**REPUBLIC OF NAMIBIA**

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

**APPEAL JUDGMENT**

Case no: HC-MD-CRI-APP-CAL-2023/00027

In the matter between:

**ROLLY KARUNGA** **APPELLANT**

and

**THE STATE** **RESPONDENT**

**Neutral citation:** *Karunga v S* (HC-MD-CRI-APP-CAL-2023/00027) NAHCMD 179 (19 April 2024)

**Coram:** JANUARY J *et* D USIKU J
**Heard**: **16 February 2024**
**Delivered:** **19 April 2024**

**Flynote:** Criminal Procedure – Sentence – Appeal against sentence – Appellant convicted on a charge of housebreaking with intent to steal and theft on his own plea of guilty – sentenced to direct imprisonment without any part of the sentence suspended – Appellant having a previous conviction proven against him of a similar offence.

*Point in limine* – Appeal filed out of time in terms of s 309(2) of the Criminal Procedure Act 51 of 1977 as amended– Notice of appeal filed late – Explanation not *bona fide* – no prospects of success on appeal – Sentence imposed not shockingly inappropriate – No misdirection by the court *a quo* – Application for condonation refused.

**Summary:** The appellant was convicted in the magistrate's court sitting at Outjo on 20 September 2022 on a charge of housebreaking with intent to steal and theft and was subsequently sentenced to 4 years' direct imprisonment after he tendered a guilty plea.

The appellant had previously been convicted on a charge of housebreaking with intent to steal and theft on 27 January 2022 and was sentenced to 6 months imprisonment. The appellant filed a notice of appeal on 21 April 2023 and an application for condonation accompanied by an affidavit explaining his failure to timeously file his notice of appeal. He contended that he is a laymen and was in a state of shock after his sentence. Further, that he did not properly understand his appeal rights when explained by the learned magistrate.

*Held:* that the appellant bears the onus to give a reasonable and acceptable explanation for the delay and further to satisfy the court that he has reasonable prospects of success on appeal.

*Held* further that: an application for condonation must be lodged without delay and must provide a full detailed and accurate explanation for the delay.

*Held* further that: there are no reasonable prospects of success on appeal and therefore the application for condonation is refused.

*Held* further that the sentence imposed is neither startlingly shocking nor inappropriate as the appellant has a similar previous conviction on a charge of housebreaking with intent to steal and theft. No misdirection by the court *a quo* when it imposed a sentence of 4 years' direct imprisonment.

**ORDER**

1. The point *in limine* is upheld.

2. Application for condonation is refused and the matter is struck from the roll and regarded as finalised.

**APPEAL JUDGMENT**

D USIKU J (JANUARY J concurring):

Introduction

[1] The appellant was convicted in the magistrate court held at Outjo on 20 September 2022 on his own plea of guilty on a charge of housebreaking with intent to steal and theft. He was subsequently sentenced to a term of 4 years' direct imprisonment. The appellant's previous conviction relating to an incident that occurred on 27 January 2022 (in the same year of this offence) was proven and he admitted the previous conviction. The appellant is now appealing against the sentence imposed.

[2] Ms Shilongo appeared on behalf of the respondent while the appellant was represented by Mr Kanyemba.

[3] At the outset the respondent raised a point *in limine* to the effect that the notice of appeal was filed outside the prescribed time limit and further submitted that the explanation tendered by the appellant explaining the delay, is not *bona fide*, neither

has the appellant shown that he has good prospects of success on appeal, hence his appeal must fail.

[4] It is settled law that s 309(2) of the CPA makes provision for condonation of the appellant's failure to file a notice of appeal within a prescribed period of 14 days provided for in the Magistrate's Court Rules. Condonation is not for the mere asking and non-compliance with the rules, it will only be condoned once the applicant provides an acceptable and reasonable explanation, and that the prospects of success on appeal are good. In *Ruhumba v The State*[1], it was held:

> 'This court has on many occasions emphasised the fact that where an appeal is noted out of time, the applicant must bring a substantive and proper application in which condonation of the late filing of the notice of appeal is sought.'

[5] The appellant, *in casu*, under oath explained the delay in filing the notice of appeal late by saying that he was not in a sound state of mind to adequately take further steps to appeal and further that he could not properly understand the explanation given by the learned magistrate. He further claimed that he was a layman.

[6] The record of the proceedings, however, show that the review and appeal rights were fully explained to the appellant upon his conviction to which the appellant indicated that he understood, whereafter he appended his signature as confirmation that he indeed understood the rights as explained.

[7] From the above, it is clear that the appellant's explanation for having filed his notice of appeal outside the prescribed time limit is *mala fide* as the court *a quo* had duly informed him of his right of appeal. The magistrate in fact and in detail explained to him the procedure to follow if he intended noting an appeal, together with the time

[1] *Ruhumba v The State* CA 103/2003 (24 February 2004) Unreported.

limits involved. It must also then be noted that the reasons advanced by the appellant in which he explains the delay when noting the appeal, are neither acceptable nor reasonable and as such, the application must fail.

[8] I now intend to deal with the issue of prospects of success on appeal. The appellant filed a notice of appeal, which was later on amended. The appellant's grounds of appeal in the amended notice of appeal are articulated in the notice of appeal as follows:

(i) That the court *a quo* misdirected itself in law and/or fact by over-emphasising the seriousness of the offence and the deterrent effect of the sentence at the expense of the personal circumstances of the appellant and in so doing, the court *a quo* ignored mitigating factors of the case;

(ii) That the court *a quo* erred and/or misdirected itself in law and/or fact by finding that there are no mitigating circumstances that it can rule as exceptional in order for it to deviate from a custodial sentence, while the appellant raised the fact that at the time of his sentencing, one of his minor children were in his care.

(iii) The court *a quo* erred and/or misdirected itself in law and/or in fact by imposing a sentence of 4 years' which is shockingly inappropriate, and which induces a sense of shock, and further failed to impose a suspended sentence in the given circumstances, and no reasonable court could have imposed such a sentence.

[9] It is trite that an appellate court may interfere with the sentence imposed by the trial court only if 'the sentence is vitiated by an irregularity or misdirection or if the sentence is so manifestly excessive that it induces a sense of shock in the mind of the appellate court'.[2]

[2] *S v Simon* 2007 2 NR 500 at 518 A-C.

[10] An appeal court will not easily interfere with a sentence imposed by a lower court if such sentencing was exercised judiciously. In *S v Tjiho*[3], it was held*:*

'This discretion is a judicial discretion and must be exercised in accordance with judicial principles. Should the trial court fail to do so, the appeal court is entitled to, not obliged to, interfere with the sentence. Where justice requires it, appeal courts will interfere, but short of this, courts of appeal are careful not to erode the discretion accorded to the trial court as such erosion could undermine the administration of justice.'

[11] The aggravating features of this serious crime would in my view, justify a custodial sentence of some duration especially taking into consideration that the appellant has a previous conviction of a similar offence. He had not been deterred by the previous sentence he served. Deterrence is therefore strongly encouraged in the present case.

[12] The appellant had been released from custody after barely 8 months but was again involved in similar criminal activities. Appellant knew he had minor children to take care of. Housebreaking with intent to steal and theft is regarded as a very serious offence. In *S v Drotsky*[4], it was held:

'The crime of housebreaking with intent to steal and theft is regarded by law and society as a particularly insidious form of theft. It is said that a man's home is his castle, if there is one place where a person should feel safe and secure, it is his house.'

[13] It is generally accepted that the appellant should be punished for the crime committed and not so much for the previous conviction. However in *S v Muchaka*[5], it was held

'Earlier convictions impact on the character of the offender, especially where he/she was not deterred by the experience of previous convictions and sentences. Thus the courts

[3] *S v Tjiho* 1991 NR 361 (HQ) 1992 (1) SACR 693 at 366 A – B.
[4] *S v Drotsky* (CA 195 of 2004) [2005] NAHC 3 (12 May 2005).
[5] *S v Muchaka* (CR 20/2017) [2017] NAHCMD 69 (10 March 2017).

first and foremost must ensure that the appellant is prevented from repeating similar crimes. Secondly the sentences must not only deter the appellant but should equally deter other criminals from committing similar or other serious crimes.'

[14] Having regard to the circumstances of this case, it is my view that an impression should not be created in the public eye that crime pays. A non-custodial sentence under the circumstances of this case may trivialise the crime.

[15] In my view, the trial court did take into account all the mitigating circumstances as well as the aggravating factors presented and did not commit any misdirection when it sentenced the appellant. The sentence imposed is also not disturbingly inappropriate and does not induce a sense of shock.

In the result,

1. The point *in limine* is upheld.

2. The application for condonation is refused and the matter is struck from the roll and regarded finalised.

_____

D N USIKU

Judge

_____

H C JANUARY

Judge

8
8
8
8
8

APPEARANCES:

APPELLANT: S Kanyemba
Of Salomon Kanyemba Incorporated,
Windhoek

RESPONDENT: M Shilongo
Of the Office of the Prosecutor General,
Windhoek