REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION

APPEAL JUDGMENT

Case No: HC- MD-CRI-APP-CAL-2021/00033

In the matter between:

REINHARD UIRAB **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Uirab v S (*HC-MD-HCMD-CRI-APP-CAL-2021/00033) [2021] NAHCMD 95 (7 March 2022)

Coram: D USIKU, J, (CLAASEN J concurring)
Heard: **4 February 2022**
Delivered: **7 March 2022**

Flynote: Appeal – Sentencing – Robbery with aggravating circumstances — Application for condonation – Previous convictions – Condonation application dismissed. Criminal procedure – Appeal against sentence – Noting of appeal out of statutory time limit – Applicant should apply to court for condonation of late noting of appeal – Appellant must give satisfactory explanation for delay – In determining the condonation application court should take into account the explanation in the supporting

affidavit for the delay and prospects of success on appeal – In instant case appellant has failed to give satisfactory explanation for the delay and there are no prospects of success on appeal – Court finding that appellant has not shown that the proceedings on sentence was vitiated by an irregularity or misdirection on the part of learned magistrate – Court also found that the sentence is not so manifestly excessive that it induces a sense of shock in the mind of the court – Court concluded that upon the authorities the court was not entitled to interfere with the sentence imposed.

Summary: The appellant pleaded guilty on a count of robbery with aggravating circumstances on 20 November 2019 and was sentenced to 14 years direct imprisonment on the same day. The appellant is appealing against the sentence only. The appellant filed his notice to appeal on 4 February 2021 only, almost 1 year and 3 months out of time.

Appellant filed a supporting affidavit with his notice to appeal explaining his reasons for late filing that he did not know the procedure of writing and filing an appeal. The appellant further mentions that the delay was caused by an inmate who was asking for the record in order to see whether there are prospects of success. The appellant's explanations however end there and fail to raise any reasonable and acceptable explanation for his non-compliance.

Held that appellant has failed to give satisfactory explanation for the delay and there are no prospects of success on appeal.

Held the application for condonation is dismissed.

ORDER

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1. The respondent's point *in limine* is upheld.
2. The application for condonation is dismissed.
3. The matter is considered finalised and is removed from the roll.

JUDGMENT

USIKU J, (CLAASEN J, concurring):

[1] The appellant was charged before the Magistrates' Court, Otjiwarongo. On 20 November 2019 he pleaded guilty to a charge of robbery with aggravating circumstances and was sentenced to 14 years imprisonment. He proceeded to file his notice of appeal on 4 February 2021 accompanied by his supporting affidavit outlining the reasons for delay.

[2] The appellant is represented by Mr. Andreas whilst Mr. Gaweseb appeared for the respondent.

[3] The appeal lies against sentence only and the grounds of appeal were listed as:

'2.1 The learned magistrate erred by overemphasizing the seriousness of the crimes and did not judicially exercise his discretion;

2.2 The learned magistrate imposed a sentence which is shockingly disproportionate to the offence and excessively harsh and induces a sense of shock. Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy;

2.3 The sentence imposed on the applicant is excessively harsh, shockingly inhumane and induces a sense of despair'.

[4] Mr. Gaweseb raised a point *in limine* in his heads of argument that the appeal was filed out of time. As such the parties argued this point, which included submissions on both legs. Mr. Gaweseb submitted that the notice of appeal was filed out of time; and in the application for condonation, the appellant has not given a satisfactory explanation for the delay in noting the appeal. Secondly that there are no prospects of success on appeal as the sentence was not shocking or startlingly inappropriate and it is consistent with similar matters. In support of his arguments he cited the cases of *Daniel Herero and another v The State CA 59/2010*, *Abraham Ruhumba v The State*[1] and *Iyambo v The State*[2].

[1] CA 103/2003.

[2] Unreported High Court case, CA 165/2008.

[5] In his reply to the point *in limine* the appellant stated that he did not have knowledge on how to draft a notice of appeal and thus needed the assistance of a co-inmate. The appellant in his heads of argument regarded this reason to be a reasonable and acceptable explanation for his non-compliance in his supporting affidavit attached to the application for condonation.

[6] For an application of this kind to succeed, the appellant must under oath, give a reasonable and acceptable explanation for the cause of the delay and satisfy the court that he has reasonable prospect of success on appeal. These requirements remain the same for any litigant, regardless of whether you are a self-actor or legally represented. The explanation advanced for the delay in filing is not acceptable.

[7] In the matter of *S v Nakale*[3] at para [7] Shivute CJ while dealing with s 309 of the Criminal Procedure Act, 51 of 1977 said the following:

> '… generally, a court may condone such a late filing and if an applicant provides an acceptable explanation for such late filing and if there is reasonable prospect of success on appeal.'

I am inclined to accept the views expressed by Shivute, CJ in *S v Nakale*[4], which I will adopt and apply to this matter. In any case, the appellant has not indicated clearly that he has reasonable prospects of success on appeal and the basis thereof, *S v Nowaseb.*[5]

[8] It is trite that an appellate court may interfere with the sentence imposed by the trial court only if 'the sentence is vitiated by an irregularity or misdirection' or if 'the sentence is so manifestly excessive that it induces a sense of shock in the mind of the appellate court'.[6]

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[3] *S v Nakale* (CR 3 /2014) [2014] NAHCMD 9 (22 January 2014).
[4] Supra.
[5] 2007 (2) NR 640.
[6] *S v Simon* 2007 (2) NR 500 at 518A-C.

[9] In respect of his contention that most of the stolen property was recovered and that the appellant did not benefit from the commission of the offence. I find this to be irrelevant.

[10] It is trite that the courts will not interfere with a sentence imposed by a lower court if such sentencing was exercised judiciously. In *S v Tjiho*[7] it was held at 366A-B:

'This discretion is a judicial discretion and must be exercised in accordance with judicial principles. Should the trial court fail to do so, the appeal court is entitled to, not obliged to, interfere with the sentence. Where justice requires it, appeal courts will interfere, but short of this, courts of appeal are careful not to erode the discretion accorded to the trial court as such erosion could undermine the administration of justice'

[11] The aggravating features of this serious crime would in my view justify a custodial sentence of some duration especially taking into consideration that the accused has a string of previous convictions of a similar nature. Deterrence is strongly encouraged in this instance. I agree with what was stated in *S v Immanuel Paulus*[8] where this court in turn cited with approval remarks made in the context of sentencing of those convicted of robbery by De Wet CJ in *S v Myute* and *Others*; *S v Baby.*[9]. De Wet CJ rightly stressed the severity and seriousness of the crime of robbery in the following way:

'Magistrates should never lose sight of the fact that robbery is a most serious crime. The offence consists of the two elements of violence and dishonesty. Normally an individual can avoid situations which lead to violence and the danger of his being assaulted by the taking of the necessary precautionary measures. Similarly he can take steps to guard against his property being stolen. It is a different matter when it comes to robbery. The victim cannot take precautions against robbery. In his day to day living he visits friends, goes to work and goes shopping. This is usually when robbers strike. Robbers often roam the townships in gangs, attacking innocent people, depriving them of their property and almost invariably injuring the victims, sometimes seriously. The persons robbed are more often than not women or elderly people who cannot defend themselves. It must also be remembered that robbery is always a deliberately planned crime. The legislature regards robbery in such a serious light that, when in the course of a robbery, a firearm or any other dangerous weapon is used, or where grievous

[7] *S v Tjiho* 1991 NR 361 (HC) (1992 (1) SACR 693).
[8] Case No. CA 114/1998, unreported 28/3/2000.
[9] 1985 (2) SA 61 (KSC).

bodily harm is inflicted or threatened, such robbery is termed robbery with aggravating circumstances (see S 1(1) (i) (b) of Act 51 of 1977).'

[12] In the matter before court, it must be noted that the victim was a member of the elderly community thus, vulnerable. Had assistance not been provided to him immediately after the robbery, he would surely have succumbed to his wounds as he had been attacked on the head with a knife and glass object. The matter could easily have been one of murder versus that of robbery with aggravating circumstances.

[13] Therefore, after having carefully considered the factors in mitigation and in aggravation of sentence, I find that there was no misdirection by the Magistrate, as a deterrent sentence was called for under the circumstances of this particular case. That being so, I come to the conclusion that there are no prospects of success on appeal.

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

1. The respondent's point *in limine* is upheld.
2. The application for condonation is dismissed.
3. The matter is considered finalised and is removed from the roll.

D N USIKU

Judge

C M CLAASEN

Judge

APPEARANCES

APPELLANT	MR. ANDREAS Andreas-Hamunyela Legal Practitioners Scripture Union Building Erf 7696 Ara Street Dorado Valley Windhoek Namibia
RESPONDENT	MR. GAWESEB Of the Office of the Prosecutor-General, Windhoek Namibia