REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

LEAVE TO APPEAL JUDGMENT

Case No: CC 20/2012

SIMON NAMBULI **APPLICANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Nambuli v S* (CC 20/2012) [2021] NAHCNLD 41 (31 March 2021)

Coram: SALIONGA J

Heard: **11 March 2021**

Delivered: 31 March 2021

Flynote: Criminal Procedure – Leave to appeal to the Supreme Court – Convictions and sentences – Condonation for non-compliance with rules – Onus on the applicant - Magistrate court rules not applicable – Referred to section 316 of Criminal Procedure Act 51 of 1977 and Rule 115 of High Court Rules – No prospects of success on

convictions – Same cannot be said on leave to appeal against the sentences — Leave is granted.

Summary: This is an application for Leave to appeal against both the convictions and sentences of this court. Applicant was convicted of four counts of rape; one count of housebreaking with intent to rape and rape read with the provisions of the Combating of Rape Act, 8 of 2000; two counts of assault with intent to do grievous bodily harm and a count of defeating or obstructing the course of justice. He was sentenced to multiple custodial sentences as per the attached order the highest being 25 years imprisonment.

Held; where the rules of court are not complied with, the onus rests on the applicant and Legal Practitioners are expected to acquaint themselves with procedural and substantive legal requirements and to diligently comply with the rules of court.

Held that; Magistrates' Court Rules do not regulate appeals in Superior Courts and that in this instance Rule 115 of the High Court Rules read with section 316 of the CPA finds application.

Held further; no prospects of success in as far as the appeals against convictions are concerned.

Also held; that another court faced with the same evidence presented at the trial of the applicant might have arrived at a different sentence and that the cumulative sentences of 75 years' imprisonment falls within the category of inordinate long fixed terms of imprisonment.

ORDER

1. The non-compliance with Rule 115 of the High Court Rules read with section 316 of the Criminal Procedure Act 51 of 1977 is condoned.

2. The application for leave to appeal against convictions is dismissed.
3. The application for leave to appeal against sentences in count 1, 2, 3, 4, 5, and 6 is granted / succeed.
4. The applicant remains in custody.

LEAVE TO APPEAL JUDGMENT

SALIONGA J:

[1] Applicant was convicted by this Court on 25 July 2019 of four counts of rape, housebreaking with intent to rape and rape read with the provisions of the Combating of Rape Act, 8 of 2000, two counts of assault with intent to do grievous bodily harm and a count of defeating or obstructing the course of justice.

[2] He was sentenced on 19 September 2019 as follows;

-In respect of counts one and two the convictions were taken together for sentencing purposes and he was sentenced to life imprisonment.

-In respect of count three he was sentenced to 25 years' imprisonment.

-In respect of count 4 he was sentenced to 25 years' imprisonment

-In respect of count 5 he was sentenced to three years' imprisonment

-In respect of count 6 he was sentenced to three years' imprisonment

-In respect of count 7 he was sentenced to 25 years' imprisonment

-In respect of count 8 he was sentenced to one year imprisonment

The court ordered that the sentences imposed on count five, six and eight were to run concurrently with the sentences on count one and two.

[3] At the time of the trial and the filling of the notice of appeal, applicant conducted his own defence. However he obtained the services of Mr. Shipila of the Directorate of Legal Aid at this appeal hearing. Mr. Pienaar appears for the respondent.

[4] Displeased with the sentences imposed, applicant filed a notice of appeal on 23 September 2019 with a heading 'appeal against the decision of the magistrate of Oshakati. The notice of appeal should have been launched or filed directly with the Registrar of the High Court in terms of section 316 of the Criminal Procedure Act read with Rule 115 of the Rule of this court. However it appears to me that the documents were wrongly forwarded. According to the date stamp, the notice was received on 17 October 2019 by the clerk of the Oshakati magistrate court. Ultimately the notice was stamped by the office of the Registrar of the High Court on 30 January 2020 and indicates that application for condonation in respect of the late filing and a notice of appeal were attached but only the notice of appeal is filed. Applicant's grounds of appeal were that; 'he did not get a fair trial without a legal expert to represent him, that the sentence is too long and indeed abnormal, that he disagrees with the findings because he did not rape anyone and that 75 years' imprisonment plus a life sentence is more than the punishment that one was supposed to get.'

[5] On 1 December 2020 Mr. Shipila filed an amended notice of appeal seeking for an order of this court to grant the applicant leave to appeal the judgement and sentence imposed on 19 September 2019. In the initial notice of appeal appellant appealed against the sentences only, however in his amended notice of appeal he was appealing against both convictions and sentences. Notwithstanding the late filling of the notice of appeal, neither the appellant in his initial notice of appeal nor his legal representative in the amended notice of appeal had filed a condonation application and/or an affidavit explaining the reason for the delay.

[6] Appellant in the amended notice of appeal raised nine grounds some of which were not in his initial notice of appeal. The grounds of appeal are that:

Ad Conviction

That the Honorable Judge misdirected herself in law or in fact in one or more of the following:

1. She did not render the accused, who was unrepresented during the trial sufficient assistance as would be expected of a trial court during the trial.
2. Her understanding of the contents and effect of the applicant's statement made in terms of s115 of the CPA was plainly wrong;
3. She wrongly accorded evidential value to the s115 statement of the applicant and relied on that to conclude that the applicant had changed his version during the trial;
4. She did not apply her mind to the plausibility of the applicant's case especially with regard to counts 1 and 2;
5. She wrongly found that the applicant had coerced the complainant into committing a sexual act with him in counts 1 and 2;
6. She wrongly found that the applicant had carried a knife for the purpose of intimidating or coercing the complainant into committing the sexual acts with him;
7. She wrongly disregarded contradictions in the evidence of the complainant regarding why she says she was raped.

Ad Sentence

8. The honorable judge did not apply her mind to the cumulative effect of sentence imposed on the applicant.
9. The sentence imposed on the applicant is excessively harsh, shocking, and inhumane and induces a sense of despair.

[7] Mr Pienaar, raised a points in limine in that the applicant was sentenced on 19 September 2019 and he filed an amended notice of appeal dated 1 December 2020. He submitted that section 309 (2) of the Criminal Procedure Act, Act 51 of 1977 as amended provides that the court of appeal is competent to condone a failure to file a notice of appeal within the prescribed time frame of fourteen (14) days; that the court

will only grant extension for the late filing if good reasons are shown for the non-compliance with the rules of the court and if there is a reasonable prospect of success. In this matter Pienaar submits that appellant's initial notice of appeal as well as his amended notice of appeal did not comply with Rule 67 (1) of the rules made under the Magistrate's Court Act 32 of 1944. This in my view was an oversight by the respondent as Section 309 of the CPA and 67 (1) of the Rules he referred to, deals with the appeals from the lower court which is not the subject matter in this case.

[8] It was Mr. Pienaar's further submission that the applicant did not file an application for condonation, he did not withdraw the initial notice of appeal and there is no affidavit explaining the cause of delay. Mr. Pienaar was of the view that whatever is done on the amended notice of appeal without withdrawing the initial notice is a nullity and cannot be amended. Therefore counsel prays that condonation not be granted and the matter should be struck.

[9] Even though counsel for the respondent quoted the wrong sections, the legal principle of non-compliance with the rules are the same with the exception of calculation of days. Section 316 of the Criminal Procedure Act 51 of 1977 deals with applications for condonation in appeals in cases of criminal proceedings in superior courts. Also that this section should be read with Rule 115 of the High Court Rules.

[10] Mr. Shipila in reply to a point in limine submitted that the applicant filed his notice of appeal with the correctional facility on 10 October 2019. The same notice was received by the clerk of court on 30.1.2020. On the face value applicant complied with the fourteen days period. He further submitted that the applicant is in custody and he did not have that freedom to check if the notice filed was processed on time. It was the prison authority who were to explain and not applicant.

[11] Mr. Shipila stated that he was under the impression that once the notice of appeal is amended, the original notice is altered as there is no rule that requires the notice of appeal to be withdrawn before it is being amended. On a question by the court

why an affidavit explaining the reason for the delay had not been filed, Mr. Shipila responded that neither him nor applicant were the spokesperson of the correctional authority. He submitted that the application for leave to appeal is properly before court because the notice was given within a stipulated time limit.

[12] Section 316 of the Criminal Procedure Act 51 of 1977, provides that:

'An accused convicted of any offence before the High Court of Namibia may, within a period of fourteen days of the passing of any sentence as a result of such conviction or within such extended period as may on application (in this section referred to as an application for condonation on good cause be allowed, apply to the judge who presided at the trial or if that judge is not available, to any other judge of that court for leave to appeal against his or her conviction or against any sentence or order following thereon (in this) section referred to as an application for leave to appeal),and an accused convicted of any offence before any such court on a plea of guilty may within the same period apply for leave to appeal against any sentence or any order following thereon.'

[13] It has been said that an applicant who seeks condonation must provide sufficient reasons and give all information possible to enable the court to decide whether the reasons advanced for the delay, are reasonable and acceptable.[1]

[14] In the matter of *Katjaimo v Katjaimo*[2], the Supreme Court, though was said in the context of an appeal, at para 25 of that judgment held that the requirements applicable to applications for condonation remain the same, and quoted with approval the approach to condonation applications as outlined in *Beukes and Another v South West Africa Building Society (SWABOU)*[3] *and Others* as follows:

'An application for condonation is not a mere formality; the trigger for it is non-compliance with the Rules of Court. The jurisprudence of both the Republic of Namibia and

[1] See *Abraham Ruhamba*, Case No CA 103/2003 (unreported) delivered on 20.02.2004 referred to in *David v State* (CC 32/2007) [2014] NAHCMD 118 (01 April 2014).
[2] *Katjaimo v Katjaimo* (SA-2013/36) [2014] NASC 25 (12 December 2014);
[3] *Beukes and Another v South West Africa Building Society (SWABOU)* (SA-2006/10) [2010] NASC 14 (05 November 2010);

South Africa indicate that a litigant is required to apply for condonation and to comply with the rules as soon as he or she realises there has been a failure to comply.' I endorsed the sentiments expressed.

[15] In this application a notice of appeal was received five months out of the time prescribed by the rules and no application for condonation filed. The least counsel for the applicant could have done in the circumstances was to prepare and file an affidavit explaining the cause of delay. Applicant's legal representative was tightlipped on the issue, conducts which amounts to dereliction of a duty as legal representative. (See *Tweya v Herbert* (SA 76-2014) [2016] NASC (6 July 2016) referred with approval to the admonishing legal practitioners in *Kaiyamo v Kaiyamo & others* 2015 NR 340 at para 34.)

[16] In my view Mr. Shipila's response missed the point and/or is misplaced as the law is clear. In this regard not only is it expected of legal practitioners to comply with procedural and substantive legal requirements but to diligently comply with the rules of court. Therefore I do not agree with Mr. Shipila's submission that there is no rule to that effect and the application for leave to appeal is properly before court.

[17] Notwithstanding non-compliance with Rule 115 of the High Court Rules read with section 316 (1) of the Act, I shall also consider the prospects of success on appeal.

Ground 1

[18] Mr. Shipila submitted, inter alia, that the honourable judge did not render the unrepresented accused, sufficient assistance as would be expected of a trial court during the trial in that the court allowed the state to amend the charges in respect of count 3 from common law rape to statutory rape without explaining the nature and import such amendment had or the effect it would have on him. Counsel argued that such an amendment cannot militate against the decision of the Prosecutor-General and is inconsistent with PG's decision and is ultra vires by so doing.

[19] Mr. Pienaar to the contrary submitted that the instant matter, the defence of the appellant was a bare denial of the charges against him. There is no way the honourable judge could have helped the appellant without dissenting into the arena of either leading the appellant's evidence or cross-examining. He submitted that the court can only note the discrepancies where applicant had first denied the charges and thereafter changed to another defence of consent in Rape charges.

[20] Having considered the aforesaid submissions and the totality of evidence, the court is satisfied that the application for an amendment was properly made by a representative of the Prosecutor-General's office. Accused had no objection to the application requested to amend which was granted. In fact the charge was amended and not substituted. It is not correct that this court did not render the unrepresented accused, sufficient assistance needed as expected of a trial court during the trial. I find no merits in the applicant's argument.

Ground 2-3

[21] These grounds overlap. The applicant is complaining about the court's wrong understanding and overreliance on section 115 of the CPA statement in concluding that the applicant changed his version during the trial. Mr. Shipila submitted that the statement made in terms of that section has to be repeated under oath if it is to be given evidential value which was not done in casu. Disagreeing with the aforesaid, Mr. Pienaar submitted that in a plea explanation in terms of s115 of the CPA applicant indicated that the applicant never have sexual intercourse in count 1 and 2 with the complainant. In his evidence in chief, applicant testified that he had consensual sex with the complainant and in cross-examination he stated that complainant was his ex-wife. Therefore the applicant's submission could not be correct.

[22] I agree with counsel for the respondent in his argument. Accused explained in his plea explanation that; "he did not fuck any one / he did not rape anyone by force. The court in this regard in ascertaining what he meant by that, asked him whether he meant she consented or what? "The accused replied that he did not rape her and he

categorically said he did not fuck Christophina meaning he did not have sexual intercourse with her." In his evidence accused testified that complainant was his ex-wife since 1984 and he was ashamed that time when he used to have sexual intercourse with her, he was too young. He admitted to have sexual intercourse with her once that night and she consented to sex. In his submission accused submitted that if complainant was really raped she could have reported the matter to the police. Section 7 of the Act is clear and quoted in my judgement on merit. Surely it cannot be said that the court wrongly understood his plea explanation. It is rather the accused who kept on changing his explanation. Further that the court did not base its judgment solely on the section 115 statement but considered the evidence in its totality. For this reason these grounds have to fail.

Ground 5 and 6

[23] Mr. Shipila argued that the honourable judge wrongly found that the applicant had coerced the complainant into committing a sexual act with him in counts 1 and 2 that the applicant had carried a knife for that purpose. In both count 1 and 2 the applicant was having a knife in his pocket which he removed and displayed on the table. The knife was in his reach all the time before, during and after the rape. The applicant's version is that complainant invited him to her room but why should he need to remove his knife from the pocket to be visible on the table. The coercive circumstances are defined in section 3 (b) of the Rape Act and no need to reiterate them in this judgment. It should be noted that at no point did this court in its judgement make reference to excruciating pain as argued by the applicant. The court stated that the applicant did not even express his inner feelings towards the pain and suffering the complainant had gone through as a result of the applicant's actions which expression was supported by the evidence. The grounds are baseless and ought to be dismissed.

Grounds 4 and 7

[24] Mr. Shipila argued that the learned magistrate did not apply her mind to the plausibility of the applicant's case especially with regard to counts one and two and further wrongly disregarded contradictions in the evidence of the complainant regarding

why she says she was raped. The court could only apply its mind on the plausibility of the applicant's case if the plausibility remains the same version and if he should have put his version to the state witnesses to answer. There could not be no plausible version which was changed time and again. The court further took note of the applicant's case and that of the complainant and found despite contradictions on the complainant's evidence which were found not material the court was satisfied that the truth was told.

Ground 8

[25] This ground is no ground and will not deliberate on it.

Ad sentence

[26] In Mr. Shipila' s opinion although the honourable judge correctly applied the correct principles' of sentencing as outlined in case laws she did not apply her mind properly to the cumulative effect of the sentence imposed on the applicant. Further that the court failed to distinguish between the various counts and take the convictions together for sentencing purposes. Counsel in light of the Supreme Court matter in *S v Gaingob*[4], delivered on 6 February 2018, submitted that sentences which are inordinately long fixed terms of imprisonment which extend beyond the life expectancy of the offender amounts to cruel and inhumane punishment and is in conflict with Article 8 of the Constitution. He further submitted that the cumulative sentences imposed in the present matter falls in that category. It is for that reason this court grants the applicant leave to appeal to the Supreme Court.

[27] Mr. Pienaar correctly submitted that it is not correct that the court failed to distinguish between the various counts for purposes for sentencing. The court did in fact take some convictions in some counts together for sentencing purposes and as such counts 5, 6 and 8 were ordered to run concurrently with the sentences on count one and two.

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[4] (SA-2008/7) [2018] NASC 4 (06 February 2018)

[28] It is common cause that the *Gaingob*[5] decision is binding on this court and has offered convicted persons who were sentenced to inordinately long fixed terms of imprisonment an opportunity to have their sentences reduced. The applicant is no exception as the sentence of 75 years' imprisonment falls within the category of inordinate long fixed terms of imprisonment described in *Gaingob* above.

[29] Having carefully considered the Supreme Court judgement in *S v Gaingob*[6] even though no specific reference was made that the judgment applies to penalties in statutory offences, it is my conviction that another court faced with the evidence presented at the trial of the applicant might have arrived at a different finding.

[30] I find that there is no prospects of success in as far as the appeal against convictions are concerned. However same cannot be said with regard to appeal against the sentences imposed on the applicant in count 1, 2, 3, 4, 5, and 6. Leave to appeal against sentences stands to be granted.

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

1. The non-compliance with Rule 115 of the High Court Rules read with section 316 of the Criminal Procedure Act 51 of 1977 is condoned.

2. The application for leave to appeal against convictions is dismissed.

3. The application for leave to appeal against sentences in count 1, 2, 3, 4, 5, and 6 is granted / succeed.

4. The applicant remains in custody.

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[5] Supra
[6] Supra

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J. T. SALIONGA

JUDGE

APPEARANCES

For the Applicant:	Mr. P. L. Shipila Directorate of Legal Aid, Oshakati
For the Respondent:	Mr. L. Matota Office of the Prosecutor General, Oshakati