

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION,

HELD AT OSHAKATI

LEAVE TO APPEAL JUDGEMENT

Case Title: <i>Fillipus Uusiku v The State</i>	Case No: CC 9/2019
	Division of Court: High Court Northern Local Division
Heard before: Honourable Lady Justice Salionga	Heard on: 18 May 2021 Delivered on: 03 June 2021
Neutral citation: <i>Uusiku v S</i> (CC 9/2019) [2021] NAHCNLD 51 (03 June 2021)	
The order: <ol style="list-style-type: none">1. The point in limine is upheld.2. The application for condonation is refused.3. The leave to appeal is hereby struck off and considered finalized.	
Reasons for the above order	
SALIONGA, J	
[1] This is an application for leave to appeal to the Supreme Court in terms of section 316 of the Criminal Procedure Act 51 of 1977.	
[2] The applicant was charged and convicted in this court of the following charges: murder, assault with intent to do grievous bodily harm and assault by threat all counts read with the provisions of the Combating of Domestic Violence Act 4 of 2003. On the 24 July	

2020 he was sentenced to 32 years' imprisonment on the murder charge, three (3) years' imprisonment on assault with intent to do grievous bodily harm and six (6) months imprisonment on the charge of assault by threat.

[3] Displeased with the sentences imposed on count 1 and 3, applicant filed a notice of leave to appeal to the Supreme Court together with an affidavit. He applied for leave on 16 September 2020 about one month and 28 days from the date he was sentenced. No doubt that the leave to appeal was filed out of the prescribed time limit.

[4] Applicant is a self-actor but was legally represented at the trial. Mr. Matota appears for the respondent.

[5] At the commencement of the hearing Mr. Matota raised a point *in limine* in that the appeal was filed out of time. He submitted that applicant was sentenced on 24 July 2020 and had 14 days to apply for leave but did not. Applicant was supposed to apply for condonation wherein he was to explain the reason for the delay and whether he has prospects of success, which he did not. He further submitted that the explanation applicant gave in his affidavit is not reasonable and that he has no reasonable prospect of success in the appeal. He asked the matter to be struck for non-compliance.

[6] Applicant in reply indicated that the reasons were in the documents filed. I understand that to mean reasons were in the affidavit filed. Applicant stated in his affidavit that he is a lay man who cannot read or write the official language; that he did not fully understand the court procedure. He was looking for someone knowledgeable in appeal procedures to assist him and that took long. Whilst in his oral explanation in court he explained that he filed the appeal on time however the delay was caused by the officers at the correctional facility where he is serving his sentence.

[7] Section 316 (1) of the Criminal Procedure Act 51 of 1977 provides that: 'An accused convicted of an 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.'

[8] It is settled law that from the above paragraph leave to appeal must be applied within the prescribed time limit unless condonation is obtained for the late filing of notice of appeal. Applicant in this matter filed an affidavit wherein he explained the reason for the delay but nowhere had he indicated that he has a prospects of success in his appeal.

[9] In determining whether or not to grant condonation in the instant matter, this court will consider whether the explanation for the delay is sufficient and whether the applicant has prospects of success on the appeal. Applicant was sentenced on 24 July 2010. The leave to appeal documents dated 12, 10 August 2020 and 28 July 2020 were only filed on 16 September 2010 about one month and 28 days late. Applicant gave two different explanations and it is not clear which one is to be considered because this court cannot speculate on the exact reason for the delay. The explanation ought to be clear and satisfactory as counsel for the respondent correctly argued that if it was true that his lawyer had not explained the appeal procedures to him, he could have indicated that in his affidavit which applicant failed to explain. I find the explanation not reasonable and unacceptable.

[10] I now turn to deal with the second leg of this inquiry namely prospects of success, a very important tool to be considered in tandem with the first leg of the inquiry before condonation is granted. Nowhere in the documents filed applicant states or alleges that he has prospects of success on appeal. He merely stated in his notice that the mitigation factors were not fully considered and requests the appeal court to reduce his sentence without indicating any misdirection or irregularity committed by the trial court. Mr. Matota took a swipe at the applicant's notice of appeal and submitted that the notice does not indicate how the trial court misdirected itself in its findings. He was able to refer this court to specific paragraphs and pages of the judgement clearly indicating which of the triad factors were considered. He therefore submitted that the trial court did consider all the personal circumstances of the applicant and that proper balance was made in this case in concluding that the applicant had a history of violence against the deceased and that the applicant's remorse was not genuine as he persisted his innocence on count three even

after a finding of guilty.

[11] In the Supreme Court case of *Hyanith James Ningisa and Others v The State*¹ Mainga JA referred to the test as set out in *S v Ackerman en 'n Ander*² and *R v Boya*³ as follows:

'A reasonable prospects of success means that the Judge who has to deal with an application for leave must be satisfied that on the findings of fact or conclusion of law involved, the court of appeal may well take a different view from that arrived at by the jury or by himself or herself and arrive at a different conclusion.'

[12] In *S v Tjivela*⁴, the Supreme Court cited and with approval the principle laid down by Holmes J in *R v Lindsay* 1956 (2) SA 235 (N) that: "...The matter is governed by principle, not by ad hoc discretion. And the principle is this: If a magistrate has passed a sentence within his jurisdiction, and has not misdirected himself on law, and has duly considered the relevant facts, the Supreme Court will not interfere unless the sentence is so severe as to be unjust." Although the aforesaid judgement was ceased with appeals from the Magistrates courts, I find it relevant and applicable in this application where I am called upon to grant leave even where no prospects of success are alleged in the notice of appeal and where it was not shown to this court how and to what extent it might have misdirected itself in its findings.

[13] Reading from the judgement on sentence, the applicant's personal circumstances were considered and evaluated at length. Accused was found to have a history of assault against the deceased who was his girlfriend. The offences were pre-premediated in that prior to murdering the deceased with a dangerous weapon (a pestle), he threatened to assault her with a beer bottle, further physically assaulted her with and pulled her braiding out. The offences were committed in the presence of the mother and a sister of the deceased who were pleading with the applicant to stop assaulting the deceased but failed to heed to their plea. Applicant did not satisfy this Court that he had reasonable prospects of success on appeal. I am thus not satisfied that on the findings or conclusions of law, the court of appeal may take a different view from that which I arrived at and / or at a different conclusion. This application is unmerited and stands to fail.

¹ 2013 (2) NR 504 SC at para 6 (SA 03/2009) [2012] NASC 10 (13 August 2012)

² 1973 (1) SA 765 at 766 H quoting from *R v Boya*

³ 1952 (3) SA 574 (C) at 577 B-C

⁴ (SA-2003/14) [2004] NASC 9 (16 December 2004)

[14] Consequently, the following order is made:

1. The point in limine is upheld.
2. The application for condonation is refused.
3. The leave to appeal is hereby struck off and considered finalized.

Judge's signature	Note to the parties:
Salionga J	Not applicable.
Counsel:	
Applicant	Respondent
Fillipus Uusiku- in person Of Evaristus Shikongo Correctional Facility, Tsumeb	Mr. L. Matota Of The Office of the Prosecutor General, Oshakati