THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 831/2016

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG DIVISION, PRETORIA **APPELLANT**

and

FERHAT BENBELKACEM **RESPONDENT**

Neutral citation: *DPP, Pretoria v Benbelkacem* (831/16) [2017] ZASCA 52 (8 May 2017)

Coram: Tshiqi, Mathopo, Van der Merwe and Mocumie JJA and Nicholls AJA

Heard: 15 March 2017

Delivered: 8 May 2017

Summary: Criminal Law : application for condonation for late filing of the notice of appeal and reinstatement of appeal : no good cause shown for delay: prospects of success not shown : state bound by its acceptance of the statement tendered in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 : application for condonation and reinstatement of appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Preller J sitting as court of first instance):

The applications for condonation for the late filing of the notice of appeal and reinstatement of the appeal are dismissed.

JUDGMENT

Mocumie JA (Tshiqi, Mathopo and Van der Merwe JJA and Nicholls AJA concurring):

[1] On 29 May 2014, Mr Ferhat Benbelkacem, the respondent, was convicted on his plea of guilty of murder (count 1), unlawful possession of a prohibited firearm and unlawful possession of live ammunition (contravention of ss 4 and 5 of the Firearms and Ammunition Act 60 of 2000 (counts 2 and 3)) by the Gauteng Division of the High Court, Pretoria (Preller J). On 6 August 2014, the court a quo, having found compelling and substantial circumstances to exist, sentenced the respondent as follows: (a) 'Count 1: 13 years' imprisonment, three of which are suspended for five years on condition that he is not convicted of a crime involving assault with intent to do grievous bodily harm and which was committed during the period of suspension.
(b) Count 2: 7 years' imprisonment and
(c) Count 3: 2 years' imprisonment.'
The sentence on count 3 as well as five of the seven years of the sentence on count 2 were ordered to run concurrently with the sentence on count 1, resulting in an effective 12 years' imprisonment.

[2] On 28 November 2014, the appellant applied for leave to appeal against the sentence imposed by the court a quo. It also applied for condonation for the late filing of

that application. The court a quo granted leave to appeal to this court on 8 December 2014. In terms of rule 7 of the Rules Regulating the Conduct of the Proceedings of this court, the appellant was required to file a notice of appeal within one month thereafter ie on 9 February 2015 but this was not done. On 18 January 2016, the registrar of this court, informed the appellant that the notice of appeal and the order granting leave to appeal were not filed and that the appeal had thus lapsed. Consequently, the matter was not enrolled for hearing. As the appeal had indeed lapsed, the appellant filed an application for condonation for the late filing of the notice of appeal and an application for the reinstatement of the appeal in these current proceedings.

[3] Ms Marika Jansen Van Vuuren (Ms Jansen Van Vuuren), who argued the application for the condonation and reinstatement, in her affidavit confirmed that she was contacted by the registrar of this court as stated earlier. The notice of appeal was only filed on 28 January 2016 together with a condonation application by counsel for the appellant, Ms Mokgaetsi Juliet Makgwatha (Ms Makgwatha). In her affidavit Ms Makgwatha stated that she received the transcribed record on the sentence and arguments by both counsel in the court a quo on 17 September 2015 and then filed heads of argument. The heads of argument were filed on 23 December 2015, together with the appeal record.

[4] Ms Makgwatha further stated that the delay was occasioned by the fact that she was involved in another matter which occupied her between 20 April and 26 May 2015. She gave no explanation for the period between January and April 2015. She merely stated that she was again seized with another matter between 24 August and 18 September 2015, without explaining why she could not attend to the matter between May and August 2015. A period of approximately seven months up to 18 September 2015 and the further delay from there until 23 December 2015 is thus unaccounted for.

[5] Ms Jansen Van Vuuren however contended that despite the unacceptable reasons for the delays, which she readily conceded, condonation should be granted

because the appeal had good prospects of success and that the refusal of the condonation application would amount to a miscarriage of justice.

[6] The application is opposed by the respondent again on the basis that the appellant has given no plausible explanation for its numerous delays in the handling of the appeal and that the respondent's constitutional right to a speedy trial in terms of s 35(3)(*d*) of the Constitution has been infringed thereby.

[7] In considering an application for condonation a court must take into account a number of considerations. These include the degree of non-compliance, the explanation thereof, the importance of the case, the prospects of success, the respondent's interests in the finality of the matter and the administration of justice. The cogency of any factor will depend on the circumstances of each case. A belated appeal against a criminal conviction may also affect the public or individual interest in the matter.[1] (See *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* [2013] ZASCA 5; 2013 2 All SA 251 (SCA) paras 11–13; *Federated Employers Fire & General Insurance Company Limited & another v McKenzie* 1969 (3) SA 360 (A) at 362F-G; *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA); *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449 G-H; *Miles Plant Hire v Commissioner SARS* (20430/2014 [2015] ZASCA 98 (1 June 2015)).

[8] The application for leave to appeal in the court a quo was brought 30 days after sentence was given. The appeal record was filed at this court on 23 December 2015, more than 12 months and 15 days after the application for leave was granted by the court a quo (8 December 2014). The notice of appeal is dated 22 January 2016, but was filed 28 January 2016, which means that it was filed approximately 13 months and

[1] *S v Mantsha* 2009 (1) SACR 414 (SCA) at 419 para11.

20 days ie one year, one month and 20 days after the date on which leave to appeal was granted.

[9] The contents of the affidavits of both Ms Makgwatha and Ms Jansen Van Vuuren show not only a glaring ineptitude on the part of the appellant in dealing with this appeal but laxity which should not be countenanced. This takes us to the second leg of the enquiry ie whether the appellant has good prospects of success in the appeal.

[10] The respondent's conviction was solely based on his s 112 statement in terms of the Criminal Procedure Act, 51 of 1977 (CPA). Regarding count 1 he stated the following:

'2.1.5 On my exiting the aforementioned Exclusive Book store I noticed Makarof Osmani sitting at a restaurant named Parrots in the presence of an unknown female. It appeared as if they were occupied in some meeting.

2.1.6 I exited the centre and retrieved the firearm relevant to count 2 from [an] abandoned stadium and returned to where I previously observed Makarof in conversation with an unknown female.

2.1.7 My original idea was to confront him about the monies owed to me, however on approaching the area where he was seated I became so enraged that I decided to shoot him.

2.1.8 I approached him from behind, took the firearm from a white plastic bag it was concealed in and shot three shots in short distance towards him. I admit that I intentionally fired these shots towards the deceased knowing quite well that this will result in his death. . . '

[11] This statement was accepted by the appellant and no evidence was led. After convicting the respondent, the court a quo said in its judgment on sentence in respect of count 1:

' . . . Ms Makgwatha submitted that the accused had fetched the firearm from where it was hidden in the nearby building for the purpose of killing the deceased. I cannot agree with that submission either because the only information that is before me is to the contrary. The accused

says in his plea explanation that he went to fetch the firearm with the intention of persuading the deceased to pay his money back.'

The court continued:

'I therefore find that this murder was committed on the spur of the moment and was not a premeditated one qualifying for the prescribed minimum sentence.'

[12] The appellant contended that the sentence imposed by the court a quo was inappropriate in that it approached sentencing as if a prescribed sentence of 15 years' imprisonment as opposed to life imprisonment was applicable. The crux of the appellant's contention was that as the respondent was charged with murder in terms of s 51(1) read with Part I of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Act), he was in effect, convicted of premeditated or planned murder.

[13] I am however not persuaded by the appellant's contentions in this regard. The court a quo's reasoning and findings as illustrated by the dictum referred to hereinabove, show that the court was not persuaded that the murder was premeditated or planned. The s 112(2) statement tendered by the respondent suggested, as the court a quo correctly found, that the respondent killed the deceased on the spur of the moment. The decision of the court a quo consequently cannot be faulted.

[14] In *Kekana v S* [2] this court stated:

'In *S v Jansen*[3] it was held that where an accused pleads guilty and hands in a written statement in terms of s 112 (2) of the Criminal Procedure Act 51 of 1977 (CPA) detailing the facts on which his plea is premised and the prosecution accepts the plea, *the plea constitutes the essential factual matrix and cannot to be extended or varied in any manner which adversely impacts on the measure of punishment as regards the offence*. The plea defines the lis between the prosecution and the defence. See also *S v Ngubane*.[4]' (My emphasis.)

Once the appellant accepted the s 112 statement as it was and confirmed that it was in accordance with the facts at its disposal, it was bound by the contents thereof.

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[2] *Kekana v S* (629 /2013) [2014] ZASCA 158 (1 October 2014) para 9.
[3] *S v Jansen* 1999 (2) SACR 368 (C).
[4] *S v Ngubane* 1985 (3) SA 677 (A) at 683E-F.

[15] It is trite that in any case in which an accused pleads guilty and the state is not satisfied with the plea as tendered, the state is not bound to accept such a plea. It is open to the state to reject it. In such an instance, the accused would have to amend his or her plea accordingly to meet all the elements of the offence. Alternatively, based on the rejection by the state of the plea as tendered, the court would have to note, at the request of the state as dominis litis, a plea of not guilty in terms of s113 of the CPA. The state would then have to lead evidence to prove its case beyond reasonable doubt. In this case, the state did not exercise any of these available options.

[16] To sum up, the appellant was bound by the contents of the s 112 statement. One cannot make assumptions as to the intention of the respondent, which cannot be justified.

[17] In conclusion, given the flagrant breach of the rules of this court, the failure to advance an acceptable explanation for the several delays on the part of the appellant, coupled with the evident prejudice to the respondent and the fact that the appeal has no prospects of success, the application for condonation must thus fail and the appeal cannot be reinstated.

[18] In the result, the following order is granted:

The applications for condonation for the late filing of the notice of appeal and reinstatement of the appeal are dismissed.

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BC Mocumie
Judge of Appeal

Appearances:

For Appellant:	M Jansen van Vuuren and M J Makgwatha Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein
For Respondent:	N L Skibi Instructed by: Legal Aid South Africa, Pretoria Bloemfontein Justice Centre, Bloemfontein