

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION WINDHOEK

JUDGEMENT

Case No.: CA 70/2017

EVANE VANWYK

APPELLANT

versus

STATE

RESPONDENT

Neutral Citation: *Van Wyk v The State* (CA 70/2017) [2017] NAHCMD 346 (01 December 2017)

Coram: Shivute J and Salionga J

Heard: 3 November 2017

Delivered: 1 December 2017

Fly note: Appeal - Application for condonation of the late filing of notice to Appeal - Court may not accept explanation for the delay - Court balancing cumulative effect of explanation for late filing with prospects of success - Prospects of success good - Application for condonation granted.

ORDER

- (a) The application for condonation is granted.
 - (b) The appeal is upheld and the sentence of 4 (four) years imprisonment is set aside.
 - (c) Accused is sentenced to 12 months imprisonment backdated to April 2017.
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JUDGMENT

[1] The appellant was convicted in a Magistrate Court on a charge of Escaping before being locked up in contravening section 51 (1) of Act 51 of 1977 as amended and sentenced to 4 (four) years imprisonment.

[2] The appellant filed his appeal out of time and applied for condonation for the late filling of a notice of appeal. He is only appealing against the sentence imposed in the Karibib Magistrates Court.

[3] We allowed counsel for the appellant to argue on the application for condonation as well as on the merits. Counsel argued that he was not the attorney of record at the time the appellant was sentenced. However after he received instructions from the appellant of his desire to appeal he immediately took up the matter. The delay was caused by the fact that the appellant's family had to post funds to him since the appellant was incarcerated at Walvis Bay Correctional facility. Counsel further argued that the appellant had a reasonable prospects of success on appeal because the accused was sentenced under the repealed Act.

[4] Even though this court might not accept the explanation given by the accused for non-compliance with Rule 67 of the Magistrates' Court Act, it may look at the prospects of success on appeal and for this purpose the court would look at the sentence imposed, in the court a quo. The cumulative effect of the explanation and

the prospects of success have to be balanced in order to determine whether condonation should be granted or not.

[5] It is common cause that the appeal was noted out of time but counsel appearing for the state did not object to such application. He also conceded that in view of the fact that the learned magistrate misdirected herself in imposing a sentence of 4 (four) years under the repealed law, the appellant has over whelming prospects of success on his appeal against the sentence. Since the prospects of success on appeal are good, we decided to grant the condonation.

The Prison Act, Act 8 of 1959 under which the appellant was sentenced was repealed in its entirety by the Prison Act, 1998. (Act 17 of 1998) To this end, Act 17 of 1998 was also repealed by the Correctional Services Act 2012 (Act 9 of 2012). Section 134 (1) of Act 9 of 2012 provides that "the laws specified in the First Schedule are repealed to the extend specified in the third column thereof".

Act 9 of 2012 amends section 51(1) of Act 51 of 1977 by substituting the words "section 48 of the Prison Act 8 of 1959" with the following words "section 91 of the Correctional Services Act", 2012.

In this regard, "Section 91" provides for the sanctions for major disciplinary offence to be imposed at trial. The Act further provides that where a trial for a major disciplinary offence is conducted under section 88 (1) (b) and the offender is found guilty of the offence, he or she is liable to-

- (a) Imprisonment for a period not exceeding 2 years;
- (b) In addition or alternatively to any period of imprisonment imposed under paragraph (a), any one or more of the sanction set out in section 89 (1) .

[6] This court may only interfere with the sentence if it finds that it is;

- (a) vitiated by irregularity or
- (b) misdirection and when the sentence is disturbingly inappropriate or if it induces a sense of shock.

[7] In view of this it is justifiable for this court to interfere with the sentence imposed by the court a quo because the learned magistrate misdirected herself by sentencing

the appellant under the repealed Act. Therefore, the sentence imposed cannot be allowed to stand and this court is at liberty to sentence the appellant afresh.

[10] A contravention of section 51 (1) of Act 51 of 1977 as amended is now punishable in accordance with the penalty provisions in section 91 of Act 9 of 2012 which provides for imprisonment for a period not exceeding 2 years.

[11] In the result the following order is made:

- (1) Application for condonation is granted.
- (2) Appeal is upheld and the sentence of 4 (four) years imprisonment is set aside.
- (3) Accused is sentenced to 12 months imprisonment backdated to 6 April 2017.

J.SALIONGA
ACTING JUDGE

N.N SHIVUTE
Judge

APPEARANCES:

APPELLANT: **Mr Nambahu**
Nambahu Associates
Windhoek

RESPONDENT: **Mr lipinge**
Office of the Prosecutor-General
Windhoek