REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: CC 36/2008

ARUMUGAM THAMBAPILAI **1ST APPLICANT**
LINDA SHIPALANGA **2ND APPLICANT**
FESTUS SHINDUME **5TH APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Thambapilai v State* (CC 36/2008) [2022] NAHCMD 388 (4 August 2022)

Coram: SIMPSON AJ
Heard: **21 July 2022**
Delivered: **04 August 2022**

Flynote: In an application for leave to appeal, the applicant must satisfy the court that he/she has reasonable prospects of success on appeal. The granting of leave to appeal should not be based on a mere possibility that another court might come to a different conclusion.

Summary: The first applicant was sentenced to ten (10) years imprisonment of which four (4) years were suspended for five (5) years, after being convicted of seven (7) counts, consisting of four (4) counts of fraud, one (1) count of attempt to defeat or obstruct the course of justice and two (2) counts of forgery and uttering. All the counts were taken together for purposes of sentence.

The second applicant was sentenced to four (4) years imprisonment, after being convicted of one (1) count of fraud.

The third applicant was sentenced to six (6) years imprisonment of which two (2) years were suspended for five (5) years, after being convicted of four (4) counts consisting of one (1) count of fraud, one (1) count of theft by conversion, and two (2) counts of forgery and uttering. All four (4) counts were taken together for purposes of sentence.

Counsel for the three applicants in their grounds of appeal, submitted that the sentencing court misdirected itself by over emphazising the seriousness of the offence, as well as the interest of society, and not taking into consideration the personal circumstances of the applicants.

The application for leave to appeal was dismissed as there were no reasonable prospects of success placed before court to rule to the contrary.

ORDER

The application for leave to appeal against sentence is dismissed.

JUDGMENT

SIMPSON AJ:

[1] The first applicant was sentenced to ten (10) years imprisonment of which four (4) years were suspended for five (5) years on condition that he is not convicted of the offence of fraud or any offence of which dishonesty is an element, committed during the period of suspension. The first applicant was convicted of seven (7) counts, whereas four (4) counts were fraud, one (1) count of attempt to defeat or obstruct the course of justice and two (2) counts of forgery and uttering. All the counts were taken together for purposes of sentence.

[2] The second applicant was sentenced to four (4) years imprisonment after being convicted of one (1) count of fraud.

[3] The third applicant was sentenced to six (6) years imprisonment of which two (2) years were suspended for five (5) years on condition that he is not convicted of fraud or any offence of which dishonesty is an element, committed during the period of suspension. This follows after the third applicant was convicted of one (1) count of fraud, one (1) count of theft by conversion and two (2) counts of forgery and uttering. The four counts were taken together for purposes of sentence.

[4] The three applicants lodged an application for leave to appeal against sentence.

First Applicant

[5] Counsel for the first applicant stated that this court misdirected itself and erred in law and/or facts when it refused and/or failed to take into account the personal circumstances of the applicant, i.e.:

a) That the applicant is a first offender and that he is of an advanced age at the time of sentencing (77 years old).

b) That the applicant is of ill health and that the applicant acted as an agent during the commission of the offences.

c) That at the time of the commission of the offences, the applicant spoke through interpreters.

d) That the applicant showed remorse and prayed for mercy during sentencing.

e) That the applicant made a positive contribution to the Namibian society.

f) That the applicant has fallen from grace as a result of the convictions against him.

g) That the applicant has since retired from legal practice and as such is no longer able to commit similar offences in the future.

h) That the applicant was financially and materially ruined by the criminal case which has hanged on his head since 2005 to date.

[6] Counsel for the first applicant also stated that the sentencing court erred in law and/or facts and misdirected itself during the sentencing process when it over emphasized the public interest and the seriousness of the offences at the expense and to the detriment of the applicant's personal and unique circumstances.

[7] Counsel for the first applicant also stated that a direct custodial sentence, without an option of a fine, is not in the interest of the administration of justice, taking into account that punishment should fit the criminal, as well as the crime.

[8] Counsel for the first applicant submitted that the sentencing court overlooked the approach of mercy or compassion and plain humanity, and referred to the case of *S v Rabie*[1].

[9] It was also submitted that the sentence of direct imprisonment against the applicant is so severe that no reasonable court would have imposed it against the applicant. Counsel further also pointed out that one of the accused persons

[1] *S v Rabie* 1974(4) SA 855.

(accused 8) was given an option of a fine when latter was sentenced, and that there is a discrepancy and disparity between the sentences imposed.

Second Applicant

[10] Counsel for the second applicant stated that the court misdirected himself by over emphasising the seriousness of the offence while ignoring, alternatively under emphasising the personal circumstances of the applicant. Counsel for the second applicant further stated that the learned judge misdirected himself by attaching no weight, alternatively insufficient weight, to the applicant's tender to repay the money as a means to reimburse the MVA fund, and at the same time affording the applicant the opportunity to escape a custodial sentence.

[11] It was also submitted that the learned judge misdirected himself, alternatively erred in law and/or fact by imposing a sentence that induces a sense of shock and which is inappropriate in the circumstances. Counsel for the second applicant is of the view that a different court would come to a different conclusion.

Third applicant

[12] Counsel for the third applicant stated that the learned judge erred and misdirected himself in law and in fact in arriving at a very harsh, irrational, unjustified, shocking and illogical sentence when it sentenced the applicant. Counsel further stated that the learned judge did not consider the personal circumstances of the appellant in that he has seven children that need their father, and therefore did not consider the applicant's right to family. It was also stated that the learned judge applied the principles of punishment according to the circumstances wrongly.

[13] It was further stated that the learned judge did not consider the undisputed fact that the appellant has serious health ailments, to wit, HIV-AIDS and is on treatment for his condition. It was also stated by counsel for the third applicant that the court erred in fact/law by finding that there is no other option but to impose a sentence of direct imprisonment. It was also stated that the court erred in fact/law by failing to consider that the appellant was a first offender at the time of sentencing.

[14] Counsel for the third applicant further stated that the court erred in fact/law, in that it failed to consider that the appellant offered to pay back the money as well as a fine. It was also stated that the court erred in law/fact, in that it failed to consider that the appellant showed remorse and regretted his criminal conduct and prayed for mercy during sentencing.

[15] It was stated further, that the court erred in law/fact and misdirected itself during the sentencing process when it over emphasised the public interest at the expense and to the detriment of the appellant's personal circumstances and that the court erred in law and/or fact and misdirected itself for it failed and/or refused to properly apply the basic principle of individualisation.

[16] The respondent (the State) opposed this application for leave to appeal, by referring to the test to be applied when considering such an application. The respondent referred to various case law in this regard. Leave to appeal will be granted if the applicant satisfies the court that there are reasonable prospects of success on appeal. I refer to *Mukuwe v The State* CC 08/2009 (delivered on 6 June 2011) where Liebenberg J at paragraph 3 stated as follows:

'[3] It is well established that the proper test to be applied in applications of this kind is that the applicant must satisfy the Court that there is a reasonable prospect of success on appeal (*R v Ngubane and Others*, 1945 A.D. 185 at pp 186-7, *R v Baloi*, 1949 (1) SA 523 (AD) at pp. 524-5). In *S v Ceaser*, 1977 (2) SA 348 (A) at 350E Miller, J.A. emphasised "that the mere possibility that another Court might come to a different conclusion is not sufficient to justify the grant of leave to appeal." Only when the Court is satisfied that the applicant has shown that he or she has reasonable prospects of success, will leave be granted.'

[17] Sentencing falls within the discretion of the court and the powers of a court of appeal to interfere with sentence are limited. Interference is only permissible where the trial court has not exercised its discretion judicially or properly. This is when it

has misdirected itself on facts material to sentencing or on legal principles relevant to sentencing. In *S v Brand and other cases*[2] the court held:

'The reason for punishing convicted persons is to deter them and others from committing similar crimes, and if they are capable of being reformed, of reforming them. Society also expects that people who have done wrong will be punished, that is, the retributive purpose is important ... Sentences which are to low do not achieve any of those purposes. The accused and the community laugh and scoff at such sentences and at the administration of justice. Such sentences lead eventually to the community taking the law into their own hands and meting out the punishment they consider the accused deserves.'

[18] As was pointed out by the respondent, this court considered the elements of contribution, prevention, deterrence, reformation and rehabilitation. It balanced the circumstances to each of the applicants, the crimes committed and the expectations of society, coupled with a blend of mercy. The respondent also referred to paragraphs 5 - 12 of the sentencing judgment.

[19] When sentence was imposed, the court indeed took into consideration the personal circumstances of the applicants.

[20] Regarding the first applicant, the court took into consideration his age, being 77 years old at the time of sentence. The court also took into consideration the health condition of the applicant.

[21] In this regard, the court was guided by the witness from the correctional facility who testified as to how inmates with similar conditions as that of the first applicant are catered for. Furthermore, this witness also testified that there are inmates even older than the first applicant, and that medical facilities are available at the facility.

[22] Counsel for the first applicant attempted to introduce new evidence regarding the condition of the prison where the appellant is kept. However s316 of the Criminal Procedure Act 51 f 1977 is clear as to the procedure to follow when there is an intent

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[2] *S v Brand and other cases* 1991 NR 356 (HC), at 357.

to lead further evidence. These steps were not followed, and this court can therefore not entertain this sentiment.

[23] Regarding the reimbursement of money, it was stated clearly during the sentencing proceedings, that it would be difficult for a person to make payments, whilst incarcerated. There was also no clarity between the applicant and the respondent, as to what amount the first applicant responsible is for.

[24] It must also be borne in mind, that the first applicant was not convicted of one count, but seven counts. I am therefore of the view that the sentence imposed, was just.

[25] Regarding the second applicant, counsel relied on the fact that another court might to a different conclusion, which is clearly not the test to be applied. The court indeed took into consideration the personal circumstances of the second applicant, as set out in paragraphs 23 of the sentencing proceedings.

[26] In respect of the third applicant, it is clear that the applicant was convicted of four (4) counts. Similarly, as in the case of the first applicant, the third applicant is of ill-health. However, as was stated by the witness from the Correctional Facility, the facility caters for people with ailments, including HIV-AIDS.

[27] In view of the foregoing, the court is not satisfied that there are prospects of success. The application for leave to appeal is therefore dismissed.

A K SIMPSON

Acting Judge

APPEARANCES:

STATE:	Marondedze Office of the Prosecutor-General, Windhoek
1st APPLICANT:	F Bangamwabo FB Law Chambers, Windhoek
2nd APPLICANT:	E Shikongo Shikongo Law Chambers, Windhoek
5th APPLICANT:	T P Brockerhoff Brockerhoff & Associates, Windhoek