

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2018/00047

In the matter between:

OLIVEIRA FRANCISCO TIGANA

APPELLANT

v

RESPONDENT

THE STATE

Neutral citation: *Tigana v S* (HC-NLD-CRI-APP-CAL-2018/00047) [2019]
NAHCNLD 14 (20 February 2019)

Coram: TOMMASI J and CHEDA J

Heard: 20 November 2018

Delivered: 20 February 2019

Flynote: Criminal Procedure – Sentence – Appeal against - Affording more weight to specific factor at expense of another permissible and sometimes

unavoidable – first offenders not shielded from imprisonment – learned magistrate applied discretion judiciously by carefully considering all the mitigating and aggravating factors.

Criminal Procedure – Condonation for late noting of appeal – no reasonable prospects of success - condonation for late noting of appeal denied.

Summary: The appellant was convicted of theft of a container which he sold for N\$10 000. The undisputed value of the container was N\$30 000. The appellant was convicted and sentenced to 36 months' imprisonment. The appellant noted his appeal outside the time period provided for in Rule 67 of the Magistrates' Court Rules. The court held that the determining factor is whether or not there are reasonable prospects of success. The court held further that there are no reasonable prospects of success and the application for extension of the time period was thus dismissed.

ORDER

1. The appellant's application for condonation for prosecuting his appeal outside the time period provided in terms of Rule 67 of the Magistrates' Court Rules, is dismissed.
2. The matter is removed from the roll.

JUDGMENT

TOMMASI J (CHEDA J concurring):

[1] This is an appeal against sentence only. The appellant was convicted of theft of a container and sentenced to 3 years' imprisonment. The appellant noted his appeal outside the time limit provided for by Rule 67 of the Magistrates' Court Rules

and he applied for condonation for the late filing thereof. This application is opposed by the respondent.

[2] The appellant appeared in person and the respondent is represented herein by Mr Mudamburi.

[3] The respondent submitted that the appellant noted his appeal more than 6 months after sentence. The appellant was sentenced on 21 September 2017 and the notice of appeal bears a date stamp of the clerk of court of 11 April 2018. The notice of appeal is undated but the appellant's affidavit was commissioned by the prison authorities on 1 December 2017 i.e. approximately 36 court days out of time. This court takes cognizance of the fact that the appellant is in custody and thus has to rely on the prison authorities for assistance to file his appeal.

[4] Mr Mudamburi further submitted that the reason advanced for the delay is not reasonable. The appellant merely indicated that he is a lay person. The appellant indicated that he does not understand court proceedings and it took him time to find someone who assisted him to file the appeal. Mr Mudamburi referred this court to *Abraham Ruhumba v The State*,¹ and *Pencock & another v The Attorney General, Natal*². The crux of his argument is that the prospects of success should only become a consideration if the reason for delay is acceptable. He further submitted that the appellant, in any event, failed to establish the existence of good prospects of success

[5] The explanation given is the same as numerous other appellants who are illiterate and / or ignorant of the procedure to be adopted. I am in agreement with the approach adopted in *S v Zemberuka*³ where Van Niekerk J held that the court should not be overly fastidious. In this matter the delay is not substantial and the appellant is prosecuting his appeal in person. The determining factor herein would be whether or not there are reasonable prospects of success.

[6] The grounds of appeal which I am able to discern from the notice of appeal are the following:

¹ An unreported judgment, Case no 103/2003 delivered on 24/02/2004.

² 1958 (3) SA 875.

³ 2008 (2) NR 737 (HC).

1. The magistrate failed to take into consideration the appellant's personal circumstances;
2. The appellant was placed on the proverbial altar of deterrence.
3. The sentence of imprisonment without the option of a fine induces a sense of shock.

[7] The appellant pleaded guilty but a plea of not guilty was entered. The evidence adduced by the complainant and not disputed by the appellant was that the value of the container was N\$30 000. The appellant employed another person (his co-accused who was found not guilty and discharged) to sell the container without the permission or knowledge of the owner. His co-accused sold the container for N\$10 000. His co-accused kept N\$2500 and was given N\$1500 as commission by the appellant. The appellant thus profited in the sum of N\$6000 from the sale of the container. The container was recovered.

[8] In mitigation appellant expressed remorse and requested the court to release him in order for him to continue making payments toward compensating the buyer. He testified that he has 2 children, aged 5 and 2 respectively and their mother lives in Grootfontein. He stated that he has a clothing business and he earns between N\$2500 to N\$3000 a month. He had some savings and owned the furniture in his house.

[9] The learned magistrate gave detailed reasons for the sentence he imposed. He took into consideration the appellant's personal circumstances and that he was the only one taking care of his minor children. The court further took cognizance of the fact that the appellant is a first offender. He also referred to the fact that the appellant wanted to compensate the buyer and that he is a businessman with some savings. He took note of the fact that the container was recovered. The court, in aggravation, considered the following: (a) the prevalence of the offence; (b) the careful planning and sophistry with which the offence was committed; (c) the breach of trust of the people who treated him like a brother; and (d) the buyer who expended N\$10 000 upfront now has to rely on being repaid piecemeal. The learned magistrate took into consideration that society demands that people should respect property rights and a wrong message would be sent to criminals i.e. that theft is condoned by

the courts. The learned magistrate accepted the remorse of the appellant but juxtaposed it with the prejudice suffered by the buyer and concluded that in the circumstances the accused, although a first offender, cannot escape a custodial sentence.

[10] It is trite that an appellant court would only interfere with the discretion exercised by the trial court in limited instances conveniently set out in *S v Tjiho*⁴ at page 366 (A-C) as the following:

- '(i) the trial court misdirected itself on the facts or on the law;
- (ii) an irregularity which was material occurred during the sentence proceedings;
- (iii) the trial court failed to take into account material facts or over-emphasised the importance of other facts;
- (iv) the sentence imposed is startlingly inappropriate, induces a sense of shock and there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by the court of appeal.'

[11] Mr Mudambui submitted that the learned magistrate took into consideration the personal circumstances and weighted it against the interest of society. He submitted further that the fact that the appellant is a first offender, does not shield him from custodial sentence.

[12] The above submission is indeed correct. It is evident that the magistrate placed more emphasis on the offence and the impact it must have had on the buyer. It is permissible and sometimes unavoidable for the trial court to emphasize the offence and the need for deterrence at the expense of an accused's personal circumstances. The learned magistrate considered all factors inclusive of all the mitigating factors and personal circumstances of the appellant. There is thus no merit in the first and second ground.

[13] A further consideration is whether or not the sentence is disproportionate to the offence and the legitimate expectation of society. The occurrence of theft is prevalent within the jurisdiction of the court a quo and it is the prerogative of the trial court to impose sentences which would deter other offenders. I would have imposed

⁴ 1991 NR 361 (HC) (1992 (1) SACR 639).

a different sentence but this is not the criteria. The disparity between the sentence imposed by the trial court and that which would have been imposed by this court cannot be described as “striking”. It is evident that the learned magistrate applied his discretion judiciously and there is no reason for this court to interfere with the sentence.

[14] There are no reasonable prospects that the appellant would succeed on the grounds raised in his notice of appeal. This court therefore cannot condone his non-compliance with Rules 67 of the Magistrates’ Court Rules.

[15] In the premises the following order is made:

1. The appellant’s application for condonation for prosecuting his appeal outside of the time period provided for in Rule 67 of the Magistrates’ Court Rules, is dismissed.
2. The matter is removed from the roll.

M A TOMMASI
JUDGE

I concur

M CHEDA
JUDGE

Appearances:

For the Appellant:

O F Tigana

In person, Oluno Correctional Facility, Ondangwa

For the Respondent:

J Mudamburi

Office of the Prosecutor General, Oshakati