



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

(APPLICATION FOR LEAVE TO APPEAL- REASONS)

Case no: CC 11/2010

In the matter between:

ABISAI NDAUMBWA

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Ndaumbwa v S* (CC 11/2010) [2017] NAHCNLD 73 (31 July 2017)

Coram: TOMMASI J

Heard: 30 July 2015

Delivered: 08 September 2015

Reasons: 31 July 2017

Flynote: Application for leave to appeal – Sentence – No reasonable prospects of success – Application for leave to appeal dismissed.

ORDER

1. The application for leave to appeal is dismissed.
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JUDGEMENT

TOMMASI J

[1] The applicant was convicted of murder and housebreaking with intent to rob and robbery with aggravating circumstances. He was sentenced to 32 years' imprisonment on the count of murder and to 15 years' imprisonment on the count of housebreaking with intent to rob and robbery. The court ordered that 7 years of the sentence imposed for housebreaking with intent to rob and robbery run concurrently with the sentence imposed for murder. The applicant, in his personal capacity, applied for leave to appeal against his conviction and sentence. He however later opted to proceed with the application for leave to appeal against sentence only.

[2] The application was filed outside the prescribed time limit and the applicant requested this court to grant an extension of the time. This application was not opposed by the respondent and as such the court heard the application for leave to appeal against sentence.

[3] Having heard the applicant and Mr Shileka, counsel for the respondent, the court dismissed the application for leave to appeal. These are the reasons for the aforementioned ruling.

[4] The applicant was convicted of the murder of a 75 year old woman who was living alone on a farm in the Otavi district. He broke into the farmhouse and killed the deceased with a panga. He took off with some items and a vehicle which he later abandoned in Otjiwarongo.

[5] The determining factor whether the court ought to grant leave to appeal is whether or not the applicant has shown that he has reasonable prospects that he would succeed. (See *S v Ningisa & others 2013 (2) NR 504 (SC)*).

[6] The applicant advanced the following as the grounds upon which he would appeal against the sentence:

- (a) The effective term of imprisonment is shockingly inappropriate in that:
 - (i) it is out of proportion with the totality of the accepted facts in mitigation;
 - (ii) it in effect disregards all the steps taken by the accused to assist and co-operate with the Namibian police;
- (b) The court erred by not imposing a shorter sentence;
- (c) The court overemphasized the seriousness of the offence and the deterrent effect of the sentencing and doing so the court ignored the mitigation features of the accused's case.

[7] The applicant submitted during argument that the court ought to have ordered the entire 15 years to run concurrently with 32 years imposed for the murder. Mr Shileka submitted that the sentence imposed is consistent with other sentences imposed in

similar matters. In *State v Wilbard Uushona*¹ where Mainga J, as he then was, imposed 35 years' imprisonment for murder and 9 years' imprisonment for robbery; *Karirao v State*² where the sentence imposed was 30 years' imprisonment for murder and 20 years for robbery of which 10' years imprisonment was ordered to run concurrently with the sentence for murder. The applicant referred to a regional court matter where the accused was sentenced to 20 years/ imprisonment for murder and robbery. The details of this case is however not known or reported.

[8] The sentences imposed by this court is not disproportionate to sentences imposed in similar matters and I am of the considered view that there are no reasonable prospects that he applicant would succeed on the ground that the sentence imposed is shockingly inappropriate.

[9] The cumulative effect of the sentence was specifically considered by this court and there are no reasonable prospects that the appellant would succeed on the ground that the shorter sentence ought to have been imposed or that the entire 15 years ought to have been ordered to run concurrently.

[10] The co-operation of the applicant with the police officers is not born out of the record of the proceedings. The court concluded that the aggravating factors, the need for retribution, general deterrence and prevention outweigh the personal circumstances of the applicant. It is trite that a court in the exercise of its discretion may in certain circumstances emphasize one aspect of punishment at the expense of the other. There are no reasonable prospects that another court would conclude that this court had wrongly overemphasized the seriousness of the offence and the deterrent effect of punishment at the expense of the applicant's personal and mitigating circumstances.

¹ CC 34/2008 HC, an unreported case, delivered on 29 April 2009

² (SA 70 / 2011) [2013] NASC (15 July 2013)

[11] Given the above considerations, I hold the view that there are no reasonable prospects that the applicant would succeed on appeal.

[12] In the result the court made the following order:

1. The application for leave to appeal is dismissed.

M A Tommasi
Judge

APPEARANCE

For the Appellant:

Ms Mugaviri
Of Mugaviri Attorney

For the Respondent:

Adv. Shileka
Of the Prosecutor General Office