

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION,
HELD AT OSHAKATI

APPEAL JUDGMENT

CASE NO: HC-NLD-CRI-APP-CAL 2019/00009

In the matter between:

HANGULA ERASTUS

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Erastus v S* (HC-NLD-CRI-APP-CAL 2019/00009) [2020]
NAHCNLD 127(10 September 2020)

Coram: JANUARY J and SALIONGA J

Heard: 6 August 2020

Released: 10 September 2020

Flynote: Criminal Procedure — Appeal — Grounds of appeal should be clear and specific — Appellant failed to show that the trial court misdirected itself on the fact or on

the law or irregularity occurred during sentence proceedings or the sentence imposed is startlingly inappropriate or induces a sense of shock and there is a striking disparity between the sentence imposed by a court a quo and that which would have been imposed by the court of appeal — No irregularity or misdirection detected — No reasonable explanation for delay nor is there any prospects of success — Consequently the appeal is dismissed.

Summary: The appellant noted his appeal out of time. He applied for condonation for the late filing. Appellant did not advance a reasonable explanation why he filed his notice of appeal late. His grounds of appeal furthermore do not reveal any prospects of success against both conviction and sentence. The appeal was accordingly dismissed.

ORDER

1. The application for condonation is refused
 2. The appeal against conviction and sentence is dismissed.
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JUDGMENT

SALIONGA J, JANUARY J (concurring)

[1] The appellant together with his co–accused were arraigned in the Regional Court at Ondangwa on a charge of malicious damage to property. It was alleged that ‘the accused did upon or about 26 August 2016 and at or near Ondangwa Police Station in the district of Ondangwa did wrongfully, unlawfully and, maliciously break and/or damage and /or nine (9) CCTV cameras valued at N\$ 112 500 the property or in the lawful possession of Chief Inspector Antonius and /or Namibian Police with intent to injure them. They both pleaded not guilty but were found guilty after the evidence was led and subsequently each was sentenced on 24 May 2018 to six (6) years imprisonment’.

[2] Unpleased with both conviction and sentence, the appellant appeals to this court against the magistrate's decision. The appellant is a self-actor and Ms Petrus appears for the respondent.

[3] Appellant having noted the appeal out of time, simultaneously brought an application for condonation of the late filing of the appeal. The appellant stated in his notice of appeal that he did not know and understand what appeal was since he was not legally represented and his appeal rights were not explained clearly. However at the hearing of the appeal, Ms Petrus raised a point *in limine* in that the appellant was sentenced on 24 May 2018 but only filed a notice of appeal on 9 August 2018. Ms Petrus submitted that when an appeal is out of time the appellant is supposed to file an application for condonation in which he must satisfy the court that there is reasonable explanation for the delay and that there is reasonable prospects of success. It was Ms Petrus's further submission that the appellant's explanation, that he did not know and understand what an appeal is both unreasonable and not acceptable. His rights of appeal and review were fully explained to him and he understood.

[4] The appellant was sentenced on 24 May 2018. At the end of the Appellant's trial and after he had been sentenced, his rights in respect of review and appeal were explained. The appellant indicated that he understood the Magistrate's explanation and does not require any further explanation. This court thus accepts submission by the respondent's counsel that the appellant's rights were indeed explained as indicated in the annexure on page seven of the record in which the appellant confirmed same by attaching his signature to the document.

[5] This court has given careful thought to the explanation of the appellant in that he is acting in person and allowed the parties to argue the appeal on the merits.

[6] The appeal against his conviction is based on the premise that the state failed to link the suspects to the allegations; that the trial court misdirected itself by failing to

recognise that the state failed to adduce evidence that all other inmates did not have a body mark on the left arm; that the magistrate failed to consider his points of view or his argument on the matter. In so far as the appeal against sentence imposed is concerned, the appellant alleges that the court a quo or the magistrate failed to consider an option of a fine as an appropriate sentence in the circumstances, rather the magistrate opted for a heavy and inappropriate sentence of six years' imprisonment. He wants the appeal court to reduce the sentence or to grant him an option to pay a fine.

[7] In support of the conviction the respondent led the evidence of four witnesses in the court a quo. Michael Johannes a constable in the Namibian police testified that when he reported on duty on 20 September 2016 he found CCTV cameras damaged. He viewed the video footage together with other police officers and discovered that accused one in the court a quo and the appellant were the persons that caused damage to the cameras. Appellant was identified on his bodily features namely a tattoo and/ or a scar on his upper left arm. He further testified that when viewing the video footage together with the appellant he compared the tattoo from the footage to that of the appellant and the tattoo matched. His evidence of the appellant's bodily features was corroborated by the Station Commander of Ondangwa police station and two other police officers who knew the appellant well.

[8] Reading from the judgement of the Court a quo the court found that the identification was not only made through the CCTV footage but also through comparison of the body marking of the people on the footage and the court had the opportunity to view the comparison. It went further to state that the people on the CCTV cameras were the same as the two before court. Further that although the two accused were only visible in the three video footage and no one could be seen with regard to the other six cameras, the *modes operandi* used is the same as the one used to damage the three cameras where the two accused were positively identified. In our view a proper evaluation of all the evidence was done and the magistrate was correct in its finding that the six cameras were damaged in the same manner and the appellant was also responsible for damaging the six cameras which evidence accused denied. The

court a quo did not misdirect itself in its factual finding and the link between the crime and the appellant was properly established beyond reasonable doubt.

[9] Coming to the appeal against sentence, it is trite law that sentencing essentially falls within the discretion of the trial court and that a Court of appeal will interfere only in certain circumstances namely where the trial court has misdirected itself on the facts or on the law; or where material irregularities occurred during sentencing proceedings; or where the trial court failed to take into account material facts or overemphasised the importance of other facts; or where the sentence imposed is startlingly inappropriate; or induces a sense of shock and where there is a striking disparity between the sentence imposed by the trial court, and that which would have been imposed by a court of appeal.

[10] The appellant stated as a ground of appeal that the magistrate failed to consider an option of a fine as an appropriate sentence and imposed a lengthy custodial sentence. However the magistrate properly balanced the personal circumstances of the appellant, the interest of justice as well as the crime committed. I am alive to the fact that the form of punishment is sometimes determined by the moral guilt of the offender and the gravity of the offence committed. In *S v Kambu* 1998 NR 194 (HC) at 196 E, 'the court warned that the imposition of a fine in serious offences creates the wrong impression that the court endeavoured to keep the accused out of prison and boomerang especially in those cases where a fine is not a proper and appropriate sentence'. I agree with a note of warning expressed in *Kambu's* case supra.

[11] It is undoubtedly that the offence of malicious damage is serious and prevalent. The value involved is substantially high, being N\$ 112 500. The appellant damaged state properties. The offence was not committed in the spur of the moment but after careful planning. That alone is an aggravating factor that calls for a deterrent sentence to be imposed.

[12] Normally, where no irregularities or misdirection are proven or apparent from the record, the court on appeal will not reject the credibility findings by the trial court. The appellant in his notice of appeal did not refer to any irregularity or misdirection committed by the magistrate and we also do not detect any misdirection or error in relation to the sentence imposed. I find the sentence of 6 (six) years' imprisonment not disproportionate or startlingly shocking and there is no reason why this court should interfere. The appeal stands to fail.

[13] Accordingly, the following order is made.

1. The application for condonation is refused.
2. The appeal against conviction and sentence is dismissed.

J T SALIONGA
Judge

I agree

H C JANUARY
Judge

APPEARANCE:

For The Appellant:

Mr H Erastus

Of the Oluno Correctional Facility

Ondangwa

For The Respondent:

Ms. S Petrus

Of the Prosecutor General Office

Oshakati