

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION,
HELD AT WINDHOEK

LEAVE TO APPEAL JUDGEMENT

Case Title: <i>David Kondjara v The State</i>	Case No: CC 17/2016
	Division of Court: High Court Northern Local Division
Heard before: Honourable Lady Justice Salionga	Heard: 19 September 2023 Delivered: 3 October 2023
Neutral citation: <i>Kondjara v S</i> (CC 17/2016) [2023] NAHCMD 612 (3 October 2023)	
The order: <ol style="list-style-type: none">1. The application for condonation is refused.2. The matter is struck from the roll and is regarded as finalized.	
Reasons for the above order	
SALIONGA, J	
<u>Introduction</u>	
[1] This is an application for leave to appeal to the Supreme Court in terms of s 316 of the Criminal Procedure Act 51 of 1977, as amended.	
[2] Applicant together with the other two co-accused were convicted in this Court on a charge of murder. On 4 March 2022, they were each sentenced to life imprisonment. Irked	

by the decision of the court, applicant is now seeking leave to appeal against both conviction and sentence. He is also applying for an order condoning the late filing of the notice of appeal.¹

[3] Mr Shilongo appeared for applicant during the trial and at also represents the applicant at this hearing. Ms Ndlovu appears for the respondent.

Condonation

[4] The applicant filed his notice or application for leave to appeal on 24 March 2022 within 15 working days. On 8 September 2022 he withdrew his notice and filed a new notice together with an application for condonation accompanied by an affidavit.

[5] In his supporting affidavit, applicant attributed the delay for the late filing of the notice to a defective notice he had originally filed on time. It had to be withdrawn because it did not set out clear and specific grounds of appeal and this called for a proper notice to be filed. He thus submitted that the explanation for the delay is reasonable and this court should condone the late filing of the notice of appeal.

[6] Strictly speaking the applicant did not comply with s 316 (1) of the Criminal Procedure Act 51 of 1977. He failed to file his application within 14 days as required by the law. However, respondent did not oppose the application and the court reserved its ruling on the condonation application. The parties were allowed to address the court on the second leg of prospects of success.

Grounds of appeal

AD CONVICTION

[7] In his challenge against conviction, applicant raised several grounds which counsel for the applicant grouped into four main grounds namely: (a) the primary evidence of what is called “styled confession” made by applicant. (b) the issue of MTC cellphone printouts admitted by the court; (c) the spontaneous admissions the applicant made to Constable

¹ Section 316(1) of the Criminal Procedure Act 51 of 1977.

lipinge before his arrest and (d) the forensic evidence of cigarette butts implicating the applicant.

[8] I should pause here to note that in his opening statement of the oral submissions, Mr Shilongo on behalf of the applicant submitted that:

‘It is not our submission that the trial court is wrong in convicting the applicant but looking at the principle of law and this court’s decision, chances are that another court might arrive at a different conclusion.’

[9] When a court is seized with an application for leave to appeal, the applicant must satisfy the court that he or she has reasonable prospects of success on appeal. The test at this stage is clear that, there should be reasonable prospect of success on appeal and no other. This entails that if it appears to the judge that there is no reasonable prospect of success on appeal, then the application for leave to appeal should not be granted. It should be underscored that the mere possibility that another court might come to a different conclusion is not sufficient to justify the grant of leave to appeal. See *S v Nowaseb*.²

[10] The test to consider in the application for leave to appeal was described in *Rex v Kuzwayo*³ as follows:

‘That test must, to the best of the ability of the trial judge, be applied objectively. By that is meant that he must disabuse his mind of the fact that he himself has no reasonable doubt as to the guilt of the accused: he must ask himself whether there is a reasonable prospect that the judges of appeal will take a different view. This applies to questions both of fact and of law: there is, in this respect, no distinction between a question of fact and a question of law.’

[11] Bearing the foregoing principles in mind, I proceed to consider the grounds against conviction as grouped in the heads of argument and oral submissions. Grounds 1 to 4 are that the court misdirected itself or erred by placing more weight on MTC cell phone records that did not comply with s 21 of the Criminal Procedure Act 51 of 1977 as amended. Counsel for the applicant submitted that the MTC cellphone printout records did not take the admissions in the styled confession anywhere, reasoning that there was no evidence

² *S v Nowaseb* 2007 (2) NR (HC) 640F-641A. See also: *S v Ceaser* 1977 (2) SA 348 (A) 350E.

³ *Rex v Kuzwayo* 1949 (3) SA 761 (AD) at 765; See also *Rex v Baloi* 1949 (1) SA 523 (A) at 524-525.

indicating the location or town in which Theo Katjimune tower was. Counsel further submitted that lipinge's evidence of cell phone records obtained on 1 April 2015 that linked the applicant to the commission of the crime is not before court. The only MTC cell phone printout records before court is that of Kavita dated 7 April 2015.

[12] As respondent rightly submitted, the cell phone printouts were testified on by Constable lipinge. That he obtained search warrants from the Katutura Court. After he obtained them, he went to MTC to be provided with communication data. The court found his evidence clear and reliable. According to lipinge, that was the evidence that led to the arrest of the applicant on 1 April 2015, which is common cause. His evidence was corroborated by that of sergeant Nuule. It was further corroborated by the evidence of Kavita with an exception of dates being 1 and 7 April 2015. The evidence was not challenged during cross-examination. The defence did not even object to the admission of Exhibit R and the documents were handed in by consent. (See *S v Eiseb* 2014 (3) NR 834 (SC) at 13 para 22) Surely this issue should have been taken up with witnesses Sergeant Nuule and Constable lipinge during their testimony. (See *S v Luis* 2005 NR 527 (HC) at 531 and *Small v Smith* 1954 (3) SA 434 (SWA) at 438E-F). It is in my view misleading for counsel for the applicant to argue that lipinge's evidence was not before court and the printouts were only handed in during the evidence of Kavita.

[13] With regard to grounds 5 and 8, applicant contended that the court erred in law or fact by finding that the styled confession falls short of a confession and regarded it as admissions but still continued to convict the applicant without any other evidence furthering the admissions in the styled confession. It is clear from the judgment on merits that the statements made by applicant to the magistrate was not an unequivocal admission of guilt and nothing more. For counsel to argue that the court did not indicate which statements in the styled confession amounts to admissions is misplaced. The court was clear on that point. It is trite that the court in convicting the applicant did not only rely on the admissions made in the styled confession but considered and relied on other circumstantial evidence. This ground is baseless and has no merit.

[14] On the spontaneous admission as a ground, it is not clear from the written submissions whether applicant is denying making admissions or the said admissions made should not have been admitted because they were exculpatory. Be that as it may, Mr

Shilongo in his oral submission stated that this Court relied on an exculpatory statement which is hearsay in nature and only admissible in certain cases. Sound as this argument appears, it is misplaced as the court ultimately retains the duty to analyse the evidence in its totality and decide the guilt of the applicant. *In casu*, it cannot be said that these spontaneous admissions did not implicate the applicant. They could not be ignored either. Although they were exculpatory in nature they implicate the applicant in showing that he had knowledge of the crime committed against the deceased and it was not just a coincidence. The court, after assessing the evidence in totality, found that the state proved its case against the applicant beyond reasonable doubt. This ground also has to fall.

[15] With regard to the submission that the forensic evidence of cigarette butts found in the vicinity of the crime scene had the DNA of the applicant, Mr Shilongo argued that such evidence does not take the state's case anywhere. It only indicates that the applicant was in the vicinity where the crime was committed, but applicant gave an explanation why he was in that vicinity. Good as it sound, it is one thing to give an explanation, however it is another thing whether or not such explanation is acceptable.

[16] In the present case, the applicant's DNA was found on these cigarette butts. The applicant explained that they were not deposited on the day in question. The court rejected the applicant's explanation and accepted the evidence of Mr Liswaniso, Ms Ntelamo and Eixab that the cigarette butts were fresh and had not been exposed to the sun for too long. These witnesses' evidence corroborated each other in material respects and was not displaced in cross-examination. In fact, the trial court had given sufficient weight to the evidence before it in light of various established facts and authorities relied upon as per its judgments on conviction and sentence.

[17] On grounds 6 and 7, applicant argued that the court erred in law or fact in applying the doctrine of common purpose by imputing the acts of unknown individuals to the applicant merely by being at the scene. In this regard the requirements for common purpose were discussed in detail in *S v Gurirab and Others* 2008 (1) NR 316 (SC) at 322. The applicant on his own admissions and the evidence of the MTC printouts and DNA found on the cigarette butts proved that he was at the scene where the deceased was

killed. The applicant was not just at the scene, but was involved in this case right from the planning stage and furtherance of the plan. He acted as a mediator between his co-accused number 1, 5 and the killer/s. He even received money to have the deceased killed. From his statement, exhibit R, applicant knew of a plan to kill the deceased. He received payment on behalf of the killers and accepted the payment to kill the deceased including allowing his cell phone to be used. He fully participated in luring the deceased to a secluded place and then according to his testimony, watched the deceased being killed. By so doing, the applicant ought to have foreseen the possibility of the deceased being killed. It matters not whether applicant stoned the deceased or not, the conduct of his co-accused is imputed to him and that does not exonerate him. Counsel for the applicant also made reference to *S v Madisia*⁴ where the accused was acquitted on a murder charge despite the admissions made by the accused person. I agree with the finding of that Court in that there was no other acceptable and reliable evidence apart from her own admissions. However I find Madisia's case distinguishable from the facts of this case. The state in the instant matter led evidence that satisfies the cardinal rule of logic highlighted on page 27 paragraph 86 of the judgment on merits and further satisfies the necessary prerequisite of common purpose. For the reason stated, this ground for leave to appeal has to be dismissed.

AD SENTENCE

[18] In respect of sentence, it was submitted that the applicant was sentenced to the most severe form of punishment.⁵ That the Court failed to consider that applicant is a first offender and has no previous convictions. He further argued that the Court did not consider his personal circumstances, the time he spent in custody and that the court wrongly found that the applicant did not show remorse. That the court erred in imposing a sentence that would have been imposed on the main perpetrators, despite that the applicant did not stone the deceased. That such sentence is startlingly inappropriate, induces a sense of shock and on the basis of the *Gaingob* matter above, the Supreme Court may arrive at a different conclusion.

[19] On her part, Ms Ndlovu, counsel for the respondent, in referring to the principles of sentencing, submitted that those factors complained of by applicant were not only

⁴ *S v Madisia* (CC 08/2023) [2023] NAHCMD 267 (16 May 2023).

⁵ *Gaingob v The State* (SA 7 and 8-2008) [2008] NASC (6 February 2018).

mentioned but adequately considered. As to the allegation that the sentence was shockingly inappropriate, she referred the court in her heads of argument to similar cases where much harsher punishments were imposed. She disagreed that applicant did not deserve the most severe sentence, submitting that the sentence is in line with other sentence imposed in similar cases⁶.

[20] The principles to be considered in an application for leave to appeal against sentence cannot be stretched more than what Small AJ in *Ndovai v S*⁷ set out as follows:

[25] The approach by an appeal court when considering sentences of a trial court is trite and has long been settled. Suffice to say, a court of appeal can only interfere with the discretion exercised by the trial court in certain limited instances. The reason is that the discretion to be exercised is that of the trial judge and not the appeal court, and it is not an issue whether the sentence is right or wrong. Instead, the question is whether the trial judge judicially exercised the discretion. Such discretion may be said not to have been judicially or properly exercised if an irregularity or misdirection vitiates the sentence. The appeal Court is thus only entitled to interfere with a sentence if the trial court misdirected itself on the facts or the law or if a material irregularity occurred during the sentencing proceedings. Furthermore, an appeal Court can interfere in the sentence if the trial court failed to consider material facts or over-emphasized the importance of other facts. Lastly, interference on appeal is allowed if the trial court's sentence is startlingly inappropriate, induces a sense of shock, and there is a striking disparity between the sentence imposed by the trial court and that which a court of appeal would have imposed.⁸

[21] In my view, there is no misdirection in sentencing the applicant to life imprisonment. The law is clear in as far as sentencing individual charged with attempt, conspiracy and inducement where there is a main perpetrator is concerned. Section 18 of the Riotous Assemblies Act⁹ is clear in that both the main perpetrator and/or an accomplice shall be liable on conviction to punishment to which a person convicted of actually committing that offence will be liable. In this case the sentencing principles were properly applied and the balance between the interest of the applicant, the crime and the society

⁶ *S v Du Preez and Another* Case No 02/2016.

⁷ *Ndovai v S* (CC 10/2019) [2021] NAHCNLD 85 (11 October 2021) para 25.

⁸ *S v Jason and Another* 2008 (1) NR 359 (SC) 363J-364G; *S v Shikunga and Another* 1997 NR 156 (SC) at 173B – F; *S v Ndikwetepo and Others* 1993 NR 319 (SC) at 322I; *Ex parte Neethling and Others*, 1951 (4) SA 331 (A) at 335H; *R v Lindsay* 1957 (2) SA 235 (N); *S v de Jager and Another* 1965 (2) SA 616 (A) at 629; *S v Tjiho* 1991 NR 361 (HC) at 366A – B.

⁹ Riotous Assemblies Act 17 of 1956.

were properly struck when sentencing the applicant. For counsel to argue that the applicant should have been sentenced differently because he was not the main perpetrator in this case is flawed and unmerited.

[22] After carefully considering the oral arguments by both sides as well as the heads of argument filed by the parties and applying the principles set out hereinbefore, I agree with counsel for the respondent that applicant has failed to show that there are reasonable prospects on appeal and that he will succeed in the Supreme Court. Therefore condonation for the late filing of the appeal cannot be granted.

[23] In the result, it is ordered that:

1. The application for condonation is refused.
2. The matter is struck from the roll and is regarded as finalized.

Judge's signature	Note to the parties:
Salionga J	Not applicable.
Counsel:	
Applicant	Respondent
P K Shilongo Of Directorate of Legal Aid, Windhoek	E N Ndlovu Of Office of the Prosecutor General, Windhoek