appellant's own evidence, which was found too good to be true and which the Court rejected as false beyond a reasonable doubt. The fact of the matter is that Mr Kolle's wallet was robbed from him inside the shop by a person who he said was the first appellant. That same wallet was found on the first appellant's person in suspicious circumstances outside the shop while the robbery was still in progress inside. The first appellant was also found in possession of a firearm which corresponds to Mr Kolle's description. The first appellant submitted that there is no satisfactory explanation as to how he was able to leave the premises when the front entrance to the shop had been closed. However, he loses sight of the

fact that there was not only one entrance to the shop and that the wallet robbed inside was found outside in his possession. The question arises, how did it get there? The probabilities are overwhelming that it was the first appellant who conveyed the wallet to the outside.

[19] For these reasons and the reasons set out in the appeal judgment I am of the view that the first appellant has no prospects of success on appeal.

The merits of the second appellant's application for leave to appeal

[20] The second appellant was identified by Const Ipumbu, who already knew him from before, as one of the robbers who was inside the shop and who fired a shot while at the front entrance. It is common cause that the second appellant was indeed inside the shop at the time of the robbery, but the second appellant claimed that he was an innocent customer who was caught up in the robbery. The Court rejected this story on appeal.

[21] The second appellant based much of his argument in support of his application for leave to appeal by pointing out alleged misdirections by this Court regarding the make and calibre of the firearms used during the robbery. Four firearms were seized at the scene, of which one was in the first appellant's possession. This firearm was not sent for ballistic tests. The other three were described as (i) a 7,65mm CZ pistol; (ii) a 9mm Makarov pistol 'made in Russia'; and (iii) a 9mm Makarov pistol. A spent cartridge and two projectiles were also picked up at the scene. Ballistic tests showed that these three items were consistent with having been fired by the pistol mentioned in (ii). The second appellant submitted that this evidence shows that pistol (ii) was the only firearm fired at the scene. However, the forensic evidence does not go that far. The

second appellant misinterprets the evidence. The tests merely show that the objects picked up were fired from pistol (ii), not that pistol (ii) was the only firearm fired.

[22] Based on this misinterpretation, the second appellant constructed a factual argument which goes like this. Pistol (ii) was in the third appellant's possession. Constable Ipumbu testified that the second appellant fired a firearm that was in his possession. As pistol (ii) was the only pistol fired at the scene, Ipumbu's evidence identifying the second appellant must be rejected as the only firearm fired at the scene was not in the second appellant's possession. However, as I pointed out, the basis for the argument is flawed.

[23] Apart from this flaw, it seems that the second appellant also misinterprets the evidence by Mr Beukes about which firearm was in the third appellant's possession. The evidence given in an exchange between the prosecutor and the witness is as follows (Record p65, lines 11-21):

> 'The pistols that were pointed at you Sir can you maybe give us a description or do you know what make it was? --- The pistol the specific one who was pointed to me was a 9mm pistol it was black.
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> And the other one? --- A black 9mm pistol the other one that we had was also black but he got a the handle was a brown handle.
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> Brown? --- I think it was a Tocaref or a Mackarov something between that.
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> A Tocaref or a Mackarov? --- Yes a Russian made [make].'

[24] From the evidence as a whole it is clear that the person who pointed a firearm at Mr Beukes was the third appellant. Another robber hit him over the head with another firearm. According to the quoted extract it is clear that Beukes

distinguished between the firearm that was pointed and the other firearm. It was the second firearm that he described as being of a Russian make. It seems to me from this evidence that the firearm seen in the third appellant's possession was not conclusively shown to have been of Russian make. This fact also upsets the second appellant's argument.

[25] The second appellant further submitted that there was not sufficient evidence that the exhibits were actually found at the scene. He suggested that they could just as well have been picked up at Okahandja Park and falsely used by the police as so-called exhibits form the scene of the robbery. There is no basis for these speculations on the record.

[26] On the evidence provided by Constable Ipumbu there is a strong case against the second appellant. The second appellant submits that he was, just like the fourth appellant, arrested merely because he was known to the police. Yet, he submitted, the fourth appellant was acquitted on appeal, while his own convictions were confirmed. However, the second appellant loses sight of the fact that the case against him was much stronger than the case against the fourth appellant as I have set out in detail in the appeal judgment.

[27] The second appellant submits that the appeal court erred by using the doctrine of common purpose while there was not a sufficient factual basis to satisfy the legal requirements of this doctrine as set out in *S v Singo* 1993 (1) SACR 226 (A) at 227B, where the Court held that where common purpose was manifested simply by conduct, as opposed to common purpose arising from express agreement or conspiracy, liability required in essence (1) that the accused must have had the intent, in common with the other participants, to commit the substantive crime charged, and (2) that there had to have been an

active association by him with the conduct of the others for the attainment of the common purpose. The Court held, further, that it followed that liability would only continue while both requirements remained satisfied, or, conversely, that liability ceased when either requirement was no longer satisfied. The second appellant further submitted that there was no evidence of any agreement or conspiracy between him and the robbers.

[28] I must point out that in the appeal judgment I did not expressly deal with the issue of common purpose, but this aspect arose in the court *a quo* and some argument was addressed thereon before me. Be that as it may, it seems to me to be a matter of necessary inference that the persons who were engaged in the robbery that day could not have embarked upon their course of conduct without some agreement and conspiracy to commit the crime. It is in the nature of this kind of armed robbery that planning is required. The explanations by first, second and third appellants that they were just innocent bystanders or even victims who happened to be at the scene of the crime clearly were thought of in advance. They were present in the shop while bearing handguns at the same time just before the shop was closing. This clearly was no coincidence. When the third appellant was spotted by Mr Beukes, the first and second appellants came to his assistance, which was just the time when the fifth unknown person emptied the tills. At this time the first appellant also robbed Mr Kolle of his wallet. The second appellant shortly thereafter fired a shot when the front door would not open as he appeared intent on leaving the shop just as the fifth robber did and when Const Ipumbu saw him there. The second and third appellants together tried to open the other door where some of the customers and Mr Beukes were hiding and when the police arrived they pretended to be fleeing from the robbers. They both got

rid of their unlicensed weapons before the police searched them. There can be no doubt that the appellants acted with common purpose.

[29] The second appellant raised a further ground of appeal. This is that, because he was a layman and unrepresented on appeal, the Appeal Court should, in the spirit of fairness, have allowed him to raise a certain ground of appeal although it was not in his notice of appeal. That ground of appeal was that he did not receive a fair trial as the trial court denied him the right to call a certain witness in support of his defence. The only reference to the fact that something like this might have occurred is on page 517 of the reconstructed record where the second appellant mentions that the trial magistrate allegedly did not allow him to call a witness because he had not indicated earlier that he intended to call this witness and the magistrate wanted to finalize the case. The second appellant referred to certain cases where the High Court allowed additional grounds to be argued and submitted that I should have done the same.

[30] In *S v Safatsa* 1988 (1) SA 868 (A) at 877B-F the following was stated:

> 'It is generally accepted that leave to appeal can validly be restricted to certain specified grounds of appeal (see *R v Jantjies* 1958 (2) SA 273 (A) at 275A; *S v Williams en 'n Ander* 1970 (2) SA 654 (A) at B 655F - G; *S v Sikosana* 1980 (4) SA 559 (A) at 563A - B). In practice this is frequently a convenient and commendable course to adopt, especially in long cases, in order to separate the wheat from the chaff. On the other hand, this Court will not necessarily consider itself bound by the grounds upon which leave has been granted. If this Court is of the view that in a ground of appeal not covered by the terms of the leave granted there is sufficient merit to warrant the consideration of it, it will allow such a ground to be argued. This is well illustrated by the judgment of Schreiner ACJ in *R v Mpompotshe and Another*

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> 1958 (4) SA 471 (A) at 472H - 473F. In my view, however, it requires to be emphasised that an appellant has no right to argue matters not covered by the terms of the leave granted. His only 'right' is to ask this Court to allow him to do so. In *Mpompotshe's* case *supra*, Schreiner ACJ referred to 'matters which this Court should think worthy of consideration', and to the power of the Court 'to condone the delay and grant leave to appeal on wider grounds than those allowed by the trial Judge'. A formal petition for leave to appeal on wider grounds is not an indispensable prerequisite, since the matter is before the Court whose members would be conversant with the record, but the remarks I have quoted show that the Court will certainly decline to hear argument on an additional ground of appeal if there is no reasonable prospect of success in respect of it.'

[31] In the case before me the record had to be re-constructed after the matter had already been set down for appeal. As the second appellant did not raise the issue of the witness in his notice of appeal, this issue presumably did not receive particular attention in the re-construction. Apart from the second appellant's remark mentioned above, it cannot be gleaned from the record that the magistrate did refuse the second appellant's request to call a witness (and whether the calling of the witness meant that the matter had to be postponed) and if so, what the reasons and circumstances were. As such the point belatedly raised could not be assessed for prospects of success. Furthermore, as this ground was not included in the notice of appeal, it seems to me in all the circumstances of this appeal, that the respondent was prejudiced by the belated raising of the point. I therefore exercised my discretion not to allow the second appellant to argue it. In my view the discretion was judicially exercised.

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[32] In conclusion I hold that the second appellant does not have reasonable prospects of success on the merits of his application for leave to appeal.

The merits of the third appellant's application for leave to appeal

[33] The first ground on which the third appellant seeks leave is that the Appeal Court should have upheld his lawyer's argument that the trial court committed an irregularity by not allowing him the opportunity to call Johannes Petrus, a witness who allegedly was with him at the food counter while Beukes was, according to the State case, fighting with the third appellant. As I understand it, this witness would have been able to corroborate the third appellant that he was not the person who was fighting with Beukes. (I pause to note that this ground of appeal was included in an amended notice of appeal).

[34] There is no merit in this ground as the record (p441- 443) indicates that the only witness that the third appellant wanted to call was an unknown person who took a photograph of him which appeared in a local newspaper.

[35] The next ground relates to the evidence by the state witness Retho, which the appellant submits this Court should have ruled inadmissible and irrelevant. There is no basis for such a ruling. The Court dealt in detail in the appeal judgment on the issue of Retho's credibility and reliability as a witness. While the Court criticised his evidence, it was accepted where there was corroboration. I refer to the detailed analysis of his evidence. What is more, no part of Retho's evidence was used to uphold the conviction against the third appellant. There is no merit in this ground of appeal.

[36] The third appellant raised several aspects of the evidence by Beukes. These are all related to the issue of whether Beukes' evidence identifying the third appellant

was correctly accepted by this Court. For the reasons set out in the appeal judgment I am quite satisfied that the evidence by Beukes was reliable and credible. He had ample opportunity to observe the third appellant at close range over some time in a well lit area. Beukes also observed him when he was pursuing Beukes to the back of the shop and when he struggled to open the door. This is also where the police caught the third appellant, outside that very door while he was still trying to open it. When Beukes came out of hiding he found the third appellant already arrested there. There was no need in such circumstances to have given a detailed description of the third appellant, as he was caught in the act, so to speak. The fact that Beukes stated later that he is not sure if he would be able to identify the robbers again is an indication of his honesty and carefulness in not pointing out an innocent person. It also does not detract from the fact that on the night he was sure that the person who fought with him was the one who pursued him and who was arrested.

[37] The third appellant raises a similar argument on common purpose as the second appellant. It is rejected on the same basis.

[38] The third appellant's story was that he went to the shop by car with his uncle to fetch the latter's girlfriend. While the uncle waited outside in a car the third appellant went inside the shop to buy some food. He was innocently caught up in the robbery and was also trying to hide in the same room as Beukes. There he was arrested, beaten up and taken to the police station as an accused in the robbery. I made the observation in the appeal judgment that I find it very strange that he did not say a word further to the police about his uncle who was waiting outside while the commotion inside was happening and who would surely have vouched for his innocence. The third appellant takes the point that the record shows that he did say

this to the police, but reading the record in context, my understanding is that he did so afterwards and not at the scene, which is the point in time that I had in mind.

[39] In my view the third appellant has shown no grounds to conclude that there are reasonable prospects that the Supreme Court may come to a different conclusion on the merits of his appeal.

[40] The result, then, is that the three appellants' applications for leave to appeal are refused.

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K van Niekerk

Judge

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APPEARANCE

For the appellants: In person

For the respondent: Mrs I M Nyoni

Office of the Prosecutor-General