

FILING SHEET FOR THE HIGH COURT OF SOUTH AFRICA, BISHO

JUDGMENT

PARTIES:

BONISILE GREY

vs

THE STATE

Case Number: **CC38/2006**

JUDGMENT DELIVERED: **26 November 2009**

JUDGE: **Y EBRAHIM**

LEGAL REPRESENTATIVES:

Appearances:

For the Appellants: **Mr L Silandela**

For the Respondent: **Mr L Mbusi**

Instructing attorneys:

For the Appellants: **Justice Centre
KING WILLIAM'S TOWN**

For the Respondent: **The Director of Public Prosecutions
BHISHO**

CASE INFORMATION:

Nature of proceedings: Criminal procedure – Application for leave to appeal and application for condonation

Topic: Leave to Appeal & condonation

Key Words: Condonation – inadequate explanation for delay – failure to show good cause for condonation – condonation refused
Application for leave to appeal – merits – no reasonable prospects of success on any of grounds of appeal – leave to appeal refused

IN THE EASTERN CAPE HIGH COURT

BHISHO

CA&R 11/09

CASE NO: CC38/06

In the matter between:

BONISILE GREY

Applicant

and

THE STATE

Respondent

JUDGMENT

Y EBRAHIM J:

Introduction

[1] The applicant was convicted of murder on 19 November 2007 and sentenced on 1 September 2008 to imprisonment for eighteen years. The applicant now seeks leave to appeal the conviction and sentence.¹ The application for leave to appeal was not lodged within the time period stipulated in the rules of Court² but on 3 August 2009 and the applicant therefore also seeks condonation for failing to do so timeously.

¹ Criminal Procedure Act 51 of 1977 – s 316(b)(1)

² See fn 1 *supra* – s 316(b)(i) stipulates that an application for leave to appeal must be made within fourteen days of sentence

Application for condonation

[2] The applicant seeks an indulgence and is required to show good cause for condonation to be granted.³ The applicant's explanation for the delay in noting the application for leave to appeal is set out in these terms:

'.....

4.

I was legally represented by Mr Sandi who was briefed by Messrs. Nduli, a firm of attorneys in East London.

5.

On the 1st September 2008, the Court convicted [*sic*] and sentenced me to undergo eighteen (18) years imprisonment.

6.

During September 2008, I instructed Messrs. Nduli to pursue this matter and note an appeal on my behalf against sentence and conviction. I was then caused (*sic*) to sign requisite documents which I was advised and verily believed were for the purpose of lodging an appeal.

7.

During the month of April 2009, I phoned Messrs. Nduli and enquired about the progress in my appeal. I was only advised that my appeal was never pursued as I did not advance any payment to Messrs. Nduli as legal fees to pursue my appeal. Having realized that my instructions were never executed and I have (*sic*) no funds to employ the services of Messrs. Nduli, I immediately contacted Mr. Ndunyana of the King William's Town Justice Centre in King William's Town and made a legal aid application for the execution of an appeal on my behalf.

8.

I submit that I had indicated my intentions of noting an appeal against my sentence timeously. The delay in bringing this application has not been brought about capriciously and by fault on my part.'

[3] The applicant's explanation is far from satisfactory. From the date of sentence a period of eleven months elapsed before the application for

³ *S v Mantsha* 2009 (1) SACR 414 (SCA) at para [5] – 'Good (or sufficient) cause has two requirements. The first is that the applicant must furnish a satisfactory and acceptable explanation for the delay. Secondly, he or she must show that he or she has reasonable prospects of success on the merits of the appeal.'

leave to appeal was lodged. The applicant has stated that he instructed attorneys Nduli during September 2008, without disclosing on which date this occurred, 'to note an appeal on [his] behalf against sentence and conviction'. He has not explained why he waited until April 2009 before communicating with them to enquire what progress had been made. There is no explanation either for the absence of an affidavit from attorneys Nduli confirming that this is what had occurred and that it is only then that they raised the issue of non-payment of their fees. The absence of such confirmation casts doubt on the veracity of the applicant's assertion that the attorneys were to blame for the application for leave to appeal not being noted timeously.

[4] The applicant had initially stood trial before Nyangiwe AJ. He was then represented by a different legal representative and had successfully applied for the recusal of the presiding judge. In the trial, to which these proceedings relate, the applicant was represented at various stages by four different legal representatives. Thus, when the applicant instructed attorneys Nduli 'to note an appeal' it was not the first occasion that he had engaged the services of attorneys. There can be no doubt that the applicant knew that he had to pay for the legal services of attorneys and that at least a portion of the fees had to be paid prior to them executing his mandate. Not surprisingly the applicant has not suggested that he was unaware of this. It is most unlikely that the matter of payment of the attorneys' legal fees was not broached when he instructed them but was

only raised in April 2009 after he had enquired about progress of his appeal.

[5] In my view, the applicant has not been frank and honest in explaining the long delay in lodging the application for leave to appeal within the stipulated period or reasonably soon thereafter. His explanation is wholly inadequate and unsatisfactory. I find it unpersuasive.

[6] In view of the inadequacy of the explanation the applicant has failed to show good cause for condonation to be granted. Nevertheless, should the prospects of success on the merits of the appeal be strong condonation may still be granted.⁴ I accordingly proceed to consider the merits.

Merits

[7] Mr Silandela, who appeared for the applicant, in addressing argument to the Court confirmed that the applicant had abandoned all the grounds of appeal cited in the application for leave to appeal, save for one. The only ground of appeal being pursued was that the Court had erred in drawing the inference that the murder was premeditated. He submitted that there was no direct evidence of premeditation and it was not far-fetched that it was a spur of the moment decision by the applicant to attack the deceased.

⁴ *Saloojee & Ano.*: fn 5 *supra*, *S v Mantsha* 2009 (1) SACR 414 (SCA) and *Mzizi v S* [2009] 3 All SA 246 (SCA)

[8] Mr Mbusi, on behalf of the State, submitted that the applicant had planned to murder the deceased as he came armed with a dagger. The court had not erred in finding that the murder was premeditated.

[9] I agree with Mr Mbusi. The only reasonable inference from the proved facts was that the stabbing of the deceased was premeditated. The fatal assault occurred at a funeral which, by all accounts, was attended by many hundreds, if not a few thousand, mourners. The evidence clearly established that the applicant arrived at the funeral armed with a knife. He had then launched an attack at the deceased when he had his back to him and was carrying containers of food in both hands. The deceased had tried to escape the attack and in the process of running away tripped and fell to the ground. The applicant thereupon straddled the deceased as he lay defenceless on his back and stabbed him a number of times in the chest, arms and legs. The applicant ignored the screams of mourners that he should stop stabbing the deceased and only ceased his attack when they assaulted him with chairs. The evidence established that the deceased had not at any stage attacked the applicant and that his claim that he had acted in self-defence when he stabbed the deceased was untrue.

[10] The knife, which was handed in as an exhibit in the trial, had been identified by a witness as the weapon used by the applicant. From its appearance it was not an ordinary knife but a dagger. It is most improbable that the applicant would have armed himself with such a

weapon when attending a funeral unless he intended using it for a criminal purpose. In the circumstances the only reasonable inference is that the applicant's actions were premeditated. In my view, there is no reasonable prospect of another Court differing from the conclusion reached by this Court.

[11]Insofar as the appeal against sentence is concerned the Court's comments when passing sentence are self-explanatory. I do not deem any further comment necessary, save for stating that the applicant's claim that he was married to Ms Boniswa Qaga by customary union was found to be false,. I am of the view, therefore, that there is no reasonable prospect that another Court would reach a different conclusion in regard to sentence.

Conclusion

[12]In the circumstances, the applications for condonation and for leave to appeal the conviction and sentence must fail.

Order

[13]In the result, the following order is made:

1. Condonation is refused.
2. The application for leave to appeal conviction and sentence is refused.

JUDGE Y EBRAHIM

26 November 2009

Judgment delivered:

26 November 2009

Counsel for the Appellant:

Mr L
Silandela
Justice Centre
KING WILLIAM'S TOWN

Counsel for the Respondent:

Mr L Mbusi
The Director of Public Prosecutions
BHISHO