REPORTABLE

CASE NO. SA 04/2010

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

FILLEMON NAKALE **APPELLANT**

And

THE STATE **RESPONDENT**

Coram: Shivute, CJ, Mainga JA *et* Strydom AJA

Heard on: 28/03/2011

Delivered on: 20/04/2011

APPEAL JUDGMENT (REASONS)

SHIVUTE CJ:

[1] This appeal was disposed of by way of an order on 28 March 2011. We indicated then that reasons were to follow. These are the reasons. The appellant and his co-accused named Robert Martin, as well as one Bonny Paulus were arraigned in the Regional Court, Windhoek, on a charge of robbery with aggravating circumstances. Bonny Paulus died before the commencement of the trial and so Robert Martin and the appellant as Accused No. 1 and Accused No. 2 respectively jointly stood trial on the charge, it being alleged that while armed with a firearm, the accused on 19 January 2000 robbed the principal of a school in Windhoek of cash in the amount of N$5470,00. Both the appellant and Robert

Martin pleaded not guilty to the charge but after the conclusion of the trial, they were convicted and sentenced to 17 years imprisonment each.

[2] Robert Martin appealed against his conviction and sentence, which appeal was heard in the High Court on 3 July 2003. His conviction and sentence were set aside in a judgment prepared by Frank, AJ and in which Damaseb, AJ (as he then was) concurred. I will advert to certain aspects of this judgment at a later stage. For the moment, it is necessary to continue with the presentation of the history of the matter. Appellant, acting in person, subsequently launched his own appeal against his conviction and sentence. It is common cause that he was out of time. After some two postponements, the matter was finally called before Manyarara, AJ and Hinrichsen, AJ on 1 October 2007. No written judgment arising out of the proceedings of 1 October 2007 is available, but the Court order issued on that date indicates that the application for condonation had been refused and the appeal dismissed. The “dismissal” of the appeal in the circumstances in which the merits of the appeal had not been dealt with is an anomaly which will be commented upon later on in this judgment. The matter was again placed on the roll for 15 June 2009, this time around for the hearing of an application for leave to appeal. The application for leave to appeal was refused in a brief judgment handed down the same day. In that judgment, the High Court referred to the fact that the appellant had been charged jointly with Robert Martin; that the appellant noted his appeal more than three years and two months out of time; that he had applied for condonation; that the appellant had alleged in the supporting affidavit that part of the delay had been caused by his mistake in citing the wrong case number, and that it was one Mr Marcus, a clerk at the Magistrate’s Court where

the appellant was convicted and sentenced, who had provided him with the correct case number. Significantly, the Court *a quo* remarked that Mr Marcus had denied what had been attributed to him by the appellant. The Court below also levelled criticism at the appellant's attempt to explain the steps he purportedly took to rectify the mistake after he had allegedly become aware of the incorrect case number, characterising the attempt as "highly improbable" and thereby rejecting it.

[3] With the refusal of his application, the appellant then filed what purported to be a petition to the Chief Justice for leave to appeal to the Supreme Court. Upon perusal of the "petition", a view was expressed through the Registrar of the Court that since the underlying reason for the order the appellant was seeking to appeal against was that the High Court was not inclined to grant condonation for the late filing of the notice of appeal against his conviction and sentence in the Regional Court, that other than in the context of the application for condonation the merits of the appeal had not been dealt with by the High Court, in the circumstances, so it was remarked, it was not in law competent for the Supreme Court to consider a petition for leave to appeal against, what was in essence, a refusal of the application for condonation in the High Court. The appellant was informed to consider his right to appeal with regard to the provisions of the law and was furthermore informed to have regard to specific authorities of the South African Supreme Court of Appeal which he may find useful in considering the nature of the remedies available to him.

[4] The appellant consequently filed a notice of appeal wherein he stated *inter alia* as follows:

> "I am hereby noting an appeal against the High Court's judgment refusal (*sic*) to grant me condonation for the late filing of the notice of appeal and/or the application for leave to appeal to the Supreme Court of Namibia heard and delivered on 15 June 2009 by the Honourable Acting Judges, Justice Manyarara and Justice Hinrichsen.
>
> During the hearing the appellant argued in person and I am now filing this appeal based on similar cases such as *S v Absalom* 1989 (3) SA 145 (A); *S v Gopal* 1993 (2) SACR 584 (A); *S v Phiri* 1992 (2) SACR 525 (A); *S v N* 1991 (2) SACR 10 (A)."

I may add that the cases cited by the appellant in his notice of appeal are the authorities that he was asked, through the Registrar, to consider in the exercise of his rights should he be advised or minded to do so. The appellant also filed an application wherein he sought condonation for the late filing of the appeal in this Court. In his supporting affidavit, the appellant stated that although he had filed the notice of appeal with the clerk of the Regional Court within the stipulated time, only the appeal of his then co-accused, Robert Martin, had been processed. After Robert Martin's appeal was allowed, the appellant made several enquiries about his appeal and was at a later stage informed by Mr Marcus that the reason why his appeal had not been processed was because the case number on the initial notice of appeal had been wrongly recorded and that he was accordingly advised to file a fresh notice of appeal giving the correct case number, which number was allegedly supplied to him by Mr Marcus. This he duly did; filing at the same time, also the application for condonation for the late noting of the appeal. In his written heads of argument, the appellant criticised the Court *a quo*'s finding that Mr Marcus had denied knowledge of the appellant's averments in this regard. The appellant argued, correctly in my view and this brings me to this aspect on which I undertook

to comment, that there was no proof that Mr Marcus had denied the averment made by the appellant relating to Mr Marcus. It is not apparent from the record that Mr Marcus had made any representation during the hearing of the appeal or at any stage prior to the hearing thereof but, I may add, this issue in itself is not dispositive of the appeal.

[5] A reading of the judgment of the Court *a quo* on the application for leave to appeal also gives some insight into the reasoning behind the making of the order of 1 October 2007 refusing the application for condonation and "dismissing" the appeal. In paragraph [4] of that judgment, the Court *inter alia* recorded its rejection of what it characterized as the appellant's "attempt to explain away the steps he purportedly took to rectify the mistake" relating to the case number allegedly pointed out to him by Mr Marcus. In paragraph [5] of the judgment, the High Court explained the order it had made on 1 October 2007 as follows:

> "The Court also found that there were no prospects of success on appeal and concluded that the application was so meritless that the Court refused condonation and dismissed the appeal without giving reasons in writing; neither did the applicant request a written judgment."

[6] It is evident from the reading of this paragraph and of the judgment as a whole that other than in the context of the application for condonation, the High Court did not deal with the merits of the appeal. It is trite that where the merits of the appeal have not been dealt with, there can be no scope for the dismissal of the appeal. The refusal of the application for condonation entails a tacit endorsement

that the appeal would not be allowed to continue since the first hurdle, i.e. condonation, has not been overcome. In those circumstances, one cannot properly speak let alone write, about the dismissal of the appeal. Instead, the appeal is struck off the roll. The High Court ought rather to have struck the appeal off the roll. It follows also that since the merits of the appeal were not dealt with, it was not necessary for the appellant to apply for leave to appeal. This Court has recently reaffirmed the principle in our law that where on an appeal noted to it, the High Court does not consider the merits of the appeal other than in the context of the application for condonation, but it only decides and refuses the application for condonation for the late noting of the appeal, an appellant is entitled to appeal to the Supreme Court against the decision refusing condonation as of right. If the Supreme Court upholds the appeal against the refusal of the application for condonation, the matter has to be remitted to the High Court for the merits of the appeal to be heard and decided in that Court. This is so because the Supreme Court does not have the power to hear the appeal on the merits, there being no provision in our law for an appeal directly to the Supreme Court against a conviction by a magistrate. If, on the other hand, the Supreme Court dismisses the appeal against the refusal of condonation, that is the end of the matter. (See judgments of this Court in *Severen Iita v State*, unreported, delivered on 17/11/2010; *Phillipus Longer v State,* unreported, delivered on 8/12/2000. See also decisions of the South African Supreme Court of Appeal on the point cited in the appellant's notice of appeal referred to in paragraph [4] above.)

[7] It has become necessary now to consider also the procedure appellant had to follow to note and prosecute his appeal against conviction and sentence by the

Regional Court. In terms of section 309 of the Criminal Procedure Act, 1977 read with rule 67 of the Magistrates' Courts Rules, appellant had to deliver a written notice of appeal to the clerk of the court within 14 days of the date of the conviction, sentence or order. In spite of the assertion on the part of the appellant that he had noted the appeal on time, it must be accepted that the written notice of appeal had not been delivered to the clerk of the court within the time limit set in the rule. As such the appellant was required to apply for condonation for the late noting of the appeal as he had indeed done. Section 309(2) of the Criminal Procedure Act, 1977 (Act No 51 of 1977), empowers the High Court to condone the failure to file the notice of appeal within the prescribed time limit. Generally, a court may condone such a late filing if an applicant provides an acceptable explanation for such late filing and if there is reasonable prospect of success on appeal. *S v Ngombe* 1991 (1) SACR 351(Nm) at 352B-C; *Pietersen-Diergaardt v Fischer* 2008 (1) NR 307 (HC). In *Pietersen-Diergaardt v Fischer* (*supra*) it was explained in the headnote and in the context of a civil case as follows:

> *"In considering an application for condonation for the late prosecuting of an appeal, the court will take several factors into account. These include the degree of the delay, the reasonableness of the explanation, the prospects of success and the importance of the matter. The list is not exhaustive and the court has discretion, but there should be some flexibility when exercising such discretion.*

[8] Against the backdrop of these legal principles, it remains then to consider whether the Court below was correct in holding that the appellant's application for condonation was meritless. I agree with the Court *a quo* that there had been a long delay between the period of conviction and sentence and the ultimate noting

of the appeal. Sight should, however, not be lost that the appellant is a layman and a prisoner who stood trial in the Regional Court without legal representation. By this it is not meant to be understood that the appellant was not aware of his right to appeal. Indeed the record shows that his rights were explained in full. My view, however, is that the merits of the appeal in this matter are very important and should have tipped the scales at the granting of the application for condonation and consideration of the merits of the appeal. Mr Small who argued the appeal on behalf of the respondent readily conceded that the Court *a quo* should have granted condonation. For the reasons that will follow, I am satisfied that this concession was properly made.

[9] The State's case during the trial rested entirely on the evidence of identification. Only three witnesses testified on behalf of the State, yet the facts of the case clearly called for more. Two of the witnesses observed the actual robbery. The two eyewitnesses testified, in summary, that two men walked in the school principal's office while the school principal was attending to the registration of new pupils. Appellant was identified in Court as the robber who was armed with a firearm and demanded money. Robert Martin collected the money from a drawer and some from an envelope. Thereafter both left the room. The principal sent a teacher to follow the robbers while she activated the alarm. The teacher followed the robbers and observed them getting in a Toyota Cressida. The car, fitted with registration number N4464G, drove away. The robbery was over in about 10 minutes. In her statement to the police, the principal stated *inter alia* that she could not identify the two men who robbed her, but she was insistent in court that the appellant and Robert Martin were the robbers. When asked to comment on the

appellant's defence of alibi, the principal reacted: "I find it very surprising because he looks like the man who was there." Neither the principal nor the teacher knew the robbers before. The two witnesses saw the appellant and Robert Martin in court two years after the robbery had been committed.

[10] The third State witness who claimed not to have known the appellant before, told the trial court that he met Bonny Paulus in the company of the appellant and Robert Martin for the first time in a residential area of Windhoek on the day of the robbery. Bonny Paulus asked him to take the three men to the school where the robbery was committed supposedly to enrol for English classes. He took the men to the school in his Toyota Cressida with registration number N50603W. He denied that the registration number ascribed by the teacher to the Cressida that allegedly transported the robbers from the school belonged to his car. He parked the car in front of the school and the three men alighted therefrom and all entered the school building while he waited. The men did not take long and the appellant emerged from the building first and went to stand at the rear of the car. The two remaining men also came and got on the vehicle; the witness drove away. Robert Martin paid him N$50,00 for his services. When asked about the registration number allegedly seen by the teacher on a Cressida, the witness implied that the appellant who had allegedly stood at the rear of his Cressida while parked at the school might have affixed a false number plate on his car. Reading the evidence as a whole, in all probabilities this witness was an accomplice.

[11] The appellant testified and stuck to the defence of alibi that he disclosed at the beginning of the trial. He called four witnesses seemingly to corroborate his

evidence that he was at a wedding in the North at the time of the robbery. My view is that these witnesses' evidence is suspect but this does not compensate for the fact that the appellant was identified from the dock. I respectfully endorse what was stated by Dowling J in *R v Shekelele and Another* 1953 (1) SA 636 (T) at 638F-H:

> "Questions of identification are always difficult. That is why such extreme care is always exercised in the holding of identification parades – to prevent the slightest hint reaching the witness of the identity of the suspect. An acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identifications. People often resemble each other. Strangers are sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence. Witnesses should be asked by what features, marks or indications they identify the person whom they claim to recognize. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplored, untested and uninvestigated, leaves the door wide open for the possibility of mistake."

[12] No evidence whatsoever emanating from the investigating authorities had been led to establish the circumstances under which the appellant and his former co-accused were arrested or the extent to which they were connected to the commission of the crime. The fact that the erstwhile co-accused was acquitted on appeal on the same case and evidence should have weighed heavily with the Court *a quo* in the evaluation of the evidence led against the appellant during the trial, considered in the context of the application for condonation.

[13] On page 5 of the cyclostyled judgment in the matter of *Robert Martin v State,* unreported judgment of the High Court delivered on 03/07/2003, and to which I had promised to advert, when considering the appeal of Robert Martin, the Court observed in reference to the present appellant as follows:

> "Secondly, the co-accused of appellant did not appeal against his conviction. His conviction is thus not dealt with but it must be stated that the facts and circumstances surrounding his conviction, although based on identification, differ markedly from that of the appellant and the resultant conclusion will thus not necessarily be the same as in his case."

[14] I respectfully agree with this observation only up to the point where it was stated that the appellant's appeal had not been dealt with. As regards the rest of the dictum, I agree with Mr Small that the evidence led by the State at the trial is, on the whole, the same in respect of both the appellant and Robert Martin. The witnesses identified the appellant and Robert Martin in court and it did not appear as if there was other evidence implicating them. The trial magistrate observed that the principal and the teacher were educated people who would not incriminate others falsely. It should be re-emphasised in this regard that in a criminal case involving the identification of a person, courts are more concerned about the witness's accuracy rather than his or her honesty, sincerity or conviction. (*S v Ndikwetepo and Others* 1992 NR 232 at 250D-E; *S v Mehlape* 1963 (2) SA 29 (A) at 32F.) The accuracy of the witnesses' identification of the appellant and his erstwhile co-accused as the robbers in this case had not been tested at a properly constituted identification parade. There is no evidence why that was not done.

[15] In the result, it has been shown that while the High Court considered the explanation offered for the delay to note the appeal on time, it did not sufficiently deal with the prospects of success, which as I have endeavoured to demonstrate, appear to be good. Had the Court below examined the evidence as part of its consideration of the application for condonation more carefully, I have no doubt that it would have granted condonation on the basis of the good prospects of the appeal succeeding.

[16] It was for those reasons that the following order was made:

1. The appeal succeeds.

2. The order of the Court *a quo* is set aside and the following order is substituted therefor:

> "The application for condonation of the late filing of the appellant's notice of appeal is granted."

3. The matter is referred back to the High Court for that Court to hear the appellant's appeal against his conviction and sentence.

4. In view of the concession made by the respondent that there are reasonable prospects of the appeal succeeding, the Registrar is requested to expedite the hearing.

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SHIVUTE, CJ

I concur.

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MAINGA, JA

I also concur.

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STRYDOM, AJA

COUNSEL FOR THE APPELLANT: In person

COUNSEL FOR THE RESPONDENT: Mr DF Small

Instructed by: The Prosecutor-General