

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

CRIMINAL APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2018/00076

JAMON LOUW

APPELLANT

and

THE STATE

RESPONDENT

**Neutral citation:** *Louw v State* (HC-MD-CRI-APP-CAL-2018/00076 [2019] NAHCMD 236 (12 July 2019))

**Coram:** SHIVUTE J *et* MILLER A J

**Heard:** 24 June 2019

**Delivered:** 12 July 2019

**Flynote:** Criminal Procedure – Appeal against sentence – Late filing of appeal condonation – Prerequisite: Good cause to grant condonation and prospect of success on merits – Court has discretion to grant condonation - Court finding no good cause and no prospects of success on appeal – No misdirection on the part of magistrate convicting the appellant and in imposing the sentence – Application for condonation refused – Appeal dismissed.

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## ORDER

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

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## CRIMINAL APPEAL JUDGMENT

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Miller AJ, Shivute J concurring:

[1] The appellant was convicted on his own plea of guilty of dealing in a dependence producing substance in contravention of section 2 (a) read with section 1, 2 (i), 8, 1, 14 and Part 1 of the Schedule of Act 41 of 1971, as amended. The learned magistrate after hearing submissions in mitigation and aggravation from the appellant and the State respectively sentenced the appellant to 2 years imprisonment without the option of a fine.

[2] The appellant was convicted and sentenced by the Magistrate's Court for the district of Rehoboth on 18 April 2018.

[3] The appellant appealed against the sentence imposed. He was represented by Mr Sibeya and Ms Esterhuizen appeared on behalf of the respondent. The appeal was lodged out of time. An application was therefore lodged seeking condonation for the late filing of the appeal.

### Brief Background

[4] The appellant under cover of a letter dated 15 July 2018 addressed to the Registrar High Court of Namibia, lodged an 'application for leave to appeal against sentence together with an application for condonation'. The appellant thereafter by way of a letter dated 23 October 2018 addressed to the Clerk of the Court, Rehoboth Magistrate's Court, served the same 'application for leave to appeal and an application for condonation' on the Court *a quo*. The letter was received on 19 October 2018.

[5] On 26 March 2019, the appellant through his legal representative lodged an amended notice of appeal. On 16 April 2019, the appellant's legal practitioners filed an application for condonation supported by the affidavits of the appellant and Mr Sibeya, seeking condonation for the late filing of the notice of appeal and the amended notice of appeal.

[6] I hold the view that the appellant would first have to obtain condonation before his appeal may be adjudicated upon. I therefore deem it necessary to adjudicate upon the condonation application first.

### Condonation

[7] This court has a discretion whether or not to grant condonation. The appellant's first notice for leave to appeal *prima facie* is not a proper notice of appeal. The first notice for leave to appeal was lodged out of time. The requirements that an applicant seeking condonation for late filing of the notice appeal must meet have been succinctly summarised in *Elumba v S*<sup>1</sup> where the court stated as follows;

'My considered view is that the fact that no reasons for prospects of success are provided is not the criteria. This court must first decide if the explanation for the delay is reasonable and then deal with prospects of success by dealing with the merits of the case. Even if the court is not satisfied with the explanation for the delay and when there are good prospects of success, this court may condone the late filing. The Court will balance the explanation for the late filing with the prospects of success on appeal.'

[8] The explanation provided by the appellant for the period 18 April 2018 to 15 July 2018 is not acceptable. The appellant states that he was in a state of shock and could not think clearly due to the sentence imposed. It is evident from the record that the learned magistrate advised the appellant of his right to appeal against both conviction and sentence. The appellant was advised that if he was not satisfied, he should file a notice of appeal within 14 days from 18 April 2018, the appellant was advised that the notice of appeal had to include grounds of appeal. The court *a quo* advised the appellant about condonation for the late noting of the notice of appeal.

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<sup>1</sup> [2018] NAHCNLD 43 (24 April 2018)

The appellant was specifically asked whether he understood the procedure in respect of reviews and appeals. His answer was in the affirmative.

[9] On 18 February 2019 Legal Aid appointed a legal representative for the appellant. The appellant states that by 5 March 2019 a copy of the record was in the possession of his legal representative, however the application for condonation was only instituted on 16 April 2019. I find that there is no acceptable explanation for the period 5 March 2019 up to 16 April 2019. I must now address the prospects of success of the appeal against sentence.

#### Prospects of success ad sentence

[10] The appellant appeals against sentence on the basis that the learned magistrate erred in law and/or in fact. The approach to an appeal against sentence was set out as follows in *S vs Tjiho*<sup>2</sup>:

‘The appeal court is entitled to interfere with a sentence if:

- (a) the trial court misdirected itself on the facts or on the law;
- (b) an irregularity which was material occurred during the sentencing proceedings;
- (c) the trial court failed to take into account material facts or that emphasised the importance of other facts;
- (d) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by a court of appeal.’

[11] In *Shikulo vs State*<sup>3</sup> the court held that an appeal court could only interfere with the sentence imposed by the trial court if the alleged misdirection was of such a nature, degree or seriousness that it shows directly or indirectly that the trial court did not exercise its discretion or exercised its discretion improperly or unreasonably. I must therefore, consider not just whether there was a misdirection but rather whether

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<sup>2</sup> 1991 NR 361 (HC) at 366A-B

<sup>3</sup> [2016] NAHCMD 35 (24 February 2016)

the misdirection was of such a degree of seriousness as to demonstrate that the trial court did not exercise its sentencing discretion judiciously.

[12] The first ground of appeal as per the amended notice of appeal is to the effect that the learned magistrate excessively sentenced the appellant to two (2) years imprisonment without the option of a fine while ignoring the submission by the appellant that he could afford to pay a fine. An alternative ground for appeal is raised to the effect that the learned magistrate erred in fact and or in law when sentencing the appellant to direct imprisonment without addressing the appellant's request for a fine or a totally suspended sentence was appropriate. I find that the failure to state the reasons why the court a quo did not impose a fine does not automatically mean that a fine was not considered, especially when regard is had to the fact that the learned magistrate enquired from the appellant whether the appellant could afford to pay a fine.

[13] The appellant raises another ground of appeal to the effect that the learned magistrate paid lip service to the personal circumstances of the appellant. This ground of appeal addresses the same issue as the ground of appeal to the effect that the learned magistrate ignored or failed to consider the weighty mitigating factors that the appellant's girlfriend was pregnant with his child, his mother had a stroke and his younger brother whom he was taking care of was in school in grade 10. *Ex facie* the record of proceedings, it is evident that the personal circumstances were considered by the court in determining an appropriate sentence.

[14] The learned magistrate was in any event correct to impose a sentence of direct imprisonment. The reasoning of this court in *Umub v S*<sup>4</sup> is instructive. The court when addressing sentencing in the context of dealing in dependence producing drugs stated as follows;

'The fight against dealing in and possession of dependence and dangerous dependence producing substance must be intensified at all levels by the law enforcement agencies and the courts. It is on the increase and busy destroying our communities particularly the youth despite the heavy sentences imposed. The courts must step in and impose severe sentences, never heard of before, as we are losing the battle against drug abuse. The

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<sup>4</sup> [2019] NAHCMD 8 (8 February 2019) at paragraph 12

sentences to be imposed must be so severe to deter the appellant and would-be offenders from committing such offences. The sentence imposed in the prevailing circumstances is in my view not shockingly inappropriate but fit the prevailing circumstances.

[13] In this regard, I wholeheartedly associate myself with the sentiments expressed by Liebenberg J with Damaseb JP concurring, in *S v Swartz* wherein it was held that:

“There is a dire need for change in the court’s stance on drug related matters and to accord the necessary weight to the seriousness of the particular offence and its prevalence in society. To this end, all possible evidence should be submitted in order to place the presiding officer in the best position to fully appreciate the offence before court and to impose an appropriate sentence. Though the personal circumstances of the accused should be accorded the necessary weight and taken into account, the nature and extent of the crime, as well as the need of society to root out the evil of drugs in its midst, should equally be given proper consideration. In doing so, sentences should reflect the determination of our courts to play their part in curbing this evil that is only aimed at destroying human lives and the more vulnerable members of society like the youth. A clear and unequivocal message should emerge from the courts that crimes of this nature will not be tolerated any longer and sentences will henceforth be appropriately severe.”

[15] The appellant by way of the amended notice of appeal raises a ground of appeal the court *a quo* over emphasised and repeatedly stated that the offence was prevalent in the district therefore, punishment calls for specific and general deterrence without any evidence produced to prove such allegation and without hearing the appellant on the allegation of prevalence such amounted to a misdirection in sentencing. The appellant relies on *S vs Nakangombe*<sup>5</sup>.

It is apparent from the record of proceedings that the issue of prevalence was raised in the present matter by the State in aggravation, as opposed to being raised by the learned magistrate at sentence. The accused was therefore aware that the learned

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<sup>5</sup> 2006 (2) NR 565 at paragraph 10

magistrate had been advised that the offence was prevalent in the district prior to the imposition of sentence in the present matter. In addition the prevalence or otherwise of crime in the community is a notorious fact and judicial notice can be taken of that fact.

[16] I am further of the view that even if it could be found that a misdirection as contemplated by the decision in *Nakangombe supra*, the misdirection would not be one of such a degree of seriousness as to demonstrate that the trial court did not exercise its sentencing discretion judiciously. The sentence imposed does not on the facts of this matter induce a sense of shock.

### Conclusion

[17] In the result, the court is not satisfied that there are prospects of success on appeal against sentence. The application for condonation refused and the appeal is dismissed.

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K Miller  
Acting Judge

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NN Shivute  
Judge

### APPEARANCES

APPELLANT:

Mr O Sibeya

INSTRUCTED BY: Sibeya & Partners Legal Practitioners

RESPONDENT: Ms K Esterhuizen  
Office of the Prosecutor-General



