



Reportable:	YES / <u>NO</u>
Circulate to Judges:	<u>YES</u> / NO
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **KS32/2004**
DATE HEARD: **21/06/2016**
DATE DELIVERED: **24/06/2016**

In the matter between:

BEYLEVELD, H J

Appellant

and

THE STATE

Respondent

Coram: Olivier J

JUDGMENT

Olivier J:

- [1.] During 2005 the applicant and two co-accused stood trial in the High Court, Kimberley, on charges of kidnapping, robbery with

aggravating circumstances and murder. All three of them pleaded not guilty to all charges. On 27 October 2005 the applicant and his co-accused were sentenced to an effective period of 21 years imprisonment.

- [2.] On 18 June 2014, almost 9 years after the sentence, a notice of motion and a founding affidavit by the applicant were received (via e-mail) by the secretary of the Judge President. They had both ostensibly been drafted during April 2014, presumably by the applicant himself. In the notice of motion condonation was sought for the late filing of the application, as well as *"an order ... directing that a portion of the Applicant's sentence is deducted in the form of suspending a portion of the applicant's sentence or in any manner which the ... Court may deem meet"*.
- [3.] The Judge who presided at the trial is not available to deal with this application.
- [4.] The applicant's sentence could of course only be interfered with on appeal and his reference to the powers of courts of appeal indicated that he was well aware of this and that his application had in fact effectively been intended as an appeal. It is trite that the applicant would, however, not have been entitled to pursue such an appeal without leave to do so. Although the notice of motion did not contain a prayer for such leave, I was prepared to entertain the application as one for leave to appeal against sentence. This is also

how both Mr Fourie, who appeared on behalf of the applicant, and Mr Cloete, counsel for the respondent, approached the application in argument. The position is therefore that, should leave to appeal be granted, the appeal against sentence would have to be heard by a properly constituted court of appeal.

[5.] It appears that the record in this matter is incomplete. The evidence of accused number 3 and the proceedings on judgment and sentence have not been transcribed. According to information from the office of the Registrar no recording of those proceedings is at this stage available. As far as the possibility of a reconstruction is concerned, it appears that the applicant had initially been represented by Adv. Muhlohlonyi, until his mandate was terminated by the applicant. Thereafter, and more specifically also at the stage of sentence, the applicant was represented by the attorney Mr Louis Jooste, who however passed away a number of years ago. The prosecutor, Adv. J J Cloete, has no notes and the bench book/s of the presiding Judge cannot be traced. A reconstruction is therefore not possible.

[6.] The applicant however, according to his letter of 1 March 2016, now wishes the application to proceed regardless of the fact of the incomplete record. The absence of recordings and notes is not surprising at all, given the extraordinary long delay, and the applicant would have only himself to blame for this¹. He has

¹ Compare *S v Van Staden* 2008 (2) SACR 626 (NC)

consciously delayed this application for almost 9 years. Furthermore this application is, as will appear in due course, entirely based on facts and evidence which would in any event not have appeared in the record of the proceedings in the trial court.

[7.] As far as the issue of condonation is concerned, the applicant's explanation for the delay in filing the application for leave was basically that he never took steps to appeal against his sentences, because he had "*resigned (himself) to (his) fate*". He furthermore stated that "*after sentencing (he) resigned (himself) to serving this sentence*", that "*having accepted (his) fate, there was no need for (him) to adhere to the various prescribed time periods*" and that he therefore did not apply for leave to appeal.

[8.] In my view the applicant had, on his own version, taken the conscious decision not to pursue his right to apply for leave to appeal on the basis of the evidence before the trial court, and had effectively abandoned that right. At the very least though the delay was caused by a deliberate decision not to apply for leave to appeal on that basis.

[9.] The applicant's situation and the circumstances of this application are however distinguishable from cases where late applications for leave to appeal are based on facts and evidence which had existed at the time of sentence and where timeous applications for leave to appeal could therefore normally be expected. The facts upon which

the applicant relies only came into existence long after the prescribed period for applications for leave to appeal had lapsed.

[10.] The applicant stated that he had “*recently*” been advised by a fellow inmate that the court could possibly reconsider his sentence, apparently on the basis of the applicant’s present circumstances, and that he had then taken steps to file this application. It is not clear what “*recently*” means and the applicant has not really shown that, subsequent to the alleged advice, there was no further delay in the filing of the application.

[11.] The applicant clearly prepared this application as a lay person and, although the applicant may perhaps be considered fortunate, I will proceed on the basis that the late filing of the application is condoned.

[12.] As regards the merits of the appeal the applicant conceded that, on the facts existing at the time of the imposition of sentence, there would have been no prospects of success. He relied entirely on the court of appeal deciding to admit evidence of facts which had since then come into existence². These new facts were, according to the applicant, that he had rehabilitated in prison, *inter alia* by attending courses and by contributing towards the rehabilitation of fellow inmates, and that he had a job opportunity should he be released from prison at this stage.

² There is therefore no merit in Mr Fourie’s argument that the incomplete record makes a meaningful consideration of the application for leave to appeal against the sentence impossible.

[13.] It is trite that, although appeals are normally considered on only the facts and information that served before the trial court, “*in exceptional circumstances factors later coming to light may be taken into account*”³. The fact of an accused having successfully rehabilitated can in my view not constitute such exceptional circumstances, and cannot be viewed as “*exceptional or peculiar circumstances that occur after sentence is imposed*”⁴, because rehabilitation and reintegration into society are indeed among the objects of sentences of imprisonment.

[14.] If facts like these were to be seen as new evidence which a court of appeal has to take into account, it could result in an influx of late applications by inmates who claim to have been rehabilitated and to have job opportunities available should they be released. These are circumstances relevant to the issue of whether an inmate should be released on parole, and would therefore fall within the province of the executive, and not that of the courts⁵.

[15.] In two of the cases relied upon by Mr Fourie, viz the **Michele** case⁶ and **S v Karolia**⁷, the Supreme Court of Appeal had in any event on the existing evidence and facts been at large to consider sentence afresh, and in such circumstances a court of appeal would be “*more*

³ **S v Michele and Another** 2010 (1) SACR 131 (SCA) para [13]

⁴ **S v Jaftha** 2010 (1) SACR 136 (SCA) para [15]

⁵ Compare **S v Drummond** 1979 (1) SA 565 (RA) at 569 D-E

⁶ See footnote 3 *supra*.

⁷ 2006 (2) SACR 75 and [2004] 3 All SA 298 (SCA)

receptive of an argument that, in reconsidering sentence, facts which have come into existence since the trial should also be taken into account"⁸.

[16.] In the Jaftha⁹ case the rehabilitation of the appellant did not occur while serving a sentence; a period during which a sentenced inmate could in any event be expected to take steps and to attend courses with a view to rehabilitation.

[17.] In my view there are therefore no prospects of success with an appeal on the basis advanced by the applicant. In the premises the following order is therefore made:

THE APPLICATION IS DISMISSED.



C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the appellant: Mr P J Fourie
Legal Aid South Africa, Kimberley.

For the respondent: Adv J J Cloete
Office of the Director of Public Prosecutions, Kimberley.

⁸ *S v Drummond*, *supra*, at 569 F

⁹ See footnote 4 *supra*.