

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case No: HC-MD-CRI-APP-CAL-2020/00074

IN THE MATTER BETWEEN:

CHARLIE BOOYSEN

APPELLANT

and

THE STATE

RESPONDENT

**Neutral citation:** *Booyesen v State* (HC-MD-CRI-APP-CAL-2020/00074) [2021]  
NAHCMD 153 (8 FEBRUARY 2021)

**Coram:** LIEBENBERG J et SHIVUTE J

**Heard:** 8 FEBRUARY 2021

**Order:** 8 FEBRUARY 2021

**Reasons:** 9 APRIL 2021

**Fly note:** Constitutional Law – Human Rights – Right to legal representation –  
Fundamental right – Right not absolute – Imposing limits only in exceptional

circumstances – where reasonable to limit such rights – No exceptional circumstances found.

Criminal Procedure – Fair trial – Accused claiming that he was medically unfit to testify and not prepared – Accused coerced into testifying by court – Not afforded adequate time and facilities for preparation for his defence – Article going beyond physical facilities to prepare defense – Must include information to be presented as part of the defense case – Failure to allow such right amounting to misdirection

**Summary:** The appellant sought a postponement to secure the presence of his legal representative to attend trial in the magistrate's court. The court refused the postponement. Accused who claimed to be medically unfit to testify, was coerced by the magistrate to take the stand and testify in his defence unrepresented, notwithstanding the fact that Legal Aid had appointed counsel to represent him. The right to legal representation is a fundamental right. Though such right is not absolute as it is subject to certain limitations, such limitations should only be imposed in exceptional circumstances where it is reasonable to limit such rights. Court found that no such exceptional circumstances existed. Accused claimed that he was medically unfit to testify and not prepared to continue with the trial. However, he was coerced into testifying by court. Accused not afforded adequate time and facilities for preparation of his defence. Such facilities must go beyond the physical facilities and must include information to be presented as part of the defence case. Failure to allow such right amounts to misdirection. Appellant deprived of a fair trial. Nature of irregularly vitiates proceedings.

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### APPEAL JUDGMENT

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- (a) The application for condonation is granted.
- (b) The appeal is upheld.
- (c) The conviction and sentence are set aside.
- (d) If the appellant is still in custody he must be released immediately and without fail.

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## REASONS FOR THE ORDER

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SHIVUTE J (LIEBENBERG J concurring):

[1] This is an appeal against conviction and sentence. The appeal was disposed of by way of an order on 8 February 2021. We indicated then that the reasons for the order would follow. What follows are the reasons.

[2] The accused was convicted of stock theft read with the provisions of the Stock Theft Act 12 of 1990, as amended, in the magistrate's court sitting at Karasburg. He was sentenced to 7 years' imprisonment, of which two (2) years were suspended for a period of three (3) years on condition that the accused was not convicted of stock theft or possession of suspected stolen stock, committed during the period of suspension. Dissatisfied with the outcome, he appealed against his conviction and sentence.

[3] Although the appellant raised several grounds of appeal, there are two material grounds of appeal. First, it was contended that the learned magistrate misdirected himself and erred in law and/or fact by failing to adequately consider the fact that the appellant was not given an opportunity to apply for legal representation, alternatively he was not advised adequately about his right to apply for legal representation in the trial after his erstwhile legal practitioner withdrew. Secondly, it was averred that the magistrate erred in fact and /or law by forcing the appellant who was sick and under medication to proceed with the trial which the appellant was not prepared for due to the unexpected withdrawal by his former legal representative. These two grounds are interrelated and will be discussed together.

Condonation

[4] The notice of appeal was filed late. The appellant was sentenced on 30 August 2019 and his notice of appeal was filed with the clerk of court some 11 months later on 24 July 2020. Rule 67(1) of the Magistrates' Court Rules provides as follows:

'...A convicted person desiring to appeal under section 103 (1) of the Act, shall within 14 days after the date of conviction, sentence or order in question, lodge with the clerk of the court a notice of appeal in writing in which he shall set out clearly and specifically the grounds, whether of fact or law or both fact and law, on which the appeal is based.'

In light of the above, the appellant was supposed to have filed his notice of appeal with the clerk of court within 14 days after the date of conviction or sentence.

[5] In the affidavit accompanying the condonation application, the appellant explained that the cause of the delay for filing his notice of appeal was an incomplete record of proceedings. The record took a long period to be completed by the transcribers. He further added that as from February 2020 all inmates, including him, were restricted from moving in-between cells as a precautionary measure to prevent Covid-19 infection. He was thus unable to secure the assistance of another inmate to draft his notice of appeal. He only managed to obtain such assistance from a fellow inmate on 15 May 2020.

[6] The above position was confirmed by appellant's erstwhile legal practitioner, who also filed an affidavit explaining that she was appointed by Legal Aid as counsel for the appellant early September 2019 and that because she was not aware of the merits of the case, she had to wait for the transcribed record of proceedings which was only availed to her on 27 January 2020. After perusal of the record, she discovered that it was not complete. The record was sent back to the transcribers on 20 February 2020 and a complete version thereof was received by her on 21 May 2020, hence the delay in filing the notice of appeal. Counsel for the respondent argued that applicant's condonation application should fail because although reference was made to the clerk of court, there was no supporting affidavit from such clerk.

[7] As a general rule, an applicant must explain the reason why he or she did not comply with the rules in an affidavit that accompanies the condonation application. This explanation must not only be reasonable but it must be *bona fide* as well. Although the statements made in the appellant's condonation affidavit are not accompanied by a supporting affidavit from the clerk of the magistrate's court, such statements were confirmed by the appellant's erstwhile legal practitioner.

[8] Turning to the second requirement of whether or not the application for condonation should be granted, namely whether there are reasonable prospects of success on appeal, counsel for the respondent conceded that in light of the fact that appellant was sentenced to 7 years' imprisonment in a magistrate's court, which by law, is limited to sentences which are 5 years and lower, the applicant had good prospects of success on the merits.

[9] In determining whether there are prospects of success on the merits, this court needs to consider the evidence presented in the court *a quo* and what transpired there.

[10] This brings us to the grounds of appeal where it is contended that the appellant did not receive a fair trial because he was not afforded the opportunity to have a legal representative present in court during his trial and that he was forced by the learned magistrate to proceed with the trial when he was ill. If the court finds that there was a misdirection on the part of the trial court, this finding may dispose of the other grounds advanced on behalf of the appellant.

[11] With regards to the abovementioned grounds of appeal, counsel for the appellant argued that his client was denied the right to legal representation in the court *a quo* in that after his erstwhile legal practitioner withdrew, he requested a postponement of the case to allow his newly appointed legal aid counsel to come on record. Such request was refused by the magistrate and the appellant was coerced into giving evidence in his defence, notwithstanding the fact that he was not medically fit to do so or prepared to

present his case on account of the abrupt withdrawal of his erstwhile legal practitioner. Counsel argued that the right to legal representation is a fundamental right and failure by the court to afford an accused the opportunity to exercise such right amounts to a fatal irregularity. Furthermore, although the right to legal representation is not absolute, the appellant was sick and even if he was not sick, he indicated that he wanted a lawyer during trial and a lawyer was appointed for him. This evidence was available to the magistrate but disregarded it.

[12] On the other hand, counsel for the respondent argued that although the appellant proceeded with the trial unrepresented, it did not result in a miscarriage of justice because at that stage all the State witnesses had given their evidence and had been cross examined by the appellant's erstwhile legal practitioner. Further, the court *a quo* exercised its discretion judiciously and the appeal court should not interfere with that decision. Counsel further argued that the right to legal representation is not an absolute right and the appellant's legal practitioner is an officer of court and was supposed to take instructions well before the defence case. In any event, although the appellant claimed to have been ill during his trial, there was no proof before court that medication had been prescribed for him.

[13] Both counsel referred us to several authorities which we have considered. Before I decide the question whether the appellant did or did not have a fair trial, I would like to consider the issues that led to the trial proceeding in the absence of the appellant's legal representative.

[14] On 3 July 2019, the matter was called for plea and trial. During this stage, accused was legally represented until the State closed its case. On 29 August 2019, the matter was set down for continuation of trial for the defence case. However, counsel for appellant informed the court that the appellant was unable to take the stand and testify in his defence as he was not medically fit to do so. He further added that he was unable to consult the appellant in order to receive instructions, because the accused was

unresponsive as a result of his medical condition. He then requested that the matter be postponed to a different date for the defence case.

[15] In Response, the magistrate stated the following:

'One thing that you need to know is that tomorrow is my last day and there is now way I can be able to come back. So, I think the defence needs to make a choice, either elect not to conduct your defence or choose to remain silent and the matter proceeds forward that is the choice that the defence has to make or if the matter drags on to another date there is a possibility that the matter may not be resolved anytime soon. So those are the options that you have....

[16] Defence counsel thereafter confirmed the accused's intention to testify in his defense. He added, however, that he could not allow his client to do so when he holds instructions that accused was not physically and mentally fit to testify on that date. He further added that if he proceeded with leading the accused on the stand while in such a state, it would amount to inadequate legal representation.

[17] Thereafter the court ruled that because the accused was articulate when interrupting the court, he was medically fit to proceed with the trial. After such a ruling, defence counsel withdrew legal representation as he found it unethical to lead the accused in evidence when he was medically and physically unfit to do so.

[18] After his counsel withdrew, the accused informed the court that he could not proceed with the trial if he did not have a legal representative. He went further to request that he be provided with an opportunity to apply for legal aid. The magistrate then informed the accused that he was delaying justice by asking for a postponement for legal aid and directed that the accused phone legal aid to enquire about the appointment of a legal practitioner in his case. After the adjournment, the prosecutor informed the court that legal aid would instruct another legal representative to represent the accused and that such counsel would attend court on Monday, 2 September 2019, which is one working day later as the matter was in court on Thursday, 29 August 2019.

[19] The magistrate then informed the accused that by Monday, 2 September 2019, the magistrate would have left the district and there would be no magistrate to hear the case. Thereafter, the magistrate went on an endless tongue lashing reminding the accused of how privileged he was to have had a free lawyer from legal aid when other accused persons were not so fortunate. The magistrate further complained about the various postponements that took place and the fact that his or her term in Karasburg was coming to an end at the end of August 2019. The magistrate elaborated on how other accused persons in similar cases managed to represent themselves without a lawyer and that a case of stock theft was not that complicated and did not require legal representation. The accused stood his grounds and indicated that he would prefer to only proceed once his lawyer was present. He further informed the court that he did not prepare himself to give evidence on account of the abrupt withdrawal of his legal practitioner. He further added that he was not medically fit to give evidence.

[20] The magistrate then gave the accused 2 options, either to remain silent or proceed with his defence unrepresented. As a result, the accused informed the court that he will proceed to testify in his defence because he was forced or pushed to do so by the court. Thereafter, the accused proceeded to give evidence in his defence unrepresented.

#### Applicable Law

[21] The rights provided by the Namibian Constitution in Art 12(1)(e), namely that 'all persons shall be afforded adequate time and facilities for the preparation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice' are there to ensure that all the offenders charged with criminal offences and appearing before a criminal court are afforded a fair trial.



[22] The expression '*facilities for preparation and presentation of their defence*' referred to in the Article above must go beyond the physical facilities in which to prepare the defence. It must include information to be presented as part of the defence case. It would be difficult to hold that adequate facilities for preparation and presentation of the defence case within the meaning of Article 12(l)(e) were given when the accused was forced by the magistrate to take the stand and give evidence notwithstanding the fact that he informed the court that he was not prepared to give evidence on account of the abrupt withdrawal of his erstwhile legal practitioner. His request for a postponement was also refused by the court. It is further not the magistrate's place to rule on whether an accused person is medically fit to stand trial or not.

[23] On the other hand, the right to be legally represented is a fundamental right. Failure to give an accused person an opportunity to acquire the services of another legal representative after his legal practitioner withdrew abruptly constitutes gross irregularity insofar as in the circumstances the accused is not given a choice and opportunity to exercise his constitutional right to legal representation. It in fact amounts to a failure of justice in the context of section 322 (1) of the Criminal Procedure Act 51 of 1977.

[24] Whether the failure of the accused to be afforded the opportunity to be represented and provided with adequate facilities for preparation and presentation of his defense results in a failure of justice, is a question of fact which depends on the circumstances of each case. Before the appeal court sets aside the conviction, it should consider the nature of the irregularity and its effect. If the irregularity is of such a fundamental nature that the accused has not been afforded a fair trial then a failure of justice per se has occurred and the accused person is entitled to an acquittal, for there has not been a trial. Therefore, there is no need to go into the merits of the case at all.<sup>1</sup>

[25] In the present matter, as noted earlier, the appellant's legal practitioner withdrew as he was not comfortable with leading evidence when the appellant indicated that he

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<sup>1</sup>S v *Kandovazu* 1998 NR 1 (SC) at 8

was not medically fit to do so. Even after the withdrawal of his counsel, the appellant informed the court countless times that he did not want to testify without a lawyer present and requested that the matter be postponed to allow his newly appointed lawyer to come on record but the court refused this request. When asked to take the stand and testify in his defense, the accused informed the court that he was not feeling well and was not properly prepared to proceed with the trial. Again the court coerced him to proceed with his evidence and even informed him that his case was not a serious one and he did not require legal representation.

[26] It appears that the magistrate was more concerned with his or her imminent departure from the district and did not want to return to Karasburg for the same case. By reasoning this way, the trial court ignored the notions of justice and basic fairness. There cannot be a fair trial if the appellant is forced to proceed with the trial when he was not adequately prepared. The least the court could have done was to afford the appellant a postponement and to allow his newly appointed counsel to come on record.

[27] Although this court is in agreement with the proposition that the right to choose a legal representative is a fundamental right that is not absolute, the limitations that may be imposed on such a right should only be applied in exceptional circumstances where it is reasonable to do so. In this case, no exceptional circumstance existed to justify refusing the appellant his right to legal representation.

[28] As a result, there is no doubt that there has been a miscarriage of justice that negates the core notion of a fair trial. The nature of the irregularity vitiates the proceedings. As for the other grounds of appeal, it is not necessary to deal with them as the matter has been disposed of on the grounds discussed herein. We are further satisfied with the explanation given for the delay in filing the notice of appeal and the prospects of success on the ground of an unfair trial are such that the application for condonation should be granted.

[29] It was for all these reasons that the following order was made:

- (a) The application for condonation is granted.
- (b) The appeal is upheld.
- (c) The conviction and sentence are set aside.
- (d) If the appellant is still in custody he must be released immediately and without fail.

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NN SHIVUTE

Judge

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J C LIEBENBERG

Judge

APPEARANCES:

APPELLANT:

Mr Siyomunji  
Siyomunji Legal Practitioners

RESPONDENT:

Mr Moyo  
Office of the Prosecutor-General

