

SOUTH AFRICA / JUDGMENT

Tyhala v S (CC22/2019) [2021] ZAE CGHC 119 (23 November 2021)

[2021] ZAE CGHC 119

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Rugunanan

CASE / FILE NUMBER

CC22/2019

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IN THE HIGH

COURT OF SOUTH AFRICA

EASTERN CAPE

DIVISION, GRAHAMSTOWN

CASE

NO. CC 22/2019

Date heard: 16 November 2021

Date delivered: 23 November 2021

In

the matter between:

SIMOSAKHE

TYHALA

Applicant

and

THE

STATE

Respondent

JUDGMENT

RUGUNANAN, J

- [1] This matter is before me in terms of section 17 (2) (a) of the Superior Courts Act 10 of 2013 by directive of the Judge President of this division. It is an application for leave to appeal against a conviction for rape under section 3 of Act 32 of 2007[1] and a sentence of life imprisonment imposed by the late Jaji J. The applicant was convicted on 13 September 2019 and sentenced on 28 October 2019.

- [2] Among the documentation on file is a notice of motion in which condonation is sought for the late filing of the application for leave to appeal. Attached to the notice is a founding affidavit deposed by Helen Louise McCallum “an attorney practising as the High Court Unit manager of the Grahamstown local office of Legal Aid South Africa.” Also attached to the affidavit is a notice of application for leave to appeal purportedly under section 309 (B) of the Criminal Procedure Act.[2] The signatory to that notice is Mr V. M. Sojada who qualifies himself as “Attorney for the appellant”.
- [3] An applicant who seeks leave to appeal either in relation to their conviction or sentence is required to satisfy the court that there is a reasonable prospect of success in the appeal (see section 17 (1)
- (a) (i) of the Superior Courts Act 10 of 2013). This is not an exercise in frivolity. On the appropriate test,[3] it requires serious consideration.[4]
- [4] The purpose of this judgment is to underscore the shortcomings in the documentation before this court. This inadequacy is perplexing. The documentation does not engage with the transcript of the proceedings in the trial court, neither with the judgment on conviction nor on sentence. A meaningful assessment of the applicant’s prospects of success in deciding whether leave to appeal should be granted is not possible in such circumstances.

THE NOTICE OF APPLICATION FOR LEAVE TO APPEAL

- [5] Generally appeals in criminal cases are governed by the provisions of the Criminal Procedure Act. Section 309 (B) deals with an application for leave to appeal against any conviction or any resultant sentence or order of a lower court and directs an accused to apply to that court against that conviction, sentence or order. Plainly, in this instance section 309 (B) does not apply and the notice of application for leave to appeal is inaccurate.
- [6] Relevant for present purposes is section 316. It permits an accused convicted of any offence by a High Court to apply to that court for leave to appeal against such conviction or against any resultant sentence or order.
- [7] The notice of appeal, reproduced as it is, sets out the grounds of appeal as follows:
- “AD CONVICTION:
1. The honourable court erred to find that the state proves its case beyond reasonable.
 2. In that trial court misdirected itself to arrive at the conclusion that the evidence of the complainant was satisfactory in all material respect whereas there was contradiction in her evidence.
 3. It is further submitted that the trial court erred in rejecting the version of the Applicant which does not contradict itself and no inherent improbabilities.

4. Further that the trial court misdirected itself that there is no reason for the complainant to falsely implicate the accused, an accused does not have a duty to assume and / or speculate as to why the witness falsely implicate him.
5. Trial court further erred by not giving a benefit for the doubt to accused, taking into account the fact that the complainant is a single witness and a minor, whereas the is faced with two mutual destructive evidence.

AD SENTENCE:

6. It is submitted that the trial judge had failed to properly consider the personal circumstances of the Applicant and by so doing over emphasised the seriousness of the offences and the interests of society.
7. It is submitted that the trial judge erred by imposing sentence that was grossly disproportionate to the offence.
8. It is therefore respectfully submitted given all the factors placed on record with regards to the commission of the offence and the Applicants personal circumstances that the court had erred in imposing an overly harsh sentence. It is submitted that the court should have found substantial and compelling circumstances and thereafter imposed lesser sentences.”

[8] Section 316 (4) (a) of the Criminal Procedure Act pronounces that:

“Every application for leave to appeal must set forth clearly and specifically the grounds upon which the accused desires leave to

appeal.”

[9] This means that the grounds relied on by the applicant must be clear and unambiguous with a defined scope. It is of no practical significance or use if the grounds are so wide as to encompass every conceivable point that can be taken into account no matter how irrelevant or narrow it is to have any positive bearing on the appeal itself (see *Mosia and Another v The State*[5]). This is the impracticality and the difficulty encountered in this application.

[10] The applicant’s notice of application for leave to appeal fails to set out clearly and specifically the grounds on which the appeal is based. I have no hesitation in saying that the application was drafted without any regard for what section 316 (4) (a) requires.

[11] Compliance with the subsection is peremptory.

[12] It is impossible to analyse the document to establish the grounds the applicant intends to rely on. Its contents are incomprehensible,

obscure and vacuous, being nothing more than a generic ramble across the issues it purports to identify without even the slightest

elucidation of the factual or legal issues as would indicate that an informed consideration (or investigation) of the transcript and/or the judgments was rendered. Indeed, no effort was made to point to the relevant portions of the transcript or pages of the judgments to facilitate identification of the issues. The practical effect is that neither the court nor the respondent is informed of the case the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal.

CONDONATION – THE FOUNDING AFFIDAVIT

[13] Section 316 (1) (b) provides that:

An application referred to in paragraph (a) must be made-

- (i) within 14 days after the passing of the sentence or order following on the conviction; or
- (ii) within such extended period as the court may on application and for good cause shown, allow.

(my own italics)

[14] Courts have refrained from attempting to formulate a comprehensive definition of what constitutes good cause. The overriding consideration when deciding an application for condonation is that a court has a discretion.[6] The discretion must be exercised judicially upon a consideration of all the facts, and, in essence, it is a matter of fairness to both sides. There is no *numerus clausus* but amongst the factors that should guide the discretion are; the degree of lateness, the explanation therefor, the prospects of

success and the importance of the case. These factors are not individually decisive.

[15] Good cause usually comprehends prospects of success on the merits of a case. It imposes on the party seeking condonation the burden of actually proving, as opposed to merely alleging, good cause (see *Brangus Ranching (Pty) Ltd v Plaaskem (Pty) Ltd*[7]). Good cause as a requirement for condonation was dealt with by the Supreme Court of Appeal in *Madinda v Minister of Safety and Security*[8]. Although it was considered in the context of a different legislative instrument (i.e. section 4 (b) of the Institution of Legal

Proceedings against certain Organs of State Act 40 of 2002), my sense is that it holds good for section 316 (1) (b) (ii) of the Criminal Procedure Act.

[16] Turning to the affidavit by Ms McCallum, and redacting irrelevant material, the case for condonation is set out in the following terms:

“3. The Applicant’s trial was finalised in the High Court ... on 28 October 2019. He was legally represented by a practitioner in private practice throughout his trial.

- 4. In early 2020 the Applicant approached our office to bring an application for leave to appeal. At this point the prescribed 14 days after sentence to file an application for leave to appeal had already.

5. The Applicant's request was refused on 3 February 2020.
 6. The Applicant wrote a formal letter on 19 February 2021 requesting to appeal the decision of the Head of Office of the Grahamstown office of Legal Aid South Africa to refuse legal aid, although his family were in contact with us to proceed before then but we need instructions from the applicant himself.
 7. Judgements and merit reports were forwarded to the Provincial Executive ... in May 2021 to consider the applicant's appeal.
 8. On 14 June 2021 the Provincial Executive overruled the decision taken at the local office and directed that an application for leave to appeal be brought.
 9. In July 2021 the matter was allocated to Mr Sojada to attend to the matter.
 10. It is respectfully submitted that the late filing is not due to any deliberate or negligent action on behalf of the appellant and or any legal representative of the appellant. It was essentially due to the fact that the appellant applied for legal aid at a late stage which was refused and then an internal appeal process was followed.
 11. It is respectfully requested that this Honourable Court grant condonation for the late filing of the application for leave to appeal."
- [17] The omission to have dealt with prospects of success as a requirement of good cause is obvious. As signatory to the founding affidavit the deponent ought to have applied her mind and appreciated the meaning and import of its contents. Had she done so its deficiency would have readily crossed her mind.
- [18] It is not intended in this judgment to lay down that prospects of success is the sole determinant for seeking condonation. It is acknowledged that there are differing approaches by the courts as to the role and emphasis placed on prospects of success.[9] But it seems to me that, depending on the facts and circumstances of each matter and the approach of the courts, a demonstration of prospects cannot be excluded entirely.
- [19] The local branch of Legal Aid South Africa conducts by far the majority of criminal cases and criminal appeals at this seat of the Division. In promoting access to justice its practitioners have a duty to acquaint themselves fully with the law on the subject if they are to provide competent representation for needy clients, and not leave it to a judicial officer to point out deficiencies, if there are any.
- [20] There is every reason to be critical of the shoddy manner which this application was presented especially since it should have occurred to those concerned that the application for leave to appeal must of necessity be heard by another judicial officer who had no involvement

in the trial. Rightly or not, the inescapable impression is that judicial lassitude would be the lifeline for securing a second

hearing on appeal without the legal basis being set out.

[21] The appellant is incarcerated. The inadequacies in the material before this court can certainly not be attributed to him. They are solely the fault of those representing him. Had they diligently applied themselves to the task at hand by applying the established legal principles the application for leave to appeal would probably have been disposed of on its date of hearing.

[22] Consequent to the order below this court will be required to reconvene sine die to give effect to the directive of the Judge President.

[23] In the circumstances the following order issues:

21.1 The application for condoning the late filing of the application for leave to appeal, and the application for leave to appeal are struck from the roll.

21.2 The legal representative(s) of the applicant shall within 14 days of this order file an application for the reinstatement of the application for leave to appeal, and simultaneously therewith file a renewed application for condoning the late filing of the application for leave to appeal, and a renewed application for leave to appeal which are in accordance with the applicable law.

21.3 The parties shall as soon convenient thereafter comply with rule 10(a) of the Joint rules of practice for the High Courts of the Eastern Cape Province.

21.4 The registrar of this court is directed to forward a copy of this judgment to the regional head of Legal Aid South Africa in Gqeberha for the edification of the applicant's legal representative(s).

S. RUGUNANAN

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Mr. V. M. Sojada

Legal Aid South Africa

Makhanda / Grahamstown

For the State: Adv. Hendricks

Office of the National Director of Public Prosecutions Makhanda / Grahamstown

[1] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

- [2] Act 51 of 1977, as amended
- [3] Minister of Police v Abongile Zamani (12/2019) [2021] ZAECBHC 1 (2 February 2021) at paragraphs [9]-[10]
- [4] In this regard see the remarks by Chetty J in Blouw v S (CA&R 48/2010) [2011] ZAECGHC 20 (27 May 2011) at paragraph [8] which thought they predate the Superior Courts Act are apt.
- [5] (23/2019) [2021 ZAFSHC 90 (24 March 2021) at paragraph 2
- [6] Torwood Properties (Pty) Ltd v South African Reserve Bank 1996
- (1) SA 215 (WLD) at 228A-D
- [7] 2011 (3) 477 KZP at paragraph [28]
- [8]
- [2008] ZASCA 34; 2008 (4) SA 312 (SCA) at paragraphs [10]-[12], especially at 316J
- [9] see Du Toit et al, Commentary on the Criminal Procedure Act [Service 60, 2018] at 31-12A to 31-13

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