

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA
APPEAL JUDGMENT
PRACTICE DIRECTION 61



MAIN DIVISION, WINDHOEK

Case Title: <i>Nakale Jesaya Shihungileni v The State</i>	Case No: HC-NLD-CRI-APP-CAL-2022/00029
	Division of Court: Northern Local Division
Heard before: Honourable Mr Justice Munsu <i>et</i> Honourable Mr Justice Kessler	Heard on: 10 March 2023
	Delivered on: 12 May 2023
Neutral citation: <i>Shihungileni v S</i> (HC-NLD-CRI-APP-CAL-2022/00029) [2023] NAHCNLD 43 (12 May 2023)	
IT IS ORDERED THAT: 1. The application for condonation is refused. 2. The appeal is struck from the roll and considered finalised.	
Reasons for decision:	
MUNSU J (KESSLAU J concurring): <u>Introduction</u> [1] The appellant was convicted in the Magistrates' Court of Outapi on three counts of	

attempted murder and one count of assault with intent to do grievous bodily harm. During proceedings in the court *a quo*, the appellant was arraigned alongside two others, who are not appellants in this matter.

[2] The three counts of attempted murder were taken together for purposes of sentence and the appellant was sentenced to five years imprisonment of which one year was suspended on usual conditions. As for the count of assault with intent to do grievous bodily harm, the appellant was sentenced to two years imprisonment of which one year was suspended on usual conditions.

[3] The appeal lies only against sentence. Furthermore, at the hearing of the appeal, the appellant made it clear that the appeal is only in respect of the counts of attempted murder (count 1, 2 and 3) which were taken together for purposes of sentence. Accordingly, our attention is restricted only to the abovementioned counts.

[4] The appellant, a self-actor, was sentenced on 04 December 2020. His notice of appeal is dated 12 March 2021. However, it is not clear when the said notice was served on the Clerk of the Magistrates' Court as it bears no date stamp. That notwithstanding, the appellant acknowledges that his appeal was filed out of time. To this end, he filed a condonation application.

Condonation application

[5] In *Kohler v S*¹ at para 5, Liebenberg J had the following to say:

'...In addition, the courts have elucidated certain principles as regards condonation applications which, *inter alia*, are the following:

- a) Where the explanation proffered is not reasonable but an applicant enjoys prospects of success on appeal, a court *may* condone the non-compliance.²
- b) Where the applicant's non-compliance is found to be a flagrant disregard of the rules of court, a court need *not* consider the prospects of success on appeal.
- c) If prospects of success on appeal are non-existent, it matters not whether there is a reasonable explanation or not, the application will be *refused*³.

¹ *Kohler v S* (CC 21/2017) [2020] NAHCMD 96 (16 March 2020).

² *S v Nakale* 2011 (2) NR 599 (SC) at page 603.

³ *S v Gowaseb* 2019 (1) NR 110 (HC) at page 112.

[6] In his application for condonation, the appellant attributes the delay in noting the appeal to lack of awareness on how to launch an appeal. He states that he was only assisted by his fellow inmates after the stipulated 14 day period had lapsed.⁴

[7] In *Elton Jossop v The State*⁵ the court held that an application for condonation must be lodged without delay, and must provide a full, detailed and accurate explanation for the entire period of the delay including the timing of the application for condonation. I find that this requirement was not satisfied by the appellant. He did not provide an explanation for the entire period of the delay.

[8] Having considered the appellant's explanation, I now proceed to address the second leg of the inquiry, which is whether the appellant's case enjoys any prospects of success.

[9] The appellant's ground of appeal is that 'the learned Magistrate erred by over-emphasising the seriousness of the crimes and did not exercise his discretion judicially by considering the cumulative effect of the sentences to a first offender'.

[10] In his written heads of argument, the appellant submits that the sentence of five years is shockingly inappropriate and induces a sense of shock; that there is a striking disparity between the sentence imposed and that which the appeal court would have imposed given the principle of uniformity in sentencing similar offences on more or less the same facts; and that the court *a quo* misdirected itself by over emphasising the seriousness of the offence at the expense of the personal circumstances of the appellant. He concludes by submitting that the sentence imposed is excessive and that the court should have imposed a lesser sentence.

[11] In his oral submissions, the appellant argued that the trial Magistrate paid lip service to the fact that he was a first offender; that he was only 19 years at the time of his arrest and the fact that he is an orphan.

[12] For this court to interfere with the sentence imposed in the matter, it must be satisfied that the trial court did not exercise its discretion judicially. It is trite that punishment falls within the ambit of the discretion of the trial court and that a court of appeal should not

⁴ Rule 67 of the Rules of the Magistrates Court.

⁵ *Elton Jossop v The State* Case No. SA 44/2016 (unreported) delivered on 30 August 2017.

readily interfere unless there is good cause; and there will be good cause where the sentence is vitiated by irregularity or misdirection or, where the sentence imposed is disturbingly inappropriate and 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.⁶

[13] In his reasons on sentence, the learned Magistrate considered the fact that the appellant is an orphan; that the accused were first offenders and they asked for an opportunity to go back to society; that the offences were committed at the same time; and further that the accused were youthful offenders. On the other hand, the learned Magistrate noted that the accused were convicted of serious offences and that the victims of crime deserve justice. The Magistrate further noted that the accused did not show remorse.

[14] It is evident from the above that the trial Magistrate considered the triad of factors, namely, the accused's circumstances, the offences committed, and the interests of society.⁷

[15] The appellant was convicted of serious offences. The complainants were assaulted with life threatening objects such as pangas, knives, and sticks. The complaints in all three counts suffered major injuries ranging from fractured skull to haemothorax, multiple lacerations on the face and scalp, and a stab wound on the chest etc.

[16] The appellant is pleading for a reduction in the sentence imposed, emphasising his personal circumstances. The appellant does not seem to appreciate that his personal circumstances are but one of the factors a sentencing court considers.

[17] In my opinion the appellant was fortunate to receive the kind of sentence imposed in this matter, which appears to be lenient given the magnitude of the offences committed. Consequently, there is no basis for this court to interfere with the sentence imposed by the court *a quo*. In this regard there are no reasonable prospects of success on appeal.

[18] In the result, it is ordered that:

⁶ *S v Tjiho* 1991 NR 361 (HC) at 366A-C; *Shetu v The State* (HC-NLD-CRI-APP-CAL-2020/00057) [2021] NAHCNLD 34 (1 April 2021); *S v Ndikwetepo and Others* 1993 NR 319 (SC) at 322F-J; *S v van Wyk* 1993 NR 426 (HC) at 447G-448B.

⁷ See *S v Zinn* 1969 (2) SA 537 (A).

1. The application for condonation is refused.
2. The appeal is struck from the roll and considered finalised.

Judge's signature:	Note to the parties:
Munsu J	None
Kessler J	None
Counsel:	
Appellant	Respondent
NK Shihungileni In person) Evaristus Shikongo Correctional Facility Tsumeb	V Shigwedha Office of the Prosecutor-General Oshakati