

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-SNA-2022/00002

In the matter between:

THE STATE

APPELLANT

v

THOMAS HAINANA

RESPONDENT

Neutral citation: *S v Hainana* (HC-NLD-CRI-APP-SNA-2022/00002) [2022]
NAHCNLD 66 (24 June 2022)

Coram: MUNSU AJ et KESSLAU AJ

Heard: 13 May 2022

Delivered: 24 June 2022

Flynote: Criminal procedure- Appeal – notice of appeal filed late - condonation application – reasonable and acceptable explanation for delay - reasonable prospects of success on appeal.

Criminal procedure- application for postponement – guidelines for postponements - final remand – magistrates' discretion – witnesses to be placed under oath – state *dominus litis* – *audi alteram partem*.

Summary: The respondent was charged for assault with intent to do grievous bodily harm in the Magistrates court. The matter was scheduled for plea and trial (final). Before the charge was put to the respondent the prosecutor informed the court that the case was for plea and trial but that the state was only ready for plea because they were two more matters that were defended. When the charge was read the respondent tendered a not guilty plea whereafter the prosecutor sought a postponement for trial. In the process of postponing the matter and warning the state witness who was also the complainant for the next trial date, the complainant informed the court that he did not want to proceed with the matter. The prosecutor insisted that he would proceed with the case. After being addressed by both the prosecutor and the witness the magistrate refused the state's application for a postponement and deemed the state's case closed and *ex mero motu* discharged the respondent in terms of section 174 of the Criminal Procedure Act 51 of 1977 as amended (CPA).

Held; that the appellant had a reasonable explanation for the delay and enjoyed prospects of success;

Held further; that the Magistrate misdirected herself by allowing the complainant to volunteer evidence from the gallery without being under oath;

Held further; that the magistrate misdirected when deeming the state case closed without allowing them an opportunity to be heard or to reconsider their request.

ORDER

1. The appellant's application for condonation is granted.
2. The appeal is upheld and the Section 174 ruling of the court *a quo* is set aside.
3. The matter is remitted to the Oshakati Magistrates Court for the magistrate to proceed with trial and bring this matter to its natural conclusion.

JUDGMENT

KESSLAU AJ (MUNSU AJ concurring):

Introduction

[1] The respondent made his first appearance at the Oshakati Magistrates Court on 1 November 2018 on a charge of assault with the intent to do grievous bodily harm. His rights to legal representation were explained and the accused elected to proceed without legal counsel.

[2] After various remands for further investigations the matter was scheduled for plea and trial (final) on 31 July 2019. On that day the proceedings in court are recorded as follows:

'PP: Case for Plea and Trial, state is ready for plea, we however have defended bail application and urgent defended trial where witnesses are foreigner' (sic).

[3] The charge was thereafter read to the accused who pleaded not guilty and gave a plea explanation indicating that he defended himself against an unlawful attack. The record then reflects the following:

'PP: 9 March 2020 Trial

Witness Fillemon Sheimange: I don't want to proceed with this case we forgave each other

PP: we will proceed, complainant is our only witness

CRT: this was a final remand for Plea and Trial, the complainant is before court and the court is ready to proceed. in addition the complainant when warned informs court that he does not want to proceed. The application refused. States case deemed closed. Accused discharged in terms of section 174' (sic).

[4] The record thus indicates an application for a postponement, if it can be labelled as such. Prior to the charge being put to the accused/respondent, the prosecutor had indicated to the Magistrate that only the plea could be taken from the accused as there was also a defended bail application and a defended trial scheduled with foreign witnesses for the same day. After the plea was noted the prosecutor said: '9 March 2020 for Trial'. The complainant thereafter indicated that he does not want to proceed with the matter, however the State insisted that they would proceed with the matter and that the complainant would be the only witness to be called.

[5] In her additional reasons, the magistrate indicated that she refused the application for postponement after considering the fact that it was a final remand for plea and trial; that the complainant was present which the State had indicated would be their only witness; that such witness did not want to proceed with the matter and; the fact that the court was ready to proceed. After refusing the application for a postponement, the magistrate then went further and deemed the State's case closed and *ex mero motu* discharged the accused in terms of Section 174 of the CPA.

[6] The State was granted leave to appeal however the notice of appeal and heads of argument of the appellant were filed out of time necessitating an application for condonation for the said late filing.

[7] There are two requirements when considering an application for condonation namely the reasonableness of the explanation provided and secondly, the prospects of success on the merits. Gibson J in *S v Nakapela and Another*¹ stated the following at para 185G-H:

'In my opinion, proper condonation will be granted if a reasonable and acceptable explanation for the failure to comply with the sub-rule is given; and where the appellant has shown that he has good prospects of success on the merits of the appeal. In my opinion, these requirements must be satisfied in turn. Thus if the appellant fails on the first requirement, the appellant is out of court.'

The appellant's reason for late filing

[8] The appellant's reason for the late filing is that counsel was involved in two other time consuming criminal matters during the same period, one of which was a murder trial and the other a fraud case. It was furthermore submitted by counsel for the appellant that he is also serving as control prosecutor for the lower court and due to his workload could not manage to file documents in time.

[9] Considering the appellant's reasons, although not without fault, they appear to be reasonable. Given that the respondent did not oppose the application for condonation and was not prejudiced by the late filing, the reason is accepted.

Prospects of success

¹ *S v Nakapela and Another* 1997 NR 184 (HC).

[10] Turning to the second leg of the test for condonation, *to wit* prospects of success, it is appropriate to refer to what was said by Ndauendapo J in *S v Gowaseb*²:

'The appellant is not absolved from the second requirement regardless of whether a reasonable explanation was furnished or not. The prospect of success on appeal is imperative. If the prospect of success at appeal is non-existent, it matters not whether the first requirement was reasonable or not, the appeal must fail.'

[11] The first three grounds of appeal are all aimed against the decision of the magistrate not to grant a further postponement on the request by the State, whilst the fourth ground of appeal is that the magistrate misdirected herself by deeming the State's case closed whilst ignoring the fact that the State is *dominus litis*.

[12] The appellant referred us to the matter of *S v Usiku*³ wherein the court held that the trial judge has a discretion as to whether an application for a remand should be granted or refused and that such discretion should be exercised judicially. In the *Usiku* matter above the State brought an application for a postponement to secure the attendance of a witness, which application was refused based on the fact that it was a final remand. In that matter all the previous remands were due to the absence or on the request of the accused. It was found that the magistrate erred by refusing a postponement on the basis that it was a final remand, as such postponement was previously directed at the accused. The State did not request for postponements up to that point. The circumstances of the case at hand are clearly distinguishable from those of the case referred to. The postponement *in casu* was requested because of essentially a lack of planning and furthermore all the previous remands were granted on the request of the State to finalise investigations.

[13] The appellant also referred to *S v Koorts*⁴ and in particular that:

² *S v Gowaseb* 2019 (1) NR 110 at par 4 page 112; See also *S v Umub* 2019(1) NR 201 and *S v Murangi* [2013] NAHCMD 50 (CA 88/2013; 14 February 2014) paras 7-9

³ *S v Usiku* (CA 103/2000) Unreported (Delivered on 6 June 2003)

⁴ *S v Cecil Koorts* CA 25/2000 HC unreported (Delivered on 7 December 2001) on page 5

'Each case however must be decided on its own merits. I however cannot agree with the rigid approach of the magistrate that 'final' should in all circumstances mean final...If such a rigid approach is adhered to it may result in an injustice and a miscarriage of justice.'

We agree that each instance will be different and should be decided on its own merits. Circumstances in court proceedings change constantly and the fact that a matter was remanded finally to proceed is but one of the factors to be considered when confronted with a request for a postponement. In the *Koorts* matter above, the facts are likewise distinguishable from the case at hand in that the application for a postponement therein was properly motivated and was sought to secure the attendance of a witness at court.

[14] The appellant's third ground of appeal is that the magistrate failed to consider the guidelines as set out in the matter of *S v Acheson*⁵ submitting that the magistrate thus failed to properly consider the application for a postponement.

[15] The guidelines for a court, when considering an application for a remand, were listed in the *Acheson* matter (supra) as *inter alia* the following:

'the length of the adjournment sought; how long the case has been pending; the reason and duration for any previous adjournments; whether there has been any remissness from the party seeking the adjournment and, if so, the degree and nature of such remissness; the seriousness of the offence of which the accused is charged; the attitude and the legitimate and reasonable needs and concerns of the adversary of the party seeking the adjournment; the resources, capacity and ability of the party affected by the adjournment to protect and advance its case on the adjourned date; the financial prejudice caused by such party by the adjournment; the public interest in the matter and; whether or not the accused is in the interim kept in custody'. The appellant submitted that the magistrate failed to consider all of the listed factors but instead considered only a selective few. The circumstances in each case will however be different and in many instances some of the above mentioned factors will be absent or in conflict

⁵ *S v Acheson* 1991 NR 1

with each other. Thus each case will have to be considered on its own merits whilst considering its own peculiar circumstances.

[16] In *Acheson* (supra) there was a formal application before court requesting for a postponement sought in order to secure the attendance of witnesses. In casu the prosecutor suggested a date and mentioned that there were two defended matters scheduled as well. It can hardly be said that there was a proper application for a postponement before the magistrate. In *Acheson* it was also said that: 'An adjournment of a criminal trial is not to be had for the asking. It must be motivated in terms of the Criminal Procedure Act on the grounds that it would be necessary or expedient to do so. What I am required to do is to exercise a judicial discretion in terms of Section 168 of the Criminal Procedure Act...'

[17] In *Katiti v S*⁶ the court held that there was a duty on the magistrate to exercise discretion in a judicious manner when considering the application for a postponement and that a failure to properly consider same constituted a vitiating irregularity.

[18] It is therefore vital that upon a request for a postponement by any party the presiding officer exercise the discretion judicially in deciding whether to grant or refuse such remand. A judicial officer will invariably have to keep in mind that both the accused and victim have the constitutional right in terms of Article 12(1) (b) for the trial to be finalized within a reasonable time.

[19] *In casu* the accused and victim were not to be blamed for the fact that defended matters were scheduled for the same day. Furthermore the fact that the other matters were defended, should not automatically mean that an undefended matter has a lesser right of adjudication. The State intended to call a single witness who was present at court. The magistrate, in her additional reasons provided for the decision, indicated that the legal practitioners referred to by the State in the defended matters were not present at court at the time. Considering only the above,

⁶ *Katiti v S* (CA 51/2017) [2017] NAHCNLD 82 (15 August 2017).

it appears that the magistrate made a sound decision. However, it appears from the record that the complainant addressed the court from the gallery without being called to testify and whilst not under oath.

[20] Section 162 of the CPA makes it clear that for a person to be examined as a witness that person should be under oath and furthermore in terms of Section 166 parties have the right to cross-examine or re-examine any witness so called⁷.

[21] In *S v Venaani*⁸ the court *a quo* similarly discharged the respondent in terms of Section 174 of the CPA because the complainant did not want to proceed with the case. It was held that the Prosecution is *dominus litis* and therefore has the sole discretion to proceed with the matter or not. Upon a closer look at the record of the case before court it appears that after the date for trial was suggested by the State, the remand was in fact favorably considered by the magistrate because in the process of warning the complainant for the next court date he (complainant) raised his concern. The magistrate, by allowing the complainant to volunteer information from the gallery, entering it on record and finally considering that information as evidence to reach a decision, committed an irregularity⁹.

[22] The last ground of appeal addressed the fact that the magistrate erred by deeming the State's case closed. The authority to prosecute is vested in the State and provided for in terms of Section 2 of the CPA which reads: 'The authority to institute and to conduct a prosecution in respect of any offence in relation to which any lower or superior court in the Republic exercises jurisdiction, shall vest in the State'. The complainant was in terms of Section 192 of the CPA a competent witness who could be compelled by the State to proceed with the matter on their request.

[23] After the request for a postponement was refused by the magistrate, matters took a turn for the worst. The magistrate recorded: 'The application refused, states case deemed closed, accused discharged ito sec 174' (sic). The frustration of the

⁷ *Teofelus v S* (HC-NLD-CRI-APP-CAL-2020/00014) [2022] NAHCNLD 44 (22 April 2022)

⁸ *S v Venaani* (CA 38/2015) [2017] NAHCMD 114 (18 April 2017).

⁹ *Walusiku v S* (CA 55-2013) [2017] NAHCNLD 28 (7 April 2017)

magistrate is reflected from the hasty manner in which the subsequent orders followed. When regard is had to the maxim *audi alteram partem*, the court upon refusing the remand should have allowed the State to proceed with calling their witness or alternatively bring additional applications. Only if there was none forthcoming would the magistrate be entitled to deem the State's case closed.

[24] Considering the above, it is clear that the appellant has prospects of success and condonation is granted. Applying same to the merits of the appeal, we find that the magistrate misdirected herself by allowing the complainant to volunteer evidence from the gallery without being under oath which influenced her decision. Furthermore the magistrate misdirected herself by deeming the case closed without allowing the State an opportunity to reconsider their stance after their request was refused.

[25] In the result it is ordered:

1. The appellant's application for condonation is granted.
2. The appeal is upheld and the Section 174 ruling of the court *a quo* is set aside.
3. The matter is remitted to the Oshakati Magistrates Court for the magistrate to proceed with trial and bring this matter to its natural conclusion.

E. E. KESSLAU
ACTING JUDGE

I agree,

D. C. MUNSU
ACTING JUDGE

APPEARANCES

APPELLANT	Mr. R. S. Sibungo Office of the Prosecutor-General, Oshakati
RESPONDENT	Mr. T. Hainana In person