REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case No.: HC-MD-CRI-APP-CAL-2022/00044

In the matter between:

RAINIER WILLEMSE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Willemse v S* (HC-MD-CRI-APP-CAL-2022/00044) [2023] NAHCMD 556 (8 September 2023)

Coram: SHIVUTE J *et* CHRISTIAAN AJ
Heard: **28 July 2023**
Delivered: **8 September 2023**

Flynote: Criminal Procedure – Appeal – Sentence – Assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act 4 of 2003 – Rape – Contravening s 2(1)(*a*) of the Combating of Rape Act 8 of 2000 – Attempted murder – Appeal filed out of time – Appellant failed to give a satisfactory and reasonable explanation for the cause of the delay – Appellant had also failed to satisfy the court that he has prospects of success on appeal – Application for late filing of appeal refused – Matter struck from the roll.

Summary: The appellant was convicted of assault with intent to do grievous bodily harm, read with the provisions of the Combating of Domestic Violence Act 4 of 2003, a contravention of s 2(1)(*a*) of the Combating of Rape Act 8 of 2000 and attempted murder. He pleaded not guilty to count 1 and 2 and guilty on count 3 for having stabbed the complainant 19 times with a knife. Appellant was convicted and sentenced to two years imprisonment on count 1, 12 years imprisonment on count 2 and nine years imprisonment on count 3. The sentence in count 1 was ordered to run concurrently with that in count 2. The appeal lies against the sentence only. The appeal was filed three years after the date of sentence. Application for condonation was filed. Appellant failed to give a satisfactory and reasonable explanation for the cause of the delay and also failed to satisfy the court that he has prospects of success on appeal. The application for late filing of the appeal is refused and the matter is struck from the roll.

Held that the reasons advanced for the late filing of the appeal is found not to be reasonable and acceptable. The appellant has further failed to establish that he has reasonable prospects of success when prosecuting his appeal.

ORDER

The application for condonation is refused and the matter is removed from the roll and considered to be finalised.

JUDGMENT

CHRISTIAAN AJ (SHIVUTE J concurring):

Introduction

[1] The appellant in this matter was convicted and sentenced after a trial on 6 April 2018, of three counts, count 1 of assault with intent to do grievous bodily harm, count 2 of rape taking into account the provisions of the Combating of Rape Act 8 of 2000 and count 3 of attempted murder. He was sentenced to two years' imprisonment on count 1, 12 years imprisonment on count 2 and nine years imprisonment on count 3. The

sentence in count 1 was ordered to run concurrently with that in count 2. He proceeded to file his notice of appeal on 14 December 2021 accompanied by his supporting affidavit outlining the reasons for delay.

[2] The appeal is against sentence. The appellant is represented by Mr Kanyemba and the respondent by Mr Iipinge.

The grounds of appeal

[3] The grounds of appeal are summarised as follows: 'The learned magistrate erred by failing to impose a lesser cumulative sentence, which sentence of 21 years was not consistent with the sentences imposed in the past in similar cases; and by failing to adequately consider that the cumulative effect of the sentences is unduly severe and excessive given the circumstances of the case; the learned magistrate erred by making a finding that he did not believe that there are any substantial and compelling circumstances while these existed at the time of sentencing; the learned magistrate erred and/or misdirected himself on a question of law and/or fact by failing to wholly suspend the sentence.'

Point in limine – Condonation for the failure to file appeal on time

[4] Mr Iipinge raised a point *in limine* in his heads of argument that the appeal was filed out of time. As such the parties argued this point, which included submissions on both legs. Firstly, Mr Iipinge argued that the notice of appeal was filed three years after the date of sentence and is therefore out of time; and in the application for condonation, the appellant has not given a satisfactory explanation for the delay in noting the appeal. He argued that the appellant gave several reasons for his failure to lodge the appeal on time, but fails to account for certain periods of time. The appellant further blamed the failure to file the appeal on time, on him being a layman, who could not draft his notice of appeal. Secondly, that there are no prospects of success on appeal as the sentence imposed on the appellant did not induce a sense of shock and that the sentences could not be ordered to run concurrently, as the offences were not committed at the same

time. In support of his arguments he referred the court to several cases as authority, which we had considered.

[5] On the other hand, Mr Kanyemba argued on behalf of the appellant that the appellant had difficulty in securing the record of proceedings from the clerk of the Court, and when he eventually received the record, he did not have knowledge on how to draft a notice of appeal and thus needed the assistance of a co-inmate, who was busy attending to his rehabilitation programs. The appellant regarded this reason to be a reasonable and acceptable explanation for his non-compliance in his supporting affidavit attached to the application for condonation.

[6] For an application of this kind to succeed, the appellant must under oath, give a reasonable and acceptable explanation for the cause of the delay and satisfy the court that he has reasonable prospect of success on appeal. The explanation advanced for the delay in filing is not acceptable. I will now deal with the prospect of success.

Appeal against sentence

[7] In *S v Rabie*[1] there occurs the following passage:

> 'In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal - should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial court"'; and
> (b) should 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.'

[8] This court of appeal has limited power to interfere with the sentencing discretion of a court *a quo.* A court of appeal can only interfere;

a) when there was a material irregularity; or
b) a material misdirection on the facts or on the law; or
c) where the sentence was startlingly inappropriate;
d) or induced a sense of shock; or

[1] *S v Rabie* 1975 (4) SA 855 (A) at 857D.

e) was such that a striking disparity exists between the sentence imposed by the trial Court and that which the Court of appeal would have imposed had it sat in first instance in that;

f) irrelevant factors were considered and when the court *a quo* failed to consider relevant factors. *(See: S v Kasita 2007 (1) NR 190 (HC); S v Shapumba 1999 NR 342 (SC) at 344 I to 345A; S v Jason & another 2008 NR 359 at 363 to 364G.)*

[9] From the reading of the judgment on sentence, it is evident that the trial court applied the relevant principles applicable to sentencing and gave due consideration to the triad of factors and evidence presented by the defence in mitigation of sentence. Before it sentenced the appellant, the trial court in this matter considered the following factors:

(a) The court balanced the three main factors as set out by the matters *of S v Zinn*[2] and *S v Rabie*[3], namely; the personal circumstances of the accused, the nature of the crime committed and its seriousness as well as the circumstances under which it was committed;

(b) The appellant's personal circumstances as stated during his mitigation;

(b) The court took into account the period the appellant spent in custody awaiting trial;

(c) The trial court concluded that pre-sentence incarceration could not be ignored especially if the accused is not the author of such incarceration, for example, by jumping bail or committing other crimes whilst on bail or warning;

(d) The trial court considered pre-sentence incarceration where a prescribed minimum sentence is called for in the absence of substantial and compelling circumstances, regard being had to the fact that the trial court had considered and

[2] *S v Zinn* 1969 (2) SA 537 (A).
[3] *S v Rabie* 1975 (4) SA 855 (A) at 862.

found ten years' imprisonment being the starting point before factoring in mitigation and aggravation.

[10] I will proceed to address the grounds of appeal that deals with the cumulative effect of the sentence imposed.

[11] Mr Kanyemba argued that the learned magistrate could have ordered that the sentence in count 3 run concurrently with the sentence in count 2 as that would demonstrate that the sentence was blended with a measure of mercy and not aimed at breaking down the appellant.

[12] Mr Iipinge relying on *S v Booysen*[4], argued that where offences are not committed at the same time an order for the concurrent running of such sentences is incompetent, and therefore the learned magistrate was correct in not ordering the sentences in the said counts to run concurrently.

[13] Liebenberg J in *S v Jerobeam*[5] para 29*,* had the following to say, when he dealt with the cumulative effect of sentences to be imposed:

'Where an accused stands to be sentenced in respect of two or more related offences, as in this instance, the accepted practice is to have regard to the cumulative effect of the sentences to be imposed, thereby ensuring that the total sentence the accused in the end has to serve, is not disproportionate to his/her blameworthiness in respect of the offences committed. By ordering in terms of s 280 (2) of Act 51 of 1977 the concurrent serving of some of the sentences, this will appropriately ameliorate the cumulative effect of the individual sentences imposed. The court therefore has a discretion to exercise in favour of the accused where multiple related offences has been committed and where failure to make the appropriate order would result in an injustice. In view of the circumstances of the present case, it seems appropriate to order the concurrent running of some of the sentences to ameliorate the severity of the cumulative effect of the individual sentences imposed.'

[4] *S v Booysen* (CR 5/2016) [2016] NAHCMD 26 (15 February 2016).
[5] *S v Jerobeam* (CC 06/2020) [2022] NAHCMD 617 (14 November 2022).

[14] In the instant matter, it is clear from the record of proceedings that the assault and rape charges (count 1 and 2) stems from the events of 21 September 2014, whilst the attempted murder charge (count 3) stems from the events of 9 February 2015. The trial magistrate clearly pointed out during sentencing that, in order to ameliorate the severity of the punishment and taking into account the period of pre-trial incarceration, the two years imprisonment in count 1 will be ordered to run concurrently with the sentence in count 2.

[15] It is clear from legal principles laid down in several matters in this court that where offences are not committed at the same time, an order for the concurrent running of such sentences is incompetent.[6] This clearly indicates that the learned magistrate did not deviate from the principle stated above and therefore ground 1 and 2 of the appeal is found to be without merit.

[16] I will now proceed to deal with that deals with the aspect of whether there were substantial and compelling circumstances for the court a quo to deviate from the imposition of a mandatory sentence as prescribed by the Combating of Rape Act 8 of 2000 or whether the learned magistrate deviated lightly or "for flimsy reasons" from imposing the mandatory sentence.

[17] Section 3(2) of the Combating of Rape Act 8 of 2000 provides:

'(2) If a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the applicable sentence prescribed in subsection (1), it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.'

[18] Mr Kanyemba argued on behalf of the appellant that the appellant was a first time offender and he informed the court that he suffers from psychosis and he showed remorse for his actions and he was in pre-trial incarceration for over three years, are compelling and substantial circumstances the court should have considered by the learned magistrate in sentencing.

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[6] Footnote 4 supra.

[19] There are no specific factors which are listed to be substantial and compelling. All factors traditionally taken into account in sentencing thus continue to play a role, none is excluded at the outset from consideration in the sentencing process.[7]

[20] This court in the matter of *S v Noble*[8] outlined the approach courts must take in dealing with pre-trial incarceration when deciding on an appropriate sentence we wish to highlight the following:

> '(31) A considerable amount of time spent in custody pending trial is a weighty mitigating factor. This position attracted no adverse submissions from both counsel, correctly so. It is established in our jurisdiction that the period spent in custody awaiting trial is a material mitigating factor which should lead to a reduction in sentence.
>
> (32) Courts should, however, not blindly follow this principle from a mathematical perspective where twelve months spent in custody pending trial is equal to twelve months reduction from the intended sentence. The court retains a discretion which should be exercised after considering the surrounding circumstances of the matter after which appropriate weight should be afforded thereto.'(Our emphasis)

[21] The trial magistrate pointed out that after he had considered the factors stated in paragraph [9] above, he found that there are no substantial and compelling circumstances.

[22] We are alive to the fact that the offences the appellant has been convicted of are serious as they were committed in a domestic setting in that the complainant in all counts have a child with the appellant. Thus the provisions of the Combating of Domestic Violence Act 4 of 2003 are applicable.

[23] The evidence of the complainant was that the appellant first stabbed her twice in the face with a knife, she ran away to hide, however the accused caught up with her

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[7] *S v Malgas* 2001 (2) SA 1222 (SCA) at 1231C.

[8]

and he continued to rape her. During this process the complainant sustained grievous bodily harm being open wounds inflicted with a knife on her face and the appellant used a weapon.

[24] However, sitting as an appellate court, and applying the principles that have already been mentioned and at the pain of being repetitive, we are only entitled to interfere with the discretion of the trial court if there are convincing reasons that the court failed to exercise its discretion judiciously; that the sentence imposed is startlingly inappropriate in the sense that it induces a sense of shock and/or that an irregularity took place during the proceedings which leads to the miscarriage of justice. Taking into account the principles relevant to sentencing, the trial court's reasons for imposing the sentence under scrutiny, we are not persuaded that any of the factors upon which a court of appeal may interfere is present in this matter.

[25] We do not find any misdirection in the approach of the trial court on the contended grounds of appeal or at all. The fact that the appeal court could have imposed a different sentence does not mean that the learned magistrate did not exercise his discretion judiciously. It can also not be said that the sentence of 12 years imposed on the respondent after no substantial and compelling circumstances were found not to exist, is not so startlingly inappropriate that it induces a sense of shock. We find that there is no prospects of success as the grounds of appeal have no merit.

[26] In the result, the following order is made:

The application for condonation is refused and the matter is removed from the roll and considered to be finalised

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P CHRISTIAAN

Acting Judge

I agree

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N N SHIVUTE

Judge

APPEARANCES:

APPELLANT:	S Kanyemba Of Salomon Kanyemba Inc, Windhoek
RESPONDENT:	H K A Iipinge Of Office of the Prosecutor-General, Windhoek