REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX-TEMPORE JUDGMENT

Case no: CA 96/2010

In the matter between:

SALEKS DITSHABUE	**FIRST APPELLANT**
WILFRED SIRIRIKA	**SECOND APPELLANT**
AUGUSTINUS GWAI	**THIRD APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Ditshabue v State* (CA 96/2010) [2013] NAHCMD 132 (12 April 2013)

Coram: PARKER AJ and MILLER AJ
Heard: **12 April 2013**
Delivered: **12 April 2013**

Flynote: Criminal procedure – Appeal – Record incomplete – Court must decide whether despite incomplete record all the evidence is before the court for the court to make a decision on the appeal and whether appellant is prejudiced by any indistinct parts of the record.

Summary: Criminal procedure – Appeal – Record incomplete – *In casu* certain parts of the record are incomplete – Court decided that the record is comprehensible and adequate for a proper consideration of the appeal as all the relevant evidence necessary for the court to make a decision is before the court – Court found that the

indistinct parts are not such that the court could not make a sense out of the evidence that was adduced and that the appellants are not prejudiced in any way by certain parts being indistinct.

Flynote: Criminal procedure – Sentence – Appellant contending that trial court emphasized seriousness of the offence compared with the personal circumstances of appellants – Court finding that the trial cannot be faulted in doing that.

Summary: Criminal procedure – Sentence – Appellant contended that the trial court emphasized seriousness of the offence compared with the personal circumstances of the appellants – Court rejected such argument on the basis that there is no inflexible rule of law to the effect that a trial court may not emphasize one or more factors in sentencing at the expense of others – Court confirmed sentence as the sentence imposed did not induce a sense of shock in the mind of the court and the sentence is not so severe that it is unjust or unreasonable, considering the circumstances of the commission of the offence.

ORDER

The appeal against conviction and sentence is dismissed.

JUDGMENT

PARKER AJ (MILLER AJ concurring):

[1] Appellants 1, 2 and 3 appeared before the Regional Magistrates' Court, Gobabis on a charge of robbery. Additionally, appellants 1 and 3 were also charged with contravening ss 1, 38(2) and 39 of the Firearms Act 7 of 1996; that is, possession of firearm without a licence. The appellants pleaded not guilty to all the counts. They were tried and found guilty as charged. Each appellant was sentenced

to 20 years' imprisonment on 9 October 2008. They now appeal against conviction and sentence.

[2] The respondent, represented by Ms Ndlovu, raises a point *in limine* on the basis that the appellants filed their notices of appeal out of time, and there are no applications filed of record seeking condonation of the late filing of the notices. In the course of the hearing counsel informed the court that the respondent was not pursuing that point. The appellants also informed the court that they were representing themselves; and they had filed heads of argument, as did Ms Ndlovu.

[3] In the course of his submission appellant 1 informed the court that he wanted to apply for legal aid. Ms Ndlovu opposed this request at this late hour in the proceedings. In any case, the appellants had informed the registrar that they would represent themselves. At an earlier hearing in 2010 appellants had requested, and had been given, the opportunity to seek legal representation. After almost three years and there being nothing on the record to indicate to the court why appellant 1 was not successful in obtaining legal representation, we ruled that the court could not accept the appellant's request. In addition to their written submissions, the appellants and Ms Ndlovu made oral submissions. We have carefully considered the written submissions and the oral submissions, as we should.

[4] On the ground of incomplete record of the proceedings in the lower court, we are satisfied that the record of proceedings is comprehensible and adequate for a proper consideration of the appeal. (See *S v Chabedi* 2005 SACR 415(SC).) All the relevant evidence necessary for the court to make a decision on the appeal is now before the court. The indistinct parts are not such that one cannot make a sense out of the evidence that was adduced; and the appellants are not prejudiced in any way by certain parts being indistinct.

[5] We have pored over the record of proceedings, as well as the judgment of the learned regional magistrate. The only main basis why the appellants have appealed against conviction is simply this. All that the appellants say is that they were not involved in the commission of the crime and that there is nothing linking them to the crime. Having considered the record and the judgment of the learned regional

magistrate, we find that no irregularities or misdirections have been proved or are apparent on the record. In that case, as was held on *S vs Slinger* 1994 NR 9 at 10D-E, this court sitting as a court of appeal will not reject the findings of credibility by the trial court and will usually proceed on the factual basis as found by the trial court. We accept this principle as good law and so we apply it. It follows that we cannot fault the lower court for finding the appellants guilty as charged.

[6] We have considered the sentence imposed by the lower court. The ground that the lower court misdirected itself because it overemphasized the seriousness of the offence compared with the personal circumstances of the appellants has no merit. There is no inflexible rule of law to the effect that a trial court may not emphasize one or more factors in sentencing at the expense of others. A court may do so if the circumstances demand it. In any case the appellants have not given any reason why the lower court was not entitled to do so. Furthermore, it is trite that sentencing is primarily within the discretion of the trial court. An appellate court may only interfere if the sentence imposed is so severe that it comes to the appellate court with a sense of shock or it is so severe that it is unjust or unreasonable.

[7] We have taken into account the circumstances of the commission of the offence; an offence committed with aggravating circumstances. We have looked at the sentence to see if it comes to us with a sense of shock. (See *S v Ndikwetepo and Others* 1993 NR 319 (SC).) It does not. Besides, the sentence does not appear to us to be so severe that it is unjust or unreasonable. (See *Harry de Klerk v The State* SA 18/2009 (Unreported).)

[8] Having considered these reasoning and conclusions against the grounds put forth by the appellants, we are not persuaded that the learned regional magistrate misdirected himself when he imposed the sentence of 20 years' imprisonment.

[9] In the result, the appellants' appeal against conviction and sentence is dismissed.

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C Parker

Acting Judge

P J Miller

Acting Judge

APPEARANCES

FIRST APPELLANT:	In Person.
SECOND APPELLANT:	In Person.
THIRD APPELLANT:	In Person
RESPONDENT:	E N Ndlovu Of Office of the Prosecutor-General, Windhoek.