



NOT REPORTABLE

CASE NO: CA 151/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

HENDRIK BURGER

APPELLANT

and

THE STATE

RESPONDENT

CORAM: HOFF, J *et* MANYARARA, AJ

Heard on: 03 October 2008

Delivered on: 03 October 2008 (*Ex tempore*)

Reasons on: 14 March 2012

APPEAL JUDGMENT

HOFF, J: [1] The appellant in this matter was convicted in the magistrate's court Tsumeb of the crime of fraud and sentenced to 3 years imprisonment of which one year imprisonment was suspended for a period of 5 years on condition that the accused is not convicted of the crime of fraud committed during the period of suspension.

[2] The appeal lies against the sentence only. The appellant was represented by Adv. L Hamutenya.

[3] Two points *in limine* were raised by Adv. Truter who appeared on behalf of the respondent.

[4] The first point *in limine* is that the grounds of appeal were not set out clearly and specifically in the notice of appeal. The notice of appeal refers to a number of issues the magistrate ostensibly did not take into account e.g. that the accused was a first offender, that the amount involved was only N\$600.00, that the appellant was married and was self-employed and the father of one minor child. I must however add that the record reflects that the appellant had informed the Court that he was unemployed.

It was further stated in the grounds of appeal that the magistrate over-emphasised the seriousness of the offence and the interests of society and that the magistrate erred in taking into account statistics regarding the prevalence of the offence without affording the appellant an opportunity to address the Court on this issue.

The record does not support the contention that the magistrate took into account statistics regarding the offence of fraud into consideration.

It was submitted that the grounds of appeal were vague and misleading and that the appellant failed to mention the reasons on which these grounds were based.

This Court was referred to *S v Grey van Piltius and Another* 1990 NR 35 (HC) in which it was held that grounds of appeal should not be mere conclusions drawn without setting out the reasons therefor.

In my view there is merit in this submission.

[5] The second point *in limine* relates to the question of condonation.

The appellant was sentenced on 7 February 2006. The grounds of appeal, having regard to the date stamp of the clerk of the court, was filed on 25 April 2006.

[6] In terms of Rule 67(1) of the Magistrate's Court Act, Act 32 of 1944 as amended, an appellant must file his notice of appeal within a period of 14 days after the passing of sentence. Where an accused person has failed to file the notice of appeal within the prescribed 14 day period a substantial application for the late filing of the notice of appeal must be brought. This application must be supported by a affidavit by the accused person in which he or she must set out a satisfactory and acceptable explanation why the notice of appeal was not filed in time and must show that there are reasonable prospects of success on appeal.

[7] The applicant must also be *bona fide* in such an application.

Where the applicant fails to provide an acceptable explanation or where there is no application for the condonation for the late filing of the notice of appeal, as in the present case, the appeal may be dismissed irrespective of the prospects of success on the merits of the appeal.

The appeal should be struck for this reason alone.

[8] In *S v Tjiho* 1991 NR 361 (HC) at 366 A – B Levi J stated that a court of appeal is entitled to interfere with a sentence if:

- (i) the trial court misdirected itself on the facts or on the law;
- (ii) an irregularity which was material occurred during the sentencing proceedings;
- (iii) the trial court failed to take into account material facts or over-emphasized the importance of other facts;
- (iv) the sentence is startlingly inappropriate, induces a sense of shock and where there is a striking disparity between the sentence imposed by the trial court and that which would have been imposed by a court of appeal.

[9] I am of the view that there was no misdirection by the magistrate neither were there material irregularities apparent during the sentencing proceedings.

[10] In my view there were no reasonable prospects of success on appeal on the merits.

[11] These are thus the reasons why the appeal was dismissed.

HOFF, J

ON BEHALF OF THE APPELLANT:

ADV. L. HAMUTENYA

Instructed by:

DIRECTORATE OF LEGAL AID

ON BEHALF OF THE RESPONDENT:

ADV. TRUTER

Instructed by:

OFFICE OF THE PROSECUTOR GENERAL