



NOT REPORTABLE

CASE NO: SA 44/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

ELTON JOSSOP

Appellant

and

THE STATE

Respondent

Coram: SMUTS JA, HOFF JA, and FRANK AJA

Heard: 13 July 2017

Delivered: 30 August 2017

Summary: It is well established that an application for condonation is required to meet two requisites of good cause before an applicant can succeed in such an application. These entail firstly establishing a reasonable, acceptable and bona fide explanation for the non-compliance with the rules, and secondly satisfying the court that there are reasonable prospects of success on appeal.

The appellant failed in respect of both requisites.

Held on appeal that the high court was in the circumstances justified to refuse to grant condonation for non-compliance with the provisions of rule 67(1) of the Magistrates' court rules.

The appeal is dismissed.

APPEAL JUDGMENT

HOFF JA (SMUTS JA and FRANK AJA concurring):

[1] This appeal lies against the decision of the high court refusing appellant condonation for the late filing of his notice of appeal.

[2] The appellant was arraigned in the regional court sitting at Keetmanshoop on a charge of rape in contravention of the provisions of s 2(1) of the Combating of Rape Act 8 of 2000 and sentenced on 18 August 2014 to 19 year's imprisonment. Dissatisfied with his conviction the appellant lodged an appeal.

[3] In terms of Rule 67(1) of the Magistrates' court rules the notice of appeal should have been filed within 14 days from the date of sentence. The appeal was filed with the clerk of the court only on 16 February 2015, 6 months out of time.

[4] The notice of motion was accompanied by an application for condonation for the late filing of the notice of appeal. The appellant explained under oath that he

drafted the first notice of appeal within the prescribed time and gave it to the warrant officer of his section who in turn had to pass it on to the officer dealing with appeals. This was not done. He subsequently discovered that his first notice of appeal was never received by the clerk of the court, necessitating him to file a second one.

[5] It is well established that an application for condonation is required to meet two requisites of good cause before an applicant can succeed in such an application. These entail firstly establishing a reasonable, acceptable and bona fide explanation for the non-compliance with the rules and secondly satisfying the court that there are reasonable prospects of success on appeal.¹

[6] An application for condonation must be lodged without delay, and must provide a full, detailed and accurate explanation for the entire period of the delay including the timing of the application for condonation.²

[7] In respect of the first requirement the high court found that the only reason given by the appellant was his bold assertion that he had given the original notice to a warden of his section without stating when this took place, the name of the warden, and the date on which he discovered that the original notice had not been filed as requested. In addition no supporting affidavit was obtained from the officer concerned to confirm the veracity of his assertion.

¹ *Balzer v Vries* 2015 (2) NR 547 (SC) at 551J.

² See *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) para 5; *Primedia Outdoor Namibia (Pty) Ltd v Kauluma* (LCA 95-2011) [2014] NALCMD 41 (17 October 2014).

[8] I agree that this explanation is inadequate and falls short of being reasonable and acceptable, and this in itself is sufficient reason for refusing the application for condonation.

[9] The second requirement was not dealt with at all in the condonation application. The high court nevertheless (in view of the fact that the appellant is a layperson when he drafted the application) invited the appellant and counsel appearing for the respondent to argue the appeal on the merits.

[10] The factual matrix was summarised by the court *a quo* as follows in para 11:

'The established facts proved that after the victim's mother had left the room at night to relieve herself when the accused, sleeping in the same room, approached the victim where she and her mother had been sleeping on the sofa. He, as per the victim's testimony, then had sexual intercourse with her. She was heard crying out for help by her mother as well as Rudy Plaatjies, the latter sleeping in an adjacent room. Appellant admitted having had contact with the victim but claims only to have picked her up from the sofa in order to remove his jacket from under a cushion. Upon her return the mother was suspicious that the appellant might have done something to her daughter but could not detect anything on her body. It was only the next day that she observed that something was wrong with the child. During a medical examination done on the victim four days later, a fresh hymen tear was observed; evidence corroborating that of the victim about penetration having taken place.'

[11] The first ground of appeal which turns on contradictions between the evidence of the victim, her mother and Rudy Plaatjies was dealt with as follows by the court *a quo* in para 12.

'The trial court comprehensively discussed and considered the contradictions in the evidence of the witnesses and correctly found that not every discrepancy serves to nullify the evidence of a witness. Having found the State witnesses to be credible, the court rejected appellant's explanation as being false. The conclusion reached by the court below is indeed supported by the facts and is sound in law; hence we are unable to find any misdirection committed in this regard. The court's rejection of appellant's evidence being false beyond reasonable doubt, in view of the evidence adduced, was justified. Accordingly, as far as it concerns this ground of appeal, there is no basis for this court, sitting on appeal, to interfere with the court a quo's finding. This ground is without merit.'

[12] In rejecting the version of the appellant the high court stated that the regional court magistrate analysed the appellant's explanation, made value judgments on certain aspects of the evidence where required, and after due consideration of all the evidence presented, including the merits and demerits on both sides, concluded that the appellant's explanation was false beyond reasonable doubt. I agree with this evaluation.

[13] In the regional court the appellant had been legally represented and the defence readily conceded that it was beyond doubt that the complainant had been raped. During the closing addresses a prominent argument by the defence was since the complainant had been medically examined only four days later, that the complainant could have been raped by anyone else during the intervening period. The magistrate excluded this possibility and reasoned as follows:

The appellant during the trial admitted firstly, he was left alone with the complainant, secondly that he picked up the complainant, and thirdly the mother of complainant testified that she found appellant crawling from the couch to his makeshift bed on the floor. Furthermore, the complainant's mother discovered the next morning that she had difficulty in walking and was dragging her right leg, a fact which points out that the abuse had already taken place; the complainant refused to have her vagina washed indicating that it was painful and the vagina had an unusual reddish colour – another indicator that the abuse had already occurred; from 1 October until 4 October when she was examined, she was detained in hospital, and that it was highly improbable that the complainant could have been raped in hospital.

[14] Seen in context the regional court magistrate was in my view correct in excluding the possibility that the complainant could have been raped by anyone else. This was pure speculation by defence counsel.

[15] The high court dealt with each of the further seven grounds of appeal raised by the appellant and found all of them unmeritorious. I fully agree with the analysis and evaluation by the high court and endorse the conclusion reached that those grounds are without any merits. There are accordingly no prospects of success in respect of the merits on appeal.

[16] The high court was in my view justified in the circumstances to refuse the application for condonation.

[17] In the result the following orders are made:

1. The appeal is dismissed.
2. The order of the high court dismissing the condonation application is confirmed.

HOFF JA

SMUTS JA

FRANK AJA

APPEARANCES

APPELLANT:

M Siyomunji

Of Siyomunji Law Chambers, Windhoek

RESPONDENT:

P S Khumalo

Office of the Prosecutor-General, Windhoek