

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: CA 28/2017

In the matter between:

ESINDO ERASTUS

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Erastus v S* (CA 28/2017) [2017] NAHCNLD 112 (14 November 2017)

Coram: TOMMASI J and JANUARY J

Heard: 02 November 2017

Delivered: 14 November 2017

Flynote: Criminal Procedure – Appeal – Sentence – Assault with intent to do grievous bodily harm – 24 months imprisonment of which 6 months imprisonment suspended for 5 years on condition – Condonation – Reasons for the delay found reasonable – No prospects of success on appeal – Matter struck from the roll.

Summary: The appellant was convicted and sentenced for assault with intent to do grievous bodily harm after he pleaded not guilty and a trial was held. The appellant appeals against sentence. He is sentenced to 24 months imprisonment of which 6

months are suspended for 5 years' on condition that he is not convicted of assault committed within the period of suspension. He filed his notice of appeal out of time. He filed an application for condonation and advanced reasons for the delay. This court considered the merits to determine if the appellant has any prospect of success on appeal. There are no prospects of success on appeal. The matter is accordingly struck from the roll.

ORDER

1. I find that there are no prospects of success on appeal.
 2. The appeal is struck from the roll and considered finalized.
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APPEAL JUDGMENT

JANUARY J (TOMMASI J CONCURRING)

[1] The appellant was charged with assault with intent to do grievous bodily harm: 'In that on or about the 02nd day of February 2016 at or near Okafitukashau village in the district of Outapi the accused did wrongfully, unlawfully assault Vilho Endjala by assaulting him with a stick on the face with intent to do the said Vilho Endjala grievous bodily harm'. He pleaded not guilty but was convicted after a trial was held. He was sentenced on 02 February 2017 to 24 month's imprisonment of which 6 months are suspended for 5 years' on condition that the accused is not convicted of assault committed within the period of suspension.

[2] The appellant gave a plea explanation that: 'Vilho is the one who started and he grabbed me by the neck and hit me against a tree and he threatened to kill me and he insulted me by saying that I excreted at his house and my faeces had worms and I do not know the entrance to his home.'

[3] The appellant was initially represented in the court *a quo* by Mr Tjiteere but he subsequently withdrew as legal representative. The appellant then opted to conduct his

own defence. Mr J Greyling (Jnr) is representing the appellant in this court and the respondent is represented by Mr Gaweseb.

[4] The appellant as a self-actor initially filed his notice of appeal with supporting affidavit on 06 April 2017 but it was only received by the clerk of Outapi magistrate's court on 19 April 2017, about 2 months late. The appellant gives reason for the delay: that he had no knowledge on how to launch the notice of appeal; that he only came to know when he was informed by his fellow inmates who knows the proper procedure. When the appellant obtained Mr Greyling as legal representative he was advised to withdraw the initial notice of appeal. This was done and a new notice of appeal was filed on 07 July 2017 and caused a further delay of about another 3 months. It is to be noted that the appellant's right to appeal and review procedures were explained and he indicated that he understood.

[5] For an application for condonation to be successful any applicant needs to satisfy the court that he has a reasonable explanation for the delay and that there are reasonable prospects of success on appeal.

[6] The appellant in mitigation indicated that he was 70 years old. Considering his age I accept that he might have experienced difficulty to grasp the explanation on the procedure of appeal and since this was his first brush with the law, I give him the benefit of the doubt and accept the explanation as reasonable for the delay in the circumstances.

[7] The grounds of appeal are briefly that; the magistrate failed to assist the unrepresented accused in mitigation; The magistrate failed to place sufficient weight on the personal circumstances and mitigating factors; the sentence is shockingly inappropriate; the magistrate failed to impose a wholly suspended sentence.

[8] The complainant testified that there was altercation between him and the complainant. The complainant is a police officer and the appellant a retired police officer. The complainant testified that the assault is a matter of revenge by the appellant. The incident was preceded by a discussion of the struggle between Swapo freedom fighters and the South African army before the independence of Namibia. The

appellant accused the complainant that he was working for the South Africans and that his parents levelled false accusations against the mother and father of the appellant. As a result thereof the house of the complainant was allegedly burned down. The appellant alleged that one of his siblings was killed by Swapo because of the false information spread by the parents. The appellant eventually took a knobkierie and hit the complainant on the left jaw as a result of which the left lower jaw fractured. The complainant had to receive medical treatment in that the jaw was fixed with metal plates. The complainant was hospitalized for a week. The evidence of the assault is corroborated by a medical report reflecting the fracture of the left lower jaw and a witness who was present during the incident.

[9] Sentencing is primary within the discretion of the trial court. This court of appeal has limited power to interfere with the sentencing discretion of a court *a quo*. A court of appeal can only interfere;

- when there was a material irregularity; or
- a material misdirection on the facts or on the law; or
- where the sentence was startlingly inappropriate;
- or induced a sense of shock; or
- was such that a striking disparity exists between the sentence imposed by the trial Court and that which the Court of appeal would have imposed had it sat in first instance in that;
- irrelevant factors were considered and when the court *a quo* failed to consider relevant factors.¹

[10] The personal circumstances of the appellant are noted in bullet form as follows on the record:

'70 years old

Widower

I have 18 children

¹ *S v Kasita* 2007 (1) NR 190 (HC); *S v Shapumba* 1999 NR 342 (SC) at 344 I to 345A; *S v Jason & another* 2008 NR 359 at 363 to 364G

I went up to grade 7 years

7 are minors

I was a police officer but now I am a pensioner

I can afford a fine of N\$300-00

I have small children at home. Some are at pre-primary and some at primary school

There is no one to look after my live stock at the cattle post

That's all.'

It is in my view not clear if this information was noted as a result of questions from the magistrate or whether it spontaneously was forthcoming from the appellant. The learned magistrate filed a statement that she has no additional reasons to add to his/her *ex tempore* judgement.

[11] In the absence of additional reason I accept that the personal circumstances was put on record spontaneously by the appellant and that the magistrate did not extract the information by questions.

[12] Mr Greyling submitted that the magistrate ought to have questioned the appellant to determine if he was employed or not; if he had other dependants; if he felt any remorse; his state of intoxication; in view of his age, his medical condition.

[13] In my view this submission does not hold water. The appellant stated that he was a pensioner, he has 18 children who are his dependants and he is a widower. The issue of whether he had remorse or not can be gleaned from his conduct during the trial. He pleaded not guilty and was adamant that he did not assault the complainant, in other words he showed no remorse. I am not convinced that the magistrate was duty bound to enquire about the medical condition of the appellant. Inmates receive medical care in prison.

[14] The issue of the payment of a fine was considered by the magistrate. The appellant indicated that he could afford a fine of N\$300. The offense is obviously

serious and a fine in my view would trivialize the crime. The magistrate considered that the appellant was a first offender at an advance age. The charge sheet indicates an age of 61 years. When the appellant testified he stated that he is 65 years old and in mitigation said he was 70 years old. I agree that being a first offender at the age of the appellant, an advance age, is mitigating. In my view the other side is also true that being at such mature age and hitting someone with a knobkierie in the face and more so because he was a police officer is more aggravating.

[15] The complainant sustained a serious injury. The appellant was a former police officer and in the circumstances it is more aggravating that he committed this crime. I do not find a misdirection or irregularity by the magistrate in the circumstances. I therefore conclude that there are no prospects of success on appeal.

[16] In the result:

1. I find that there are no prospects of success on appeal.
2. The appeal is struck from the roll and considered finalized.

H C JANUARY
JUDGE

I agree

M A TOMMASI
JUDGE

Appearances:

For the Appellant:

Mr Jan Greyling Jnr.

Of Greyling & Associates

For the Respondent:

Adv Gaweseb

Of Office of the Prosecutor-General