



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CALL-2018/00054

In the matter between:

RICHARD KATJATENYA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Katjatenya v State* (HC-MD-CRI-APP-CALL-2018/00054)
[2019] NAHCMD 174 (3 June 2019)

Coram: NDAUENDAPO J et SHIVUTE J

Heard: 6 May 2019

Delivered: 3 June 2019

Flynote: Criminal Procedure – Appeal against sentence – Appellant convicted of rape and escaping from lawful custody – Condonation Application – Appellant must give reasonable explanation for cause of delay – and satisfy court that he has reasonable prospect of success on appeal – magistrate erred by ordering the sentence on escaping from lawful custody to run concurrently with the sentence on rape – Application refused.

Summary: The appellant was convicted and subsequently sentenced, in respect of the first count of having contravened Section 2(1)(a) further read with sections 1,2(3), 3, 4, 5, 6, and 7 of the Combating of Rape Act 8 of 2000, the appellant was sentenced to seventeen years imprisonment. He was also convicted of escaping from lawful custody (common law) and sentenced to eighteen months. The sentence was ordered to run concurrently with that of rape.

The appellant thereafter noted an appeal against the sentence of rape outside of the prescribed time limit, his appeal only being brought 8 months after the prescribed time limit. The condonation application was accompanied by an affidavit deposed to by the appellant wherein he had attempted to explain the cause for the delay in filing the notice of appeal. The appellant stressed that he is a layman. It is this difficulty in the appellants' view that resulted in him being unable to timeously set out and file his notice of appeal during the prescribed period

In the result, the court *held*: The explanation by the appellant for the delay in noting his appeal is not reasonable nor acceptable. The transcribed record was available two days after he was sentenced and to have waited for eight months to get assistance from fellow inmates to draft the notice of appeal is unreasonable and unacceptable.

Held The appellant's conduct was clearly brutal, vicious and callous. He stabbed the complainant repeatedly and she suffered seven stab wounds. No compelling and substantial circumstances were adduced for the magistrate to have deviated from the sentence of minimum fifteen years. There is no misdirection on the part of the learned magistrate. In the result there are no prospect of success on appeal. *Held* further that, the learned magistrate did not err in sentencing the appellant to seventeen years.

Held further that, the learned magistrate erred by ordering the sentence on escaping from lawful custody to run concurrently with the sentence on rape.

ORDER

1. The application for condonation for the late noting of the appeal is refused.
2. The appeal is dismissed.
3. The sentence of eighteen months for escaping from lawful custody which was ordered to run concurrently with the sentence of seventeen years for rape is set aside and substituted with the following;
 - (a) The accused/appellant is sentenced to eighteen months. It is further ordered that the sentence of eighteen months will run consecutively with the sentence imposed for rape.

JUDGMENT

NDAUENDAPO J (SHIVUTE J concurring):

Introduction

[1] The appellant was convicted in the Regional court sitting at Otjiwarongo of having contravened s 2(1)(a) read with section 1, 2(3), 3, 4, 5 6 and 7 of the Combating of Rape Act 8 of 2000 (Rape). He was sentenced to seventeen years imprisonment. The appellant was also convicted of escaping from lawful custody and was sentenced to eighteen months imprisonment which was ordered to run concurrently with the sentence imposed on the rape charge.

[2] Disenchanted with the sentence on the rape count, he filed a notice of appeal against that sentence. The grounds of appeal can be summarised as follows: (a) the learned magistrate erred on the facts and the law by overemphasising the retributive aspect of punishment at the expense of

deterrence and rehabilitation; (b) the learned magistrate erred in law and facts in imposing a sentence which is inappropriate and shockingly severe; (c) there is a striking disparity between the sentence imposed by the trial court and that which the appeal court would have imposed and (d) the magistrate erred in law or and or the facts by totally ignoring the personal circumstances of the appellant. The appellant was sentenced on 7 July 2017 and the notice of appeal was filed on 19 March 2018. The appeal was filed out of time by approximately eight months. He also filed an application for condonation together with the notice of appeal.

[3] Counsel for the respondent took issue with the late noting of appeal as a *point in limine*. Counsel argued that the explanation was not reasonable nor acceptable. The appellant explained in the affidavit that the notice was filed out of time because there was a delay in getting the record, that he was a layman and not acquainted with the intricacies of the law and that only on 8 March 2018 with the assistance of his fellow inmates did he draft the notice of appeal. From the transcriber's certificate it is clear that the record was transcribed on 9 July 2017, two days after the appellant was sentenced on 7 July 2017. On the issue that he is a laymen and only 8 March 2018 did he get assistance from fellow inmates to draft the notice of appeal, I must point out that the rules of court are equally applicable to all litigants. They must be adhered to by all litigants. In *S v Mantsha* 2006(2) SACR 4 (CPD) cited with approval in the case of *Julius Kafidi v The State* case no 41/2009 delivered on 24 November 2009, the court held that:

'It is trite that a Court of appeal may relax the rules in granting condonation where a (lay) litigant did not comply with them, however, there are limits thereto and the court will only grant condonation on good cause shown i.e. then the Court is satisfied that the explanation advanced justify the granting of the indulgence sought.'

Condonation is not there for the asking and applications for condonation (especially those brought by lay persons) have become commonplace in criminal appeals, which in my view, emphasises the need for those applications to meet the requirements set out in the rules of the court and which should only be relaxed on good cause shown.'

[4] The explanation by the appellant for the delay is not reasonable nor acceptable at all. The transcribed record was available two days after he was sentenced and to have waited for eight months to get assistance from fellow inmates to draft the notice of appeal is unreasonable and unacceptable. The appellant further states that he has good prospects of success if one considers the evidence adduced in his favour at the trial. He argued that the sentence imposed was too long and that it should be reduced. Counsel for the respondent argued that the sentence imposed fit the crime. The rape was committed in a most brutal and vicious manner.

The law

[5] A court of appeal has limited power to interfere with the sentencing discretion of the trial court. The appeal court may only interfere with his discretion in the following circumstances:

- 5.1 when there was a material irregularity; or
- 5.2 a material misdirection on the facts or on the law; or
- 5.3 where the sentence was startlingly inappropriate; or
- 5.4 induced a sense of shock; or
- 5.5 was such that a striking disparity exists between the sentence imposed by the trial court and that which the court of appeal would have imposed had it sat in first instance in that;
- 5.6 irrelevant factors were considered and when the court *a quo* failed to consider relevant factors.

[6] The appellant was offered accommodation in the complainant's room, after he had asked for it. Whilst the complainant was sleeping he took a knife and stabbed the deceased in the arms and ear and told her that he wanted to sleep with her. Out of fear she told him to get condoms from her handbag and thereafter he proceeded to rape her. After that, the appellant passed out and two boys came to her rescue. She spent two weeks in hospital because of the injuries she sustained from the stab wounds. The appellant's conduct was clearly brutal, vicious and callous. He stabbed the complainant repeatedly and

she suffered seven stab wounds. The complainant was attacked in the sanctity of her own home. The learned magistrate remarked that 'this was one of the worst rapes with the worst consequences that this court has come upon.' In my respectful view the learned magistrate did not err in sentencing the appellant to seventeen years.

Penalties

3. (1) Any person who is convicted of rape under this Act¹ shall, subject to the provision of subsection (2), (3) and (4), be liable-

(a) in the case of a first conviction

(iii) where-

(aa) the complainant has suffered grievous bodily or mental harm as a result of rape; to imprisonment for a period not less than fifteen years;

[7] In this case the complainant was stabbed seven times with a knife and therefore she suffered grievous bodily harm and in terms of the penalties the minimum sentence is fifteen years. No compelling and substantial circumstances were adduced for the magistrate to have deviated from the sentence of minimum fifteen years. There is no misdirection on the part of the learned magistrate. In the result there are no prospect of success on appeal.

Escaping from lawful custody

[8] The appellant was sentenced to eighteen months for escaping from lawful custody and the sentence was ordered to run concurrently with the sentence on rape. When the appeal came before us, we raised the concern whether it was competent for the magistrate to have ordered the sentence on escaping from lawful custody to run concurrently with the sentence on rape. We gave notice to the parties to address us on that aspect and postponed the appeal for two weeks to afford the parties to prepare on that issue.

¹ The Combating of Rape Act 8 of 2000.

[9] On return, the appellant argued that the magistrate was correct to order the sentence to run concurrently. Ms Shikerete for the respondent argued that the magistrate was wrong to order the sentence of escaping to run concurrently with the sentence of rape. She referred this court to the cases of *S v Linyando*². In *S v Linyando* the court held that:

‘Where an accused has been sentenced on a conviction of escaping from lawful custody, such sentence could not run concurrently with any other sentence’. Relying on the *Linyando* matter, the learned magistrate erred by ordering the sentence on escaping from lawful custody to run concurrently with the sentence on rape.

[10] In the result, the court is not satisfied with the explanation given for the late noting of the appeal and there are no prospects of success on appeal.

[11] In the result, I make the following order:

1. The application for condonation for the late noting of the appeal is refused.
2. The appeal is dismissed.
3. The sentence of eighteen months for escaping from lawful custody which was ordered to run concurrently with the sentence of seventeen years for rape is set aside and substituted with the following;
 - (a) The accused/appellant is sentenced to eighteen months. It is further ordered that the sentence of eighteen months will run consecutively with the sentence imposed for rape.

N. G. NDAUENDAPO
JUDGE

² 1999 NR 300.

N. N. SHIVUTE
JUDGE

APPEARANCES

APPELLANT

In Person

Windhoek Correctional Services

RESPONDENT

Ms Felistas Shikerete

Of the Office of the Prosecutor-General

Windhoek.