REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2021/00031

In the matter between:

JOSEPH TANGI NGHIYALWA **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Nghiyalwa v S* (HC-NLD-CRI-APP-CAL-2021/00031) [2022] NAHCNLD 24 (25 March 2022)

Coram: SALIONGA J *et* KESSLAU AJ
Heard: **18 February 2022**
Delivered: **25 March 2022**

Flynote: Criminal Appeal - procedure – notice of appeal filed late - condonation application – explanation for delay accepted - no reasonable prospects of success on appeal – appeal struck from the roll.

Summary: The appellant was convicted for Robbery with aggravating circumstances and sentenced to 5 years imprisonment of which sixteen months were suspended for a period of five years on the usual conditions. The appeal lies against sentence. The

notice of appeal was filed out of time. Appellant's application for condonation states that he did not know how to launch the notice of appeal.

Held; that the appellant enjoys the benefit of doubt as there is no indication that the details of the appellant's rights to appeal were properly explained.

Held further; that grounds of appeal in the form of mitigating factors already mentioned in the court a quo cannot constitute substance of the appeal.

Held further; factors and facts not mentioned in the court *a quo* cannot be considered.

Held further; the fact that some factors were not specifically mentioned in the Magistrate's ruling does not necessarily mean that they were ignored by the Magistrate.

Held further; that the sentence imposed by the trial court is consistent with that imposed in similar cases, does not induce a sense of shock and that there is no disparity from the sentence that this court would impose in similar circumstances.

ORDER

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1. The Respondent's point *in limine* is upheld;
2. The appeal is struck from the roll and considered finalised.

JUDGEMENT

KESSLAU AJ (SALIONGA J concurring):

Introduction

[1] The appellant was convicted in the Magistrates Court of Eenhana on a charge of Robbery with aggravating circumstances and was sentence to five years imprisonment of which sixteen months were suspended for a period of five years on condition that the accused is not convicted of Robbery with aggravating circumstances committed during

the period of suspension. Aggrieved by the sentence the appellant is now appealing to this court for a reduced sentence. The appellant furthermore filed an application for the condonation for late filing of the notice of appeal[1].

Appellant's reason for late filing

[2] The appellant's reason given for the delay was that he was unaware that he was being sentenced and furthermore that he had no knowledge on how to launch the notice of appeal until informed by fellow inmates. During oral submissions the appellant conceded that his right to appeal was explained to him in court but that he did not understand it. Respondent on a point *in limine* submitted that the reason should not be accepted as reasonable and the appeal should be struck.

[3] The record of proceedings in the court a quo indicates that the learned Magistrate after imposing sentence said the following: 'The case is finalised right of review and appeal[2].' Assumingly that was an indication to the interpreter to explain the said rights. Normally a template wherein such rights are explained to an accused is then attached to the record reflecting the signature of the said accused indicating the details explained and the accused confirming that he/she understood the said explanation. In this matter there is no such template attached. It cannot be assumed by this court that the right of appeal were indeed correctly explained to the appellant and that he understood same, as we can only consider the information reflecting on the record. It is unfortunate that the magistrate did not fulfil her duty and fully explain the review and appeal rights to the undefended appellant on record[3]. The appellant in these circumstances thus have to enjoy the benefit of the doubt.

Prospects of success

[4] Turning to the second requirement for condonation *to wit* the prospect of success.

[5] The appellants' grounds of appeal against the sentence imposed can be summarized as follows:

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[1] Rule 67 of the Magistrate's Court act 32 of 1944 as amended
[2] At page 92 of the Appeal record.
[3] See *Maiba v S* (CA 52/2017) [2017] NAHCMD 359 (29 December 2017); *Musweu v State* (HC-MD-CRI-APP-CAL-2020/00115) [2021] NAHCMD 305 (25 June 2021)

1. That the learned magistrate imposed a harsh sentence despite the appellant being a first time offender.
2. That the learned magistrate did not consider the pre-trial incarceration of the appellant during sentencing.

The appellant spend just over thirteen months in custody before he was sentenced. The rest of the grounds listed are mitigating factors and not grounds of appeal being that the appellant is the father of a young child and that the appellant wants to further his education. The mentioned mitigating factors were already submitted in the court a quo. In the heads of argument filed by the appellant he introduced new grounds of appeal however no amended notice of appeal was filed and as such these will not be considered[4].

[6] The appellant furthermore submitted that his property is at risk of being looted if incarcerated. This is another mitigating factor however the appellant failed to mention it in the court a quo. The court of appeal is confined to the record of the court a quo and thus it cannot be considered[5].

[7] The respondent submitted that the appellant has no prospect of success in that the sentence *in casu* is similar to other sentences imposed upon convictions on the charge of Robbery with aggravating circumstances[6]. The court was also reminded by the Respondent on the severity and the seriousness of the offence of Robbery with aggravating circumstances[7].

[8] It is trite law that sentencing is primarily at the discretion of the trial court[8]. This court is guided by the matter of S *v Tjiho* 1991 NR 361 HC at 366 A-B, where Levy J stated:

> 'The appeal court is entitled to interfere with a sentence if:
>
> (i) the trial court misdirected itself on the facts or on the law;

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[4] See *S v PV* 2016 (1) NR 77 (HC).
[5] See *S v Mwambazi* 1990 NR 353 (HC) at page 356 par H-I
[6] See *S v Amukoto* (CR 01-2016) [2016] NAHCMD 6 (21 January 2016) where a sentence of three years with one year suspended was imposed for attempted robbery.
[7] *S v Myute and others*; *S v Baby* 1985(2) 61 (Ciskei Supreme Court)
[8] *S v Ndikwetepo and Others* 1993 NR 319 (SC)

(ii) an irregularity which was material occurred during the sentencing proceedings;

(iii) the trial court failed to take into account material facts or overemphasized 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 any court of appeal.'[9]

[9] It is important to aim for consistency in sentencing to promote legal certainty, install a sense of fairness and improve the respect for the judicial system[10]. While the uniformity of sentence is paramount to the public's confidence in the judicial system, at the same time the court must endeavour to individualise the sentence taking into consideration the particular offender's personal circumstances. Sentencing is a balancing act which is not an exact science and not an easy task by any means[11].

[10] When considering similar sentences imposed for the offence of robbery in our courts they tend to aim for the deterrence of the offence. See *Thomas v S* where eight years was imposed and confirmed on appeal for robbery (with no aggravating circumstances)[12]; *State v Noabeb* where ten years imprisonment was imposed for robbery with aggravating circumstances[13] and *S v Kastoor* where eight years imprisonment with three years suspended was imposed for robbery with aggravating circumstances.[14]

[11] The crime of Robbery with aggravating circumstances is without doubt a serious offence. It is more often than not that the punishment of direct imprisonment will be imposed[15]. The crime involves the elements of violence and dishonesty, robbing the victim's property and also the confidence of the victim to roam around freely. The evidence in this matter was that a dangerous weapon was used *to wit* a knife and furthermore the female victim was traumatized severely and is since the incident too scared to move freely in an area where she actually grew up in. The item robbed was a cell phone which in the technological era means that the victim's means of

[9] *S v Tjiho* 1991 361 (HC) at 366 A-B.
[10] *S v Skrywer* 2005 NR 288 (HC) at page 289
[11] *S v Strauss* 1990 NR 71 (HC)
[12] *Thomas v S*(HC-MD-CRI-APP-CAL-2019/00089) [2020] NAHCMD 179 (19 May 2020)
[13] *State v Noabeb* (CC 09/2014) [2016] NAHCMD 147 (18 May 2016)
[14] *S v Kastoor* 2006(2) NR 450 HC
[15] *Kanyeumbo v S* (HC-NLD-CRI-APP-CAL-2018/00015) [2018] NAHCNLD 83 (9 August 2018); *S v Amukoto* (Supra); *S v Haufiku* (CR 63/2013) [2013] NAHCMD 292 (17 October 2013)

communication was taken from her including personal information stored on the device. The mugging of cell phones in particular is extremely prevalent in our communities as they are a sought after commodity. It is in these circumstances where a crime is prevalent and serious in nature that the aims of punishment would rightfully outweigh the personal circumstances of an accused[16].

[12] This court agrees with the submission by the respondent that no judgment can ever be all inclusive or perfect[17]. The grounds of appeal noted by the appellant *to wit* being a first offender and his time in custody before sentence were not specifically mentioned in the sentence of the magistrate however this information prominently forms part of the record of proceedings. The fact that the said factors were not specifically mentioned in the ruling does not necessarily mean that they were ignored by the magistrate[18]. Sixteen months of the five year sentence were suspended, indicating that the magistrate extended a hand of mercy to the appellant by being alive to the mitigating factors.

[13] Considering the above principles this court cannot find that the court *a quo* in sentencing the appellant misdirected itself; committed any material irregularity; overemphasized the deterrent aspect or seriousness of the crime at the expense of the accused. The sentence imposed by the trial court does not induce a sense of shock and furthermore there is no disparity from the sentence that this court would impose in similar circumstances. This court is in agreement with the Respondent that there is no prospect of success on appeal against sentence.

[14] In the result:

1. The Respondent's point *in limine* is upheld;
2. The appeal is struck from the roll and considered finalised.

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[16] *Iiyambo v State* (CA 68/2012) [2013] NAHCMD 42 (8 February 2013) at par [6]; *Ndaumbwa v S* (CC 11/2010) [2017] NAHCNLD 73 (31 July 2017) at par [10].
[17] *Paulus Nepembe v The State* Unreported Case no 114/2003 (20.01.2005*); S v Pillay* 1977 (4) SA 531 (A) at 534H – 535G
[18] See *S v Ashimbanga* 2014 (1) NR 242 (HC) at page 246, par 22.

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E. E. KESSLAU
ACTING JUDGE

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J. T. SALIONGA
JUDGE

APPEARANCES

APPELLANT	Mr. J. T. Nghiyalwa (In Person) Oluno Correctional Facility, Ondangwa
RESPONDENT	Ms. S. Petrus Of the Office of the Prosecutor-General, Oshakati