

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case no.: HC-NLD-CRI-APP-CAL 2022/00027

In the matter between:

SHIWALA PETRUS

1ST APPELLANT

FLAVIANO HASHOVALI

2ND APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Petrus v S* (HC-NLD-CRI-APP-CAL-2022/00027) [2023]
NAHCNLD 73 (04 August 2023)

Coram: SALIONGA, J et KESSLAU J

Heard: 16 June 2023

Delivered: 04 August 2023

Reasons: 07 August 2023

Flynote: Criminal Procedure —Criminal Appeal—sentence — contravening s 4 (1) (b) read with sections 1, 4, (2) (b), 8, 9, 12, 13 and 14 namely- dealing in any controlled wildlife product—no misdirection—no merits—appeal dismissed.

Summary: Both appellants were charged with a contravening s 4 (1) (b) read with sections 1, 4, (2) (b), 8, 9, 12, 13 and 14 namely- dealing in any controlled wildlife product of which dealing is unlawful in terms of Schedule 1 of the Controlled Wildlife Products and Trade Act, No 9 of 2008 as amended by Act 6 of 2017. They pleaded guilty and were convicted on their own pleas of guilty. Each appellant was sentenced to 5 years imprisonment without an option of a fine. This appeal lies against the sentence. The notice of appeal was filed within the stipulated time. The court considered the merits of the case and found no misdirection or irregularities. The appeal against sentence is dismissed.

ORDER

1. Both appellants' appeal against sentence is dismissed.

JUDGMENT

SALIONGA, J. (KESSLAU J concurring):

[1] Both appellants appeared in the Ondangwa Magistrates' Court on the 14 June 2022, charged with a contravening s 4 (1) (b) read with sections 1, 4, (2) (b), 8, 9, 12, 13 and 14 namely - dealing in any controlled wildlife product of which dealing is unlawful in terms of Schedule 1 of the Controlled Wildlife Products and Trade Act, No 9 of 2008 as amended by Act 6 of 2017. On the same date, the 14th June 2023 each accused was sentenced to 5 years imprisonment without an option of a fine. The second Appellant was further charged, convicted and sentence for contravening s 34 (3) of the Immigration Control Act 7/1993 - found in Namibia without a valid permit and failing to report to an immigration officer and is not appealing against this conviction and sentence.

[2] Dissatisfied with the sentences of 5 years imprisonment imposed on each one of them on count one, both appellants filed an appeal against the sentences.

[3] At the trial Mr Ngula represented the appellants but in this appeal Ms Amupolo is representing them. Ms Petrus appears for the respondent.

[4] The appeal is based on the following two grounds:

1. The learned magistrate erred in fact and in law in that the sentence of 5 years imprisonment without the option of fine on each appellant is strikingly and shockingly inappropriate and in contrast with the judicial precedence of a similar nature.
2. The learned Magistrate erred in the facts and/or in law, by not placing sufficient weight on the appellants' mitigating and personal circumstances and in contrast with judicial precedence of a similar nature.

[5] Counsel for the appellant in her oral submission stood by her written heads of argument. She submitted that in line with the judgment such as *Mberirua v The State*¹ the sentence is inappropriate. Further that if the principle of uniformity is followed, the sentences in similar cases normally fall within the two years range. She submitted that the appellants' sentences given by the Court a quo are not in line and does not fulfil the above stated requirements thereby justifies the interference by this honourable Court in this appeal.

[6] Counsel went on submitting that the lip-service paid to the personal circumstances of the appellants is evidenced by the fact that there was no individuality in sentencing as both appellants were brushed with the same proverbial brush and merely sentenced to a term of direct imprisonment of 5 years. According to her the learned magistrate indicated in her judgment that there was no submissions under oath. In the same vein there was also no basis for which the State submitted that the appellants cannot afford a fine as

¹ *Mberirua v State* (HC-MD-CRI-APP-CAL-2018/00077) [2019] NAHCMD166 (24 May 2019).

there was no cross-examination as the learned magistrate pointed out. Counsel in referring the court to *Mukwangu v S*² was of the view that in the absence of special aggravating circumstances and remarkable divergent personal circumstances, the sentencing court is constrained to pass similar or not widely divergent sentence in similar matters.

[7] Counsel for the appellants also submitted that the magistrate played down the personal circumstances of the accused by remarking that his dependants were not his children. She contended that in doing that the personal circumstances of the appellants were underemphasized and the seriousness of the crime was overemphasised without considering the time spent in custody. That because both appellants did not lead evidence in aggravation, there was no basis for the magistrate to conclude that appellants could not afford a fine. In this regard, the magistrate had a duty to ensure that the court has all the factors that need to be considered in determining an appropriate sentence.

[8] On the other hand, Ms Petrus, counsel for the respondent correctly in our view submitted that in the *Mberirua's case*³ the appellants were charged and convicted of contravening section 4 (1) (a) of the Act which is possession of any controlled wildlife product and were not convicted of dealing. According to Ms Petrus the case of *Mberirua* cited by counsel for the appellants does not find its application in this case. The elements of the offence and the penalty clause are different, a reason why the two cases are distinguishable.

[9] Counsel for the respondent went on refuting the appellants' contention, that a sentence of 5 years imprisonment for each appellant without an option of a fine is shocking, startling or disturbingly inappropriate. The sentence does not induce a sense of shock neither, considering the seriousness of the offence and the penalty clause. She submitted that the trial court did consider the aggravating circumstances of the offence, personal circumstances and mitigating factors of both appellants in arriving at a suitable sentence.

² *Mukwangu v S* (HC-MD-CRI-APP-CAL-2022/00042) [2022] NAHCMD 605 (7 November 2022).

³ *Supra*.

[10] In the present case, we found it prudent before we consider the appeal against sentence to comment on the appellants' plea statements. They both pleaded guilty to the charge and made statements in terms of section 112(2) of the Criminal Procedure Act.⁴ They admitted having unlawfully and illegally dealt with a controlled wildlife product on the date in question, the possession of which is unlawful in terms of the schedule 1 to Controlled Wildlife Act⁵. Besides them admitting the bare elements of the charge, no further information was placed before the court pertaining the circumstances under which the offence was committed. (Emphasis added)

[11] Section 4 (1) [b] of the Act⁶ provides that 'Any person who deals in any controlled wildlife product if the dealing therein is unlawful in terms of Schedule 1, commits an offence.' The word dealing in terms of the Act refers to 'sell, buy, offer or expose for sale or purchase or offer as valuable consideration.' It is not clear from the appellants' statements in Court how they actually dealt with the pangolin.

[12] This Court agrees and endorses the remarks made in *S v Moya*⁷ on the duty of legal practitioners when required to draw up statements under s 112 (2) where the following remarks were made:

'Attorneys and counsel who prepare statements such as these should acquaint themselves fully with the law on this score and not leave it to others to find the deficiencies, if there are any. In particular, it should not be left to a busy magistrate to have to do so and, later on, to the High Court.'

[13] It is common cause that the defence in principle may submit a written statement as provided for in s 112 (2) of the Act. However such statement should not be simply a regurgitation of what appears in the charge-sheet, for that would be insufficient.⁸ A section 112 (2) statement should set out the factual basis supporting a plea of guilty (See *Director of Public Prosecutions, Gauteng Division, Pretoria v Hamisi* 2018 (2) SACR 230 (SCA)). Notwithstanding the aforesaid, the trial court in the instant case convicted the

⁴ Criminal Procedure Act, Act 51 of 1977.

⁵ Control Wildlife Products and Trade 9 of 2008 as amended by Act 6 of 2017.

⁶ Supra footnote 5.

⁷ *S v Moya* 2004 (2) SACR 257 (WLD) at 261 b-c.

⁸ *S v B* 1991 (1) SACR 405 (NPD) at 406 b-c.

appellants, proceeded to hear oral submissions made in mitigation by their legal representative; as well as the prosecutor's submissions in aggravation.

[14] This Court is mindful that this is an appeal against sentence only. However in our view it would have been important for counsel for the accused to place enough facts or circumstances surrounding the commission of the offence together with sufficient mitigation factors on record, not only for the determination of the appellants' guilty, but for sentencing purposes. These facts would have assisted the presiding officer in arriving at a proper and appropriate sentences. Without those facts having been placed before the court *a quo*, it cannot be said that the magistrate misdirected herself, especially in this case after she has sentenced the appellants to direct imprisonment.

[15] In deciding an appeal against sentence, the court hearing an appeal should be guided by the principles as stated in *S v Ndikwetepo* and others 1993 NR 319 (SC):

'It is indeed a settled rule that punishment falls within the discretion of the court of trial. As long as that discretion is judicially, properly or reasonable exercised, an appellant court ought not to interfere with the sentence imposed. The discretion may be said not to have been judicially or properly exercised if the sentence is vitiated by an irregularity or misdirection.'

[16] The magistrate in her judgment took into account the triad factors, namely the offender, the crime, societal interest and the fact that the court always sprinkles a measure of mercy depending on the circumstances. She then dealt with the mitigating factors and found nothing outstanding. She correctly mentioned/or stated that from the first appellant's submission before court it did not come out clearly if the said children were the appellant's or not but she had taken into account that the appellant had three minor children. The same consideration was given to the second appellant. The magistrate also took into account that the crime was serious, prevalent and that there is a reason why wildlife products are being controlled which reason she stated in her judgment.

[17] Given the seriousness of the offence the appellants were convicted of and the sloppiness of the legal representative's failure to place all facts and circumstances surrounding the commission of this offence, as well as sufficient mitigating factors before court, it is unfair and incorrect to lay blame on the magistrate. The magistrate in all fairness properly considered all the appellants' mitigating and personal circumstances placed before her and weighed same with the aggravating circumstances and judicial precedence of similar nature in arriving at appropriate sentences.

[18] The Court is alive that sentencing falls entirely in the discretion of the trial court. An appeal court can only interfere with the sentence of a lower court if there was a material misdirection or if the sentence imposed by the trial court was so inappropriate. In this appeal, we found no misdirection nor was the sentence imposed shockingly, startlingly or disturbingly inappropriate in the circumstances. The appeal against sentence has to fail.

[19] Consequently, the following order is made:

1. Both appellants' appeal against sentence is dismissed.

J.T. SALIONGA
Judge

I concur.

E.E. KESSLAU
Judge

APPEARANCES

APPELLANT

M Amupolo
Of Jacobs Amupolo Lawyers & Conveyancers

RESPONDENT

V T Shigwedha
Of the Office of the Prosecutor-General