

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case no: HC-MD-CRI-APP-CAL-2023/00007

In the matter between:

**JOSEF MAKANGA**

**1<sup>ST</sup> APPELLANT**

**KEFAS FILEMON**

**2<sup>ND</sup> APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Makanga v S* (HC-MD-CRI-APP-CAL-2023/00007) [2023] NAHCMD  
808 (8 December 2023)

**Coram:** January J et Usiku J

**Heard:** 17 July 2023

**Delivered:** 8 December 2023

**Flynote:** Appeal – Conviction – Robbery with aggravating circumstances, attempted murder and unlawful possession of firearms and ammunition– Undisputed material evidence from complainant and investigating officer – Strong prima facie case – Appellants opted to remain silent – Condonation – Reasonable explanation and prospects of success – Explanation not reasonable in circumstances and no prospects of success on appeal.

Sentencing - 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 two appellants were charged with robbery with aggravating circumstances, attempted murder, two counts of unlawful possession of firearms and two counts of unlawful possession of ammunition. They pleaded not guilty but were convicted after they closed their case and after the testimony of two State witnesses were led. They were defended during the cross-examination of the State witnesses. They raised a defence that they were employed by the complainant; that the complainant owed them money for work done and that the complainant invited them on the day of the incident to pay them. They alleged that the complainant could not pay them but instead gave them his property that was eventually found in their possession. The allegations remained mere allegations as they did not testify under oath.

Dissatisfied with the conviction and sentence, both appellants filed their notices of appeal. The notices of appeal by both appellants in person, are dated 17 May 2022 and received by the clerk of court, Lüderitz, date stamped 30<sup>th</sup> May 2023. The appellants were thus late by about nine months. Consequently, both appellants applied for condonation. In his founding affidavit, the first appellant gave an explanation that he experienced a challenge to obtain the record of proceedings from the lower court. Further, he had to look for examples of a notice of appeal and only found assistance on 14<sup>th</sup> May 2022. The second appellant gave a similar explanation.

The first appellant stated that the State will suffer no prejudice because of the late filing. In relation to prospects of success he stated briefly that there are good prospects because the record reveals that their rights as Namibian citizens had blatantly been violated by the district court and regional court respectively. Further that the sentences imposed are too harsh and induced a sense of shock compared to sentences imposed

previously in similar cases. The second appellant followed suit with a similar explanation.

The respondent raised a point *in limine* in relation to the late filing of the notice of appeal and prospects of success on appeal in relation to both appellants.

*Held that*, an extension of time within which to file a notice of appeal is an indulgence which will be granted on good cause shown for non-compliance and upon good prospects of success on appeal. It is therefore axiomatic that an appellant must give a reasonable explanation for a delay to file a notice of appeal.

*Held further that*, it is trite that 'an application for condonation must be lodged without delay, and must provide a full, detailed and accurate explanation for the entire period of the delay including the timing of the application for condonation.

*Held further that*, it is safe to accept that the appellants knew of their right to appeal after sentence, otherwise they would have expressed their ignorance in the founding affidavit. In addition there is no explanation for the whole period of delay before filing their notices of appeal. The explanation for the delay, in the circumstances, is not reasonable and acceptable in respect of both appellants.

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### **ORDER**

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1. The application for condonation is refused
2. The appeal is struck from the roll and considered finalised.

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### **JUDGMENT**

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JANUARY J (USIKU J concurring)

### Introduction

[1] The appellants stood charged in the Regional Court, Luderitz on the following charges: Robbery with aggravating circumstances, attempted murder, two charges of possession of a firearm without a licence in contravention of s 2 read with ss 1, 38 and 39 of the Arms and Ammunition Act 7 of 1996 and two charges of possession of ammunition in contravention of s 33 read with ss 1, 38(2) and 39 of the Arms and Ammunition Act 7 of 1996, as amended.

[2] Both appellants were convicted in the Regional Court, Luderitz for the crimes of robbery with aggravating circumstances, attempted murder, two charges of possession of a firearm without a license in contravention of s 2 read with ss 1, 38(2), and 39 of the Arms and Ammunition Act 7 of 1996, as amended and two charges of possession of ammunition in contravention of s 33 read with ss 1, 38(2) and 39 of the Arms and Ammunition Act, as amended.

[3] It is reflected on the record of proceedings that the public prosecutor explained the rights to legal representation and its importance in view of the seriousness of the case to the appellants. Both of them informed the magistrate that their rights to legal representation were explained to them and that they understood same but opted to represent themselves. The appellants pleaded not guilty on all the charges. They gave brief plea explanations in terms of s 115 of the Criminal Procedure Act 51 of 1977 (the CPA). The first appellant stated that he did not commit any robbery and that he was working for the complainant. Further, he does not know anything about the other counts. The second appellant stated that he did not commit anything wrong. The appellants were convicted and eventually sentenced on 4 August 2021 as follows:

Accused one, count one; eight years' imprisonment of which two years are suspended for five years on condition that the accused is not convicted of robbery, committed during the period of suspension.

Accused two, count one; six years' imprisonment of which two years are suspended for five years on condition that the accused is not convicted of robbery, committed during the period of suspension.

Accused one, count two; five years' imprisonment of which two years are suspended for five years on condition that the accused is not convicted of murder and/or attempted murder, committed during the period of suspension.

Accused two, count two; three years' imprisonment of which two years are suspended for five years on condition that the accused is not convicted of murder and/or attempted murder, committed during the period of suspension.

Accused one and two, counts three and four taken together for the purpose of sentence; N\$2000 or in default of payment, 12 months' imprisonment.

Accused one and two, count five and six taken together for the purpose of sentence; N\$1000 or in default of payment six months' imprisonment.

In terms of s 10(7) and (8) of the Arms and Ammunition Act 7 of 1996, Accused one and two were declared unfit to possess an arm for five years after having served their sentences.

[4] The appellants were both represented during cross-examination of two State witnesses and during the sentencing in the court *a quo*. They are represented in this appeal by Mr Goraseb whereas Mr litula is representing the respondent.

[5] The notices of appeal by both appellants in person, are dated 17 May 2022 and received by the clerk of court, Luderitz, date stamped 30<sup>th</sup> May 2023. The appellants were thus late by about nine months. Consequently, both appellants applied for condonation.

#### Reasons for the delay and prospects of success

[6] The first appellant, Josef Makanga, gave an explanation that he experienced a challenge to obtain the record of proceedings from the lower court. Further, he had to look for examples of a notice of appeal and only found assistance on 14<sup>th</sup> May 2022. He filed the notice of appeal without the court record on 17<sup>th</sup> May 2023. The first appellant mistakenly alleged that he was convicted by magistrate Linda Nakale in her absence whilst the record of proceedings reflects that the matter was adjudicated by Regional Court Magistrate Anderson. To clarify, it seems that the matter was transferred from the district court, in all probability by magistrate Nakale, to the regional court on instruction of the Prosecutor-General

[7] When the legal representative, Mr Goraseb, came on board, he filed an amended founding affidavit, dated 27 April 2023, in relation to the first appellant. In this affidavit the first appellant re-stated his challenge to obtain the record of proceedings; that he did not know how to draft a notice of appeal and struggled to find somebody to assist with the application for condonation and the notice of appeal. Further, he stated that he was challenged in that his legal representatives during the trial changed without his knowledge. When Velikoshi Incorporated was appointed to represent him during July 2022, they immediately also requested for the record of proceedings. Six months thereafter the legal representative had to again enquire about the record of proceedings. The record was eventually only received in February 2023 after numerous enquiries. He stated that it was therefore impossible for him to appeal against the conviction and sentence timeously.

[8] In addition, the first appellant stated that the State will suffer no prejudice because of the late filing. In relation to prospects of success he stated briefly that there are good prospects because the record reveals that their rights as Namibian citizens had blatantly been violated by the district court and regional court respectively. Further that the sentences imposed are too harsh and induced a sense of shock compared to sentences imposed previously in similar cases.

[9] The second appellant, likewise, gave an explanation almost similar to that of the first appellant. He struggled to obtain the record of proceedings. He also did not know how to draft a notice of appeal and application for condonation and had to search for someone to assist. Eventually, he found someone to assist on 14<sup>th</sup> May 2022 and filed his documents on 17<sup>th</sup> May 2022. This appellant, mistakenly also, raised the same concerns about magistrate Nakale's involvement. Mistakenly, that he too was convicted by District Court Magistrate Nakale and sentenced by Regional Court Magistrate Anderson.

[10] Mr Goraseb also filed an amended founding affidavit on behalf of the second appellant, dated 27<sup>th</sup> April 2023. This content of this affidavit is a copy with the necessary change of the name and is similar in all aspects to that of the first appellant. It is unnecessary for the content to be repeated.

#### Point *in limine*

[11] Mr Gaweseb raised points *in limine* in relation to the late filing of the notice of appeal and prospects of success on appeal in relation to both appellants.

[12] This court was referred to *S v Arubertus*<sup>1</sup> where it was held that an extension of time within which to file a notice of appeal is an indulgence which will be granted on good cause shown for non-compliance and upon good prospects of success on appeal.

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<sup>1</sup> *S v Arubertus* 2011 NR 157 (SC) at 160.

It is therefore axiomatic that an appellant must give a reasonable explanation for a delay to file a notice of appeal.

[13] It was submitted that both appellants' explanations that they could not file their notices of appeal in time because of the unavailability of the record of proceedings are not acceptable and reasonable. Further, it was argued that the record of proceedings are availed upon receipt of the notice of appeal. The court was referred to rule 67(1) of the Rules of the Magistrates Court which stipulates that the notice of appeal shall be lodged within 14 days after a conviction, sentence or order in question and rule 67(3) stipulating that upon 'an appeal being noted the clerk of the court shall cause to be prepared a copy of the record of the case, including a transcript thereof if it was recorded in accordance with the provisions of rule 66 (1), and then place such copy before the judicial officer...' In addition, it was further argued that the clerk of the court could not prepare and provide the appellants with the record of proceedings without the notice of appeal.

[14] Mr Gaweseb submitted that both appellants are under the mistaken belief that the process of appeal commences with the clerk of court providing a copy of the record of proceedings. Consequently, he argued that the blame for the delay is now mistakenly placed on the clerk of court when the appellants did not lodge the appeal within 14 days after the date of conviction and sentence as is required by the rules of court. Rule 67(3) provides that upon an appeal being noted, the clerk of court shall prepare a copy of the record of the case including a transcript thereof if it was recorded in accordance with rule 66(1) and then place it before the judicial officer.

[15] It was further pointed out that the appellants were represented by Mr Van Zyl for purposes of mitigation and sentence. Appellants omitted to disclose that they obtained his services at own cost. The trial commenced with both appellants conducting their case in person. After the evidence of the first State witness was led, the case was postponed for cross-examination. At the subsequent appearance both appellants opted to apply for legal aid. Eventually, Mr Coetzee was appointed for first appellant and a Mr



Uariua for the second appellant and later Mr Kawana who eventually represented both appellants. The appellants allege that legal practitioners on the instruction of the Legal Aid Directorate were changed or switched without their knowledge to their prejudice. This allegedly contributed to the delay in filing the notice of appeal. It is, however evident that some of these legal practitioners withdrew when their service was terminated on request of the appellants.

[16] It is trite that ‘an application for condonation must be lodged without delay, and must provide a full, detailed and accurate explanation for the entire period of the delay including the timing of the application for condonation<sup>2</sup>’. The appellant did not give a satisfactory explanation for the total period of the delay. Nowhere is it stated that after sentence they timely applied for legal aid for assistance. Further, it is not clear how Velikoshi Inc. came on board. There is a letter, dated 9 June 2022, as part of the record of proceedings on behalf of the appellants requesting that the record of proceedings be transcribed. In addition, the letter states that they were acting on private instructions but due to lack of funds of the appellant they advised the appellants to apply at the Directorate Legal Aid for them to be appointed.

[17] The appellants were sentenced on 4 August 2021. Their notices of appeal, compiled in person, are dated 17 May 2022. Their legal representative came on board at an unknown date, seemingly in April 2023 or shortly before. Be that as it may, the amended notices of appeal are dated, 5 April 2023 and the amended founding affidavit dated 6 April and 27 April 2023 respectively. The appellants both state in their founding affidavits that six months after 17 May 2022, their legal practitioners attempted to contact the clerk of court to obtain the transcribed record of proceedings. Feedback was only received on 17 November 2022. On 8 December 2022, the legal practitioner again contacted the clerk of court four times with no success. Eventually the record was received in February 2023. No supporting affidavit was filed disclosing who the legal practitioner was who struggled for six months to obtain the transcribed record. In addition, the appellants did not reveal that they were represented at sentencing stage

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<sup>2</sup> *Jossop v The State* (44 of 2016) [2017] NASC 35 (30 August 2017).

and whether or not they were informed of their rights to appeal by such lawyer. It is significant that there is no transcribed record as the magistrate kept record by long hand and that is what this court had to peruse in the appeal.

[18] This court has in *S v Kohler*<sup>3</sup> dealt with the situation where an appellant was legally represented at the time of trial and where an application for leave to appeal was filed out of time. Likewise, the same consideration is applicable where an accused wants to appeal and he/she is out of time. That court expressed itself as follows:

'The applicant omitted to mention that he was legally represented by Mr Tjituri at the time and whether or not he obtained advice from his counsel on lodging an application for leave to appeal. He is also silent as to whether he gave any instructions in that regard as might be expected of a person in his position, moreover where in para 2 of applicant's notice he states that 'I always had the intention to appeal since the receiving of my sentence'. From this assertion it can safely be deduced that the delay in lodging the application was not brought about by ignorance on the part of the applicant about his right to bring an application for leave to appeal. There is thus, for the reasons relied upon, no justification for the applicant's failure to lodge the application on time.'

[19] It is safe to accept that the appellant knew of their right to appeal after sentence, otherwise they would have expressed their ignorance in the founding affidavit. In addition there is no explanation for the whole period of delay before filing their notices of appeal. The explanation for the delay, in the circumstances, is not reasonable and acceptable in respect of both appellants.

#### Prospects of success on appeal

[20] The appellants boldly and briefly only state that they have good prospects of success on appeal; that their rights as Namibian citizens have been blatantly violated and exploited in the Lüderitz Magistrates Court and the Keetmanshoop Regional Court.

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<sup>3</sup>*S v Kohler* (CC 21/2017) [2020] NAHCMD 96 (16 March 2020).

They stated that similarly it can be argued that the sentences are too harsh and induces a sense of shock as opposed to sentences in similar cases.

[21] It seems that the bold allegations stem from their initial grounds of appeal where they are alleging misdirections by the magistrate in the trial. The founding affidavits do not state why there are good prospects of success on appeal. We have in any event reserved judgment on condonation and allowed counsel to address us on the merits because we have to consider the merits, after all, to determine the prospects of success on appeal. The merits of the appeal are important to determine the prospect of success and may tip the scales at the granting of the application for condonation.<sup>4</sup>

#### The evidence

[22] On 26 June 2015 at about 05h15 in the morning, the complainant in the matter opened the garage door of his house in Lüderitz to go open a shop, OK grocer in Lüderitz. He did not see anyone enter but he was suddenly attacked by a person causing him to fall on the floor. He stood up and was hit on the head with a piece of wood by the perpetrator. Whilst standing, another perpetrator came down stairs with the wife of the complainant. Her face was covered in blood and she had an injury on the face. The complainant and his wife were bleeding and there was blood everywhere. The perpetrators took them to the bedroom of the house. When in the bedroom, the perpetrators threatened to kill the couple. One of the perpetrators was taller and the other shorter. Both were speaking fluent Afrikaans.

[23] The perpetrators demanded the keys to the safe and asked for money. The complainant handed them money from his pocket but they wanted more money. They eventually started beating the complainant and his wife again. The complainant remembered that the safe's key was in his motor vehicle. He went with the shorter perpetrator to the car and removed the keys from the glove box. The perpetrator grabbed the key from his hands and opened the safe. Before going to the motor vehicle

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<sup>4</sup> See; *S v Nakale* 2011 (2) NR 599 (SC) at 603 paragraph 8.

the taller perpetrator took the wife to the bathroom whilst the shorter one went to the kitchen. The latter returned with plastic bags which he melted and dripped on the head of the wife. The complainant grabbed the bags.

[24] After the safe was opened, the shorter one started throwing the contents of the safe on the floor and started selecting what he wanted to take. He took N\$8000 in cash and put it in his pocket. In addition, he took a small collection of pocket knives, a small black money box with semi-precious stones and two cut diamonds which he took out of the box as well as firearms. The cell phone of the complainant was taken when he was lying on the floor in the garage. The taller perpetrator took the wife's cell phone. At some stage the complainant's cell phone rang but the perpetrators refused it to be answered. They tied the hands of the complainant and his wife. One of the perpetrators took the complainant's shoes and wore them. He left behind his old shoes. They took the wife to assist in putting the items in a bag. The perpetrators left after tying the complainant's hands. The wife succeeded to free herself and untied the complainant. Thereafter, she ran down the street to call a certain Mr Callusi, whilst the complainant called the police. The complainant could not see the faces of the perpetrators because one was wearing a balaclava and the other one covered his face with his jersey.

[25] The complainant testified that he did not have an appointment with anyone about a business transaction that morning. Further, he did not invite the accused to his house. He did not produce a firearm to harm them as his firearms were in his safe at the time. He denied that he fell and hit his face against the car. He denied having shouted to his wife to bring a firearm from the safe. He explained that at the time he did not have the keys for the safe. He denied that he had a short knife and threatened to stab the second accused with it. He stated that the knife he had was taken in the garage when he was lying on the floor. He testified that he never apologised to the appellants about anything. He never offered any of his property to them. He stated that the value of the polished diamonds was between N\$80 000 to N\$100 00 for both. There were more than two firearms in the safe, all registered in his name. It was .22 and 357 calibre fire arms. The

complainant and his wife both sustained injuries all over their bodies. In addition, she sustained a broken jaw.

[26] The complainant further testified that he had no prior agreement either verbally or orally with any of the appellants. He did not authorise any of the assailants to take his property and did not owe money to any of them.

[27] In cross-examination the appellants were both represented by Mr Kawana. The complainant testified that he does not know the appellants. He denied that he had a contract with the appellants to assist him with hunting. He denied that he produced a rifle and that there was a scuffle as a result of which he injured himself. He stated that he shouted for his wife to stay where she was in the bedroom and did not shout for her to bring another firearm. He denied that his wife slipped and fell when the first appellant brought her down the stairs but that she was attacked. He denied that he had to be contained and never apologised to the appellants. He never pleaded with the appellants not to report him to the police. According to the witness, he never communicated with the appellants. The complainant again denied that he promised to give property to them as collateral until the payment of money. He never invited the appellants to his house. He denied that he directed the photographer to take photos. It was just boldly put to the witness that the appellants deny the testimony of the complainant.

[28] Nothing in particular was denied and no contradictions pointed out or emanated from cross-examination. The witness was not discredited at all in cross-examination nor was material parts thereof seriously disputed. Only the version of the appellants were put to witnesses.

[29] The testimony from the investigating officer was that he was on standby duty on 26 June 2015 at Lüderitz police station. He received a call at about 5h15 of an alleged robbery in Lüderitz. He and police colleagues attended to the scene. On arrival he observed blood next to a red motor vehicle in the garage and bloodstains on the stairs with pieces of glass in the house. He also observed a wooden stick like a baseball bat.

He approached the complainant and observed that things in the house were scattered on the floor. Both the complainant and his wife were bleeding. The complainant informed him what happened i e that it was two males who approached him when he was coming out of the garage. The complainant informed him how both him and his wife were assaulted and robbed.

[30] The investigating officer made observations at the scene and detected footprints of two persons who approached the house from the back. He found a pair of old tekkies/sand shoes which corresponded with one of the shoeprints approaching the scene. The other shoeprint was different. He observed that one pair of shoeprints that left the scene matched the sandals of the complainant that were worn by one of the perpetrators. The other shoeprint was different. Photos were taken of the shoe prints and handed up as exhibits in the docket and the court was referred to photo 21.

[31] The police officers followed the shoeprints and about 900 meters from the house in a South- Western direction, one of the police officers picked up live ammunition. The officers further found a blue balaclava, an empty cell phone box, two boxes of life ammunition and a silencer hidden in a small cave in the mountains, South-West of the scene. These items were confiscated and booked as exhibits.

[32] The complainant gave a description of the assailants as one who wore a blue freezer jacket, tall and dark in complexion. The other one was short and dark in complexion and fluent in Afrikaans. The build of both was average.

[33] The investigation involved the use of informants to trace the suspects. The victims were treated for their injuries and J88-medical examination reports were handed up as exhibits.

[34] On 28 June 2015, the investigating officer received information that someone was selling diamonds. Since the complainant alleged that he lost precious stones to the value of N\$80 000 which could be sold as diamonds, the information was followed up

on. The investigating officer used an informant who was unknown in Lüderitz town to find out who the person was that was selling diamonds and to meet him under surveillance. The informant met with the person on 29 June 2015. Eventually, the informant met with both appellants later on 29 June 2015 at Sand Hotel. When the investigating officer saw the appellants, they corresponded with the description given by the complainant. Both appellants were kept under surveillance and eventually their place of residence were established. The first appellant had two places of residence, one of them, he only used at night time.

[35] On 30 June 2015, the first appellant while under surveillance arrived at a bar and showed the diamonds to the informant. Copies were made of N\$200 bills in preparation for the sale. The first appellant in the meantime went and fetched the diamonds from someone. On 1 July 2015, the informant, negotiator and first appellant met. He handed the diamonds to the informant and was given N\$5000. The first appellant wanted N\$10 000. The buyer informed him that the other N\$5000 was at a hotel with a tester for diamonds. The first appellant embarked a vehicle, Toyota VVTI with private registration number DMK to drive to the hotel. Enroute, the investigator and his colleague stopped the vehicle. The informant handed over to him a parcel which contained three objects which were alleged to be diamonds.

[36] A body search was conducted on the first appellant. The N\$5000 was found on him consisting of the N\$200 notes that were copied prior. On further search, a unique brown wallet was discovered which was later identified by the complainant as his. In addition, a cell phone and two pocket knives belonging to the complainant was found in possession of the first appellant. There were also keys in his possession. The copies of the N\$200 bills were handed up in court as exhibits.

[37] First appellant gave permission for his place of residence to be searched. The police officers and the first appellant went to a shack in New Location. One of the keys in possession of first appellant opened the padlock. The investigating officer searched the room in the presence of his colleagues and first appellant. He found a grey suitcase

under the bed which first appellant claimed to be his. Inside the suitcase were two firearms, a note 3 Samsung cell phone, curtains, different types of clothes, live ammunition, two male Tempo watches and jewellery. On further search, a brown trouser with suspected blood stains was discovered. The cell phone matched with the cell phone box that was earlier discovered in the small cave. The rights of the first appellant was explained to him and he was arrested.

[38] As investigations continued the first appellant's second residence detected under surveillance, was also visited with the first appellant. Again a key in possession of the first appellant opened the door to the shack. A search was conducted and a brown sandal corresponding with a shoeprint leaving the scene was discovered. The complainant identified it as his. In addition, a charger for the cell phone discovered at the first shack and a bag belonging to the complainant were discovered.

[39] The investigation further continued whilst the first appellant was in custody. On 2 July 2015, the second appellant approached the negotiator and enquired about the arrest of the first appellant. He stated that he was also selling diamonds. Arrangements were made for a second informant to buy the diamonds. Constable (Cst) Katzao, a police officer was used to buy the diamonds from the second appellant. Katzao was not known to the second appellant.

[40] On 3 July 2015, the second appellant met with Cst Katzao. It was agreed that the deal would take place outside Lüderitz in Walvis Bay. The second appellant was given transport in an unmarked police vehicle with private registration plates. The vehicle was stopped about nine kilometres out of town. When the second appellant disembarked, he was found in possession of a Fossil watch, one of the stolen items of the complainant. The brown container containing the alleged diamonds, was on the passenger side of the motor vehicle. It was opened and two objects were found. The second appellant was searched and jewellery were found in his possession which was later identified by the complainant as his. He was then arrested. Second appellant agreed to show the place where other items were hidden at a mountain.



[41] A Samsung cell phone, gear fitted watch, a key for the Prado motor vehicle, two remote control devices for the gates of the complainants garage doors were found. These items were seized and was later identified by the complainant.

[42] After the second appellant was charged, the brown trouser with blood samples of the victims was sent to the National Forensic Science Laboratory for analysis. The result came back that on the trouser was human blood belonging to the victims. One of the firearms recovered matched a firearm licence of one of the victims. The first appellant did not have any licence to possess any of the firearms confiscated. That was the reason why ammunition found on him was also confiscated. No search warrant was obtained because it would have defeated the purpose and objective of finding any exhibits.

[43] The investigating officer testified before the complainant and was also cross-examined by Mr Kawana. The witness stated in cross-examination that the complainant is a businessman with various businesses in Lüderitz, involved with polishing of diamonds, and at some stage he was involved with culling/hunting of seals. He stated that it was possible that he was involved with the hunting of game. When it was put to the witness that the complainant hired the appellants to assist him with hunting about three to four months before the incident in an oral agreement, he stated that the licence of the complainant was withdrawn four years before the incident. He was not aware of an oral agreement to that effect. The witness was not aware of a case having been registered by the first complainant about theft where allegedly the written agreement was also stolen, although, the first appellant later told him about it.

[44] The witness further did not know about the complainant promising a payment of N\$10 000 for the appellants services. Further, he does not know that the complainant later said that he could not pay and promised to call them at a later stage to collect the money. Further, he did not know that the complainant called the appellants on 26 June 2015 to his house to collect the money. It was put to the witness that the injuries

sustained by the complainant and his wife was as a result of the appellants acting in self-defence. Further, that the complainant opened the door for them and there was therefore no forced entry. The witness was not afforded the opportunity to answer these two statements as there were objections raised by the public prosecutor. The witness did not know of a further allegation that the complainant attempted to assault the appellants and as a result injured himself. The witness disputed an allegation that the wife of the complainant went to the safe to get another firearm and fell, injuring herself. He stated that the wife had burn marks in her face.

[45] The instructions from the appellant was put to the witness, that because of what the complainant did, the appellants took the firearm that was almost used against them. The witness did not agree and questioned such a scenario because the appellants also took other items like cash, jewellery and a rifle etc. further in cross-examination, the witness confirmed his evidence on the stolen property recovered in the mountain, on the accused and in the shacks. In cross-examination, there were no discrepancies in respect of the evidence in chief. The witness was not at all discredited nor was much of his material evidence disputed.

[46] I have to comment on the preparation of the record of proceedings for this appeal. The court *a quo* kept record with long hand. Although, his handwriting is legible, this court experienced a challenge to decipher it on perusal thereof. It is a unique and peculiar handwriting causing one to read through sentences and words repetitively in order to grasp what it states. That exercise is painstaking, frustrating and tremendously delayed the writing of this judgment. It may be easy for a person who is used to the magistrate's handwriting but not easy for a person who for the first time has to peruse it. I suspect that the magistrate and clerk who had to prepare it for the appeal accepted that the hand writing is easy to read. The unified coded instruction require for the record to be typed to facilitate easy perusal and to expedite appeal proceedings.

[47] Both the appellants elected to remain silent after the State closed its case despite explanations from the magistrate of the effect thereof and consequences.

### The conduct of the appellant in relation to legal representation

[48] The appellants opted to conduct their own defence at the beginning of the trial despite advice from the court and prosecution to get legal representation. The appellants, however, applied for legal aid only after the first witness testified. They were represented until cross-examination of the second witness's cross-examination was finalised. After the closing of the State's case, the legal representative informed the magistrate that the accused will both testify and not call any witnesses. Thereafter they ended the instructions of the legal representative and opted to appoint a lawyer at own cost. The lawyer consequently withdrew. When they requested for a postponement, the State objected as the case was at that stage continuing for five years, delayed by accused persons and they terminated the services of their lawyer for no apparent reason. The magistrate, however granted the application and remanded the matter for more than a month on the understanding to continue with the trial with or without legal representation on the postponed date.

[49] On the next date of appearance, both appellants again appeared without legal representation and requested for another postponement. The first appellant requested for another three months postponement to gather funds. The second appellant was relying on money that he inherited but was not sure when he would receive same. I was uncertain in relation to both appellants when they would be ready to appoint legal representation at own cost. It appeared that the legal representative whom the second appellant briefed was no longer going to represent him. The matter was then postponed to the following day for submissions. Both appellants refused on that day to make any submissions without legal representations and opted to remain silent.

### The reasons and findings of the magistrate

[50] The magistrate appropriately dealt with the conduct of the appellants in relation to their legal representation, summarised the evidence and made certain findings. The first appellant gave a short plea explanation that he was employed by the complainant

and the second appellant stated that he is not guilty because he did nothing wrong. The magistrate explained that a further postponement was eventually refused because it was clear that the appellants were deliberately frustrating and delaying the finalisation of the case.

[51] Further, the magistrate dealt with the fact that he only had the evidence of the State since the appellants opted not to testify and not to call any witnesses. He found that they did not deny their presence at the scene of crime and took items alleged to have been stolen. The magistrate, correctly so, found that the versions of the appellants, in their explanation of plea and as it emerged during cross-examination do not constitute evidence as it was not repeated under oath, is untested and has little or no evidential weight.

[52] The magistrate applied the doctrine of recent possession as the appellants were at the scene and did not deny taking items along. He found it critical that the appellants did not testify and convicted them as charged.

### Discussion

[53] It was boldly submitted that the learned magistrate failed to properly and fairly assess the evidence of State witnesses, more specifically that the magistrate did not consider that the evidence was discredited by the accused in cross-examination. We have dealt with the evidence of the two State witnesses above and do not find any merit in the submission. During cross-examination, mostly, the instructions of the appellants were put. We have perused the evidence and cross-examination. We do not find any discretisation.

[54] It was further submitted that the magistrate failed to meticulously scrutinise the element of possession in relation to stolen property. More specifically, property that were found in a mountain. The evidence of the complainant was crystal clear as to how the appellants obtained possession of his property. The investigating officer followed

footprints from the scene to the mountain where property was hidden and later identified by the complainant. This evidence was not discredited and neither was any evidence to the contrary produced.

[55] The appellants submitted that the State did not call all the witnesses in the case and neither handed up statements. This ground does not hold water. There is no requirement in a criminal case that all witnesses need to be called failing which, a conviction cannot follow. The evidence established a prima facie case. No evidence was produced to gainsay that case, failure of which resulted in the conviction of the appellants.

[56] The trial court's finding that the appellants did not deny their presence at the scene cannot be faulted. Their instructions during cross-examination is clear that they were allegedly working for the complainant; that he allegedly owed them money; allegedly called them to come to his house; that he could not pay and eventually gave them property as guarantee to at some stage pay them. All these allegations were vehemently denied by the complainant and no evidence was presented in support thereof.

[57] The allegation that the houses of the appellants were searched while they were in custody is not borne out by the evidence. The undisputed evidence was that the searches conducted were in the presence of the appellants. It was done without a search warrant but the investigating officer testified that he believed that such a warrant would have been issued and that a delay in first applying for it would have defeated the object of the search. Thus, complying with the requirements to search without such a warrant as is stipulated in s 22(b)(i) and (ii) of the Criminal Procedure Act 51 of 1977.

[58] Further, criticism was levelled against the conviction of attempted murder. The investigating officer testified that when he arrived at the scene he found the complainant and his wife bleeding severely. Photos handed up as exhibits reflect blood all over the house. In addition, the complainant testified that he was assaulted with a wooden object

the size of a baseball bat and rendered unconscious with the first strike. He testified about the prolonged attacks on him and his wife and how the assailants threatened to kill them. In these circumstances, the court cannot be faulted for having convicted them of attempted murder.

[59] The appellants, in addition raised a ground that they were prejudiced as they did not receive a fair trial because they were not afforded adequate time and facilities to prepare for their case in relation to the appointment of private legal representation. In this regard, the record of proceedings is self-evident that the magistrate granted postponements on request of the appellants on multiple occasions to accommodate them on their requests to secure legal representation. The court started to act firm after the appellants terminated their legal representative for no apparent reason. Despite the fact that the matter was postponed for longer than a month at the time, there was no progress in the appointment of private legal representation. The right to legal representation is not absolute. It was clear that the appellants were busy with delaying tactics. It is trite that a postponement of any case is not just for the asking and that a court has a discretion to grant it or not. The court correctly exercised that discretion to refuse a further remand after accommodating the appellants multiple times and as such cannot be faulted.

#### Ad Sentence

[60] The ground raised against the sentences are mainly that the sentences are excessively severe and generate a sense of shock. This court was referred to the approach of a court of appeal in relation to factors such as how the sentencing court exercised its discretion in sentencing, other sentences in similar cases, the seriousness of the offence and the personal circumstances of the offender. The court was only referred to the one case, *S v Aspelling*<sup>5</sup> where the appellant shot and killed the deceased and severely injured another individual and was convicted of murder and attempted murder. The appellant was sentenced to 8 years' imprisonment for murder

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<sup>5</sup> *S v Aspelling* 1998 (1) SACR 561 (C).

and 5 years' imprisonment for attempted murder. On appeal the sentences were reduced to five years' imprisonment for murder and three years' imprisonment for attempted murder to be served concurrently

[61] The respondent argued that this ground of appeal is vague, lacks clarity and specificity and is in non-compliance of rule 67(1) of the Rules of the Magistrate's Court. Counsel consequently argued that they cannot adequately respond to it. There is merit in the concern raised. The appellants were convicted of six counts each and this court is not in a position to discern to which convictions the appellants are referring to. The appeal against sentence may on this ground alone be struck from the role.

[62] We have, however, considered the cumulative effect of the sentences. The crimes of robbery with aggravating circumstances and attempted murder are indeed more serious crimes. Crimes in relation to illegal possession of firearms and ammunition are also serious, though less serious than the aforementioned. The magistrate imposed imprisonment with a partly suspended sentence for the robbery and attempted murder charges. He combined the charges of unlawful possession of firearms and unlawful possession of ammunition, for purposes of sentence and imposed fines.

[63] It is required of this court sitting as the court of appeal, to decide whether the presiding officer exercised his discretion on sentencing properly and judiciously. It is trite that the appeal court's interference with the sentence passed by a lower court is limited only to 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.

[64] We are unable to find that the court *a quo* misdirected itself either on the law or in the evaluation of the material facts when imposing sentence, thus there are no prospects of success on the appeal against sentence.

[65] In the result:

1. The application for condonation is refused.
2. The appeal is struck from the roll and considered finalised.

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H C JANUARY  
JUDGE

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D USIKU  
JUDGE

APPEARANCES:

APPELLANT: L Goraseb  
Of Ileni Velikoshi Inc, Windhoek

RESPONDENT: T litula  
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