REPUBLIC OF NAMIBIA

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CRI-APP-CAL-2022/00042

In the matter between:

DANIEL MUKWANGU **1ST APPELLANT**

JACINTO MBIMBI **2ND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mukwangu v S* (HC-MD-CRI-APP-CAL-2022/00042) [2022] NAHCMD 605 (7 November 2022)

Coram: LIEBENBERG J *et* D USIKU J

Heard: **30 September 2022**

Delivered: **7 November 2022**

Flynote: Appeal – Against conviction - Contravening s 4 (1)(*d*) read together with sections 1, 4 (2)(*b*), 8, 9, 12, 13 and 14 of the Controlled Wildlife Products and Trade Act No. 9 of 2008, as amended – Importing anything from a Controlled Wildlife Product, the import of which is unlawful in terms of Schedule 1 of the Act (count 1) and contravening section 4 (*b*)(*i*) and (*ii*) read with sections 1, 11 and 97 of the Prevention of Organized Crime Act No. 29 of 2004 – Disguising unlawful origin of property (count 2).

Legal Representation – Sequence of explanation of rights to legal representation – Sequence of no moment – Appellants duly informed of rights to legal representation.

Docket disclosure – Failure by court *a quo* to inform appellants of their right to disclosure – Constitutes irregularity – Appellants not prejudiced – Verdict not tainted by irregularity.

Appeal against sentence – Triad of factors considered – Insufficient weight accorded – Factors favourable to appellants – Pleaded guilty – First offenders – Court overemphasised seriousness of the offence and interest of society.

Fines – Applicable Guidelines – Not followed – Fines of N$ 800 000 imposed – Circumstances of appellants' inability to pay ignored – Sentences imposed startlingly inappropriate.

Summary: The appellants appeared in the Rundu Magistrate's Court on charges of contravening s 4 (1)(*d*) read together with sections 1, 4 (2)(*b*), 8, 9, 12, 13 and 14 of the Controlled Wildlife Products and Trade Act No. 9 of 2008, as amended (hereinafter referred to as 'the Act') – Importing anything from a Controlled Wildlife Product, the import of which is unlawful in terms of Schedule 1 of the Act (count 1) and contravening section 4 (b)(*i*) and (*ii*) read with sections 1, 11 and 97 of the Prevention of Organized Crime Act No. 29 of 2004 – Disguising unlawful origin of property (count 2). They pleaded guilty to the charges preferred against them and subsequent to their conviction,

were sentenced to pay a fine of N$ 400 000 or 4 (four) years' imprisonment on each count.

The appeal is founded on four grounds which amount to the court *a quo's* failure to adequately explain to the appellants their rights to legal representation; failure to explain to the appellants their rights to have copies of the docket disclosures and the charge sheet; failure to make use of an interpreter to translate the proceedings to the language which the appellants are conversant in (Portuguese); and that the sentence imposed is harsh, excessive and startlingly inappropriate and induces a sense of shock. The respondent opposes the appeal.

Held that the record of proceedings on both dates makes plain that the appellants were duly informed of their right to legal representation, with the accompanying explanation as to how to exercise these rights. The fact that the court on the second occasion changed the sequence in which these rights were explained does not derogate from the effectiveness of the explanation and neither does it appear to be 'bizarre' as, contended by the appellants.

Held that the court *a quo's* failure to inform the appellants of their right to disclosure of statements the state intends relying on to prove its case, constitutes an irregularity. The impact of the irregularity needs to be decided on the facts and circumstances of the case.

Held that despite the court *a quo's* omission to inform the unrepresented appellants of their right to disclosure, the appellants were not prejudiced as a result thereof as, from the onset, they intended pleading guilty.

Held that it is not essential to the charge in count 1 to name the country ie Namibia, neither from which country the controlled wildlife products were brought in.

Held further that the manner in which the charges were drawn sufficiently informed the appellants of the case they had to meet and that they took an informed decision when pleading guilty.

Held that there is no merit in the contention that the trial court did not take into account the personal circumstances of the appellants as complained of. However, insufficient weight was accorded to the fact that the appellants were first offenders who pleaded guilty.

Held furthermore that the court *a quo* failed to give the necessary weight to their personal circumstances which, consequently, resulted in the court over-emphasising the seriousness of the offence and the interests of society.

Held that the applicable guidelines regarding fines have not been followed by the court *a quo*.

Held further that the court *a quo* ignored the circumstances of appellants' inability to pay a fine. Hence, sentences imposed startlingly inappropriate.

ORDER

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1. The application for condonation is granted.
2. The appeal against conviction in respect of both appellants is dismissed.
3. The appeal against sentence in respect of both appellants is upheld and the sentences imposed are set aside and substituted with the following: Each accused sentenced to:-

   Count 1: Three (3) years' imprisonment.

   Count 2: Two (2) years' imprisonment.

4. In terms of s 280(2) of the Criminal Procedure Act 51 of 1977 it is ordered that one (1) year of the sentence imposed on count 2 to be served concurrently with the sentence imposed on count 1.
5. The sentences are antedated to 12 April 2022.

JUDGMENT

LIEBENBERG J (USIKU J concurring):

Introduction

[1] On 12 April 2022 the appellants appeared in the Rundu Magistrate's Court on charges of contravening s 4 (1)(*d*) read together with sections 1, 4 (2)(*b*), 8, 9, 12, 13 and 14 of the Controlled Wildlife Products and Trade Act No. 9 of 2008, as amended (hereinafter referred to as 'the Act') – Importing controlled wildlife products, to wit, one elephant tusk, the import of which is unlawful in terms of Schedule 1 of the Act (Count 1); and contravening section 4 (b)(*i*) and (*ii*) read with sections 1, 11 and 97 of the Prevention of Organised Crime Act No. 29 of 2004 – Disguising unlawful origin of property (Count 2). They pleaded guilty to the charges preferred against them and subsequent to their conviction, were sentenced to pay a fine of N$ 400 000 or 4 (four) years' imprisonment on each count.

[2] Aggrieved by the outcome of the proceedings, the appellants lodged an appeal against both their conviction and sentence.

[3] Subsequent thereto appellants abandoned their original notice of appeal and filed an amended notice of appeal on 15 July 2022 together with an application for

condonation. The respondent does not oppose the condonation application but does so as regards the appeal itself.

[4] Mr *Olivier* appears for the appellants while Mr *Iipinge* represents the state.

Grounds of Appeal

[5] The appeal is founded on four grounds enumerated in the amended notice of appeal, three against conviction and one against sentence. The appeal against conviction essentially turns on the court *a quo's* failure to adequately explain to the appellants their rights to legal representation; failure to explain to the appellants their right to docket disclosure prior to the commencement of their trial; and failure to make use of an interpreter during the proceedings as the appellants are conversant in the Portuguese language. During oral submissions counsel intimated that the appellants abandon grounds 4 and 5 of their amended notice of appeal. As regards the appeal against sentence, it is contended that the sentences imposed are harsh, excessive and startlingly inappropriate, inducing a sense of shock.

Appeal against conviction

Failure by the court a quo to explain the right to legal representation to the appellants

[6] On 12 April 2022 the court *a quo's* explanation of the right to legal representation to the appellants started-off by firstly explaining to them that they have the right to represent themselves (i.e. that they have the right to conduct their own defence) during the proceedings. Thereafter they were informed that they may appoint a private legal practitioner at their own cost and may also apply for legal aid. Appellants contend that the court *a quo* deliberately twisted the sequence in which the right to legal representation should and ought to be explained by judicial officers to the accused persons and by so doing, created a wrong impression in the minds of the appellants. Alternatively, the court *a quo* has thereby induced them into believing that the right to

conduct their own defence should be their first choice while their right to legal representation should be their second and third choices, respectively. Here the objection clearly lies against the sequence in which the rights were explained and not the content of the explanation as such.

[7] The respondent's counter argument is that, already on 18 November 2021, after the court *a quo* explained their rights, to legal representation and the appellants indicated that they understood the explanation, they elected to conduct their own defence. Subsequently, on 12 April 2022 the court *a quo* again explained the appellants' right to legal representation and again they indicated that they understood the explanation and that they wished to conduct their own defence.

[8] The first explanation of the appellants' rights to legal representation on 18 November 2021 was done in the following terms:

'Accused it is your right to engage a Legal Representative of your choice. A legal Representative is a lawyer, who will advise you on points of both law and facts during the trial before court. This person (lawyer), will be at your own costs. You may also apply for a Legal Aid lawyer, who will be provided for you by the Government. These forms are with the Clerk of the Court to be filled in and who will also assist you in completion thereof. This forms will be forwarded to the Directorate of Legal Aid who will then decide whether to grant you a lawyer or not. You also have the right to conduct your own defense.'(sic)

[9] Subsequent thereto the court on 22 April 2022 and prior to taking down their pleas, again explained the appellants' rights to legal representation in the following terms: I quote verbatim from page 35 of the transcribed record of the proceedings.

'Yes. Can you take note that you have the right to represent yourself in this proceedings, that is to conduct own defense you may also appoint a private legal practitioner at your own cost to represent you and you may also apply for legal aid, if you want to be represented by but you do not have the funds. . . .'

[10] We were referred to the matter of *S v Kasanga*[1] where the court stated the following:

'In my view, the starting point in determining the fairness of a trial, as envisaged in Art. 12 should always be whether or not the Accused is informed. Without an Accused being properly informed, one cannot even begin to speculate whether or not rights have been exercised or indeed waived.

The right to legal representation which includes the entitlement to legal aid must in my view not only be explained in such a way that an accused person may make an informed decision, but he must also be informed, especially if he or she is a layperson, how to exercise such right or entitlement.'

[11] Respondent, in turn, finds support for its contention in the matter of *Ndatipo v S*[2] where the court held that:

'[34] The right to legal representation of his own choice and cost, the right to apply for a legal aid lawyer paid by government partially or fully and the procedure how to apply was explained to the appellant in the district court. He was also informed that he can conduct his own defence. The record reflects that the appellant understood. He opted for an attorney of his own choice indicating that he understood…In my view, all these facts are indicative that the appellant was not a person not knowing of his right to legal representation. I find that when he opted to conduct his own defence when his lawyer withdrew was an informed decision.'

[12] After the court *a quo* explained the appellants' rights to legal representation on the first occasion (18 November 2021), the court specifically enquired from them whether they understood the explanation and to which they answered in the affirmative. This was followed by an indication that both appellants wished to conduct their own defence. During the latter proceedings on 12 April 2022 the first appellant again confirmed that he understood his rights when explained and informed the court that he wished to conduct his own defence, followed by the second appellant's similar response.

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[1] *S v Kasanga* 2006 (1) NR 348 (HC).
[2] *Ndatipo v S* (CA 14/2014 [2019] NAHCNLD 80 (8 August 2019).

[13] The record of the proceedings on both dates makes plain that the appellants were duly informed of their right to legal representation, with the accompanying explanation as to how to exercise these rights. The fact that the court on the second occasion changed the sequence in which these rights were explained does not derogate from the effectiveness of the explanation and neither does it appear to be 'bizarre' as contended by the appellants. There is no room for any suggestion that the appellants were not informed of their rights to the extent that they were unable to make an informed decision when opting to conduct their own defence. I am accordingly unpersuaded that there is any merit in this ground of appeal.

Failure by the court a quo to explain to the appellants their rights to obtain copies of the docket disclosures prior to the date of commencement of the trial.

[14] The appellants contend that they were not informed of their right to docket disclosure, inclusive of a copy of the charge-sheet setting-out the charges levelled against them. Neither does the record reflect that the appellants confirmed that they were provided with the said copies as required in terms of Article 12 (1)(*e*) of the Namibian Constitution. This, it was submitted, resulted in them being unable to adequately prepare for their trial.

[15] The respondent's counter argument is that the appellants pleaded guilty and admitted that they were caught red handed while selling the elephant tusk. The appellants had no defense against the state's case, consequently disclosure would not have advanced the appellants' case and that the irregularity is not fundamental to vitiate the conviction.

[16] From the case record it is evident that the appellants were not informed of their right to docket disclosure. In *Kafunga v S*[3] the court made reference to the matters of *S v Angula* and *Others*; *S v Lucas*[4] per Strydom, JP, (as he then was) and after having

[3] *Kafunga v S* CA 40/2011.
[4] *S v Lucas* v1996 NR 323 (HC).

considered the earlier decided cases on disclosure of *S v Nassar* the court at 326D-H said:

'That the principles applied in the *Scholtz* case are also applicable in the lower Courts can in my opinion not be doubted. There is not a different brand of fairness in the lower courts in comparison to that applicable in any of the superior courts. After all, it is in the magistrate's courts that most members of the public come into contact with the law and, on the strength of their experience there, they form their perceptions of justice and fairness. The same rules of evidence and procedure apply, with certain exceptions, in all courts of law. Where there are distinctions it concerns practice rather than rules that are designed to ensure fairness and justice to all parties. That this is so is in my opinion clear from a reading of the reasons delivered in the *Scholtz* case and also, I would think, from para 4 of the order made by the learned Judges of Appeal. What is however also clear from para 4 is that in regard to cases in the lower courts, fairness does not require that accused shall have access to police dockets indiscriminately in each and every prosecution in such courts. This is inherent in the type of cases which are routinely being dealt with in the lower courts and where fairness does not require such access. The *Scholtz* case did not spell out, or lay down guidelines in this regard. However, in the case of *Shabalala v Attorney-General of Transvaal* 1995 (2) SACR 761 (CC) Mahomed DP, also dealt in general with the position of the lower courts in regard to discovery to an accused of witness' statements and other evidential material.' (Emphasis provided)

The Court in *Angula* continued at 328B-E and laid down guidelines which may assist lower courts:

'1. That the State would be under a duty to serve on the defence the material upon which the prosecution intended to rely as founding the prosecution case, in matters where the offence involves complexities of fact or law and in which there is a reasonable prospect of imprisonment; examples of these are witness' statements, J88 medical reports, alcohol analyses, etc.

2. The State would also be under a duty to disclose to the defence certain material on which the prosecution does not intend to rely;

3. In respect of minor offences involving no complexities of fact or law in which there is no reasonable prospect of imprisonment, and in which the accused can easily adduce and challenge the State's evidence, disclosure should not necessarily follow. The same is applicable to routine prosecutions such as most traffic offences eg illegal parking, etc.' (Emphasis provided)

[17] In view of the authorities cited above, it is inevitable to come to the conclusion that the court *a quo's* failure to inform the appellants of their right to disclosure of statements the state intends relying on to prove its case, constitutes an irregularity. However, the impact of the irregularity needs to be decided on the facts and circumstances of the case.

[18] It is settled law that not every misdirection committed leads to the entire proceedings being vitiated, as the effect thereof must be decided against the evidence as a whole. In *S v Shikunga and Another*[5] the court found that 'a non-constitutional irregularity committed during a trial does not *per se* constitute sufficient justification to set aside a conviction on appeal'. That will depend on the nature of the irregularity and the effect thereof on the outcome of the trial, namely whether or not the verdict has been tainted by the irregularity.

[19] It was argued on behalf of the appellants that, had disclosure been made, then the appellants would likely not have pleaded guilty, moreover, if they were legally represented. Besides being mere speculation, there is nothing on the record supportive of counsel's contention.

[20] A reading of the complete record of proceedings shows that, after the appellants were apprised of their rights and the charges preferred against them, they elected to plead guilty out of their own free will. Also evident from their answers during the court's questioning in terms of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977 (CPA) is that the appellants got hold of an elephant tusk in Angola and decided to enter into Namibia in order to sell it. Whilst entering into negotiations with the buyer, they were caught in the act.

[21] Objectively viewed, I find it difficult to support counsel's contention that the appellants were likely to have pleaded not guilty, had disclosure been made. Given the circumstances of the case, the converse holds true ie the appellants realised that there

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[5] *S v Shikunga and Another* 1997 NR 156 (SC) at 170 G-I.

was no way out for them when caught and decided to come clean by pleading guilty. This conclusion is consistent with their decision not to acquire legal representation when afforded the opportunity, but, rather to act in person. There is simply nothing on record that shows otherwise. I am therefore satisfied that, despite the court *a quo's* omission to inform the unrepresented appellants of their right to disclosure, the appellants were not prejudiced as a result thereof. On the contrary, it is evident that the appellants from the onset intended on pleading guilty to the charges preferred against them. This is further borne out by their unambiguous answers to the court's questioning during which they admitted guilt on both counts. Consequently, this ground of appeal is equally found to be without merit.

[22] It was further submitted on behalf of the appellants that count 1 was defective in that it lacked certain averments ie where the elephant tusk is imported from and that the appellants did not have the required permit to import such tusks. Therefore, the appellants contend that the court should have *mero moto* applied the provisions of s 85 and 86 of the Criminal Procedure Act 51 of 1977. The respondent countered that this contention is without merit as the appellants admitted that they brought the elephant tusk from Angola into Namibia. They further admitted to not having a permit to import the tusk into Namibia.

[23] The offence for which the appellants were charged in count 1 is sanctioned in s 4(1)*(d)* of the Act which makes plain that any person who unlawfully imports any controlled wildlife product, commits an offence, unless he or she has been issued with a permit contemplated in subsection (3) authorising the act in question and unless he or she complies with the conditions specified in the permit.

[24] Section 84 of the CPA regulates the essentials of a charge and reads:

'(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have

been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.' (Emphasis provided)

[25] With regards to both counts charged, the state formulated the charges by incorporating the words of the law creating the offence set out in s 4(1)*(d)* of the Act, which it was entitled to do. Contrary to the view taken by counsel acting for the appellants that the charge in count 1 is defective for want of the name of the specific country from which the elephant tusk was imported from, or the name of the country to which it was exported, these are neither elements nor particulars of the offence charged. The charge to which the appellants pleaded informed them of the date and place where they wrongfully and unlawfully, acting with common purpose, imported one elephant tusk. Whereas the Act does not define or interpret the word 'import', it must be given its ordinary meaning, which could only mean to import or bring into Namibia. Accordingly, it is not essential for the charge in count 1 to name the country ie Namibia, neither from which country the controlled wildlife products were brought in.

[26] Though it is not alleged in the charge that the appellants did not have the required permit to import controlled wildlife products, their actions were stated to have been unlawful. During the court *a quo's* questioning, the appellants admitted to bringing the elephant tusk into Namibia without permission or authority and that their actions were unlawful.

[27] I am accordingly satisfied that the manner in which the charges were drawn, sufficiently informed them of the case they had to meet and that they took an informed decision when pleading guilty. The argument advanced on behalf of the appellants is therefore found to be unmeritorious.

Failure by the court a quo to appoint a competent interpreter to interpret the proceedings

[28] This ground is clearly based on the transcribed record of the proceedings held on 12 April 2022 where the cover sheet reflects the word 'NONE' where provided for an interpreter. However, the Namcis record of the same proceedings clearly identify the parties by name, being the appellants, the magistrate, prosecutor and interpreter.

[29] When the court at the hearing of this matter pointed this out to Mr *Olivier,* he conceded that he did not pick that up when preparing the appeal and abandoned this ground of appeal. In hindsight, one would have expected of counsel to have raised this issue with the appellants at the outset, for reason that, if the appellants are not conversant in the official language, how does it explain their interaction with the court as reflected in the appeal record? The answer lies in the fact that the services of an interpreter were employed. Hence, the issue requires no further consideration.

Appeal against sentence

[30] The appellants contend that the sentences of N$400 000 or 4 (four) years' imprisonment on each of the two counts are very harsh, excessive, startlingly inappropriate and induces a sense of shock, in that the court *a quo* did not take into account, or that it had attached little or no value at all, to the following considerations: Both appellants were first offenders; both appellants had shown genuine remorse by pleading guilty without wasting the court's time; and both appellants had spent approximately 4 (four) months and 26 (twenty-six) days in pre-trial incarceration.

[31] The respondent's counter argument is that the sentences imposed do not induce a sense of shock, therefore, this court should not interfere with the sentence imposed. It was further submitted that sentencing predominantly falls within the discretion of the trial court, while regard must equally be had to the principle of consistency or uniformity when it comes to sentencing in similar cases.[6]

[6] *S v Gerry Wilson Munyama* Case No. SA 47/2011 delivered on 9 December 2011.

[32] In its judgment on sentence the court *a quo* set out the approach to sentencing as guided by the triad of factors being the personal circumstances of the accused, the nature of the offences committed and the interest of society. Regard was also had to the objectives of punishment. There is no need to restate the court *a quo's* reasons on sentence. Suffice it to say that there is no merit in the contention that the trial court did not take into account the personal circumstances of the appellants, as complained of. With regards to the offences the appellants were convicted of, these were considered to be very serious and prevalent, not only in the court's jurisdiction, but country wide. It furthermore required proper planning and execution from which the appellants stood to gain financially. The court recognised that the moving of illegal goods cross-border constituted a transnational crime which, in itself, was aggravating. Furthermore, the protection of controlled wildlife products is of great concern to the Namibian society and internationally. For these reasons, deterrence should be the main objective of punishment. I am unable to fault the court *a quo's* reasoning in this regard.

[33] It is trite that the powers of a court of appeal to interfere with a sentence imposed by the court *a quo* is limited. In *S v Rabie*[7] the court held that the court of appeal (a) should be guided by the principle that punishment is a matter for the discretion of the trial court and (b) must be careful not to erode such discretion, hence the further principle that the sentence should only be altered if the discretion has not been judicially and properly exercised. This approach has been adopted, stated and restated in numerous decisions by the courts in Namibia.[8]

[34] In *S v Munyama*[9] as per Mainga JA, the Supreme Court at para 7 stated thus:

'[7] The Courts have by judicial precedents expounded on the test above and justified interference on appeal if a trial Court has committed a misdirection of fact or law which by its nature, degree or seriousness is such 'that it shows directly or inferentially that the Court did not exercise its discretion at all or exercised it improperly or unreasonably' (see: *S v Pillay* 1977 (4)

[7] *S v Rabie* 1975 (4) SA 855 (A) at 857D-F.
[8] (See *S v Tjiho* 1991 NR 361 (HC) at 364F-H, 366A-B; *S v Van Wyk* 1993 NR 426 (SC) at 447G – 448A; *S v Shikunga and Another* 1997 NR 156 (SC) at 173B-E; *S v Gaseb and Others* 2000 NR 139 (SC) at 167H-I; *S v Alexander* 2006 (1) NR 1 (SC) at 4D-5A-E).
[9] *S v Munyama* (3) (SA 47 of 2011) [2011] NASC 13 (09 December 2011).

SA 531 (A) at 535D-G; if a material irregularity has occurred in the proceedings (*S v Tjiho, supra,* at 336B); if the sentence is manifestly inappropriate given the gravity of the offence and induces a sense of shock (*S v Salzwedel and Others 2000* (1) SA 786 (SCA) at 790D-E); or a patent and disturbing disparity exists between the sentence that was imposed and the sentence that the Court of Appeal would have imposed had it been the Court of first instance (*S v Van Wyk, supra,* at 447I); *S v Petkar* 1988 (3) SA 571 (A) at 574C); if there has been an overemphasis of one of the triad of sentencing interests at the expense of another (*S v Zinn* 1969 (2) SA 537 (A) at 540F-G; and *S v Salzwedel and Others, supra* at 790F; or if there has been such an excessive devotion to further a particular sentencing objective that others are obscured (*S v Maseko* 1982 (1) SA 99 (A) at 102F).'

[35] Despite the appellants informing the court in mitigation of sentence that they would only be able to pay fines up to N$3000, the court imposed fines of N$400 000 on each count, totalling N$800 000 per person. Not surprisingly, the appellants were unable to raise funds to pay the fines and are serving the alternative sentences totalling eight years' imprisonment.

[36] With regards to the suitability of imposing a fine, the court in *S v Mynhardt; S v Kuinab*[10] set out the following guidelines:

'a) Fines should be used mainly as punishment for lesser offences.

b) The imposition of a fine is an alternative punishment, ie the purpose of a fine is to punish an accused without incarcerating him. To impose a fine which an accused can obviously not pay is to impose direct imprisonment in the guise of an alternative term of imprisonment.

c) Although not capable of exact calculation the alternative of imprisonment must be proportionate to the fine and the gravity of the offence.

d) The presiding officer must obtain the necessary facts before deciding upon a fine. Of vital importance is the ability of the accused to pay a fine. Here, not only the accused's income is of importance, but also his assets and liabilities and other means of obtaining funds.

e) The amount should usually fall within the ability of the accused…' (Emphasis provided)

[37] There can be no doubt that the fine imposed by the court fell well outside the financial means of the appellants, thereby effectively imposing direct imprisonment on

[10] *S v Mynhardt; S v Kuinab* 1991 NR 336 (HC).

each count. The bold assertion by the magistrate that the sentence on each count is 'fit and proper' is not substantiated by established principles or case law on sentencing in matters of this nature. Where the appellants in this instance were clearly not in the position to meet the fine the court had in mind, a custodial sentence appears to have been the only suitable option open to the court. Instead, the court opted for a fine which fits the term 'startlingly inappropriate'.[11] To this end the magistrate clearly misdirected himself and the fines imposed on both counts cannot be permitted to stand.

[38] It then raises the question what sentence(s) would be appropriate in the circumstances of the case? Whilst mindful that similar cases should attract more or less the same punishment, the principle of individualisation must be given equal consideration to the extent that a sentence must be constructed and tailored in such way that it fits the particular accused before court, and should not be one of general application ie a 'fit all' sentence. Though the court should have regard to sentences imposed in similar cases,[12] it is an accepted principle of our law that even where offenders of the same crime are more or less in identical situations, the punishment meted out may differ, depending on the personal circumstances of each accused. In *S v Cambinda, S v Agostino, S v Carvalho*[13] the court stated the following:

'Where similarly placed accused commit similar crimes, in the absence of special aggravating circumstances and remarkable divergent personal circumstances, the sentencer is constrained to pass similar or not widely divergent sentences.'[14]

[39] Although the judgment on sentence reflects a summary of the appellants' personal circumstances, it seems to me inevitable to come to the conclusion that the court failed to give the necessary weight to their personal circumstances which, consequently, resulted in the court over-emphasising the seriousness of the offence and the interests of society. Equally evident from the court's reasons is that insufficient weight was accorded to the fact that the appellants were first offenders who pleaded

[11] *S v Tjiho* 1991 NR 361 (H).
[12] It is referred to as the principle of uniformity.
[13] *S v Cambinda, S v Agostino, S v Carvalho* 2006 (2) NR 550 at 551D-E.
[14] See also; *S v Strauss* 1990 NR 71 (HC) at 76D-F.

guilty. With regards to the guilty plea tendered by the appellants and their subsequent conviction, this court in *State v Majiedt*[15] occasioned to make the following observations at para. 32 with regard to accused persons deciding to plead guilty in criminal proceedings:

'This court in the past opined that in circumstances, as the present, where a plea of guilty is tendered and is fortified by sincere contrition and repentance, the accused should gain some benefit from doing so when it comes to sentencing. It should therefore serve as incentive to an accused, knowing he or she is indeed guilty of the offence charged, to take the court fully into his or her confidence by pleading guilty from the onset and repent, rather than taking the chance of the matter going to trial and only when convicted, then try to persuade the court during sentence of being genuinely remorseful. In the latter instance the court is likely to accord less weight thereto as a mitigating factor, if at all.' (Emphasis provided)

[40] I earlier alluded to the fact that, in the circumstances of the case, a custodial sentence would be appropriate. I am in respectful agreement with the view taken by the court *a quo* that a deterrent sentence is called for, given the serious nature of the offences committed. It is a well-established principle of our law that, where an accused is sentenced in respect of two or more related offences, the accepted practice is that regard should be had to the cumulative effect of the sentences imposed in order to ensure that the total sentence is not disproportionate to the accused's blameworthiness in relation to the offences committed.[16] In this instance the appellants crossed the border into Namibia with an elephant tusk with the intention of selling it off and return to Angola with the proceeds of their crime. They were however caught in the act. To this end, the offences are inter-related wherefore regard should be had to the cumulative effect of the individual sentences imposed. This could be addressed by way of an appropriate order in terms of s 280 of the CPA.

Conclusion

[15] *State v Majiedt* (CC 11/2013) [2015] NAHCMD 289 (01 December 2015).
[16] *S v Sevenster* 2002 (2) SACR 400 (CPD) at 405a-b.

[41] In the result, it is ordered:

1. The application for condonation is granted.
2. The appeal against conviction in respect of both appellants is dismissed.
3. The appeal against sentence in respect of both appellants is upheld and the sentences imposed are set aside and substituted with the following: Each accused sentenced to:-

   Count 1: Three (3) years' imprisonment.

   Count 2: Two (2) years' imprisonment.
4. In terms of s 280(2) of the Criminal Procedure Act 51 of 1977 it is ordered that one (1) year of the sentence imposed on count 2 to be served concurrently with the sentence imposed on count 1.
5. The sentences are antedated to 12 April 2022.

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J C LIEBENBERG

JUDGE

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D USIKU

JUDGE

APPEARANCES:

Appellants:	M Olivier Instructed by Thomas Appolus Incorporated, Windhoek
Respondent:	H Iipinge Office of the Prosecutor-General, Windhoek