REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CRI-APP-CAL-2019/00094

In the matter between:

EDISON TSUSEB **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Tsuseb v S* (HC-MD-CRI-APP-CAL-2019/00094) [2020] NAHCMD 472 (19 October 2020)

Coram: LIEBENBERG J *et* SHIVUTE J
Heard: 13 October 2020
Delivered: **19 October 2020**

Flynote: Criminal procedure – Appeal – Sentence – Condonation for the late filing – Reasonable explanation and prospects of success – Explanation not reasonable in circumstances – Plea of guilty – Youthfulness – Weight to be attached – Lifestyle of appellant emancipated himself from hiding behind youthfulness – Punishment pre-eminently a matter for the discretion of the

trial court – Court *a quo* properly weighed all factors applicable to sentence – No misdirection found – no prospects of success on appeal.

Summary: The appellant, a youthful offender, was convicted and sentenced in the Swakopmund regional court on a charge of murder following his plea of guilty to a period of 18 years' imprisonment of which 5 years suspended on condition of good behaviour. Appellant filed his appeal out of time and proffered an unreasonable explanation and did not present sufficient prospects of success on appeal. Appeal is struck from the roll.

Held, it is settled law that an appellant seeking condonation for failure to comply with the rules of court, must give a reasonable and acceptable explanation *and* show that he has good prospects of success on the merits of the appeal.

Held further, the appellant, whilst trial awaiting, committed a further crime of stock-theft and fathered a daughter during the same period, it seems inevitable to come to the conclusion that the appellant lived the life of an adult person, essentially emancipating himself from his young age.

Held further, when serious offences are committed, the youth cannot hide behind their youthfulness.

Held further, appellant not taking the court into his confidence in mitigation of sentence and express his remorse under oath, the genuineness of his proclaimed remorse questioned.

Held further, the court *a quo* did not misdirect itself either on procedure or in the evaluation of the material facts when imposing sentence.

Held further, appeal is struck from the roll.

ORDER

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1. The application for condonation is refused.
2. The matter is struck from the roll.

JUDGMENT

LIEBENBERG J (concurring SHIVUTE J)

[1] The appellant appeared in the Swakopmund regional court on a charge of murder (*dolus directus*) and, consequential to the state's acceptance of the appellant's plea of guilty, he was sentenced on 16 August 2018 to 18 years' imprisonment of which 5 years suspended on condition of good behaviour. Discontented with the sentence imposed the appellant filed a Notice of Appeal, accompanied by an application for condonation, as the noting of the appeal fell outside the prescribed time limit. The state (respondent) opposes the appeal and raised a point *in limine* which I intend disposing of first.

[2] On appeal the appellant is represented by Mr *Siyomunji* while Mr *Iipinge* appears for the respondent. The parties have agreed in writing, which agreement is filed of record, that this matter may be decided on the papers and in chambers. Both parties have duly filed their heads of argument.

Point *in limine* – Condonation

Explanation for the delay

[3] The *crux* of the issue raised is that the explanation advanced by the appellant for the late filing of his notice, is not reasonable and acceptable when regard is had to the duration of the delay of over four months.[1] Additional thereto, that the appellant did not show any prospects of success on appeal in the application.

[4] Appellant in his supporting affidavit explained that at all times since his sentence he contemplated appealing against his sentence but, being unacquainted with the right procedure and him having been transferred back and forth between different correctional facilities during that period, he could not settle down and prepare his notice of appeal. He further mentions that he sought legal advice as regards the application (seemingly from fellow inmates). The appellant however did not mention or show in his affidavit any prospects of success on appeal.

[5] Mr *Siyomunji* did not further develop in his heads of argument the explanation advanced by the appellant for the delay in filing his notice of appeal; neither did he address the appellant's prospects of success on appeal. It is settled law that an appellant seeking condonation for failure to comply with the rules of court, must give a reasonable and acceptable explanation *and* show that he has good prospects of success on the merits of the appeal. As stated in *Nakapela* (*supra*), these requirements must be satisfied in turn and if the appellant fails on the first requirement, the court would be entitled to refuse the application.

[6] After sentencing in the present matter, the court explained to the *represented* appellant his rights pertaining to the lodging of an appeal, if so inclined, which explanation he indicated to have understood. He thus knew what was required of him and that he had to lodge his appeal with the clerk of the Swakopmund court within the prescribed period. This he failed to adhere to.

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[1] See *S v Nakapela and Another,* 1997 NR 184 (HC) at 185G-H.

[7] When applying the principles applicable to an application of this nature, I am satisfied that the appellant failed to show that his explanation for the delay is either reasonable or acceptable. For this reason alone the application for condonation should fail. However, I turn next to consider the further requirement of the prospects of success on appeal, based on the grounds set out in the notice.

Prospects of success on appeal

[8] The heading of the Notice of Appeal reads that the appeal lies against sentence only. Notwithstanding, the grounds enumerated in the notice are muddled up with some relating to conviction, whilst those on sentence are not entirely clear. The substance of these grounds appear to be the following: The court failed to properly consider the appellant's youthfulness when committing the crime; that he pleaded guilty; and that the period of pre-trial incarceration was not taken into consideration at sentencing.

[9] It was submitted that the appellant from the outset pleaded guilty and did not waste the court's time. Furthermore, that although the court acknowledged his young age, this factor was given insufficient weight. With regards to the period of one year the appellant spent in custody before he was granted bail, it was submitted that this factor was not taken into consideration. In light thereof, it was argued on the appellant's behalf that, cumulatively, these factors constituted substantial and compelling circumstances which render the sentence of thirteen years' direct imprisonment excessive.

[10] In the court *a quo's* judgment on sentence the learned magistrate succinctly discussed the principles applicable to sentence and that the court in the end must strike a balance between the divergent interests of the appellant and that of society. In its reasoning the court took into account the appellant's young age and found same to be a mitigating factor; also that he pleaded guilty and seemed to have remorse for his wrongdoing. Being part of his personal circumstances, the court took note of the appellant's dependent child, aged two years, and that he was currently serving a four year sentence

for stock theft. I pause to observe that this offence must have been committed either prior to his arrest on the murder charge or whilst he was placed in the custody of his grandparents thereafter. As regards the offence and the circumstances under which it was committed, the court considered the appellant's actions to have been unnecessary and resulted in the senseless killing of another in circumstances which did not even involve him personally, but his friend. Also that the deceased had a family of his own to whom he was the sole provider; the prevalence of crimes of murder in the court's jurisdiction and, although the appellant was still youthful, he could not hide behind his age when committing serious crimes.

[11] The respondent's counter argument is that those factors complained of as having been either ignored or underemphasised by the court *a quo,* had been given adequate weight in light of the established facts and authorities relied upon, as *per* the court's reasoning.

[12] As regards the objectives of punishment, the court reasoned that a deterrent sentence is called for and that a sentence of direct imprisonment was inevitable. Though considerable weight was accorded to the young age of the appellant, the court was of the view that in light of the seriousness of the crime, the appellant's youthfulness could not be used as an excuse; that would send out the wrong message from the courts. To this end it seems apposite to repeat what has been said by the courts on the approach to sentencing when dealing with youthful offenders.

[13] It is trite, as was stated in *S v Erickson*[2] and the cases cited therein, that youthfulness of an offender is, as a matter of course, a mitigating factor. The reason being that youthful persons, *prima facie,* should be considered immature for they often lack maturity, insight, discernment and experience.[3] However, although the youthful age of an accused is a weighty factor when considering sentence, it has also been said, especially when serious offences

[2] *S v Erickson* 2007 (1) NR 164 (HC) at 166E-H.
[3] *S v Ngoma,* 1984 (3) SA 666 (A) at 674F.

are committed, that the youth cannot always hide behind their youthfulness.[4] It seems worthwhile repeating what this court occasioned to say in *S v Kashikule*[5] at 8A-C:

> '[9] When regard is had to the circumstances of this case, including the personal circumstances of the accused and in particular his youthfulness and the fact that he is a first offender, I am of the view that, although the aforementioned factors are weighty in sentencing, the accused cannot today escape punishment simply because of his young age when he committed the crime. It seems worthwhile repeating that young offenders cannot (always) hide behind their youthfulness when they are guilty of committing serious crime. The message should also be clear to young people that they will not simply be excused by the courts on account of youthfulness and go out scot-free; but, where justice will not otherwise be done, they will be held accountable and punished accordingly for the pain and misery caused to others as a result of serious crimes committed by them. Although the young age of an offender is usually regarded as a mitigating factor counting in favour of the accused person, it is merely one of several factors that need to be considered when sentencing.

[14] See also *Director of Public Prosecutions, Kwazulu-Natal v P* [6] where the court at 249i-j said that the accused in that case, being only eight years of age, '…in spite of her age and background, acted like an "ordinary" criminal and should have been treated as such.' (Emphasis provided)

[15] In mitigation of sentence the appellant's then legal representative submitted that the appellant was under the influence of alcohol at the time of the incident, but conceded that this was no excuse for his actions. Add thereto that the appellant, whilst trial awaiting, committed a further crime of stock-theft and fathered a daughter during the same period, then it seems inevitable to come to the conclusion that the appellant lived the life of an adult person, essentially emancipating himself from his youthfulness; and acted accordingly

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[4] *Andries Lippe and Others v The State,* (unreported) Case No CC1/93 at p 10.
[5] *S v Kashikule* 2011 (1) NR 1 (HC).
[6] *Director of Public Prosecutions, Kwazulu-Natal v P* 2006 (1) SACR 243 (SCA).

when committing the murder under consideration. Hence, we are of the view that the trial court's reasoning that not too much weight could be accorded to the appellant's youthfulness, cannot be faulted.

[16] Turning next to the ground based on the appellant having pleaded guilty and thereby not wasting the court's time, coupled with the appellant having expressed remorse for his wrongdoing through his legal representative, the court on this point stated the following in *S v Matlata*[7] at para 22:

'Argument was advanced about the accused having pleaded guilty and that this should be regarded as a sign of remorse. This court in recent times expressed the view that the offering of a guilty plea is a factor to be taken into account in sentencing, as this could be indicative of contrition on his part. However, in order to be a valid consideration, the guilty plea should be followed by a sincere expression of remorse which is usually done on oath and tested through cross-examination. In this instance the accused elected to remain silent and left it up to his counsel to mitigate on his behalf. In this regard I fully endorse the remarks made in *S v Landau*[8] where Kuny J at 678a-c said:

> "Courts often see as significant the fact that an accused chooses to "plead guilty". This is sometimes regarded as an expression on the part of the accused of genuine co-operation, remorse, and a desire not to "waste the time of the court" in defending the indefensible. In certain instances a plea of guilty may indeed be a factor which can and should be taken into account in favour of an accused in mitigation of sentence. However, where it is clear to an accused that the "writing is on the wall" and that he has no viable defence, the mere fact that he then pleads guilty in the hope of being able to gain some advantage from that conduct should not receive much weight in mitigation of sentence unless accompanied by genuine and demonstrable expression of remorse, which was absent *in casu*."

> [23] In the absence of the accused having taken the court into his confidence and by not testifying about his feelings towards his victims and the harm, pain and suffering he has caused them, there is absolute nothing before

[7] *S v Matlata* (CC 16/2018) [2018] NAHCMD 289 (18 September 2018).
[8] *S v Landau* 2000(2) SACR 673 (WLD).

> court showing that the accused has remorse, except for the mere say-so on his behalf by his counsel. In my view, this falls far short from a demonstration of sincere and genuine contrition on his part. Though the accused's offering of pleas of guilty on the charges could be considered mitigating, it is also evident from the documentary evidence presented that he had no sustainable defence which, in my view, significantly reduces the weight accorded to his guilty pleas as mitigating factor. Therefore, despite the pleas having saved the State its resources by not having to prove its case against the accused, as well as the time it would have taken up in court to do so, it counts for little without the accused having acknowledged his wrongdoing towards society by showing genuine remorse.'

[17] Similarly, the appellant in the present instance did not take the court into his confidence in mitigation of sentence and express his remorse under oath, thus questioning his proclaimed remorse being genuine. His offering of a plea of guilty in these circumstances should neither *per se* be seen as a sign of remorse and a mitigation factor. Be that as it may, the court in the end did weigh up these factors against the gravity of the offence and found that a sentence of 18 years' imprisonment of which 5 years suspended on condition of good behaviour, is justifiable in the circumstances of the case.

[18] With regards to the appellant's contention that the trial court failed to take into consideration the period of pre-trial incarceration, it is true that this is usually a factor taken into consideration at sentencing, especially when the period an accused spends in custody is lengthy. This will usually lead to a deduction in sentence.[9] In this instance the appellant was in custody for a period of seven months. However, such period is not arithmetically discounted and subtracted from the overall sum of imprisonment imposed. This is a factor which is considered together with other factors, such as the culpability of the appellant and his moral blameworthiness, to arrive at an appropriate sentence in all the circumstances of the case. In our view, sufficient compensation has been made by imposing a partly suspended sentence.

[9] *S v Kauzuu* 2006(1) NR 225 (HC).

[19] What is required of this court sitting as the court of appeal, is to decide whether the presiding officer exercised her discretion on sentencing properly and judiciously; it is not a matter for this court to decide whether the sentence ultimately imposed is right or wrong, or whether a different sentence should have been imposed. It is trite that the appeal court is limited to interfere with the sentence passed by a lower court only if there are grounds that the trial court exercised its discretion in an improper or unreasonable manner, as punishment is pre-eminently a matter for the discretion of the trial court.[10] These grounds have been set out in *S v Tjiho* [11] at 366A-B:

> i) 'The trial court misdirected itself on the facts or on the law;
> ii) an irregularity which was material occurred during the sentencing proceedings,
> iii) the trial court failed to take into account material facts or overemphasized the importance of the other facts,
> iv) 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.'

Conclusion

[20] Having duly considered the grounds of appeal raised by the appellant against sentence and the reasons advanced by the court *a quo* for the sentence imposed, we are unable to find that the court *a quo* misdirected itself either on procedure or in the evaluation of the material facts when imposing sentence; neither do we find the sentence to be shockingly inappropriate. Consequently, in our considered view, there are no prospects of success on appeal.

[21] In the result, it is ordered:

1. The application for condonation is refused.

2. The matter is struck from the roll.

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[10] *S v Rabie* 1975 (4) SA 855 (A) at 857D *S v Pieters* 1987 (3) SA 717 (A) at 727 F-H).
[11] *S v Tjiho S v Tjiho* 1991 NR 361 (H).

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JC LIEBENBERG

JUDGE

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NN SHIVUTE

JUDGE

APPEARANCES

APPELLANT	M Siyomunji Of Siyomunji Law Chambers, Windhoek
RESPONDENT	H Iipinge Of the Office of the Prosecutor-General, Windhoek