

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2018/00050

In the matter between:

**ABSAI SHIVIKU**

**APPELLANT**

**v**

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Shiviku v S* (HC-NLD-CRI-APP-CAL-2018/00050) [2019]  
NAHCNLD 67 (11 July 2019)

**Coram:** TOMMASI J et JANUARY J

**Heard:** 31 January 2019

**Delivered:** 11 July 2019

**Flynote:** Application for condonation – poor explanation and no reasonable prospects of success – application for condonation must fail – matter struck from the roll and considered finalized.

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**ORDER**

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1. The application for condonation for the late noting of the appeal is dismissed;
2. The appeal is struck from the roll and considered finalized.

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**APPEAL JUDGMENT**

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TOMMASI J (JANUARY J concurring):

[1] The appellant herein appeals against sentence. He noted his appeal outside the time period stipulated in rule 67 of the Magistrate's Court Rules and he attached an affidavit to his appeal titled supporting Affidavit wherein he stated reasons why he noted his appeal out of time. The appellant noted his appeal in person and the court has become accustomed to the filing of a pro forma affidavit used by in-person inmates as an application for condonation.

[2] The respondent took issue with the fact that the appellant submitted an unsigned affidavit in support of his application for condonation. The court after hearing the parties and having considered the fact that the appellant is a lay person and not well versed with the legal procedure required for bringing an application for condonation, ordered the appellant to file a signed affidavit which he did.

[3] The explanation advanced by the appellant for the late filing of the notice of appeal is that he was so shocked at the severity of the sentence that the importance of filing an appeal did not register when the magistrate explained it to him. This only dawned upon him when it was explained by a fellow inmate. This explanation more than anything confirms that the appellant only felt aggrieved when he spoke to a fellow inmate. This is hardly a reasonable explanation. The period however is not a lengthy delay. There are not reasonable prospects that the appellant would succeed with his appeal and the reasons for concluding thus follow hereunder.

[4] The appellant pleaded guilty to the offence of theft out of a motor vehicle. The appellant admitted having stolen cash from the vehicle and he did not dispute that this amount was N\$59 350. When asked how he took the money he informed the court that he walked up to the vehicle and he took the money. He was correctly convicted of the offence and sentenced to 4 years' imprisonment of which one year's imprisonment was suspended for a period of 4 years on condition that the appellant is not convicted of theft committed during the period of suspension.

[5] His grounds of appeal are that:

- (a) the sentence is out of proportion with the crime he committed;
- (b) the learned magistrate erred in not considering that the appellant is a first offender;
- (c) the learned magistrate erred by giving him the maximum sentence;
- (d) the learned magistrate erred by not considering that appellant has pleaded guilty and did not waste time.
- (e) the learned magistrate erred by not considering to impose term of imprisonment with the option to pay a fine;
- (f) the learned magistrate did not consider the fact that all the money was recovered as he was caught red-handed;
- (g) he is the sole breadwinner as his children and parents rely on him and now have no one to help them.

[6] The appellant is a 28 year old father of 6 children between the ages 9 and 4 years old. He completed grade 10 and is unemployed. The learned magistrate took his personal circumstances into consideration as well as the fact that he is a first offender who pleaded guilty. The learned magistrate weighed his personal circumstances against the aggravating factors i.e. that the offence was a prevalent offence, the nature of the offence and the need for deterrence, in arriving at the sentence he imposed.

[7] The appellant must show that there are reasonable prospects with which this court would interfere with the sentence imposed by the learned magistrate. As

counsel for the respondent correctly pointed out; the appeal court would only interfere with the sentence imposed by the court *a quo* if there is misdirection or the sentence is startlingly inappropriate. Counsel for the respondent submitted that no such error occurred and that the magistrate was alive to the fact that the offence of theft out of a motor vehicle violates a person's property rights and that there is a duty to deter other would be offenders. He submitted that a: 'First offender is not shielded against imprisonment and where the circumstances are such that it justifies imprisonment that the court should not shy away from imposing a custodial sentence simply because the accused is a first offender.'<sup>1</sup>

[8] There is no indication that there was a misdirection or an irregularity in the sentencing procedures. The sentence imposed is rather stiff but it is not the maximum sentence which the district court could impose. It is furthermore not shockingly inappropriate given the large amount of money which the appellant stole out of the vehicle. The fact that the money was recovered and that he was caught red-handed was not placed before the court in mitigation and cannot be considered by this court. It is evident that the court *a quo* took all the factors into consideration and ameliorated the impact the sentence would have on the appellant by suspending a portion thereof.

[9] It is our considered view that there are no reasonable prospects that the appellant would succeed on the grounds raised.

[10] Having considered all the factors it is this court's view that that the appellant's application for condonation for the late noting of the appeal should fail.

[11] In the result the following order is made:

1. The application for condonation for the late noting of the appeal is dismissed;
2. The appeal is struck from the roll and considered finalized.

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<sup>1</sup> S v Marius Bezuidenhout & others, case no. CA 58/1999 delivered on 2001/5/17 (HC)

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M A TOMMASI  
JUDGE

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H C JANUARY  
JUDGE

## APPEARANCES:

For the appellant: Mr A Shiviku, in person  
Oluno Correctional Facility, Ondangwa

For the respondent: Mr L Matota  
Office of the Prosecutor General, Oshakati