THE HIGH COURT OF SWAZILAND

NKOSINATHI VUSI NKAMBULE AND ANOTHER

Vs REX

Criminal Appeal No. 80/2001

Coram	MAPHALALA - J
	ANNANDALE - J
For the Appellants	IN PERSON
For the Respondent	MISS LANGWENYA

JUDGEMENT

(25/09/2002)

Maphalala J

This is an application for condonation for late filing of appeal in compliance with Section 1 (1) of the Magistrate's Court Rules - Order No. XXCVI. The appellants were charged and subsequently convicted of the crime of robbery. On the 16th March 2001, the appellants were sentenced to six (6) years imprisonment by the Senior Magistrate in Manzini.

The appellants, in terms of the above captioned Section should have filed their application for appeal to the High Court on or before the 6th April 2001. The first and second appellants filed for condonation for non-compliance with the Rules on the 17th April 2001 and on the 26th April 2002 respectively.

The reasons advanced by the first appellant's failure to comply with the rules in this respect were:

1. That he was under the impression that his parents would arrange and secure him a legal representative to note his appeal.

The second appellant's reasons for non-compliance with the Rules is that:

1. He was let down by inmates who have the knowledge of drafting criminal appeals and that;

2. He needs to be given a second chance in life.

The factors to be considered by the court in exercising its discretion whether or not to grant condonation for non-compliance with the rules of court are two fold. These were clearly enunciated in the case of Mlotshwa vs R 1979 - 81 S.L.R. 55, thus:

a) Whether the appellants are to blame for failure to comply with the rules of court, and

b) Whether there is a reasonable prospect of success on appeal.

Further, in Immelman vs Loubser en 'n ander 1974 (3) S.A. 816 (A) the following appears in the head note:

"In an application for condonation of failure to note an appeal timeously, etc, the fact that applicant himself was not in no way to blame is an important consideration, but it does not necessarily always serve as a

sufficient excuse".

The appellants appeared before us on the 4th September 2002, where we heard their submissions in support thereto. Both appellants do not challenge the conviction but

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urged the court to revisit the sentence imposed by the Senior Magistrate in the court below. In their submissions they did not advance any additional reasons for the non-compliance save to what is written in their letters of condonation.

Before proceeding with their application for condonation I wish to point out that the conviction by the Senior Magistrate was supported by overwhelming evidence against the appellants and no fault can be found in the conclusions which the learned Magistrate reached a quo. The appellants themselves recognized that fact and only confined themselves to the severity of the sentence.

Reverting to the application for condonation for the late filing of their appeal it is my considered view that they have dismally failed to satisfy the requirements spelt out in Mlotshwa vs R (supra).

Miss Langwenya's formidable arguments in her Heads of Argument are correct on all fronts and I would embrace them in toto. On the first requirement of whether the appellants are to blame for failure to comply with the rules the reasons advanced by the appellants are not capable of verification and thus their veracity is suspect. This is further compounded by the fact that allegations are made about third parties, namely parents in respect of the first appellant and in the case of the second appellant, inmates with the know-how to draft a notice of appeal. I agree with Miss Langwenya that an affidavit signed by the parents/sister of the first appellant confirming that they unsuccessfully tried to secure an attorney to note an appeal on his behalf would have gone some way to render credible the reason advanced by the first appellant. In the absence of such supporting evidence the reason put forth by the first appellant remains flimsy if not downright incredible.

In the case of the second appellant who states that he was let down by inmates who have the know-how to draft criminal appeals the Correctional Services personnel is entrusted with the responsibility to help would-be appellants in the drawing and typing of documents for inmates.

It appears from the record that all facts being considered, the appellants were informed of their rights including the right to appeal.

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Coming to the second requirement enunciated in Mlotshwa op cit of whether there is reasonable prospect of success on appeal the appellants again failed to convince us in this respect. Both appellants appealed for mercy on the grounds that they were young offenders and that they have learnt their lesson. They urged the court to suspend portion of their sentence or to be given an option of a fine.

Sitting as a court of appeal the ambit of the court's jurisdiction in relation to sentence is relatively restricted. This is because the question of sentence, the appropriateness of it, what particular sentence should be passed, is primary the responsibility of the trial court. On appeal it is clearly established that, in the absence of misdirection or irregularity, a court of appeal will only interfer if, as it is sometimes expressed, there is a striking disparity between the sentence of the court a quo and that which the court of appeal would itself have passed (see S vs Shikunga 2000 (1) S.A. 616 at 631 F - I) (NMSC) per Mahomed CD. In casu, it has not been shown that the sentence in question is severely harsh and induces a sense of shock, nor has it been shown in any way how the Senior Magistrate misdirected himself in any respect in arriving at the sentence that he did. The learned Senior Magistrate considered all the personal circumstances of the appellants against the interest of society and that this was a very serious offence where the complainant was accosted and assaulted. She was forced by the appellants to show them where the money was kept. The appellants took off with the money.

On the issue of suspending portion of the sentence or impose a sentence with an option of a fine the answer to that question is that it is not permissible to suspend a portion of a sentence imposed for robbery in terms of Section 313 (1) read with the Third Schedule of the Criminal Procedure and Evidence Act (as amended), 1938. Neither is the imposition of a sentence with an option of a fine appropriate for this offence.

In conclusion, the appellants have failed to satisfy the requirements in Mlotshwa supra viz, a) whether they are to blame for failure to comply with the rules of court, and b) whether there is reasonable prospect of success on appeal.

In the result, I would propose that the application for condonation for non-compliance with the rules ought to fail and it is so ordered.

S.B. MAPHALALA

JUDGE

I agree

J.P. ANNANDALE

JUDGE