REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC 22/2010

In the matter between:

MANDUME MATHEUS KAMUDULUNGE **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Kamudulunge v The State* (CC 20/2010) [2014] NAHCNLD 11 (26 February 2014)

Coram: LIEBENBERG J

Heard: **26 February 2014**
Delivered: **26 February 2014**

Flynote: **Criminal procedure** – Appeal – Application for leave to appeal in terms of s 316(1)(*b*) – Court found no reasonable prospects of success on appeal.
Condonation - Notice of appeal filed outside prescribed time limit – In view of no reasonable prospects of success on appeal – Application refused.

ORDER

1. The application for condonation of late filing of the Notice of Appeal is refused.
2. The matter is struck from the roll.

JUDGMENT

Application for Leave to Appeal

LIEBENBERG, J:

[1] After evidence was heard in a criminal trial the applicant was convicted on two counts of murder, read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 and sentenced to 40 years' imprisonment on each count. It was ordered that 20 years of the sentence imposed on count 2 must run concurrently with the sentence imposed on count 1. In effect applicant thus has to serve a sentence of 60 years' imprisonment. He now seeks leave from this court to appeal against both convictions and the sentences imposed.

[2] Applicant was legally reprented during the trial but now appears in person as his application for legal aid was unsuccessful. Mr *Lisulo* appears on behalf of the respondent.

[3] Respondent opposes both applications on the basis that there are no prospects of success on appeal.

[4] Whereas the applicant filed his Notice of Appeal outside the prescribed time limit he further seeks condonation for the late noting of the appeal. In a supporting affidavit, filed together with the notice, applicant made no attempt to explain his non-compliance with the provisions set out in s 316 (1) of Act 51 of 1977, except for the bold assertion that he is a lay person and experienced some difficulty in finding someone who could assist him in preparing the appeal.

[5] It is trite that where an appeal is noted out of time, a substantive and proper application for condonation of the late filing of the notice to appeal must be filed. However, where the accused acts without any assistance from a legal representative, the accused may be prejudiced if the court were to follow a strict approach and therefore, the court should be led by the circumstances of each case (*S v Wasserfall*[1]). Regard must also be had to the prospects of success on appeal (*Nakale v The State*[2]).

[6] In the present matter the Notice to Appeal was filed late by about one week and I would for purposes of the application for condonation be inclined to find in favour of the applicant, provided he satisfies the second requirement of showing reasonable prospects of success on appeal.

[7] It is trite that the test to be applied in applications of this nature is that the applicant must satisfy the Court that there is a reasonable prospect of success on appeal (*R v Ngubane and Others*[3]; *R v Baloi*[4]). In *S v Nowaseb*[5] the court cited with approval the case of *S v Ceasar*[6] where Miller, J.A. emphasised that 'the mere possibility that another Court might come to a different conclusion is not sufficient to justify the grant of leave to appeal'. I now turn to consider the application for leave to appeal on the merits.

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[1] 1992 NR 18 (HC) at 19I-J.
[2] Case No SA 04/2010 (unreported) delivered on 20 April 2011.
[3] 1945 AD 185 at 186-7.
[4] 1949 (1) SA 523 (AD) at 524-5.
[5] 2007 (2) NR 640 (HC).
[6] 1977 (2) SA 348 (AD) at 350E.

The conviction

[8] Applicant raised several grounds in the Notice of Appeal which amount to the following: The first concerns exhibits handed in during the trial which applicant contends were not his property. He says that in the absence of DNA testing done on a T-shirt and a box of matches testified about by the State's witnesses, there was insufficient proof that these items were his. He further challenges the reliability of evidence adduced at the trial about a knife and a 5 litre container found at the scene of crime. He also contends that the court misdirected itself by not ordering the State to produce into evidence a 'bag' (suitcase) which applicant allegedly arrived with at the police station. As regards evidence adduced at the trial about applicant being informed of his rights, he claims that these were never explained to him prior to the making of a statement to the police; neither did the magistrate during court proceedings explain these rights to him in any detail. Lastly, that this court misdirected itself when finding that applicant admitted to the police his involvement in the crimes committed.

[9] Applicant's contention about a (yellow) T-shirt and a box of matches not being his property, is not supported by the evidence of independent witnesses who testified to the contrary during the trial. The same applies to the plastic container and the knife afterwards found on the scene of crime. As regards the T-shirt, Mr Mathias (applicant's brother) testified that he saw applicant wearing a yellow T-shirt when leaving home on that fateful night. It is common cause that the applicant proceeded to the police station and there he was met by Constable Ndeutapo who confirmed that applicant was wearing a yellow T-shirt on his arrival. Sergeant Mukete also confirmed this and went on to say that it was he who later requested the applicant to take off the T-shirt because it was required as an exhibit. Applicant then took another shirt from the suitcase he had with him and put it on. From their evidence it is clear that these witnesses could not have mistaken applicant wearing a yellow T-shirt at the time.

[10] Applicant's complaint about ownership of the T-shirt (and box of matches) not properly being established in the absence of DNA-evidence, is without merit. Whether or not the T-shirt belonged to the applicant was not essential to the outcome of the proceedings and in itself has no probative value as he was not identified on what he was wearing. He was seen wearing the specific T-shirt when leaving home and was still wearing it when he arrived at the police station. His brother kept him in sight throughout and followed him up to the police station. Applicant on his own evidence confirmed having gone to the police station, albeit for different reasons. Thus the T-shirt was not required for identifying purposes and there was no need for the State to subject it to forensic examination.

[11] As for the suitcase, Mr Mathias saw applicant leaving with the suitcase and his evidence is corroborated in all material respects by that of two police officers on duty at the police station that night. He later, upon his return to the applicant's room, discovered that all applicant's belongings had been removed which clearly supports evidence about applicant having arrived at the police station with a suitcase. There is further evidence about applicant having taken another shirt from the suitcase when the one he was wearing was seized as an exhibit by Sergeant Mekete. Constable Ndeutapo testified that he saw no need to seize the suitcase and its content as it only contained the applicant's personal belongings. For the very same reason there was no need for the court to order the production of the suitcase into evidence. Despite applicant disputing evidence about a suitcase he had with him, four independent witnesses testified to the contrary and there is no legal basis on which the court would be entitled to disregard their evidence.

[12] The sum of the evidence about the applicant having arrived at the police station with a packed suitcase was to turn himself in, thus anticipating not returning to his room. Such conduct is consistent with the report applicant made to Constable Ndeutapo upon his arrival and also later to Sergeant Mukete.

[13] The box of matches referred to relates to an incident when applicant, upon his arrival at the police station, went behind the counter and after throwing down a box of matches on the desk, sat himself down and said he had come to turn himself in for the killing of his girlfriend and child. The evidence of Constable Ndeutapo in this regard is consistent with that of Mr Mathias who had followed the applicant from his room. The room was earlier set alight and was still smouldering. Possession of the box of matches *per se* does not prove that the crimes were committed by the applicant and should not be viewed in isolation. It is however consistent with the evidence of other witnesses implicating the applicant in the commission of the crimes and to that end the court was entitled to have regard thereto. Applicant's complaint about the box of matches not having been subjected to forensic analyses through which DNA-evidence could possibly be established is unrealistic; neither had this point been raised during the trial. There is thus no merit in this ground.

[14] Applicant further challenges the reliability of Sergeant Mukete's evidence about admissions made to him regarding a knife that was used in the killing of the deceased persons, and a 5 litre container used to fetch petrol with from the filling station in order to set the bodies alight. He contends that he never made such report to the officer and that the court misdirected itself when relying on that evidence. This ground ties in with another in that applicant claims that his rights were never explained to him prior to him making a statement.

[15] The court extensively dealt with the admissibility of statements made by the applicant to the police upon his arrival and during a subsequent interview with Sergeant Mukete shortly thereafter and there is no need to rehash what has been stated in the judgment.[7] Suffice it to say that in the light of all the evidence adduced the court was satisfied beyond reasonable doubt that evidence about self-incriminating admissions made by applicant to the police was not only admissible, but also credible and reliable. It is of importance to note that when applicant made mention about the knife and the container that

[7]Paras 41 – 46 of the judgment.

could be found inside his room, the police by then had not attended to the crime scene and otherwise would not have had any knowledge about the existence or presence of these items in the room. The items mentioned were indeed subsequently found in the room like applicant said. This piece of evidence further ties in with the evidence of two witnesses who testified about applicant borrowing the container whereafter he was seen going in the direction of the filling station. There is overwhelming evidence proving the nexus between applicant and the container found in his room, from which the court was entitled to infer that it had been used to set the room and the bodies of the deceased alight. In my view there is no prospect of success on appeal on this ground either.

[16] The last ground of appeal turns on the magistrate having failed to explain to the applicant his rights during the s 119-proceedings. This point was raised by defence counsel during the trial and the court thoroughly dealt with it in the judgment.[8]

[17] The court in its final analysis of all the evidence adduced found that applicant's alibi defence simply did not measure up to the incriminating evidence against him and, in conclusion, rejected his story as false beyond reasonable doubt. He was accordingly convicted on both counts of murder.

The sentence

[18] The only ground of appeal against sentence applicant relies on is that the sentence of 60 years' imprisonment is too severe.

[19] This ground is vague and does not constitute a proper ground of appeal. This notwithstanding, I shall deal with this ground on the basis that applicant complains about the sentence imposed being inappropriately severe.

[20] As can be gleaned from the judgement on sentence, the court, after discussing the principles applicable to sentencing, summarised applicant's

[8]Paras 47 – 50 of the judgment.

personal circumstances and the circumstances in which the crimes were committed. It paints a sordid picture where applicant acted with direct intent when he first stabbed his girlfriend and baby of seven months with a knife and thereafter poured petrol over them setting them alight, whilst his girlfriend was still alive. The method of killing used by the applicant displays signs of inhumanity and barbarity which is aggravated by the absence of remorse. When asked in cross-examination how he felt about the deceased persons' passing, he replied that he was fine with the idea as they had left the suffering of this world. More disturbing is his remark about him not behaving 'like in flesh'. In view of applicant's criminal record involving crimes of armed robbery, theft and escaping from lawful custody for which he had served terms of imprisonment and had been released shortly before committing the murders he now stands convicted of, the court came to the conclusion that applicant is a threat to society and must be prevented from repeating any heinous crimes.

[21] After weighing up applicant's interests against that of society, the court concluded that the latter outweighed his interests by far and that lengthy custodial sentences, in the circumstances of this case, are justified. This is an instance where prevention, deterrence and retribution, as objectives of punishment, must be emphasised. As regards the term of imprisonment the court took cognisance of the sentences imposed in equally serious cases and concluded that the imposition of lengthy custodial sentences was inevitable.

[22] After due consideration of the grounds set out in applicant's Notice of Appeal I am unable to find that there are reasonable prospects of success on appeal against both convictions and the sentences imposed.

[23] In the result, it is ordered:

1. The application for condonation of late filing of the Notice of Appeal is refused.
2. The matter is struck from the roll.

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JC LIEBENBERG

JUDGE

APPEARANCES

APPELLANT	In person
RESPONDENT	D Lisulo Of the Office of the Prosecutor-General, Oshakati