

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case Title: <i>The State v Frans Edwin Frederick</i>	Case No: HC-MD-CRI-APP-SLA-2019/00047
Ruling on Application for leave to Appeal	Division of Court: Main Division
Heard before: Mr Justice Liebenberg	Delivered on: 08 February 2022
Neutral citation: <i>S v Frederick</i> (HC-MD-CRI-APP-SLA-2019/00047) [2022] NAHCMD 35 (08 February 2022)	
The order: <ol style="list-style-type: none">1) The condonation application is granted.2) The application for leave to appeal is granted.	
Reasons for decision:	
LIEBENBERG J [1] This is an application for leave to appeal by the state in terms of section 310(2)(a) of the Criminal Procedure Act 51 of 1977, as amended (the CPA) against the acquittal and discharge of the respondent in the Oranjemund Magistrate's Court on a charge	

of assault with intent to do grievous bodily harm on 15 April 2019.

- [2] The application was lodged with the registrar of this court on 24 May 2019. It is thus out of time with 9 (nine) days. As required the applicant filed a condonation application to explain the delay. It was explained that the prosecutor, who was entrusted with the application, mistakenly believed that the prescribed 30 day period allowable for state appeals in terms of s 310(2)(a) of the CPA, excluded weekends and public holidays. He thus took full responsibility for the late filing.
- [3] The reasons advanced by the applicant explaining the late noting of the application for leave to appeal are, in the circumstances, found to be reasonable and acceptable.
- [4] I am satisfied that the notice for leave to appeal was duly served on the respondent within the prescribed period and in the absence of any statement filed by the respondent opposing the application, it must be accepted that the application is unopposed.
- [5] On perusal of the record it appears that on 28 March 2019 when the charges were put to the accused, the complainant was not present. A medical certificate was presented by the state, which the court rejected as it did not indicate whether the complainant was booked off. The state nevertheless proceeded to call an eye witness of the alleged assault on the complainant. She testified on how she saw the accused stabbing the complainant with a bottle in the face. Her testimony continued until the next day, 29 March 2019, whereafter the matter was postponed to 15 April 2019. The record also reflects that the complainant was present and warned on record to attend court on 15 April 2019.
- [6] With the resumption of proceedings on this day, the state informed the court that the complainant (who was duly warned on the previous session) was not present and applied for a warrant of arrest to be issued against the complainant. In the same breath the state applied for a further remand, in an attempt to trace one of its

witnesses who is no longer resident in Oranjemund. The court *a quo* (having provided no reasons) seemingly refused both applications, acquitted and discharged the appellant. Though not recorded as such, it would appear that the court considered the state case closed and invoked the provisions of s 174 of the CPA without hearing the parties. This constituted an irregularity.

[7] The magistrate's concession for committing an irregularity is well received. As the court *a quo* misdirected itself by:

- 1) Refusing the application for the issuing of a warrant of arrest by the state for no reason.
- 2) Acquitting and discharging the appellant without satisfying the provisions of s 174 of the CPA.

[8] These irregularities are such that they are likely to vitiate the trial.

[9] It is for I am satisfied that there are good prospects of success on appeal and that leave to appeal should be granted.

[10] In the result, it is ordered:

- 1) The application for condonation is granted.
- 2) The application for leave to appeal is granted.

	J C LIEBENBERG JUDGE