REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CC 12/2011

In the matter between:

BERNARD MAFENYEHO LIFATILA **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Lifatila v The State* (CC 12/2011) [2014] NAHCNLD 12 (26 February 2014)

Coram: LIEBENBERG J

Heard: **26 February 2014**
Delivered: **26 February 2014**

Flynote: **Criminal procedure** – Leave to appeal – Section 316 (1) of Act 51 of 1977 – Appeal against sentence – No prospects of success on appeal.

Summary: Applicant seeks leave to appeal against a sentence of 27 years' imprisonment on a charge of murder. Applicant contends that the court in

sentencing ignored his personal circumstances. This ground of appeal found without merit and application refused.

ORDER

---

1. The application for condonation of late filing of the Notice of Appeal is refused.
2. The matter is struck from the roll.

JUDGMENT

Application for Leave to Appeal

LIEBENBERG, J:

[1] This court at the conclusion of the trial convicted the applicant on charges of murder and attempting to defeat or obstruct the course of justice. On the murder charge it was found that he had not acted with direct intent but with intent in the form of *dolus eventualis*. In view of the relationship between applicant and the deceased, the provisions of the Combating of Domestic Violence Act, 4 of 2003 found application.

[2] On 11 June 2012 the court sentenced the applicant on count 1 to 27 years' imprisonment on a charge of murder and on count 2 he was sentenced to 3 years' imprisonment for attempting to defeat or obstruct the course of justice. The sentences were ordered to run concurrently. The appeal lodged by the appellant lies only against sentence and from the notice it is clear that the application only concerns the murder charge (count 1). The application is approached on that basis.

[3] Applicant's application for legal aid was unsuccessful and he is in person before court while Mr *Shileka* appears on behalf of the respondent. Applicant was legally represented during the trial by Ms *Mugaviri*.

[4] A Notice of Appeal was filed with the registrar of this court as recent as 06 January 2014, though the date stamp on it reads that it was already received by the authorities at Walvis Bay prison as far back as 20 August 2012, one week after the notice was prepared (13 August 2012). There is no explanation as to why the notice was not forwarded sooner. Be that as it may, the notice was filed outside the time limit of 14 days and applicant therefore also seeks condonation for the late noting of the appeal.

[5] A supporting affidavit was simultaneously filed in which applicant explains the delay in filing the notice of appeal. He asserts that he was unfamiliar with the procedure to be followed and it was only when he was transferred to Walvis Bay prison that he learned what he should do. Not being conversant in the English language, according to him, was a contributing factor.

[6] While applicant's explanation could hardly be described as being 'full, detailed and accurate'[1], I am however of the view that regard must be had to applicant being unrepresented and though a former police officer and not a layman as such, it is evident from his papers that he is unfamiliar with procedural requirements pertaining to criminal appeals. In the present circumstances I believe it would be prejudicial to the unrepresented applicant to require strict compliance with the provisions of the Act. Therefore, whether application for leave to appeal ought to be granted or not must be decided on the merits and whether there are prospects of success on appeal.

[7] In applications of this nature the applicant must show on a balance of probabilities that there are reasonable prospects of success on appeal (*S v*

---

[1] *Beukes* (see Case No SA 25/2010 delivered 18 June Rainier Arangies v Quick Build footnote 3)

Nowaseb[2]). It is trite that it is insufficient for applicant merely to show that another court might possibly come to a different conclusion (*S v Ceasar*[3]).

[8] I have already mentioned that the appeal lies only against sentence. What can be gleaned from the grounds of appeal as enumerated in the notice is, that the court failed to take into account applicant being a first offender; that he had no intention to murder the deceased which, he says, is evident from him having taken her to the hospital afterwards. He further contends that factors such as insufficient treatment given to the deceased at Katima Mulilo hospital because of the lack of medical equipment and the deceased's deteriorating medical condition after she had been operated on, were ignored by the court; also evidence adduced about the deceased's general condition. The last ground ties in with the first namely, that the court 'failed to consider' his personal circumstances.

[9] I pause here to remark that not all these grounds relate to sentence, but rather to his conviction on the murder charge. Be that as it may, these issues were fully dealt with in the judgment and I shall only briefly touch on it in this judgment.

[10] The question as to whether or not lack of medical equipment and treatment of the deceased at Katima Mulilo State hospital, and her further treatment at Rundu State hospital constituted a *novus actus intervenience,* was comprehensively discussed and decided during the trial (paras 40 – 41). The court in the end found the argument to be without merit and was satisfied that there was no evidence adduced showing that, had the deceased been treated differently either at Katima Mulilo or Rundu hospitals, then she would have survived the assault. The court further accepted medical evidence presented that the correct procedures were followed at both hospitals and that the deceased received the right treatment from which she was expected to recover, had there not been complications in that she developed septicaemia. A contributory factor adversely impacting on the recovery of the deceased

[2] 2007 (2) NR 640 (HC)
[3] 1977 (2) SA 348 (AD) at 350E.

was her HIV status. The court in the end concluded that neither the lack of medical equipment and expertise at Katima Mulilo State hospital, nor the treatment received at Rundu State hospital, constituted a *novus actus* which interrupted the chain of causation resulting in the deceased's death. The court was satisfied that in the circumstances, the deceased received the best medical treatment available.

[11] The aforementioned factors, as well as applicant's uncontroverted evidence that he took the injured deceased to the hospital in the morning, are consequential to the stabbing of the deceased the previous evening and in no way strengthens applicant's claim that he had acted in self-defence. Neither does it prove he lacked intent when inflicting fatal injuries to the deceased's body, nor that her death was unforeseen. The court rejected his evidence on that score and convicted him of murder. From the circumstantial evidence presented at the trial the court, through inferential reasoning, found that applicant intentionally killed the deceased when foreseeing the possibility of death ensuing (as a result of the stabbing with a knife on the upper body) and he associating himself with this possibility (*dolus eventualis*). Despite applicant's protestations the court found beyond reasonable doubt that he had acted with the required intent and accordingly convicted him of murder.

[12] I now turn to consider the last ground raised namely, that the court misdirected itself by giving no or insufficient weight to applicant's personal circumstances.

[13] The court in its judgment on sentence extensively dealt with the applicant's personal circumstances and the court's approach when assessing facts and circumstances favourable to him (paras 5 – 13). The interests of society and the nature of and circumstances under which the crimes were committed, were equally considered in determining what would be an appropriate sentence in the circumstances of the case (paras 14 – 18). Applicant's complaint about the court completely having ignored his personal circumstances is not supported by the reasons given in the judgment. Applicant's suspension and loss of income pending finalisation of the trial and

his subsequent conviction undoubtedly aggravated the already dire circumstances he and his family found themselves in at the time. The court was sensitive to the hardship and distress suffered by his dependants and loved ones as a result of applicant's conviction but remarked, that this is unfortunately an inevitable consequences of serious crime having been committed (para 10). From evidence presented the court was further satisfied that the minor children were not left destitute as they would be cared for by their grandmother and older siblings who had already been doing so for some time.

[14] The picture now painted by applicant about his mother being blind and no one else capable of taking care of her and his children who, according to him, are on anti-retroviral medicine, differs markedly from his evidence in mitigation. Neither did applicant inform the court then that he was taking anti-retroviral medicine himself; something only now raised in his heads of argument.

[15] Applicant cannot now be heard complaining about the court disregarding facts which were never put before the court by him when afforded the opportunity to do so. Applicant was legally represented at the trial and I have no doubt that counsel would have placed such important information before the court had it been known. In fact, applicant's mother was earlier portrayed as the main caregiver for his family during his suspension – despite her age – with whom the children were living and her having made a monetary contribution from her pension money towards the household. In sentencing the applicant the court took these facts into consideration and, although conditions were far from perfect, I was satisfied that the children were not left destitute and at their own mercy, requiring intervention by the court.

[16] Despite applicant's passionate plea to have his sentence reduced for the above reasons, I am not persuaded that he has reasonable prospects of success on appeal.

[17] In the result:

1. The application for condonation of late filing of the Notice of Appeal is refused.
2. The matter is struck from the roll.

_____

JC LIEBENBERG

JUDGE

APPEARANCES

APPELLANT	In person
RESPONDENT	R Shileka Of the Office of the Prosecutor-General, Oshakati