REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

APPEAL JUDGMENT

Case Title: *Nakale Abraham Dumingu v The State*	**Case No:** HC-NLD-CRI-APP-CAL-2022/00011
	Division of Court: Northern Local Division
Heard before: Honourable Lady Justice Salionga, J *et* Honourable Mr Justice Kesslau J	**Heard on:** 19 January 2024 **Delivered on:** 12 February 2024
Neutral citation: *Dumingu v S* (HC-NLD-CRI-APP-CAL-2022/00011) [2024] NAHCNLD 15 (12 February 2024)	
The order: 1. The Respondent's point *in limine* regarding the late filing of the notice of appeal is upheld in the result the application for condonation is refused. 2. The appeal is struck from the roll and considered finalized.	
Reasons for decision:	
KESSLAU J (SALIONGA J concurring) <u>Introduction</u>	

[1] The Appellant, who was legally represented, was arraigned in the Regional Court sitting at Outapi on a charge of contravening section 2(1)(a) of the Combating of Rape Act 8 of 2000: Rape (read with the provisions of section 94 of the Criminal Procedure Act 51 of 1977(CPA) alleging that the offence was committed on divers occasions.

[2] The Appellant initially pleaded not guilty however after making various admissions in terms of s 220 of the CPA with the assistance of his then legal representative was convicted of attempted rape on diverse occasions.[1] On 27 January 2021 he was sentenced to 15 years' imprisonment.

[3] Almost a year later the Appellant filed a notice of appeal simultaneously with an application for condonation for the late filing. This appeal lies against sentence only.

[4] The Appellants' grounds of appeal are as follows:

- The learned Magistrate imposed a sentence which is shockingly disproportionate to the offense and excessively harsh and induces a sense of shock. Punishment should fit the criminal as well as the crime, be fair to the society and be blended with a measure of mercy according to the circumstances.
- The learned Magistrate over-emphasised the seriousness of the offense and the deterrent effect of the sentence and in doing so the court failed to individualize the sentencing of the Appellant and in the process gave little to no weight to the mitigating factors presented by the Appellant.
- The learned Magistrate failed to look into the facts that the Appellant had spent almost four years in custody and he indeed pleaded guilty to the offense after he realized that what he did is wrong.
- The learned Magistrate did not suspend any portion of the sentence imposed notwithstanding that it is a severe sentence.

Point *in limine*

[1] In terms of s 18 of the Riotous Assemblies Act 17 of 1956.

[6] The Respondent *in limine* raised the point that the notice of appeal was filed contrary to the provisions of Rule 67(1) of the Magistrates' court rules in that it was filed outside the 14 days period as required. It was submitted that it failed to meet the requirements for condonation.

[7] In considering the application for the condonation of the late filing, the requirements are twofold. It consists firstly in deciding on the reasonableness of the explanation for the late filing and secondly the prospects of success on the merits. The circumstances of each case should be taken into account and to grant or refuse condonation falls entirely within the discretion of the Court.[2]

The Appellant's reason for late filing

[8] The Appellant's reason for the late filing is that he does not have any knowledge of the English language and that he could only manage to find assistance from a co-inmate approximately a year after the finalization of the case. It was submitted by the Respondent that the reason provided is unreasonable in that the Appellant did not attempt to get assistance from the Clerk of Court, his initial counsel or the officers at the Correctional Facility. This court is in agreement with that submission and find the delay to be unreasonable. Be that as it may, counsel were invited to address the court on the merits of the appeal and we will therefore proceed to consider the second requirement of condonation being the prospects of success.

Prospects of success

[9] The first ground of appeal in essence is that the Magistrate imposed a sentence which is shockingly disproportionate to the offense, excessively harsh and induces a sense of shock.

[2] Section 309(2) of the Criminal Procedure Act 51 of 1977, *S v Nakapela and Another* 1997 NR 184 (HC) p185 par G-H.

[10] It is well settled in our law that punishment falls predominately within the realm and discretion of the trial court and may only be interfered with on appeal when is it evident that the sentencing court did not exercise its discretion judiciously in that the sentence is either vitiated by an irregularity or misdirection, or that it is disturbingly inappropriate and induces a sense of shock. Furthermore a court of appeal would be generally reluctant to erode the trial Court's discretion which could undermine the administration of justice.[3]

[11] From the record of proceedings in the court *a quo* it is clear that the Magistrate was alive to all the factors and objectives which must be taken into account at the stage of sentencing. There is nothing showing that the court a quo misdirected itself either on the facts or the law, or that an irregularity occurred.

[12] The facts of this matter is that the appellant, who was 21 years old at the time, was convicted of attempting to rape a 5 year old girl on various occasions. A medical report received into evidence indicated that the victim sustained an injury.[4] The Appellant was employed by the family of the victim and as such had access to her. The magistrate imposed the minimum prescribed sentence as per the applicable penalty clause. When considering the sentences imposed in similar cases, this court finds that the sentence was not shockingly inappropriate.[5] The first ground is without merit and therefor has no prospects of success on appeal.

[13] The second ground of appeal is that the Magistrate over-emphasised the seriousness of the offense and the deterrent effect of the sentence, failed to individualize the sentencing of the Appellant and gave little to no weight to the mitigating factors presented by the Appellant. It was submitted by counsel for the Appellant that the Magistrate should have found substantial and compelling circumstances in the mitigating factors placed before him and therefore should have deviated from the minimum

[3] *S v Tjiho* 1991 NR 361 (HC).
[4] See page 36 to 38 of the Appeal record.
[5] *S v Haufiku* (SA 6-2021) [2023] NASC (21 July 2023); *S v Kaanjuka* 2005 NR 201 (HC); *S v Libongani* 2015 (2) NR 555 (SC).

prescribed sentence of 15 years imprisonment.

[14] The personal circumstances of the Appellant was placed on record before sentence by his then legal representative and was considered by the Magistrate during sentencing. The Magistrate also invited counsel to address him on the presence of compelling and substantial circumstances. Thereafter the age of the Appellant, his family history and time spent trial awaiting was argued to be sufficient for the Magistrate to find compelling reason to deviate from the prescribed minimum sentence.

[15] The court *a quo*, in referring to the fact that the offence was committed on diverse occasions and against a vulnerable person, was entitled to emphasise any of the sentencing factors or objectives of punishment at the expense of the others.[6] The Magistrate cannot be faulted for not finding substantial and compelling circumstances in the mitigating facts placed before him. The second ground is without merit and therefor has no prospects of success on appeal.

[16] The third ground of appeal is that the Magistrate failed to consider that the Appellant had spent almost four years in custody awaiting trial, furthermore that the Appellant pleaded guilty to the offense.

[17] Firstly it is factually incorrect to state that the Appellant pleaded guilty as his initial plea was one of not guilty. The record reflect that it was only on the trial date that he made the admissions that led to his conviction. Secondly, the facts that he made these admissions and the time spent trial-awaiting, were factors explicitly mentioned and considered by the Magistrate during sentencing. We find the third ground of appeal without merit and does not have prospects of success on appeal.

[18] The fourth ground of appeal is that the learned Magistrate failed to suspend any portion of the sentence imposed.

[6] *S v Van Wyk* 1993 NR 426 SC.

[19] Section 3(4) of the Combating of Rape Act 8 of 2000 states that:

'If a minimum sentence prescribed in subsection (1) is applicable in respect of a convicted person, the convicted person shall, notwithstanding anything to the contrary in any other law contained, not be dealt with under section 297(4) of the Criminal Procedure Act, 1977 (Act 51 of 1977): Provided that, if the sentence imposed upon the convicted person exceeds such minimum sentence, the convicted person may be so dealt with in regard to that part of the sentence that is in excess of such minimum sentence.'

[20] The Magistrate imposed the minimum prescribed sentence and, once he determined the absence of substantial and compelling circumstances, was not entitled to suspend any part thereof. Equally this ground of appeal is without merit and has no prospects of success on appeal.

[21] In the result and after consideration of the above, the following orders are made:

1. The Respondent's point *in limine* regarding the late filing of the notice of appeal is upheld in the result the application for condonation is refused.
2. The appeal is struck from the roll and considered finalized.

Judge(s) signature:	**Comments:**
KESSLAU J	None
SALIONGA J	None
Counsel:	
APPELLANT	**RESPONDENT**
S O Edegware On instructions of the Directorate of Legal Aid	S F Petrus Of the Office of the Prosecutor-General, Oshakati