



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

CASE NO: HC-MD-CRI-APP-CAL-2021/00098

In the matter between:

VALENCIA VAN WYK

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Van Wyk v S* (HC-MD-CRI-APP-CAL-2021/00098) [2022]
NAHCMD 341 (08 July 2022)

Coram: SHIVUTE J *et* JANUARY J

Heard: 06 June 2022

Delivered: 08 July 2022

Fly note: Criminal Procedure – Appeal - Appeal against sentence – Appellant convicted of theft of property valued at N\$21 800 – Appellant was sentence to 24 months' imprisonment – Appellant first time offender – Prevalent offence – Crime committed to buy drugs – Condonation refused - No prospect of success – No misdirection - The sentence by the court a quo is confirmed - Appeal struck from the roll.

Summary: The appellant was convicted of theft of property. Appellant was sentenced to 24 months' imprisonment. She appealed against sentence on the ground that it was shocking and induces a sense of shock. Appellant is a first time offender. She committed the crime to buy drugs. The magistrate remarked that offence is prevalent and did not consider the option of a fine. The sentence by the court a quo is confirmed. There is no prospect of success. The appeal is struck from the roll.

ORDER

1. Condonation is refused.
2. The appeal against the sentence is struck from the roll and considered finalised.

APPEAL JUDGMENT

JANUARY J (SHIVUTE J concurring)

Introduction

[1] The appellant was arraigned in the Swakopmund Magistrate's Court on a charge of theft of goods valued at N\$21 800.

[2] The appellant pleaded guilty to the charge on 11 October 2021. The accused was questioned in terms of section 112(1) (b) of the Criminal Procedure Act 51 of 1977 (the CPA), convicted and sentenced to 24 months imprisonment.

[3] This appeal is against the sentence only.

[4] The appellant is represented before this court by Mr. Andreas and Mr. Lilungwe appears on behalf of the State.

Grounds of appeal

[5] The appellant filed the notice of appeal and application for condonation with founding affidavit in person on 10 November 2021. She was sentenced on 11 October 2021. Her notice was eight days late considering the provisions of rule 67(1) of the Magistrate's Court Rules. The grounds of appeal are as follows:

1. 'The sentence imposed is shockingly inappropriate given prevailing circumstances.
2. That I omitted to tell the court or inform the court of the abuse I endured in the relationship with accused one (1) and that I too was a victim of theft, loss of income etc. caused by accused number (1).'

Points in Limine

[6] Counsel for the State raised points in limine that the notice of appeal was filed out of time and that the appellant had no prospects of success on appeal. Counsel cited rule 67(1) of the Magistrate Court which provides that a convicted person who wishes to appeal should file a notice of appeal within 14 days after the date of conviction or sentence.

[7] The appellant stated in her founding affidavit that immediately after sentence on 11 October 2021 she engaged her father to secure a private legal practitioner to lodge an appeal in the High Court. Initially the father agreed but at the beginning of November 2021 he pleaded financial constraints as he was retrenched from work at the end of October 2021. Soonest thereafter the appellant drafted in her own handwriting a notice of appeal and a condonation application. She filed same with the clerk of the magistrate court on 10 November 2021. The appellant claimed to have applied for legal assistance from the Directorate of Legal Aid in November 2021. She was provided with a legal representative on 18 January 2022.

[8] With regard to the prospects of success on the merits, the appellant stated that the learned magistrate misdirected herself or erred in law or fact as follows:

- 1) When she sentenced of the appellant without an option of a fine, despite the appellant indication that she can afford to pay a fine;
- 2) By failing to consider any other form of punishment other than custodial sentence;
- 3) By overemphasising deterrence as the purpose of punishment without regard to personal circumstances and remorse showed by the appellant;
- 4) The sentence meted out is startlingly inappropriate, induces a sense of shock and there is striking disparity between the sentence imposed and that a different court would have imposed.

[9] The appellant apologised for any inconvenience caused to this court and that it will be in the interest of justice if his amended notice of appeal is condoned. However, no amended notice of appeal was filed save the appellant initial handwritten notice of appeal as alluded to above.

[10] The respondent opposed the application for condonation of the late filing of the notice of appeal by stating that the appellant did not state what other steps he took in ensuring that the notice of appeal is filed on time. The appellant's father did not depose to a confirmatory affidavit to supplement the relevant assertion by the appellant about the father. In the circumstances, it would be advisable if a confirmatory affidavit was filed.

[11] The respondent amplified his argument with the case of *S v Nakapela*¹ where the court stated that if the appellant fails to satisfy the court on the first requirement, it is fatal to the appellant's application.

[12] The contested period of the late filing of the notice of appeal is 8 days, from 1st to 9th of November 2021. The appellant stated under oath in her affidavit at paragraph 8 that around early November 2021 she applied for legal assistance with the Directorate of Legal Aid. The administrative process that goes with such application must be taken

¹ *S v Nakapela* 1997 NR 184 (HC).

into account. The appellant has made reasonable efforts, considering her action immediately after sentencing, including the period in November 2021. This court cannot find her explanation to be reasonable. Considering that the appellant is a lay person, we granted condonation and allowed the appeal to be argued on the merits.

Prospects on merits

[13] In mitigation before sentencing, the appellant stated that she is 39 years of age, is a divorcee, has three minor children aged 14, 17 and 19 years. She can afford to pay a fine and was a first offender and pleaded guilty. The record was silent on whether the stolen goods were recovered or not.

[14] The appellant cited the trite legal position as to when an appeal court may interfere with the trial court's sentencing discretion. The limited instances enabling such interference are where the sentence imposed is shockingly inappropriate or induces a sense of shock or was such that a striking disparity existed between the sentence imposed by the trial court and one which the court of appeal have imposed had it sat in first instance.²

[15] Counsel further referred this court to *S v Ndlovu and Another*³ where MacDonald JA, said the following:

'In deciding whether a sentence is excessive, this court must be guided by the sentence sanctioned or imposed by this court in similar cases, due allowance being made, of course, for factual difference.'

In the case of *S v Skrywer*⁴ a 30 years old cashier at Lewis, was convicted of theft of N\$9 993 cash from her employer. The court of appeal altered the sentence of four years' imprisonment to two years' of which one year was suspended.

'The court held inter alia: The principle of consistency in sentencing has gained wide acceptance. Its significance lies in the fact that it strives to avert any wide divergence in the sentences imposed in similar cases and should thus appeal to any reasonable person's sense

² *S v Tjiho* 1991 NR 361(HC).

³ *S v Ndlovu and another* 1971 (1) SA 27 (R).

⁴ *S v Skrywer* 2005 NR 280 (HC).

of fairness and justice. One advantage of consistency in sentencing is that it promotes legal certainty and consistency improves respect for the judicial system.’

[16] Counsel for the appellant referred to *Tangi v S*⁵ in which the appeal court in interfering in a trial court’s sentencing discretion, having regard to the young dependents under the supervision of the appellant.

[17] The respondent submitted that the sentence imposed was appropriate in the circumstances as the reason for theft was to buy drugs and not to feed herself. He argued that there was no misdirection by the learned magistrate. Counsel cited the case of *Brockerhoff v S*⁶ where the appellant was convicted of theft of a trailer valued at N\$12 000, was convicted and sentenced to 36 months in imprisonment of which 12 months was suspended for 5 years on usual conditions.

A distinguishable aspect is that the appellant’s counsel requested a partially suspended sentence and he had a previous conviction which disqualified him from an option of a fine.

[18] Furthermore counsel cited *Hanguwo v The State*⁷ wherein trading stock, valued at N\$32 500, was stolen. The appellant was sentenced to four years imprisonment, one year suspended on usual conditions. His appeal was dismissed.

Counsel also referred to *Hamalwa v S*⁸ wherein gambling machines worth N\$70 000 were stolen. The accused was sentenced to five years imprisonment of which three years were suspended for five years on appropriate condition.

Magistrate’s reasons considered

[19] The learned magistrate considered the mitigating factors, her personal circumstances i.e. a first offender, that she has pleaded guilty and has children. It is trite that no judgement is all encompassing. The fact that something is not said or noted does not mean that it was not considered. The magistrate noted with reference to case

⁵ *Tangi v S* (CA 41/2017) [2018] NAHCNLD 25 (20 March 2018) par 11.

⁶ *Brockerhoff v State* (HC-MD-CRI-APP-CAL-2021/00015) [2021] NAHCMD 506 (29 October 2021).

⁷ *Hanguwo v The State* (CA15/2014)[2016] NAHCNLD 24 (1 April 2016).

⁸ *Hamalwa v S* HC-MD-CRI-APP-CAL-2019/00040 (2019) NAMHCMD 385 (1 October 2019).

law, *S v Angula* (no citation), that it has become the norm that even first offenders are sentenced to imprisonment. In my view, she must have considered a fine and found it to be inappropriate in the circumstances. These types of crimes are indeed prevalent, thus, a deterrence sentence was needed.

[20] It is aggravating that the accused, who seems to have been gainfully employed as a photographer, committed this crime not because of need but to buy drugs, which in itself is another crime. The punishment imposed by the court is in my view, not startlingly inappropriate, does not induce a sense of shock or was such that a striking disparity exists between the sentence imposed by the court a quo and one which this court would have imposed had it sat as a court of first instance.

[21] In the result:

1. Condonation is refused.
2. The appeal against the sentence is struck from the roll and considered finalised.

H C January
Judge

H N Shivute
Judge

APPEARANCES:

FOR THE APPELLANT: Mr Joseph Andreas
Andreas-Hamutenya Legal Practitioners
(Directorate of Legal Aid)

FOR THE RESPONDENT: Mr Basson Lilungwe
Office of the Prosecutor-General