

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI**

**APPEAL JUDGMENT**

Case no: HC-NLD-CRI-APP-CAL-2022/00024

In the matter between:

**PETRUS ASEB**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Aseb v S* (HC-NLD-CRI-APP-CAL-2022/00024) [2023] NAHCNLD  
66 (21 July 2023)

**Coram:** SALIONGA J et KESSLAU J

**Heard:** 19 May 2023

**Delivered:** 21 July 2023

**Flynote:** Criminal Appeal - Procedure – Notice of Appeal filed late - Condonation application – No reasonable and acceptable explanation for delay - No prospects of success on appeal – Appeal struck from the roll.

**Summary:** The appellant was convicted for murder in the Regional Court sitting at Tsumeb. He pleaded not guilty, offer no explanation and was convicted after the evidence was led. He was sentenced to 17 years imprisonment. Dissatisfied with the conviction and sentence imposed appellant filed a notice to appeal.

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## ORDER

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1. The appellant's application for condonation is hereby dismissed.
  2. The appeal is struck from the roll and considered finalised.
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## JUDGEMENT

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SALIONGA J (KESSLAU J concurring):

### Introduction

[1] On the 11<sup>th</sup> September 2018 the appellant was convicted of murder in the Regional Court sitting at Tsumeb. On 14 September 2018 he was sentenced to 17 years imprisonment. During the trial he was represented by Mr Siambango from the Directorate of Legal Aid. In this appeal appellant is a self-actor while the Respondent is represented by Ms Hasheela.

[2] Appellant only filed a notice of appeal together with an application for condonation on 21 June 2022, a period of about three years and 9 months from the date he was sentenced. Reading from his notice of appeal, appellant is asking for a reduction in sentence or a substitution of the conviction to one of culpable homicide.

[3] In his affidavit for the application for condonation, the appellant alleged that the clerk of court did not furnish him with the necessary documents namely; the case record and typed judgements on both verdict and sentence within the fourteen days period needed to note his appeal. Moreover without making any reference to any specific issues appellant argued that he has prospects of success on appeal and prayed that condonation be granted.

### Points *in limine*

[4] At the hearing counsel for the respondent raised points *in limine* stating that the appellant's notice of appeal did not comply with rule 67 of the Magistrates court rules in that; the grounds contained therein are not clear and specific and that the said notice of appeal was filed late. Another point *in limine* also raised was against the appellant's introduction of new grounds of appeal in the heads of argument which did not form part of the notice of appeal.

[5] Ms Hasheela submitted that it was not clear whether this was an appeal against conviction or sentence or both conviction and sentence. That the purported notice of appeal consists of an introduction and argument. It was her further submission that some grounds overlapped with one another, and some amounted to conclusions reached by the drafter. On the second point *in limine*, respondent submitted that the notice of appeal was filed late by three years and 5 months and that it was only in the appellant's heads of argument where appellant alleged that his rights to appeal were not explained to him despite the fact that he was represented by counsel at the trial. On the last point *in limine* and while referring the court to the matter of *Nghipunya v S*<sup>1</sup> she argued that an appellant cannot introduce additional grounds of appeal in his/her heads of argument or at the hearing which have not been encapsulate in the notice of appeal.

[6] Counsel for the respondent concluded that the appellant failed to show that he has a reasonable and acceptable explanation for the delay and that he enjoyed reasonable prospects of success on appeal. She submitted that on those grounds the appeal should be struck.

[7] In response to the points *in limine* and in addition to what was contained in his affidavit for the application for condonation, the appellant indicated that he was appealing against both the conviction and sentence. He went further to state that he is a lay person and just put down what he thought was proper. With regards to his notice of appeal having been filed out of time, he submitted that his rights to appeal were not explained to him in court as his lawyer was not at court and someone else stood in for him. This explanation was contrary to what he has already stated in the affidavit that the clerk of court failed to provide him with the case record on time.

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<sup>1</sup> HC-MD-CRI-APP-CAL-2020/00077 [2020] NAHCMD 491 (28 October 2020)

[8] In considering the appellant's application for condonation and the points *in limine* raised by the respondent, I remind myself that an application for condonation should satisfy two requirements before it can succeed. These entail firstly establishing a reasonable and acceptable explanation for the delay, and secondly, satisfying the court that there are reasonable prospects of success on appeal.<sup>2</sup>

[9] For practical purposes I will first address the issues surrounding the notice of appeal, then the explanation for the delay and end with the second leg of the test that deals with prospects of success.

### The notice of appeal

[10] On the point *in limine* that the notice of appeal failed to comply with rule 67 (1) of the rules of court I find it necessary to quote same verbatim as follows:

## **'NOTICE OF APPEAL**

### **INTRODUCTION**

I Petrus Aseb An offender at Evaristus Shikongo correctional facility, serving an imprisonment term of seventeen (17) years on a case of murder that was given to me on the 14<sup>th</sup> September 2018 by the learned magistrate L.N Hangalo of Tsumeb regional court. I hereby writes an appeal to your honourable office to appeal for deduction of sentence or change this case to culpable homicide.

### **THE ARGUMENT**

1. I am a first time offender, the right to first offenders is a cornerstone of the right to a fair trial article 12 (1) of the Namibian constitution.
2. I am a father of three children who started reforming myself End contributed to the society already.
3. I was able to secure employment as I was working for my children and my whole family before I was sentenced.
4. Both my parents unemployed and they are unable to look after my children.
5. I am a layman and I'm not trained in law I don't know the law and understand any of this regarding my case I did not have a fair trial.

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<sup>2</sup> See *Balzer v Vries* 2015 (2) NR 547 (SC), *Leonard v Oshana Security Services CC* (HC-NLD-LAB-APP-AAA-2021/00006) [2023] NAHCNLD 1 (17 April 2023)

6. The trial also erred in not taking appropriate steps, I am a first time offender the right to the first time offenders is a cornerstone of the right to a fair trial article 12 (1) of the Namibian constitution. I was clearly not educated in the law.’ (SIC)

[11] In this appeal the notice of appeal does not clearly and specifically show which part(s) of the judgement or where exactly the trial magistrate had erred. The purpose of filing a notice of appeal with clear and specific grounds has been reiterated in many decisions of this court. It acts as a cursor that helps the trial magistrate to provide additional reasons for their findings, it also helps the respondent to properly prepare, respond and address the issues raised in the appeal for the hearing and guides the court as to what are the issues to be adjudicated upon.

[12] I however agree and endorse the finding in *Shetu v S*<sup>3</sup> where this court found that;

‘[15] Although our Courts must maintain the principle that notices of appeal should contain clear and specific appeal grounds, some leniency should be given to a layperson drawing up a notice of appeal while serving a custodial sentence. This was indicated by Van Niekerk J (Ueitele J concurring) in *S v Ashimbanga*<sup>4</sup> when they declined to strike a matter from the roll when they were able to discern what the Appellant was taking issue with. I agree with the principle of the exception and wish to state that cases should be considered on a case-to-case basis, with the general rule still being that notices of appeal should contain clear and specific grounds of appeal.’

[13] When regard is had that appellant is self-actor and when appellant’s notice of appeal is placed into context, two grounds (firstly that the trial court erred in finding that he had the intention to commit murder and should instead have convicted him of culpable homicide, secondly that the trial court failed to take onto account his personal circumstances and the fact that he was a first offender when he was sentenced) stand out. We found it prudent under the circumstances of this case to extend this exception to this appellant who is a lay litigant.

#### *The explanation for the delay*

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<sup>3</sup> (HC-NLD-CRI-APP-CAL 2020-00057) [2021] NAHCNLD 34 (1April 2021)

<sup>4</sup> 2014 (1) NR 242 (HC) paragraphs 3-5.

[14] It is common cause that there are two explanations given by the appellant, one given in his affidavit that accompany the late notice of appeal and the other in the written submissions. In his affidavit, the appellant blames the clerk of court for not promptly providing him with a copy of the case record whereas in his submissions he blamed the Magistrate for failing to explain his rights to appeal. It should be noted that the appellant was represented by counsel on the date he was sentenced.

[15] Laying the blame on the clerk of court for failing to promptly give him a copy of the record is an indication that he was either aware of his right to appeal or his explanation is not correct. In any event it took the appellant more than three years to file his notice of appeal, he does not however indicate what efforts he made to try and get the record on time nor does he indicate when and how the record was provided to him. Condonation is not for the mere asking, a properly detailed and satisfactory explanation for the delay needs to be provided before condonation is granted. We find the explanation given by the appellant for the delay to be flawed.

#### Prospects of success on conviction

[16] As I turn to the second leg of the test for condonation which is the prospects of success, I am guided by the following ruling of Ndauendapo J in *S v Gowaseb*<sup>5</sup> that:

‘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.’

[17] The State’s case rested on the evidence of five witnesses. Three of the witnesses were at the scene and identified the appellant. The other two witnesses are a police officer that attended the scene and took photos as well as the doctor that conducted the post-mortem examination. Three witnesses corroborated each other in as far as their testimonies that the accused was with the deceased, that appellant was confronted about what he did and him fleeing the scene. The third witness (Hauhabab) who is a cousin to the accused testified that appellant and deceased were talking, appellant pushed the deceased and stabbed him with a

<sup>5</sup> *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.

knife without the deceased saying anything. Nothing was said by the accused when stabbing deceased. The doctor confirmed that the cause of death was internal bleeding from a stab wound to the chest.

[18] The defence's case was that of a bare denial. He testified that while looking for his sister at the club appellant asked a certain lady whether she had seen her and deceased shouted at him while at the bridge. Deceased grabbed him on the shirt, took out a knife while shouting at him. Deceased then tried to stab him, he moved backwards and grabbed the knife from the deceased, and he then wanted to slap the deceased but ended up stabbing him. That he was supposed to pass the bridge where deceased was when the deceased grabbed him on the shirt. In cross examination he confirmed that he knew the person that was with the deceased and that they were cousins. That this person saw what happened because he was so close to them. He maintained that he did not have the intention to stab the deceased and only wanted to slap him.

[19] From the testimony, it is clear that the accused used a knife to stab the deceased who died as a result of such stab wound. This evidence shows that the appellant was not provoked nor attacked by the deceased. Klaudius Hauhabab a cousin to the appellant appears to be honest and frank. Usually one expects a cousin to testify in appellant's favour because of close blood relationship but that was not the case. The Magistrate can therefore not be faulted in his finding that a knife was used, appellant aiming and stabbing of the deceased in the chest and running away were all indicators that the appellant had the intention to kill the deceased. The evidence is overwhelming and clearly shows that appellant does not enjoy prospects of success against conviction.

### Sentence

[20] On the ground of appeal that the sentence imposed on him failed to take into account his personal circumstances, and the fact that he was first offender this court

has to decide whether appellant enjoys prospects of success on appeal against the sentence imposed.

[21] The accused's personal circumstances were placed on record by his counsel from the bar. It was submitted by his counsel that the appellant was 28 years old and was 19 years when he committed the offence. That he has three children ages 8, 3 and 1 year respectively, was living with his girlfriend and took care of all. His highest qualification is grade 8 and was employed as a farm worker who earned N\$1200 per month. He took care of his elderly parents and grandmother and was remorseful. He apologized to the mother of deceased who accepted the apology. That the appellant was a youthful first offender and useful member of society. The murder was not premeditated and asked the court to impose a sentence blended with a measure of mercy.

[22] In aggravation it was submitted by the State that the deceased was deprived of his life at the age of 23 without a justifiable reason. Although the offence was not pre-meditated it was committed with direct intent. That appellant ran away without assisting the deceased after he had stabbed him. The appellant claims to be remorseful but yet had been denying throughout the trial that he was the one that had stabbed the deceased.

[23] It is trite that punishment falls within the ambit of the discretion of the trial court and that a Court of Appeal should not readily interfere unless there is a good cause. There will be good cause when the sentence is vitiated by irregularity or misdirection or where the sentence imposed is disturbingly inappropriate and induced a sense of shock. To come to such a conclusion, the Court must be satisfied that the sentencing court did not exercise its sentencing discretion, judicially.<sup>6</sup>

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<sup>6</sup> *S v Ndikwetepo and Others*, 1993 NR 319 (SC) at 322F-J; *S v van Wyk*, 1993 NR 426 (HC) at 447G-448B; *S v Ivanisevic and Another*, 1967 (4) SA 572 (A) at 575F-G; *S v Shapumba* 1999 NR 342 (SC); *S v Rabie* 1975 (4) SA 855 (A) *S v Tjiho* 1991 NR 361 (HC) at 362A-B and *Paulus v The State* (CA 40/2015) NAHCMD 211 (11 September 2015).



[24] In his judgment on sentence, the magistrate was alive to the triad<sup>7</sup> of factors, namely the appellant's personal circumstances, the offence committed, and society's interests.<sup>8</sup> He also took into account the appellant's personal circumstances as placed before him by his legal representative. He weighted same against the aggravating factors as placed before him by the state in determining an appropriate sentence. In the same judgement the Magistrate also found that the crime was aggravated by a number of factors such as that the killing was senseless and unnecessary and without justification. The crime is serious, the age of the deceased, weapon and the part of the body which was stabbed. The fact that the state suggested a sentence of 20 years imprisonment but the magistrate imposed 17 years is a sign that he applied his mind and not just rubberstamped what the state submitted.

[25] As earlier stated, unless it is clearly wrong, a court of appeal will not readily differ from a trial court's assessment of the factors to be regarded or the value to be attached thereto.<sup>9</sup> Although being a first offender is factor to be considered as far as sentencing is concerned it does not mean that first offenders will never be sentenced to direct imprisonment. In the instant matter it appears that the Magistrate was alive to the fact that the appellant was a first offender who was also in his youthful age at the time of the commission of the crime (See *S v Makwanyane* 1994 (2) SACR 158 (A) at 161 e-f). It must be mentioned here that although being a first offender maybe regarded as a mitigation, the nature of the crime, the callousness and brutality of the offender's actions may show that he/she has no regard for other people' life and in such cases the interests of society becomes more important than the interest of the offender himself/herself.

[26] Having considered the above, it cannot be said that the magistrate erred in convicting the accused of murder and imposing a custodial sentence of 17 years imprisonment. Therefore the appellant has failed to make out a case for condonation in that there is no proper and justifiable reason provided for the delay and no prospects of success on appeal against both the conviction and sentence.

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<sup>7</sup> *S v Zinn* 1969 (2) SA 537 (A).

<sup>8</sup> *S v Seas* 2018 (4) NR 1050 (HC).

<sup>9</sup> *S v Van Wyk* supra at 448A-B; *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684; *S v Berliner* 1967 (2) SA 193 (A) at 200D.

[27] In the result, I made the following order:

1. The appellant's application for condonation is hereby dismissed.
2. The appeal is struck from the roll and considered finalised.

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J.T. SALIONGA  
JUDGE

I concur.

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E.E. KESSLAU  
JUDGE

**APPEARANCES**

APPELLANT

Mr P. Aseb- In person

Evalistus Shikongo Correctional Facility- Tsumeb

RESPONDENT

Ms M. Hasheela

Of the Office of the Prosecutor-General, Oshakati