

HIGH COURT OF
WINDHOEK



NAMIBIA MAIN DIVISION,

Case No: HC-MD-CRI-APP-CAL-2018/00003

LOURENS KAMBARA

APPELLANT

v

THE
RESPONDENT

STATE

Neutral citation: *Kambara v S* (HC-MD-CRI-APP-CAL-2018/00003) [2019]
NAHCMD 140 (10 May 2019)

Coram: NDAUENDAPO, J et SHIVUTE, J

Heard: 8 April 2019

Delivered: 10 May 2019

Flynote: Criminal Procedure – Application for condonation for late filing of notice of appeal – Appellant filed his notice of appeal out of time more than a year – Causes for delay – Appellant alleged court and legal representative failed to explain his rights of appeal – Court held – Explanation incorrect, unreasonable and not acceptable. Record reflects explanation of rights by court a quo – First requirement not satisfied – Prospects of success – Appellant arguing – Period spent in custody constitutes substantial and compelling circumstances – Court held – This cannot be taken in isolation or be

conclusive on itself – It must be considered together with other factors including explanation for the cause of delay.

Appellant deliberately misleading court concerning explanation for delay – Appellant failed to discharge burden on second leg.

Mandatory sentence – theft of motorvehicle – Not less than 10 years – Whether 1 year 4 months spent in custody amounts to substantial and compelling circumstance – Court held – This does not amount to substantial and compelling circumstance – Magistrate was not persuaded to deviate from imposing mandatory minimum sentence – No misdirection found on part of court a quo. Application for condonation refused. Appeal dismissed.

ORDER

The application for condonation is refused and the appeal is dismissed.

APPEAL JUDGMENT

SHIVUTE, J (NDAUENDAPO, J concurring)

[1] The appellant was convicted of theft of a motorvehicle in contravention of Act 12 of 1999 in the Regional Court sitting in Otjiwarongo. He was sentenced to 11 years' imprisonment of which 1 year was suspended on usual conditions. The sentence was meted out to him on 31 August 2017 after he pleaded guilty. He is not satisfied with the sentence hence this appeal.

[2] The appeal was lodged out of time for more than a year. He had applied for condonation for the late filing of the notice of appeal. His explanation for the cause of the delay is as follows:

- (a) He filed his notice of appeal' titled notice for leave to appeal' dated 6 September 2017. However, it was defective because it did not set out clearly the grounds of appeal.
- (b) The court did not explain his rights regarding an appeal, instead, the court informed his legal representative to explain to him but he failed to do so.
- (c) With regard to the prospects of success, he explained that he has good prospects of success on appeal. He is of the view that the sentence imposed by the court was a misdirection as there existed substantial and compelling circumstances to deviate from the mandatory minimum sentence. The court had failed to take into consideration the period the appellant spent in custody awaiting the finalisation of the appeal.

[3] Grounds of appeal are as follows:

- (i) The sentence imposed is shockingly inappropriate in the circumstances.
- (ii) The court unjustifiably overemphasised the seriousness of the offence at the expense of mitigating factors.
- (iii) The court paid lip service to the fact that the appellant had been in custody for a period of one year and four months.

[4] The appellant in his affidavit explained that, the cause of the delay to file his notice of appeal on time was because, the court and his legal representative failed to explain to him his rights regarding an appeal. The appellant's above explanation for the failure to comply with the rules of court was a deliberate move to mislead the court. It is evident from page 15 typed, 42 handwritten that the court went to the extent of explaining the appellant's right of appeal in detail despite the fact the he was legally represented. Therefore, the accused's explanation is not correct, not reasonable and it is not acceptable. In view of this he has failed to meet the first requirement.

[5] With regard to the prospects of success, in an application for condonation of the late filing of notice of appeal this cannot be taken in isolation or be conclusive on itself, it has to be considered together with all the factors and this should include the explanation given for the non-compliance with the rules of court. The appellant deliberately made a false declaration, he deliberately disregarded the rules. Where the rules of court have been deliberately disregarded the application should not be granted irrespective what the prospects of success might be. This is in line with *S v Vries* 1992 NR 1 (G).

[6] Parties were also allowed to argue on the merits. Counsel for the appellant argued that the court misdirected itself by overemphasising the seriousness of the offence at the expense of the personal circumstances of the appellant. The court failed to take into consideration the time the appellant was incarcerated pending the finalisation of the trial. It was further counsel's argument that the appellant pleaded guilty to the charge. Because of the time the appellant spent in custody this should have been considered as a substantial and compelling circumstance and the court a quo was supposed to suspend a portion of the sentence so, counsel argued. Alternatively the court a quo should have on this basis deviated from the mandatory minimum sentence provided for by the Act.

[7] On the other hand, counsel for the respondent argued that although the appellant was in custody awaiting his trial for a year and four months, he was first arrested in May 2013. He was granted bail and absconded and was only re-arrested in April 2016. Furthermore, counsel argued that there are no substantial and compelling circumstances pointed out by the appellant for the court to deviate from the mandatory sentence.

Mandatory Sentence

[8] The penalty provided for in respect of theft of a motorvehicle is a sentence of not less than 10 years imprisonment without the option of a fine. However, if a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, it shall enter those circumstances on the record of proceedings and may impose a lesser sentence. The mandatory sentence should not be easily deviated from or should not be deviated for flimsy reasons. Theft of a motorvehicle is a serious offence. The legislature view this in a serious light and this is the reason it came up with mandatory sentences.

[9] Although the court may take into consideration the lengthy period the appellant spent in custody pending the finalisation of his case, this factor alone does not constitute substantial and compelling circumstances. Again, the fact that the accused pleaded guilty to the charge cannot be considered to be a substantial and compelling circumstance. The appellant had no alternative but to plead guilty. He took the complainant's car on the pretence that he was going to buy it but instead, he sold it to another person and never paid the complainant. The court a quo remarked that the appellant did not steal out of poverty but to enrich himself. Furthermore, the appellant did not show true remorse. What the court observed was that the appellant was sick and tired of being in prison.

[10] *S v Libongani* 2015 (2) NR 555(SC) the respondent was sentenced to 12 years imprisonment after the court found that there were substantial and compelling circumstances. The court considered the period the accused spent in custody awaiting his trial and that he was of ill health because he suffered from swollen feet. Upon appeal by the state the Supreme Court held that the period spent in custody and swollen feet suffered by the appellant did not amount to substantial and compelling circumstances that could have persuaded the court to depart from the minimum sentence of 15 years imprisonment prescribed for rape. The sentence of 12 years was set aside and substituted with the sentence of 17 years.

[11] We associate ourselves with the above matter. No substantial and compelling circumstances existed in this matter. The sentence of 11 years' imprisonment of which 1 year was suspended is not inappropriate and it does not induce a sense of shock. The appellant had also failed to discharge the burden that he has prospects of success. We found no misdirection on the part of the learned magistrate and there is no justification for us to intervene with the sentence.

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

The application for condonation is refused and the appeal is dismissed.

N N Shivute
Judge

G N Ndauendapo
Judge

APPEARANCES:

APPELLANT:

Mr Trevor Brockerhoff
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RESPONDENT:

Mr Hesekeil Kuye-Awike Ipinge
Of Office of the Prosecutor-General, Windhoek