



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CA32/2016

In the matter between:

GEORGE EPAFALUS

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Epafalus v S* (CA32/2016) [2017] NAHCNLD 41 (25 April 2017)

Coram: TOMMASI J and JANUARY J

Heard: 3 March 2017

Delivered: 25 April 2017

Flynote: Criminal Procedure – Application for condonation – No affidavit filed – The appellant uneducated and reason for delay understood in the light of his explanation – However no room for interference – No prospects of success – Application dismissed

ORDER

1. The application for condonation is dismissed.
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JUDGEMENT

TOMMASI J (JANUARY J concurring)

[1] This is an appeal against sentence and the appellant, having lodged his appeal out of time, “applied” for condonation. The appellant pleaded guilty to the offence of robbery in the district court of Tsumeb. He was convicted and sentenced to 2 years’ imprisonment.

[2] The appellant, when questioned in terms of section 112(1)(b) in the district court admitted that he pushed his mother down and took N\$1200 from her. He informed the court that his mother found him in the room where he had taken the money from her drawer with the intention to steal it. When she saw it she took the money from him. He grabbed it back from her and ran away.

[3] In mitigation he testified that he is 30 years old and that he lives with his mother who is 52 years old. He is not married and has a daughter aged 6 who also lives with his mother. He is unemployed and his mother “is looking after him”. He was of the view that 1 year’s imprisonment would be appropriate. Cross-examination revealed that only N\$400 was recovered.

[4] The learned magistrate when sentencing the appellant took into consideration that the offence is serious and prevalent, that only a little of the money was recovered and that the appellant was in a domestic relationship with the victim. He also took into

consideration the personal circumstances of the appellant; the fact that he is a first offender; and that he pleaded guilty. The learned magistrate, considered the main purpose of sentencing, the offence committed, the administration of justice, the need for deterrence and concluded that the seriousness of the offence outweigh the personal circumstances of the appellant.

[5] The appellant drafted his notice of appeal on 9 May 2016 but it was received the clerk of court on 11 May 2016. He simultaneously applied for condonation indicating that he is a layperson who does not know the legal procedure for noting an appeal and he only came to know it in prison. This document is not an affidavit i.e the contents thereof was not attested to under oath.

[6] The appellant withdrew the notice of appeal and filed a new notice of appeal on 12 July 2016 with the following grounds:

1. The learned magistrate did not come to the aid of the unrepresented accused during mitigation by posing questions in order to illicit information favorable to the accused and suggested that the court ought to have called the complainant to testify.
2. The learned magistrate failed to take the appellant's personal circumstances into consideration and overemphasized the seriousness of the offence at the expense of the accused's personal circumstances;
3. The learned magistrate failed to take into consideration that the appellant pleaded guilty and that he was a first offender
4. The sentence passed was shockingly inappropriate and the learned magistrate failed to consider other forms of punishment.

[7] The learned magistrate indicated that he had nothing to add to his reasons of sentence.

[8] Ms Nghiyoonanye, counsel for the respondent submitted *in limine* that the appellant did not file a proper affidavit and that his right to appeal was explained

to him. She submitted that there were no reasonable prospects of success as all questions were posed to the appellant and the learned magistrate took all factors into consideration and that no misdirection has been shown.

[9] Mr Aingura, counsel appointed *amicus curiae*, brought under the court's attention that the appellant may have been wrongly convicted of robbery as he merely snatched the money from his mother. The act of snatching the money back is an assault which was aimed to induce the possessor to submit to the taking of the property¹ and the learned magistrate correctly thus correctly convicted the appellant of robbery. Mr Aingura submitted that the explanation given by the court was not a proper explanation and in his view the sentence which the learned magistrate imposed, was excessive.

[10] The learned magistrate indeed explained to the appellant his right to appeal if he felt aggrieved by either the conviction and sentence or both. He was advised the appellant to lodge his notice of appeal, which had to be in writing in the official language, within 14 days from date of sentence and that the notice should set out clearly the reasons for his appeal. The learned magistrate further explained that, if he files his notice after 14 days that he should bring an application for condonation. He was advised that he should entail the reasons for the late filing of the notice of appeal in the application for condonation. The appellant indicated that he understood this explanation.

[11] I am prepared to accept that the appellant may not have understood what an "application for condonation" was and would thus examine his reasons he advanced. The appellant knew that he had to write a notice of appeal within 14 days but according to him he is uneducated and he engaged his fellow inmates to assist him. Over and above these noncompliance with the Rule 67 of the Magistrate's Court rules, is the consideration whether the appellant has reasonable prospects of appeal.

[12] It is trite that:

¹ *S v Auala* (No 2) 2008 (1) NR 240 (HC) & *S v Alexander* 2006 (1) NR 1 (SC)

“Punishment being pre-eminently a matter for the discretion of the trial Court, the powers of a Court on appeal to interfere with sentence are limited. Such interference is only permissible where the trial Court has not exercised its discretion judicially or properly. This occurs when it has misdirected itself on facts material to sentencing or on legal principles relevant to sentencing. It will also be inferred that the trial Court acted unreasonably if

‘(t)here exists such a striking disparity between the sentences passed by the learned trial Judge and the sentences which this Court would have passed (Berliner's case supra at 200) - or, to pose the enquiry in the phraseology employed in other cases, whether the sentences appealed against appear to this Court to be so startlingly (S v Ivanisevic and Another (supra at 575) or disturbingly (S v Letsolo I 1970 (3) SA 476 (A) at 477) inappropriate - as to warrant interference with the exercise of the learned Judge's discretion regarding sentence’.”

[13] In this case the State Prosecutor posed a number of questions which elicited further information from the appellant. The fact that some of the money was recovered was a factor beneficial to the appellant and this information was elicited during cross-examination. The evidence of the complainant had the potential to aggravate and it would have been risky for the learned magistrate to have called this witness. There is no merit in the ground that the magistrate failed to assist the unrepresented accused as there was sufficient information before the court a quo to enable it to determine an appropriate sentence. No irregularity occurred in this regard.

[14] It is apparent from the learned magistrate's reasons that he considered all factors in mitigation and aggravation. He considered the main purpose of punishment, the offence committed and the administration of justice and gave reasons why he was of the view that his personal circumstances had to take a backseat to the need for other considerations. I am satisfied that the magistrate indeed applied his discretion judiciously and there is no room for this court to interfere with the sentence imposed by the learned magistrate.

[15] The appellant herein failed to persuade this court that he has reasonable prospects of succeeding with his appeal against sentence.

[16] This court, having considered all the factors, cannot grant the appellant the indulgence he seeks in his “application for condonation”.

[17] In the result the following order is made

1. The application for condonation is dismissed.

MA Tommasi

Judge

H C January

Judge

APPEARANCE

For the Appellant:

Mr Aingura
Of Aingura Attorney

For The Respondent:

Ms Nghiyoonanye
Of Prosecutor General